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# GLOBAL MINING GUIDE 2020





Over the years, **Baker McKenzie's Global Mining Guide** has provided a global perspective on the mining regulations of the world's major jurisdictions in this sector. Once again our Firm is proud to provide its readers with an overview of both the main mining regulations and how legal norms are today shaping future trends.

It is clear that many of the countless issues that concern us in today's mining industry will have a direct impact on the business of mining in the future, and as active industry participants we should always consider what we will leave behind as the heritage and teachings in an industry of this cyclical nature on which so many countries in the world still depend on today.

Of the many issues on the table, perhaps one of the most significant is the current trade war between the United States and China, which is affecting and will, for still some time to come, continue to affect the value of metals and minerals around the world and the global economy in general.

Answers to many of the most pressing questions that surround us in the industry today are still unclear: What will the nature of the mining industry be like in the next few years? How much automation will there be and what role will human intervention still have? Which minerals will be indispensable and which minerals will finally be replaced by tireless human ingenuity?

Other important challenges for the mining sector include the vertiginous speed of technological change, the increasingly intense social expectations and the impact of giants such as China, the United States and India, on the global trends in the industry.

This guide seeks to deepen the understanding of the mining sector, how minerals are treated normatively in different jurisdictions; how each country's legislation gradually seeks to achieve sustainable development and environmental protection in the face of imminent climate change; and what regulatory measures are in place to attract foreign investment, a significant driver for many of the mining-sector dependent economies.

We hope that readers will successfully tackle the preliminary mining legal questions to then be able to venture an answer to the trickier queries, such as what to do about water scarcity; how to deal with pollution problems; and how, and to what extent, should countries deal with the rehabilitation and closure of mining sites.

Without further ado, we invite you to continue reading, hoping that we can contribute to clarify, at least in part, the vast legal world of mining in each of the national legislative frameworks here discussed.

Sincerely yours,



**Antonio Ortuzar Jr.**

Global Chair, Mining & Metals Sub-Industry Group  
Santiago de Chile, October 2019

## Table of Contents

Argentina.....	1
Australia.....	10
Brazil.....	24
Canada.....	32
Chile.....	57
China.....	70
Colombia.....	80
Indonesia.....	94
Kazakhstan.....	111
Peru.....	120
Russia.....	133
South Africa.....	143
Spain.....	165
Sweden.....	179
Thailand.....	191
Turkey.....	205
Ukraine.....	220
USA.....	235
Venezuela.....	250
Vietnam.....	260
Baker McKenzie Offices.....	273



# Argentina

Law	Mining Code, provincial procedural codes and additional regulations
Member of New York Convention	Yes
Foreign investment regulation	Bilateral Investments Treaties
Local party ownership requirement	No
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes (performance bonds)
Exploration license	Depends on the extension of the license (minimum term: 150 days)
Mining license	Exploitation concessions are perpetual provided that the holder complies with Mining Code provisions
Able to use tenement as security	Yes
Royalty payable to government	Yes

## 1 Summary

Investment in Argentina is subject to an overlapping of provincial and federal legislation that generates challenges for projects. The provinces collect the royalties, canon, exploration fees and limited taxes; the federal government – all national taxes and export duties. Disputes such as those arising from the applicability of the Glacier Law generate delays on certain projects.

Fortunately, since the Macri administration took office in December 2015, foreign exchange regulatory restrictions were significantly amended and progressively lifted. On 19 May 2017, the Central Bank amended the entire exchange control regulatory framework and currently no restrictions apply to the inflow or outflow of funds in Argentina or the remittances of dividends abroad.

Dividends can be transferred abroad to foreign shareholders without any legal or de facto restrictions, provided that they correspond to duly closed and audited financial statements, and that the local company

# Argentina

complies with certain periodical information regimes. Local exporters of goods and services are free to keep the proceeds from their exports deposited in accounts opened in foreign jurisdictions.

In Argentina, federal and provincial states are the owners of first category minerals (such as potash, lithium, gold, silver, copper and other minerals) located in their respective territories. Under federal law, except for certain cases, federal and provincial governments are not permitted to explore or exploit mining areas. Rights to do so are reserved for private parties. Rights are granted on a first-come, first-served basis and exploration permits grant their holders the right to transform that right into a mining concession. Both federal and provincial laws apply to mining projects located in provincial territories. A title to mining property does not include ownership of the relevant surface land. Mining operations trigger environmental obligations and procedures, which are administered by the relevant provincial or federal environmental authorities.

## 2 Legal framework for mining

Argentina is a federal country and its provinces hold original domain over the natural resources located in their territories. Nevertheless, jurisdiction is shared between the federal government and the governments of the provinces. Therefore, mining is regulated by the National Constitution, the Mining Code, federal laws and decrees, and the legislation enacted by each Argentine province (particularly, mining procedural codes).

The provincial governments are the grantors of mineral rights (exploration permits and exploitation concessions) and they must grant rights on any vacant area to the party that first applies for them.

The Mining Code (federal legislation) divides minerals into three categories. In the first category (hard minerals, lithium, potash, uranium, etc.), the owner of the surface land does not have any priority or right on those minerals. In the second category (mainly construction materials), the surface owner has certain priorities on those minerals, and in the third category (other construction materials including fracking sands), the surface owner is also the owner of those minerals.

Argentina has a civil law legal system.

Although the oil and gas industry has its own regulatory framework, it does not greatly differ from that applicable to mining. The same ownership regime applies and the national and provincial governments share jurisdiction. The main difference is that a mining exploitation concession (hard minerals) is considered to be real estate (a perpetual right) but an oil and gas exploitation concession is granted for 25 years with the right to a 10-year extension.

Argentina has also entered into Bilateral Investment Treaties (BITs) with more than 20 countries, and has also been subject to significant claims for alleged violation of those treaties.

## 3 Restrictions on foreign investment

The Mining Code and applicable legislation do not include any particular restrictions on foreign investment in the mining industry. However, if a mining project includes the acquisition of rural land, special approval or restrictions will apply.

## 4 Government or local participation requirements

Although the Mining Code restricts direct participation of the government in mining activities, Jujuy Province recently created a mining company that requested private companies to associate with it in lithium projects.

# Argentina

Other provinces, such as Santa Cruz, Chubut or San Juan, have provincial entities that hold mining rights associated with private parties.

## 5 Land tenure and priority

The provinces are the holders of the eminent domain (*dominio originario*) of the natural resources located within their territories. However, exploration and exploitation of mining deposits are granted to private parties on a first-come, first-served basis by means of rights under the Mining Code.

Mining rights do not include rights to the surface land. The Mining Code grants holders of mining rights easements to access lands covered by mining rights – and access agreements are usually signed.

## 6 Indigenous or local community rights

In 1992, Argentina issued a law adhering to the OIT Convention 169/1989 on indigenous people. In general, projects are giving greater consideration to the rights of indigenous people.

## 7 Environmental protection and rehabilitation obligations

Before commencing exploration, and at each stage of a mining project, the tenement holder must submit an environmental impact report. The report is filed with the provincial authority, and must include the actions that the company will take to protect the environment. The report must be updated every two years.

The provincial authorities are entitled to issue regulations to supplement those of the federal government.

Companies are liable for any environmental damage caused by themselves, their employees, contractors or subcontractors.

## 8 Exploration licenses

### 8.1 Scope

Mining areas may only be explored pursuant to an exploration permit granted by the relevant provincial mining authority. In all Argentine provinces, a party may apply for an exploration license, which generally allows the holder to carry out activities to determine the existence, quality and quantity of minerals within an area by low-impact methods, such as prospecting, geophysical surveys, drilling and sampling.

### 8.2 Duration

The areas covered by an exploration permit are divided into units, with each unit comprising 500 hectares. One exploration permit may include up to 20 units (i.e., 10,000 hectares). A company or individual is not allowed to hold, directly or through its shareholders, more than 20 exploration permits or more than 400 units per province (i.e., a company or an individual may not hold exploration permits covering more than 200,000 hectares in any one province).

Each exploration permit is for a term of 150 days for the first unit and for a further 50 days for each additional unit. Exploration permits cannot be renewed and the holder of an exploration permit cannot request another permit covering the same or part of the area covered by the exploration permit after it expires for a period of one year from the expiration date.

# Argentina

In the case of hard minerals (such as gold, copper and silver), the exploration fee is ARS 1,600 for each exploration unit (500 hectares), regardless of the exploration permit's term. The fee for a 10,000-hectare permit is currently ARS 32,000.

## 8.3 Steps to acquire an exploration right

An application must be filed with the relevant mining authority, together with: (a) the geographical coordinates of the requested area(s); (b) the names of the surface landowner and the applicant; (c) a description of the work to be done, including the estimated investment and equipment; and (d) a sworn statement indicating that the request does not violate any provision of the Argentine Mining Code. Additionally, the application must include evidence of payment of a provisory exploration fee, which is reimbursed (totally or partially) if the exploration permit is denied or granted for a smaller area.

Upon filing the application, the relevant mining authority: (a) registers the application; (b) notifies the surface landowner that an application has been filed; and (c) publishes an official notice in the Official Gazette of the place where the exploration permit is requested.

If no opposition is filed, the mining authority grants the exploration permit immediately, and from the application date, all discoveries (even those made by third parties) belong to the holder of the exploration permit. Granting a permit generally takes at least six months but the applicant has exclusivity from the filing of the application.

## 8.4 Relationship with landowners

Exploration permits do not include ownership of surface land, but mining activities (first category of mining rights) have priority over the rights of surface owners. Thus, in theory, after a proper guarantee covering potential damages is delivered, the surface owner cannot restrict mining activities. If a surface owner denies access, the mining authority can be requested to grant an easement. However, in practice, to avoid delays, surface owners and mining companies try to agree on an access agreement.

## 8.5 Obligations of the holder

The holder of an exploration permit must release an area equal to half of the area exceeding four units (i.e., 2,000 hectares) within 300 days from the date the relevant exploration permit becomes effective. Similarly, within 700 days from the effective date, the holder must release an area equal to half of the area remaining from the first release, excluding the four units.

Within 90 days from the expiration of an exploration permit, the mining authority may request the former holder of the permit to file all information and technical documentation on the respective area obtained during the term of the exploration permit.

If such information is not filed, the holder may be subject to sanctions equivalent to double the exploration fee paid for that area.

No minimum exploration investment is required.

# Argentina

## 9 Holding tenements

### 9.1 Scope

In some local jurisdictions, the term of an exploration permit may be extended if its holder cannot access the areas covered by the relevant exploration permit as a result of adverse weather conditions.

### 9.2 Rights and obligations

Under an exploration permit, the holder is exclusively authorized to explore for a limited time. Provided the holder complies with the regulatory requirements and discovers a potential mineral deposit, the holder is entitled to file a written request (declaration of discovery). The declaration of discovery allows the holder to start the procedure to obtain an exploitation concession.

The holder is protected as from the registration with the relevant mining authority until conversion into an exploitation concession, as described separately.

## 10 Development/production tenements

### 10.1 Scope

A mineral deposit can only be legally exploited by means of an exploitation concession or, if a provincial company holds the rights, through an exploration and exploitation agreement with that company.

### 10.2 Duration

An exploitation concession grants the holder a perpetual property right to the mine, subject to two conditions: (a) payment of an annual fee; and (b) compliance with the investment plan. Failure to comply with these obligations can lead to forfeiture of the concession. If a project is not active for more than four years, the authority is entitled to request an activation plan and if no such plan is presented in the six months following the request, it may cancel the mining rights.

The area covered by an exploitation concession is divided into units. The number and extent of units that a claimant is entitled to obtain varies depending on: (a) whether the discoverer is a company or an individual; (b) the minerals found; and (c) the type of deposit (vein or disseminated form).

In the case of disseminated deposits, the annual exploitation fee is ARS 3,200 per unit (100 hectares). The exploitation fee is due as from the registration of the relevant declaration of discovery, except in the case of the discoverer of the deposits, who is exempt from the requirement to pay the exploitation fee for three years from registration.

### 10.3 Transition from exploration/holding right to mining right

The holder of an exploration permit must file the relevant declaration of discovery before the permit expires.

The declaration of discovery must be converted into an exploitation concession within the time frame and under the terms and conditions described in a later section.



## 10.4 Steps to acquire a right

The procedure for obtaining an exploitation concession can be summarized as follows:

- (a) The holder of an exploration permit must file a declaration of discovery, submitting a sample of the minerals found and disclosing the exact location of the mine or vein and the area to be covered by the mining units to be measured (this area is protected against third parties until the measurement is completed).
- (b) The relevant mining authority, with the report of the cadastral registry, informs the holder whether the declaration of discovery is made on a free or occupied area. Provided the requested area is free, the mining authority registers the declaration of discovery under the applicant's name.
- (c) The registration of the declaration of discovery must be published in the Official Gazette for 15 days to allow any third party claiming rights to file an opposition.
- (d) Within 100 days from the date of registering the declaration of discovery, the applicant must carry out the work necessary (legal labor) to determine the existence and type of minerals discovered, as well as the direction and inclination of the deposit.
- (e) Within 30 days following the "legal labor" (or its extensions), the applicant requests registration of the mining units and their measurements. Once the measurement is complete, the relevant mining authority registers the measurement and gives a copy to the applicant. The copy of this measurement constitutes the property title to the exploitation concession.

The procedure summarized above is provided by the Argentine Mining Code. However, this procedure may differ slightly depending on the province.

## 10.5 Relationship with landowners

The regime described in "Relationship with landowners - Exploration" also applies to the relationship between the holders of exploitation concessions and the landowners. In relation to indigenous communities, see "Indigenous people considerations."

In addition, the Argentine Mining Code grants the holder of an exploitation concession the right to compulsorily acquire an area equivalent to one mining unit (i.e., 100 hectares).

## 10.6 Obligations of the holder

Companies are obliged to comply with certain minimum investment requirements.

Within one year from the request of measurement of the mining units (whether completed or not), companies must file an estimated investment plan and must actually make the investment within five years (the applicant cannot make an investment inferior to 20% of the total investment detailed in the relevant investment plan in each of the first two years as from filing the investment plan). The investment plan is an estimation of the amounts to be spent in: (a) the construction of the camp; (b) the construction of roads to access the deposit; and (c) the purchase of machinery and equipment to produce and treat the minerals, among other expenditures. The estimated minimum investment cannot be less than 300 times the annual exploitation fee.

# Argentina

Provincial authorities demand companies undertaking mining activities within their territories to hire a determined percentage of local labor. This percentage varies depending on the province but it can reach approximately 80%. This obligation also applies in relation to the local purchase of supplies.

## 11 Assignment of and security over tenements

### 11.1 Assignment

Mining rights can be assigned without the prior authorization of any governmental authority. For exploitation concessions, the only required formality is to execute the relevant assignment through a public deed.

### 11.2 Security

The granting of a security over a tenement does not require the approval of any governmental authority. The security must be registered with the relevant mining authority.

## 12 Royalties

Any province adhering to the Mining Investment Law may charge a maximum 3% royalty on the “mine head” (*boca de mina*) value of extracted minerals.

## 13 Mineral reporting and classification

There are no specific regulations currently applicable to mining companies that oblige them to report their exploration results, mineral resources or ore reserves, and there is no mandatory system for their classification. Reporting requirements for mining companies listed on the Argentine stock exchange are governed by the general stock exchange regime.

Please note that the Mining Investment Law establishes a voluntary regime pursuant to which any mining company may elect to register to receive certain tax, customs and royalties benefits. Following registration, mining companies become subject to various obligations including, among others, the obligation to file an affidavit describing the works, studies and investments to be made in a specific schedule, and to communicate the geological information about the areas explored to the National Mining Secretariat Databank, which publicizes such information for public consultation. Non-compliance with such obligations may result in the termination or suspension of the benefits provided by the Mining Investment Law and the imposition of fines.

## 14 Other key issues

### 14.1 Usual structure of venture

Foreign companies must organize a local corporation or register a branch to do business in Argentina. A corporation (SA or *sociedad anónima*) or a limited liability company (SRL or *sociedad de responsabilidad limitada*) structure is usually chosen. Joint ventures take the form of either joint ownership of the shares of a corporation or limited liability company, or a Transitory Union of Company agreement, which is a contract regulated under the Companies Law that does not imply the creation of a corporate entity.

## 14.2 Restricted mining areas

Mining activities cannot be performed within areas qualified as “natural protected areas” (for example, natural reserves, natural parks, etc.) or within glaciers and surrounding areas. Some provinces have issued laws prohibiting the use of cyanide or other chemicals or restricting open pit mining, making mining activities in them almost impossible (i.e., Mendoza, Chubut, Córdoba).

## 14.3 Export

Except for nuclear minerals, for which the National Government has a first refusal right, the exportation of minerals is not subject to any specific restriction. However, the exportation of minerals is subject to withholding duties until December 2020 (up to four pesos per dollar).

## 14.4 Taxes

Mining activity is subject to federal, provincial and municipal taxes, including, but not limited to, value-added tax (VAT), income tax and stamp duty (although there are stamp duty exemptions in some Argentine provinces).

Companies complying with special registration enjoy “tax stability” for 30 years from the filing of the feasibility study. This stability covers every federal, provincial and municipal tax that may be levied on the mining activities, except VAT.

Registered companies are entitled to recover the VAT paid during the exploration stage.

## 14.5 Overlapping tenements

A mining tenement may overlap with another use of land right or tenure, such as hydrocarbons rights. Holders of a mining tenement and hydrocarbons usually execute agreements to coordinate operation within the overlapped areas.

## 14.6 Water licenses

Federal and provincial legislation regulates the use of water. A mining tenement does not include a right to the water necessary for mining and processing.

## 14.7 Infrastructure

Access to infrastructure is a key investment consideration in view of Argentina’s large geographical size and the fact that mining tenements are often located in remote areas. Therefore, the mining project assessment should involve considerations regarding rail, road, water, electricity and port access and capacity.

Argentina has private and shared-use rail and port infrastructure, although some capacity constraints may exist. Rail networks and some ports are subject to price/revenue regulation and formal access arrangements.

# Argentina

## 15 Useful websites

Argentine Ministry of Energy and Mining

<http://www.minem.gob.ar/>

Argentine Ministry of Environmental and Sustainable Development

<http://www.ambiente.gob.ar/>

Argentine Ministry of Foreign Relations and Culture

<http://www.mrecic.gov.ar/>

Argentine Geological and Mining Service

<http://www.segemar.gov.ar/>

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# Australia

Law	Common law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically five years, with extensions
Mining license	Typically 20–25 years, with extensions
Able to use tenement as security	Yes
Royalty payable to government	Yes. Amount depends on commodity and State
Classification system used	JORC

## 1 Summary

Resource-rich Australia has a relatively small population but has become a dominant player in the global mineral export market. It has a well-established and transparent legal system that encourages foreign investment.

The mining industry continues to be a strong contributor to gross national product, although it has been impacted by changes in government regulation and by a number of externalities in recent years. For example, challenges have arisen due to the volatility in commodity prices and relatively high labor and project development costs.

Within Australia, environmental protection considerations continue to have an impact on new project development timelines. In addition, the federal government and some state governments have introduced laws regulating competing land use, such as dealing with the priority of mining versus agriculture/viticulture and regulating the impact on water resources and geology from the “fracking” techniques used in coal seam gas extraction. Federal carbon tax and mining tax were repealed in 2014.

# Australia

As the existing mines close to the ports and other existing infrastructure become depleted, new projects and the associated infrastructure are being developed in more remote areas. These new projects bring technological challenges and create a need for further rail and port infrastructure, such as the Galilee Basin. How industry and sponsors deal with these challenges is shaping the future growth of the Australian mining industry.

## 2 Legal framework for mining

Australia is a federation of six states: Western Australia, South Australia, New South Wales, Victoria, Tasmania and Queensland. In addition, there are various federal government administered territories, with the primary ones being the Northern Territory and the Australian Capital Territory.

Australia is a common law jurisdiction, based on promulgated legislation and case law. Australian law primarily operates on two levels – federal and state/territory:

- (a) exploration and mining activities are primarily regulated at state and territory level. There is no federal mining law;
- (b) there are certain federal laws affect mining activities (in addition to other industries), including those relating to taxation and native title rights, and some laws relating to environmental protection, greenhouse and energy reporting, employment and occupational health and safety.

Each of the state mining regimes are based on similar concepts and approaches, but may vary in detail. Each recognizes at least two distinct stages of mining: exploration licenses and exploitation/mining leases. Exploration licenses tend to be for a shorter duration and, in some states, include obligations to regularly surrender a portion of the area covered by the license to ensure that holders progress to exploration (“use it or lose it” principle).

The holder of an exploration license may apply for the grant of a mining lease once a mineral resource has been identified within the tenement and professionally confirmed (for example, by a Joint Ore Reserves Committee compliant resources statement). The grant of a mining lease is, in all cases, subject to the discretion of the relevant state mining minister. A mining lease will generally be granted where the tenement holder can demonstrate:

- (a) it will proceed with commercial development of the project in the short term;
- (b) it possesses all necessary financial capability and technical skills to undertake the development; and
- (c) it has carried out necessary community, environmental and native title consultation and negotiation.

Some state legislation also recognizes an intermediate licensing stage (often termed a “retention” lease), that allows the holder to retain but not develop a mining project (for example, pending commercial feasibility or the development of required transportation infrastructure).

State mining legislation generally applies equally to any type of mineral deposit found in the relevant jurisdiction, although there are some examples of separate/special treatment for iron ore and coal, depending on the state. The exploration and mining of uranium has historically been restricted in Australia due to political sensitivity. Following recent changes in state governments and a shift in public attitude, uranium mining is now permitted in most jurisdictions in Australia, but is dependent on current political views.

# Australia

A separate legislative regime exists in each state for petroleum (oil and gas, including coal seam gas) exploration and production within the state boundaries (which includes the three-nautical-mile limit from each state's coastline). Within the territories and areas outside the states' territorial limits, petroleum is owned and regulated by the federal government. This guide does not address the legal regime for petroleum in Australia.

## 3 Restrictions on foreign investment

Foreign investment in Australia is generally regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("**FATA**"). Under the FATA, certain investments by a "foreign person" require the approval of the Australian Treasurer, who is advised on the proposed investment by the Foreign Investment Review Board (FIRB). A foreign person includes a natural person not ordinarily a resident in Australia, a foreign corporation or trust, or an Australian corporation or trust in which a foreign person holds a substantial interest.

Generally, FIRB approval is required for the following investment proposals by foreign persons:

- (a) acquisition of a substantial interest (20% ownership by an individual foreign person or 40% in aggregate for foreign persons) in an Australian company or business with assets or shares valued above AUD 266 million (a higher threshold, currently AUD 1.154 billion, applies for US, Chilean, New Zealand, Canadian, Japanese, Chinese, Mexican, Singaporean and Korean foreign persons);
- (b) making an investment in a prescribed "sensitive" sector (for example uranium, critical infrastructure assets), regardless of value; and
- (c) acquiring an interest in Australian land or an Australian land corporation (a company with greater than 50% of its assets comprising land), regardless of value. For these purposes, Australian land includes mining tenements.

The FATA also provides that any direct investment by a "foreign government investor," regardless of value, requires FIRB approval. The term "foreign government investor" includes companies or other entities in which foreign governments have an interest of 20%, or companies or entities that are otherwise controlled by foreign governments. This includes state-owned enterprises and sovereign wealth funds. Investments by foreign governments are scrutinized closely by the FIRB and potentially may have separate conditions or undertakings imposed as part of any approval process.

An investment in the mining industry may be through the acquisition of shares or a direct investment at project level. If mining tenements are being directly acquired, FIRB approval may or may not be required, depending on the nature of the tenement being acquired and the state of development of any mining operations.

An application to the FIRB must be made online and include certain information concerning the target, the investor, and a description of the investor's intended plans for the investment. A decision must be made by the FIRB within 30 days of receipt of an application and notified within 40 days. However, the FIRB reserves the right to extend this time frame by a further 90 days if a matter is particularly complex or sensitive.

## 4 Government or local participation requirements

There are no state or federal government mandatory participation rights in a license or a project. Nor are there any requirements for local Australian ownership, subject to any bespoke FIRB conditions.

# Australia

## 5 Land tenure and priority

All minerals located within state boundaries are the property of the relevant state until the mineral is extracted. Mining legislation creates a system of mining tenure separate from land tenure. Therefore, landholders, be they freehold, leasehold or native title, do not have any ownership right to minerals, although they may be entitled to compensation for the loss of the use of land due to mining activities.

## 6 Indigenous or local community rights

"Native title" is the term used to describe certain rights held by indigenous Australians in respect of traditional access to and use of land and water. The Native Title Act 1993 (Cth) and state legislation implement a national scheme governing the validity of land dealings affecting native title and establishing a process for indigenous Australians to make native title claims. A register of native title claims and granted interests is maintained and is publicly accessible.

If recognized, native title rights may include the right to possess, access, occupy, use and enjoy an area; visit and protect important places; hunt, fish and gather food and bush medicines; take water, wood, stone and other traditional resources; and conduct social, religious and cultural activities and ceremonies. There are no native title rights to minerals. However, if native title rights exist over an area that is the subject of a mining lease application, the right must be taken into account and certain procedures must be complied with before a tenement will be issued.

- (a) If the proposed grant of a mining tenement is affected by native title rights or claims, there are two ways to deal with this:
- (b) an Indigenous Land Use Agreement ("ILUA") can be negotiated and entered into bilaterally. The advantage of an ILUA is that it can be tailored to provide benefits to the native title parties such as employment, compensation and recognition of their native title rights while providing certainty to the mining investor in the form of protocols and agreements for future mine development; or

if an ILUA cannot be negotiated, the parties must comply with the "right to negotiate" process set out in the Native Title Act 1993 (Cth) and negotiate in good faith regarding the conditions of the grant of the mining tenement. Some states provide an expedited mechanism where the proposed activities involve minimal disturbance to the water and land.

Generally, protection of indigenous cultural heritage sites and objects in Australia is regulated under the laws of the state in which they are located. Depending on the jurisdiction, the protection requirements may include the entity seeking to progress the mining project being required to conduct a survey of potential cultural heritage sites on the tenement area and take all reasonable and practical measures to ensure the activity does not harm any protected heritage sites or objects. Acts which disturb or remove heritage sites or objects can typically only be undertaken with specific approvals and consent. The relevant state legislation sets out the remedies and penalties for non-compliance, which, in some cases, may enable specific remedies such as injunctions or stop work orders.

Certain federal legislation also impacts activities affecting indigenous heritage, including the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), the Protection of Moveable Cultural Heritage Act 1986 (Cth) and the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act"). Under the EPBC Act, there are penalties for any person who takes an action that has or will have a significant impact on the national heritage values of a place recognized for its national heritage value. The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) enables the federal government to respond to



requests to protect important indigenous areas and objects that are under threat, if it appears that state laws have not provided effective protection. This is generally viewed as a power of last resort, after the relevant state processes have been exhausted.

## 7 Environmental protection and rehabilitation obligations

In Australia, mining exploration and production activities may be subject to extensive federal and state environmental laws as well as local council planning regulations. For example, at federal level, the EPBC Act establishes a regime for protecting the environment, flora and fauna biodiversity and Australian national heritage. It requires any person taking an action which would have a significant impact on matters of national environmental significance (for example, matters impacting on a world heritage site, certain wetlands, threatened species and marine areas and material impacts on water resources) to refer it to the Federal Minister for the Environment for consideration and potential assessment. In some cases, the federal government has taken steps to empower state governments to exercise delegated assessment powers.

Mining projects in each state require environment and planning approval from the state government. Legislation provides for the integrated assessment of these issues and approval may be given subject to certain conditions, including as to rehabilitation, protection of flora and fauna and the acquisition of environmental offsets.

Governmental authorities have the power to enforce compliance with environmental laws, regulations and permits, and violations may result in the issuance of injunctions limiting or prohibiting operations, as well as administrative, civil and even criminal penalties.

Environmental laws may:

- (a) restrict the types, quantities and concentrations of various substances that can be released into the air, land and water as a result of drilling, production and processing activities;
- (b) regulate the manner in which certain substances, including waste, is transported;
- (c) suspend, limit or prohibit construction, drilling and other activities in certain lands lying within wilderness, wetlands and other protected areas;
- (d) require remedial measures to mitigate pollution from historical and ongoing operations such as the use of tailings dams.

Environmental regulators have the ability to require a project operator to prepare and implement a plan to improve the environmental performance of a project, and may also amend the conditions of an existing environmental approval. The environmental regulation of a project should not be assumed to remain static following approval, and may become more onerous over time.

Each state has its own regulation with respect to the level and type of rehabilitation bond or guarantee that is required. The level of the rehabilitation bond or guarantee may be reviewed by the relevant authority during the life of the mine.

### 7.1 Managing greenhouse gas emissions

The National Greenhouse and Energy Report Act 2007 ("**NGER Act**") requires companies to audit and report annual greenhouse gas emissions as well as energy consumption and production. Together with NGER reporting obligations, a safeguard mechanism sets emissions baselines for all facilities that directly emit over

100,000 tonnes of carbon dioxide equivalent per year. Facilities that are subject to a baseline must ensure their emissions stay below the baseline or offset any excess emissions.

## 8 Exploration licenses

### 8.1 Scope

In all states and territories, a party may apply for an exploration license, which generally allows the holder to carry out activities to determine the existence, quality and quantity of minerals within an area by low-impact methods, such as prospecting, geophysical surveys, drilling and sampling.

Different licenses may be required for different minerals, and an endorsement may be required for iron ore, depending on the jurisdiction.

### 8.2 Duration

In each state, an exploration license is usually issued for a term of up to five years as its initial term, which may be renewed for further terms of two to five years each (depending on the jurisdiction), subject to certain restrictions (such as compliance with its terms of issue and, potentially, surrender of a part of the area).

Exploration areas are usually divided into sub-blocks and different states impose a different maximum number of sub-blocks that may be included within one permit. Statutory fees apply per annum per sub-block, and for renewals.

### 8.3 Steps to acquire an exploration right

In most jurisdictions, the applicant applying for an exploration license needs to fulfill the following requirements:

- (a) submit a work program which sets out the details of the proposed exploration methods and expected expenditure;
- (b) meet a number of conditions under other environmental, cultural and/or heritage legislation; and
- (c) notify the public of the application.

Following the satisfaction of the relevant filing requirements, an application for an exploration license may result in an issued license within six to 12 months.

### 8.4 Relationship with landowners

All jurisdictions have provisions requiring negotiation of compensation with the landowners and occupiers. Compensation heads include deprivation of use of land, loss of earnings and social disruption. In addition, security deposits or private property bonds may be required.

Generally, for exploration on unoccupied and undeveloped land, minimal compensation for low-impact exploration is required other than to ensure rehabilitation of disturbed sites.

### 8.5 Obligations of the holder

An exploration license will be issued with standard terms. These may include:

# Australia

- (a) payment of an application fee and rental;
- (b) provision of rehabilitation security (or bond);
- (c) at the end of certain years of its term, surrender of part of the license area;
- (d) requirements not to extract or disturb more than a specified tonnage of materials, including overburden, during activities;
- (e) incur minimum expenditure amounts (based on the agreed work program); and
- (f) file annual reports to the authorities.

## 9 Holding tenements

### 9.1 Scope

In most jurisdictions where the holder of an exploration license has located a mineral deposit but it is not certain of the economic potential and commercial feasibility of that deposit, they may apply to extend the exploration license or apply for a retention lease (or mineral development license).

### 9.2 Duration

A retention lease is typically issued for a term of up to five years and is renewable for further five-year terms.

### 9.3 Rights and obligations

The holder of a retention lease may carry out further geoscientific programs and feasibility studies.

It can be issued over all or part of the area within an exploration license, but typically only over the area identified as having mineral potential.

Statutory fees apply per annum, per square kilometer and for renewals.

## 10 Development/production tenements

### 10.1 Scope

In each jurisdiction, once a mineral deposit has been located and assessed, a holder of an exploration license (or retention lease) may apply for a mining lease. Depending on the jurisdiction, a mining lease generally provides the holder with the exclusive right to conduct mining operations and authorizes the holder to sell or dispose of minerals recovered in the course of mining operations or to utilize those minerals for commercial and industrial purposes.

Minerals will become the property of the holders of the mining lease on extraction.

### 10.2 Duration

A mining lease will generally be issued for an initial 20 to 25 year term depending on the jurisdiction, and may be renewed for further periods.

Generally, a mining lease application may be over an area as large as the identified ore body.

Statutory fees apply per annum, per square kilometer and for renewals.

## 10.3 Transition from exploration/holding right to mining right

A holder of an exploration license generally has an exclusive right to apply for a mining lease with respect to mineral deposits within the exploration license area.

## 10.4 Steps to acquire a right

In most jurisdictions, the applicant applying for a mining lease needs to fulfill the following requirements:

- (a) submit a mine operations plan which sets out the details of the proposed mining methods and expected expenditure;
- (b) provide evidence of meeting any environmental assessment requirements under relevant legislation;
- (c) provide evidence of compliance with the provisions of the *Native Title Act 1993* (Cth) if any native title claims affect the area;
- (d) provide copies of land compensation agreements; and
- (e) notify the public of the application.

Following the satisfaction of the relevant filing requirements, an application for a mining lease may result in an issued lease within 12–24 months, but it may take longer depending on the size of the project and environmental and community considerations.

## 10.5 Relationship with landowners

With respect to landowners, all jurisdictions have provisions requiring negotiation of compensation with the landowners and occupiers. Compensation heads include deprivation of use of land, loss of earnings and social disruption. In addition, security deposits or private property bonds may be required. Compensation will be based on market rates for the loss suffered by the landholder. The amount of compensation will depend on whether the land is held freehold or leasehold (such as under a pastoral lease).

With respect to native title, generally, a mining lease will not be issued until the government is satisfied that the steps required by the *Native Title Act 1993* (Cth) have been complied with.

## 10.6 Obligations of the holder

The holder of a mining lease must comply with the general and specific terms and conditions under the legislation and/or on the lease instrument. These may include the following:

- (a) comply with the mine operations plan as submitted to the government at the time of application;
- (b) pay the rents and royalties due under the lease;
- (c) use the lease only for mining purposes;
- (d) arrange for a survey of the lease;
- (e) comply with the prescribed expenditure conditions applicable unless exemption is granted;



# Australia

- (f) not use ground-disturbing equipment when mining on the land unless with prior government approval of the relevant work program;
- (g) not transfer or mortgage a legal interest in any part of the lease without the prior written consent of the Minister;
- (h) lodge, in the prescribed manner, periodical reports and returns;
- (i) furnish to the Minister geological samples obtained in the course of operations;
- (j) promptly report in writing to the Minister with details of all minerals of economic significance discovered;
- (k) provide a rehabilitation bond in accordance with law; and
- (l) submit and obtain written approval for a mine closure plan.

There are generally no local employment requirements or local processing or domestic supply obligations, but local community employment and service contract considerations are important for project proponents to take into account.

## 11 Assignment of and security over tenements

### 11.1 Assignment

Assignment of an interest in a tenements will require the approval of the relevant issuing authority. In some states a change of control of the license holder may also require approval of the issuing authority.

In most cases, the transferee must exhibit the requisite technical and financial abilities, as well as being of good character.

### 11.2 Security

In most jurisdictions the grant of security over a tenement will require the approval of the relevant issuing authority, and may need to be granted on a designated form. The security may be registered on the tenement register.

## 12 Royalties

Upon grant of a mining lease, the license holder is entitled to mine the minerals and retain the economic benefit of the minerals that have been mined, subject to payment of a royalty to the relevant government.

The amount of the royalty varies from state to state and will depend on the type of mineral being mined and the form or product sold. For example, most states impose a 4% to 5% royalty on the value of base metal concentrates sold, while coal may, in some cases, be taxed at 6% to 10% of the value exported (but up to 15% in Queensland – different rates may apply for different grades of coal and the prevailing market price).

## 13 Mineral reporting and classification

The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves ("**JORC Code**") is a mandatory system for classification of resource estimates prepared for the purposes of

# Australia

protecting investors in mining and exploration companies in Australia. The JORC Code classifies mineral quantities into “mineral resources” and “ore reserves.” The JORC Code requires public mineral statements or reports to be based on work undertaken by a competent person and provides extensive guidelines on the criteria to be considered when preparing reports. The Listing Rules of the Australian Securities Exchange expressly require reports prepared by listed mining companies or their subsidiaries regarding resources and reserves entitlements to be prepared in accordance with the JORC Code. For further information, see the Australasian Joint Ore Reserves Committee’s website at <http://www.jorc.org/>.

## 14 Other key issues

### 14.1 Usual structure of venture

Mining activities can be conducted in Australia independently, through contractors or by way of joint venture.

Common in Australia (and similar to what is found in the petroleum industry) is the unincorporated joint venture (UJV) structure. This comprises an association of persons which does not create a separate legal entity or a partnership. The relationship between the participants is both contractual (as set out in the joint venture agreement) and proprietary (property which is the subject of the venture is held by the participants as tenants in common in proportion to their ownership interests).

UJV participants appoint an operator to manage the exploration or production assets and to enter into contracts with third parties. The operator may be the majority interest holder or an independent third party, and is responsible for meeting budgets, complying with the law and permit terms and delivering the mineral end-product to each participant. Key decisions concerning exploration and development activities are subject to the supervision of a management committee representing the parties.

All joint venture costs are shared in proportion to the participants’ ownership interest. However, to avoid classification as a partnership (and the joint and several liability associated with that classification), there is no sharing of profit. Each participant is entitled to take their respective proportion of all minerals produced and is free to deal with those minerals separate from the other participants. In practice, each of the participants tends to appoint a common entity as the joint venture marketing company. The marketing company will acquire all minerals produced from each of the participants and sell those minerals to off-takers, or may act as the agent for each of the participants.

To acquire a stake in a UJV, an investor will often enter into a “farm-in” agreement, agreeing to spend a fixed amount of money (for example, to fund exploration or development costs) to acquire an agreed ownership interest in the project.

### 14.2 Restricted mining areas

Generally, mining activities are not permitted in areas designated as state or national parks without special approval. At state level, ministers have the power under the relevant mining laws to classify forests or wilderness areas as protected areas, with restrictions or prohibitions on mining activities. At federal level, the EPBC Act regulates mining activities in both:

- (a) the external territories over which the Federal government has direct control; and
- (b) other land which the Commonwealth has jurisdiction over under the Constitution, such as land designated as national heritage or world heritage under international treaties.

# Australia

In addition, a substantial part of South Australia has been classified as the Woomera Prohibited Area (WPA), which is administered by the Federal Department of Defence and used for military purposes. Mining and exploration access to the WPA is restricted and is divided into two regions:

- (a) the "core area of operation" where mining is not permitted; and
- (b) the "non-core area" where exploration and mining may be permitted, subject to approvals and possible restrictions.

Projects located in this area must apply to the federal government for an access agreement, in consultation with the South Australian State Government.

## 14.3 Climate change risks

Australia's corporate regulator, the ASIC, has increasingly indicated that climate change is a material risk that should be assessed and disclosed. Listed companies are encouraged to disclose meaningful and useful climate risk related information to investors, with some now applying the voluntary framework developed by Taskforce on Climate-related Financial Disclosures.

Climate change impact is increasingly viewed as relevant consideration for approval bodies in determining applications for new mines or expansions of existing mines. Coal mines are particularly controversial, and a number of proposals have been subject to legal challenges by third parties.

## 14.4 Export

Other than state and federal government policy in relation to the export of uranium, and federal government policy on the transport of hazardous and radioactive products (such as some rare earths), there are no government licenses or quotas required for the export of minerals.

## 14.5 Taxes

Entities carrying out mining activities will be subject to the usual income and corporate taxes, together with payroll tax and goods and services tax (GST).

Transfers of mining leases and shares in companies with significant land assets may also attract state stamp duty, being ad valorem taxes of up to 5% to 6% of the gross asset value.

## 14.6 Overlapping tenements

Mining tenements may not always grant exclusive use of or access to an area. It is possible that a mining tenement may overlap with another use of land right or tenure. Examples of multiple rights that may exist include a petroleum lease, a coal seam gas tenement, rights to different minerals, a geothermal tenement or a pipeline or other infrastructure right.

In most instances, complementary use of land may be possible, but the widespread commercialization of coal seam gas and other non-conventional gas and oil resources (particularly in Queensland) have caused tensions regarding which holders have priority to develop resources.

In most states, the rights to coal seam gas are covered by a petroleum production lease while the rights to coal are covered by a mining lease. Queensland has implemented legislation which creates a specific priority arrangement, giving priority to the party who first applies for a development (mining/production) permit. If

parties hold overlapping tenements, then they must try and agree a co-development agreement for the development of both interests.

## 14.7 Strategic cropping land

Queensland, New South Wales and Western Australia have legislation which protects areas of land that are classified as "strategic" cropping land or premium agricultural land from the environmental impact of mineral, gas and petroleum exploration and mining activities. In the case of Western Australia, the area protected to date is specifically limited to the Margaret River wine region.

The relevant legislation typically provides that operators wishing to conduct exploration or mining activities in an area that is determined to be strategic cropping land will not be granted an environmental authority for a project until the relevant department has assessed the impact of the project against certain criteria. If the proposed activities are high impact, the project may be prohibited or restrictive conditions imposed in the environmental authority.

The Regional Planning Interests Act 2014 (Qld) seeks to manage the impact of resources and other regulated activities on areas of "regional interest." Under the legislation, a person is required to apply for a "regional interests development approval" if they intend to undertake a resource activity (defined as an activity which requires one of a list of specified permits) or a regulated activity in a regional interest area, unless one of the limited exemptions apply. Failure to obtain a regional interests development approval prior to carrying out a resource activity in a regional interest area is an offense under the legislation.

## 14.8 Water licenses

The ownership and use of water is governed by legislation issued by state and territory governments. Water may be bundled with the land or unbundled, depending on the state and the nature of the water resource. A mining tenement does not include a right to the water necessary for mining and processing, which will need to be negotiated separately. Water rights include water allocations and water access entitlements.

Foreign persons are required to register their holdings of registrable water entitlements and contractual water rights with the Australian Taxation Office once each year.

## 14.9 Skilled labor and visas

Australian employment laws are derived from a number of sources, including contracts of employment, industrial instruments, such as modern awards and collective workplace agreements, state and federal legislation, common law and decisions of federal and state tribunals. As such, employment law can be complex. Notwithstanding these various sources, there are a number of minimum standards that employers need to comply with, including minimum rates of pay, providing 20 days' annual leave and 10 days' sick/carer's leave per year, parental leave for full-time employees, providing minimum levels of superannuation contributions for employees and certain minimum notice periods for termination.

Employees in the mining industry may be members of a trade union (for example, the Colliers Union). State and federal industrial relations legislation regulates the internal operations of trade unions and provides for a system of registration of unions. Each trade union also has its own detailed set of rules which, among other things, specify the eligibility requirements for employees to become members. These rules are regulated by statute. Industrial disputes are also heavily regulated by federal and state legislation. Federal legislation, in particular, sets out a framework for taking protected industrial action in the course of workplace bargaining, and recourse for employers in circumstances where industrial action is not protected or is unlawful.

# Australia

Economic conditions in recent years have seen an increase in mining industry wages. Stricter immigration rules on the use of foreign labor has contributed to this pressure on local wages.

With the abolishment of the 457 Temporary Work Skilled Visa and the introduction of the new 482 Temporary Skill Shortage Visa program ("**482 Program**"), there has been a significant reduction in the number of occupational categories available to be sponsored under this program. The 482 Program currently allows for up to four-year work visas for the occupational categories of geophysicist, mining engineer (excluding petroleum), geotechnical engineer, welder (first class) and mechanical engineer. While occupations such as metallurgical or materials technician allow for a temporary work visa for only up to two years. The federal government has also introduced a new program for businesses operating in designated regional areas through Designated Area Migration Agreements (DAMAs). These formal agreements are negotiated between the Australian Government and a regional, state or territory authority and provides further access to semi-skilled and skilled foreign workers. Employers must firstly obtain endorsement from the designated area representative before lodging a labor agreement request. DAMAs are now in place for the Northern Territory, Great South Coast, Western Australia Goldfields, Regional South Australia, Adelaide City, Orana New South Wales and Far North Queensland. DAMAs are generally in effect for five years and use the Temporary Skills Shortage (TSS) and Employer Nominated Scheme (ENS) visa programs.

## 14.10 Infrastructure

Given Australia's large geographical size and the fact that mining tenements are often located in remote areas, access to infrastructure is a key investment consideration. Assessment of a mining project involves careful assessment of rail, road, water, electricity and port access and capacity.

Australia has private and shared-use rail and port infrastructure, although some capacity constraints can exist. Rail networks and some ports are subject to price/revenue regulation and formal access arrangements. Some third-party access regimes exist to govern rights of access to privately owned and operated infrastructure, most notably under a national regime set out in Part IIIA of the Competition and Consumer Act 2010 (Cth) and a Queensland regime set out in Part 5 of the Queensland Competition Authority Act 1997 (Qld). Recent changes to this legislation means that project proponents, regardless of whether they are seeking to access or develop relevant infrastructure, should consider the implications of third-party access to infrastructure at an early stage of their potential project.

## 15 Useful websites

Australian Government Department of Industry and Science	<a href="http://www.industry.gov.au/Pages/default.aspx">http://www.industry.gov.au/Pages/default.aspx</a>
QLD Department of Natural Resources, Mines and Energy	<a href="https://www.dnrme.qld.gov.au/">https://www.dnrme.qld.gov.au/</a>
NSW Department of Planning and Environment - Resources and Energy Division	<a href="https://www.resourcesandgeoscience.nsw.gov.au/">https://www.resourcesandgeoscience.nsw.gov.au/</a>
SA Department of Energy and Mining	<a href="http://www.energymining.sa.gov.au/">http://www.energymining.sa.gov.au/</a>
TAS Department of State Growth, Mineral and Resources	<a href="http://www.mrt.tas.gov.au/portal/home">http://www.mrt.tas.gov.au/portal/home</a>
VIC Department of Environment, Land Water & Planning	<a href="http://delwp.vic.gov.au/">http://delwp.vic.gov.au/</a>
VIC Department of Jobs, Precincts and Regions - Earth Resources	<a href="https://earthresources.vic.gov.au/home">https://earthresources.vic.gov.au/home</a>
WA Department of Mines, Industry Regulation and Safety	<a href="http://www.dmp.wa.gov.au/">http://www.dmp.wa.gov.au/</a>

# Australia

NT Department of Primary Industry and Resources  
National Native Title Tribunal

<https://dpir.nt.gov.au/>

<http://www.nntt.gov.au/Pages/Home-Page.aspx>

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# Brazil

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	No
Exploration license	1–3 years, with extensions possible
Mining license	Undetermined period
Able to use tenement as security	Yes
Royalty payable to government	Yes. Maximum of 3.5% of the companies' gross income

## 1 Summary

Brazil has a very large territory and a significant geological diversity. The country has achieved a prominent position in the global mining scene, both in reserves and mineral production, having reached a mineral production of circa USD 57.7 billion in the year of 2018, which represented about 4% of the country's industrial GDP.

The mining industry reached more than USD 49.8 billion in exports, with iron ore alone responsible for approximately USD 20.2 billion.

## 2 Legal framework for mining

Mining activities in Brazil are regulated by the Brazilian Republic Constitution of 1998, the Brazilian Mining Code (Federal Decree-Law No. 227/1967), regulated by Federal Decree No. 9.406/2018, Law No. 13.575/2017 (which regulates the Brazilian Mining Agency), Law No. 13.540/2017 (which regulates royalties) and by resolutions, ordinances and other regulations from the mining authorities, mainly at federal level.

Article 176 of the Brazilian Constitution of 1988 establishes that all mineral deposits belong to the Federal Union and will be deemed to be separate assets from the surface area. Consequently, mining activities in

# Brazil

Brazil can only be carried out through authorizations and/or concessions granted by the federal government to either (a) Brazilian citizens; or (b) companies with head offices and management in Brazil (regardless of the nationality of the controlling partners, save very few exceptions).

The Brazilian Mining Code divides mining activities into two different phases: exploration and production. Exploration is granted upon an exploration authorization (*Alvará*) issued by the National Mining Agency (ANM). If the research is successful, the mining entity will be entitled to request a concession for production, which is granted by the Ministry of Mines and Energy (MME) for an undetermined term.

Brazil's regulatory framework is rather complex, involving multiple authorities at municipal, state and federal levels. At federal level, there are three key governmental authorities responsible for mining:

- (a) The MME oversees the areas of geology, mineral and energy resources, being responsible for defining policy.
- (b) The ANM is a federal government agency created by Law 13.575/2017, subordinated to the MME. The ANM is vested with administrative powers to inspect mining undertakings and to enact regulations. All mining companies are required to cooperate with ANM's inspection officers and to provide technical and financial information on the entire chain of exploration, production and commercialization of mineral resources.
- (c) The Mineral Resources Exploration Company (CPRM) is a state-owned company subordinated to the MME, responsible for undertaking and managing Brazil's Geology Program. The CPRM's primary role is to conduct research on Brazilian geology to produce the knowledge necessary for the sustainable development of mining activities.

Recently in Brazil, two new laws were enacted in the mining sector, both of which resulted from the conversion into law of provisional measures, which are bills issued by the president with effect of law for 120 days that shall be ratified by the Federal Congress to continue in force.

On 18 December 2017, Provisional Measure 789/2017 was converted into Law No. 13.540/2017, which reviewed royalty rates to increase tax bases and rates.

Also in December 2017, Provisional Measure 791/2017 was converted into Law No. 13.575/2017, creating the ANM to replace the former National Department of Mineral Production (DNPM) in all its attributions.

There is a bill for a new Mining Code, which has stalled in the Federal Congress, as the most urgent demands from the public sector for the mining sector were the increase in royalties and the creation of a more modern agency, which were addressed in the aforementioned laws.

Although the Mining Code of 1969 continues to be the primary legislation, in 2018, the president issued Federal Decree No. 9.406/2018, which sets forth a new secondary regulation, with more modern provisions to govern mining practice.

## 3 Restrictions on foreign investment

Mining activities in Brazil may only be carried out through authorizations and/or concessions granted by the federal government to either: (a) Brazilian citizens; or (b) companies with head offices and management in Brazil (regardless of the nationality of the controlling partners, save very few exceptions). Therefore, it is possible for foreign companies to invest in mining activities in Brazil by incorporating a Brazilian subsidiary or investing in existing Brazilian companies.

# Brazil

However, companies that perform mining activities within a frontier zone (an area within 150 kilometers of Brazil's border with other countries) shall have at least the majority of the corporate capital belonging to Brazilian citizens and a majority of the members of the management of such companies must be Brazilian citizens who shall have predominant management powers over the company.

Furthermore, pursuant to the Brazilian Constitution, the exploration and production of nuclear minerals and its derivatives on Brazilian territory may only be carried out by state-owned companies.

## 4 Government or local participation requirements

As a general rule, government participation is not mandatory for mineral exploration and production in Brazil. However, as mentioned above, pursuant to the Brazilian Constitution, the exploration and production of nuclear minerals and its derivatives within the Brazilian territory can only be carried out by state-owned companies.

## 5 Land tenure and priority

All minerals located within Brazilian national territory boundaries are the property of the Union until the mineral is extracted. Mining legislation creates a system of mining tenure separate from land tenure. Therefore, landholders do not have any ownership right to minerals, although they are entitled to compensation for the loss of the use of land due to the mining activities, as further detailed below.

## 6 Indigenous or local community rights

The Brazilian Constitution foresees that the federal government shall protect indigenous people and their culture. In this sense, indigenous people in Brazil are entitled to the land they traditionally occupy, which shall be declared "reserves," and also to the enjoyment of the natural resources found in such lands.

The Federal Congress can authorize the exploration and production of mining resources found within indigenous land. In these cases, the indigenous community shall be heard and will be entitled to participation in the outcome. The Brazilian Constitution of 1988 determines that mining activities in indigenous lands will be subject to specific legislation, which has not yet been enacted.

## 7 Environmental protection and rehabilitation obligations

Mining activities are deemed to be potentially high-polluting activities. As such, they are subject to previous environmental licensing proceeding as well as to strong scrutiny from the environmental authorities. Except in certain cases set forth in Supplementary Law No. 140/2011, environmental licensing of mining projects will be conducted by the competent state environmental agency. The proceeding will be simultaneous with the proceeding for granting of the production license.

An environmental licensing proceeding comprises three phases: (a) the preliminary license, which authorizes the location of the activity and the concept of the project, pursuant to the environmental studies presented; (b) the installation license, which, upon fulfillment of the conditions imposed in the preliminary license, authorizes the installation of the activity; and (c) the operating license, which authorizes the start-up of the activities.

As a general rule, for the issuance of the Preliminary License, a previous Environmental Impact Study (EIA) and a corresponding Environmental Impact Report (RIMA) are required. The purpose of the studies is to

# Brazil

assess negative and positive impacts of the intended activity, to explore the locational and technological alternatives and the measures to prevent or mitigate negative impacts.

In addition to the environmental licensing proceeding, other environmental permits and licenses will apply in a mining project. For example, permits from the federal or state water agency for the use of water and for the construction of dams. Mining is also subject to permits for appropriate destination of solid waste and scrap materials, as well as to registration with the Registry of Potentially Polluting Activities. Suppression of vegetation, use of explosives and utilization of certain chemicals products are also subject to specific licenses from the authorities.

Failure to comply with applicable environmental laws and regulations can result in criminal and administrative penalties pursuant to Brazilian Federal Law No. 9,605 of 12 February 1998 and Federal Decree No. 6,514 of 22 July 2008, in addition to the obligation to restore the environment and indemnify third parties in case of environmental damage. Polluters in Brazil are subject to strict, joint and several liability. It is possible to pierce the corporate veil and obtain the assets of controlling shareholders if the polluter does not have funds to pay the damage and/or the penalties.

## 8 Exploration licenses

### 8.1 Scope

Exploration authorizations (*alvará de pesquisa*) are granted by the ANM's general officer.

### 8.2 Duration

Exploration authorizations are granted for a period not shorter than one year and not longer than three years, which may be extended by the ANM. At the end of the term, the holder of the exploration authorization must present a final exploration report to the ANM, with information regarding the results of its geological studies as well as the field's economic and technical feasibility.

### 8.3 Steps to acquire an exploration right

The request for an exploration authorization must be addressed to the ANM's general officer accompanied by the following information/documentation:

- (a) specifications of the minerals to be explored;
- (b) location of the reserve and extension of the surface area to be explored;
- (c) description of the area;
- (d) plan of the mining facilities;
- (e) full "exploration work plan" explaining the activities to be carried out; and
- (f) a "budget" and an "exploration schedule" for the performance of the exploration work.

Any area may be subject to an exploration authorization as long as the exploration work plan, the budget and exploration schedule are approved and the area is deemed to be "free," meaning that it is not the subject of a prior exploration authorization, mining concession or a similar grant.

## 8.4 Relationship with landowners

The holder of the exploration authorization must agree the payment of an indemnification due to the owner for an exploration easement in his/her property. Since legislation does not establish the amount of compensation so payable, it must be discussed on a case-by-case basis.

If there is no agreement between the holder of the exploration authorization and the landowner, a lawsuit may be filed to enforce an easement on the surface area necessary for the exploration, in which the judge will arbitrate the amount of compensation to be paid to the landowner.

## 8.5 Obligations of the holder

An exploration license will be issued with standard terms, which will include:

- (a) "Administrative fees" – paid to the ANM when the exploration authorization request is filed;
- (b) "Annual hectare fee" (*Taxa Anual por Hectare*) – a fee per hectare to be paid by the exploration authorization holder each year until the delivery of the final exploration report to the ANM;
- (c) minimum expenditure amounts (based on the agreed work program); and
- (d) filing of reports to the authorities on the development of the work performed.

Assignment of an exploration authorization is allowed, subject to the ANM's prior approval. The ANM will assess the assignee's ability to comply with the approved exploration work plan, budget and exploration schedule.

## 9 Holding tenements

A party who performed exploration has a preemptive right to apply for a mining concession within one year from the approval of the final exploration report by the ANM. Although exploration authorizations can be granted to individuals, mining concessions are only awarded to legal entities. If an individual performed the exploration, he/she shall assign the right to a legal entity.

## 10 Development/production tenements

### 10.1 Scope

The right to mine is given through a mining concession (*Concessão de Lavra*). Minerals will become the property of the holders of the mining concession upon extraction.

### 10.2 Duration

Mining concessions are granted for an undetermined period.

### 10.3 Transition from exploration/holding right to mining right

After the exploration phase under an exploration authorization is concluded, a report shall be forwarded to ANM, evidencing the discoveries. Upon approval of such report, the holder of the exploration license may apply to the MME for a mining concession.

After the request and all the relevant documentation are analyzed, the MME issues an ordinance providing for the concession of the area.

## 10.4 Steps to acquire a right

The concessionaire must present an economic production plan (*Plano de Aproveitamento Econômico* (PAE)) and prove that it has the economic means to comply with the financial obligations arising therefrom.

The request for a mining concession must be addressed to the MME and be accompanied by the following information/documentation:

- (a) certificate issued by the Commercial Registry of the state where the mining company was incorporated;
- (b) specifications of the minerals to be explored and documents evidencing that an Exploration Authorization has been previously granted;
- (c) description and location of the mineral field to be exploited;
- (d) graphical definition of the area to be exploited;
- (e) easements/servitudes that shall apply to the area; and
- (f) evidence of the existence of funds or of financial commitment necessary for the execution of the PAE.

## 10.5 Relationship with landowners

The holder of the mining concession shall pay the surface owner a monthly fee equivalent to 50% of the value of the accrued royalties (CFEM) due to the government. Calculation of the CFEM is further detailed below.

## 10.6 Obligations of the holder

The holder of a mining concession must fulfill several obligations, including, but not limited to:

- (a) commencing the production work contemplated in the PAE within six months from the date the real estate in which the mineral rights are located is made accessible;
- (b) extracting minerals from the mining field in accordance with the PAE approved by the ANM;
- (c) presenting the annual production report (*Relatório Anual de Lavra*), related to the activities performed in the previous year, to the ANM before 15 March of each year; and
- (d) refraining from overproducing in the mine or stopping the production for a period longer than six months.

The mining concession holder must only exploit the substances that are specified in the relevant title. If new substances are discovered, the owner may request the ANM to amend the mining concession.



# Brazil

## 11 Assignment of and security over tenements

The assignment and encumbering of a mining concession is allowed, subject to the ANM's prior approval. Any encumbrance or assignment will be effective only after it has been registered with the ANM.

It is also possible to lease certain mining rights (*arrendamento de direitos minerários*) to a third party, likewise subject to the ANM's prior approval.

## 12 Royalties

The holder of a mining concession has an obligation to pay CFEM (royalties). CFEM rates vary depending on the mineral substance and are applicable to the gross sales of mineral products (minus sales taxes) as follows:

- (a) Rocks, sands, gravel, clay and other mineral products used directly in civil construction (also called construction aggregates), ornamental rocks, as well as mineral and thermal water: 1% rate
- (b) Gold: 1.5% rate
- (c) Diamonds and other mineral products: 2% rate
- (d) Bauxite, manganese, niobium and rock salt: 3% rate
- (e) Iron ore: 3.5%, which ANM may reduce to 2% depending on the market price and the productivity of the mine.

Out of the amount collected, 60% thereof is earmarked for certain municipalities affected by production activities, 20% to states and 10% to the Federal Union. Municipalities affected by the activity, such as those with railroads and pipelines, will receive 10% of the amount collected.

## 13 Mineral reporting and classification

Brazil is currently a member of the Committee for Mineral Reserves International Reporting Standards (CRIRSCO), an international body established in 1994, the purpose of which is to align and upgrade resource and reserves reporting standards around the world. Member countries follow the CRIRSCO R&R reporting template, adjusting for specific local laws and particularities.

## 14 Other key issues

### 14.1 Usual structure of venture

Considering that mining concessions are only granted to legal entities, the usual structure adopted by national and international investors is establishing a local company, either in the form of a limited liability company (*limitada*) or corporation (*sociedade anônima* (SA)).

On the one hand, some of the advantages of a *limitada* are:

- (a) lower costs, both in organization and management (for example, as a general rule, a *limitada* is not required to publish its financial statements and annual balance sheet, except if it has assets over BRL 240 million or gross annual revenue over BRL 300 million).

# Brazil

- (b) its Articles of Organization may be amended by a simple document executed by the company's quota holders or their attorneys-in-fact, and publication of the amendment is not required; and
- (c) stock certificates, share registration books, share transfer books, shareholders' meeting presence and minute books, etc., are not required, since all of a *limitada*'s corporate information is addressed in its Articles of Organization.

On the other hand, the advantages of an SA are: (a) The possibility of issuing shares on the stock market; (b) clearer regulations regarding the execution and effectiveness of shareholders' agreements; and (c) less bureaucracy in the transfer of shares and issuance of new shares.

Sometimes, other corporate structures are utilized by mining companies in Brazil. For instance, it is relatively common for mining title holders to associate themselves with private investors through a de-facto partnership under the Brazilian law of "*sociedade em conta de participação*," under which mining activities are funded.

## 14.2 Protection for foreign investors

The Brazilian Federal Constitution provides for equal treatment to national and foreign investors. Any foreign investment in the equity of a Brazilian company must be registered with the Brazilian Central Bank, which is essential to ensure that profits or capital gains are remitted abroad without additional taxation.

## 15 Useful websites

Ministry of Mines and Energy	<a href="http://www.mme.gov.br">www.mme.gov.br</a>
National Mining Agency	<a href="http://www.anm.gov.br">www.anm.gov.br</a>
National Agency of Water – ANA	<a href="http://www.ana.gov.br">www.ana.gov.br</a>
Brazilian Institute of Mining – IBRAM	<a href="http://www.ibram.org.br">www.ibram.org.br</a>
Brazilian Federal Senate	<a href="http://www.12.senado.leg.br">www.12.senado.leg.br</a>
Brazilian Chamber of Deputies	<a href="http://www2.camara.leg.br">www2.camara.leg.br</a>
Ministry of the Environment	<a href="http://www.mma.gov.br">www.mma.gov.br</a>
Brazilian Presidency	<a href="http://www2.planalto.gov.br">www2.planalto.gov.br</a>

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# Canada

Law	Common law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate to surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically 1-24 years, with extensions and renewals and in some cases no expiry, if activity conducted
Mining license	Typically 15-30 years
Able to use tenement as security	Yes
Royalty payable to government	Yes. Amount depends on commodity and state
Classification system used	JORC

## 1 Summary

The mining industry contributes greatly to Canada's economics. The industry employs 426,000 workers across the country in mineral extraction, smelting, fabrication and manufacturing. The Canadian mining sector's predominant production includes the Northwest Territories as the country's dominant source of diamonds, leading in the production of gold are Ontario and Quebec, Saskatchewan produces all of Canada's uranium and has world-class potash reserves, British Columbia is prominent in metallurgical coal production, Newfoundland and Labrador and Quebec produce virtually all of Canada's iron ore and several provinces have strong copper and nickel production.

Canada is a federal state comprised of 10 provinces and three territories, each with their own governments that exercise exclusive powers derived from the Canadian constitution. The constitution affords the federal government powers over matters that concern Canada as a whole, including international trade, interprovincial trade, national defence, ports and currency among others. There is considerable overlap with respect to many of these topics. Each of the provinces and territories has the power to enact laws in relation to property, contracts, natural resources, and employment, amongst others. Mining as an industry attracts all of these areas of regulation and is therefore regulated provincially for the most part by the province or

# Canada

territory in which the mine is physically located. The federal government has some overlapping jurisdiction however in regards to environmental regulation, indigenous peoples and taxation. This creates a regime which differs as you cross the country, but generally focusses on the following aspects of the mining industry: ore body ownership, leases, staking claims, prospecting, effluent and environmental impact, health and safety and control of explosives and blasting.

Canada continues to attract significant foreign investment in the resource sector due to its relatively stable political regime and approach to regulation of the extractive sector. However, some recent amendments to provincial legislation have increased the costs of carrying out mining activity in Canada. In addition, recent increased enforcement of the Corruption of Foreign Public Officials Act (Canada) within Canada, in connection with mining activity outside of Canada, has forced mining companies to increase their compliance efforts.

## 2 Legal framework for mining

Canada is a federal state composed of 10 provinces and three territories, each with their own governments that exercise exclusive powers derived from the Canadian constitution. The constitution affords the federal government powers over matters that concern Canada as a whole, including international trade, interprovincial trade, national defense, ports and currency, among others. There is considerable overlap with respect to many of these topics.

For the most part, mining activities are governed by the province or territory in which the mine is physically located. The federal government has some overlapping jurisdiction, however, in regards to environmental regulation, indigenous people (including Indians, Métis and Inuit) and taxation.

The Canadian legal system is predominantly based on British common law. However, the province of Quebec still maintains a civil law system which it retained from its French settlers. Under the constitution of Canada, both common law and civil law jurisdictions have equal authority in a court of law, and both English and French languages are equally authoritative. As a result, laws can vary significantly between Quebec and the other provinces of Canada, and legal terminology can be misconstrued when translated from English common law to French civil law terminology.

Metallic minerals and other natural resources in the ground are predominantly owned by the province in which they are located (with the exception of the limited cases of private or indigenous ownership), but minerals located in offshore waters and the continental shelf are the property of the federal government. Subsequently, both levels of government have their own mining, environmental and ancillary legislation in relation to mining projects in these areas.

In Ontario, for example, a mining claim grants a claim holder mineral rights to all naturally occurring metallic and non-metallic minerals including coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals within the claim area, but does not include sand, gravel, peat, gas or oil.

While the Ontario regulation is typical of schemes in other jurisdictions across Canada, notable distinctions do exist.

Exportation of minerals is often governed by an industry-specific permitting scheme, for example, uranium, which has stringent measures due to its use in nuclear technology. Often, the province where minerals are mined will restrict exports and require extracted minerals to be processed in the province or within Canada.

In much the same way as metals and minerals, the rights to, and regulation of, oil and gas is largely undertaken by the provinces, with the federal government having jurisdiction over related areas of the law,

# Canada

and power in relation to oil and gas reserves within the Northwest Territories, the Yukon, Nunavut, the continental shelf and offshore. The federal government also has power over international and interprovincial trade, and therefore, due to Canada having the second largest proven oil reserves in the world, the federal government has a more influential role to play in the regulation of oil and gas as opposed to the regulation of other minerals.

Despite the similarities between oil and gas and mineral regulation, there are some notable differences. The migratory nature of oil and gas has led to some separate legislation dealing exclusively with oil and gas.

## 3 Restrictions on foreign investment

Generally, there are no restrictions on foreign investors holding direct or indirect interests (through a Canadian-incorporated subsidiary) in mining rights. However, an investment in a Canadian mining company may require filings and approvals under the Investment Canada Act and general securities legislation, as would an investment in any other Canadian company. Provincial and territorial legislation does not currently restrict mining rights based on citizenship or residency. The Canadian government also continues to be of the view that it expects reciprocal benefits from the investor nations, and that any foreign investment within the sector is not be a threat to Canadian national security.

Recent amendments to the Investment Canada Act have provided the government with very broad powers to examine any investment in Canada made by a non-Canadian, on the basis that the government reasonably believes the investment could be injurious to national security. A transaction cannot be closed without approval if the government has given notice to the non-Canadian prior to implementation. If the transaction has already closed, the federal cabinet may order divestiture. National security is not defined and to date, virtually no guidance has been provided as to how this provision will be interpreted or implemented. The time period for review is very open-ended.

Foreign entities looking to conduct exploration, development or production work in one of Canada's provinces or territories will be required to register in that province or territory under the applicable corporate statute. The rules and regulations in this regard vary from province to province, but generally it is a straight forward process requiring an entity to file registration documents and apply to register to pay tax.

## 4 Government or local participation requirements

There are no provincial or federal government mandatory participation rights in a license or a project. Nor are there any requirements for local Canadian ownership, subject to general foreign investment considerations.

## 5 Land tenure and priority

The Canadian constitution allocates legislative authority between federal government and the provinces. Legislative authority over mining related issues is attributed to both federal and provincial governments. The ownership of lands and minerals are vested in the province where they are located.

Mineral interests underlying indigenous reservations, national parks, federal territories, the continental shelf and certain federally owned land are owned by the federal government. The federal or provincial government may grant lands or minerals to private persons. Generally, government will lease minerals, extract royalties and impose operating conditions on Crown land by law, permit or contract.

The Province of Quebec has a civil law system and, as a result, there may be some differences in dealing with title issues. Generally, all Crown lands are open for prospecting and staking. Certain lands are not open for prospecting and staking (i.e., parklands, environmentally sensitive lands). Developing minerals on Crown owned lands may trigger a duty to consult with the affected indigenous peoples.

## 6 Indigenous or local community rights

Indigenous peoples and their rights must often be considered at the outset of any mining development activities. Although mineral rights are generally under the jurisdiction of the province they are located in, indigenous peoples' rights are under the jurisdiction of the federal government of Canada and their rights can include traditional rights to the land (such as hunting, fishing and forestry), treaty rights, land claim rights and reserves.

Recognition of indigenous peoples' rights has increased over the last few decades, and the courts in Canada have imposed a legal duty on the Crown to consult with indigenous peoples where proposed actions may affect their rights or land. The Government of Canada has a duty to consult and, where appropriate, accommodate indigenous groups when it considers conduct that might adversely impact potential or established indigenous or treaty rights. This duty to consult is proportionally contextualized to the anticipated impact of a mining project on indigenous peoples' rights, and the strength of the rights or claims asserted by the indigenous people involved. Subsequently, the complexity and length of the consultation process will vary from project to project. For instance, projects that anticipate minor impacts on indigenous peoples' rights may require only a duty to give notice, share information and discuss important factors of the project with aboriginal communities. On the other hand, if the project is anticipated to have major adverse implications on indigenous peoples' rights, then the duty to consult becomes more onerous and may include more in-depth consultations leading to mitigation and/or accommodation.

Although there is a duty to consult with indigenous peoples over proposed mining developments, the Canadian courts have held that there is no concurrent duty to reach an agreement with an indigenous community, although, in our view, proceeding without one is not advisable. The duty to consult is aimed at ensuring a fair decision-making process that encompasses the opinions of affected parties, and the Crown must act in good faith to carry out genuine consultations that are appropriate in the circumstances. Ultimately, however, indigenous peoples do not have a veto over what the Crown can do.

New approvals and projects will be subject to an assessment under the coming federal Impact Assessment Act, 2012 that will likely lead to greater environmental scrutiny of the mining projects and greater participation rights by indigenous groups. The Impact Assessment Act, 2012 sets out to achieve the Government of Canada's commitments towards reconciliation with indigenous peoples through a number of substantive measures which will impact the mining sector. Broadly, these measures are focused on (i) increasing opportunities for indigenous participation and cooperation with government in the impact assessment processes and decision-making; (ii) enhancing recognition and consideration of indigenous rights and interests; and (iii) enhancing consultation and engagement opportunities for indigenous groups. Currently, while Canada's current environmental assessment legislation, the Canadian *Environmental Assessment Act, 2012* and its common law regime do contain some indigenous consultation requirements currently, the *Impact Assessment Act, 2012* provisions are expected to significantly increase the obligations of Canadian mining companies.

Unlike the Crown, private companies are not constitutionally obliged to consult with indigenous peoples, but may have an express statutory duty to do so (for example, Ontario's Mining Act obliges developers to negotiate and/or consult with indigenous peoples throughout the mining process). These duties can vary



from province to province and will ultimately be determined by the physical location of the proposed project.

Indigenous consultation is now a normal course of developing mining projects in Canada. Therefore, mining companies are advised to identify affected indigenous peoples prior to the engagement of exploration or development, to begin discussions to ascertain the level of impact of the proposed activities on indigenous communities. Preliminary consultations can help determine the major issues at hand and also help find solutions that work for both parties and mitigate risks.

7 Environmental protection and rehabilitation obligations

Few major projects in Canada can escape the scrutiny of both the federal and provincial governments as both levels enforce environmental protection policies. In recent years the federal government, in particular, has been playing a more active role in regulating and enforcing environmental laws, causing further jurisdictional conflicts.

Both levels of government have developed broad ranging powers in order to manage the environmental effects of commerce and industry. On the whole, environmental regulation consists of the prohibition of the discharge of polluting substances into the environment, except where expressly authorized by the relevant governing body in the form of a permit or approval.

Criminal sanctions are a major component of environmental legislation. The cost of rectifying environmental damage can be financially crippling, and governing legislation is broad enough to impose liability on previous owners in some cases.

8 Exploration licenses

8.1 Scope

As discussed above, the location of the minerals will dictate which level of government has the jurisdiction to grant rights over the claimed resources, and both levels of government have developed substantive laws and regulations to govern mining, environmental and occupational health and safety concerns in relation to mining projects.

Due to Canada’s abundance of natural resources, mining rights are well developed. This allows the courts, tribunals and other established dispute resolution bodies to offer a degree of certainty for actors within the industry.

The rights available are set out below.

8.2 Duration

The table below summarizes typical license characteristics in Canada. All dollar amounts in the table below, including the symbol \$, refer to lawful currency in Canada. When carrying out exploration activities, leases are generally not available and royalties or taxes are not generally payable.

Jurisdiction	Prospecting licenses	Mining claims
Alberta	An exploration license must be obtained prior to a company or person applying for, or carrying out, an exploration program,	Type: Permit Term: 14 years

# Canada

Jurisdiction	Prospecting licenses	Mining claims
	<p>and is a prerequisite for securing an exploration permit or approval. A license allows the holder to explore for metallic and industrial minerals throughout Alberta.</p> <p>An exploration permit is required in order to operate equipment during exploration.</p> <p>Exploration approval from the Land and Forest Service of Alberta Environmental Protection ("LFSAEP") is needed in order to conduct exploration that requires environmental disturbance, including drilling. Various information has to be submitted to the LFSAEP in order to secure approval, including the type of mineral explored for and the techniques used.</p> <p><b>Fees:</b></p> <p>License \$50</p> <p>Permit \$50</p> <p>Approval \$100</p>	<p><b>Renewable:</b> No</p> <p><b>Area:</b> Between 16 and 9,216 hectares</p> <p><b>Fee:</b> \$625</p> <p><b>Minimum assessment work:</b> For each two-year period, \$5 per hectare per year for the first period; \$10 per hectare per year for each of the next two periods and \$15 per hectare per year for each of the next four periods.</p> <p>A minister may cancel the permit/license if no exploration work is carried out for a period of at least three years, or if the operator has ceased to carry on business in Alberta for at least three years.</p>
British Columbia	<p><b>Term:</b> One year</p> <p><b>Renewable:</b> Yes</p> <p><b>Fee:</b> \$500</p>	<p><b>Term:</b> One year</p> <p><b>Renewable:</b> Yes</p> <p><b>Area:</b> Up to 100 complete or partial adjoining mining cells</p> <p><b>Fee:</b> \$1.75 per hectare per year</p> <p><b>Minimum assessment work:</b> \$5 per hectare per year for the first and second anniversary years; \$10 per hectare per year for the third and fourth anniversary years; \$15 per hectare per year for the fifth and sixth anniversary years and \$20 per hectare per year for each anniversary year thereafter.</p> <p>A recorded holder of a mineral claim must not produce, or cause to be produced, more than 1,000 tonnes of ore in a year from each unit/cell. A bulk sample of up to 10,000 tonnes of ore may be extracted from a claim not more than once every five years.</p>

Jurisdiction	Prospecting licenses	Mining claims
Manitoba	<p><b><u>Prospecting licenses</u></b></p> <p>Permits the exploration for minerals</p> <p><b>Term:</b> Lifetime</p> <p><b>Renewable:</b> No</p> <p><b>Transferable:</b> No</p> <p><b><u>Mineral exploration licenses</u></b></p> <p>Awards the exclusive right to explore for minerals.</p> <p><b>Term:</b> Three or five years depending on location</p> <p><b>Renewable:</b> Yes</p> <p><b>Fee:</b> \$401</p> <p><b>Minimum Expenditure:</b> Between \$0.50 per hectare per year and \$15 per hectare per year depending on the location of the area and the year of the license</p>	<p><b>Term:</b> Two years</p> <p><b>Renewable:</b> Yes</p> <p><b>Area:</b> Between 16 and 256 hectares</p> <p><b>Fee:</b> \$16 for unsurveyed territory; \$67 for surveyed territory</p> <p><b>Minimum expenditure:</b> \$12.50 per hectare per year increasing to \$25 per hectare per year after year 10, unless the license is for an area designated as Zone A or B, in which case varying minimum expenditure is required depending on location and number of years explored, between \$0.50 per hectare and \$15 per hectare.</p>
New Brunswick	<p><b>Term and Renewable:</b> A prospecting license is valid for a lifetime and may be issued to a person who is at least 19 years old, to a company or to a registered partnership.</p> <p><b>Fee:</b> \$100 for a natural person, \$200 for a partnership, \$500 for a corporation</p>	<p><b>Term:</b> One, two or three years from the effective date</p> <p><b>Renewable:</b> Yes, up to three terms of one year each</p> <p>A claim cannot be renewed for more than one term at a time unless the dollar value of the work in that term equals or exceeds the estimated dollar value of the work to be completed in the subsequent term(s).</p> <p><b>Area:</b> Not less than one mineral claim unit and no more than 256 mineral claim units</p> <p><b>Fee:</b> \$10 per mineral claim unit increasing to \$50 per mineral claim per year for all terms after the 16th term</p> <p><b>Minimum required work:</b> \$100 per mineral claim per year for the first term increasing to \$800 per mineral claim per year for all terms after the 25th term</p> <p><b>Payment in lieu of required work in first year:</b> \$20 per mineral claim unit</p>

Jurisdiction	Prospecting licenses	Mining claims
Newfoundland and Labrador	<p><b>Term:</b> Five years</p> <p><b>Renewable:</b> Yes, maximum of three times for a period of 5 years each; after the three terms, it can be renewed up to 10 times for a period of one year each</p> <p><b>Fee:</b> \$65 per claim</p>	<p><b>Term:</b> Five years</p> <p><b>Renewable:</b> Yes, to a maximum of 30 years in total. Fees for renewal vary from \$50 to \$200 per claim per year, depending on the term of the claim.</p> <p><b>Area:</b> Up to 256 coterminous map-staked claims (each map-staked claim is 25 hectares or less)</p> <p><b>Fee:</b> \$65 per claim</p> <p><b>Minimum assessment work:</b> Between \$200 and \$2,500 per claim per year depending on the year and term of the license</p> <p><b>Area upon renewal:</b> 100 coterminous map staked claims</p>
Northwest Territories and Nunavut	<p><b>Term:</b> From date of issue until March 31</p> <p><b>Renewable:</b> Yes</p> <p><b>Fee:</b> \$5 for an individual, \$50 for a corporation</p> <p><b>Transfer:</b> A license is not transferable</p>	<p><b>Term:</b> Three years or five years, depending on location of claim</p> <p><b>Renewable:</b> No, extension of one year available if unable to complete minimum assessment work</p> <p><b>Area:</b> Maximum 1,250 hectares; cannot include certain protected areas</p> <p><b>Fee:</b> \$0.25 per hectare</p> <p><b>Minimum assessment work:</b> \$10 per hectare during the first two years, \$5 per hectare each subsequent year</p> <p><b>Transfer:</b> No consent required</p>
Nova Scotia	<p><b>Term:</b> One year from date of issue</p> <p><b>Renewable:</b> May be renewed once each year for a further year</p> <p><b>Fee:</b> \$10 per claim</p>	<p><b>Term:</b> One year</p> <p><b>Renewable:</b> Yes</p> <p><b>Fee:</b> \$20 per claim in the first year, increasing to \$320 per claim in years 26 and after</p> <p><b>Minimum assessment work:</b> \$200 per year per claim for the first 10 years; \$400 per year per claim for years 11 to 15; \$800 per year per claim for years 16 and after</p>

Jurisdiction	Prospecting licenses	Mining claims
Ontario	<b>Term:</b> Five years <b>Renewable:</b> Yes <b>Fee:</b> \$25.50	<b>Term:</b> No expiration, provided work requirements are met and fees are paid <b>Renewable:</b> Yes <b>Area:</b> Minimum 16 hectares; maximum 256 hectares <b>Fee:</b> \$20.40 to \$61.20, depending on the number of claims staked <b>Minimum assessment work:</b> \$400 within the first two years; \$400 every year thereafter
Prince Edward Island	<b>Term:</b> One year <b>Renewable:</b> Yes	<b>Term:</b> One year <b>Renewable:</b> Yes, for four consecutive years provided that the holder carries on mineral investigation and work as required <b>Area:</b> Maximum of 80 claims <b>Fee:</b> \$5 per claim <b>Minimum assessment work:</b> \$5 per acre every year; excess amounts spent in one year may be credited to future years
Québec	<b>Term:</b> Five years <b>Renewable:</b> Yes <b>Fee:</b> \$40.50 <b>Transfer:</b> No	<b>Term:</b> Two years <b>Renewable:</b> Yes <b>Area:</b> Each parcel restricted to 16 hectares and its sides shall be 400m in length <b>Fee:</b> Ranges from \$33.25 to \$151 per claim depending on the size and location of claims. For claims over 150 hectares the fee is five times the registration fee. <b>Minimum assessment work:</b> Ranges from \$48 to \$3,600 per claim depending on the size, location and term of the claims

Jurisdiction	Prospecting licenses	Mining claims
Saskatchewan	<b>Term:</b> Two years <b>Renewable:</b> No <b>Fee:</b> \$0.30 per hectare, with a minimum of \$3,000 <b>Area:</b> Between 10,000 and 50,000 hectares <b>Expenditure Requirements:</b> \$5.25 per hectare during the term	<b>Term:</b> One year <b>Renewable:</b> Automatic one-year renewals so long as compliant with applicable regulations, including minimum spend on exploration. <b>Area:</b> Not greater than 6,000 hectares <b>Fee:</b> \$0.60 per hectare with a minimum of \$300 <b>Expenditure requirements:</b> Ranges from \$15 to \$25 per two-year period, with a minimum of \$240 - \$400 per period
Yukon	A prospecting license is not required in Yukon. Anyone aged 18 years or older, or an individual authorized by any corporation authorized to carry on business in Yukon, or anyone acting on behalf of someone else aged 18 years or older, may enter on available land for mining purposes, locate, prospect, and mine for gold and other precious minerals or stones.	<b>Term:</b> 21 years <b>Renewable:</b> Yes, further 21 years <b>Area:</b> Maximum size 1,500 feet by 1,500 feet for one claim or 2,250 by 2,250 feet per claim where two or more locators <b>Fee:</b> \$10 <b>Minimum assessment work:</b> \$200 per claim per year work done outside the claim will be considered 'work done' <b>Term rental:</b> \$50 if acreage is 51.65 or less and add \$5 for each additional acre <b>Renewal fee:</b> \$200 if acreage is 51.65 or less and add \$20 for each additional acre <b>Transfer:</b> Requires the minister's consent

## 8.3 Steps to acquire an exploration right

Within Canada, there are two main procedures for acquiring mining rights: the "free-entry" system and the "Crown discretion" system.

The free-entry system allows both individuals and corporations to obtain mineral rights by staking claims on their own initiative and later acquiring Crown leases, if they so desire. Mining rights under this system are acquired on a first come, first served basis, and most of the provinces and territories within Canada have adopted this system, including British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nunavut, Ontario, Québec, Saskatchewan and the Yukon.

The Crown discretion system involves the granting of mineral rights at the discretion of the relevant provincial or territorial government, and is applicable in Alberta, Nova Scotia and Prince Edward Island.



# Canada

## 8.4 Relationship with landowners

Depending on the type of property (Crown land, private land or indigenous people's property) and type of project, different requirements apply to the interaction between stakeholders in the property.

## 8.5 Obligations of holder

Project developments, typical license renewals and report filings will be required. These requirements vary from one province or territory to another.

## 9 Holding tenements

Canada does not have a system of holding tenements to bridge the gap between when the exploration is finished and the development starts. Typically, the interest has to be maintained by either exploration or development work, performed and reported periodically in a prescribed fashion.

## 10 Development/production tenements

### 10.1 Scope

Some form of mining lease is generally required to permit the extraction of minerals from a mining property. Typical mining leases are issued for a specific term, are subject to an annual maintenance fee and are transferable in certain cases.

Surface rights are the rights of the owner of surface lands under which minerals are located. These rights interact with those of the mineral owner.

### 10.2 Duration

The table below summarizes typical lease/license characteristics in Canada. All dollar amounts in the table below, including the symbol \$, refer to lawful currency in Canada. Please note that in some jurisdictions specific lease requirements are in place for specific minerals and metals. We have based our summary on the general framework for precious metals and commonly mined minerals in Canada. In the development and production of tenements, prospecting licenses and mineral claims are not applicable; in order to develop or produce minerals and metals, a lease to the sub-surface or surface rights is usually required.

Jurisdiction	Leases	Royalties/tax
Alberta	<b>Term:</b> 15 years <b>Renewable:</b> Yes <b>Annual rental:</b> \$3.50 per hectare (minimum \$50 for the year) <b>Area:</b> Not more than 2,304 hectares <b>Transfer:</b> Requires the minister's consent <b>Fee:</b> \$625 (+ tax) application fee	Before payout, 1% of mine mouth revenue; after payout, the greater of 1% gross mine mouth revenue and 12% of net profits.  A 10% allowance is permitted in lieu of overhead.  Combined federal/provincial income tax rate of 25% (Alberta 10% + federal 15%)

Jurisdiction	Leases	Royalties/tax
British Columbia	<p><b>Term:</b> Not more than 30 years</p> <p><b>Renewable:</b> Yes, an additional term of 30 years</p> <p><b>Annual rental:</b> \$20 per hectare</p> <p><b>Transfer:</b> No consent required</p> <p><b>Permit fees:</b> Major mine applications can attract a fee of up to \$125,000 per application, depending on the complexity of an application</p>	<p>Tax of 2% of net current proceeds and 13% of net revenue.</p> <p>Combined federal/provincial income tax rate of 26% (British Columbia 11% + federal 15%)</p>
Manitoba	<p><b>Term:</b> 21 years</p> <p><b>Renewable:</b> Yes</p> <p><b>Application fee:</b> \$287</p> <p><b>Area:</b> Shall not exceed 800 hectares, more or less</p> <p><b>Annual Rental:</b> If in production, \$10.50 per hectare, but not less than \$193. For first term of rental, if not in production, \$12 per hectare but not less than \$257.</p> <p>For renewal term, when lease is not in production, \$12 per hectare but not less than \$200.</p> <p><b>Transfer:</b> Requires the minister's consent</p> <p><b>Minimum expenditure:</b> \$625 per hectare for initial lease; \$1,250 per hectare for renewal</p>	<p>Tax is applied at graduated rates:</p> <ul style="list-style-type: none"> <li>(a) 10% of the operator's profit for the year, if the profit for the year is \$50 million or less</li> <li>(b) \$5 million plus 65% of the operator's profit for the year in excess of \$50 million if the profit for the year is more than \$50 million and not more than \$55 million</li> <li>(c) 15% of the operator's profit for the year, if the profit for the year is more than \$55 million but not more than \$100 million;</li> <li>(d) \$105 million plus 57% of the operator's profit for the year in excess of \$100 million if the profit for the year is more than \$100 million and not more than \$105 million; or</li> <li>(e) 17% of the operator's profit for the year, if the profit for the year is more than \$105 million.</li> </ul> <p>Combined federal/provincial income tax rate of 27% (Manitoba 12% + Federal 15%)</p>
New Brunswick	<p><b>Term:</b> 20 years</p> <p><b>Renewable:</b> Yes, an additional term of 20 years</p> <p><b>Annual rental:</b> \$6 per hectare</p> <p><b>Transfer:</b> Requires the minister's consent</p> <p><b>Minimum required work:</b> \$60 per hectare per year</p> <p><b>Application fee:</b> \$500</p>	<p>Two-tier mining tax system with a 2% tax on net revenue and a 16% tax on net profit.</p> <p>New mines exempt from the 2% royalty in the first two years.</p> <p>Combined federal/provincial income tax rate of 27% (New Brunswick 12% + federal 15%)</p>

Jurisdiction	Leases	Royalties/tax
Newfoundland and Labrador	<p><b>Term:</b> Not more than 25 years</p> <p><b>Renewable:</b> Yes, for term of not more than 10 years</p> <p><b>Transfer:</b> No consent required; transfer document must be completed and filed</p> <p><b>Annual rental:</b> \$120 per hectare</p>	<p>Tax of 15% on net income plus 20% on the royalty receipts.</p> <p>In computing the mining profit subject to 15% tax, a deduction is allowed equal to the greatest of 20% of profits (before the allowance) and non-Crown royalties paid.</p> <p>Combined federal/provincial income tax rate of 29% (Newfoundland and Labrador 14% + federal 15%)</p>
Northwest Territories and Nunavut	<p><b>Term:</b> 21 years</p> <p><b>Renewable:</b> Yes</p> <p><b>Annual rental:</b> \$2.50 per hectare for the first term and \$5 per hectare thereafter</p> <p><b>Transfer:</b> No consent required</p> <p><b>Fee:</b> \$25 per claim in the lease</p>	<p>Royalty of the lesser of 13% of output and the amount determined by a formula in s. 65(1) of the Northwest Territories and Nunavut Mining Regulations that applies a progressive rate that starts at 5% for output in excess of \$10,000 and increases to 14% for output in excess of \$45 million.</p> <p>Acquisition cost of expansion claims deductible within limits.</p> <p>Combined federal/provincial income tax rate of 26.5% for Northwest Territories (Northwest Territories 11.5% + federal 15%)</p> <p>Combined federal/provincial income tax rate of 27% for Nunavut (Nunavut 12% + federal 15%)</p>
Nova Scotia	<p><b>Term:</b> 20 years</p> <p><b>Renewable:</b> Yes, an additional 20 years</p> <p><b>Annual rental:</b> \$120.90 per claim, paid in advance for the first year</p> <p><b>Transfer:</b> Requires the minister's consent</p>	<p>Annual royalty of the greater of 2% of net revenue or 15% of all net income. If gross income for the fiscal year is less than the prescribed minimum amount, the total royalty is 2% of net revenue.</p> <p>Combined federal/provincial income tax rate of 31% (Nova Scotia 16% + federal 15%)</p>
Ontario	<p><b>Term:</b> 21 years</p> <p><b>Renewable:</b> Yes, further term of 21 years</p> <p><b>Annual rental:</b> \$3 per hectare</p> <p><b>Transfer:</b> Requires the minister's consent</p>	<p>Tax of 10% on net profit (5% for remote areas).</p> <p>Royalties: No royalties payable on the first \$10,000 of net value of output for the year, after those royalties vary between 5%-13% on net value of the output for the year between \$5 million and \$14 million, with a royalty of 14% on net amounts above that.</p> <p>Combined federal/provincial income tax rate of 25% (Ontario 10% + federal 15%)</p> <p>No tax payable on profit under \$500,000.</p>

Jurisdiction	Leases	Royalties/tax
		<p>No tax payable on the first \$10 million or first three years (10 years for remote areas), whichever comes first.</p> <p>Mining land tax of \$4 per hectare per year.</p>
Prince Edward Island	<p><b>Term:</b> 20 years</p> <p><b>Renewable:</b> Yes, further 20 years</p> <p><b>Rent:</b> \$1 per acre</p> <p><b>Transfer:</b> Requires the minister's consent.</p> <p>A lease will not be granted for more than 80 claims.</p> <p>If the operator ceases to operate for a period of 12 months the lease shall be surrendered for a development license</p>	<p>No royalty regime in place.</p> <p>Combined federal/provincial income tax rate of 31% (PEI 16% + federal 15%)</p>
Québec	<p><b>Term:</b> 20 years.</p> <p><b>Renewable:</b> Yes, three periods of 10 years each</p> <p><b>Rental:</b> \$22.10 per hectare on granted or alienated lands; \$46.50 per hectare on lands in the public domain</p> <p><b>Transfer:</b> Must be registered</p> <p>Mining leases for surface minerals may be granted for up to 10 years, depending on whether it is exclusive or non-exclusive.</p>	<p>There are two levels of taxation in Québec:</p> <ol style="list-style-type: none"> <li>1. A royalty on production — a 1% tax on the first \$80 million of output value at the mine shaft head and 4% on any value in excess of that. This applies to all companies operating a mine in Québec regardless of profitability.</li> <li>2. A graduated tax based on a company's profit margin — a tax rate of 16% to 28% will apply to annual profit according to the company's profit margin.</li> </ol> <p>Combined federal/provincial income tax rate of 26.9% (Quebec 11.9% + federal 15%)</p>
Saskatchewan	<p><b>Term:</b> 10 years</p> <p><b>Renewable:</b> For further terms of 10 years provided that regulatory requirements are met</p> <p><b>Annual rental:</b> \$10 per hectare, minimum of \$1,600 per lease</p> <p><b>Transfer:</b> No consent required (however you must register it)</p> <p><b>Expenditure requirements:</b> Ranges from \$25 to \$75 per two-year period, with a minimum of \$400 to \$1200 per period</p>	<p>5% of net profit from sales of up to one million troy ounces of precious metals; 10% of net profit from sales in excess of one million troy ounces of precious metals.</p> <p>There is a 10-year royalty holiday from the date that commercial production begins, provided that commercial production began after 2002.</p> <p>Combined federal/provincial income tax rate of 27% (Saskatchewan 12% + federal 15%). A 2% rebate on SK tax is available, which reduces the rate to 10%.</p>

Jurisdiction	Leases	Royalties/tax
Yukon	<p><b>Term:</b> The lease grantor can set out the term of the lease, but it cannot be more than two years</p> <p><b>Renewable:</b> Yes, at the discretion of the grantor</p> <p><b>Term rental:</b> \$50, plus \$50/hectare for every portion above two hectares</p>	<p>Annual royalties are based on the value of the output of the mine.</p> <p>The rates are 3% on output between \$10,000 and \$1 million; 5% on output between \$1 million and \$5 million; and a proportional increase of 1% on each additional \$5 million in output, to a maximum of 12%.</p> <p>Combined federal/provincial income tax rate of 30% (Yukon 15% + federal 15%)</p>

## 10.3 Transition from exploration/holding right to mining right

One may not acquire a mining lease/right in any province or territory without first holding a claim.

There is no interim license between an exploration and mining right. Project documents typically deal with the transition from exploration to production, but there is no set form that this transition takes. The acquisition of a mining lease usually marks the transition from mining exploration to mining production.

## 10.4 Steps to acquire a right

The general requirements that a claimholder must satisfy in order to obtain a mining right are: (i) complete a survey of the lands; (ii) file an application in the prescribed form, and (iii) pay the required fees and a portion of rent deposit. Certain jurisdictions also require advertising of the intent to apply for a mining right.

## 10.5 Relationship with landowners

As a general rule, surface rights owners and mineral rights owners must act in a way so as not to injure their neighbors. This usually requires a surface rights owner to provide a mining rights owner with reasonable access to a property, and the mineral rights owner must support the surface lands without interference.

## 10.6 Obligations of holder

Requirements such as expenditure and restrictions on time to develop vary significantly amongst jurisdictions and are prescribed in legislation.

Employment requirements vary significantly amongst jurisdictions and are prescribed in legislation, and in some cases, involve requirements with respect to indigenous peoples.

Domestic supply obligations also vary significantly amongst jurisdictions and are prescribed in legislation.

# 11 Assignment of and security over tenements

## 11.1 Assignment

Assignment of an interest in tenements will usually require the approval of the relevant issuing authority. In some provinces, a change of control of the license holder may also require approval of the issuing authority.

# Canada

## 11.2 Security

The highest and most secure form of tenure under Canadian mining law is the mining right or lease. The term of a mining lease is usually 20 or more years, in comparison with an exploration claim term of a year. In addition, generally, once a mining lease is obtained and maintained, there is no automatic cancellation for default. A mining lease is also a proprietary interest as well as an interest in land. The mining lease also usually provides protection from attack by third parties.

## 12 Royalties

On the grant of a mining lease, the license holder is entitled to mine the minerals and retain the economic benefit of the minerals that have been mined, subject to payment of a royalty to the relevant government. There are several different types of royalties in the Canadian mining industry, all generally based on revenues, accounting profits or production. The specific royalties applicable to a project are subject to contract negotiation and not standardized. Typical categories include royalty in kind, fixed rate royalty, net smelter return and net profits interest.

The amount of the royalty varies from province to province and will depend on the type of mineral being mined and the form or product sold. The various royalties are set out below.

**Tax - general** - <http://www.nrcan.gc.ca/mining-materials/taxation/mining-taxation-regime/8890#tab3>

Province/territory		Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia
Title of statute		Metallic and Industrial Minerals Royalty Regulation	<i>Minerals Tax Act</i>	<i>The Mining Tax Act</i>	<i>Metallic Minerals Tax Act</i>	<i>Revenue Administration Act</i>	<i>Mineral Resources Act</i>
Mining tax or royalty rate	First tier	1% of mine-mouth revenue	2% Net Current Proceeds (NCP) Tax on operating income	n.a.	2% on net revenue	15%	2% of net revenue or NSR
	Second tier	12% of net profits after payout	13% Net Revenue Tax on cumulative net profit	10% (<\$50 M); 65% (\$50 M to \$55 M); 15% (\$55 M to \$100 M); 57% (\$100 M to \$105	16% on net profit in excess of \$100,000	20% (Mineral Rights Tax)	15% of net income

# Canada

Province/territory		Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia
				M); 17% (>\$105 M)			
Mining tax exemption for new mines (\$)		No	Yes	Yes	The first tier 2% royalty is exempted in the first 2 years	Up to \$2 M/year credit for first 10 years	No
Exploration expenses deductibility rate		100%	100%	100-150%	150%	100%	100% first 3 years, 30% after
Pre-production development expense deductibility rate		100%	100%	20%	100%	Over the life of the mine	100% first 3 years, 30% after
Depreciation (Note 1)	Mining assets	15% straight-line	100%	20%	5% minimum for new or expanded mine assets, other assets 33.33%	25% (100% for new or expanded mine assets)	100% first 3 years, 30% after
	Processing assets					25%	
Processing allowance rates	Milling	n.a.	n.a.	20%	8%	8%	8% of the cost of processing assets + 25% of assets necessary to service and manage processing activities
	Smelting			20%	15%	15%	
	Refining			20%	15%	8%	
	Other			n.a.	n.a.	n.a.	
Processing allowance caps				0-65%	0-65%	0-65%	0-65%
Special features		A 10% allowance is permitted in lieu of overhead	Investment allowance replaces the deduction for interest expenses; a 33.33%	Tax holiday until payback is achieved, available for new mines established	Finance allowance replaces the deduction for interest expense; new mine exempt from	In computing mining profit subject to 15% tax, a deduction is allowed equal to the greater of 20% of	n.a.



# Canada

Province/territory	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia
		super-deduction for capital and pre-production costs of new or reopened mine or major expansion; exploration investment allowance also available	after 1 January 1993	the 2% royalty in the first 2 years; the amount of 16% tax payable is reduced by 25% of eligible process research expenditures	profits (before this allowance) and non-Crown royalties paid; income taxes on mining (up to \$2 M per year) deductible from mining taxes for first 10 years of production	
Can mine reclamation fund contributions be deducted?	Yes	Yes	Yes	Yes	Yes	n.a.

Features of provincial/territorial Mining Tax Regimes (continued)

Province/territory	Ontario	Québec	Saskatchewan	Northwest Territories	Nunavut	Yukon
Title of statute	<i>Mining Tax Act</i>	<i>Mining Tax Act</i>	<i>The Mineral Taxation Act, 1983</i>	Northwest Territories and Nunavut Mining Regulations	Northwest Territories and Nunavut Mining Regulations	<i>Quartz Mining Act</i>
	First tier	n.a.	n.a.	n.a.	n.a.	n.a.
Mining tax or royalty rate	Second tier	10% (5% for remote area)	16%	5% (cumulative sales up to 1 M troy oz of precious metals or 1 M metric tonnes of base metals); 10% (above the thresholds)	Lesser of 13% and following formula: \$10,000 - \$5 M: 5%; \$5 M - \$10 M: 6%; for every additional \$5 M annual profit, rate increases by	Lesser of 13% and following formula: \$10,000 to \$5 M: 5%; \$5 M - \$10 M: 6%; for every additional \$5 M annual profit, rate increases by
						\$10,000- \$1 M: 3%; \$1 M - \$5 M: 5%; \$5 M - 10 M: 6%; for every additional \$5 M, rate increases by 1% to a maximum of 12%

# Canada

Province/territory		Ontario	Québec	Saskatchewan	Northwest Territories	Nunavut	Yukon
					1% to a maximum of 14%	1% to a maximum of 14%	
Mining tax exemption for new mines (\$)		no tax for profit under \$0.5 M/ year; no tax for the first \$10 M or first 3 years (10 years for remote area), whichever comes first	No	10-year holiday for new mines	No	No	No
Exploration expenses deductibility rate		100%	100-125%	150%	100%	100%	100%
Pre-production development expense deductibility rate		100%	150%	100%	100%	100%	
Depreciation (Note 1)	Mining assets	30% straight-line (100% for new mine)	30%	100%	100%	100%	15% straight-line
	Processing assets	15% straight-line					
Processing allowance rates	Milling	8%	7%	n.a.	8%	8%	Ministerial decision
	Smelting	12%	13%		8%	8%	n.a.
	Refining	16%	13%		8%	8%	n.a.
	Other	20% northern Ontario refining	n.a.		n.a.	n.a.	n.a.
Processing allowance caps		15-65%	0-55%		0-65%	0-65%	Ministerial decision
Special features		No mining taxes are	Effective 1 April 2010, a	10-year tax holiday for new	Acquisition cost of	Acquisition cost of	

Province/territory	Ontario	Québec	Saskatchewan	Northwest Territories	Nunavut	Yukon
	payable in first three years of production on profits below \$10 M; the period is extended to 10 years for mines in remote locations; 5% tax rate for mines in remote locations	cash refund equal to the lesser of 16% of the non-capital loss and 8% of the aggregate of exploration and development costs is available	mines, starting in 2007; 150% of pre-production expenses are recovered prior to any royalties being payable; separate royalties apply to potash, coal and uranium producers	expansion claims deductible within limits	expansion claims deductible within limits	
Can mine reclamation fund contributions be deducted?	Yes	Yes	Yes	Yes	Yes	No

## 13 Mineral reporting and classification

National Instrument 43-101 — Standards of Disclosure for Mineral Projects ("**NI 43-101**") is a national instrument within Canada. The instrument is a codified set of rules and guidelines for reporting and displaying information related to mineral properties owned by, or explored by, companies which report these results on stock exchanges within Canada. This includes foreign-owned mining entities who trade on stock exchanges overseen by the Canadian Securities Administrators.

Disclosures covered by NI 43-101 include press releases of mineral exploration reports, reporting of resources and reserves, presentations, oral comments and websites. NI 43-101 covers metalliferous, precious metals and solid energy commodities as well as bulk minerals, dimension stone, precious stones and mineral sands commodities.

NI 43-101 is broadly comparable to the Joint Ore Reserves Committee Code ("**JORC Code**") which regulates the publication of mineral exploration reports on the Australian Stock Exchange. It is also broadly comparable with the South African Code for the Reporting of Mineral Resources and Mineral Reserves ("**SAMREC**"). The reporting codes are, however, not entirely congruent in practice, in that NI 43-101 is more prescriptive in terms of the manner in which mineral exploration reporting is presented, although the content of the technical reports, and the scientific rigors to which the mineral resource classifications within them are put, are often very similar.

For TSX listing purposes, an NI 43-101 Technical Report would have to be accompanied by a report prepared in accordance with NI 43-101. For ASX listings, a JORC Mineral Resource Statement needs to be accompanied by a Valmin Valuation Report, while for JSE listings, a Competent Person's Report ("**CPRs**"), which is

compliant with SAMREC and The South African Code for the Valuation of Mineral Assets ("**SAMVAL**"), needs to be submitted.

In many cases, NI 43-101 and JORC Code technical reports are considered inter-changeable and may be accepted by either regulatory body in cases of dual listed entities and, indeed, are accepted as the de facto industry reporting standard by many other jurisdictions which lack similar rigorous reporting standards or internationally recognized industry professional bodies. The LSE, for instance, accepts CPRs, Qualified Person's Reports ("**QPRs**"), and Mineral Resource Statements, compiled using JORC, SAMREC and SAMVAL, or NI 43-101, when accompanied by a NI 51-101 Valuation Form, for listing on the LSE. Likewise, the Hong Kong Stock Exchange accepts reports prepared in accordance with NI 43-101, SAMREC or JORC.

## 14 Other key issues

### 14.1 Usual structure of venture

Joint ventures (incorporated or unincorporated) are commonly used by investors in Canada to explore, develop and operate mining properties.

In Canada, and many other countries around the world, it is common for holders of mineral properties to grant options to other parties to acquire interests in property, particularly during the early stages of exploration and development of a project. The options often allow option holders to earn an interest in the property by funding pre-determined exploration and development costs during a defined period. Once the option holder has performed the work or expenditure requirements, the option holder may trigger the option to acquire a pre-determined percentage interest of the property known as an "earn-in" or "farm-in" right.

If the option holder exercises their right then, typically, the parties will continue proceedings as a joint venture, sharing costs and revenues as determined by each party's percentage interest in the property.

Earn-in options often transfer 100% of the exploration and development costs to the option holder during the option period, and the option terms may also oblige the option holder to provide cash consideration to the option grantor as compensation for the option. Despite the burden of 100% of the initial exploration and development costs, the earn-in option is a favored vehicle for acquiring mining interests because it allows the option holder to gain exclusive access to a property during the option period, rather than making an upfront financial commitment and purchasing an interest in the property.

### 14.2 Restricted mining areas

Canada has a number of protected areas that are designated by the federal, provincial and territorial governments for the conservation of natural ecosystems and that are off-limits to mineral exploration and mining.

Canada has a system of National Parks run by the federal government with the goal of protecting representative areas of national significance in each of the 39 natural regions across the country. These parks are created under the authority of the National Parks Act. The system currently covers a land area of almost 300,000 km<sup>2</sup> or about 2.25% of Canada. Claim staking or any mineral exploration activity and mining are not permitted in National Parks.

The federal government has two other types of protected areas, National Wildlife Areas and Migratory Bird Sanctuaries. These areas are managed for the conservation of specific wildlife species and do not outright prevent mining but require special authorization for it to occur.

# Canada

Each of the provinces and territories have also created protected areas under their own jurisdiction – most of which do not permit mineral exploration or extraction. These protected area networks vary in the amount of area covered.

Together provincial and federal protected areas make up about 9.4% of Canada's land area with the large majority (94%) of protected areas not being open to mining.

In cases where mining is permitted in a protected area, it is usually due to the fact that mineral claims were staked prior to the establishment of the protected area. In a number of cases across Canada, creation and expansion of protected areas has been complicated by the existence of mineral rights that were granted before the designation of the area as protected.

The provinces of Nova Scotia and New Brunswick have legislation to protect watersheds to ensure the maintenance of water supplies. Mining is restricted or prohibited in these watersheds, which in New Brunswick are designated under the Clean Water Act and in Nova Scotia under the Environmental Act.

Canada also has 16 Biosphere Reserves recognized within the international UNESCO network. The designation of a Biosphere Reserve does not prevent mineral exploration or mine development. Biosphere reserves include core protected areas and surrounding lands that are to be managed as buffer or transition zones. In Canada most of the core conservation areas in Biosphere Reserves are provincial and national parks so these areas are not open to mining but other areas of the reserve may be.

## 14.3 Export

In certain cases, exportation of minerals from Canada is restricted. Certain provinces require mineral extracted in that province to be processed there or within Canada. Also, see above with respect to foreign investments.

## 14.4 Taxes

Entities carrying on mining activities will be subject to the usual income and corporate taxes, together with payroll tax and goods and services taxes at both the federal and provincial level.

Transfers of mining leases and shares in companies with significant land assets may also attract transaction related taxes.

## 14.5 Overlapping tenements

Mining tenements may not always grant exclusive use of or access to an area. It is possible that a mining tenement may overlap with another use of land right or tenure. Examples of the multiple rights that may exist include a petroleum lease, a coal seam gas tenement, rights to different minerals, a geothermal tenement or a pipeline or other infrastructure right.

## 14.6 Water licenses

Water rights vary between Canadian provinces. Each province falls into one of the following four approaches to water rights: prior allocation, public authority, riparian rights, or civil code. Indigenous water rights play an important role in each province.

Prior allocation: Sometimes called 'first-in-time, first-in-right', the prior allocation system gives the licensee exclusive rights to use their water allocation in a system of seniority based on the age of the license. In a time of shortage, the older licensees have the right to take their full allocation before other licensees. This is

the dominant approach to water rights in Western provinces of British Columbia, Alberta, Saskatchewan and Manitoba, and to some extent in Nova Scotia.

**Public authority management:** In the north (Yukon, Northwest Territories, Nunavut), a public authority makes decisions about water use that are then implemented by local water boards.

**Riparian rights:** British in origin, the common law “riparian rights doctrine” entitles the owner of land that borders on a surface water source to riparian rights, such as access to water “in its natural quantity and quality”, and domestic water use rights on the land itself. In Ontario and in the Maritimes water allocation is in part governed by systems of riparian rights.

**Civil Code Management:** Québec’s water is governed by the Civil Code of Québec, which establishes the use of all water resources (surface and groundwater) as “common to all”. Recent water policy specifies that the “government has a responsibility to regulate water use, establish priority use and preserve its quality and quantity, while taking the public interest into account”.

**Indigenous Water Rights:** Prior to colonization, indigenous customs (or customary law) governed the use of water in Canada and continues to exist in tandem with Canadian law.

## 14.7 Skilled labor and visas

An employer in Canada will be governed by either federal employment/labor laws or provincial employment/labor laws, depending on the nature of its business. Employment/labor laws will typically include such things as employment/labor standards, labor relations, human rights, occupational health and safety, pay equity and workers’ compensation or workplace safety and insurance legislation.

Typically, the legal regulation of a company’s employment relationships will therefore depend on the province in which each employee works. Employment relationships in Canada’s common law provinces (all provinces but Québec) are governed by the principles of common law (primarily contract law) and statute. In the province of Québec, employment relationships are governed by Québec’s civil law and statute.

Each jurisdiction in Canada, including the federal jurisdiction, has enacted legislation prescribing certain minimum employment/labor standards within that jurisdiction. These employment/labor standards operate in conjunction with, but not as a replacement for, the common law or the civil law in Québec. An employer may provide its employees with greater rights than those contained in the jurisdiction’s employment/labor standards legislation, but it may not offer less than the minimums prescribed by the statute.

## 14.8 Infrastructure

Given Canada’s large geographical size and the fact that mining properties are often located in remote areas, access to infrastructure is a key investment consideration. Assessment of a mining project involves careful assessment of rail, road, water, electricity and port access and capacity.

Canada has private and shared-use rail and port infrastructure, although some capacity constraints can exist. Rail networks and some ports are subject to price/revenue regulation and formal access arrangements.

## 15 Useful websites

### 15.1 Government of Canada

Canadian Nuclear Safety Commission	<a href="http://www.nuclearsafety.gc.ca/">http://www.nuclearsafety.gc.ca/</a>
Departments and Agencies	<a href="https://www.canada.ca/en/government/dept.html">https://www.canada.ca/en/government/dept.html</a>
Environment Canada	<a href="http://www.ec.gc.ca/">http://www.ec.gc.ca/</a>
Government Contacts	<a href="http://www.canada.gc.ca/directories-repertoires/direct-eng.html">http://www.canada.gc.ca/directories-repertoires/direct-eng.html</a>
Government of Canada Website	<a href="http://canada.gc.ca/index.htm">http://canada.gc.ca/index.htm</a>
Natural Resources Canada	<a href="http://www.nrcan.gc.ca/earth-sciences/geography/atlas-canada/selected-thematic-maps/16878">http://www.nrcan.gc.ca/earth-sciences/geography/atlas-canada/selected-thematic-maps/16878</a>

### 15.2 Other Canadian links

Association for Mineral Exploration British Columbia	<a href="http://www.amebc.ca/">http://www.amebc.ca/</a>
Atlantic Canada Opportunities Agency	<a href="http://www.acoa.ca/">http://www.acoa.ca/</a>
Atomic Energy Commission of Canada	<a href="http://www.aec.ca/">http://www.aec.ca/</a>
Canadian Environmental Assessment Agency	<a href="http://www.ceaa-acee.gc.ca/">http://www.ceaa-acee.gc.ca/</a>
Canadian Institute of Mining, Metallurgy and Petroleum (CIM)	<a href="http://www.cim.org/">http://www.cim.org/</a>
Mining Association of Canada (MAC)	<a href="http://www.mining.ca">http://www.mining.ca</a>
Prospectors & Developers Association of Canada (PDAC)	<a href="http://www.pdac.ca/">http://www.pdac.ca/</a>

### 15.3 Securities Commissions

Canadian Securities Administrators (CSA)	<a href="http://www.securities-administrators.ca/">http://www.securities-administrators.ca/</a>
Alberta Securities Commission (ASC)	<a href="http://www.albertasecurities.com/">http://www.albertasecurities.com/</a>
Autorité des marchés financiers	<a href="http://www.lautorite.qc.ca/en/index.html">http://www.lautorite.qc.ca/en/index.html</a>
Ontario Securities Commission (OSC)	<a href="http://www.osc.gov.on.ca/">http://www.osc.gov.on.ca/</a>



# Canada

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# Chile

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	The license is granted for two years, with extensions of two years, if the licensee drops at least half of the granted area.
Exploitation mining license	Unlimited duration providing mining licenses are duly and yearly paid (referred below as royalty payable to government)
Able to use tenement as security	Yes
Royalty payable to government	Yes. Amount depends on the extension of concession area.
Classification system used	N/A

## 1 Summary

Mining is the pillar of the Chilean economy, and dramatic growth in the industry over the past 30 years has made Chile the world's top copper exporter, producing over a third of global output. Mining activity is mainly focused in the Atacama Desert in northern Chile, which, in addition to copper, is rich in gold, silver, iron and non-metallic products such as nitrates, boron, potassium, iodine and lithium.

Recent growth in the mining sector can be attributed to the increase in foreign capital. The Chilean government strongly supports external investment and has modified many of its laws to create a favorable investment climate for foreign companies wishing to do business in Chile. In addition, Chile has become the focus of attention for its non-metallic elements, specially lithium and cobalt.

## 2 Legal framework for mining

Mining in Chile is governed by the Constitution of Chile and by basic constitutional laws, the Mining Code and regulations, which apply specifically to the mining industry. Chile has a civil-law-based legal system.

According to the Constitution of Chile, all minerals are the property of the state. The Mining Code basically states that to explore for, or mine, any mineral, it is necessary to obtain concession rights from the state.

Such concession rights are granted by a fairly quick process, by the pertinent court of law, and, once incorporated, is a real property right or right in rem.

In view of the fact that some 98% of mining in Chile takes place in deserts or semi-desert areas, the development of a water resource is indispensable. Rights to water, whether surface, underground or marine, are governed by a legislated framework similar to that governing mining.

## 3 Foreign investment statute, foreign exchange regulations and new foreign investment law

Until 31 December 2015, foreign investment was regulated principally by the Foreign Investment Statute (Decree Law No. 600) ("**Statute**") administered by the Foreign Investment Committee, and Chapter XIV of the Foreign Exchange Regulations of the Chilean Central Bank ("**Regulations**") administered by the Central Bank.

However, as of 1 January 2016, the Statute was replaced with the new foreign investment framework contained in Law No. 20,848 ("**New Foreign Investment Law**"). The New Foreign Investment Law, among other things, replaced the Foreign Investment Committee established by the Statute with an entity called the Foreign Investment Promoting Agency, which complies with OECD standards.

The New Foreign Investment Law did not modify or alter the Regulations issued by the Chilean Central Bank. In fact, foreign investments that seek to benefit from the New Foreign Investment Law need to be registered first under the Regulations.

Neither the Statute nor the Regulations impose any domestic ownership requirements (i.e., 100% foreign ownership is possible). However, the New Foreign Investment Law imposes a domestic requirement by which the foreign direct investment should, directly or indirectly, give control of at least 10% of voting shares or rights in the Chilean company receiving the foreign investment.

### 3.1 Certificate of foreign investor under the foreign investment law

The New Foreign Investment Law states that the Foreign Investment Promoting Agency is the successor of the Foreign Investment Committee for all legal purposes. The foreign investor may request a certificate from the Foreign Investment Promoting Agency which confirms the status of authorized foreign investor.

The New Foreign Investment Law defines "foreign investor" as any individual or legal entity incorporated abroad, not residing or domiciled in Chile, which performs foreign direct investment in Chile.

The New Foreign Investment Law defines "foreign direct investment" as the transfer of foreign funds or assets to Chile, owned by the foreign investor or a related company, in an amount equal to or greater than USD 5 million, through the transfer of freely convertible foreign currency, contribution of physical goods, reinvestment of profits, capitalization of credits, provision of technology in different ways that can be capitalized, or credits associated with foreign investments of related companies. Further, it is considered

foreign direct investment if a foreign investor transfers to Chile an amount equal to or greater than USD 5 million, and accordingly results in the acquisition of at least 10% of the voting shares or rights in the Chilean company recipient of the investment.

The foreign investor's application with the Foreign Investment Promoting Agency shall provide evidence of the materialization of the investment in Chile, and contain a detailed description of the investment, including its amount, purpose and nature of it.

If the foreign investor's application complies with all legal requirements, the Foreign Investment Promoting Agency shall issue the foreign investment certificate within 15 days from the date of the submission of the application.

The New Foreign Investment Law grants certain rights to foreign investors whose investments have been recognized by a certificate issued by the Foreign Investment Promoting Agency, including: (i) the right to remit abroad the transferred capital and net profits generated by the investment, upon fulfillment of the relevant tax obligations; (ii) access to the formal (banking) exchange market to settle or obtain foreign currency; and (iii) the right to not be discriminated against when competing with domestic investors. The New Foreign Investment Law grants the above rights without requiring authorization from any foreign investment regulatory entities.

Until 31 December 2015, under the Foreign Investment Statute (which was administered by a committee chaired by the Minister of Economy), foreign investment had to be reflected in foreign investment contracts signed by the foreign investor and the Chilean state. Foreign investment contracts executed on or before 31 December 2015 **are still in full force and effect**.

## 3.2 Entry and type of capital contributions

Under the Statute, investments had to be introduced into Chile within a period of three years to obtain foreign investment approval in non-mining related projects (which could be extended to up to eight years for projects over USD 50 million).

Such term was eight years for mining projects (which could be extended to up to 12 years if exploration was required).

The New Foreign Investment Law **eliminates** such deadlines for the entry of the foreign investment.

## 3.3 Repatriation of capital and profits under the foreign investment law

Under the Statute, foreign investment equity capital had to be remitted overseas one year after entering Chile but only from the proceeds of the sale or liquidation of all or part of the assets, business, shares or rights representing the investment. Capital comprising reinvested profits is not subject to the one-year restriction.

## 3.4 The New Foreign Investment Law eliminates such restrictions on the repatriation of capital

The foreign investor may purchase the foreign currency required to repatriate capital and net profits from the local formal currency market once it has complied with all tax obligations in relation to such repatriation.

## 3.5 Non-discrimination

Under the New Foreign Investment Law, some important advantages that were guaranteed in the Foreign Investment Statute remain in force. One of these advantages is the prohibition of arbitrary discrimination towards foreign investors. Like the Statute, the Foreign Investment Law prohibits the discriminatory treatment of foreign investments, which are subject to the laws generally applicable to domestic investments. Laws are considered discriminatory if the foreign investor is excluded from all or a major part of a specific productive activity, or if he or she is refused access to a free trade zone or special regime despite complying with the conditions imposed on local investors.

## 3.6 Restrictions on foreign investment

The Foreign Exchange Regulations currently in force maintain the policy of the Central Bank of Chile to liberalize foreign exchange transactions. In fact, only certain foreign exchange transactions are subject to restrictions, which may be classed under the following three categories:

- (a) transactions which must be conducted through the Formal Exchange Market (for example, local commercial banks) and reported to the Central Bank of Chile (for example, investments, loans or deposits made by Chilean domiciled individuals or entities, other than banks, abroad or into Chile, in excess of USD 10,000)
- (b) transactions which must be conducted through the Formal Exchange Market (for example, license and royalty payments); and
- (c) transactions which must be reported to the Central Bank of Chile (for example, payments for export and import transactions; or investments kept abroad in excess of USD 100,000) Entities and individuals are free to purchase and sell foreign currency.

Please note that under Article 49 of the Constitutional Organic Law of the Central Bank of Chile, the Central Bank is entitled to establish restrictions to foreign exchange operations (for example, mandatory repatriation of funds, mandatory conversion of foreign currency into Chilean pesos, and reserve requirements). Hence, pursuant to such article, the Central Bank of Chile may, at any time, re-establish these restrictions.

## 3.7 Special tax treatments

### VAT exemption

The New Foreign Investment Law does not afford certain tax rights contained in the Statute, such as the VAT stability clause. The New Foreign Investment Law, however, establishes a new exemption for foreign investors in relation to VAT in the import of capital goods for an amount equal to or higher than USD 5 million for mining, industrials, forestry, energy, infrastructure, telecommunications, investigation and technological, medical or scientific projects, among others.

Further, the New Foreign Investment Law sets forth a more expeditious procedure to request VAT exemptions in the import of capital goods.

## 3.8 Applying for a new mining tax stability

Between 1 January 2016 and 31 December 2019, a new regime applies for foreign investors seeking mining tax stability. In this regard, foreign investors with the intent to invest at least USD 50 million in a defined mining project are eligible.

# Chile

Please note that this new mining tax stability regime will lock in the mining tax regime in force at the time of application (i.e., mining operators with annual mineral sales over the equivalent value of 50,000 metric tons of fine copper may lock in a progressive mining royalty tax of between 5% and 14% for 15 years).

## 3.9 Investment under the Regulations

Foreign investments need to be registered under Chapter XIV of the Regulations. Chapter XIV of the Regulations applies to foreign loans, deposits, investments and capital contributions.

The Regulations essentially impose two requirements to be complied with in connection with foreign loans, deposits, investments and capital contributions: (a) they must be made through the Formal Exchange Market; and (b) the parties must inform the Central Bank of Chile by using the appropriate forms.

The Regulations do not require the foreign investor to enter into a contract with the State of Chile, nor do they limit or restrict the repatriation of the capital invested in Chile or of the profits obtained from such investment.

## 3.10 Minimum investment which may be effected under the Regulations is USD 10,000

Even though no restriction to access the formal exchange market exists today, it is important to consider that registration under the Regulations does not guarantee a foreign investor the right of access to the Formal Exchange Market to repatriate its capital investment and remit profits.

## 4 Land tenure and priority

All minerals located within Chilean territory are the property of the Chilean state until said mineral is extracted. In such sense, mining legislation creates a system of mining tenure separate from land tenure. Therefore landholders, be they freehold or leasehold, do not have any ownership right to minerals, although they may be entitled to compensation – agreed or ruled by a court of law – for the loss of the use of land due to mining activities.

## 5 Government or local participation requirements

There are no state or local government mandatory participation rights in a license or a project.

## 6 Indigenous people considerations

Chile has recognized indigenous people and subscribed to OIT Agreement No. 169. The state recognizes that the indigenous people of Chile are the descendants of the human groups that existed in the country since pre-Columbian times. Preserving their own ethnic and cultural land is important as it is the main foundation of their existence and culture.

Moreover, political agreements to introduce amendments to environmental regulation, combined with recent case law, has raised the requirements for effective communication and notification to indigenous communities that may be affected by the development of a mining project.

## 7 Environmental protection and rehabilitation obligations

The Environmental Act (EA) provides a framework for environmental policy in Chile and establishes the Environmental Impact Assessment System (EIAS) to determine whether the environmental impact of a given activity or project is consistent with this framework. Projects or activities that generate effects contemplated by the EA are subject to the EIAS. Parties planning to undertake activities subject to the EIAS must submit an Environmental Impact Assessment (EIA) or an Environmental Impact Statement (EIS).

In general, if it is anticipated that a project or activity will have any of the following environmental impacts, an EIA must be submitted and approved:

- (a) Risk to human health
- (b) Significant adverse effects on the quantity and quality of renewable natural resources, including soil, water and air
- (c) Relocation of human communities or significant alteration of living systems and customs of population groups
- (d) Proximity to inhabited or protected areas or resources, or to an area defined as being of environmental value
- (e) Significant alteration of the touristic or scenic value of an area
- (f) Alteration of monuments and sites with anthropological, archaeological or historical value and, in general, those monuments and sites which form part of the cultural heritage of the country

An EIA must provide well-founded background data for predicting, identifying and interpreting the environmental impact of a project or activity and describe the action(s) to be performed to prevent or minimize material adverse effects.

Unlike the EIA, an EIS is a simple description of the contemplated activity.

Under the EIAS, individual and community organizations directly affected are able to make filings and petitions in respect to an EIA or an EIS processes of incorporation. The EIA presupposes liability for environmental damage or the violation rests with the party or parties undertaking the project or activities. Environmental liabilities, which require repair of the damaged environment and civil liability, have a five-year statute of limitation.

Criminal liability for environmental damage exists only in very specific cases where the environmental damage is major and is a result of willful misconduct. However, currently being discussed in Congress is a bill that – among other matters – shall hold the board of directors and/or chief officers of a legal entity criminally accountable if responsible for malicious/wrongful contamination.

## 8 New mining site closure regulations

Pursuant to Law No. 20.551, upon the closure of any given mining site, there are several obligation for the sponsors of the project to comply with (financial, environmental, regulatory, etc.).

Currently there is a bill of law (fairly advanced in the legislative process) which shall reform said Law No. 20.551.



Accordingly, the reform intends to un-restrain financial resources that would otherwise be tied up in a closure of site guarantee, allowing mining companies to further invest into their projects. Furthermore, the reform will allow projects that have stagnated and are currently unable to continue their EISs approved due to lack of funding, to make substantive progress towards exploitation of their projects.

In addition, the reform mandates that prior authorization be sought from the National Service of Geology and Mining (*Sernageomin*) to renew, substitute or replace financial instruments, either for increase or decrease of securities or conditions or when executing a transfer to another custodian.

## 9 Exploration licenses

### 9.1 Scope

The right to explore is given by an exploration concession.

### 9.2 Duration

An exploration concession:

- (a) Is granted by a court of law (pertinent to the mining concession's location it shall determine its jurisdiction) for an initial period of two years with a right to apply for a further two-year period prior to expiry of the initial concession. Where an extension is granted, the concession holder must relinquish half of the original designated area.
- (b) Requires annual payment.
- (c) Enables exploration over the concession area and provides an exclusive right to file for an exploitation concession in respect of that concession area.
- (d) Must be greater than 100 hectares and less than or equal to 5,000 hectares in area.
- (e) Does not require an environmental authorization for exploration works.
- (f) Does not require work to be undertaken on the concession area to maintain interest in that concession.
- (g) Does not authorize its owner to exploit the minerals in that concession.

Exploration concessions are granted for an initial period of two years, at the end of which an extension of an additional two years is available subject to relinquishment of 50% of the area.

Fees for an exploration concession are approximately one-fifth of those for a mining concession.

### 9.3 Steps to acquire an exploration right

The application for an exploration concession is initiated with the presentation of a *Pedimento* to the civil judge in a courthouse located within the appropriate jurisdiction, including:

- (a) name, nationality and domicile of the applicant;
- (b) location of the center point of the concession (in UTM coordinates) if the concession is greater than 100 hectares in area, or one or more geographically distinct points (with direction, distance and identifying name) from the center-point if the concessions are less than 100 hectares in area;

- (c) concession name being assigned; and
- (d) concession surface, indicated in hectares, being applied (the surface cannot be smaller than 100 hectares or larger than 5,000 hectares).

The judge makes a determination within 30 days of any court-authorized copy of the *Pedimento* being filed with the Custodian of Mines in the corresponding jurisdiction and should be published in the Official Mining Bulletin (*Boletín Oficial de Minería*).

At the same time, and within the 30-day period, a filing fee (*tasa*) must be paid, calculated based on the number of hectares being solicited and using the UTM published for the month in question, as well as utilizing a factor developed ad hoc (*Formulario 10*) by the treasury of the republic.

Within 90 days and in the same legal (i.e. non-technical portion) application initiated previously, the applicant formally solicits the definitive granting of the concession.

The following documents should accompany the solicitation for the issuance of the concession (signed by a lawyer):

- (a) a copy of the notarized record of the *Pedimento*;
- (b) a copy of the Official Mining Bulletin which published the authorized *Pedimento* application data;
- (c) an original map (and two copies) showing the configuration and location of the applied-for concession; and
- (d) the receipt for the payment of the appropriate filing fee which is calculated based on the applied-for area in UTM for the month in which the payment is made and for the period remaining between the date of payment and the last day in February of the following year.

The judge then orders that the application be sent to Sernageomin for technical review of the documentation. Sernageomin has 60 days to complete the review. Once this review is completed, the judge allows 60 days for third parties to file possible complaints with the court of appeals.

At the conclusion of this 60-day period and assuming no complaints have been filed, the judge will issue the final approval of the application, thereby granting the concessions to the applicant.

Once the final approval or final ruling (*Sentencia Constitutiva*) has been issued by the pertinent court, the applicant must, within a period of 120 days:

- (a) have an excerpt of the *Sentencia Constitutiva* duly published at the Official Gazette;
- (b) request Sernageomin to provide a statement of proof for the original map and an authorized copy of the *Sentencia Constitutiva*; and
- (c) register the authorized copy of the *Sentencia Constitutiva* with the appropriate regional Custodian of Mines.

## 9.4 Relationship with landowners

The title over a mining concession does not concede any rights over the surface land in Chile.

To develop exploration or exploitation activities, the owner of the mining concession has to purchase the surface land required for the project, execute agreements to obtain the use of the surface (lease) or obtain a legal mining easement. The latter may be incorporated by means of an agreement, or by court ruling.

## 9.5 Obligations of the holder

The mining easement includes determining appropriate compensation for damage caused to the landowner or any person who has an interest in that property.

## 10 Holding tenements

### 10.1 Scope

There is no separate concept of holding tenements. It is possible to skip the exploration concession process and apply directly for an exploitation mining concession.

### 10.2 Duration

As long as the annual property tax payments have been made, the system provides the legal tools to maintain (and defend if necessary) the concession in perpetuity.

### 10.3 Rights and obligations

Refer to "Scope" (above).

## 11 Development/production tenements

### 11.1 Scope

Development and exploration are carried out under a mining concession.

### 11.2 Duration

#### Exploitation concession (*Concesion de Explotacion*)

An exploitation concession:

- (a) of unlimited duration;
- (b) requires annual payment;
- (c) involves a more onerous process for filing, and higher costs for filing and compliance;
- (d) does not require work to be undertaken on the concession in order to maintain interest in that concession;
- (e) must be greater than one hectare and less than or equal to 10 hectares in area;
- (f) does not require an environmental authorization for exploration works but requires said authorization and closing plans for exploitation works;
- (g) grants mining rights which prevail over third-party claims; and

- (h) entitles the owner to exploit the minerals in that concession area.

## 11.3 Transition from exploration/holding right to mining right

An exploration concession must be converted to an exploitation concession before it lapses, i.e. within two years or four in the event it was extended.

## 11.4 Steps to acquire a right

The application (*Manifestacion*) must indicate:

- (a) name, nationality and domicile of the applicant;
- (b) location of the interest point of the concession (in UTM coordinates);
- (c) the number of claims being applied for and the claim names being assigned; and
- (d) concession surface, indicated in hectares, being applied for each claim (according to the Mining Code, a *Manifestacion* cannot consist of more than 10 hectares or less than one hectare).

In addition, if the application is to convert a previously existing exploration concession, the mining concession should be located in the same area as previously and occupy the same area (or less). In this manner, the application will have as its initial starting date the pre-existing date of application for the prior exploration concession.

The judge issues a legalized copy of the *Manifestacion* which has been approved by court within a period of 30 days after receiving the application. This document is registered with the Custodian of Mines located in the appropriate jurisdiction and must also be published in its entirety in the Official Mining Bulletin, which is also located in the appropriate jurisdiction. The fee is calculated based on the number of hectares being solicited and using the UTM published for the month in question as well as utilizing Formulario 10 by the treasury of the republic.

Subsequent steps include:

- (a) completion of a survey;
- (b) rights of third parties to object;
- (c) technical review of the Sernageomin; and
- (d) registration of the *Sentencia Constitutiva*.

## 11.5 Relationship with landowners

Development and exploration are carried out under a mining concession.

The title over a mining concession does not concede any rights over the surface land in Chile. To develop exploration or exploitation activities, the owner of the mining concession has to purchase the surface land required for the project, execute agreements to obtain the use of the surface (lease) or obtain a legal mining easement. As already stated, said legal mining easement may be incorporated by means of an agreement, or by court ruling.

The mining easement includes appropriate compensation for the injury caused to the landowner or any person who has an interest in that property.

## 11.6 Obligations of the holder

Notable obligations include the obligation to employ 85% Chilean nationals or residents.

## 11.7 Foreign ownership restrictions and government participation

There are no restrictions on foreign acquisition of mining concessions, except where the mining concession is located near the Chilean border. Then it may unfold into a national security issue.

## 12 New Electronic Procedural Law

Both exploration and exploitation licenses, as being incorporated by means of a process before a court of Law, are – since 2016 – subject to the Electronic Procedural Law (No. 20.886).

In such sense, incorporation of mining property has become friendlier for mining venturers, considering that there is substantially more control and efficiency upon said incorporation processes.

For example, most of documentation may be submitted to court digitally, therefore discarding the necessity to forward large amount of records to distant courts in northern Chile.

## 13 Assignment of security over tenement

### 13.1 Assignment

Assignment of an interest in tenements does not require approval of the authority. The assignment of the rights arising from tenements are governed by the civil rules of Chilean immovable assets or right in rem, therefore it must be registered before the Custodian of Mines.

### 13.2 Security

The Chilean Mining Code allows the granting of security over mining tenement and over the minerals extracted from it. The security may be registered before the Custodian of Mines.

## 14 Royalties

Mining royalty tax (*Impuesto Específico a la Actividad Minera*) is levied on the annual “operational income” derived from a metal mining activity obtained by a mining operator. This tax applies as a function of the size and profitability of the mining operator. Law No. 20.469 of 2010 overhauled the mining royalty tax regime.

- (a) Mining operators with annual sales below the equivalent of 12,000 metric tons of fine copper are not required to pay this tax.
- (b) Mining operators whose annual sales have an equivalent value between 12,000 and 50,000 metric tons of fine copper pay the tax at progressive marginal rates from 0.5% and 4.5%.
- (c) Mining operators with annual sales exceeding the equivalent value of 50,000 metric tons of fine copper (large mining operators) will be subject to a progressive marginal rate between 5% and 14% of the “taxable operational income.” The specific applicable rate in these cases will be determined by reference to a profitability test called the “mining operational margin.”

# Chile

Large mining operators with a mining operational margin of 85% or more will be subject to a 14% mining royalty tax rate. Moreover, operators with a mining operational margin of 35% or less will be subject to a 5% mining royalty tax rate. Lastly, those with a margin of between 35% and 85% will be subject to marginal tax rates between 5 and 14%.

The “operational income” of the mining activity is calculated following certain rules established by law (add-backs or deductions from the company’s corporate taxable income, as provided by law).

A mining operator refers to all individuals or legal entities that extract mineral substances and sell them in any state of production.

## 15 Mineral reporting and classification

Law No. 20.235 creates the Public Registry of Qualified Persons in Resources and Mining Reserves to register natural persons who meet the requirements set forth therein, to issue technical or public reports certification in relation to the characteristics of a particular mine site. The requirements are to have a professional degree related to the mining industry, and have work experience of at least five years.

Registration will be mandatory if the technical report is intended to raise capital or debt in the capital markets of the country.

## 16 Other key issues

### 16.1 Usual structure of venture

Under the Mining Code, the registration of a mining concession in two or more names creates a Legal Mining Company (LMC) by operation of law. LMCs have a formal legal structure which often makes them unsuitable for a structure that needs to be tailor made.

More commonly found are Chilean Contractual Mining Companies (SCMs), which are used for exploration or exploitation and allow more flexibility in terms of structuring.

Other structures available are limited liability partnerships (*Sociedad de Responsabilidad Limitada*), corporations (*Sociedad Anonimas*) and stock companies (*Sociedad por Acciones* (SPAs)).

### 16.2 Protection for foreign investors

The Foreign Investment Statute guarantees that restrictions applicable to the remittance of capital and profits will not be less favorable than those applying the acquisition of foreign currency to pay for imports.

The Foreign Investment Statute prohibits the discriminatory treatment of foreign investments, which are subject to laws generally applicable to domestic investments. Laws are deemed discriminatory if the foreign investor is excluded from all or a major part of a specific productive activity, or if he or she is refused access to a free trade zone or special regime despite complying with the conditions imposed on local investors. However, the Statute provides that the restriction of foreign investors’ access to local credit will not be considered discriminatory. No general legislative restriction of this type currently exists, and foreign investment contracts which allow maintenance of offshore accounts normally do not limit local financing (see “Exchange Controls - Formal and Informal Currency Markets”).

The Foreign Investment Statute sets out a procedure for challenging discriminatory conduct through the Foreign Investment Committee and the courts.

# Chile

With regard to tax, the Foreign Investment Statute allows foreign investors to choose to be subject to an overall income tax rate of 42%, fixed for 10 years (rather than the normal 35% rate which may change).

In the case of investments exceeding USD 50 million in industrial or extractive projects, such as mining, investors may also be entitled to:

- (a) adopt a fixed income tax rate of 42% for up to 20 years (rather than 10 years);
- (b) rely (for a period of up to 20 years) on laws and rulings in force when the investment is approved relating to depreciation, carrying forward of losses, organizational and start-up expenses and the right to maintain accounts in US dollars; and
- (c) rely on laws and regulations in force when the investment is approved, relating to the right to export freely for a period of up to 20 years.

## 16.3 Sensitive minerals

Exploration for and exploitation of lithium and, with some limited exceptions, gaseous and liquid hydrocarbons, is reserved to the state of Chile. However, private investors may enter into “risk contracts” with the government for the exploration or exploitation of specific areas, giving the investor a right to participate in exploration and exploitation income.

The Chilean Government also has a first option to purchase minerals containing uranium or thorium.

## 17 Useful websites

Ministry of Mines

<http://www.minmineria.gob.cl/>

National Geology and Mining Service

<http://www.sernageomin.cl/>

Chilean Copper Commission

<https://www.cochilco.cl/Paginas/Inicio.aspx>

Mining Council

<http://www.consejominero.cl/>

National Mining Society

<http://www.sonami.cl/site/>

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# China

Law	Civil law based with its own particularities
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	For certain types of minerals, yes
Indigenous and local community rights	No
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	Moderate
Rehabilitation bonds or guarantees	Yes
Exploration license	Generally three years, with extensions
Mining license	Typically 10–30 years, with extensions
Able to use tenement as security	Yes
Royalty payable to government	Mining resource compensation fees and resource tax
Classification system used	GB/T13908-2002

## 1 Summary

The mining industry plays an important role in the Chinese economy. China is the world's leading producer of coal, steel, aluminum, rare earths, lead, zinc, tin, magnesium, tungsten and other metallic minerals, in addition to being a major consumer of a number of key mineral resources. China's mining industry is highly regulated and the grant or acquisition of exploration and mining rights is subject to a number of governmental approvals and procedural requirements. There is no private land ownership under Chinese law. However, the operator may acquire or lease land use rights either directly from the state or from holders of land use rights for the purpose of mining activities, subject to the approval of the competent land authority and payment of any necessary land grant fee or land use compensation to the government or holders of land use rights.

In addition to the primary laws governing exploration rights and mining rights, a comprehensive array of national and local laws, including foreign investment restrictions and environmental procedures and regulations, applies to mining-related activities in China. A separate regulatory regime applies with regard to the oil and gas sector.

# China

Notwithstanding, continuing market-oriented reforms and movement toward a “rule of law,” a top-down (“rule by law”) view of law as an instrument of government with citizens as the object of legal regulation remains influential.

## 2 Legal framework for mining

The legal system in China is civil-law based. It has some similarities to the legal systems of Continental Europe but also contains substantial elements taken from the Soviet Union and some elements inherited from traditional Chinese law.

The mining industry in China is regulated by both national and local (including, but not limited to, provincial and municipal) laws, regulations and rules. The Ministry of Natural Resources (MONR), the successor of the Ministry of Land and Resources, is the principal regulatory body that administers these laws and regulations.

Other bodies vested with authority for approving and registering aspects of a foreign investment project in mineral exploration or mining in China include:

- (a) the National Development and Reform Commission (NDRC), which reviews contemplated investments from a policy perspective to ensure that proposed investments are in line with the state’s industrial policies and plans;
- (b) the Ministry of Commerce (MOFCOM), which is responsible for recording or approving foreign investment in certain industries and sectors, including the mining industry. MOFCOM oversees the establishment of foreign-invested enterprises (FIEs) and, for certain industries in which foreign investment is more tightly regulated, reviews and approves the primary transaction documents; and
- (c) the State Administration for Market Regulation (SAMR), which registers the establishment of FIEs and issues business licenses to FIEs.

Under Chinese law, all minerals in the subsoil belong to the state.

To legally operate and engage in exploration and/or mining in China, an FIE will require all the required approvals or licenses from each of the above government bodies.

## 3 Restrictions on foreign investment

At national level, foreign investment in China (except in free trade zones (FTZs)) is subject to the Special Management Measures for the Market Entry of Foreign Investment (Negative List) (effective on 30 July 2019) (“**Negative List**”) and Catalog of Industries for Encouraging Foreign Investment (effective on 30 July 2019) (“**Encouraged Catalog**”). Meanwhile, foreign investments in FTZs are subject to the Special Management Measures for the Market Entry of Foreign Investment in Pilot Free Trade Zones (Negative List) (2019 Version) (“**FTZ Negative List**”) and the Encouraged Catalog.

The Negative List and the FTZ Negative List specify industry sub-sectors in which foreign investments are prohibited (“**Prohibited**”), and certain industry sub-sectors subject to restrictions on the market entry of foreign investment, such as equity caps and senior manager requirements (“**Restricted**”). For foreign investments into such Restricted sub-sectors, approvals from MOFCOM or its local branches are required.

Sectors that are not included in the Negative List, including those listed in the Encouraged Catalog (“**Encouraged**”) and those not listed in any other list or catalog, are managed according to the principle of national treatment of domestic and foreign investment. Foreign investment in those sectors is only subject to record-fillings with MOFCOM or its local branches.

# China

Below is a brief outline of the mining sub-sectors which are categorized respectively as "Prohibited," "Restricted" or "Encouraged" under the Negative List and the Encouraged Catalog:

(a) Prohibited:

Foreign parties are prohibited from engaging in the exploration, exploitation and ore dressing of rare earths, radioactive minerals and tungsten. It is specifically indicated in the FTZ Negative List that it is prohibited to enter the rare earth mining area or to obtain mine geological data, ore samples and relevant production technology.

(b) Restricted

No sub-sectors are categorized as "Restricted" within the mining industry.

(c) Encouraged

- (i) Exploration and development of petroleum and natural gas, and utilization of mine gas
- (ii) Development and application of new technologies to increase oil recovery (in the form of engineering services).
- (iii) Development and application of new oil exploration and development technology in geophysical prospecting, drilling, logging, and downhole operations.
- (iv) Development and application of new technology to improve mine tailings utilization and comprehensive application of mine ecological restoration technology.
- (v) Exploration, mining and beneficiation of minerals urgently needed in China (such as potash, chromite, etc.).

In addition, the Catalog of Encouraged Foreign Investment Projects in Central and Western China, as part of the Encouraged Catalog, specifically guides and directs foreign direct investment in Western and Central China. Generally, more mining industry sub-sectors are encouraged with regard to investment in the Western and Central regions of China, where social and economic conditions are less developed than in the Eastern regions.

## 4 Government or local participation requirements

As discussed in section 3 above, foreign investment in the mining industry is not "restricted" and therefore not subject to any equity requirements or senior manager requirement under the Negative List.

Under Chinese law, there is no express provision requiring government participation in mining facilities. But in practice, state-owned enterprises have a predominant position in China's mining industry and the government can exert significant influence via those state-owned enterprises. In addition, according to relevant regulations, China National Petroleum Corporation, China Petrochemical Corporation and China National Offshore Oil Corporation (all state-owned enterprises) have the exclusive right to cooperate with foreign enterprises in petroleum exploitation, mining and production within continental or offshore areas approved by the State Council.

## 5 Land tenure and priority

In China, land is owned by the state in urban areas and by rural collectives in rural areas. There is no private land ownership under Chinese law. A private party may use a certain plot of land by acquiring land use rights

either directly from the state or from holders of land use rights. Each land use right license is valid for a certain period of time, varying from several years to tens of years, depending on the type of land.

Similarly, all minerals in the subsoil are the property of the state under Chinese law. State ownership of mineral resources, either near the earth's surface or underground, does not change with the alteration of ownership or right to the use of the land to which the mineral resources are attached. Therefore, land use right holders have no ownership title to the minerals, though they are entitled to compensation if their property rights are affected by any exploration or mining activities.

## 6 Indigenous or local community rights

Chinese laws do not provide for special rights to ethnic minority groups or indigenous people affected by the acquisition or exercise of mining rights. However, if exploration or mining activities affect farmers residing or farming on the site, the mining rights holder is required to pay such persons compensation for their loss or damage.

## 7 Environmental protection and rehabilitation obligations

Under Chinese law, exploration, construction, development and mining activities are each subject to environmental protection rules and requirements. Under the relevant Chinese environmental regulations, an environmental impact assessment (EIA) must be conducted prior to the construction of a mining facility. The EIA must be in the form of a detailed report containing the following:

- (a) analysis, pre-evaluation and assessment of the possible impact of the mining facility on the environment;
- (b) feasibility study of the proposed environmental protection measures from technical and commercial perspectives; and
- (c) economic cost-benefit analysis of the construction and proposals for environmental supervision and survey.

The EIA report must be approved by the competent environmental authority.

After completion of construction and prior to the commencement of mining operations, the environmental authority will conduct an inspection to ensure that the relevant environmental conditions are satisfied.

If the operation of the mining facility will involve the discharge of pollutants into the environment, the business operator must obtain a pollutant discharge permit from the local environmental authority.

## 8 Exploration licenses

### 8.1 Scope

Mineral areas may only be explored pursuant to an exploration license granted by national or provincial authorities. In China, an exploration license holder is entitled to:

- (a) conduct exploration in accordance with the area, time limit and work object specified in the exploration license;

- (b) erect pipes and cables for electricity and water supply and communication lines in the exploration area and neighbouring areas, provided that the same does not affect or damage the existing electricity and water supply facilities and communication lines;
- (c) pass through the exploration area and its neighbouring areas;
- (d) use land temporarily, as required for the construction of mining facilities;
- (e) a priority right to obtain a mineral exploration license for newly discovered minerals within the exploration area;
- (f) a priority right to obtain a mining license for mineral resources within the exploration area;
- (g) transfer its exploration license, following the required legal procedures; and
- (h) independently sell mineral products recovered in the course of exploration operations carried out in accordance with the approved engineering design, except for mineral products (such as gold and silver) which are to be purchased by designated units on a monopoly basis, as specified by the State Council.

## 8.2 Duration

An exploration license is generally valid for three years, but the validity of an exploration license for oil and gas could be as long as seven years. It is possible to apply for an extension of an exploration license, subject to approval by the governmental authority. In general, each extension is valid for two years.

The exploration license holder has a priority right over third parties to acquire a mining license for the area covered by the existing exploration license. The law does not specify when the exploration license holder can exercise such priority right, but it appears that such right must be exercised during the validity period of the exploration license. No specific administrative fee is attached to the exercise of the priority right.

## 8.3 Steps to acquire an exploration right

Before 2009, it was possible to acquire an exploration right on a first-come, first-served basis by submitting an application to the local authority. Since 2009, the grant of exploration permits has been generally awarded through a competitive process, in the form of a public tender, auction or listing process.

## 8.4 Relationship with landowners

In China, land is owned by the state in urban areas and by rural collectives in rural areas. The holder of an exploration license may obtain the land use right on a temporary basis from the relevant land title holders for exploration activities, subject to the approval of the local land authority. If the exploration activities cause any loss to farmers who reside or farm on the site, the exploration license holder is required to enter into a compensation agreement with the farmers and pay compensation for their loss or damage.

## 8.5 Obligations of the holder

An exploration license holder has obligations to:

- (a) pay to the State an exploration-right use fee;
- (b) pay to the State any State funding received prior to the grant of the exploration license;

- (c) invest a minimum amount of funding as required;
- (d) commence the exploration activities no later than six months after obtaining the exploration license and report the progress of the exploration activities to the governmental authorities; and
- (e) comply with environmental, labour, safety and other relevant laws and regulations.

The exploration license holder is required to comply with all conditions and obligations which are generally applicable with regard to an application for a mining license.

## 9 Holding tenements

To bridge the gap between when exploration is finished and development starts, Chinese mining law provides for an exploration right reservation period of less than two years, with up to two extensions. The reservation must be applied for 30 days before the expiration of the exploration license on the condition that a mineable deposit is verified.

## 10 Development/production tenements

### 10.1 Scope

A mineral deposit can only be legally exploited by the holder of a mining license, granted by the relevant authorities.

Under Chinese law, the holder of a mining license has the right to:

- (a) engage in development and mining activities in accordance with the mining scope and time limit specified in the mining license;
- (b) construct production and living facilities within the scope of the mining area, which are necessary in mining;
- (c) obtain land use rights as required for the development, construction and mining production;
- (d) independently sell mineral products, except for mineral products (for example, gold and silver) which are to be purchased by designated units on a monopoly basis, as specified by the State Council;
- (e) transfer its mining license by following the required legal requirements and procedures; and
- (f) enjoy other rights as specified in the relevant Chinese laws and regulations.

### 10.2 Duration

In China, the period of validity of a mining license varies depending on the size and scale of the relevant mining facilities. The maximum validity period is 30 years for a large mining facility, 20 years for a medium-sized mining facility, and 10 years for a small mining facility. It is possible to apply for an extension of the mining license before it expires, subject to approval by the relevant governmental authority.

### 10.3 Transition from exploration/holding right to mining right

If the exploration activities have identified mineral deposits suitable for commercial development, the exploration license holder may apply to the local authority for the approval of an overall development plan.

After the overall development plan is approved, the exploration license holder may submit the requested documents to the local authority for the mining license.

An exploration license and mining license are separate licenses. Therefore, an existing exploration license holder will have to follow the rules and make a separate application to the relevant governmental authority for a mining license. An existing exploration license holder has a priority right over any third parties to obtain a mining license within the area covered by its existing exploration license, under the same terms and conditions.

## 10.4 Steps to acquire a right

Before 2009, it was possible to acquire a mining license on a first-come, first-served basis by making an application to the local authority. Since 2009, the grant of a mining license has generally been effected through a competitive process, in the form of a public tender, auction or listing process.

## 10.5 Relationship with landowners

Land in China is owned by the state in urban areas and by rural collectives in rural areas. There is no private land ownership under Chinese law. However, private parties may acquire or lease land use rights either directly from the state or from holders of land use rights for the purpose of mining activities, subject to relevant procedures for obtaining land use rights. If the mining activities affect farmers residing or farming on the site, the mining license holder is required to enter into a compensation agreement with the farmers and pay compensation for their loss or damage.

## 10.6 Obligations of the holder

A holder of a mining license is obliged to:

- (a) pay to the State a mining-right use fee;
- (b) repay to the State any State funding prior to the grant of the mining license, if applicable;
- (c) report its mining activities annually to the relevant governmental authorities; and
- (d) comply with the construction, environmental, labour, safety and other relevant laws and regulations.

In general, a mining license holder must commence construction or mining activities within six months after obtaining the mining license. Some local governments may revoke the mining license if no construction or mining activities are started within the prescribed period.

The mining license holder is required to comply with all employment laws and rules which are generally applicable to businesses in China. In addition to the general employment obligations, employers in the mining sector have the obligation to ensure sufficient health and safety related training for, and the protection of, the employees engaged in mining activities.



## 11 Assignment of and security over tenements

### 11.1 Assignment

Under Chinese law, mineral licenses can be assigned to another party. The license holder may lawfully transfer mineral licenses through direct sale or as capital contribution to a joint venture, etc., subject to the approval of the relevant issuing authority.

However, a valuation process is usually required. Where the assets had received any funding or investment, including any work done, by any state apparatus, the valuation process can be very onerous and tightly controlled.

### 11.2 Security

Chinese law allows the granting of security over a mineral license for the owner's or a third party's debt, and such security is required to be recorded and registered with the original issuing authority.

## 12 Royalties

A holder of mining rights in China is subject to the following charges:

- (a) exploration-right use fee and mining-right use fee;
- (b) mining resource compensation fee;
- (c) price for exploration-right and price for mining-right, in the event that the exploration right or the mining right is based on State-funded explorations;
- (d) resource tax;
- (e) value-added tax (VAT) for sale of minerals; and
- (f) enterprise income tax for the profit earned.

The Chinese Government is working on the reform in its resource tax system. Since July 2016, the compensation fee rate for every mineral resource has been reduced to zero. On the other hand, the scope of resource taxation will gradually be enlarged to cover all natural resources. The aim of such reform is that resource tax will apply universally to all types of natural resources and finally supersede the current resource compensation fee regime. The base of resource taxation is the sale price of the resource and tax rates vary according to the type of natural resources.

## 13 Mineral reporting and classification

The Detailed Rules for Implementation of the Law of the People's Republic of China on Mineral Resources issued by the State Council in 1994 includes an appendix called Classified Catalog of Mineral Resources, which classifies mineral resources into four categories, namely energy minerals, metal minerals, non-metal minerals and groundwater/gas minerals.

In addition, Chinese mining laws require exploration license holders to submit exploration reports to the license issuing authorities at certain stages of the project. The authorities have issued a number of national standards, including very detailed procedures, guidelines, qualifications and criteria that should be complied

with when preparing mineral exploration reports, such as Classification for Resources/Reserves of Solid Fuels and Minerals (GB/T13908-2002).

## 14 Other key issues

### 14.1 Usual structure of venture

A foreign investor may acquire mineral rights in China by:

- (a) entering into a joint venture with a Chinese domestic entity that contributes the exploration or mining rights for an interest in the joint venture;
- (b) purchasing the exploration or mining licences from a qualified Chinese enterprise;
- (c) obtaining exploration or mining licences through a tender, auction or bid process;
- (d) obtaining approval from the government to explore and, after discovery of a viable deposit, applying for the right to mine;
- (e) acquiring an existing company holding mining rights; and
- (f) entering into Sino-foreign cooperation agreement with the three abovementioned Chinese enterprises designated by the State Council to exploit petroleum resources.

The acquisition of an exploration or mining license from a Chinese seller will be subject to the approval of the Ministry of Natural Resources and its local counterparts. The establishment of a joint venture company or the share acquisition of an existing Chinese exploration or mining holder is subject to recordal filing with the Ministry of Commerce or its local counterparts and also possibly the National Development and Reform Commission or its local counterparts.

### 14.2 Taxes

As discussed in Section 12 above, entities carrying out mining activities will be subject to a number of fees and taxes, from the usual corporate income tax to industry-specific taxes such as resource tax.

China has adopted certain incentive measures to attract investment in mining industries. Subject to the requirements specified under the relevant laws and regulations, private parties investing in mining activities may enjoy a lower enterprise income tax rate, duty-free importation of equipment, exemption from or reduction in resources, compensation fees and use fees for exploration and mining rights, etc. Some incentives are available in specific areas only.

### 14.3 Overlapping tenements

Under Chinese law, holders of mining rights are required to take precautionary measures such that the mining activities will not damage other facilities or utilities above, beneath or neighboring the mining site.

### 14.4 Security of tenure

Lawful exploration and mining rights are protected by Chinese law. As discussed above, an exploration license holder has a priority right to apply for a mining license within the area covered by the existing exploration license. The judicial system in China has been making progress toward greater adherence to the rule of law and due process.

## 14.5 Protection for foreign investors

The Chinese government maintains a policy of encouraging foreign direct investment but the focus has been changed in recent years to give preference to foreign investors able and willing to provide advanced technology and management skills. In the mining industry, China promotes foreign investment in high technology and green mining, and the development of unconventional natural resources. Chinese law provides for a legal structure to give appropriate compensation to foreign investors in case of nationalization of mining assets held by foreign investors.

At the same time, it is prudent for foreign investors to note the following risks:

- (a) The approval process for issuing exploration and mining licenses lacks transparency (each province tends to have its own internal mineral planning, which ultimately determines how exploration and mining rights are granted and to whom).
- (b) An exploration license holder has priority right to obtain a mining license for expected mineral resources in the exploration area. In practice, however, the factors taken into account in consideration of a mining license application remain unclear.

The Chinese government imposes export restrictions on certain metallic minerals. For example, certain minerals, such as tungsten, antimony, and silver, may only be exported by designated state-owned export trading companies. Some other metallic minerals, such as rare earth, coking coal and molybdenum, are subject to export quotas or export licenses.

## 15 Useful websites

Ministry of Natural Resources of the PRC	<a href="http://www.mnr.gov.cn/">http://www.mnr.gov.cn/</a>
Ministry of Commerce of the PRC	<a href="http://www.mofcom.gov.cn/">http://www.mofcom.gov.cn/</a>
National Development and Reform Commission	<a href="http://www.ndrc.gov.cn/">http://www.ndrc.gov.cn/</a>
State Administration for Market Regulation	<a href="http://www.samr.gov.cn/">http://www.samr.gov.cn/</a>
Ministry of Environmental Protection of the PRC	<a href="http://www.mep.gov.cn/">http://www.mep.gov.cn/</a>

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# Colombia

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mineral rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	No. The only bond required by Colombian mining legislation regarding mining concession agreements is a mining-environmental insurance policy guaranteeing the performance of concessionaire's obligations under the concession agreement, including those related to environmental and mining obligations, as well as those pertaining to the payment of fines and caducity.
Exploration stage	<p>Three years, which can be extended (with prior approval from the authority), for additional terms of two years, up to a total term of 11 years.</p> <p>Exploration licenses are not applicable to Colombia. Colombian law provides for the rights to explore and exploit minerals to be granted as a whole, by means of the execution of a concession agreement between the government and the interested party (mining company), and no individual per-stage licenses are granted, unlike some other jurisdictions. We instead refer to the different stages of a single concession.</p>
Production stage	<p>The maximum term will be equivalent to the total term of the concession (30 years) minus the time spent on the exploration, construction and assembly stages (in any case, no less than 15 years).</p> <p>Mining licenses are not applicable to Colombia. Colombian law provides for the rights to explore and exploit minerals to be granted as a whole, by means of the execution of a concession agreement between the government and the interested party (mining company), and no individual per-</p>

# Colombia

	stage licenses are granted, unlike some other jurisdictions. We instead refer to the different stages of a single concession. Mining concessions can be extended for an additional 30-year period prior to their expiration if approved by the Mining Authority.
Able to use tenement as security	Yes
Royalty payable to government	Yes. Amount depends on the minerals produced.
Classification system used	Colombian CRIRSCO Reserves and Resources Standard (CCRR)

## 1 Summary

For the past 10 years, Colombia has seen significant growth in its mining industry, primarily driven by the improving security situation and solid private investor protection rules. The rapid growth, however, has overwhelmed the traditional mining regulatory structures and has forced the government to implement stiff institutional changes aimed at satisfying the demands of the industry. However, Colombia, much like many other countries in the region, did suffer a setback in foreign investment after the global financial crisis in 2010 when commodity prices plunged to their lowest levels in decades. Since then, Colombia has strengthened its institutions and maintained an investor-friendly environment. This kept the mining industry surging, despite the post-GFC crisis. Additionally, the Mining Authority focused all its efforts in “cleaning the house” by terminating mining concessions that were in breach, becoming more responsive in their auditing process and focusing on developing a new, fully online, mining cadaster and information system.

Colombia follows the principle that the subsurface is owned by the state. As a result, a concession is generally required to explore and exploit minerals within Colombian territory. Law 685 of 2001 (“**Mining Code**”) was initially an attempt to collect, in a single statute, all regulations applicable to mining operations. However, because of the fast development of environmental law, the Mining Code is no longer the only source consulted in connection with the structuring of a mining project. Mining regulations are applied by the Colombian Mining Authority, which operates at a national level and has a local presence in several mining districts. The Ministry of Environment and Sustainable Development, the National Environment Licensing Agency and independent local environmental agencies apply environmental regulations.

The general rule applicable to the award of mining concessions is that of first come, first served. However, pursuant to the National Development Plan for 2014–2018 (Law 1753 of 2015), the Colombian Government has a right to temporarily<sup>1</sup> reserve certain free areas that, pursuant to available geoscientific information, are considered strategic (*Áreas de Reserva Estratégica Mineras and Áreas de Reserva para el desarrollo minero-energético*). Such free areas, therefore, will only be granted as a result of competitive bidding processes, the specifics of which are to be defined by the government through the issuance of new regulations. These new regulations for competitive bidding processes are being reviewed by the Mining Authority and will be published for comments in the coming months. We consider that this regulation will be issued during the fourth quarter of 2019.

These reserved areas will coexist with strategic areas, in which delimitation was permitted under the former National Development Plan for 2010–2014 (Law 1450 of 2011), which shall also be awarded as a result of competitive bidding processes. In any case, prior to the exercise of its rights to reserve the areas mentioned

<sup>1</sup> The original provision allowed the reservation of these areas to be indefinite, but the Constitutional Court eliminated the word “indefinitely” to limit this declaration in time.

# Colombia

above, the government shall reach an agreement with local authorities to guarantee their constitutional right to regulate land use. The areas corresponding to moors (*páramos*) and wetlands cannot be reserved for the purposes mentioned before.

## 2 Legal framework for mining

Colombia is a civil law jurisdiction, based on promulgated legislation, and Colombian law operates at a national level. The mining industry is mainly regulated by the Mining Code. Due to its nature, the Mining Code can only be modified by a new law enacted by Congress. Decrees, resolutions and other types of regulations issued by the Colombian Government (including different ministries and agencies) may govern specific aspects of the Mining Code, but can neither change nor exceed any of its provisions.

In line with the above, the general legal framework governing the mining industry is composed of the following:

- (a) The Colombian Constitution (1991), Articles 58, 332, 333, 360 and 361; and
- (b) The Mining Code.

A major amendment to the Mining Code, enacted in 2010 (Law 1382 of 2010), was declared unconstitutional, with effect from 13 May 2013. The grounds for the declaration of unconstitutionality relate to the fact that the right of ethnic communities to participate in the process of the design and approval of the amendment was neither duly observed nor protected.

The Ministry of Mines and Energy is in charge of dictating the policies of, and issuing regulations for, the mining industry, always within the parameters of the Mining Code. The Ministry of Environment and Sustainable Development is in charge of dictating policies and regulations as they relate to the protection of the environment. Other governmental entities are involved in the issuance of regulations concerning specific areas of the mining industry (for example, the Ministry of Social Protection is in charge of issuing health, safety and environmental regulations for mine workers).

In turn, the national mining agency (*Agencia Nacional de Minería* (ANM)), is the competent governmental entity (dependent on the Ministry of Mines and Energy) that grants the rights to explore and exploit minerals in Colombia.

The same legal regime applies to all minerals, without prejudice to the fact that technical rules for exploitation may vary depending on the characteristics of the mineral and the requirements for its extraction. Oil and gas have separate regimes.

## 3 Restrictions on foreign investment

Foreign individuals or companies looking to obtain a mining concession must have a legal representative in Colombia to be able to submit proposals and must have a branch or subsidiary domiciled in Colombia to be able to execute the concession agreement, once the corresponding application for a mining concession is approved.

Article 18 of the Mining Code expressly indicates that foreign individuals or entities have the right to receive treatment equal to that received by Colombian nationals in all matters associated with the mining industry in Colombia.

There are no requirements for minimum domestic ownership of mining companies operating in Colombia and, thus, said mining companies can be wholly owned by foreign entities. Furthermore, there are no



# Colombia

restrictions on the transfer of profits arising from mining activities, nor are there any limits to foreign investment.

## 4 Government or local participation requirements

There are no mandatory participation rights for a mining concession or project in Colombia, nor are there any requirements for local Colombian ownership, as explained in the preceding section.

Regarding local participation requirements, there is no legal obligation to include local participation in mining operations. However, it is becoming a good industry practice in Colombia to include the local workforce and local communities in a mining project to ensure their participation and social backing of a given project. Additionally, due to increasing illegal mining activities present in the mining industry, the government has adopted regulation to formalize “informal miners” and make them a part of legal operations by executing formalization agreements with such informal miners. This has proven to be a good tool to encourage informal miners to become formal and to produce minerals under the umbrella of a legal title.

## 5 Land tenure and priority

All minerals located within Colombian territory are the property of the nation until they are extracted. Mining legislation creates a system of mining tenure separate from land tenure. Therefore, landholders, whether freehold, leasehold or any other type, do not have any ownership rights to minerals, although they may be entitled to compensation for the loss of the use of land due to mining activities.

## 6 Indigenous or local community rights

There are four major groups subject to special protection regarding their social, cultural and economic values vis-à-vis mining projects or activities within their territories, which are as follows: indigenous peoples; Afro-Colombian communities; Raizal communities; and Romani people or gypsies.

The main right of ethnic communities, arising from Convention No. 169 of the International Labor Organization, is the right to be consulted, through their corresponding representative institutions, on the impact that projects on the exploitation of natural resources (including, but not limited to, mining projects) may have on their respective social, cultural and economic values and worldview.

By virtue of this consultation right, which is expressly set forth in the Mining Code with regards to indigenous peoples and Afro-Colombian communities, the exploration and exploitation of mineral deposits within the territories of ethnic communities (as well as any other mining activities that may cause an impact on their traditional values and worldview) may only be conducted through consultation, for the purposes of obtaining their consent for the project.

However, as a rule, ethnic communities do not have any veto rights regarding the development of mining projects. Nevertheless, there are certain exceptional cases in which consent from the ethnic communities involved must be necessarily obtained in practice, to determine and implement the less harmful development structure on which the mining project will be based.

In addition to, and coexisting with the above (the general and supralegal right of consultation and participation), the Mining Code foresees the existence of specific areas assigned to indigenous peoples (*zonas mineras indígenas*) or Afro-Colombian communities (*zonas mineras de comunidades negras*), where the corresponding communities have a right of preference regarding the granting, by ANM, of a mining concession. By virtue of this right, the corresponding indigenous or Afro-Colombian communities that



# Colombia

present a proposal for the exploitation of minerals within the corresponding areas covered by the applicable legal definition will be entitled to have a mining concession granted to them, with preference over other eventual proposals that may have been filed by third parties within the area. In such an event, the ethnic community granted the mining concession may subcontract the exploration and exploitation works, but may not transfer the concession in any case.

Indigenous authorities are entitled to exclude certain places within the mining zone from exploration or exploitation activities because of their cultural, social and economic significance to the community.

In the event that any person different from the indigenous community itself has a concession over an indigenous mining territory, that person must prefer the local indigenous community in order to undertake its works.

Royalties from indigenous territories' mining exploitation must be applied for the direct benefit of such indigenous communities.

ANM may define certain mixed areas where both indigenous and Afro-Colombian communities are located.

## 7 Environmental protection and rehabilitation obligations

In Colombia, mining exploration and production activities are subject to stringent environmental regulations. During the exploration stage of a mining concession, concessionaires shall comply with the mining-environmental guides adopted by the Ministry of Mines and Energy and the Ministry of Environment and Sustainable Development, and shall obtain specific permits for the use of specific natural resources (water, air and forest). No environmental license is required to undertake exploration activities.

However, to transit into the construction and assembly stage to commence exploitation activities, concessionaires must obtain an environmental license, which will serve as the sole instrument for the environmental management of the concession and the project. This license covers concessionaires' activities up to abandonment and dismantling, and imposes compensation obligations on the licensee (such as reforestation, in the event that one of the specific permits subsumed in the global environmental license is the forestry utilization permit).

The environmental authorities may require a project operator to prepare and implement a plan to improve the environmental performance of a project.

## 8 Exploration stage

### 8.1 Scope

Since the enactment of the Mining Code in 2001, individuals can only explore and/or exploit minerals pursuant to a mining concession agreement, duly granted and registered with the National Mining Registry. This is, however, without prejudice to other types of mining licenses or agreements granted pursuant to former regulations, which remain valid during their corresponding term and may be governed, in certain matters, by said former regulations (the mining concessions and other mining licenses or agreements are hereby jointly referred to as "**Mining Titles**").

More recently, mining concession agreements entered into pursuant to the Mining Code grant the corresponding concessionaire the exclusive rights to explore, develop and exploit certain specific minerals within a defined area.

Concession agreements have three stages: (i) an exploration stage; (ii) a construction and assembly stage; and (iii) an exploitation stage. The maximum duration of each stage is as follows:

- (a) exploration: three years, which can be extended (with prior approval from the Mining Authority) for additional terms of two years, up to a total term of 11 years;
- (b) construction and assembly: three years, which can be extended (with prior approval from the authority) for one additional year; and
- (c) exploitation: The maximum term will be equivalent to the total term of the concession (30 years) minus the time spent on the exploration and construction and assembly stages (in any case, no less than 15 years).

The maximum size of the areas to be explored and/or exploited by virtue of a mining concession agreement is 5,000 hectares for concessions adjacent to a water source, and 10,000 hectares for all other areas. Mining concessions close to the Colombian borders with other countries are subject to special rules regarding their size.

## 8.2 Duration

The total term of a concession agreement is 30 years, counted from its registration with the National Mining Registry. Before the expiration of the initial term, the term of the concession agreement can be extended for an additional term of 30 years. To request the extension, the concessionaire must demonstrate compliance with its obligations and the existence of additional resources and reserves to justify the extension. Upon expiration of the additional term mentioned above, the holder of a mining concession will have a preferential right to enter into a new concession agreement over the same area to continue the exploitation activities it had been carrying out until the expiration of such term. Exploitation does not need to be suspended while the new concession agreement is formalized between the applicant and the government. The new concession agreement may include additional terms or conditions, which may be required by the Mining Authority to grant the new concession agreement to the same concessionaire. Such additional terms and conditions may include compensation payments to the National Government above royalties dictated by law.

## 8.3 Steps to acquire exploration, construction and assembly, and production rights through the granting of a mining concession

To be granted a mining concession agreement, applicants must file a proposal with ANM. Upon approval of such proposal by ANM, the applicant must demonstrate: (i) legal capabilities; (ii) financial capacity; and (iii) technical capabilities, pursuant to Resolution 831, 2015 issued by the Mining Authority.

Proposals requesting the granting of a mining concession agreement are currently filed electronically and do not grant, by themselves, any right to the applicant, other than a preferential right over the area, provided that its proposal was filed first. A proposal for a mining concession agreement must contain the following:

- (a) indication of whether there is any type of mining exploitation over the area subject to the proposal to determine the eventual existence of traditional mining labors in the area, which are subject to special protection;
- (b) description, location and size of the requested area;
- (c) indication of the mineral or minerals subject to the proposal;

- (d) indication of whether there are any indigenous or Afro-Colombian ethnic groups with permanent residence in the place of the concession;
- (e) indication of whether the area requested through the application covers, in whole or in part, any restricted areas for which authorization from other authorities is required (in which case, the corresponding authorization must be attached);
- (f) indication of the mining guides and terms to be applied during the exploration period and economic investment expected to be performed in such stage;
- (g) a map and a technical annex prepared pursuant to the applicable general and official technical rules; and
- (h) evidence of compliance with Resolution 831, 2015, regarding financial and technical capabilities.

If ANM considers that there are grounds to reject a proposal, related to errors that can be corrected, it may request that the applicant make the necessary corrections, granting a term of 30 days to correct such errors. If the errors found by ANM cannot be corrected, or are not corrected by the applicant within the 30-day period, the mining concession proposal would be rejected.

If the proposal is not rejected by ANM, ANM will proceed to determine the area that is free for award under a mining concession agreement, based on the verification of any eventual overlaps with third-party rights over the same area. However, the National Development Plan 2018–2022, adopted by Law 1955, 2019, granted ANM the right to reject proposals that superpose entirely with another mining concession or application.

If, based on information provided by the Ministry of the Interior, ANM concludes that there are protected ethnic communities with rights of preference over the area of the concession, ANM will grant such communities a 30-day preemptive right to opt for the award of the concession.

With respect to any area determined by ANM to be free after the foregoing steps, ANM will request the proponent to execute the mining concession agreement, using the standard agreement form pre-approved by the Ministry of Mines and Energy.

Once both ANM and the concessionaire have executed the mining concession agreement, ANM will file a copy of the agreement for registration with the National Mining Registry. After completion of the registration process, the concessionaire will formally hold sufficient legal title to explore and exploit minerals within the area subject to the mining concession agreement.

## 8.4 Relationship with landowners

Concessionaires may purchase or acquire — by any other legal means — any plot of land to be used for the development of mining projects, subject to the consent of the corresponding landowners, provided that an agreement is reached with them.

However, acquisition by mining concessionaires of the property rights over the lands subject to mining concession agreements is not necessary for the initiation or continuance of a mining project, considering that the Mining Code provides for legal — mandatory — easements to be declared over any lands whenever deemed necessary for the performance of any activities associated with either of the stages composing the mining activity. As a result, the process required to “formalize” easements over lands involved in a mining project does not seek to decide whether the easement may or may not be imposed because it can be alleged that such easement already exists, by mandate of the Mining Code. Therefore, such process merely seeks to

# Colombia

declare the existence of an already constituted easement, fix the amount that, in any case, shall be paid by the mining concessionaire to the landowner affected by the easement, as compensation for the damages caused, and determine whether any guarantee or bond shall be required to cover any possible liabilities. The recent National Development Plan, enacted by Law 1955, 2019, introduced a change for imposing easements and rights of way for the mining industry by assimilating such procedure to that used in the oil & gas sector. This change, which enables the mining industry to apply the procedure set forth in Law 1274, 2011, will make the imposition of easements and rights of way much more expeditious and grant certainty over land use for mineral rights holders.

In the event that easements are not enough to allow mining projects to be undertaken in their entirety, expropriation is the ultimate resource foreseen in the Mining Code. The expropriation measure is taken through the course of a dual process, consisting of an administrative stage followed by a judicial procedure. As indicated regarding easements, expropriation also entails payment, by the concessionaire, of a just compensation to the landowner for the damages caused.

Both the easement and expropriation measures may be imposed within or outside the areas subject to the corresponding Mining Titles, as well as over other mining titles.

## 8.5 Obligations of holder

During the exploration stage of a mining concession, the holders are subject to compliance with the following obligations:

Stage	Obligations			
Exploration	(a)	Comply with the exploration terms contained in the terms of reference issued by the Ministry of Mines and Energy;		
	(b)	Comply with the Mining-Environmental Guidelines issued by the Ministry of Environment and Sustainable Development;		
	(c)	Request to the Ministry of Environment and Sustainable Development the subtraction of any portion of the requested area that overlaps with forest reserves created by any laws in force;		
	(d)	Constitute and preserve a mining-environmental insurance policy guaranteeing the performance of its obligations under the concession agreement, including those related to environmental and mining obligations, as well as those pertaining to the payment of fines and caducity for an amount equivalent to 5% of the amount of the investment provided for the exploration works;		
	(e)	Pay a surface fee ( <i>canon superficialio</i> ) to ANM, calculated pursuant to the following criteria:		
		Number of hectares	0 to 5 years	More than 5* to 8 years
			Daily minimum legal wages per hectare	Daily minimum legal wages per hectare
		0–150	0.5	0.75
				More than 8* to 11 years
				Daily minimum legal wages per hectare
				1.0

# Colombia

Stage	Obligations			
	151– 5,000	0.75	1.25	2.0
	5,001– 10,000	1.0	1.75	2.0
	* Upon expiration of the year plus one day (5 years + 1 day, 8 years + 1 day)			
	The surface fee will be paid taking into account the area of the concession;			
	(f) Fill out and file with ANM the basic mining forms ( <i>Formatos Básicos Mineros</i> (FBM)) aimed at reporting technical information. These are presented upon the expiration of the first semester of the year and at the end of the corresponding year;			
	(g) File a work plan ( <i>Programa de Trabajos y Obras</i> , “ <b>Work Plan</b> ”) with ANM at least 30 days prior to the expiration of the exploration stage. The Work Plan is the roadmap of the mining project and may also be objected to, or commented on, by ANM on the grounds of a substantial breach of any legal or technical obligations of concessionaires concerning the matter; and			
	(h) File an environmental impact study (EIA) with the competent environmental authority to enable the commencement of activities corresponding to the construction and assembly stage, once the term of the exploration stage elapses.			

## 9 Holding tenements

Under the mining legislation currently in force, the only possible mining licensing scheme includes all of the activities that compose mining operations in general, from exploration to production. Therefore, a “transitory” scheme, such as holding tenements existing in other jurisdictions, is not applicable in Colombia. In any case, the exploration stage of a mining concession agreement can be extended for up to 11 years to allow the concessionaire to conduct the studies required to identify the existing resources and reserves of minerals to be further exploited.

## 10 Development/production stages

See “Exploration Stage,” from “Scope” to “Relationship with landowners – Exploration and production.”

## 10.1 Obligations of holder – Construction and assembly/exploitation<sup>2</sup>

During the construction and assembly and exploitation stages of a mining concession, the holders are subject to compliance with the following obligations:

Stage	Obligations
Construction and assembly	<ul style="list-style-type: none"> <li>(a) Undertake the construction and assembly works foreseen in the Work Plan, pursuant to the specifications contained therein;</li> <li>(b) Obtain and preserve an environmental license and any other environmental permit as required, depending on the characteristics of the project and based on the EIA presented during the exploration stage;</li> <li>(c) Preserve the mining-environmental insurance policy, first obtained during the exploration stage, in an amount equivalent to 5% of the investment projected for the construction and assembly stage;</li> <li>(d) Pay a surface fee (<i>canon superficiario</i>) to ANM, in the amount referred to above regarding the exploration stage; and</li> <li>(e) Fill out and file with ANM the FBM in the manner explained regarding the exploration stage.</li> </ul>
Exploitation	<ul style="list-style-type: none"> <li>(a) Maintain the environmental license that must be obtained during the construction and assembly stage as explained above, and maintain or obtain any other environmental permit that may be required, depending on the characteristics of the project;</li> <li>(b) Undertake all exploitation activities foreseen in the Work Plan approved by ANM;</li> <li>(c) Preserve the mining-environmental insurance policy, first obtained during the exploration stage, in an amount equivalent to 10% of the annual production volume at the mine mouth price of the minerals, fixed quarterly by the government (<i>Unidad de Planeación Minero Energética</i> (UPME));</li> <li>(d) Take and maintain all necessary measures to preserve the safety and integrity of all individuals working in locations/facilities associated with the mining project, in accordance with Colombian hygiene and occupational health norms;</li> <li>(e) Keep detailed registries of the mineral production at the mine mouth and assemblage places (<i>sitio de acopio</i>) using the forms designed by the Ministry of Mines and Energy for such purposes;</li> </ul>

<sup>2</sup> The terms “construction and assembly” and “exploitation” (as used in Colombian legislation) are synonymous with “development” and “production” respectively.

Stage	Obligations
	<p>(f) Take all measures and follow any rules, methods and/or technical procedures required to avoid causing damage to the exploited minerals, or the deterioration or sterilization of in situ reserves that may be exploited in the future;</p> <p>(g) File with ANM the forms related to the effectively exploited minerals and subsequently pay the amounts corresponding to the applicable royalties, observing the percentages and rules foreseen in applicable laws (mainly, Law 141 of 1994);</p> <p>(h) Pay any and all applicable taxes, fees and levies foreseen in regulations complementary to the Mining Code;</p> <p>(i) To the extent that the exploitation is initiated in an anticipated manner during the exploration or construction and assembly stages (and only over a certain portion of the total area granted through the mining concession), continue to pay the surface fee regarding the area at which exploitation is not initiated, following the rules foreseen above (regarding exploration and construction and assembly); and</p> <p>(j) Fill out and file with ANM the FBM, in the manner explained regarding the exploration stage.</p>

## 11 Assignment of and security over tenements

### 11.1 Assignment

Duly granted mining concessions can also be acquired by means of a transfer or an assignment of the concession agreement. Such an assignment process is carried before ANM, which has the right to grant or deny such transfer. The National Development Plan 2018–2022, adopted by Law 1955, 2019, has simplified the mining concessions transfer process to allow more favorable terms for the concession holders by reducing the times and requirements for said transfers.

Mining concessions can be assigned or transferred to third parties so long as:

- (a) The third party acquiring the mining concession demonstrates the legal, financial and technical capacities provided in Resolution 352, 2018; and
- (b) The parties involved in the transfer submit a copy of the assignment agreement (or the corresponding acquisition agreement) to ANM.

The ANM is granted a 30 day period to decide upon the request for the transfer of a mining concession. The concession holder does not have to be compliant with its obligations to perfect the transfer of the mining concession and the acquirer of such mining concession receives the mining concession as-is (e.g., in default, breach, etc.), thus assuming all obligations with ANM.



## 11.2 Security

In Colombia, the granting of a security (lien) over a mining concession requires its registration at a certain general registry where liens over movable property in general are registered (*Registro Nacional de Garantías Mobiliarias*). Security over mining concessions can be secured by imposing pledges over (1) mining concessions; and/or (2) future production derived from a mining concession. Additionally, mining facilities incorporated on the land (i.e., non-movable property) used for the mining concessions can also be subject to mortgages as part of a security package for investors, or providers of debt or equity.

## 12 Royalties

Pursuant to Articles 58, 332 and 360 of the Political Constitution, the exploitation of non-renewable natural resources subject to state ownership generate royalties as a compulsory consideration. Royalties correspond to a certain percentage, fixed or progressive, calculated over the exploited gross production of minerals associated with Mining Titles (and their sub-products), calculated or measured at the mine mouths, payable in currency or in kind. The funds corresponding to the royalties are to be collected and distributed pursuant to the provisions contained in Law 141, 1994.

The following chart sets forth the percentages applied for the calculation of the royalties that are payable regarding each mineral:

Mineral	Percentage payable as royalty (%)
Coal > 3 million tons per year	10
Coal < 3 million tons per year	5
Nickel	12
Iron and copper	5
Gold and silver	4
Alluvium gold	6
Platinum	5
Salt	12
Limestone, plaster, clay and gravel	1
Radioactive minerals	10
Metallic minerals	5
Non-metallic minerals	3
Construction materials	1
Emeralds and other gemstones	1.5
Other minerals	3

# Colombia

Currently, there are no payments of kind for royalties because ANM does not have the capability to receive payments in kind. Hence, all royalty payments must be made in money, on a quarterly basis, as per the reported production in each quarter. The base price for calculating royalties is determined by the National Energy and Mining Planning Unit (UPME) for each quarter.

## 13 Mineral reporting and classification

Colombian mining legislation does not refer to any mandatory system for the classification of resource and reserves estimates (such as the JORC code or NI 43-101 rule).

Although mining concessionaires are not obligated to report information on the estimated resources and reserves that they identify during their exploration activities, the recently enacted National Development Plan (Law 1955, 2019) has made mandatory the obligation to all concessionaires to submit, with the corresponding Mine Plan (*Programa de Trabajos y Obras*), a resource and reserve estimate, per the guidelines adopted by CRIRSCO. Hence, a mining concessionaire can adopt the mineral resources and reserves estimate by using any CRIRSCO approved reporting standard.

Additionally, by means of Resolution 143, 2017 (modified by Resolution 299, 2018), the Colombian Government adopted the Colombian Code for Reserves and Resources (CCRRR) that is compliant and certified by CRIRSCO. On 24 May 2018, Colombia became one of the 12 countries that are members of CRIRSCO and adopted resource and reserves codes.

## 14 Other key issues

### 14.1 Registration requirements related to the commercialization of minerals

Pursuant to Law 1450, 2011 (former National Development Plan for 2010–2014) and Decree 276 of 2015, a special registry was created for commercializers of minerals to be registered (*Registro Único de Comercializadores de Minerales* (RUCOM)) as a requirement to undertake the purchase and sale of minerals, with the intention being that public authorities may control the commercialization of minerals in Colombia. The entity in charge of the administration of RUCOM is ANM and one of its new functions is the issuance of certificates accrediting that individuals/entities registered with RUCOM are in fact registered.

The main obligations of commercializers regarding RUCOM is to obtain and present to the competent authorities the corresponding certificates of origin of the minerals commercialized, which are issued by authorized mining facilities and contain specific information relating to the origin, amount and other characteristics of the minerals, the basic identification data of the commercializer to which the minerals are sold, etc.

Although there are certain individuals and entities exempted from the obligation to register with RUCOM, generally, all individuals and entities engaged in the commercialization of minerals in Colombia must register with RUCOM.

Whenever the lawful origin of minerals cannot be certified due to a lack of the required certificates of origin and registration of the commercializing parties with RUCOM, the National Police may seize and confiscate the minerals with the help of the mayor of the corresponding municipality. Furthermore (and without prejudice to subsequent criminal and administrative procedures), the National Police may inform ANM that the origins of the minerals were not properly certified so that ANM may impose the corresponding fines to the commercializers.

# Colombia

## 14.2 Adoption of the mining grid and the Integrated Mining Management System

Colombia is in the final stages of adopting an Integrated Mining Management System for the mining sector. This new system will be electronic and will be able to provide live feedback to responses, transfers, queries and petitions. ANM says that the new system should reduce processing times by more than 83% and grant users a more reliable information system. Accordingly, with the launch of this new system, ANM will adopt a mining grid with regular square-shaped grids with a size of 1.2 hectares each. This should also assist ANM in determining free areas and overlaps, amongst others. These new measures will be adopted in October 2019.

## 15 Useful Websites

Ministry of Mines and Energy	<a href="https://www.minminas.gov.co/inicio">https://www.minminas.gov.co/inicio</a>
National Mining Agency	<a href="https://www.anm.gov.co/">https://www.anm.gov.co/</a>
Mining and Energy Planning Agency (UPME)	<a href="http://www1.upme.gov.co/">http://www1.upme.gov.co/</a>
National Agency for Environmental Licensing (ANLA)	<a href="http://www.anla.gov.co/">http://www.anla.gov.co/</a>
Ministry of the Interior	<a href="http://www.mininterior.gov.co/">http://www.mininterior.gov.co/</a>
Colombian Standard for Reserves and Resources	<a href="https://comisioncolombianarecursosyreservas.com/">https://comisioncolombianarecursosyreservas.com/</a>

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# Indonesia

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	Yes
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate to surface rights
Environmental protection regulation	Moderate
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically three to eight years, with extensions
Mining license	Typically 20 years, with extensions
Able to use tenement as security	No
Royalty payable to government	Yes. Amount depends on commodity
Classification system used	KCMI

## 1 Summary

Indonesia has significant coal and mineral deposits, with the majority of Indonesia's mining exports being thermal coal. Indonesia's close proximity to the large energy-consumption nations of China, India, Japan and Korea, coupled with low-cost production, have resulted in Indonesia being ranked as one of the world's largest exporters of thermal coal. However, this attractiveness is tempered to some degree by Indonesia's regulatory regime.

The investment climate in the mining sector has been challenging due to a major regulatory overhaul which commenced in 2009 with the passing of a new Mining Law to replace its 1967 predecessor. Since the passing of this general framework law by the Indonesian Parliament in January 2009, the Indonesian government has, over the last ten years, continued to develop the detail of the new mining regulatory regime, and continues to issue new regulations to implement the Mining Law. This has had the inevitable effect of causing uncertainty for investors. However, as things currently stand, the vast majority of implementing regulations have been issued, and the focus around regulatory uncertainty has now shifted to the government's repeated practice of amending and replacing some of these implementing regulations to enact developing policy considerations, despite their relatively short life.

# Indonesia

Indonesia, like a number of other jurisdictions around the world, is struggling to draw the correct balance in respect of the interests of mining companies vis-à-vis the interests of the Indonesian government and State. Obligations on mining companies to supply the domestic market, requirements for carrying out value-adding processing in Indonesia prior to exporting the relevant mining commodities, requirements for export proceeds to be repatriated back to Indonesia and for foreign investors to divest majority control of their mining operations, are all parts of a general trend - in common with other resource-rich jurisdictions around the world - towards "resources nationalism". How the Indonesian government draws this final balance will have a major impact on Indonesia's ability to attract the foreign capital necessary to enable Indonesia to fully and sustainably exploit its natural resource wealth.

## 2 Legal framework for mining

Indonesia has a civil law system inherited from Dutch colonial law. Contract law in Indonesia is governed by the Indonesian Civil Code, which derives from the 19th century Dutch Civil Code which, in turn, derives from the French Civil Code. Since the end of the colonial period, most pre-existing Dutch colonial regulations (including some parts of the Civil Code) have been replaced by new Indonesian legislation.

Mining is regulated under Law No. 4 of 2009 on Mineral and Coal Mining ("Mining Law"). The Mining Law replaced the previous law on mining, which had been in place since 1967. The current Mining Law sets out general requirements but leaves large aspects to further implementing Government Regulations and Ministerial Regulations. These have been progressively issued since the introduction of the Mining Law.

Mining rights take two main forms in Indonesia:

- (a) "IUPs" (Izin Usaha Pertambangan – Mining Business Licences), which are in the form of a license with a set of standard license conditions (about five pages long); and
- (b) "Contracts of Work", issued under the 1967 mining law, which are in the form of an agreement between the government of the Republic of Indonesia and an Indonesia-incorporated mining company. A Contract of Work sets contractual requirements for each stage of the mining project from general survey to production, and also provides for other matters such as taxation. From the introduction of the current Mining Law, no more Contracts of Work will be issued. Contracts of Work have traditionally been used for large mining projects often with foreign ownership.

Companies incorporated in foreign countries cannot hold an IUP or a Contract of Work directly. An Indonesia-incorporated company is needed to hold the IUP or Contract of Work. Foreign companies can hold shares in these Indonesia-incorporated companies but subject to the foreign ownership restrictions discussed below. Under the Mining Laws and regulations, IUPs are issued by various levels of government based on the following rules (simplified somewhat here):

- (a) If the IUP is to be issued to a company with foreign ownership, it will be issued by the Central Government (the Director General of Minerals and Coal on behalf of the Minister of Energy and Mineral Resources). However, as of 12 August 2015, the authority to issue an IUP has been delegated to the Head of the Capital Investment Coordination Board (known by its Indonesian acronym as the **BKPM**).
- (b) In all other cases:
  - (i) if the IUP area is within one regency (Local Government area), the IUP will be issued by the regent (the head of the Local Government);

# Indonesia

- (ii) if the IUP area overlaps regencies, the IUP will be issued by the governor of the province; and
- (iii) if the IUP area overlaps provinces, the IUP will be issued by the Central Government.

The reason why IUPs are issued at several levels of government is due to Indonesia's Regional Autonomy laws, which have the aim of giving regions more control over the wealth generated in their own regions.

Notwithstanding the provisions in the Mining Law about authority to issue IUPs, the 2014 Indonesian Regional Government Law has the effect that the regent is no longer entitled to issue IUPs, and as a result, if an IUP area is within one regency (Local Government area), the IUP will be issued by the governor of the province.

The Central Government has supervisory powers under the Mining Law and actively exercises these. In essence, bureaucratic processing and evaluation of applications and compliance requirements under IUPs are done at the regional or provincial level. However, the rules and directions which govern compliance are set at the Central Government level.

Historically, Contracts of Work were all issued by the Central Government.

Prior to the issuance of an exploration IUP for ferrous minerals and coal over a new area, a tender must be conducted.

The Mining Law also provides for "specific" IUPs that can be issued to companies wishing to undertake processing or transport and sales of minerals or coal but not having a mine. In addition, the Mining Law creates other types of mining rights - such as "People's Mining Rights" - which are designed for small-scale (community) mining operations. These other types of rights are beyond the scope of this chapter.

Indonesia only has one Mining Law which governs all mining (but not oil gas or geothermal) activities. Under the Mining Law, a distinction is drawn between different minerals and coal; for example, in relation to the minimum and maximum size of concessions, or in relation to the term of concessions. A further separate regime applies for radioactive materials.

The table below sets out the concession sizes and periods for IUPs for various minerals and coal.

	Phases	Ferrous Minerals	Non-Ferrous Minerals	Rocks	Coal
Exploration IUP	General survey	Granted by tender	Granted by application	Granted by application	Granted by tender
	Exploration	Term (in aggregate for all phases): eight years max	Term (in aggregate for all phases): three years or seven years for certain kinds of minerals	Term (in aggregate for all phases): three years max	Term (in aggregate for all phases): seven years maximum
	Feasibility study	Initially 5,000* hectares to	Initially 500 hectares to	Initially, 5 hectares to 5,000 hectares	Initially 5,000* hectares to

# Indonesia

	Phases	Ferrous Minerals	Non-Ferrous Minerals	Rocks	Coal
		100,000 hectares	25,000 hectares		50,000 hectares
		Required to relinquish so that max area is 50,000 hectares in the 4th year	Required to relinquish so that max area in 2nd year is 12,500 hectares (or in 3rd year for certain kinds of minerals)	Required to relinquish so that max area in 2nd year is 2,500 hectares	Required to relinquish so that max area is 25,000 hectares in the 4th year
<b>Production Operation IUP</b>	Construction	Up to 20 years initially	Up to ten years or 20 years for certain kinds of minerals initially	Up to five years initially	Up to 20 years initially
	Mining	+ 10 years (extension 1)	+ 5 years or 10 years for certain kinds of minerals (extension 1)	+ 5 years (extension 1)	+ 10 years (extension 1)
	Processing and refining	+ 10 years (extension 2)	+ 5 years or 10 years for certain kinds of minerals (extension 2)	+ 5 years (extension 2)	+ 10 years (extension 2)
	Transportation and sales	Size: 25,000 hectares max	Size: 5,000 hectares max	Size: 1,000 hectares max	Size: 15,000 hectares max
	<b>Maximum Project Life</b>	48 years	23 years or 47 years	18 years	47 years

\*Note: Constitutional Court decisions handed down in June 2010 have revoked the provisions of the Mining Law that declare a minimum size of 5,000 hectares for ferrous minerals and coal IUPs. Consequently, there is no longer any minimum size.

Oil and gas activities are regulated under separate laws and regulations, under separate regulators, although both the mining and oil and gas sectors fall under the ultimate authority of the Ministry of Energy and Mineral Resources.



# Indonesia

## 3 Restrictions on foreign investment

Foreign shareholders in Indonesian mining companies holding IUPs may initially own 100% of the shares but must progressively divest shares to Indonesians (or Indonesian-owned entities) from the end of the fifth year of production, moving from a maximum foreign ownership of 80% in the sixth year of production to a maximum of 49% in the 10th year of production.

The shares are required to be offered to the government and government-owned entities ahead of Indonesian private entities at "market value" by using a discounted cash flow method and/or market data benchmarking method but this is currently defined not to include the value of the reserves (we assume, beyond the life of the concession). If the foreigners divest to wholly Indonesian owned entities prior to the time the relevant divestment requirement applies, they may choose who to divest to as the requirement to divest to the Government / State owned entities will not yet apply.

Another additional layer of foreign ownership restrictions that has been imposed from September 2013 is that where there is a change in shareholding of an IUP company, or an IUP company converts its status from a domestic investment company to a foreign investment company (due to foreigners acquiring shares in the IUP Company), the Ministry of Energy and Mineral Resources imposes a 75% foreign ownership cap for Exploration IUPs, and a 49% foreign ownership cap for Production Operation IUPs (irrespective of how many years the mine has been in production). This means that a foreign investor that does not already hold shares in an IUP company will be limited from the time it obtains shares to a maximum of 75% if the company holds an Exploration IUP or 49% if the company holds a Production Operation IUP. For Contract of Work holders, the foreign divestment requirements are specified in the terms of the contract and vary considerably between Contracts of Work issued at different times. A regulation enacted by the government on 14 October 2014 sought to apply the divestment provisions that apply to IUPs to Contracts of Work, with divestment to 20% Indonesian shareholding being required within one year of the regulation being issued and thereafter, an obligation to follow the same requirements as apply to IUPs after five years. Further implementing regulations issued by the Minister of Energy and Mineral Resources on 20 January 2017 sought to apply the same staging divestment requirements that apply to IUPs (as discussed above) to Contract of Work. There is currently uncertainty as to whether these provisions will be complied with as they conflict with (i) the divestment provisions stated in the Contracts of Work; and (ii) each other; the 2014 government regulation, under the Indonesia legal system hierarchy, ranks higher than the regulation, and the provisions provided in it should not be superseded by or changed based on a lower regulation (i.e., the 2017 regulation).

## 4 Government or local participation requirements

Government and/or local participation is governed under the divestment requirement described in section 3 above, through the obligation to offer the divestiture shares to the government and government-owned entities prior to offering them to Indonesian private entities.

## 5 Land tenure and priority

Under Indonesia's constitution, the land, water and natural resources of Indonesia are required to be under the control of the State and are to be used to the greatest benefit of the Indonesian people. There are varying interpretations of what control of the State should involve. The State is the ultimate owner of minerals and coal. Land titles (as opposed to mining rights) do not give the holders of the land any rights to minerals or coal located on or under the land.

# Indonesia

Conflicts in land usage are required to be resolved prior to mining commencing. Consequently, holders of land titles (or unregistered indigenous rights over land) effectively have priority over mining (as discussed below).

## 6 Indigenous or local community rights

Indonesia has a system of registered land titles and a system of traditional unregistered land ownership. A mining concession is not a land title and does not remove the rights of those who have land titles or traditional ownership over land (the mining concession and the land titles co-exist). A mining company must negotiate and reach compensation agreements with local landowners in relation to the disruption of their enjoyment of the surface rights to the land (compensate for lost crops, for example). This can be done progressively as various areas of land are needed for mining activities or facilities within the mining concession area. It is not necessary for the mining company to actually purchase the titles to the land, although sometimes a mining company may do this for strategic reasons.

Other types of rights and concessions can also co-exist over the same land area as a mining concession, including (among others) oil and gas concessions, geothermal concessions, timber concessions and plantations. Before a mining company can utilize an area of land that is subject to an overlap with another concession, a mining company needs to reach agreement with any overlapping concession holders as to the usage of the land. There are no defined rules as to who has priority in the event of a dispute. However, the government will play a coordinating role and may have a preference based on prevailing policies.

Holders of IUPs are required to formulate plans for the development and empowerment of communities around the IUP area in consultation with the Local Government and local communities. These plans are submitted each year to the issuer of the IUP as part of the IUP holder's work plan and budget. The plans must be implemented and paid for by the holder of the IUP. IUP holders are also required to report on their progress in achieving the requirements of these plans. These plans often include things such as building (or contributing to) schools, roads and medical clinics.

## 7 Environmental protection and rehabilitation obligations

A Production Operation IUP cannot be granted unless an Environmental Impact Assessment (known as an **AMDAL**) or a less onerous Environmental Management Effort/Environmental Monitoring Effort (known as **UKL-UPL**) has been completed and approved by the government, and an environmental permit has been obtained. Whether a mine requires an AMDAL or a UKL-UPL depends on the size of the mining project. The AMDAL includes an ongoing monitoring and reporting plan which also needs to be complied with.

There are a variety of smaller licences that are also needed for particular activities. The following are the typical environmental licences that may be needed:

- (a) a license to use groundwater;
- (b) a license to use surface water;
- (c) a license to dispose of wastewater to water courses;
- (d) a license to operate wastewater treatment facilities; and
- (e) a license to dispose of hazardous and toxic waste.

It is a condition under a Production Operation IUP and the related regulations that the mining company deposits a "mine closure guarantee" and a "reclamation guarantee" with the government prior to

# Indonesia

commencing any production activities. The amount of the deposit is determined by the government as part of the review of the reclamation and post-mining plan submitted with the application for the Production Operation IUP. At the end of a mining project, the mining company must perform reclamation on the affected land, to restore the land to a natural state. A reclamation guarantee is also required for reclaiming land damaged by exploration activities.

In order to conduct any activities in a forest area, a license from the Ministry of Forestry known as a "Borrow and Use" license (in Indonesian, an "Izin Pinjam Pakai Kawasan Hutan - IPPKH") is required. The concept is that in some areas of Indonesia where there is insufficient forest cover, in addition to reforesting the land used for mining activities when completed, additional land must also be provided and reforested by the mining company prior to mining activities being conducted. In other areas, where there is sufficient forest cover, only an additional government levy is paid. There are numerous requirements in relation to obtaining a "Borrow and Use" license. Open-cut mining is prohibited in areas of forest designated as "Protected Forest" (most of the coal mining in Indonesia is open-cut) so a "Borrow and Use" license cannot be obtained for these areas. There was also a two-year moratorium on the issuance of "Borrow and Use" licences in certain areas of "peat land" and "primary natural forest" which was initially due to end on 13 May 2015, but has since been extended to 17 July 2019. At the time of writing, although no formal direction has been issued yet confirming the current moratorium status, we understand that the Government is in the process of issuing a further direction to extend the moratorium for an indefinite period.

## 8 Exploration licenses

### 8.1 Scope

There are two forms of IUPs: an IUP for Exploration and an IUP for Production Operation.

The IUP for Exploration covers the phases of General Survey, Exploration and Feasibility Study.

### 8.2 Duration

The maximum term of an Exploration IUP will be between three and eight years depending on the mining commodity in question (see the table in section 2 above). An Exploration IUP has only one term and cannot be renewed. If exploration is not completed during the term of the Exploration IUP, the mining company will need to seek a new Exploration IUP (which will involve a tender process if it relates to ferrous minerals or coal).

The initial maximum exploration area also depends on the mining commodity (see the table in section 2). The maximum area for a Production Operation IUP is smaller than for an Exploration IUP so there may need to be relinquishment of areas that are not needed (depending on the size of the Exploration IUP) when moving to a Production Operation IUP. An IUP holder can also voluntarily relinquish an area that is not needed.

Holders of Exploration IUPs are required to pay "dead rent" to the government, which is a flat fee per hectare covered by the IUP.

### 8.3 Steps to acquire an exploration right

Under the Mining Law and its implementing regulations, the process for awarding new acreage is either by grant or by tender, depending on the mineral commodities involved. New IUPs for ferrous minerals and coal require a tender process. The regulation on the tender process issued in 2018 provides the required time-frames for almost every phase of the tender process, which mainly consist of : announcement of the

proposed tender; pre-qualification announcement; determination of qualified tender participant; and determination of tender winner. In determining the winner of the tender, the weighting applied is 70% for the evaluation of the pre-qualification materials, and 30% for the financial bid.

IUPs for non-metallic minerals and rocks (for example, for quarries) do not require a tender, and can be directly granted to interested investors.

## 8.4 Relationship with landowners

A mining tenement does not include surface land titles and does not constitute ownership of land titles. Holders of an Exploration IUP may perform their activities upon approval of land titleholders. Prior to the performance of production operation activities, the license holder must settle land titles (provide compensation for disruption of surface rights) with land titleholders, which settlement may be conducted in stages.

## 8.5 Obligations of the holder

Exploration IUP holders are required to deposit a “seriousness guarantee” of IDR 150,000 (approximately USD 10) per hectare of area covered under the relevant Exploration IUP in a government bank appointed by the issuer of the IUP. Holders of IUPs are also required to submit annual work plans and budgets to the issuer of the IUP and to provide quarterly reports on their activities conducted in accordance with the annual work plans and budgets.

The more significant license conditions under an Exploration IUP are, among others, to:

- (a) deposit the “seriousness guarantee” mentioned above;
- (b) submit an annual work plan and budget;
- (c) submit quarterly activity reports;
- (d) submit a plan for community development and empowerment and report on it;
- (e) pay dead rent;
- (f) prepare their AMDAL or UKL-UPL;
- (g) prepare and eventually submit a feasibility study (for progressing to the production operation stage);
- (h) fulfil the divestment requirement described in section 3 above;
- (i) prepare a reclamation and mine-closure plan based on feasibility documents;
- (j) prioritize the use of local manpower and domestic goods and services;
- (k) prioritize the use of local and Indonesian-owned mining services providers;
- (l) submit exploration data, including exploration activity reports, to the government;
- (m) compensate holders of land titles who have had their use of the land disturbed;
- (n) prepare plans for domestic processing and refining;
- (o) relinquish areas of the IUP area which are not needed; and

# Indonesia

- (p) apply good mining norms.

## 9 Holding tenements

Indonesian law does not provide for holding tenements to bridge the gap between when exploration is finished and development starts.

The holder of an Exploration IUP must apply to upgrade to a Production Operation IUP prior to expiry of the Exploration IUP.

## 10 Development/production tenements

### 10.1 Scope

When the mining company has completed its exploration activities, feasibility study and AMDAL or UKL-UPL, it applies for a Production Operation IUP. A Production Operation IUP covers the phases of construction and mining, and also allows the holder to undertake processing and transportation and sales of the minerals or coal produced. An Exploration IUP holder is guaranteed to receive a Production Operation IUP, provided that it has complied with the terms of the Exploration IUP and has applied correctly for the Production Operation IUP during the relevant period prior to the expiry of the Exploration IUP.

### 10.2 Duration

The term and area available for Production Operation IUPs are set out in the table in section 2. Two extensions to the initial term of a Production Operation IUP are available (but may be rejected if the IUP holder has failed to perform properly). Each extension for IUP for non-ferrous minerals must be applied for at least six months (but not more than two years) before the end of the current period of the relevant IUP; the extension for an IUP for ferrous minerals must be applied for at least 12 months (but not more than five years) before the end of the current period of the relevant IUP.

### 10.3 Transition from exploration/holding right to mining right

The holder of an Exploration IUP must apply to upgrade to a Production Operation IUP prior to expiry of the Exploration IUP.

### 10.4 Steps to acquire a right

The holder of an Exploration IUP that wishes to obtain a Production Operation IUP must apply for a Production Operation IUP at least three months prior to the expiry of the Exploration IUP. The holder is "guaranteed" to receive a Production Operation IUP provided that its application conforms, and it has complied with the terms of the Exploration IUP. A number of documents are required to be submitted at the time of the application, including:

- (a) a map containing the boundaries and coordinates of the area in question (produced to the government's standards);
- (b) a complete exploration report;
- (c) the feasibility study for development of the mine;
- (d) the reclamation and post-mining plan in respect of the mine;

- (e) the proposed work program and budget; and
- (f) details of the availability of mining specialists and geologists having at least three years' experience

The AMDAL or UKL-UPL must be completed and approved by the government prior to the application. There is no legislated time-frame during which a Production Operation IUP must be issued. However, because the application must be submitted at least three months prior to the expiry of the Exploration IUP, the concept is that the Production Operation IUP should be issued before the Exploration IUP expires (i.e., within three months). In many cases, a Production Operation IUP is applied for considerably before the end of the Exploration IUP as exploration activities have already been completed.

## 10.5 Relationship with landowners

A mining tenement does not include surface land titles and does not constitute ownership of land titles. Holders of a Production Operation IUP may perform their activities upon approval of land titleholders. Prior to the performance of production operation activities, the license holder must settle land titles (provide compensation for disruption of surface rights) with land titleholders. Such settlement may be conducted in stages.

## 10.6 Obligations of the holder

The more significant license conditions under a Production Operation IUP are to:

- (a) deposit mine closure and reclamation guarantee monies;
- (b) submit an annual work plan and budget;
- (c) submit quarterly activity reports;
- (d) submit production reports;
- (e) submit a plan for community development and empowerment and report on it;
- (f) pay dead rent and royalties;
- (g) prioritize the use of local manpower and domestic goods and services;
- (h) prioritize the use of local and Indonesian-owned mining services providers;
- (i) submit geological data to the government;
- (j) compensate holders of land titles who have had their use of the land disturbed;
- (k) obtain approval for long-term sales contracts (three years or more);
- (l) perform processing domestically;
- (m) construct the necessary mining facilities; and
- (n) apply good mining norms.

# Indonesia

## 11 Assignment of and security over tenements

### 11.1 Assignment

The Mining Law and regulations do not recognize the concept of assignment of IUPs. IUPs are generally not transferable (although this is now not entirely clear due to regulatory changes that appear to permit an IUP company to transfer its IUP to a subsidiary or a third party subject to prior approval from the issuer of the relevant IUP). If an investor wishes to invest in a mining project conducted under an existing IUP, it would typically buy shares in the mining company holding the IUP or invest by way of financing or other contractual means. For an investor to buy shares in a mining company holding an IUP, the approval of the Minister of Energy and Mineral Resources is required subject to the recommendation of the Directorate General of Mineral and Coal. In this connection, the regulation says that the approval will be issued within 14 working days after a complete and correct set of applications is received, but in our experience, we have seen this process take more than 12 months. In addition, a separate recommendation letter from the relevant issuer of the IUP (i.e., the Governor) is also required prior to the Minister of Energy and Mineral Resources issuing the relevant approval.

Note that the Minister of Energy and Mineral Resources also does not want to see foreign owners based in offshore tax heaven jurisdictions. It will also want tax ID numbers for all shareholders and directors. For this purpose, the Minister of Energy and Mineral Resources requires the relevant application document to be supported by a document setting out the "beneficial owner" of that corporation, i.e., an individual who may appoint or dismiss the members of the board of directors, members of the board of commissioners, managers, officers or supervisors in a corporation, has the ability to control a corporation, is entitled to and/or receives benefits from the corporation, whether directly or indirectly, and is the true owner of the company's funds or shares.

### 11.2 Security

IUPs are considered as rights *in personam* (as opposed to right *in rem*) and therefore cannot be used as security.

## 12 Royalties

Holders of Production Operation IUPs are required to pay a royalty which is a percentage of the sales price. The royalty amount depends on the type of mineral or coal and other factors (for example, for coal different royalties apply to different calorific values). Indonesia has a benchmark pricing system for coal (based on a number of indexes) and the royalty on the sale price will be calculated based on the higher of the sales price and the applicable benchmark price.

## 13 Mineral reporting and classification

In preparing an exploration report and resource and reserve estimates, mining companies must observe the Indonesian Mineral Reserve Committee Code (**KCMI Code**), which is a set of guidelines on the minimum standards that need to be observed, and the Indonesian National Standard for mineral and coal resources and reserves report. The Directorate General of Coal Regulation No. 569.k/30/DJB/2015 requires the reports on exploration, resources estimates, and coal and mineral estimate reserves to be prepared and signed by a competent person. For further information, see the KCMI's website at <http://www.kcmi.or.id/>.



## 14 Other key issues

### 14.1 Usual structure of venture

As IUPs are not readily transferable, the normal way to invest in an Indonesian mining project is to take shares in the company holding the IUP and then regulate the relationship of the investors as an incorporated joint venture. Often, there is a shareholders' agreement and a suite of other relevant agreements, such as loan facility agreements and offtake contracts. Sometimes, the joint venture aspects are implemented by the investor taking shares in an offshore holding company. Singapore is a popular jurisdiction in this regard as it has a double-tax treaty with Indonesia, is quite proximate, uses a Common Law legal system and has a good history of resolving commercial disputes.

In the past, it was common for large aspects of mining projects to be contracted out to mining services providers (contract miners) and this was also used as a form of investment. This situation changed after the introduction of the current Mining Law and the introduction of regulations that prohibit a mining services provider from removing ore from the mine (as opposed to overburden, which is allowed). The mining services regulations also require mining companies to give preference to Indonesian-owned mining services companies.

### 14.2 Taxes

The main financial obligations of a mining company to the government (in addition to paying the usual corporate tax, withholding taxes and VAT) are to pay dead rent (a flat fee based on the amount of land area covered by the IUP or Contract of Work) and royalties on the sale of minerals or coal. The royalty rates depend on the mineral (or coal) involved and are set for IUPs in a Government Regulation. For Contracts of Work, the rates for dead rent and royalties are expressly set out in the Contract of Work. In January 2017, the Ministry of Finance changed the rate of export duty applicable to certain mineral concentrates. This now ranges from 5% to 0% (the reduction in the rate being linked to the progress of the mining company in constructing domestic refining facilities).

On 1 March 2017, the Ministry of Finance issued a regulation imposing 1.5% income tax on export value of several mineral commodities including coal.

### 14.3 Overlapping tenements

Due to various historical factors, there have been numerous instances where IUPs have been found to overlap with IUPs issued to other parties for the same mineral or coal. There were also some issues with conversion of pre-existing mining licences, known as *kuasa pertambangan*, to IUPs after the enactment of the Mining Law in 2009. Since June 2011, the Central Government has been conducting an "audit" of the existing IUPs to ensure that they have been validly issued (most were issued at the Local Government level) and to resolve any overlaps. The list of compliant IUPs compiled by the Central Government has become known as the "Clean and Clear List". In 2012, the government increased the requirements that need to be demonstrated before an IUP can appear on the Clean and Clear List; these include evidence of payment of dead rent and/or royalties. To confirm the listing on the Clean and Clear list, the concept of a "Clean and Clear Certificate" was devised. This certificate is issued by the Directorate General of Minerals and Coal. This has become increasingly important for a range of administrative reasons, including to obtain a recommendation to export mineral ores. Also, the Ministry of Forestry will no longer grant a permit to use a forest area to an IUP holder if the IUP is not on the Clean and Clear List.

## 14.4 Security of Tenure

There are two main issues in relation to security of tenure in Indonesia, namely, whether the IUP was validly issued in the first place, and whether the IUP overlaps with another IUP for the same mineral or coal. Subsequent to the introduction of the Mining Law, it took some time for the new requirements to be fully understood by the Local Governments that issued most of the IUPs.

Consequently, there have been a number of instances where IUPs were issued without the correct legal procedures being followed. In the case of overlaps, an IUP should not have been issued over the area of an already existing mining right for the same mineral or coal. If this occurs, the earlier right in time should prevail (and the later in time is technically invalid in its entirety). The current regulations do not provide an adequate method for the government to unilaterally adjust the sizes of IUPs to remove the overlaps.

The Mining Law requires that existing Contracts of Work be re-negotiated. Although, this had created uncertainty for holders of Contracts of Work as to exactly how their rights will vary and resulted in various discussions between the government and some Contract of Work holders, most of the Contract of Work holders have completed the renegotiation process of the terms of their Contract of Work to be in line with the Mining Law.

## 14.5 Protection for foreign investors

Indonesia's Investment Law (Law No. 25 of 2007) contains a number of provisions designed to protect foreign investors, including a requirement that the government provide the same treatment to both domestic and foreign investors. However, in practice, numerous other laws and regulations do draw a distinction between Indonesian and foreign investors. There are also protections from nationalization without market compensation. However, these provisions are largely untested.

Indonesia is also a party to numerous double tax and investment and trade treaties and a member of the World Trade Organization. However, Indonesian has indicated that it will revisit investment protection commitments made under its Bilateral Investment Treaties, and has recently chosen not to renew several Bilateral Investment Treaties when they have expired. As a member of ASEAN, foreign investors investing from other ASEAN countries may be able to benefit from the investment protections afforded by the relevant treaties.

## 14.6 Restrictions on exports/government take

Indonesia imposes "domestic market obligation" requirements on mining companies to ensure supply to the domestic market as a priority over exports. Additionally, there are requirements in Indonesia for onshore processing and refining of minerals (which in effect works as a ban on the export of ores, with limited exceptions).

Additionally, the government does have general power to impose production limitations on mining companies on a provincial basis. To date, the government has not exercised these powers, although it has announced in the past that it may implement production limitations in the coal industry in order to try to strengthen global thermal coal prices.

The government technically owns minerals and coal produced until such time as the royalties on those minerals and coal are paid. The government does not purport to take a production share, rather, royalties are paid in cash. Under some older Contracts of Work, the concept of a "production share" was used such that a portion of the minerals or coal produced was owned by the government and the company holding the

# Indonesia

Contract of Work was appointed to market this portion on behalf of the government. Later Contracts of Work adopted the royalty concept instead.

## 14.7 Minimum sales pricing, domestic market obligation and onshore processing

Indonesia has a coal “benchmark pricing system,” under which a reference price is determined based on the average of a number of international and Indonesian published coal indices. This reference price is then split (using a formula) into a number of different reference prices for different brands of Indonesian coal based on differences in calorific value, sulfur, moisture and ash content. Sales contracts for coal are required to “refer” to the benchmark price, and royalties on the sale will be calculated on the higher of the benchmark price and the sale price. Sales below the benchmark price are only permitted if the relevant coal falls into the categories of fine coal, reject coal, or coal having certain impurities, and the sales are intended to, among other things, fulfil own needs or increase coal added value. A failure to adhere to the benchmark pricing regime can ultimately lead to a revocation of the IUP. The benchmark prices are issued monthly by the Minister of Energy and Mineral Resources. If the benchmark price for the relevant month has not yet been stipulated by the Minister of Energy and Mineral Resources, the applicable benchmark price will be deemed to be the one for the previous month.

Indonesia also has a “domestic market obligation” in relation to coal sales. In summary, the government obtains forecasts from the larger coal producers of their expected output in the following year and from major coal consumers (mainly power stations) of the expected coal requirements for the following year, and then stipulates a percentage of production that the major coal producers must sell to the major coal consumers. At the time of writing, the Minister of Energy and Mineral Resources has stipulated that coal producers are required to satisfy a minimum coal domestic market obligation of 25% of their total production set out in their approved production plan. A producer that has exceeded its domestic market obligation may sell such excess quota to a producer that has not been able to achieve its domestic market obligation. The list of producers that have a domestic market obligation imposed on them can change from time to time. In addition to this obligation, the Minister of Energy and Mineral Resources has also capped the price at which coal can be sold to PLN, the State electricity utility.

In 2012, the Indonesian government implemented a ban on the export of mineral ores. Since then, the Indonesian government has allowed temporary exports of certain concentrates based on case-by-case exemptions being issued. The ability to export certain concentrates for a temporary period is linked to progress in constructing domestic refining facilities for those minerals and is also subject to payment of export duty. To implement these requirement further, the Minister of Energy and Mineral Resources issued additional regulations in 2018 and 2019 which (i) require the processed and refined the mining products to conform with the processing and/or refinery threshold set out in the regulation, prior to such products being exported; and (ii) set out further detail on how the Government will seek to sanction companies failing to construct, or procure the construction, of domestic refining facilities (i.e. smelters) in Indonesia.

The Government now also requires any export of coal and minerals to be paid for via a letter of credit issued by a licensed foreign exchange bank in Indonesia. In certain circumstances, exporters can apply for a suspension of this requirement - for example, for contracts entered into prior to 6th September 2018, that provide terms of payment other than letters of credit.

## 14.8 Export Proceeds Requirements

Since 2014, Bank Indonesia has been requiring export proceeds to be disbursed through licensed foreign exchange banks in Indonesia (“FX Bank”). These are banks that are licensed by the Financial Services Authority (OJK) to carry out activities in foreign currencies (including foreign bank branch offices in

Indonesia); these do not include offshore branch offices of banks whose head offices are located in Indonesia. However, on 10 January 2019, the Government issued a new regulation that further tightens control over export proceeds from natural resources (e.g., coal, minerals). As a result, these export proceeds must be parked onshore, and can only be sent offshore for specific purposes. While previously, a number of schemes were introduced to immediately bounce export proceeds through FX Banks, at the very least, these arrangements will need to be reviewed.

The new regulation provides that export proceeds must be deposited into a specific account maintained with an FX Bank in Indonesia.

The exporter may only use the export proceeds placed in the proceeds account for payments of export duties and other export-related levies, loan repayments, to acquire imported goods, pay dividends and other investment purposes regulated under Indonesia's Investment Law (e.g., purchases of raw and auxiliary materials, investment financing, loan repayment, payment of royalties or other expenses, employee salaries). In order to remit the export proceeds overseas, the exporter needs to provide the relevant underlying documents. In addition, if the export payment is made through an escrow account, the exporter must use an escrow account maintained by an FX Banks in Indonesia. Payment through an existing offshore escrow account was only permitted until 10 April 2019.

## 14.9 Mandatory Use of National Shipping and National Insurance Companies for Coal Exporters

In 2017, to boost the role of Indonesia's national shipping transportation industry, the Minister of Trade issued a regulation (as amended in 2018) requiring coal exporters to use vessels controlled by national shipping companies, as well as to procure marine cargo insurance for their shipments with a national insurance companies or a consortium of national insurance companies - with an exemption being when no national vessel/insurance provider is available.

The regulation does not set out what it means by unavailability, and whether or not exporters/importers can directly use a foreign vessel/insurance provider if they are of the view that no national vessel/insurance provider is available.

The regulation defines a national shipping company as a shipping company established under Indonesian law which conducts sea transport activities within Indonesian water and/or (sea transports) from and to a foreign port. While, a national insurance company includes insurance company, sharia insurance company, reinsurance company, sharia reinsurance company, insurance broker company, reinsurance broker company, and loss adjuster company which are listed or registered at the Ministry of Trade.

The regulation provides that the requirement to use vessels controlled by national shipping companies for exporting coal will be effective on 1 May 2020 while the requirement to use insurance from national insurance companies has been effective since 1 February 2019 with a 3-month transition period for coal exporters to switch to a national shipping company.

## 14.10 Mining Regulatory Simplification and Roll Out of Tenders for New Mining Areas

In recent years, the Government of Indonesia has been actively taking steps to simplify the current regulatory framework in the mining sector. To achieve this objective, the Minister of Energy and Mineral Resources has issued a number of regulations, among others:

# Indonesia

- (a) Regulation No. 9 of 2017 (as amended) which provides guidelines on divestment of foreign held shares in mining companies (not smelting companies) as well as the price of divestment shares;
- (b) Regulation 11 of 2018 (as amended) which collates provisions relating to grant of mining areas, issuance of licenses and submission of reports into one regulation; and
- (c) Regulation 25 of 2018 which regulates upstream and downstream mining business activities, including in relation to implementation of exploration, operation and production activities, divestment and smelter development.

Aside from steps to increase the ease of doing business in the mining sector through these regulatory reform steps, the Government has also been offering up new mining areas. In 2018, the Minister of Energy and Mineral Resources offered up 15 new mining areas, with six of the offered working areas having been successfully awarded.

## 14.11 Contract of Work Extensions

In 2018, the Minister of Energy and Mineral Resources issued a further regulation setting out the procedures for applying for an extension of expiring Contract of Work. In brief, this process must be conducted by submitting the required application to the Minister of Energy and Mineral Resources within two years at the earliest and six months at the latest prior to the expiry date of the Contract of Work expiry. Having considered, among others, administrative, technical, environment, and financial requirements, the Minister of Energy and Mineral Resources will then issue the applied extension in the form of an extension IUPK (Izin Usaha Pertambangan Khusus - Special Mining Business Permit), for a period of 10 years, which is extendable for another 10 years.

Following the issuance of the extension IUPK, the rights and obligations under the initial Contract of Work will cease to apply. The *lex specialis* concept that is commonly deemed to apply to Contract of Work will cease to apply. Accordingly, anything formerly required or permitted by the Contract of Work that differs from prevailing laws and regulations will be replaced by the provisions of those prevailing laws and regulations. This includes the "nailed down" tax provisions in the Contract of Work, which will no longer apply. Accordingly, the holders of the extension IUPK will be subject to prevailing regulations in respect of deadrent, royalties, income taxes, personal income tax, withholding taxes, value added tax, stamp duty, import duties, land and building taxes and regional government levies, amongst others. They will also be subject to any new taxes or levies introduced from time to time, as well as to changes in existing rates of taxes or levies. In this connection, a government regulation has been issued that seeks to freeze income tax rates and land and building taxes - however, this regulation is, itself, capable of being amended in the future by further regulations.

## 15 Useful websites

Indonesian Government Ministry of Energy and Mineral Resources <http://www.esdm.go.id/>

Indonesian Directorate General of Mineral and Coal <http://www.minerba.esdm.go.id/>

Indonesia Investment Coordinating Board (BKPM) <http://www.bkpm.go.id/>

# Indonesia

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# Kazakhstan

Law	Continental law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	No
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically six years, with extensions
Mining license	Typically 25 years (45 years for unique or large deposits), with extensions
Able to use tenement as security	Yes
Royalty payable to government	Generally no (except for subsoil use contracts which are stabilized for tax purposes)
Classification system used	Local classification system (which is being reformed to take into account the JORC standards)

## 1 Summary

In Kazakhstan, the mining industry is regulated by the Subsoil and Subsoil Use Code – a single law which covers both mining and oil and gas sectors. The Subsoil Code has a general part which applies to all natural resources, and special parts which separately regulate oil and gas, uranium and other solid minerals areas. Mining rights for solid minerals (except for uranium) are granted by the state on the basis of licenses. Mining rights in the uranium industry are granted on the basis of so-called “subsoil use contracts” executed between the state and private entities. Mining operations are heavily regulated by various laws (including, but not limited to, environment protection, safety, health, local content and other regulations). Compliance with obligations set forth in subsoil use licenses/contracts is essential since failure to comply may result in unilateral termination of such contracts/licenses by the state. Acquisition, direct or indirect, of mining rights is subject to obtaining a number of statutory clearances (with a limited number of exceptions).

Recently, the government has announced its intent to change its general policy with respect to the mining industry. The contemplated policy change is prompted by the desire to increase the investment



# Kazakhstan

attractiveness of the industry, particularly in the mineral exploration sector. In line with this policy, the Republic of Kazakhstan adopted the new Code on Subsoil and Subsoil Use at end of 2017 (“**Subsoil Code**”).

The Subsoil Code, as a code, will have priority over laws and will remain the main statute for both petroleum (oil and gas) and mining industries. At the same time, the Subsoil Code introduces quite a different legal framework for the mining industry. Among other things, mining rights will now be granted on the basis of a license. Except for mining contracts executed prior to the enactment of the Subsoil Code (which will continue to govern relevant operations unless the relevant operators decide to switch to the new “licensing system”), there will be no subsoil use contracts in the mining industry (except for the uranium industry, which will remain subject to the “contractual system” – the same as the oil and gas industry).

By way of background, we note that prior to August 1999, subsoil use rights in Kazakhstan were granted on the basis of both licenses and subsoil use contracts. In August 1999, the previous subsoil use legislation was amended and the licensing regime was eliminated. Since then, the only documents that formalized the grant of subsoil use rights were subsoil use contracts.

The Subsoil Code now reinstates the licensing regime (for the mining industry only). It reintroduces subsoil use licenses as the main title documents confirming mining rights (except for uranium mining).

While the rationale behind this development is the intent to boost the mining industry by simplifying procedures for granting subsoil use rights, in practice, this may not necessarily be viewed as an advantage since it could be argued that, by making the mining activity subject to the general statutory regime, legislators undermined the relevant projects’ stability and gave less flexibility to the operators in terms of the opportunities to negotiate.

## 2 Legal framework for mining

Kazakhstan’s legal system is civil-law based, built on the traditions of the continental, Roman-Germanic family of laws. The Constitution, as the supreme law of the country, establishes the general basis of the mining industry. Under Kazakhstan’s Constitution, all subsoil resources in situ are owned by the state. Title to natural resources only passes from the state to the subsoil user upon extraction from the ground pursuant to the terms of a subsoil use contract/license.

The primary law regulating mining activities is the Subsoil Code. The industry is also regulated by other laws and regulations, including the Tax Code, the Land Code, the Labor Code, the Environment Code, the National Security Law and procurement rules. The Subsoil Code provides the general framework for subsoil use operations, many aspects of which are further detailed in acts of the government and other state bodies.

## 3 Restrictions on foreign investment

There are no special requirements or limitations on the acquisition of mining assets by foreign companies or individuals. However, the acquisition of subsoil use assets (irrespective of whether they are acquired by local or foreign parties) is subject to a number of statutory approvals and consent, including the waiver of the state’s pre-emptive purchase rights (if a transaction involves a strategic uranium deposit from the special list approved by the government), consent of the Ministry of Industry and Infrastructure Development and consent of the Competition Agency. Among other things, Kazakhstani law allows the Ministry of Industry and Infrastructure Development (MIID), which is the primary regulator for the mining industry (except for uranium and coal), to withhold its consent to the transfer of an interest in a subsoil use license or shares in the relevant subsoil entity (or its parent entity), if such transfer may result in a “concentration of rights to conduct subsoil use operations” in the hands of one person or a group of persons from one country. The

# Kazakhstan

concept of “concentration of rights” is not clearly defined in the law and the MIID may exercise substantial discretion in this regard.

## 4 Government or local participation requirements

Generally, there are no local participation requirements.

As concerns government participation, the Subsoil Code provides that mining rights for uranium deposits can only be granted to the national company in the uranium industry (currently, “Kazatomprom” National Atomic Company JSC). Mining rights granted in such way can be subsequently transferred only to companies where the national uranium company holds more than 50% shares.

For other minerals, there are certain deposits, the mining rights for which can be granted only to national state-owned companies. Currently, the Subsoil Code treats this special treatment as a temporary measure which will apply until 2020.

## 5 Land tenure and priority

All minerals in situ are the property of the state until the mineral is extracted. The mining legislation creates a system of mining tenure separate from land tenure. Therefore, landholders do not have any ownership right to minerals (except for certain commonly occurring minerals), although they may be entitled to compensation for the loss of the use of land due to the mining activities.

## 6 Indigenous or local community rights

In Kazakhstan, there are no indigenous people or similar population groups.

However, there are a number of so-called local content requirements. Further to these requirements, subsoil users must buy locally produced goods, works and services according to minimum thresholds usually set in subsoil use contracts.

Certain restrictions on these requirements were changed (lightened) in connection with Kazakhstan becoming part of the World Trade Organization. In particular, subsoil use contracts executed after 1 January 2015 should not contain any obligations of subsoil users to procure goods from local manufacturers. The requirement for a minimum level of local works and services was retained, but the minimum level cannot exceed 50%. Removal of notional discounts which subsoil users must give to local manufacturers of goods will be effective after expiry of the relevant subsoil use contracts or 1 January 2021, whichever occurs earlier. Notional discounts to be granted to local manufacturers of works/services will continue to exist.

## 7 Environmental protection and rehabilitation obligations

Subsoil users in Kazakhstan are subject to extensive environmental protection regulation. The newly created Ministry of Ecology, Geology and Natural Resources of the Republic of Kazakhstan (MEGNR) is the principal state authority in the area of environmental protection. Among other things, it issues environmental permits and licenses and establishes limits for environmental emissions.

Individuals and legal entities that use the environment (for example, subsoil users) are subject to state environmental control. The MEGNR carries out such control by organizing state environmental inspections. Various aspects of business activities are subject to environmental requirements. For example, a positive state environmental expert evaluation must be obtained in relation to projects involving an environmental

impact before such projects may begin. Enterprises engaged in environmentally hazardous business activities are subject to the mandatory requirement of obtaining environmental insurance covering potential damage as a result of environmental contamination. All individuals and legal entities that produce discharges into the air, sewage and any solid consumption or industrial waste must obtain an environmental permit from the MEGNR or its local subdivisions.

Legal entities and individuals may be subject to civil, administrative and criminal liability for violation of environmental requirements.

A subsoil user is obliged, after finishing work, to restore land plots and other natural objects damaged in the course of subsoil use operations to a condition suitable for further use.

## 8 Exploration licenses

### 8.1 Scope

Exploration is carried out on the basis of exploration licenses. Currently, following adoption of the Subsoil Code, Kazakhstan has a licensing system in place for granting subsoil use rights, except for the uranium industry where subsoil use rights are granted through execution of a subsoil use contract.

The territory subject to exploration rights is determined by a subsoil use license (except for uranium).

If, within one area, there is more than one subsoil user acting on the basis of separate licenses, such subsoil users should agree on how they will operate within this area. If the subsoil users cannot reach agreement, the Subsoil Code provides for a number of rules regulating the priority. In particular, in such situation, the priority is vested with a subsoil use (i) which conducts extraction of mineral resources; (ii) which has subsoil use rights issued earlier, if both subsoil users conduct extraction of mineral resources; (iii) which has subsoil use rights issued earlier, if both subsoil users conduct exploration of mineral resources; (iv) conducts use of underground space, if other subsoil user conducts exploration of mineral resources.

### 8.2 Duration

Exploration licenses are issued for a term of six years. This term can be extended once for a period up to five years.

### 8.3 Steps to acquire an exploration right

The Subsoil Code envisages that, under a general rule, exploration licenses are granted on a first-come, first-served basis. The list of territories available for grant according to this principle is set forth in the program for management of state subsoil use fund. To obtain subsoil use rights, an applicant must comply with a number of qualification requirements (e.g., availability of technical staff, necessary funds, etc.).

At the same time, there are a number of exceptions to this rule. There are certain territories (e.g., territories not on the lists of areas available for grant on a first-come, first-served basis) which can be granted only to national subsoil use companies on the basis of direct negotiations. This type of procedure for grant of subsoil use rights is considered a temporary measure which will apply until 2020.

Also, certain types of territories (e.g., territories for which there are approved industrial reserves of minerals) can be granted for exploration only through auctions.

## 8.4 Relationship with landowners

Kazakhstani legislation differentiates between surface and subsurface rights. Subsurface rights are granted by the state on the basis of a subsoil use license/contract. The Subsoil Code provides that upon execution of a subsoil use contract (i.e., the acquisition of subsurface rights), the subsoil user may apply to the local executive authority (*Akimat*) for the provision of a land plot for the purposes of subsoil use operations. The local executive authority must make the land plot available to the subsoil user for the duration of the subsoil use rights. If the land plot is state-owned, the Akimat will lease the plot to the subsoil user. If the land is privately owned, the Akimat may requisition the plot so that it may be leased to the subsoil user. The right to use the land plot is linked to the subsoil use rights, such that any changes to the subsoil use rights (such as transfer or termination) will lead to corresponding changes in the right to use the land plot.

## 8.5 Obligations of the holder

The Subsoil Code establishes a number of obligations of a subsoil user which are further detailed in the subsoil use license/contract itself.

Among others, after issuance of an exploration license, the subsoil user must prepare and submit to the MIID an exploration project document. Project documents must provide for the most effective and intensive program for investigating the territory, including modern and precise methods of exploration and laboratory analysis.

The subsoil user must submit to the MIID annual reports on fulfillment of license provisions, indicating compliance with the terms of subsoil use licenses, reports on purchased goods, works and services, reports on entities controlling the subsoil users and geological reports.

## 9 Holding tenements

### 9.1 Scope

There are no special holding tenements under Kazakhstani mining laws to bridge the gap between when exploration is finished and when development starts. However, for the gap between the exploration and production stages, there is an obligation on a subsoil user to keep the contract territory in a condition suitable for future mining operations (taking into account ecological safety) and to ensure the safety of personnel and the population. Also, under the Subsoil Code, the subsoil user is entitled to continue exploration works during the period until a production license is issued.

### 9.2 Duration

There are no special holding tenements and, accordingly, the duration of such tenements is not regulated.

### 9.3 Rights and obligations

This obligation to keep the territory in a suitable condition covers the territory that a subsoil user intends to develop on the basis of a future development license. Other territory (if any) must be returned to a condition suitable for further use, through restoration of land plots and other natural objects damaged in the course of subsoil use operations.

## 10 Development/production tenements

### 10.1 Scope

Production rights are currently granted on the basis of a production license issued by the MIID, except for uranium. Production rights for uranium are granted on the basis of a subsoil use contract entered into by the subsoil user and the Ministry of Energy (ME) representing the state. Production rights for uranium deposits can only be granted to the national company in the uranium industry (currently, "Kazatomprom" National Atomic Company JSC).

The territory of a production contract is determined by a production license or subsoil use contract.

### 10.2 Duration

A production license may be issued for a term of up to 25 years. This term can be extended for a term equal to the initial term. The number of extensions is not limited. The extension application may be rejected if, among other things, there have been breaches of obligations on payment of rental fees or minimum expenses.

### 10.3 Transition from exploration/holding right to mining right

A subsoil user that has made and assessed a commercial discovery on the basis of an exploration license has exclusive right to obtain a mining license. This exclusive right can be exercised any time during the exploration period.

### 10.4 Steps to acquire a right

The Subsoil Code envisages that, under a general rule, production licenses are granted on a first-come, first-served basis. The list of territories available for grant according to this principle is set forth in the program for management of state subsoil use fund. To obtain subsoil use rights, an applicant must comply with a number of qualification requirements (e.g., availability of technical staff, necessary funds, etc.). Also, the applicant will need to develop and obtain state expert examinations for the plan of mining works and liquidation.

At the same time, there are a number of exceptions to this rule. There are certain territories (e.g., territories not on the lists of areas available for grant on a first-come, first-served basis) which can be granted only to national subsoil use companies on the basis of direct negotiations. This type of procedure for grant of subsoil use rights is considered a temporary measure which will apply until 2020.

Also, certain types of territories (e.g., territories for which there are approved industrial reserves of minerals) can be granted for production only through auctions.

### 10.5 Relationship with landowners

Following issuance of a mining license, the contract holder may apply to the Akimat for the provision of a land plot for the purposes of subsoil use operations. The local executive authority must make the land plot available to the subsoil user for the duration of the subsoil use license. If the land plot is state-owned, the Akimat will lease the plot to the subsoil user. If the land is privately owned, the Akimat may requisition the plot so that it may be leased to the subsoil user. The right to use the land plot is linked to the subsoil use

# Kazakhstan

rights, such that any changes to the subsoil use rights (such as transfer or termination) will lead to corresponding changes in the right to use the land plot.

## 10.6 Obligations of the holder

The main obligations of a subsoil user are established by the mining license. Such obligations include, among other things, the obligation to pay a signature bonus and land rental payments, minimum production expenses, minimum threshold of local works and services to be purchased for mining operations, obligations on financing of training local personnel and obligations on financing of research and development works

Among other things, the subsoil user should also develop a development project document – mining works plan. The mining works plan must include types, methods and ways of conducting extraction works, approximate volumes and terms of such works, as well as technological decisions to be used. The mining works plan is subject to coordination with environmental protection and industrial safety authorities.

## 11 Assignment of and security over tenements

### 11.1 Assignment

Assignment of subsoil use assets is subject to a number of statutory clearances. First, the transfer is subject to approval by the competent authority (MIID or ME – for uranium and coal deposits). Secondly, transfer of rights with regard to strategic deposits (with regard to the mining industry, the current list of strategic deposits includes only uranium deposits) requires waiver of the state's pre-emptive purchase right. Finally, depending on the circumstances, the transfer may be subject to antitrust clearance.

### 11.2 Security

Security over subsoil use assets requires registration with the competent authority (MIID or ME). Subsequent enforcement of the security also requires a number of clearances (for example, consent of the competent authority for participation in the tender on enforcement of the security, and waiver of the state's pre-emptive purchase right for strategic deposits with regard to the winner of the enforcement tender).

## 12 Royalties

Generally, there is currently no royalty on subsoil use activities. Royalties were replaced by the mineral extraction tax (please see below).

As an exception, royalties apply to those subsoil use contracts which have been stabilized for tax purposes (production sharing agreements and subsoil use contracts signed by the president).

## 13 Mineral reporting and classification

Kazakhstan's mineral resource and reserve reporting system is notably different, both in principle and in practice, from generally recognized international systems such as Canada's CIM standards, Australia's JORC Code and South Africa's SAMREC Code. Kazakhstan, along with other CIS countries, still uses the former Soviet system for classification of mineral resources and reserves, which categorizes mineral reserves according to the extent to which they have been explored and substantiated. Specifically, mineral reserves are divided into categories A, B, C1 and C2, depending on the extent to which they have been explored and substantiated. Potential resources are categorized into P1, P2 and P3 groups depending on the extent to which they have been substantiated. Mineral reserves, on an economic-value basis, are also classified into

balance reserves (commercial reserves) and off-balance reserves (reserves currently lacking commercial potential).

At the same time, after adoption of the Subsoil Code, Kazakhstan is planning to transfer to a new classification system – so-called Kazakhstan's Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the KAZRC Code). The aim of such changes is to make Kazakhstan's classification system closer to international classification standards.

## 14 Other key issues

### 14.1 Usual structure of venture

The structure of ventures used in the development of mineral deposits may differ depending on the particular circumstances and requirements of participants. A mining company may develop a deposit directly by acquiring a license from the MIID or through a special purpose vehicle which will be a subsoil user under a license to be issued by the MID.

### 14.2 Taxes

In terms of fiscal obligations, subsoil users, among others, are subject to specific subsoil use taxes and payment obligations, which include the following:

(a) Signature bonus

A signature bonus is a one-time payment to the state for the right to use the subsoil. The amount of this bonus is preliminarily determined in the Tax Code based on estimations of reserves, the economic value of the deposit, and certain other factors. The final amount of the signature bonus must be set out in the subsoil use contract/license.

(b) Mineral extraction tax

For mining companies, mineral extraction tax is generally payable on the average exchange price of extracted minerals (as quoted by specified publications). The rate of mineral extraction tax for mining companies currently ranges from 0% to 18.5% depending on the type of mineral.

(c) Subsoil rental payments

Subsoil users need to pay subsoil rental payments ranging from 15 to 60 monthly calculation indices (approximately KZT 37,875–151,500) per one exploration block during the exploration stage, and 450 monthly calculation indices (KZT 1,136,250) per one square kilometer during the production stage.

### 14.3 Treaties

Kazakhstan has concluded bilateral treaties on the encouragement and mutual protection of investments with 44 countries. Kazakhstan is also party to a number of multilateral treaties concerning foreign investments (for example, the Energy Charter). Investment treaties provide a number of guarantees to nationals of member countries, including most-favored-nation treatment, protection against discrimination, requisition and nationalization and the right to resolve investment disputes by international arbitration in the absence of an arbitration agreement.



# Kazakhstan

## 14.4 Protection for foreign investors

Foreign investors currently enjoy the same level of protection as national investors. In 2003, Kazakhstan adopted the Law on Investments ("LOI") which replaced the Law on Foreign Investments and the Law on State Support for Direct Investments. The LOI equalized the rights of foreign and domestic investors, while reducing or eliminating a number of the guarantees previously available to foreign investors. In particular, the LOI eliminated guarantees against adverse changes in legislation (the so-called grandfather clause) and guarantees of international arbitration in the absence of an arbitration agreement.

The LOI retains the following investment guarantees: stability of contracts (with certain exceptions), free use of income, transparency of state investment policy, reimbursement of losses in the event of nationalization and requisition, and certain others.

## 15 Useful websites

The Ministry of Industry and Infrastructure Development	<a href="http://www.mid.gov.kz">http://www.mid.gov.kz</a>
The Ministry of Energy	<a href="http://kz.energo.gov.kz">http://kz.energo.gov.kz</a>
The Committee of Geology and Subsoil Use	<a href="http://www.geology.gov.kz">http://www.geology.gov.kz</a>

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# Peru

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	Yes
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration and exploitation concession	Unlimited period
Able to use tenement as security	Yes
Royalty payable to government	Yes
Classification system used	The Peruvian Code for Reporting Mineral Resources and Ore Reserves based on the JORC Code

## 1 Summary

In Peru, all mineral resources are vested in the government and can only be privately exploited pursuant to one of the four existing types of concession: (i) mining concessions (for exploration and exploitation activities); (ii) processing concessions; (iii) general works concessions; and (iv) mineral transportation concessions.

As in many other mining jurisdictions, mining concessions in Peru are property-related rights, distinct and independent from the surface land on which they are located. To carry out mining activities, concessionaires must also obtain the right to use the corresponding surface land from the landowner (whether such land is privately, communally or state-owned).

Additionally, concessionaires must obtain several authorizations and licenses from different governmental agencies, including environmental permits.

## 2 Legal framework for mining

The 1992 General Mining Law approved by Supreme Decree No. 014-92-EM ("**General Mining Law**") is the key legislation governing mining activities in Peru. Mining activities involve the exploration and exploitation of metallic and non-metallic mineral resources, excluding oil and gas.

Various other laws and regulations govern specific related matters such as occupational health and safety, environmental protection and taxation, among others.

According to the Peruvian Constitution, all mineral resources are vested in the government. Private parties can exploit mineral resources under the concession system (i.e., by obtaining a mining lease). The development of any mining activity requires a concession, with the exception of reconnaissance,<sup>3</sup> prospecting,<sup>4</sup> storage<sup>5</sup> and commercialization. The General Mining Law states that local and international trading of minerals is free.

There are four types of concessions:

(a) Mining Concessions

This type of concession grants the exclusive right to explore and exploit mineral resources (metallic or non-metallic substances) within the area covered by the concession. It is awarded by the Geological, Mining and Metallurgical Institute of the Ministry of Energy and Mines.

(b) Processing Concessions

This type of concession grants the right to process, purify, smelt and/or refine minerals. It is granted by the General Mining Bureau of the Ministry of Energy and Mines.

(c) General Service Concessions

This type of concession grants the right to carry out ancillary services (such as ventilation, sewerage, hoisting or underground access) to two or more mining concessions held by different entities. It is issued by the General Mining Bureau of the Ministry of Energy and Mines.

(d) Mining Transport Concessions

This type of concession grants holders the right to carry out large-scale transport of minerals using non-conventional systems (such as conveyor belts, pipelines and/or track cables). It is granted by the General Mining Bureau of the Ministry of Energy and Mines.

## 3 Restrictions on foreign investment

Under Article 71 of the Peruvian Constitution, foreign individuals (including Peru-domiciled companies ultimately owned by overseas investors) must obtain permission from the President of the Republic and the Board of Ministers, in the form of a Supreme Decree, to hold properties (including mining concessions) on lands located within 50 kilometers of any of Peru's national borders.

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<sup>3</sup> Reconnaissance: all activities conducted to reveal mineralization levels through elementary mining.

<sup>4</sup> Prospecting: research to identify potential mineral deposits by means of physical and chemical indicators measured using precision techniques and instruments.

<sup>5</sup> Storage: the storage of mineral concentrates outside the area of a mining operation is considered a mining activity that shall not be conducted under the mining concession system.

## 4 Government or local participation requirements

Mining concessions may be privately owned and no state participation is required.

According to the General Mining Law, INGEMMET only grants mining concessions to individuals domiciled in Peru or to companies incorporated in Peru whose principal business is conducting mining activities. However, such companies may be wholly owned by foreign investors or be branches of foreign companies that are established in Peru to carry out mining activities.

## 5 Land tenure and priority

All mineral resources are vested in the government. The state is entitled to grant private parties the right to extract and use minerals through concessions. Mining concessions are property-related rights (in rem) that are distinct and independent from the estate in which they are located.

## 6 Indigenous or local community rights

Peru has ratified ILO Convention No. 169, regarding Indigenous and Tribal Peoples in Independent Countries, through Legislative Decree No. 26253 and its regulations. This treaty has been implemented by the Prior Consultation Right Law, passed by Congress on 7 September 2011. This law acknowledges indigenous peoples' right of consultation, given that their collective rights may be affected directly by a legislative or administrative measure. However, the right is merely one of consultation, not veto.

The Prior Consultation Rights Law sets out certain criteria for identifying which populations are considered indigenous. They must be groups of people directly descended from indigenous populations with their own customs and lifestyle, different from other sectors of the national population, and they must have an indigenous identity.

On 2014, the Ministry of Culture approved the Official Database of the Indigenous Peoples, available online,<sup>6</sup> which identifies the indigenous peoples that are entitled to the prior consultation right. However, it should be noted that such official database is only to be used as a reference guide, and so other indigenous peoples not included in the database may be recognized.

With respect to mining projects located in areas inhabited by indigenous peoples, MINEM must follow the prior consultation procedure both before granting a start-up authorization for exploration or exploitation activities and before granting any processing concession. According to INGEMMET's criterion, prior consultation does not need to be conducted as part of the procedure to grant mining concessions because concession titles do not authorize, per se, the commencement of any mining activity.

## 7 Environmental protection and rehabilitation obligations

Mining concessionaires are responsible for the emissions, effluents, discharges and other negative impacts on the environment, health or natural resources that are generated as a consequence of their activities. Supreme Decree No. 040-2014-EM, which approved the Regulations for Environmental Protection in the Mining Sector, and Supreme Decree No. 042-2017-EM, which approved the Environmental Regulation for Exploration Mining Activities, establish the environmental rules for mining activities.

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<sup>6</sup> <http://bdpi.cultura.gob.pe/>

## 7.1 Environmental certificates

Mining exploration activities require prior authorization from the DGAAM to confirm compliance with environmental requirements. Under this regulation, mining exploration activities are classed into two different categories (Category I and Category II):

- (a) Category I<sup>7</sup> projects that involve exploration activities that will have a small impact on the environment and require an Environmental Statement (*Declaración de Impacto Ambiental* (DIA)), which is automatically approved upon filing of such project before the DGAAM, with the exception of certain cases itemized in the regulations, such as exploration activities carried out in environmentally sensitive or vulnerable areas (i.e., a short distance away from bodies of water, glaciers, forests and areas containing environmental risks).
- (b) Category II<sup>8</sup> projects involve exploration activities that will have a considerable impact on the environment and require a Semi-Detailed Environmental Impact Assessment (*Estudio de Impacto Ambiental Semi Detallado* (EIA-SD)), which, in all cases, demands the approval of the DGAAM and are subject to a process of public hearings in locations where the projects are to be developed.

Pursuant to the Regulations for Environmental Protection in the Mining Sector, all entities that hold rights to conduct mining activities and who have completed the exploration stage and are about to carry out mining development activities, mining exploitation activities, general labor, transport, storage and/or processing activities, must obtain an EIA-SD or a Detailed Environmental Impact Assessment (EIA-D), depending on the magnitude of the impact on the environment.

According to Law No. 29968, the National Service of Environmental Certification for Sustainable Investments (SENACE) is the entity responsible for reviewing and approving the EIA-D, while the Ministry of Energy and Mines maintains its power to approve the DIA and EIA-SD.

Non-compliance with Peruvian environmental laws or regulations can result in the imposition of administrative sanctions, such as fines or closure orders by the Environmental Supervision and Enforcement Agency (OEFA).

Finally, under the Mine Closure Act, approved by Law No. 28090, all entities that hold rights to conduct mining activities and who intend to start their exploitation activities must prepare and submit a mine closure plan within one year following approval of the relevant EIA. This plan must describe measures to be taken to recondition the areas, works and premises of each mining operation unit. To secure compliance of the mine closure plan, entities must submit a guarantee (i.e., letter of guarantee) to the Ministry of Energy and Mines.

## 7.2 Restricted mining areas

Natural Protected Areas (NPAs) are continental and/or maritime regions within the territory of Peru expressly designated by the government as essential to the conservation of biodiversity and other values associated with upholding cultural, landscape and scientific interests. NPAs are part of National Heritage and fall within the public domain.

<sup>7</sup> Category I includes projects under which a maximum of 40 drillings will be carried out within an area smaller than 10 hectares (taking into consideration all platforms, trenches, auxiliary facilities and accesses) and that involve the construction of tunnels no longer than 100 meters.

<sup>8</sup> Category II includes projects under which between 40 and 700 drillings will be carried out within an area larger than 10 hectares (taking into consideration all platforms, trenches, auxiliary facilities and accesses) and that involve the construction of tunnels longer than 100 meters and of a pilot plant.

The use of non-renewable natural resources, such as minerals, within NPAs is restricted. They can only be authorized if these activities are contemplated in the master plan of the NPA and if they fulfill the environmental standards, limitations and restrictions under the creation objectives, zoning and category of the park. Any activity within the NPA must be authorized by the National Service of Natural Areas Protected by the State (SERNANP).

The law secures the exercise of property and other real estate rights that existed prior to the creation of the relevant NPA. However, these rights must be exercised in harmony with the goals and purposes for which the NPA was created.

## 8 Exploration licenses

### 8.1 Scope

A mining concession allows its holder to explore and exploit resources within a specific geographical area, provided it has obtained an authorization to start up mining activities, as well as other required licenses and permits.

### 8.2 Duration

Mining concessions are granted for an unlimited period of time. Mining concessions are irrevocable, except in the following circumstances:

- (a) failure to pay the good standing fee (*Derecho de Vigencia*) for two consecutive years;
- (b) failure to pay the mining penalty due when the annual production target has not been met for two consecutive years; and
- (c) failure to meet the annual production target within 30 years

### 8.3 Steps to acquire an exploration right

The applicant must file a request for a mining concession with INGEMMET. The cost of such application is 10% of a tax unit (approximately USD 126) and the good standing fee (USD 3 per hectare) for the first year. In addition, the applicant must specify the Universal Transversal Mercator (UTM) coordinates of the concession. Pre-existing rights need to be respected.

After reviewing the application, INGEMMET will provide the applicant with notices that must be published in the Official Gazette (*El Peruano*) and in another newspaper in the capital of the province where the concession is located.

Such published notices must be delivered to INGEMMET, which, in turn, will prepare its legal and technical reports. If favorable legal and technical reports are issued, the chief of INGEMMET will grant the mining concession title.

Finally, the applicant must record the title in the Public Mining Registry. Once recorded, each concession has an entry under which the transfer, resolution or agreements related to the concession are recorded to have legal effect vis-à-vis the government and third parties.

To initiate exploration or exploitation mining activities, the mining concessionaire must obtain the main following permits and authorizations:

- (a) Authorization to start-up exploration or exploitation activities;
- (b) Surface rights;
- (c) an environmental certificate;
- (d) an archaeological certificate; and
- (e) if applicable, execute the prior consultation right process.

## 8.4 Relationship with landowners

Mining concessions are property-related rights (in rem) that are distinct and independent from the estate in which they are located. To carry out mining activities, the concessionaire must obtain a right to use the corresponding estate from the landowner.

If the land is privately owned, its use for mining activities requires prior agreement with the landowner. If such approval is not granted, the mining concessionaire is entitled to apply to MINEM for a legal mining easement over the surface land. However, to date, MINEM rarely awards such legal mining easements.

If the surface land is state-owned property, the titleholder of a mining concession has the following options:

**Acquisition:** state-owned lands can be acquired through a public bid or, exceptionally, through a direct acquisition procedure when the mining project has been officially declared by the authorities as a "Project of National or Regional Interest." It is a fairly simple process for medium- and large-scale mining projects to obtain such qualification.

- **Easement (*servidumbre*):** in case of state-owned barren lands, the mining concessionaire is entitled to apply to MINEM for a temporary or permanent easement.
- **Usufruct (*usufructo*):** a right of usufruct over state-owned lands can be granted either by the Public Estate Agency (*Superintendencia de Bienes Nacionales*) through a public bid or directly to the titleholder of the mining project when it proves either possession of the real estate for more than two years or that it will carry out investment projects related to the economic and social use of the asset.
- **Lease (*arrendamiento*):** the Public Estate Agency is authorized to lease state-owned lands for mining projects through a public bid. Direct leases are granted in very exceptional cases.
- **Loan (*comodato*):** the loaning of state assets is a legal mechanism created mostly for the Public Estate Agency to grant real estate properties to public entities. However, individuals are entitled to request such a loan in exceptional situations (justification is required).
- **Swap (*permuta*):** state-owned lands might be swapped with private lands for the development of mining projects. The authority in charge of this procedure is the Public Estate Agency.

If the surface land is held as common property, the provision requires:

- For peasant communities located in coastal areas, a favorable vote of not less than 50% of members attending the Assembly
- For peasant communities located in the highlands and Amazon area, a favorable vote of at least two-thirds of all members of the community.



## 8.5 Obligations of the holder

The holder must pay a good standing fee of USD 3 for each hectare that has been granted or applied for per year.

Mining concessionaires are required to put their concessions to work. Consequently, they shall meet an annual production target established by the Mining Law, as detailed below:

- 1 Peruvian tax unit (approximately USD 1,270) per year and per hectare applicable to metallic mining concessions
- 10% of 1 Peruvian tax unit (approximately USD 127) per year and per hectare applicable to non-metallic mining concessions

If the aforementioned annual production is not met, mining concessionaires shall pay the following mining penalties:

- If the minimum annual production target is not met by the end of the tenth year since the concession was granted, concessionaires shall pay a mining penalty equal to 2% of the corresponding annual production target.
- If the minimum annual production target is not met until the end of the fifteenth year since the concession was granted, concessionaires shall pay a mining penalty equal to 5% of the corresponding annual production target.
- If the minimum annual production target is not met until the end of the twentieth year since the concession was granted, concessionaires shall pay a mining penalty equal to 10% of the corresponding annual production target.

Mining concessionaires may avoid paying the aforementioned mining penalties by demonstrating that they have invested no less than 10 times the amount of the accrued mining penalty for each mining concession during the previous year.

If the failure to reach the annual target continues for thirty years, the mining concession shall be canceled without exception as detailed below:

- Mining concessions granted until 31 December 2008: shall be canceled if the annual production target is not met until the end of the thirtieth year counted as from 1 January 2009.
- Mining concessions granted as from 1 January 2009: shall be canceled if the annual production target is not met until the end of the thirtieth year counted as from the year following the granting of its mining concession title.

Mining concessions in operation or production must file a Consolidated Annual Statement (*Declaración Anual Consolidada* (DAC) to the DGM before 30 June of each year.

## 9 Holding tenements

Not applicable because mining concessions cover both exploration and exploitation. There is no concept of holding tenements under Peruvian law.

## 10 Development/production tenements

Mining concessions allow their holders to develop, explore and exploit the resources. Therefore, Peruvian law does not include any special regulations for development and production tenements.

## 11 Assignment of and security over tenements

Under Peruvian law, a holder of a mining concession is entitled to assign its mining concession in favor of another person or company. Such assignment could comprise exploration and/or exploitation activities. Likewise, the holder of a mining concession can create a mortgage over its mining concession as security for its own or third parties' obligations. Mining concessions cannot be partially assigned or mortgaged.

For those agreements to be valid against the state or third parties, they must be registered in the Mining Public Registry.

## 12 Royalties

### 12.1 Mining royalties

Mining concessionaires are required to make a royalty monthly payment to the government for the exploitation of metallic and non-metallic minerals. Mining royalties must be paid on a quarterly basis and are calculated based on the greater of either: (a) the amount determined in accordance with a statutory scale of tax rates based on the company's operating profit margin and applied to the company's operating profit; and (b) 1% of the company's net sales, in each case during the applicable quarter. The royalty rate applicable to the company's profit is based on its operating profit margin according to the statutory scale of rates ranging between 1% and 12%. Mining royalty payments are deductible as expenses for income tax purposes in the fiscal year in which such payments are made.

### 12.2 Special mining tax

In addition to the payment of mining royalties, mining concessionaires are required to pay a special mining tax (*Impuesto Especial a la Minería*) to the Peruvian Government for the sale of metallic resources, regardless of the state in which they are sold. The special mining tax is payable on a quarterly basis and is calculated in accordance with the operating profit derived exclusively from the sale of metallic resources. The applicable special mining tax (the rates of which range between 2% and 8.4%) is determined by the quarterly operating profit margin of the company, and such rate is applied to the operating profit derived from the sale of metallic resources. Special mining tax payments are deductible as expenses for income tax purposes in the fiscal year in which such payments are made.

### 12.3 Special mining burden (voluntary contribution)

The special mining burden is a voluntary contribution. The aforementioned mining royalty and special mining tax regimes are not applicable to holders of mining concessions who have entered into mining stability agreements before the mining royalty regime and special mining tax regimes were established.

Therefore, effective as from 1 October 2011, holders of mining concessions who have entered into mining stability agreements are expected to enter into agreements with the Peruvian Government to pay, as a "voluntary contribution," a special mining burden (*Gravamen Especial a la Minería*) to the Peruvian Government for the exploitation of non-renewable natural resources. This regime is very similar to the aforementioned mining royalty regime.

The special mining burden is payable on a quarterly basis and is calculated in accordance with the operating profit derived exclusively from the sale of metallic resources. The special mining burden (which is between 4% and 13.12%) is determined by the quarterly operating profit margin of the company and such rate is applied to the operating profit derived from the sale of metallic resources, according to a statutory scale of rates.

## 12.4 Regulatory contributions

The titleholders of medium and large-scale mining activities shall pay contributions to OSINERGMIN and OEFA to fund their supervisory activities. The sum of both contributions cannot exceed 1% of the company's annual income after deducting VAT and municipal promotion tax.

## 13 Mineral reporting and classification

The Peruvian Code for Reporting Mineral Resources and Ore Reserves, approved by the Lima Stock Exchange (*Bolsa de Valores de Lima*), establishes the guidelines to be followed by mining companies listed in the Lima Stock Exchange (*Segmento de Capital de Riesgo*) for submitting information to the public in connection with the results of exploration activities, mineral resources and ore reserves, among others.

## 14 Other key issues

### 14.1 Foreign investment guarantee

Peruvian legislation recognizes several rights and guarantees of all investors, local or foreign, without distinction of sector or kind of activity, size of investment or geographical location, and without considering whether the investors are individuals or companies. No filings are required and no minimum requirements have to be complied with. These rights are granted automatically to any private investor solely upon making investments in the country.

Among the most relevant are:

- (a) **Non-discriminatory treatment:** national and foreign investments are subject to the same conditions.
- (b) **Freedom of contract:** parties can include in their contracts any term and condition valid under the legal framework in force. Such contracts cannot be modified by law.
- (c) **Free transfer of capital:** the state guarantees the right of foreign investors to freely transfer, without prior authorization of any central government authority or state entity, the total profits obtained after taxes, including the sale of shares and other assets.
- (d) **Free competition.**
- (e) **Guarantee for private property:** property rights are inviolable. Regarding property rights, both foreign companies and individuals are entitled to the same rights as Peruvians, as follows:
  - o Unrestricted access to most economic sectors, whereby national and foreign investors are free to develop the economic activity or enter into the industry of their preference
  - o Freedom to export and import

- (f) **To trade freely, locally or abroad:** the state guarantees the freedom to trade locally or internationally.
- (g) **To use the most beneficial exchange rate available in the market:** whereas the foreign investor may need to change foreign currency to local currency and vice versa, he or she will have the right to use the most beneficial rate available at the moment of the operation.

## 14.2 General stability agreements

Notwithstanding the aforementioned guarantees, investors and the enterprises in which they invest may protect themselves from changes in Peruvian law by executing stability agreements with the Peruvian Government. A legal stability agreement is a civil contract that has the force of a law and guarantees continued application of certain laws and regulations in force at the execution date.

To execute a stability agreement, investors are required to guarantee an investment of no less than USD 20 million.

In addition to general stability agreements, local and foreign investors in mining projects are entitled to execute with MINEM, on behalf of the Peruvian Government, guarantee agreements and investment promotional measures ("**Mining Stability Agreements**").

Similar to general stability agreements, Mining Stability Agreements have the force of law and protect investors from changes in certain regimes, laws and regulations for a 10, 12 or 15-year term starting on the date when the execution or expansion of the investment is evidenced, as applicable:

- **10-year term:** companies conducting mining activities that start or are carrying out operations above 350 tons per day up to a maximum of 5,000 tons per day, may enter into a 10-year stability agreement. Additionally, companies that undertake an investment commitment of at least USD 20 million, may also enter into a stability agreement (the stability regime would be in force as of the date in which the full investment is met). Companies can choose to benefit from the stabilized regimen in advance for a maximum period of three years, within which the minimum investment shall be reached. Such advanced term shall be deducted from the 10-year term.
- **12-year term:** companies with a starting capacity of over 5,000 tons per day, or with expansion projects underway aimed at reaching a capacity of over 5,000 tons per day, may enter into a 12-year stability agreement.

Additionally, companies that undertake an investment commitment of at least USD 100 million (for the commencement of mining activities) or USD 250 million (for already-existing mining companies carrying out expansion projects) may also enter into a stability agreement (the stability regime would be in force as of the date in which the full investment is met). Companies can choose to benefit from the stabilized regimen in advance for a maximum period of eight years, within which the minimum investment shall be reached. Such advanced term shall be deducted from the 12-year term.

- **15-year term:** Companies with a starting capacity of over 15,000 tons per day or with expansion projects underway aimed at reaching a capacity of over 20,000 tons per day, may enter into a 15-year stability agreement. Additionally, companies that undertake an investment commitment of at least USD 500 million, may also enter into a stability agreement (the stability regime would be in force as of the date in which the full investment is met). Companies can choose to benefit from the

stabilized regimen in advance for a maximum period of eight years, within which the minimum investment shall be reached. Such advanced term shall be deducted from the 15-year term.

Differences between general stability agreements and Mining Stability Agreements:

General stability agreements (PROINVERSION)		Mining Stability Agreements (MINEM)	
Tax			
Income tax system		Income tax system Compensation and tax refund regime Duties or tariffs Municipality taxes Consumption taxes <sup>9</sup> Special regime for tax returns	
Administrative			
		Good standing fee and penalties for mineral properties Mining royalty Rights regulated in the Mining Law and regulations	
Money exchange			
Free exchange of local currency No discrimination in the currency exchange rate Remittance of profits, dividends, capital and financial resources at best currency exchange rate, without any discrimination whatsoever		Free exchange of local currency No discrimination in the currency exchange rate Remittance of profits, dividends, capital and financial resources at best currency exchange rate, without any discrimination whatsoever	
Free trade			
Regime for export promotion Free availability of foreign currency and remittance of profits, dividends and royalties		Regime for export promotion Free availability of foreign currency and remittance of profits, dividends and royalties	
Labor			
Stability of labor engagement systems			

Investors in mining activities are entitled to execute both types of agreement, i.e., a general stability agreement with PROINVERSION and the Mining Stability Agreement with MINEM, at the same time, to benefit from both regimes.

<sup>9</sup> Note that the stabilized regime for consumption taxes does not include the tax rate.

## 14.3 Investment agreements

Peru is also party to the International Center for Settlement of Investment Disputes (ICSID) and investors can access the Overseas Private Investment Corporation (OPIC) and the Multilateral Investment Guaranty Agency (MIGA).

Peru also has various free trade agreements in place, which protect investments.

## 14.4 Taxes

According to the provisions of Law No. 27623, by which the Regime of Final Return of VAT was approved, and its regulations, approved by Supreme Decree No. 082-2002-EF, holders of mining concessions that are exclusively carrying out exploration activities are entitled to a refund of VAT transferred to them or paid by them for the execution of their activities during the exploration phase, as long as they comply with the following conditions:

- (a) Production operations have not yet been commenced.
- (b) The exploration of mineral resources has been conducted in Peru.
- (c) An investment in exploration agreement has been entered into with the state, in which an investment of at least USD 5 million has been committed.

It must be noted that the beneficiary of this regime may only claim back VAT paid for the acquisition of goods and services that are on a list previously approved by the government.

This benefit is named the "Final Return of VAT" given that the return of VAT is not conditioned on the commencement of the exploitation phase.

This regime is currently in force until 31 December 2019.

## 14.5 Workers' participation

Under Peruvian law, every company that generates income and has more than 20 workers on its payroll is obligated to grant a share of its profits to its workers. For mining companies, the percentage of this profit-sharing benefit is 8% of pre-tax income. Cooperative, self-managed companies, civil partnerships, non-profit-making companies and companies that do not have more than 20 workers are exempt from this profit-sharing obligation. Both permanent and fixed-term employees must be taken into account for the purposes of these laws; the only legal requirement is that such workers must be registered on the company's payroll.

The profit-sharing amount made available to each worker is limited to 18 times the worker's monthly salary, based on their salary at the close of the previous tax year.

If there is a remnant between 8% of a company's pre-tax income and the limit of the workers' profit sharing benefit, it must be contributed to a public fund (FONDOEMPLEO) for the purpose of training for workers and job promotion, as well as public investment projects.

It is also important to note that the proportion of foreign personnel must not exceed 20% of the total employees and the amount of foreign personnel's salaries must not exceed 30% of the total payroll. The applicable law provides for exceptions to those limitations, such as high-level executives of a new company.

## 15 Useful websites

INGEMMET

<http://www.ingemmet.gob.pe/>

Ministry of Energy and Mines

<http://www.minem.gob.pe/>

Ministry of Environment

<http://www.minam.gob.pe/>

OEFA

<https://www.oefa.gob.pe/>

SENACE

<https://www.senace.gob.pe/>

National Society of Mining, Oil and Energy (*Sociedad Nacional de Minería, Petróleo y Energía*)

<http://www.snmpe.org.pe/>

Peruvian Code for Reporting Mineral Resources and Ore Reserves

<http://www.bvl.com.pe/scr/doc-reglamentos/Codigo%20de%20Estandares%20de%20Reporte%202013.pdf>

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# Russia

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	None
Land tenure	Mineral rights are separate from surface rights
Environmental protection regulation	Average
Rehabilitation bonds or guarantees	No
Exploration license	Up to 5–7 years, with extensions
Mining license	Life of project, typically 20–25 years, with extensions
Able to use tenement as security	No
Royalty payable to government	Yes
Classification system used	Russian resource/reserve reporting system

## 1 Summary

Russia is one of the largest mineral producers in the world and mineral resources are an important part of its wealth. The country has almost all types of minerals and mining takes place in almost all regions of the country, the most active being the South Urals, East Siberia and Far Eastern regions. Russia holds some of the world's richest mineral deposits: it has the world's second-largest coal reserves, as well as important metal reserves, including gold, silver, platinum group metals, nickel and diamonds. All Russian subsoil resources in the ground are owned by the Russian state, irrespective of who holds the title to the relevant land plot or the relevant subsoil license. Rights to extract subsoil resources can be granted under subsoil licenses, which usually grant ownership of the extracted resources to the license holder.

Mining is one of the country's most important industries, but, unlike the oil and gas industry, it currently supplies primarily the domestic market and processing is largely conducted within Russia.

## 2 Legal framework for mining

Russia's legal system is civil law based. The Russian Constitution provides that the use of subsoil resources falls within the joint competence of the federal and regional state authorities. However, in practice, regulation is mostly executed by the federal authorities. The regional authorities have competence over subsoil plots of a local character.

The principal law regulating the mining industry in Russia is Russian Federation Law No. 2395-1 on Subsoil Resources, dated 21 February 1992, as amended ("**Subsoil Law**"). The Subsoil Law covers the principal terms and conditions for prospecting, appraisal, exploration, mining and protection of subsoil resources.

The main piece of legislation regulating operations with precious metals and gemstones in Russia is Federal Law No. 41-FZ on Precious Metals and Gemstones, dated 26 March 1998, as amended ("**Precious Metals Law**"). The Precious Metals Law provides the general legal framework for the processing, use and disposal of precious metals and gemstones.

All Russian subsoil resources in the ground, until extracted, are owned by the state. The state grants the mining rights to explore and extract resources to private parties through subsoil licenses. Licenses give the license holder title to the extracted minerals.

The legislative regime, in general, is the same for all minerals. However, certain rules may differ depending on the type of minerals (for example, certain specific rules apply to precious metals, gemstones, radioactive minerals, coal, etc.).

## 3 Restrictions on foreign investment

Restrictions on foreign investment in the Russian mining industry are established, among others, by Federal Law No. 57-FZ on the Procedures for Foreign Investments in Companies of Strategic Significance for National Defense and Security, dated 29 April 2008, as amended ("**Law on Strategic Companies**") as well as by the Subsoil Law.

Under the Subsoil Law, foreign companies are prohibited from directly holding mining rights with respect to "strategic" deposits (subsoil plots of "federal significance"), which include the following:

- (a) subsoil plots containing deposits of uranium, high-purity raw quartz, the yttrium group of rare earths, nickel, cobalt, tantalum, niobium, beryllium, lithium, hard-rock diamond deposits or hard-rock (ore) deposits of the platinum group of metals with reserves recorded in the Russian State Register of Reserves starting from 1 January 2006;
- (b) subsoil plots containing the following reserves, as evidenced by the Russian State Register of Reserves starting from 1 January 2006: hard-rock (ore) gold reserves in excess of 50 tons or copper reserves in excess of 500,000 tons;
- (c) subsoil plots located in inland sea waters, territorial sea waters or on the Russian continental shelf; and
- (d) subsoil plots that can only be developed using land used for defense and security.

Nevertheless, foreign companies may hold mining rights for strategic deposits through their Russian subsidiaries.

# Russia

The Strategic Companies Law is designed to regulate the acquisition of control over Russian strategic companies by foreign investors or “group of persons” that include a foreign investor. Direct or indirect acquisition by such entities of 25% or more of the voting shares in, or other form of control over, Russian companies holding mining rights for strategic deposits require the preliminary consent of the Russian Government. Foreign countries, international organizations and legal entities under their control are subject to stricter rules, which prohibit them from acquiring control over strategic deposits (for example, directly or indirectly acquiring 25% or more in companies holding licenses for strategic deposits is prohibited and the direct or indirect acquisition of more than 5% requires a special clearance).

## 4 Government or local participation requirements

Foreign companies are prohibited from directly holding mining rights with respect to strategic deposits but are generally allowed to do so through their Russian subsidiaries (except for restrictions on ownership imposed on foreign states, international organizations and companies under their control). There are no other government or local participation requirements applicable to onshore mining projects.

## 5 Land tenure and priority

All Russian subsoil resources in the ground, until extracted, are owned by the Russian State, irrespective of who holds the title to the relevant land plot. Accordingly, save for certain permissible limited use of commonly occurring mineral resources and ground waters, landholders do not have any ownership rights or priority to subsoil resources located beneath their land plots.

## 6 Indigenous or local community rights

Generally, the rights of indigenous people do not affect the acquisition or exercise of subsoil rights in Russia. However, in practice, Russian subsoil licenses often set out general social obligations toward the local and indigenous population and the rights of indigenous people may affect the acquisition and use of surface rights.

## 7 Environmental protection and rehabilitation obligations

The key Russian environmental law is Federal Law No. 7-FZ on Environmental Protection, dated 10 January 2002, as amended (“**EP Law**”). The EP Law establishes the environmental rights and duties of individuals and legal entities, provides for the regulation of and control over environmental protection and sets out the general framework for environmental impact assessment.

In addition to the EP Law, the Land Code and Federal Law No. 101-FZ on State Regulation for Ensuring the Fertility of Agricultural Land, dated 16 July 1998, as amended, contain a substantial number of environmental and land protection requirements. Other environmental statutes of importance include the Water Code and the Forest Code, which establish the environmental rights and duties of individuals and legal entities with respect to the use of water resources and forests and the general framework for the assessment of environmental impact in these areas, and Federal Law No. 89-FZ on Industrial and Consumption Waste, dated 24 June 1998, as amended, which regulates waste disposal procedures and provides for measures to reduce the environmental impact thereof.

With a few exceptions, an environmental review is not mandatory in Russia for mining projects. However, license holders must obtain other environmental licenses and permits (for example, license for waste

disposal, permits for discharge of pollutants with wastewater and for emissions into the atmosphere within established limits).

The Subsoil Law as well as Russian mineral licenses contain specific obligations of the subsoil users in relation to permanent and temporary closure of the mining enterprises upon expiry of the term of such mineral licenses or upon their premature termination. In particular, during the permanent or temporary closure of a mining enterprise, the respective subsoil user, at its own cost, must procure rehabilitation of damaged land and ensure that mine openings are in a condition that ensures health and safety, protection of the environment, buildings and constructions, and, during the temporary closure, safety of the mine field and mine openings for the entire period of such temporary closure.

## 8 Exploration licenses

### 8.1 Scope

Legal entities and individuals may acquire rights to conduct geological surveys (prospecting and appraisal) of mineral resources under a subsoil license for:

- (a) geological survey (prospecting and appraisal) (geological survey license); or
- (b) geological survey, exploration and mining (combined license).

The area of the subsoil plot is determined by the licensing authorities and indicated in the subsoil license, and is further detailed in a geological allotment.

### 8.2 Duration

A geological survey license may be granted for a maximum period of five years for onshore plots (seven-year geological survey licenses can be granted in certain Russian regions, for instance, Republic of Sakha (Yakutia), the Kamchatka Region, the Krasnoyarsk Region, the Khabarovsk Region etc.) and 10 years for offshore plots. A combined license can be issued for the life of the project. However, in practice such licenses are usually granted for 20- or 25-year terms and the exploration period under such licenses is usually restricted by similar time frames.

Subsoil licenses can be extended if needed for completion of the work, provided there are no violations of the license terms and conditions by the license holder.

### 8.3 Steps to acquire an exploration right

Geological survey (prospecting and appraisal) licenses are issued without a tender or auction based on an application of the interested party.

Combined licenses can be granted only through a tender or auction, except (a) when a combined license is issued to a holder of geological rights that made a commercial discovery under a geological survey license; and (b) with respect to strategic deposits included by the Russian Government in the list of strategic deposits to be licensed by a government decision without a tender or auction.

Subsoil licenses are issued by the Federal Agency for Subsoil Use (**Rosnedra**). Rosnedra is in charge of granting subsoil rights with respect to all onshore plots, except for strategic deposits. Rights to strategic deposits may only be granted based on a Russian Government decision.

The overall timing for obtaining a geological survey or combined license is not prescribed by law and may vary significantly depending on the circumstances.

## 8.4 Relationship with landowners

As a rule, for geological survey purposes, license holders should acquire the surface rights to relevant land plots. Surface rights are usually acquired after the subsoil license has been granted, to the extent that such surface rights are required. There are two options to choose from: lease rights and ownership rights. In practice, subsoil users usually hold lease rights. In certain instances, a geological survey may be conducted without obtaining rights to the relevant land plot.

## 8.5 Obligations of the holder

The standard general obligations of the subsoil rights holder include obligations to:

- (a) comply with technical project documentation;
- (b) maintain geological and other documentation;
- (c) provide geological information and other data to Russian State bodies;
- (d) perform closure and remediation; and
- (e) ensure the safety of mines, etc.

In addition, specific obligations of license holders (such as basic work program obligations, key deadlines for completion of various types of work, etc.) are set in subsoil licenses.

License holders are entitled to relinquish their rights under a subsoil license. In this case, the license holder must fulfill all relinquishment-related obligations stipulated by the license (for example, abandon or shut down all facilities, submit geological and other documents to the state authorities, etc.). The license holder is not obliged to make any payments to the state in relation to any of its unfulfilled work program obligations.

# 9 Holding tenements

## 9.1 Scope

Russian law does not have the concept of holding tenements. In practice, geological survey rights may be "converted" into mining rights if a commercial discovery is made. However, such conversion is not expressly guaranteed by law.

## 9.2 Duration

Not applicable because Russian law does not have the concept of holding tenements.

## 9.3 Rights and obligations

Not applicable because Russian law does not have the concept of holding tenements.

## 10 Development/production tenements

### 10.1 Scope

Rights to conduct development of mineral resources may be acquired under a subsoil license for:

- (a) exploration and mining (mining license); or
- (b) geological survey, exploration and mining (combined license).

The area of the subsoil plot is determined by the licensing authorities and indicated in the subsoil license, and is further detailed in a mining allotment.

### 10.2 Duration

Mining licenses and combined licenses can be issued for a term equal to the life of the project. However, in practice, such licenses are usually granted for 20- or 25-year terms and can be extended, provided there are no violations of the license's terms and conditions by the license holder.

### 10.3 Transition from exploration/holding right to mining right

The holder of a geological survey license that made a commercial discovery within the licensed plot is entitled to apply for a mining license. However, the granting of such a license is not expressly guaranteed by law and, until such time as mining rights are granted, the license holder may not commence mining.

The holder of a combined license is usually required to complete its minimum program obligations related to geological survey (prospecting and appraisal) and start mining within specific deadlines prescribed by the license.

In case the holder of a combined license is a company under foreign control, exploration and mining operations under a combined license on a strategic deposit may only commence if the exploration and mining on such plot is authorized by a Russian Government decision. This is different from the general rule (applicable to other deposits) where exploration and mining under a combined license may be conducted simultaneously with a geological survey of a subsoil plot and does not require a specific authorization from the Russian Government.

Furthermore, if in the course of a geological survey a Russian company with foreign participation or under foreign control makes a commercial discovery of a strategic deposit on the basis of a combined license, the Russian Government may decide to terminate such license if it determines that there is a threat to national defense and security. The existence of the threat is determined by the government and there are no publicly available criteria that may be used for such purposes. In this case, the Subsoil Law provides for compensation of expenditure related to geological surveying and repayment of a one-off bonus for the grant of rights. Moreover, a premium may be payable by the state to the discoverer of a strategic deposit.

### 10.4 Steps to acquire a right

Mining licenses as well as combined licenses can be granted only through a tender/auction, except (a) when a mining or combined license is issued to a holder of geological rights that made a commercial discovery under a geological survey license; and (b) with respect to strategic deposits included by the Russian Government in the list of strategic deposits to be licensed by the decision of the government without a tender/auction.

The overall timing for obtaining an exploration and mining or combined license is not prescribed by law and may vary significantly depending on the circumstances, but, in general, it usually takes 3–6 months after announcement of the respective tender/auction by the authorities.

## 10.5 Relationship with landowners

For exploration and mining purposes, license holders must acquire the surface rights to the relevant land plots. There are two options to choose from: lease rights and ownership rights. In practice, subsoil users usually opt to hold lease rights.

## 10.6 Obligations of the holder

Subsoil licenses usually set out license holders' obligations in terms of exploration, development and production milestones and volumes and other work program obligations. In some instances the licenses require that such obligations be set out in respective work programs to be approved by the authorities. Russian licenses do not usually contain any minimum expenditure requirements. It is possible for a license to cover basic principles for preferential treatment of local suppliers and workforce.

# 11 Assignment of and security over tenements

## 11.1 Assignment

Subsoil rights in Russia are not freely transferable. This means that they cannot be sold, pledged or otherwise encumbered. However, the Subsoil Law permits the transfer of subsoil rights in certain instances (except for the transfer of rights to strategic deposits to companies with foreign participation), which makes such rights transferable in a limited number of instances. Such instances include:

- (a) transfer of subsoil rights from a parent company to its subsidiary and vice versa and transfer between the subsidiaries of the same parent company;
- (b) transfer following a merger of the license holder with and into another company;
- (c) transfer following a consolidation of the license holder with another company; and
- (d) transfer following a spin-off or split-off of a new company.

Any such transfer of subsoil rights requires a special decision of Rosnedra. Rights to strategic deposits are not transferable to companies with foreign participation unless otherwise determined by the Russian Government for a specific deposit.

The above options are often used by subsoil users for structuring their business, as well as for the "sale" of licenses, which is only possible through a sale of the licensee's shares.

## 11.2 Security

Subsoil rights are not freely transferable and, accordingly, may not be encumbered or used as security in Russia.



## 12 Royalties

Russian law provides for the following types of subsoil-use payments or fees related to geological survey: one-time payments, regular payments and fees for participation in tenders/auctions (in case of a combined license).

The Subsoil Law prescribes minimum and maximum rates of regular payments for different types of minerals with the total amount calculated on the basis of the area of subsoil use. Within this framework, Russian licensing authorities set specific rates, which are reflected in the corresponding subsoil licenses.

Regular payments are applicable to geological survey and exploration work but are not applicable to mining activity (which is subject to a mineral extraction tax).

## 13 Mineral reporting and classification

Russia uses its own mineral reporting and classification system which differs substantially from the main reporting codes used internationally (such as JORC). The Russian system divides mineral reserves into seven categories, in three major groups, based on the level of exploration performed: fully explored/proved reserves (A, B, C1), evaluated/probable reserves (C2) and prognostic/inferred resources (P1, P2, P3). Computation of reserves follows a set of manual procedures established by the Ministry of Natural Resources of the Russian Federation.

## 14 Other key issues

### 14.1 Usual structure of venture

There are two types of corporate vehicle commonly used in Russia: limited liability companies and joint stock companies.

Limited liability companies are often used as ventures for holding mineral rights in Russia, including as Russian wholly owned subsidiaries of foreign companies and joint venture companies (both holding and operating companies). They allow avoidance of the sometimes burdensome requirements of Russian securities legislation and are generally easier to capitalize and maintain compared to joint stock companies.

Operations in Russia are often structured through holding companies located in other jurisdictions with operating companies (license and asset holding companies) located in Russia.

### 14.2 Export

The export of certain precious metals, metallic minerals containing precious metals and gemstones is subject to certain limitations, for example, export licensing, etc. In addition, gold and other precious metals mined in Russia must, with the exception of gold nuggets, be refined in Russia in one of the listed enterprises approved by the Russian Government.

Further, under Russian law, the Russian federal and regional authorities have a right of first refusal to acquire refined precious metals, gold nuggets and gemstones.

Export of minerals from Russia is subject to Russian export customs duties at specific rates established for particular minerals.



## 14.3 Taxes

The Russian tax system includes federal, regional and local taxes, in particular, corporate profits tax, value-added tax, property tax, land tax, social security contributions, accident insurance contributions and others.

Generally, the same tax regime applies to domestic companies and foreign companies whose activities in Russia create a permanent establishment for Russian tax purposes. Otherwise, foreign companies are subject to Russian withholding tax with respect to certain Russian-sourced income such as dividends, interest, royalties and other similar income, subject to reduction or elimination under applicable double tax treaties. Income received from the provision of goods, work and services that creates no permanent establishment in Russia is not subject to Russian withholding tax.

As regards charges and taxes applicable specifically to mining companies, in addition to one-time and regular payments as well as fees for participation in tenders described above, mining companies are subject to mineral extraction tax.

Mineral extraction tax is generally calculated on an ad-valorem basis, that is, on the value of the minerals extracted from the subsoil based on the prices (excluding VAT and excise taxes) at which the extracted minerals are sold, subject to Russian transfer pricing rules, and effectively not lower than the market price.

Companies extracting minerals under a production-sharing agreement regime are subject to a special and entirely different tax regime.

## 14.4 Overlapping tenements

Pursuant to the Subsoil Law, the subsoil area under a subsoil license is provided to a license holder as a "mining allotment" (i.e., a geometrized block of subsoil) or "geological allotment."

A mining allotment is generally provided for the purpose of mineral extraction. A license holder granted a mining allotment has the exclusive right to use the subsoil resources within its boundaries. Any subsoil use-related activity within the boundaries of a mining allotment requires agreement with such license holder.

A subsoil plot granted for the purposes of geological survey is considered to be a geological allotment. Several license holders may concurrently perform operations within the boundaries of a geological allotment.

## 14.5 Protection for foreign investors

Foreign investments are regulated, among others, by Federal Law No. 160-FZ on Foreign Investments in the Russian Federation, dated 9 July 1999, as amended ("**Law on Foreign Investments**").

The Law on Foreign Investments guarantees foreign investors the right to invest and to receive revenues and profits from such investments, and sets forth the terms for foreign investors' business activity in Russian territory.

The Law on Foreign Investments stipulates that foreign investors and investments must be treated no less favorably than domestic investments, with some exceptions.

Foreign investors are protected against nationalization or expropriation unless such action is mandated by federal law. In such cases, foreign investors are entitled to receive compensation for any investment and other losses.

# Russia

One of the most important features of the Law on Foreign Investments is the tax stabilization clause. For companies and projects that meet the criteria established by this clause, it prohibits increasing the rates of certain federal taxes until initial investments have been recouped (up to a maximum of seven years, unless this period is extended by the Russian Government).

## 15 Useful websites

Ministry of Natural Resources and Environment of the Russian Federation	<a href="http://www.mnr.gov.ru/">http://www.mnr.gov.ru/</a>
Federal Agency for Subsoil Use of the Russian Federation ( <i>Rosnedra</i> )	<a href="http://www.rosnedra.gov.ru/">http://www.rosnedra.gov.ru/</a>
Federal Service for Supervision of Natural Resources of the Russian Federation ( <i>Rosprirodnadzor</i> )	<a href="http://rpn.gov.ru/">http://rpn.gov.ru/</a>
Russian Federal Geological Fund	<a href="http://www.rfgf.ru/">http://www.rfgf.ru/</a>

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# South Africa

Law	Mixed legal system
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	Yes
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface and/or land rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically three years with one extension of a further three years
Mining license	Typically 30 years with one extension of a further 30 years
Able to use tenement as security	Yes
Royalty payable to government	Yes
Classification system used	SAMREC and SAMVAL

## 1 Summary

Mining remains an important sector and major contributor to economic activity in South Africa. Despite labor unrest in the mining industry, it still remains one of South Africa's largest employers. The Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") came into effect in 2004. The MPRDA treats the state as the custodian of the nation's mineral and petroleum resources. The legislative framework supporting the MPRDA, which includes the environmental framework, creates a licensing regime which allows for mineral and petroleum exploitation subject to national priorities, underpinned by the Constitution. The MPRDA thus specifies the role the mining sector has to play in transforming the South African economic landscape by ensuring that historically disadvantaged South Africans and/or persons (HDSAs or HDPs) are included in the mainstream of the South African economy. Amendments to the MPRDA have been enacted to clarify the relationship between regulation of mineral exploitation and broader sustainable objectives. The 2013 Amendment Bill, which is not in force and which has been published in various amended forms, seeks to refine this relationship further.

# South Africa

The Broad-Based Socio Economic Empowerment Charter for the South African Mining and Minerals Industry ("**Mining Charter**") has been developed to regulate broad-based black economic empowerment (B-BBEE) and economic transformation in the sector. With the advent of the Mining Charter, the ownership and control of mining companies by HDSAs, community participation/upliftment and local beneficiation have become areas of focus in the granting and maintenance of mining and/or prospecting rights.

Applicants for a mining or prospecting right must apply in the prescribed manner for such a right in compliance with the requirements of the MPRDA. The MPRDA also regulates the transfer of prospecting or mining rights and, in certain instances, the transfer of interests held in (corporate) holders of prospecting or mining rights. Mining is subject to an array of environmental, labor and health & safety laws and regulations, which are administered by various state departments such as the Department of Mineral Resources (DMR), the Department of Water Affairs (DWA), the Department of Environmental Affairs (DEA) and the Department of Labor.

## 2 Legal framework for mining

South Africa has a mixed legal system, drawing on Anglo- and Roman Dutch Law. South African common law, as well as statute, is subject to the Constitution of the Republic of South Africa 1996 ("**Constitution**") which enshrines civil as well as socio-economic rights. The principle of co-operative government means that, while mining regulation is nationally determined, permits and licenses are, in practice, granted by one of the nine provincial DMRs.

The primary legislation relevant to the mining industry are:

- (a) MPRDA
- (b) Mining Charter of 2018 (as promulgated on 27 September 2018 and amended on 19 December 2018)
- (c) Mine Health and Safety Act, 29 of 1996 ("**MHSA**")
- (d) National Environmental Management Act, 107 of 1998 ("**NEMA**")
- (e) Mining Titles Registration Act, 16 of 1967;
- (f) Mining and Petroleum Resources Royalty Act, 28 of 2008;
- (g) Mining and Petroleum Resources Royalty (Administration) Act, 29 of 2008;
- (h) Geoscience Act, 100 of 1993;
- (i) Precious Metals Act, 37 of 2005;
- (j) Diamonds Act, 56 of 1986; and
- (k) National Water Act, 38 of 1996 ("**NWA**").

On 1 May 2004, the MPRDA became effective. The result was a shift from a model of private ownership of un-extracted minerals to a regime which recognizes mineral resources prior to their extraction as the common heritage of the people of South Africa. As such, the state has become the custodian of mineral resources with the authority to grant successful applicants prospecting and mining rights (dealt with below as "exploration" and "development/production tenements" respectively). For their duration, prospecting and mining rights may be treated as property which may be ceded, encumbered and used as security. Mineral

# South Africa

resources themselves, however, are only capable of being treated and valued as private property once extracted.

While the MPRDA regulates both the mining of mineral resources as well as oil and gas exploitation, the rights are distinct. This chapter considers only those rights pertaining to the prospecting and mining of minerals, as governed by Sections 17 to 23 of the MPRDA.

The Mineral and Petroleum Resources Development Amendment Act, 49 of 2008 ("**Amendment Act**"), published on 21 April 2009, came into effect progressively from 7 June 2013. The Amendment Act altered the administration and regulation of environmental obligations in the mining industry and ensured synthesis with the provisions of the NEMA. Environmental obligations are now regulated by the NEMA, although the necessary authorizations remain administered by the DMR (as discussed below).

A further amendment bill was introduced into legislature on 31 May 2013 ("**2013 Amendment Bill**").

The Minister of Mineral Resources indicated during the course of 2018 that the government is considering the withdrawal of the 2013 Amendment Bill, but this process has not been finalized and remains uncertain.

## 3 Restrictions on foreign investment

South Africa has enormous potential as an investment destination, offering a unique combination of a highly developed, first-world economic infrastructure within an emerging market economy.

While foreign investors can freely invest in South Africa, flow of funds is subject to exchange control regulation under the authority of the South African Reserve Bank (SARB). Regulation 14 of the Exchange Control Regulations prohibits the issue or transfer of shares by a South African resident to a non-resident without prior approval from a dealer in foreign exchange authorized by the Exchange Control Department of the SARB ("**Authorized Dealer**"). Where non-residents acquire shares in a South African entity, it is therefore necessary to have their share certificates endorsed as "non-resident" by an Authorized Dealer. The endorsement process is not unduly onerous and ensures that in the event of payment of dividends or the proceeds of a sale, the non-resident shareholder may freely remit such funds abroad. To have share certificates endorsed, it is necessary to satisfy the Authorized Dealer that the transaction in which they were acquired was:

- (a) at arm's length;
- (b) at market-related prices; and
- (c) financed in a manner approved by the SARB.

As with the acquisition of shares, all loans to a South African company made by non-residents require SARB approval. By contrast, an acquisition of assets other than shares is subject to SARB review only if the consideration is not paid in cash.

A regulatory area that is currently in flux is the state of South Africa's bilateral investment protection agreements (BITs). The protections contained in these agreements include duties to pay market value compensation in case of expropriation or nationalization, to provide full protection and security and fair and equitable treatment to foreign investors and investments, and to treat foreign investors and foreign investments no less favorably than domestic investors and investments.

In 2010, the Department of Trade and Industry (DTI) initiated a review of its BITs, which indicated that most of South Africa's BITs were structured to favor foreign investors. South Africa subsequently began a process

# South Africa

which had the objective of replacing its BITs with domestic legislation. The Promotion and Protection of Investment Bill ("**BITs Bill**") was, accordingly, first published for comment on 1 November 2013. Despite being roundly criticized, a revised version of the BITs Bill was enacted as the Protection of Investment Act, 22 of 2015 ("**Investment Act**"). Yet to be promulgated, the effects of the Investment Act have yet to be seen. It aims to balance the state's constitutional obligations and sovereign right to regulate investment in the public interest with protection of foreign investment.

The Investment Act purports to extend the constitutional rights of access to information, administrative due process and protection of property from arbitrary deprivation to foreign investors. It also includes the right to repatriate funds (subject to applicable taxation and "other" legislation). The key criticism of the Investment Act lies in the fear that, despite providing that "foreign investors and their investments must not be treated less favorably than South African investors in like circumstances," it will fail to provide for the "fair and equitable treatment" of investors. The criticism is based on the Investment Act affecting rights afforded to investors in terms of the BITs by:

- (a) removing the assurance of full market value compensation where investors are subject to expropriation, instead investors will be provided with compensation that is 'fair and equitable' in accordance with the Constitution of the Republic;
- (b) removing the obligation on the South African government to enter into international arbitration in the event of a dispute, replacing this mechanism with mediation facilitated by the DTI or South African court procedures; and
- (c) allowing investor's rights to be altered unilaterally through legislative amendment by the South African Parliament.

These criticisms notwithstanding, the Investment Act can also be read to ensure that foreign investors **are** subject to all local protections offered by South African law and the Constitution. Further, the Investment Act has not affected double taxation or other similar agreements.

## 4 Government or local participation requirements

The Constitution guarantees all South Africans common citizenship and equal benefit of its rights, benefits and privileges. Recognizing past denial of such rights, the Bill of Rights provides for "remedial measures" to "protect or advance persons, or categories of persons, disadvantaged by unfair discrimination." The Constitution, accordingly, places an obligation on the South African Government to take legislative and other measures to redress the consequences of past racial discrimination. This extends to the obligation to reform access to land, water and other resources – including mineral resources and wealth-generating commercial activities.

One result of South Africa's transformative Constitution is the enactment of public procurement legislation (including the Preferential Procurement Policy Framework Act, 5 of 2000) which provides for categories of preference in the granting of government tenders and contracts. Public procurement legislation operates together with the Broad-Based Black Economic Act, 53 of 2003 ("**B-BBEE Act**"), as amended on 24 October 2014, to promote economic transformation and enable meaningful participation of black people in the South African economy.

Focusing primarily on transforming ownership and management of commercial enterprise, the B-BBEE Act establishes an incentive-based system to provide previously disadvantaged South Africans with greater access to property, business opportunities and other economic benefits. The key mechanisms through which the B-BBEE Act operates are the B-BBEE Codes of Good Practice ("**Generic Codes**") together with certain



industry-specific codes. The Generic Codes, first gazetted by South Africa's Minister of Trade and Industry on 9 February 2007 and subsequently amended on 1 May 2015, provide a scoring framework linked to empowerment levels consistent with the objectives of the B-BBEE Act. Where public tenders are concerned, the requisite empowerment levels are, generally, specified in such tender documentation. Companies tendering for government contracts can improve their B-BBEE levels by procuring from other "empowered" companies. Accordingly, the B-BBEE Act has put in place an incentive-based system linking chains of procurement with transformed ownership, management and workforce composition.

## 4.1 MPRDA's B-BBEE provisions and the Mining Charter

In the mining sector, B-BBEE is regulated not by the B-BBEE Act and Generic Codes, but by the Mining Charter issued in terms of the MPRDA.

The Mining Charter focuses on the following elements of transformation:

- (a) ownership;
- (b) procurement, supplier and enterprise development;
- (c) beneficiation;
- (d) employment equity;
- (e) human resources development;
- (f) mine community development; and
- (g) housing and living conditions.

The MPRDA uses the definition of HDP or HDSA rather than "Black People" as in the B-BBEE Act. An HDSA or HDP is defined as any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect; any association composed of such persons (or a majority of such persons) or a juristic person other than an association, in which such persons own and control a majority of the issued capital or members' interest and are able to control majority of the members' votes. The MPRDA requires that a charter for the mining industry address sectorial historical inequalities. The first such charter was published in 2002, has since been replaced by the Mining Charter of 2010, and more recently superseded by the Mining Charter of 2018.

The Mining Charter differs from the Generic Codes and sector-specific codes issued in terms of the B-BBEE Act in that **compliance** is necessary to obtain and retain both mining and prospecting rights. Changes to the Mining Charter have reflected developments specific to South Africa's mining industry. One such example is the Mining Charter's concept of "meaningful economic participation" which requires that, irrespective of the funding arrangements put in place to allow for HDSA participation, HDSA participants must receive a portion of any dividend declared over the life of the transaction. This inclusion makes the so-called "trickle dividend," which had been incorporated into a number of HDSA-related mining transactions, mandatory.

The Mining Charter of 2018, similar to the provisions of the Mining Charter of 2010, includes a number of minimum requirements and targets which are aimed at a staged transformation of the mining industry.

In terms of the Mining Charter of 2018, mining companies are required to ensure that, within a period of five years, 70% of both capital and consumer goods and 80% of their services are procured from South African based manufacturers, and spent with HDPs, women and youth owned and controlled companies as well as BEE-compliant companies. The above targets exclude any non-discretionary procurement expenditure. For

# South Africa

further background on these requirements, it is important to note that a BEE-compliant company is defined as a company with a minimum B-BBEE level 4 status in terms of the Department of Trade and Industry's B-BBEE Codes of Good Practice, and minimum 25% +1 vote ownership by HDSA participants. These minimum procurement requirements are higher than the targets set out in the Mining Charter of 2010. The Mining Charter is designed to have the same rolling effect as the public procurement legislation. By requiring suppliers to the mining industry to become B-BBEE entities in order to remain competitive, the Mining Charter has resulted in transformation in both the primary mining space and secondary industries.

In terms of the ownership requirements under the Mining Charter of 2018, an existing mining rights holder who has achieved a minimum of 26% BEE shareholding shall be recognized as compliant for the duration of the mining right. The only offset for this ownership requirement is against the value of any beneficiation of mineral resources undertaken in terms of Section 26 of the MPRDA. The calculation of the offset includes the continuing consequences of previous transactions, taking into account market share as measured by attributable production units. This offset, however, is capped at 11% for existing mining right holders. Under the Mining Charter 2018 (for the beneficiation equity equivalent mechanism in lieu of BEE shareholding), a maximum of five percentage points of BEE shareholding will be provided for.

The position for pending and new mining and prospecting rights require higher BEE shareholding targets than for existing mining rights holders. For pending applications, although applicants only need to comply with the minimum requirement of 26% BEE shareholding under the Mining Charter of 2010, such applicants have to increase their BEE shareholding to 30% within a period of five years from the effective date of the mining right. For new mining rights, an applicant must maintain a minimum of 30% BEE shareholding, which shall include economic interest and a corresponding percentage of voting rights per mining right or in the mining company which holds a mining right. The 30% BEE shareholding has to comply with the following requirements:

- (a) 5% non-transferable carried interest to qualifying employees from the effective date of the mining right;
- (b) 5% non-transferable carried interest or a minimum 5% equity equivalent benefit as defined to host communities from the effective date of a mining right;
- (c) a mining right holder has to ensure that any reduction in shareholding of existing shareholders through the issue of new shares, shall not reduce qualifying employees carried interest and host communities' carried interest or equity equivalent benefit;
- (d) 20% effective ownership in the form of shares to a BEE entrepreneur and 5% hereof must preferably be for women; and
- (e) a mining right holder (of the minimum 20% shares) is obliged not be diluted below 51% ownership and control by a BEE entrepreneur.

In addition to ownership requirements, the transformative purpose of the Mining Charter includes obligations to employees and "the community." On the employment front, mining companies are required to ensure workplace equity, and that diversity achieves an HDP level of (i) 50% for the board of directors; (ii) 50% for executive management; (iii) 60% for senior management; (iv) 60% for middle management; (v) 70% for junior management; and (vi) 60% for core and critical skills, with minimum representation levels required for women at all these levels. There is also a requirement that 1.5% of all employees of mining companies are to be disabled persons. Mining companies are additionally required to contribute to human resource development (over and above the already mandatory skills levy). Under the Mining Charter of 2018, this levy remains at 5% of the annual payroll. The intention behind this levy is to support South African based research



to find solutions and develop initiatives for better exploration, mining, processing and technological efficiencies.

Mining companies were initially required to establish measures to improve the standard of living of its employees. Specifically, mining companies were obliged to take measures to ensure that by 2014, hostels were converted into family units, with an occupancy rate of one person per room and to facilitate home ownership options for all employees in consultation with organized labor. In terms of the Mining Charter of 2018, a mining rights holder has to submit a housing and living conditions plan to the Department of Mineral Resources, after consultation with organized labor and the Department of Human Settlements.

Beyond the immediate workforce, mining companies are required to consider “community” needs. Mining companies must therefore develop projects in line with integrated development plans, the cost of which should be proportional to the mines investment in the area.

From the perspective of sustainable development and mining industry growth, every mining company was obliged, under the Mining Charter of 2010, to implement the environmental management and industry health and safety provisions of the “Stakeholders’ Declaration on Strategy for Sustainable Growth and Meaningful Transformation of South Africa’s Mining Industry of June 2010 and in Compliance with All Relevant Legislation.” However, the Mining Charter of 2018 does not contain the same sustainability requirements and eases the obligations for mining companies.

The overall effect of the Mining Charter is to place the full responsibility for compliance with the national empowerment policy with the mining industry with the threat of suspension or cancellation of rights as a consequence for failure to comply.

## 4.2 Mining Charter 2018

In October 2013, the Generic Codes were updated to alter the “scoring system” used to define B-BBEE levels. One result of the new codes becoming operational on 1 May 2015 (“**New Codes**”) was a disconnect between the B-BBEE standards applicable to industries subject to the Generic Codes and those which had developed sector-specific codes (the Mining Charter included). The DTI therefore announced that all sector codes and charters were to be amended to be brought in line with the New Codes. Such alignment had to be complete by 30 October 2015. The mining sector was granted an extension until October 2016.

Subsequent to these developments, and pursuant to Section 100(2) of the MPRDA, the Mining Charter of 2018 was promulgated on 27 September 2018 and, together herewith, the Implementation Guidelines (GN 1399 GG 42122 of 19 December 2018) (“**Implementation Guidelines**”) and the Amendment to the Mining Charter of 2018, were published on 19 December 2018. The significant changes under the latest Mining Charter relate to increased BEE ownership requirements for mining rights holders and procurement expenditure having to comply with onerous provisions.

The Mining Charter of 2018 provides that an existing mining rights holder who has achieved a minimum of 26% BEE shareholding shall be recognized as compliant for the duration of the mining right. In this regard, it is envisioned that the 26% HDSA ownership share be consolidated and held by a special purpose vehicle. Further, not less than 5% of the 26% stake must be equitably distributed among workers (in the form of employee share ownership schemes), black entrepreneurs and the community. The interest of the community and the employees will have to be housed in trusts registered in terms of the Trust Property Control Act, 57 of 1988. As per the section above, we have also commented on the increased BEE shareholding requirements for new mining right applications and pending applications.

# South Africa

The procurement requirements in the Mining Charter of 2018 have also been increased, compared with the Mining Charter of 2010, to require mining companies to procure a minimum of:

- (a) 70% of the total mining goods' (mining goods is defined as both capital goods and consumables) procurement spend must be on South African manufactured goods. The 70% is allocated as follows:
  - (i) 21% is to be procured by a HDP owned and controlled company;
  - (ii) 5% has to be procured by women or youth owned and controlled company; and
  - (iii) a minimum of 44% is to be procured from a BEE compliant company;
- (b) 80% of services must be sourced from a South African based company further split into a minimum of the following, namely:
  - (i) 50% must be spent on services supplied by HDP owned and controlled companies (defined as HDPs holding at least 51% of the exercisable voting rights and economic interests, including the flow-through principle);
  - (ii) 15% must be spent on services supplied by women owned and controlled companies;
  - (iii) 5 and
  - (iv) 10% must be spent on services supplied by a BEE compliant company.
- (c) The Mining Charter requires that the procurement targets must be complied with progressively within a period of five years, as outlined in the transitional arrangements. Furthermore, a mining right holder must ensure that (i) the terms and conditions offered to women owned and controlled companies, or youth, are not less favorable than those offered to other suppliers; and (ii) all procurement expenditure reported must be the actual expenditure incurred.

## 5 Land tenure and priority

All mineral resources are under the custodianship of the state until lawfully extracted. The MPRDA creates a system of mining tenure separate from land tenure. Therefore, landowners cannot claim ownership of mineral resources found on their land. Holders of prospecting and mining rights, however, do have to consult landowners as part of the rights application process and are required to reach agreement over surface rights – including securing access arrangements to the prospecting or mine site.

As a form of property, mining and prospecting rights are protected by the constitutional property clause which prohibits "arbitrary deprivation" of property and requires "fair and equitable compensation" in the event that expropriation for "a public purpose or in the public interest" becomes necessary. Expropriation itself is governed by statute, allows representations to be made and requires compensation.

A risk of which mining companies should be aware, is the potential for land claims on land subject to mining or prospecting rights. Due diligence enquiries into potential land claims prior to investing in mining enterprises or engaging in the rights application process may assist in reaching agreements with claimant communities or individuals. Such agreements may be designed to meet community development obligations in the MPRDA and ensure cooperation with local communities, thereby mitigating the risks of protracted conflict over or loss of mineral tenure after the commencement of operations.

# South Africa

## 6 Indigenous or local community rights

The South African Constitution recognizes customary law as having equal standing with South African common law, both subject to the Constitution. Accordingly, customary law entitlements to property are recognized and protected. Customary law property entitlements include: the rights to possess, access, occupy, use and enjoy an area and its resources; to visit and protect sites of cultural and religious significance; to hunt, fish, herd and grow crops; and to conduct social, religious and cultural activities and ceremonies. In practice, protection of customary property rights is ad hoc and regulated by the courts. However, customary property entitlements may be raised through opposition to applications for prospecting or mining rights.

The National Heritage Resources Act, 25 of 1999 ("**Heritage Act**") includes protection of places to which oral traditions are attached or which are associated with "living heritage" (i.e., "the intangible aspects of inherited culture"). Protected areas and objects include graves and burial grounds, culturally significant landscapes, geological sites, and archaeological/paleontological sites ("**Heritage Sites**"). Heritage Sites are protected from damage or destruction. Mining and associated activities would, in most cases, require notification of the responsible heritage resources authority. If necessary, the authority will request further investigation and reporting and, thereafter, determine whether development may proceed, or proceed subject to restrictions. The effect of the Heritage Act is that sites of importance in terms of customary law or communities adhering to customary law may be protected by virtue of their designation as Heritage Sites. Generally, due diligence at the early stage of mining operations/mining company acquisition will reveal the presence of Heritage Sites. Similarly, the presence of Heritage Sites may be determined as part of the environmental impact assessment (EIA) process discussed below.

The MPRDA recognizes customary property entitlements and indigenous or local community rights through two key mechanisms. The first is the creation of "Preferent Prospecting or Mining Rights" ("**Preferent Rights**") in Section 104. The second is the series of consultation requirements found in the MPRDA as well as in the NEMA.

Preferent Rights may only be granted in the absence of pre-existing mining or prospecting rights. Accordingly, they do not pose a risk to mining companies. They may only be granted to a "community" which is able to show that the right will be used to contribute towards the development and social upliftment of the community and that benefits resulting from the granting of the right will accrue to such community. Preferent Rights endure for five years and may be renewed for a further five-year period.

The greatest area of uncertainty pertaining to indigenous and local community rights lies in the consultation process and the MPRDA's definition of "community." A "community" is defined as a "group of historically disadvantaged persons with interests or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law..." This definition is broadly aligned with legislation designed to protect customary and informal land rights. Accordingly, and as part of the consultation requirements of the MPRDA, it may become advisable or necessary for mining companies to engage with indigenous communities and, particularly in rural areas subject to traditional leadership, with traditional leaders.

## 7 Environmental protection and rehabilitation obligations

Section 37 of the MPRDA makes the principles of the NEMA applicable to all prospecting and mining operations. It also makes principles of sustainable development applicable to mining operations "by integrating social, economic and environmental factors" into all stages of the planning and conduct of

# South Africa

operations to exploit mineral resources. With effect from September 2014, amendments to the MPRDA and NEMA have aligned to the two statutes to ensure that mining occurs within the broader environmental management framework. The most important and wide-reaching environmental principle is the “duty of environmental care.” This operates as a catch-all requirement for all mining and prospecting activities and should inform how specific obligations are interpreted.

Two principles with a direct effect on how mining companies engage with environmental obligations are the notion of “cradle-to-grave” environmental planning and the presumption that the “polluter pays.” The “cradle-to-grave” approach is evident in two key provisions of the MPRDA. The first, Section 22, requires that persons wishing to apply for mining rights must **simultaneously** apply for environmental authorization – therefore requiring that environmental considerations are present even before mining operations commence. The second, Section 43, deals with the requirement of closure certificates on the cessation of mining. Such certificates may only be granted once obligations have been met in respect of “environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorization and the management and sustainable closure” of the mine. The MPRDA also empowers the minister to recover costs from polluters in the event of environmental emergencies and to suspend or cancel mining or prospecting rights if conditions of an environmental authorization are breached. An important effect of such ongoing obligations is that holders of prospecting or mining rights as well as the previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental harm – and the resulting liability beyond the cessation of mining operations. The extent to which historical polluters may be held liable is an emerging area of law. The legislative framework, however, does provide criminal offenses for historical pollution which attract extensive financial penalties as well as personal liability for company directors.

The potential liability associated with environmental obligations is tempered by a general “reasonableness” standard and clear guidance regarding expectations of the reasonable use of natural resources. Where a competent authority finds that “reasonable measures” to prevent environmental harm have not been taken, it may require that such step be taken – usually through compliance notices. Further non-compliance may lead to the competent authority taking the necessary steps itself and recovering costs from the responsible parties. Administrative or criminal penalties may also follow. What constitutes “reasonable measures,” however, is fairly clear from the details of the environmental legislation (rather than the MPRDA). Regulations passed in terms of the NEMA determine the process of application and granting of environmental authorizations, which, in turn, contain clear requirements and standards for authorized activities.

The NEMA operates together with a range of national, provincial and local legislation. The most significant of these are the NWA, National Environmental Management: Air Quality Act, 39 of 2004 (“**NEM:AQA**”) and National Environmental Management: Waste Act, 59 of 2008 (“**NEM:WA**”). Each of these acts provides for licensing (for water use, air emissions and waste management, respectively) in addition to those environmental authorizations granted in terms of the NEMA. They further impose monitoring and reporting standards and, like the NEMA itself, impose administrative and criminal penalties for non-compliance.

In practice, the environmental authorization process governed by the NEMA is used to identify which environmental legislation is applicable to a particular situation and to ensure that the relevant requirements are met. The NEMA requires that a registered environmental consultant manage the EIA process. An EIA is only required once the application for the mining right has been accepted by the regional manager (who is a senior official in the provincial department of mineral resources) (“**Regional Manager**”). In addition to addressing water use, air quality and waste management concerns, an EIA may also consider requirements such as biodiversity, protected areas, Heritage Sites and coastal zones. The EIA, usually contained in an

# South Africa

Environmental Management Plan (EMP) must be submitted to the Regional Manager within 180 days of being notified that an application for a mining right has been accepted.

Significantly, one of the conditions for the granting of a mining right is that “the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorization is issued.” In terms of this section, the minister must only grant the right if the applicant complies with all the statutory requirements. As such, it is clear that the mining right cannot be granted if an EIA and EMP have not been submitted within the requisite time periods as part of the process for the DMR to assess the mining right application. A requirement upon application for an environmental authorization relating to mining or prospecting rights is that applicants “comply with the prescribed financial provision for rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts.” The form of financial provision which is acceptable is prescribed by the NEMA regulations.

The environmental obligations of mining companies are ongoing. The framework, however, focuses on sustainable development which requires a balance between resource exploitation and preservation. Following the integration of the MPRDA with environmental legislation, greater clarity on the duty of care of mining companies is emerging.

## 8 Exploration licenses (prospecting rights)

### 8.1 Scope

For purposes of conducting prospecting activities, an applicant must hold a prospecting right. It is important to distinguish between “prospecting rights” (which pertain to minerals) and “exploration rights” (which pertain to petroleum). This section considers prospecting rights only.

“Prospecting” is defined as “intentionally searching for any mineral by means of any method (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or (b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or (c) in the sea or other water on land.”

A prospecting right entitles the holder to:

- (a) enter the land to which the right relates and to bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting;
- (b) prospect for his/her own account on or under that land for the mineral for which the right has been issued;
- (c) an exclusive right to remove and dispose of any mineral to which the prospecting right relates and which is found during the course of prospecting (subject to the requisite permission being granted);
- (d) use water from any natural spring, lake, river or stream situated on or flowing through the relevant land or from any excavations made and used for prior prospecting or mining purposes (subject to licensing and other requirements of the NWA);
- (e) sink a well or borehole required for prospecting operations (again, subject to the licensing and other requirements of the NWA);
- (f) carry out activities incidental to prospecting, subject to all applicable laws;

- (g) an exclusive right to apply for and be granted (one) renewal of such prospecting right; and
- (h) an exclusive right to apply for and be granted a mining right in respect of the relevant mineral and prospecting area (subject to the conditions for grant of a mining right being met).

## 8.2 Duration

Prospecting rights are granted for a period specified in the license for a period of up to five years. One renewal of a period of up to three years is permitted. Renewal applications must be in the prescribed form and follow the prescribed process. If compliance with all requirements is met, renewals must be granted.

The minister is empowered to cancel or suspend prospecting rights in the event that the holder thereof:

- (a) conducts the relevant activity contrary to the provisions of the MPRDA;
- (b) breaches any material term or condition of its right;
- (c) contravenes any condition of its environmental authorization; or
- (d) has submitted any incorrect, false, fraudulent, inaccurate or misleading information in connection with any matter required to be submitted in terms of the MPRDA.

In the event that the minister is considering such suspension or cancellation, the holder is provided with due process rights and an opportunity to remedy the default. Accordingly, the minister is required to provide the holder with written notice of the intention to suspend or cancel the prospecting right with reasons and to provide a reasonable opportunity to demonstrate why the license should not be suspended or canceled. The minister must, further, direct the holder to take specific corrective action to remedy the default. In the event that the holder fails to comply with such directions and after considering any representations made by the holder, the minister is entitled to suspend or cancel the relevant license. License suspensions may be lifted by the minister if he/she is satisfied that the holder has complied with ministerial directives, or made satisfactory representations.

## 8.3 Steps to acquire a prospecting right

The process commences with the relevant application, together with an application for an environmental authorization, being made in the prescribed manner and against the payment of the prescribed non-refundable fee. The application is made to the Regional Manager. It must be accepted if it is the first such application received on time for a specific mineral resource that meets the application requirements. If the application does not meet the relevant right's requirements, it must be rejected in writing within 14 days.

If the application is accepted, the Regional Manager must, within 14 days, give written notice to the applicant to:

- (a) submit all required environmental reports within 60 days; and
- (b) consult the landowner, lawful occupier and all interested and affected parties (the outcome of such consultation to be included in the environmental reports).

Once in receipt of such information, the Regional Manager is required to forward the application to the minister for consideration. The minister must grant the prospecting right within 30 days if the applicant demonstrates:

- (a) the necessary B-BBEE compliance;

- (b) access to financial resources and the technical ability to pursue prospecting activities optimally in accordance with the submitted prospecting work program;
- (c) an estimated expenditure compatible with the proposed prospecting operation and duration of the prospecting work program;
- (d) that prospecting will not cause unacceptable pollution, ecological degradation or environmental damage and an environmental authorization has been issued;
- (e) the ability to mine safely;
- (f) absence of contravention of any provisions of the MPRDA; and
- (g) that the applicant may provide meaningful opportunities for HDSAs in respect of mineral exploitation in the case of certain prescribe minerals only.

If the above requirements are **not** demonstrated, the minister must refuse to grant the prospecting right by written notice within 30 days, providing reasons for such refusal. Refusal is also required if the grant will result in some form of exclusionary or anti-competitive act.

It takes approximately six months to be granted a prospecting right, however, in some instances, it has taken longer. Prospecting rights become effective on the "effective date," which is the date on which the right is issued or "executed." Execution means signature by the applicant and a representative of the DMR before a notary public.

## 8.4 Relationship with landowners

Subject to 21 days' written notification to landowners and lawful occupiers of the land subject to a prospecting right, and the consultation of such landowners and lawful occupiers required during the application and environmental authorization process, the holder of a prospecting right is entitled to, among other things, enter the land; bring machinery, plant and equipment onto the land; build, construct and lay down infrastructure which may be required for purposes of prospecting; prospect, use water, drill boreholes and carry out any other function ancillary to prospecting.

A common misconception is that the entitlement to use the land automatically entitles the landowner or occupier to compensation. While habitually some form of compensation is offered to landowners and occupiers, there is no general entitlement to compensation but only a limited right pertaining to loss or damage caused by the license holder. Landowners may not prevent prospecting activities or access to land for such purpose. Section 54 of the MPRDA requires the holder to notify the relevant Regional Manager where access is refused, made subject to unreasonable demands, or where a landowner cannot be found to apply for access. Similarly, where a landowner or occupier is of the view that a holder has acted unreasonably, notice must be given to the Regional Manager. A process is then prescribed whereby the Regional Manager is required to facilitate agreement between the parties. If such facilitation fails, the matter must be referred for final resolution by arbitration.

An important development regarding interpretation of the balance between land/surface rights and those rights granted in terms of the MPRDA has occurred in respect of the application process. The concept of "meaningful engagement" with landowners, occupiers and interested and affected parties, means that applicants for prospecting or mining rights are required to ensure that landowners understand the impact of proposed activities. There is, in addition, a strong emphasis on the relevant parties reaching mutually beneficial agreement over land use and access **prior** to the granting of MPRDA rights.



## 8.5 Obligations of the holder

Once granted a prospecting right, the holder is obliged to:

- (a) lodge the right for registration in the Mineral and Petroleum Titles Registration Office within 60 days of the date on which the right becomes effective (or is renewed);
- (b) commence prospecting activities within 120 days;
- (c) continuously and actively conduct prospecting activities in accordance with its prospecting work program;
- (d) comply with the terms and conditions of the prospecting right, environmental authorization and all relevant laws;
- (e) pay prescribed fees and royalties to the state;
- (f) submit progress reports and date of prospecting operations to the Regional Manager within 30 days of submission thereof to the Council for Geoscience;
- (g) obtain specific authority to remove and dispose of diamonds and bulk samples of other minerals found during the course of prospecting for the holder's own account;
- (h) maintain proper records of prospecting operations, the results thereof, connected expenditure, borehole core data and core-log data at its registered place of business;
- (i) submit progress reports and data to the Regional Manager; and
- (j) comply with relevant B-BBEE requirements.

## 9 Holding tenements

South Africa does not have holding tenements or any other right similar to a holding tenement.

## 10 Development/production tenements (mining rights)

### 10.1 Scope

For the purposes of conducting production activities, an applicant must hold a mining right. As with the distinction between rights pertaining to prospecting of minerals and exploration of oil and gas, a distinction is made between "mining rights" (in respect of minerals) and "production rights" (in respect of petroleum).

A mining right entitles the holder to:

- (a) enter the land to which the right relates and to bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of mining;
- (b) mine for his/her own account on or under that land for the mineral for which the right has been issued;
- (c) an exclusive right to remove and dispose of any mineral to which the mining right relates and which is found during the course of mining;

- (d) use water from any natural spring, lake, river or stream situated on or flowing through the relevant land or from any excavations made and used for prior prospecting or mining purposes (subject to the licensing and other requirements of the NWA);
- (e) sink a well or borehole required for mining operations (again, subject to the requirements of the NWA);
- (f) carry out activities incidental to mining, subject to all applicable laws;
- (g) an exclusive right to apply for and be granted (one) renewal of such mining right; and
- (h) apply for and be granted a mining right for the same mineral in the same area.

## 10.2 Duration

A mining right is usually granted for a maximum period of 30 years and may be renewed for further periods not exceeding 30 years per renewal.

As is the case with prospecting rights, the renewal process follows a prescribed process and requires application in the prescribed form. Once a renewal application has been lodged and provided, and it has been lodged prior to the expiry of the relevant mining right, the mining right will remain valid until the renewal application has finally been dealt with.

The minister's power to suspend or cancel prospecting rights, as described above, applies equally to mining rights. In addition, mining rights may be suspended or canceled by the minister if the MPRDA requirement of "optimal mining" is not met. If the Minerals and Mining Development Board ("**Board**") makes a recommendation that the minerals mined under a right are not being mined optimally, or that the objective of promoting employment and advancing the social and economic welfare of all South Africans is being detrimentally affected, the minister must direct the right holder to take immediate corrective action. Board recommendations to the minister must consider the holder's technical and financial resources as well as prevailing market conditions. Further, before directing corrective action, the minister must allow the holder the right of representation. Non-compliance with the minister's directive and failure to provide satisfactory representations entitles the minister to cancel the mining right.

## 10.3 Transition from prospecting right to mining right

A prospecting right may only be renewed once for a period of three years. After such renewal, the holder must apply for a mining right. The entitlement to apply for and be granted a mining right in respect of the mineral and prospecting area subject to the prospective right is exclusive to the holder (although the requirements for grant of a mining right must still be met).

## 10.4 Steps to acquire a right

The initial application follows the same steps as those pertaining to prospecting rights. If the application is accepted, the Regional Manager must, within 14 days of receipt of the application, give written notice to the applicant to:

- (a) submit all required environmental reports within 180 days; and
- (b) consult the landowner, lawful occupier and all interested and affected parties (the outcome of such consultation to be included in the environmental reports).

Once in receipt of such information, the Regional Manager must forward the application to the minister for consideration within 14 days. The minister, thereafter, has 60 days in which to make a decision to refuse to grant a mining right (and a further 30 days to provide written notice of such decision to the applicant) if requirements are met. These include the applicant demonstrating that:

- (a) the necessary B-BBEE compliance;
- (b) the mineral can be mined optimally in accordance with the mining work program;
- (c) it has access to financial resources and the technical ability to conduct the proposed mining operation optimally;
- (d) its financing plan is compatible with the intended mining operation and its duration;
- (e) no unacceptable pollution, ecological degradation or damage to the environment will result from mining operations;
- (f) an environmental authorization has been issued;
- (g) provision has been made for the prescribed social and labor plan;
- (h) it has the ability to mine safely;
- (i) it has not contravened the MPRDA; and
- (j) granting the mining right will further B-BBEE objectives, the objectives of the social and labor plan, and the MPRDA objectives of substantially and meaningfully expanding opportunities for HDSAs to enter into and benefit from the mineral industry and to promote employment and advance the social and economic welfare of all South Africans.

Mining rights may be granted subject to conditions to promote the rights and interests of a community (including requirements for community participation) where an application pertains to community land.

## 10.5 Relationship with landowners

The same considerations pertaining to prospecting rights are applicable to holders of mining rights.

## 10.6 Obligations of the holder

Once granted a mining right, the holder is obliged to:

- (a) lodge the Mining Right for registration in the Mineral and Petroleum Titles Registration Office within 60 days of the date on which it becomes effective or is renewed;
- (b) commence with mining activities within one year of the date on which the mining right becomes effective;
- (c) actively conduct mining activities in accordance with the mining work program;
- (d) comply with the terms and conditions of the Mining Right, environmental authorization and all relevant laws;
- (e) comply with its approved social and labor plan and submit annual reports on compliance with the social and labor plan as well as the MPRDA's social and welfare objectives;

- (f) maintain records of mining activities and related financial records at its registered place of business;
- (g) submit prescribed monthly returns; and audited annual financial report or financial statements;
- (h) submit reports as required by NEMA - including reporting on environmental financial provision;
- (i) pay royalties to the state; and
- (j) comply with the provisions of its B-BBEE obligations as contained in the Mining Charter and the mining right itself.

## 11 Assignment of and security over tenements

Section 11 of the MPRDA sets out that other than in the instance of a change of a controlling interest in a publicly listed company and the encumbrance by mortgage of the relevant right in favor of a bank or financial institution (in which event a sale in execution will still trigger the consent requirement referred to below), a prospecting right or a mining right, or an interest in such right, or a controlling interest in a company or close corporation holding the right, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of in the absence of the written consent of the minister. The consent must be granted if the transferee is capable of carrying out and complying with the obligations, and terms and conditions of the respective right.

"Control" extends to indirect control in respect of an entity that holds a mining or prospecting right. Therefore, Section 11 approval would be required where there is a change of control in the indirect shareholding of such a company. This is the case even in the case of a non-resident entity.

Any attempted transfer which does not comply with the provisions of section 11 is void.

## 12 Royalties

Once a mining right is obtained, the holder is obliged to pay royalties to the State as provided for in the Mineral and Petroleum Resources Royalty Act, 28 of 2008 ("**Royalty Act**") and the associated Mineral and Petroleum Resources Royalty (Administration) Act, 29 of 2008 ("**Administration Act**"). The Royalty Act applies to all Mining Rights' holders, subject to exemptions for small, South African businesses.

The Royalty Act and the Administration Act were promulgated on 17 November 2008. The Royalty Act provides that any person (whether natural or juristic) who "wins" or "recovers" a mineral resource (or on whose behalf such mineral resource is won or recovered) is obliged to pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource. Transfer of a mineral resource includes the first disposal, consumption, theft, destruction or loss of a mineral resource, other than by way of flaring or other liberation into the atmosphere during the mining process. Subsequent transactions in respect of a mineral will not attract the payment of a royalty.

The royalty is determined by multiplying the gross sales of the extractor in respect of that mineral resource during the year of assessment by the applicable royalty rate for that year of assessment. The floating royalty rates for refined and unrefined mineral resources are capped at 5% and 7% respectively.

# South Africa

The royalty rate is determined in accordance with the following formula:

$$RR = 0.5 + \left( \frac{EBIT}{G(R \text{ or } UR)} \right) \times 100$$

Where: RR = the royalty rate applicable EBIT = earnings before interest and tax G = gross sales in respect of the mineral resource R = refined resource multiplier of 12.5 UR = unrefined resource multiplier of 9

Schedules to the Royalty Act define conditions for refined and unrefined mineral resources which, in effect, allows for classification thereof, and, accordingly, determine the applicable royalty rates. Deeming provisions apply in respect of mineral resources that meet conditions below or between the specified conditions. Further, where mineral resources are transferred other than in accordance with the provisions of the schedules, a deeming provision may be applicable to the gross sales of the party who has won the mineral.

## 13 Mineral reporting and classification

The Listings Requirements of the Johannesburg Stock Exchange have adopted the South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves ("**SAMREC Code**") and South African Code for Reporting of Mineral Asset Valuation ("**SAMVAL Code**"). One of the requirements for listing a company on the Johannesburg Stock Exchange (JSE) is submission of a "Competent Person's Report." Such report must comply with the SAMREC and SAMVAL Codes. Annual reporting requirements similarly require disclosure of compliance with the SAMREC Code.

## 14 Other key issues

### 14.1 Usual structure of venture

As prospecting and mining rights are not transferable without ministerial consent, as discussed below, one of the generally utilized methods of investing in a South African mining project is to acquire shares in the company holding the prospecting or mining right. However, currently the transfer of a controlling shareholding in a company holding the prospecting or mining right also triggers the provisions of Section 11 of the MPRDA, which requires the consent of the minister.

It is important to note that because of the 26% HDSA participation requirement in the Mining Charter, the usual structure of mining ventures must include a HDSA shareholder holding at least 26% of the shares in the mining company.

### 14.2 Restricted mining areas

The MPRDA prohibits the granting of prospecting or mining rights over land comprising a residential area; any public road, railway or cemetery; any land being used for public or government purposes or reserved in terms of any other law; or areas identified by the minister through publication in the Government Gazette. This prohibition is subject to ministerial consent if satisfied that the mining or prospecting will take place within the confines of environmental management policies, norms and standards; granting mining or prospecting rights will not detrimentally affect the interests of any holder of a prospecting or mining right and with regard to the sustainable development of the mineral resources involved and the national interest.

### 14.3 Export

The state or government does not purport to have ownership of any portion of the minerals once mined. In terms of Section 12 of the Precious Metals Act, 37 of 2005, no person may export any unwrought or semi-

# South Africa

fabricated gold without approval of the National Treasury granted with the concurrence of the minister. Further, export of unwrought or semi-fabricated metals of platinum requires written ministerial approval. Such approval must be granted subject to the promotion of equitable access to and the orderly local beneficiation of such metals. "Beneficiation" is defined in the MPRDA in terms of four stages of mineral extraction, recovering and refining.

## 14.4 Taxes

South African companies, and non-resident companies deriving income from a source in South Africa, are subject to corporate tax at a rate of 28% on their taxable income. For corporate tax purposes, mining companies potentially qualify to deduct certain capital expenditures which would otherwise not be deductible, subject to certain conditions.

In addition, capital gains tax (CGT) applies to South African resident entities on the taxable capital gain made on the disposal or deemed disposal of any asset. With regards to non-South African resident entities, CGT applies to the following assets:

- (a) immovable property (for example, Mining Rights, land and buildings etc.), or any right or interest in immovable property, situated in South Africa;
- (b) shares in a company where 80% or more of the market value of those shares is attributable to immovable property (for example, Mining Rights, land and buildings etc.), in South Africa and the non-South African resident holds directly or indirectly 20% or more of the shares in the company; and
- (c) assets of a permanent establishment (for example, a branch of a foreign company) situated in South Africa.

CGT is levied at a rate of 80% of the corporate tax rate applicable to companies (i.e., an effective CGT tax rate of 22.4%).

Dividends withholding tax (DWT) must be withheld from dividends declared by a South African entity at a rate of 15%. Certain exemptions do apply in the case of domestic retirement funds, public benefit organizations and domestic companies.

It should be noted that South Africa is a party to double taxation agreements (DTAs) with a number of other countries. In terms of these DTAs, non-South African residents are offered relief from international double taxation. The effect of DTAs in certain instances is that DWT and/or CGT rates applicable to non-South African residents may be reduced.

## 14.5 Overlapping tenements

As noted above, there is no restriction on overlapping tenements. As a result, it has become practice for holders of overlapping mining rights to enter into agreements to regulate access to mining sites and extraction of the relevant mineral resources.

## 14.6 Infrastructure

South Africa's infrastructural challenges are to be expected given the size and developing status of the country. Technological advances have, further, opened up new and more remote areas for mineral exploitation. Some infrastructural challenges present in South Africa are highlighted below.

## 14.7 Power supply

Unstable supply of electricity is a topic frequently in the news. This has caused significant disruptions to mining production and development. However, South Africa's electricity supplier is a major consumer of coal and other fuel sources and, as such, the unstable electricity supply is also an opportunity for mining companies.

One such opportunity is the Coal Baseload IPP Procurement Programme ("**Programme**") which was launched by the Department of Energy to assist with electricity constraints. It is envisaged that approximately 7761 megawatts will be generated from baseload energy sources in terms of the Programme, specifically coal, natural gas and hydro energy.

## 14.8 Water

In mining regions around the world a lack of reliable water sources contributes to the challenges mining companies are facing. South Africa is presently experiencing a country wide drought which has impacted various mining operations.

An unstable water supply is detrimental to mining production and as such it is becoming increasingly necessary for mining companies to make provisions for water shortages. Anglo American is an example of a mining company doing this as it has established the Emalahleni Water Reclamation Plant. This plant allows Anglo American to minimize its dependence on municipal water supplies.

## 14.9 Rail and port capabilities

Extensive and reliable "pit-to-port solutions" are vital if South Africa is to grow its mining industry in the future.

Large distances and poor historical infrastructure mean that major investment in "pit-to-port solutions" is required in South Africa for producers to be accommodated. However, the lack of such infrastructure puts a financial burden on mining companies who are forced to use inefficient and costly alternatives. Accordingly, this is something which all mining investors must take cognizance of.

## 14.10 Mine health and safety

The MHSA was promulgated pursuant to, and adopted as a result of, the recommendations of the Leon Commission of Inquiry into the Safety and Health in the Mining Industry conducted in 1994. The MHSA and its regulations provide detailed standards and requirements for mine safety and aims to give effect to South Africa's international law obligations in this regard. In addition to the MHSA, certain regulations promulgated in terms of the repealed Mines and Works Act, 12 of 1911 and Minerals Act, 50 of 1991 remain in force.

The basic premise of the MHSA is that government, employers and employees in the mining sector must subscribe to governance, health and safety priorities. Accordingly, employers are required to develop and implement systems to identify, assess and control health and safety risks so as to prevent accidents as far as is reasonably possible. Additionally, mines must be designed, constructed, equipped and operated in a manner that allows for a safe working environment. Employers are, further, required make certain statutory appointments in relation to mine management and health and safety monitoring. Reciprocal duties are placed on employees who are required to take reasonable care to protect their own health and safety as well as those of others and to comply with risk mitigation measures put in place by employers.



# South Africa

Compliance with the provisions of the MHSA is monitored by the chief inspector of mines, who is obliged to compile and distribute health and safety information, advise the minister on relevant issues, appoint a medical inspector and to determine annual inspection plans and reports on mine health and safety. The chief inspector is also responsible for monitoring environmental health on mine sites and is empowered to require all mines to prepare and implement hazard management, as well as health and safety, systems.

Inspectors, under the direction of the chief inspector of mines, are empowered to enter mines at any time without warrant or notice; enter any other place with the necessary warrant; and to bring into and use on any mine or place the vehicles, equipment and materials necessary to perform their functions in terms of the MHSA. Inspectors have wide-ranging powers and employers and employees are obliged to assist them in the performance of their duties.

## 15 Useful websites

Department of Mineral Resources	<a href="http://www.dmr.gov.za/">http://www.dmr.gov.za/</a>
Department of Energy	<a href="http://www.energy.gov.za/">http://www.energy.gov.za/</a>
Department of Trade and Industry	<a href="http://www.dti.gov.za/">http://www.dti.gov.za/</a>
Department of Science and Technology	<a href="http://www.dst.gov.za/">http://www.dst.gov.za/</a>
Department of Water and Sanitation	<a href="http://www.dwa.gov.za/">http://www.dwa.gov.za/</a>
Department of Environmental Affairs	<a href="http://www.environment.gov.za/">http://www.environment.gov.za/</a>
Chamber of Mines South Africa	<a href="http://www.chamberofmines.org.za/">http://www.chamberofmines.org.za/</a>
Institute of Mine Surveyors of Southern Africa	<a href="http://www.ims.org.za/">http://www.ims.org.za/</a>
The Southern Africa Institute of Mining and Metallurgy	<a href="http://www.saimm.co.za/">http://www.saimm.co.za/</a>
Mining Industry Association of Southern Africa	<a href="http://www.miasa.org.za/">http://www.miasa.org.za/</a>
Council of Geoscience	<a href="http://www.geoscience.org.za/">http://www.geoscience.org.za/</a>

# South Africa

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# Spain

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	No
Local party ownership requirement	Yes, if needed
Indigenous and local community rights	No
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Up to three years, extendable for three more
Mining license	<ul style="list-style-type: none"> <li>(a) Typically six months, with extensions to one year (Section A permits)</li> <li>(b) Typically one year (Section B, mining waste permits)</li> <li>(c) Typically 90 years (Section B, subterranean structures permits)</li> <li>(d) Typically 30 years, with two 30-year extensions maximum (Section C permits)</li> </ul>
Able to use tenement as security	Yes
Royalty payable to government	Yes
Classification system used	Sections A, B or C pursuant to Article 2 of the Spanish Mining Act's requisites

## 1 Summary

Spain has very diverse geological deposits and resources in its territory, which results in different kinds of mining production. This mining wealth positions Spain as the third largest producer of copper ore, one of only four states that produce nickel ore and the leading producer of spar-fluorine. Its production of ornamental rock is also very important, particularly in the case of slate.

On the other side, Spain has passed from being the eighth largest producer of coal within the European Union, to start a process of de-carbonization that resulted in the progressive closing of almost all coal mines

by December 2018 (only two of them have publicly expressed their intention to continue operating if they find the way to return all state aid received since 2011).

Regarding the geographic distribution by sub-sectors, energy products are found in six autonomous communities. In Asturias, Catalonia, Castilla y León and Castilla La Mancha, the mining of energy products represents between 19% and 37% of production value. The mining of metals accounts for 74% of the total value of mining in Andalusia, 72% in Extremadura and more than 40% in Asturias.

The main regulations governing the legal system for exploration and use of sites for mineral mining and other geological resources are Spanish Mining Act 22 of 21 July 1973 and Royal Decree 2857 of 25 August 1978, which approved the General Regulations for the Mining System.

However, there are other regulations that deal with specific aspects of the mining sector. In this respect, Spanish Mining Promotion Act 6 of 4 January 1977 provides the basis that governs the exportation of raw mineral materials and the mining taxation system. Regarding the environmental impact of mining in Spain and the different measures aimed at its protection, the most relevant are Royal Decree 975 of 12 June 2009 on Management of Industrial Mining Waste and Protection and Restoration of the Area Used for Mining Activities, Royal Legislative Decree 1 of 16 December 2016 on Prevention and Control of Contaminated Substances, and Act 26 of 23 October 2007 on Environmental Responsibility.

The foregoing, notwithstanding specific regulations, can also be found at local level in Spain, which is divided into municipalities, provinces and autonomous communities, based on the principle of independence of nationalities and regions therein. Each of these territorial bodies is granted certain regulatory powers.

## 2 Legal framework for mining

All natural resources and other geological resources existing both in national territory and in territorial waters or the continental platform are assets in the public domain, and the state can directly undertake or assign their exploration and production. Similarly, the state can reclaim areas when the use of the mineral deposits and geological resources may be of special interest for economic and social development or for national defense.

The Spanish Mining Regulations classify mineral deposits and other geological resources into the following three sections:

- (a) Resources of low economic value, those with geographical restrictions for marketing, and those which are used in infrastructure and construction work and other uses that do not require any further processing.
- (b) Mineral water (terrestrial or maritime), thermal water, subterranean structures and accumulations consisting of waste from the activities regulated by the Spanish Mining Act.
- (c) Other mineral deposits and geological resources that are not included in any of the previous sections.

The type of permit required depends on the classification of the mineral deposit or geological resource, as well as on the kind of activity that will be carried out on the mineral deposit or geological resource.

However, the following items are excluded from the scope of both the Mining Act and the Mining Regulations: (i) exploration and production of liquid and gaseous hydrocarbons; (ii) exploration and production of radioactive minerals; and (iii) mining of minerals with low technical and economic importance,

whatever the classification may be, carried out by the owner of the land where they are located, for the latter's exclusive use, and not requiring any mining technique to be applied.

### 3 Restrictions on foreign investment

Following Spain's inclusion as an EU Member State, all restrictions on foreign investment in mining were removed. Any natural or legal person, regardless of their nationality, may obtain authorizations and permits to enable them to develop mineral deposits or other geological resources within Spain.

### 4 Government or local participation requirements

Despite the lack of provisions regarding mandatory participation rights in a license or project, the state may reserve zones of any extension in the national territory, maritime territory and continental platform for itself, as long as the exploitation of the minerals and geological resources are of special interest for social and economic development, or for national defense. This special interest must be properly motivated.

When an authorization is granted, regardless of the kind, all rights conferred belong to the authorized subject. Nonetheless, the state may require the authorized subject to broaden the investigation or the usage of the deposit or geological resources that he/she applied for. The state may even adjudicate the reserved zones that had been granted or modify its conditions for its own benefit, as long as the grantees of the authorization agree with the new terms.

### 5 Land tenure and priority

All mineral deposits and geological resources in the national territory, territorial sea and continental platform are public domain goods. Depending on the classification of the minerals or geological resources lying underground, its tenure will vary. If a mining tenure's ownership differs from the land tenure's ownership, compensation may be granted for the loss of use of the land.

### 6 Indigenous and local community rights

There are no provisions that confer special rights to indigenous or other local communities.

### 7 Environmental protection and rehabilitation obligations

The Mining Regulations stipulate that the holders of mining rights are liable for all the damage caused by their work and those caused to adjacent areas, and have obligations under Spanish Environmental Liability Act 26/2007 and Royal Decree 975 of 12 June 2009 on Management of Industrial Mining Waste and Protection and Restoration of the Area Exploited by Mining Activities. The measures, procedures and guidelines aim to prevent, or reduce as much as possible, any adverse effects to the environment and, particularly to the water, air, soil, flora, fauna and landscape, as well as the risks to human health that could be caused by the exploration and exploitation of mineral deposits and other geological resources.

In this respect, the main regulations relating to the environment prescribe that companies exploiting mineral deposits must submit a plan to the competent mining authorities for rehabilitation of the natural area used for mining work, which must contain:

- (a) a detailed description of the area where the mining work will be performed;
- (b) the planned measures to restore the natural area used for the exploration of mineral resources;

- (c) the planned measures to restore the services and facilities used for exploration and exploitation of mineral resources;
- (d) a waste management plan; and
- (e) the execution schedule and estimated cost for the rehabilitation work.

Once the relevant requirements have been verified to be duly met, the competent authorities must authorize this rehabilitation plan, with or without amendments, at the same time as granting the exploration permit or the authorization or exploitation concession.

In addition, once authorization for the rehabilitation plan has been obtained, the following two financial guarantees must be provided before beginning the mining work. These guarantees ensure that the contents of the authorized rehabilitation plan will be fulfilled:

- (a) a financial guarantee for rehabilitation of the natural area used for exploitation, preparation, concentration and beneficiation of mineral resources; and
- (b) a financial guarantee that one has met the conditions that were imposed in the authorisation for the management and rehabilitation plan for the natural area affected by the facilities and mining waste.

Royal Decree 975/2009 determines that, for any aspect that is not regulated by these specific regulations, Spanish Waste and Contaminated Soil Act 22 of 28 July 2011 will be applicable. In this respect, regarding the mining waste management plan that must be included with the aforementioned rehabilitation plan, it should be noted that this law forces initial producers or owners of waste to treat it themselves, assign the treatment of their waste to a third-party trader or deliver their waste to a public or private waste collection company.

Finally, before building, assembling and transferring facilities for the mineral industry, an integrated environmental authorization must be obtained from the body appointed by the autonomous community in the territorial area where the facilities are located.

## 8 Exploration licenses

Any natural or legal person that intends to obtain authorization, a permit or a concession for exploration or exploitation of a deposit or a resource must file an application in the relevant provincial department of the Spanish Ministry of Industry and Energy. In addition, if the work exceeds 25 meters below the surface on dry land or any depth underwater, as well as obtaining the required authorizations, the same department must also be notified with at least 15 days' prior notice of the date the work will begin. This notification must also be sent to the Spanish Geological and Mining Institute, which may further require the persons concerned to regularly notify it of the geological and mining data obtained during the work.

### 8.1 Scope

Exploration permits grant the holder a right to conduct studies and perform work aimed at detecting or defining one or several resources included in Section C, within the defined perimeter and for the valid term thereof, according to the approved project. Similarly, if the exploration proves that they can be rationally used, a right is also granted for the relevant exploitation concession.

## 8.2 Duration

Exploration permits are granted for the term requested. However, this period cannot exceed three years. Permits may be extended for a further period of three years by the provincial departments of the Ministry of Industry.

## 8.3 Steps to acquire an exploration right

Firstly, to obtain an exploration permit, the land must be available and registrable. In this respect, available lands are considered those included within the perimeter of a zone reserved by the state or regarding which no application has been made, nor has one been granted, for an exploration permit or exploitation concession. Moreover, land that can be registered is deemed to be an area of the minimum required size.

The application for an exploration permit must be filed by means of a request personally made by the applicant or the latter's representative to the provincial department of the Spanish Ministry of Industry and Energy. The request must contain:

- (a) the full name or company name of the applicant, such person's residence and address;
- (b) the name to be given to the exploration permit; and
- (c) the location, limits and size of the land.

In addition, the applicant must submit the following documents within 60 days of applying:

- (a) documents proving that the applicant meets the conditions to hold mining rights;
- (b) the final classification of the land referred to in the application;
- (c) the exploration project, containing an explanatory report on the general exploration plan intended to be implemented, the exploration schedule, an estimate of the investment, implementation term and location plans; and
- (d) an economic financing study and the guarantees offered for its viability.

Within eight days from the date the documents are submitted, the provincial department will decide on the final acceptance of the application and a public information period will begin. After this, the whole file will be processed and a decision with due grounds will be adopted.

If the land becomes available due to a reserve granted in favor of the state or because an exploration permit or exploitation concession has expired, the exploration permit will be awarded by means of a public tender.

## 8.4 Relationship with landowners

Landowners may be compensated for any damages or losses caused to their properties.

## 8.5 Obligations of the holder

The holder of an exploration permit must begin the work promptly once the land can be occupied. They must also submit a work plan for the first year within four months and an updated work plan must be filed every year thereafter.



## 9 Holding tenements

### 9.1 Scope

If an exploration permit is insufficient to discover the resources lying in the area within the given time frame, the duration of the permit may be extended. Alternatively, the Spanish Mining Act, for those cases where further study is needed to determine the existence of resources classified under Section C of the Act, allows the holder of the permit to apply for an investigation permit.

### 9.2 Duration

An investigation permit can be granted for a maximum of three years, extendable for a further three years.

### 9.3 Rights and obligations

The investigation permit may not necessarily correspond to an area with mining potential, given that the investigation permit is issued merely to acknowledge the availability of resources within the area. The advantage of the investigation permit is that, if the above-mentioned resources are located within the investigation area, the holder shall be granted an exploitation permit if he/she applies for it. It therefore grants a priority right in case resources are found.

## 10 Development/production tenements

### 10.1 Scope

#### 10.1.1 Exploitation Permits Section A

The use of the resources included in Section A: (i) if they are located on privately owned lands, are deemed to belong to the landowner, (ii) if they are located on land owned by the state, province or municipality, their holders may directly use them or assign them to third parties, and (iii) if they are located on lands of public domain and use, they are for common use.

However, to exercise the right to use these resources in any of these cases, authorization for exploitation must be obtained beforehand from the relevant provincial department of the Spanish Ministry of Industry and Energy or, when specified, from the local corporation.

#### 10.1.2 Exploitation Permits Section B

The system of authorizations varies for Section B, depending on the nature of the resource and whether mineral and thermal water, deposits from non-natural sources or subterranean structures are involved.

#### 10.1.3 Exploitation Permits Section C

Exploitation concessions are granted to the holder of the right to use all the resources included in Section C that are within its perimeter, except for those reserved for the state.

## 10.2 Duration

### 10.2.1 Exploitation Permits Section A

The holder of the authorization for exploitation must start the relevant work within six months or, if an extension is granted, a maximum of one year, counted from when such authorization is granted; otherwise the authorization for exploitation will expire.

### 10.2.2 Exploitation Permits Section B

#### 1. Mineral and thermal water

Within a term of one year, counted from the date the condition of the mineral in the water has been declared, the owners (if the water is located on privately owned land) or the applicants for the declaration (if the springs are located on publicly owned land) are entitled to a pre-emptive right to use such water.

#### 2. Deposits created by mining waste

The holder of the mining rights resulting in mining waste produced from research and mining work is entitled to a pre-emptive right to the use thereof.

#### 3. Subterranean structures

The authorization for use is for a maximum term of 90 years.

In this respect, it should be pointed out that, for the three types of resources included in Section B, the Mining Regulations state that if the pre-emptive rights are not exercised, the use will either be granted to the person that submitted the file or, if this is not possible, the use will be awarded by means of a public tender.

### 10.2.3 Exploitation Permits Section C

Mining exploitation concessions are granted for a term of 30 years, which can be extended for a further two terms of the same length. Thus, the maximum term is 90 years.

## 10.3 Transition from exploration/holding right to mining right

If an investigation can sufficiently prove the existence of resources classified under Section C, as long as such permit is still in force, the tenant may apply for a mining right.

## 10.4 Steps to acquire a right

### 10.4.1 Exploitation Permits Section A

To obtain authorization for exploitation, an application must be filed containing the applicant's full name or company name and address, as well as the name given to the exploitation. This application must include:

- (a) documents that confirm that the applicant meets the requirements to be considered as a holder of mining rights;
- (b) documents that accredit the right to use; and

- (c) report and plan showing all the data related to: the site of the deposit, the production forecast to be obtained, the purpose for which it is intended to be used, the time the work will take, and an exploitation schedule.

Moreover, initiation of the work must be notified to the provincial department or, if necessary, the local corporation, providing information about the appointment of the technical manager who will be responsible for such work.

## 10.4.2 Exploitation Permits Section B

### 1. Mineral and thermal water

Firstly, a declaration of the condition of the mineral in the water must be obtained from the Ministry of Industry, according to a proposal made by the General Directorate of Mining, with a prior report from the Spanish Geological and Mining Institute and the Higher Council of such department. In addition, if medicinal mineral water is involved, a binding report must also be issued by the Directorate General of Health.

To be able to exercise these rights for use, an application must be filed for the required authorization in the relevant provincial department of the Ministry of Industry. The application must contain:

- (a) documents that justify its capacity to hold mining rights;
- (b) the general project for use;
- (c) an estimate of the investments to be made;
- (d) an economic study of the project financing; and
- (e) assignment of the protection perimeter, specifying the use that will be made of the water.

In turn, the provincial department will submit the file to the General Directorate of Mining, which, after a previous report has been issued by the Spanish Geological and Mining Institute and, when applicable, the Directorate General of Health of the Spanish Ministry of Public Works and Agriculture, will authorize the use, with or without the necessary amendments to the project submitted.

### 2. Deposits created by mining waste

Firstly, a declaration must be obtained confirming that this deposit has been categorized as a resource included in Section B. This declaration may be requested by the party concerned or officially by the provincial department of the Spanish Ministry of Industry and Energy.

An application for authorization must be filed in the relevant provincial department of the Spanish Ministry of Industry and Energy. The application must include data about the applicant, the location and limits of the resources that are intended to be used, and the following documents:

- (a) documents accrediting the right to use;
- (b) documents confirming the applicant meets the required conditions to hold the rights; and
- (c) a report, with due grounds, about the work intended to be carried out.

In addition, the following documents must be provided within two months:

- (a) a mining schedule and forecast annual production

- (b) a project of the mining facilities to be provided
- (c) an economic study specifying the plan for the investment to be made
- (d) the forecast social improvements

In turn, the provincial department will submit the file to the General Directorate of Mining, which will authorize the use or return the project for rectification.

In any case, the work for the use of waste must start within one year, counted from the notification of authorization being granted, unless this term is extended.

### 3. Subterranean structures

An authorization must be obtained to use subterranean structures. For such purpose, an application must be filed in the relevant provincial department of the Spanish Ministry of Industry and Energy, specifying the following:

- (a) the data related to the person or enterprise applying for the authorisation;
- (b) a description and the exact location of the structure;
- (c) the geological formations involved, structural context of the area and justification that such area is watertight;
- (d) type of use, kind of product or waste that is intended to be stored and the system for temporary or permanent use;
- (e) term of the authorisation requested; and
- (f) perimeter or volume of protection considered necessary.

Once the application has been filed, the provincial department will order a verification inspection. After this, the file is submitted to the General Directorate of Mining and Construction Industries, who will determine whether such structure can be classified in Section B. If such classification is approved, the party concerned must provide the following documents:

- (a) documents proving that the applicant meets the conditions to hold mining rights;
- (b) documents justifying the applicant's technical and economic capacity;
- (c) a report justifying the suitability of such use;
- (d) the project for use; and
- (e) a proposal for compensation to third parties for the assets or rights that may be affected.

After a prior report has been issued by the Geological and Mining Institute of the Higher Council of the Ministry of Industry and the Inter-Ministerial Commission for the Environment, the General Directorate of Mining will authorize the use for up to 90 years.

### 10.4.3 Exploitation Permits Section C

As in the case of exploration permits, to obtain an exploitation concession, the land must be available and registrable.

Two different kinds of concessions may be granted.

Firstly, there are direct exploitation concessions, for which an application may be filed for a concession of available lands that are able to be registered with no need to have previously obtained an exploration permit. However, this must be related to a resource included in Section C that is considered sufficiently well-known and its rational use is deemed viable or, if the resources are sufficiently well-known, the mining rights for them have expired and there is data and proof to enable their exploitation to be defined due to technological improvements or new market prospects.

To obtain a direct exploitation concession in the aforementioned cases, an application must be filed with the relevant provincial department. This application must contain the following:

- (a) full name or company name of the applicant, such person's residence and address;
- (b) location, limits and size of the land;
- (c) name assigned to the requested concession;
- (d) specification of the mineral resources to be exploited;
- (e) documents proving that the applicant meets the conditions to hold mining rights; and
- (f) a technical report justifying the admissibility of the application as a direct concession.

Similarly, the applicant must submit the following documents within 60 days from the date approval is notified of the exploitation concession process:

- (a) the final classification of the land requested;
- (b) a feasibility study and a project for use of the resource, which must include a report, general exploitation schedule, the facilities and machinery to be used and location plans for the work and facilities; and
- (c) an economic financing study and the guarantees offered for its viability.

Once the processing of the file has been completed and after being submitted for public information, it will be sent to the General Directorate of Mining and Construction Industries, who will refuse or approve the concession after a prior report has been issued by the Spanish Geological and Mining Institute.

Secondly, exploitation concessions may be granted based on exploration permits. In this case, as soon as the exploration is proven to involve a resource included in Section C, within the valid term of the exploration permit, the holder thereof may apply for an exploitation concession for part or all of the land included in the perimeter of such exploration.

To obtain the exploitation concession, an application must be filed with the provincial department in which the land requested is specified. In addition, the following documents must be provided:

- (a) a detailed report on the geological nature of the deposit and the exploration work conducted along with the results obtained; and
- (b) a feasibility study and project for use of the resources, which must include a report on the exploitation system, a diagram of the infrastructure, work schedule, estimated investments to be made and an economic study of its profitability and the financing sources.

Once the provincial department verifies the land, the file will be submitted to the General Directorate of Mining who will approve or refuse the exploitation concession.

The holder of an exploitation concession must start the work for use within one year from the date the concession is granted.

## 10.5 Relationship with landowners

Landowners may be compensated for any damages or losses caused to their properties.

## 10.6 Obligations of the holder

### 10.6.1 Exploitation Permits Section A

After 10 months, counted from the start of the work, and subsequently on an annual basis, the holder of the authorization must submit a work plan in four copies for the following year to the provincial department or local corporation, and such plan is to be verified within two months. A copy of this plan is sent to the Higher Council of the Spanish Ministry of Industry and Energy and to the General Directorate of Mining and Construction Industries.

### 10.6.2 Exploitation Permits Section C

Within six months of the start of the work, a plan of the work and facilities to be carried out in the first year must be submitted. This must then be provided on an annual basis thereafter.

## 10.7 Priority between different resource classifications

Where an application is made for the proposed use of the same resources within Section A, Section B and Section C, before granting any authorization, the Ministry of Industry must make a decision on the compatibility or incompatibility of the work proposed under each classification. If the work is determined as incompatible, the government must specify which proposal has the greatest public interest or utility and that must be given priority.

# 11 Assignment of and security over tenements

## 11.1 Assignment

The rights conferred by an authorization for resources under Section A, or an exploitation tenement for resources under Section B, may be assigned as long as the Ministry of Industry approves it.

Exploitation permits for resources under Section C may be assigned as long as the granting authority accepts it and the mandatory documents are provided by the solicitor (contract draft, project regarding the tenement's feasibility and securities over the feasibility).

## 11.2 Security

The same dispositions applicable to assignment of tenements also apply to securities over them.

## 11.3 Royalties

The applicants for exploration permits and direct/assigned exploitation concessions are responsible for paying the expenses incurred to process these permits.

However, to promote and develop the use of raw mineral materials, Spanish companies are granted capital subsidies and loans, although they must be reimbursed once the objectives sought by them have been achieved.

The holders of mining rights for mineral deposits and other geological resources must pay a royalty as consideration for the mining area where the resources have a significant economic value, where no marketing restraints have been imposed, or where the resources are not directly used in infrastructure or construction work, or do not consist of mineral water, thermal water or subterranean structures.

Certain activities for exploration, exploitation or beneficiation of deposits, because of their nature or importance in the public interest, may be subject to certain tax benefits, such as free amortization over 10 years, a reduction of up to 95% in the tax rates or a reduction in the taxable base for an amount equivalent to those assigned as a depletion factor. However, these reduced amounts in the taxable base as a depletion factor must be invested in activities related to the mining sector in the following 10 years.

## 12 Mineral reporting and classification

Minerals are legally classified in Sections A, B and C of the Spanish Mining Act, as stated in section 2.

## 13 Other key issues

### 13.1 Export restrictions

Spanish Mining Promotion Act 6 of 4 January 1997 specifies the process for exporting raw mineral materials, according to the provisions in the National Raw Mineral Material Supply Plan, the National Energy Plan and the National Uranium Exportation Plan. The government plans to issue regulations on the minimum level of processing that must be achieved for certain raw mineral materials to obtain the relevant exportation license. Furthermore, the Spanish Ministry of Trade may create export sectors for surpluses of mineral substances or those for which there are no consumers in the domestic market. The Spanish Ministry of Industry, Energy and Tourism is yet to issue any regulations for the mineral export sector and there are no restraints on these export activities in Spain.

### 13.2 Effects of the expiry of exploitation concessions

When an authorization, permit or concession for any areas in Sections A, B or C terminates, due to the term for which it was granted having expired or for any other reason, such as waiver, breach of the commitments or the resource being depleted, etc., if the holder proposes to vacate the site, it must hand over the site in a proper and safe condition. A vacating holder must notify the provincial department of the Spanish Ministry of Industry and Energy which, after prior verification, will authorize the holder to vacate the site or will impose any conditions it deems necessary.

Once the holder has been authorized to vacate the site, it may freely dispose of the machinery and facilities it owns. However, the state may prohibit these assets being removed if this could harm the future exploitation of the deposit. As consideration in such cases, the holder may be entitled to receive compensation in the manner stipulated in the Spanish Compulsory Expropriation Act.



## 13.3 Construction licenses

If one intends to set up an establishment to be used for the preparation, storage or beneficiation of resources, authorization must first be obtained from the General Directorate of Mining and Construction Industries.

For this, an application must be filed with the relevant provincial department of the Spanish Ministry of Industry and Energy. This application must include the following:

- (a) a project for setting up the establishment;
- (b) an economic and financial study; and
- (c) a schedule for building these facilities, which must specify the dates planned for carrying out each phase.

After receiving the documents, the relevant department will submit the file to the General Directorate of Mining and Construction Industries, who will adopt a decision after a prior report has been issued by the Spanish Geological and Mining Institute.

## 13.4 Compensation to landowners

Albeit with certain special features, the holder of a tenement over a mineral deposit or geological resource can generally apply for an order, under the Spanish Compulsory Expropriation Act, to occupy the land required for the site of the relevant work, facilities and services, after the required declaration of public utility, or temporary tenancy of the lands.

## 14 Useful websites

Ministry of Energy, Tourism and Digital Agenda	<a href="http://www.minetad.gob.es/es-ES/Paginas/index.aspx">http://www.minetad.gob.es/es-ES/Paginas/index.aspx</a>
Department of Mines	<a href="http://www.minetad.gob.es/energia/mineria/Mineria/Paginas/Mineria.aspx">http://www.minetad.gob.es/energia/mineria/Mineria/Paginas/Mineria.aspx</a>
Legislation regarding mining, mining promotion and environmental dispositions	<a href="http://www.minetad.gob.es/energia/mineria/Mineria/Legislacion/Paginas/Legislacion.aspx">http://www.minetad.gob.es/energia/mineria/Mineria/Legislacion/Paginas/Legislacion.aspx</a>
The Spanish Geologic and Mining Institute	<a href="http://www.igme.es/">http://www.igme.es/</a>
Mining Panorama in Spain (2015)	<a href="http://www.igme.es/PanoramaMinero/Panorama%20minero%20NIPO%20corregido/">http://www.igme.es/PanoramaMinero/Panorama%20minero%20NIPO%20corregido/</a>
Mining Statistics in Spain (last Update: 2014)	<a href="http://www.minetad.gob.es/energia/mineria/Estadistica/2014/anual-2014.pdf">http://www.minetad.gob.es/energia/mineria/Estadistica/2014/anual-2014.pdf</a>
Mining Engineers National Association	<a href="http://ingenierosdeminas.org/">http://ingenierosdeminas.org/</a>

# Spain

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# Sweden

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	No
Local party ownership requirement	No
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from land surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Three years, with extensions possible
Mining license	Typically 25 years, with extensions
Able to use tenement as security	No legislative obstacle, trial of acceptability
Royalty payable to government	Yes. Amount depends on average value of concession minerals mined
Classification system used	FRB (Fennoscandian Review Board)

## 1 Summary

For several hundred years, Sweden has been an important mining country and has had various companies providing mining operations throughout its territory – the Stora Kopparbergs Bergslags AB, formed in the thirteenth century, is actually still in operation. Sweden's mineral-rich areas provide important resources for further exploration. Mining legislation was developed to provide easy access to the mining and exploration market, while also providing safeguards for nature and its originality.

Sweden has an extensive geological database and the world's largest drill core sampling available for research.

In the EU, Sweden is the largest producer of iron ore, the second-largest producer of silver, gold, lead and zinc, and the third-largest producer of copper. Sweden plays a leading role in metallurgical research and development (R&D) as well as in the development of advanced and ecological underground mining.

Sweden has a number of important and world-leading companies in most sectors related to mining and exploration. Important companies include Atlas Copco, ABB, Boliden and Sandvik.

# Sweden

Sweden also holds a diversified industrial base with globally leading companies in sectors such as aerospace, automotive, white goods, biomedical, tooling and packaging. The interaction with materials producers and the subsequent ability to create advanced value-added applications based on cutting-edge materials knowhow have been a key driver for many successful Swedish companies.

Investment opportunities in the sector range from greenfield exploration, mining project development/participation, joint R&D projects within mining/metallurgy as well as complementary service providers in a strongly growing market.

In recent years, exploration operations have gained a huge amount of interest from Swedish and foreign companies, and there are numerous related companies at the Stockholm Exchange and OTC markets (source: Swedish Trade and Invest Council).

Below we state costs in Swedish currency – the Swedish Krona (abbreviated SEK). SEK 10.5 is approximately EUR 1 as of July 2019.

## 2 Legal framework for mining

Sweden is a civil law country and mining operations are mainly regulated by two acts: the Minerals Act (*Minerallagen* [1991:45]) and the Environmental Code (*Miljöbalken* [1998:808]).

The Minerals Act regulates the exploration and exploitation of certain mineral deposits. This act defines the minerals to which it is applicable, which are referred to as “concession minerals” in the act. Concession minerals are divided into three categories: traditional ores, certain industrial minerals, and oil, gas and diamonds. Other minerals and other kinds of rock, gravel and sand are excluded from the act and are normally referred to as landowner minerals. As regards concession minerals, exploration activities require an exploration permit and the exploitation of mineral deposits requires an exploitation concession, regardless of who owns the land on which the exploration/exploitation work is to be conducted.

## 3 Restrictions on foreign investment

There are no restrictions on foreigners obtaining exploration permits or exploitation concessions in Sweden or other foreign mining investments. Furthermore, there are no specific limitations in respect of the rights of the indigenous Sami population. However, the assessment of whether or not an exploration permit or an exploitation concession should be granted will include an assessment of any conflicting interests, such as the risk of disturbing Sami reindeer herds or cultural heritages.

## 4 Government or local participation requirements

There is no requirement for the applicant to own the land for which a permit is being sought. Applications for exploration permits and exploitation concessions are made to the Mining Inspectorate (*Bergsstaten*), and permits and applications may be transferred following consent from the Mining Inspectorate.

## 5 Land tenure and priority

Mining legislation creates a system that allows parties such as mining companies to conduct mining operations on someone else's property. There are regulations regarding compensation for loss of the use of land due to mining activities, as well as other compensation, such as an annual “minerals fee” (see section 12 below). Mining operators can also acquire the designated land from the landowners. In such case, the designated land may have to be separated from the existing property. This is done by applying for partition

of property (*fastighetsdelning*) from the Swedish Mapping, Cadastral and Land Registration Authority (*Lantmäteriet*).

When an exploitation concession expires, the concession holder loses the right to conduct mining operations on the designated land. Furthermore, upon expiration of the concession, the concession holder will lose the right to the minerals covered by the concession which have not been brought to the surface. Minerals that have been brought to the surface or that have otherwise been taken care of may remain within the area for the benefit of the concession holder for a period of up to two years after the expiration of the concession. After this two-year period has lapsed, the concession holder will forfeit its right to any material not yet removed. As regards minerals that have been mined or extracted but not brought to the surface or otherwise been similarly taken care of, the concession holder will lose any rights upon the expiry of the permit. Minerals to which the concession holder forfeits its right under this section, and which are not covered by a new exploration permit or exploitation concession, will accrue to the owner of the property.

Concession work may not be commenced before the Mining Inspectorate has designated the land within the concession area that may be utilized for the exploitation of the mineral deposit. If the landowner and the concession holder agree, or if the concession holder owns the land, the Mining Inspectorate will normally confirm its agreement/the suggested designation in its decision. If, however, no agreement can be reached, the Mining Inspectorate will hold hearings with affected parties and evaluate what land is required/affected by the concession work and designate land in accordance therewith. The Mining Inspectorate's decision will also designate the land within or outside the concession area that the concession holder may use for activities related to the exploitation operations. The concession holder bears the cost for the designation process.

## 6 Indigenous or local community rights

There are no specific limitations in respect of the rights of the indigenous Sami population. However, the assessment of whether or not an exploration permit or an exploitation concession should be granted will include an assessment of any conflicting interests, such as, among other things, the risk of disturbing Sami reindeer herds or cultural heritages.

## 7 Environmental protection and rehabilitation obligations

As mining operations are environmentally hazardous activities, they must also comply with environmental legislation, most importantly the Environmental Code. The Act on Ancient Monuments and Finds (*lagen [1988:950] om kulturminnen m.m.*) may also be applicable as it contains provisions on permits for interventions at the sites of ancient monuments.

The Minerals Act applies to the inspection and processing of certain minerals, called "concession minerals," which are divided into three categories:

- (a) traditional ores: antimony, arsenic, beryllium, bismuth, cesium, chromium, cobalt, copper, gold, iridium, iron occurring in the bedrock, lanthanum and lanthanide series, lead, lithium, manganese, mercury, molybdenum, nickel, niobium, osmium, palladium, platinum, rhodium, rubidium, ruthenium, scandium, silver, strontium, tantalum, thorium, tin, titanium, tungsten, uranium, vanadium, yttrium, zinc and zirconium;
- (b) certain industrial minerals: andalusite, apatite, baryte, brucite, refractory clay or clinkering clay, coal, fluorspar, graphite, kyanite, magnesite, nepheline syenite, pyrite, pyrrhotite, rock salt or other similar salt deposits, sillimanite and wollastonite; and

(c) oil, gaseous hydrocarbons and diamonds.

Other minerals and other kinds of rock, gravel and sand are excluded from the Minerals Act and are normally referred to as landowner minerals.

The Environmental Code applies to all activities that are potentially detrimental to human health or the natural or cultural environment, or activities that deplete biological diversity. In addition, the Environmental Code applies to all kinds of impacts on the natural environment, regardless of the size. The provisions also apply where the operations and measures are also covered by other legislation, in which case the Environmental Code applies in addition to such other rules and regulations.

Under the Environmental Code, establishments, operations and, in some cases, even mere modifications of environmentally hazardous activities of a certain magnitude require an environmental permit. All use of land, buildings or facilities that, in one way or another, causes emissions to land, air or water, or involves the risk of detrimental effects to human health or the environment, are environmentally hazardous activities. Furthermore, the term relates to all environmental impacts, regardless of whether they are local, regional, national or global. Consequently, mining operations require an environmental permit. A permit can be obtained through an application to the Environmental Court (*Mark-och miljöödomstolen*) or the Environmental Assessment Delegation (*Miljöprövningsdelegationen*) at the County Administrative Board (*Länsstyrelsen*), who will conduct an environmental assessment of the operations. The preparations required before an application can be submitted are onerous and the procedure to obtain an environmental permit normally takes several years.

A permit will only be granted when the applicant can show required knowledge of the potential environmental impact of the mining operations and how to prevent the environmental damage. The application must contain a description of the environmental impact of the operations and the possibilities of limiting such impact. This requirement, the "knowledge requirement," is not static but changes over time, depending on scientific developments, new technology and environmental changes. This means that operators must maintain detailed knowledge of the operations, the area in which the operations will be or are undertaken, the impact on the area, and technological and scientific developments.

More specific provisions on the operations that require permission and the requirements for such permission can be found in the Ordinance on Environmentally Hazardous Activities and the Protection of Public Health [1998:899] (*Förordningen om miljöfarlig verksamhet och hälsoskydd*).

A fundamental part of the permission procedure deals with the handling and disposal of waste from mining operations. The EU directive on the Management of Waste from Extractive Industries (2006/21/EC) was implemented in Swedish legislation on 1 September 2008 through the Extractive Waste Ordinance (*Utvinningsavfallsförordningen* [2008:722]). The Extractive Waste Ordinance defines certain waste facilities as hazardous facilities, for which the operator is obliged to maintain a strategy to prevent major accidents as well as a system for the execution of such strategy. The operator must also have an internal contingency plan, specifying the actions to be taken at the facility in the event of an accident. Whether or not a waste facility will be regarded as hazardous depends on criteria such as the risk of a grave accident occurring or whether or not the facility contains waste that has been classified as dangerous.

## 8 Exploration licenses

### 8.1 Scope

The holder of an exploration permit obtains access to certain land for exploration work for the purpose of locating concession mineral deposits. To obtain an exploration permit, the applicant must be able to show that there is a certain degree of likelihood of successfully discovering concession mineral deposits within the area for which the permit is sought. A permit will not be granted if it is obvious that the applicant does not have the possibility or intention of conducting appropriate exploration, or if the applicant has previously shown to be unsuitable to conduct exploration work.

As mentioned above, and according to the Minerals Act, the Mining Inspectorate will grant an exploration permit if it has reason to assume that exploration in the area for which permission is sought may lead to a discovery of a concession mineral. In relation to oil, gaseous hydrocarbons or diamonds, an exploration permit will only be granted where the applicant can show suitability for such specific exploration work. There is no requirement for the applicant to own the land for which a permit is being sought; it is sufficient if the applicant can show that it has the capacity to conduct exploration operations. There are, however, certain limitations. Exploration permits will not be granted for national parks and areas close to housing areas, public roads, railways, canals or airports, electric power plants, industrial plants, burial grounds or habituated buildings, among other things. Further, an exploration permit will not be granted for areas within 1,000 meters from a concession area with an operating mine (except to the holder of such concession). If, however, a concession has been granted for the area but the holder of such concession has not commenced mining operations within three years from when the concession was granted, an exploration permit can be issued for the same area up until the concession holder begins mining activities.

An exploration permit gives a preferential right to a subsequent exploitation concession in the area.

### 8.2 Duration

An exploration permit is valid for a period of three years from the date of issue.

### 8.3 Steps to acquire an exploration right

An application for an exploration permit must be made in writing and filed with the Mining Inspectorate, to the attention of the Chief Mining Inspector. The application must contain, among other things, the following information:

- (a) the concession mineral or minerals that the applicant wants to explore;
- (b) the geographic area/areas covered by the application;
- (c) why there are reasons to assume that exploration of the geographic area could lead to the discovery of the concession mineral; and
- (d) the impact that the planned operations may have on public and private interests, and measures that, in the applicant's opinion, are necessary for the protection of public interests or private rights.

Before commencing exploration work, the permit holder must prepare a work plan. This plan must contain:

- (a) a description of the exploration work;
- (b) a map with real-estate boundaries;



- (c) a timetable of the intended work;
- (d) contact details;
- (e) an assessment of the impact the operations may have on public interests and private rights including, among other things, the current use of the area by others;
- (f) details about the objective of the work plan in general; and
- (g) instructions regarding the possibility for other parties to affect the work plan, etc.

The work plan must be written in Swedish and must, upon request (for example, from a landowner), be translated into Finnish, Meänkieli or Sami. The duty to translate the work plan applies in areas where those minority languages are spoken according to the Act on National Minorities and Minority Languages (*lag* [2009:724] *om nationella minoriteter och minoritetsspråk*). Upon request from a relevant party (for example, a landowner or another party whom the work may affect) a notice about when the work will commence must be sent to such a person.

## 8.4 Relationship with landowners

The work plan must be communicated to all landowners and other affected parties. If, after such communication, no objections have been raised within a certain prescribed time (no less than two weeks), the plan will become effective. If objections are raised, the work plan may nevertheless become effective by an agreement between the applicant and any objecting party. If the applicant and the objecting party or parties cannot reach an agreement, the Chief Mining Inspector (*Bergmästaren*) can examine the work plan in a specific review procedure and may, in connection therewith, set up certain conditions for the exploration work. However, the work plan must fulfill the requirements as stated in the Minerals Act. The effective work plan must subsequently be sent to the Chief Mining Inspector, the local municipality and the County Administrative Board.

## 8.5 Obligations of the holder

An exploration permit will be issued with standard terms. These may include:

- (a) payment of an application fee; and/or
- (b) conditions for the exploration permit, for example, that the exploration work is only permitted to be conducted according to the work plan and that work in breach of other regulations, etc. is not allowed.

If an exploration permit is terminated without an exploitation concession having been granted for the area, the permit holder must, if he/she is carrying out exploration work professionally, provide a report on conducted exploration to the Mining Inspectorate no later than three months thereafter. The report must contain the following information:

- (a) parties who conducted the exploration work;
- (b) kind of exploration carried out;
- (c) extent of the exploration; and
- (d) results.



In addition, the applicant must attach a map of the explored area to the report.

## 9 Holding tenements

### 9.1 Scope

As mentioned above, an exploration permit is valid for a period of three years from the date of issue. After that, the permit may be extended upon the holder's application for a period of not more than three years. Such extension, however, requires exploration operations to have been conducted within the permit area. The permit may be extended even if exploration operations have not been commenced, as long as the holder can present credible excuses for this and can also show that exploration work is likely to be commenced during the applied extension period. Only in exceptional cases can a permit be further extended and, in such case, the extension is normally not for more than a total of four years. In extreme cases, a permit can be extended by a further maximum of five years. This means that the longest possible valid period for any one permit is 15 years.

### 9.2 Rights and obligations

An exploration permit may normally not be granted for an area that is subject to a recently expired permit; at least one year needs to pass between the expiry of an old permit and the granting of a new permit. It is also a condition that the exploration work does not damage the environment or land use.

## 10 Development/production tenements

### 10.1 Scope

When a mineral deposit has been found and there is reason to assume that it could be economically exploited, an exploitation concession can be sought from the Mining Inspectorate. A concession covers a certain area, the size of which is decided from, among other things, the extent of the deposit and the purpose of the concession.

Normally, a concession will be granted where the following conditions are met:

- (a) the area contains a mineral deposit that has potential to be economically exploited; and
- (b) the location and nature of the deposit will not render a concession inappropriate in that area.

As regards concessions for oil and gas, there are additional requirements that the applicant must satisfy for the exploitation of such deposits.

After being granted an exploration concession, and because mining is classified as an environmentally hazardous activity, the Environmental Code (Chapters 9 and 11) further requires an approved environmental permit (*miljötillstånd*) to actually be able to conduct the mining and dressing. The procedure for obtaining an environmental permit normally takes several years and contains the following main elements:

- (a) consultations with the applicable County Administrative Board (*Länsstyrelsen*), applicable supervisory authorities and natural persons and companies that will be affected by the mining operations. It is also usually required that consultations are held with other governmental authorities that may be affected (such as the Mining Inspectorate), the local municipality (*kommun*), and organizations and the public;

- (b) preparation of an Environmental Impact Assessment (*Miljökonsekvensbeskrivning* or EIA). This document sets out the direct and indirect effects that the intended operations may have on humans and the environment;
- (c) the filing of the application, as well as the EIA, to the deciding body. This is normally the Land and Environmental Court (*Mark- och miljödomstolen*) or the Environmental Assessment Delegation (*Miljöprövningsdelegationen*) at the County Administrative Board (*Länsstyrelsen*), depending on the nature and magnitude of the mining operations. More detailed information on which authority will try the application can be found in the 1998 Ordinance on Environmentally Hazardous Activities and The Protection of Public Health; and
- (d) the Land and Environmental Court/Environmental Assessment Delegation evaluates the application and refers it to the applicable authorities and affected parties for their consideration.

The Land and Environmental Court/Environmental Assessment Delegation issues its decision.

## 10.2 Duration

An exploitation concession is normally granted for 25 years.

## 10.3 Transition from exploration/holding right to mining right

An exploration permit will normally give the holder monopoly on the exploration work within the applied area. Only in exceptional cases may a competing exploration permit be granted for the same area as an already existing exploration permit and, in such cases, only for different minerals than those covered by the already-existing permit.

## 10.4 Steps to acquire a right

An application for an exploitation concession must be in writing and be filed with the Chief Mining Inspector. Such application must contain information on, among other things, the following:

- (a) the concession mineral or minerals to be exploited;
- (b) the geographic area and the time period for the intended concession work; and
- (c) the properties affected by the application and the names and addresses of the property owners as well as of other affected parties known to the applicant.

An EIA must be attached to an application for a concession, as well as a map, a description of the area and a work plan.

Before concession work is commenced, the Mining Inspectorate must determine the land within the concession area that the concession holder may use for exploitation of the mineral deposit ("designation of land" (*markänvisning*)). The concession holder covers the cost of the designation process. The Mining Inspectorate's decision will also cover the land within or outside the concession area that the concession holder may use for activities related to the exploitation.

In addition, mining operations may not be commenced before the local municipal authority has granted a building license and the municipality has announced that the mine may be put into service. This may require several meetings and extensive correspondence with the local building board (*Byggnadsnämnden*).

## 10.5 Relationship with landowners

As previously mentioned, a mining company does not have to own the land on which the mining operations are conducted. However, the holder of an exploitation concession must pay an annual "minerals fee" to the landowners and to the state (see section 12 above).

## 10.6 Obligations of the holder

Upon expiry of a concession, the holder is also responsible for restoration work. It follows from the Minerals Act that the holder must take any restoration measures necessary, and remove all constructions that are not necessary for the mining plant's durability and strength (such as drill hole casings and safety fences). The concession holder loses its right to such items and they must be left at the site.

It thus follows from the Environmental Code that anyone having conducted activities that are detrimental to the environment or human health remains liable until any damages or nuisances have been reasonably remedied. Insofar as a remedy is not possible, the concession holder may instead have to provide monetary compensation.

## 11 Assignment of and security over tenements

### 11.1 Assignment

A party seeking to explore a certain area for minerals has to submit financial security for the compensation of potential damage and encroachment from the exploration work.

### 11.2 Security

Before any work can start, a security amount (not less than SEK 10,000, but higher amounts in practice) has to either be deposited to the Swedish Mining Inspectorate or be guaranteed, for example, through a bank guarantee.

## 12 Royalties

The application fee for an exploration permit is SEK 500 for every 2,000 hectares of exploration area. In addition, there is an annual exploration fee. The exploration fees are related to the area of interest. For the first three years, the holder also has to pay a fee in the amount of SEK 2 per hectare in relation to diamonds, oil and/or gaseous hydrocarbons, and SEK 20 per hectare in relation to other minerals. The minimum fee is, however, SEK 100.

If the permit period is extended, the fee for years four to six is SEK 2 per hectare per year for diamonds, oil and/or gaseous hydrocarbons, and SEK 21 per hectare per year for other minerals. The minimum fee is SEK 200. If the permit period is extended further, higher fees apply. The fees are payable to the Mining Inspectorate in connection with the submission of the permit application, and all fees must be paid in advance. If an area is reduced during the exploration, the fee will be reimbursed accordingly.

The application fee for an exploitation concession is SEK 80,000 for each concession area. The fee is payable to the Mining Inspectorate in connection with the submission of the permit application, and must be paid in advance.

In addition to the application fees, the holder of an exploitation concession must pay an annual "minerals fee" to the landowners and to the state. The fee is 2 per mille of the average value of the concession

minerals mined, of which 1.5 per mille is payable to the landowners (to be distributed among them in proportion to their share of the concession area) and the remaining 0.5 per mille is payable to the state. The state uses the income from these fees for the research regarding the sustainable development of mineral resources.

## 13 Mineral reporting and classification

The Fennoscandian Review Board (FRB) is an independent regulatory framework based on "The International Template for Public Reporting of Exploration Results, Mineral Resources and Mineral Reserves, July 2006," which was drawn up by the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) to harmonize public reporting on an international level. The FRB standards have been adopted by SveMin, FinnMin and Norsk Bergindustri to be applied in Sweden, Finland and Norway respectively. These rules are subject to national laws. The FRB standards are supplemented by the "Guide for Implementing the Standards of Public Reporting of the Fennoscandian Review Board." The FRB may not, however, be applied to public reporting of natural resources such as oil, natural gas, oil shale, sand, ground water or other substances that are not defined by the term "mineral resource."

The major goal of the FRB standards is to protect shareholders, investors and potential investors from incorrect, incomplete or misleading information. These rules apply to companies that present public reports of exploration and survey results as well as feasibility studies and project assessments, whether the information is released in the form of, for example, newsletters, annual reports, quarterly reports or the usual ongoing reports, regardless of whether the form of publication is in print or through the internet. The FRB standards always apply, whether the information is given in written or oral form, by the company itself or by anybody representing the company. For further information, please see <http://www.sveamin.se/english/ethical-rules/>.

## 14 Other key issues

### 14.1 Usual structure of venture

The construction necessary for mining operations requires a building license. The procedure for obtaining a building license and the subsequent process before the construction can be put into service contain the main elements set out below. The fee depends on the magnitude and nature of the building.

- (a) the application for a building license is filed, together with applicable maps, drawings, technical information, etc. with the Building Committee (*Byggnadsnämnden*) at the local municipality;
- (b) the Building Committee grants the application;
- (c) the Building Committee, in consultation with the applicant and applicable authorities, sets out technical standards for the construction;
- (d) the Building Committee issues a commencement decision (*startbesked*), after which the construction process may begin;
- (e) during the construction of the mine, the Building Committee will conduct one or more site inspections;
- (f) completion consultations (*slutsamråd*) are held, whereby the conditions for finishing the construction and putting the construction into service are evaluated; and

- (g) a Service Decision (*slutbesked*) is issued by the Building Committee and the mine can be put into service.

## 14.2 Protected areas

It should be noted that all exploration activities are prohibited in national parks. However, after approval, exploration may be allowed in all other types of protected areas. Examples of protected areas with various types of restrictions include national parks, the Natura 2000 area, nature or culture reserves, natural monuments and biotope protection areas.

## 14.3 Export

Information on export restrictions concerning specific minerals and/or specific countries can be obtained from the following Swedish authorities:

- (a) the Swedish Civil Contingencies Agency (*Myndigheten för samhällsskydd och beredskap*);
- (b) the Swedish Agency for Non-Proliferation and Export Controls (*Inspektionen för strategiska produkter*);
- (c) the Swedish Chemicals Agency (*Kemikalieinspektionen*); and
- (d) the Swedish Customs (*Tullverket*).

## 15 Useful websites

### The Mining Inspectorate of Sweden

<http://www.sgu.se/bergstaten/>

The Mining Inspectorate of Sweden is responsible for issuing permits for exploration and mining. The inspectorate also carries out inspections of mines and provides information on mineral legislation and prospecting in Sweden.

### SveMin

<http://www.sveMin.se/>

SveMin is an industry association of mines, mineral and metal producers. We specifically recommend their comprehensive publication "Guidance for Exploration in Sweden", available in English on their website.

### SGU (Geological Survey of Sweden)

<http://www.sgu.se/>

The expert agency for issues relating to bedrock, soil and groundwater in Sweden. Supporting the development of the mining, rock and mineral industry.

### The Sami Parliament

<https://www.sametinget.se/gruvor>

The Sami Parliament is both a publically elected parliament and a state agency, working for increased self-determination concerning the Sami.

### The Swedish Environmental Protection Agency

[www.naturvardsverket.se](http://www.naturvardsverket.se)

The public agency in Sweden responsible for environmental issues.

# Sweden

**The Land and Environment Court of Appeal**

Superior instance in cases concerning environmental law and land law, as well as planning and building law.

<http://www.markochmiljooverdomstolen.se/>

**The National Board of Housing, Building and Planning**

The National Board of Housing, Building and Planning, works toward, among other things, the sustainable utilization of land and water, as well as the physical environment in general.

<http://www.boverket.se/>

**The Ministry of the Environment and Energy**

The governmental department for environment and energy.

<http://www.regeringen.se/sveriges-regering/miljo--och-energidepartementet/>

**The County Administrative Boards**

The County Administrative Boards are 21 different cooperating authorities from different regions.

<http://www.lansstyrelsen.se/Sv/Pages/default.aspx>

**The MSB – Swedish Civil Contingencies Agency**

<https://www.msb.se/>

**The ISP, Inspectorate of Strategic Products**

<http://www.isp.se/>

**The Swedish Chemicals Agency**

<http://www.kemi.se/>

**Swedish Customs**

<http://www.tullverket.se/>

In addition to the above, the municipal authorities play a major role with respect to decisions relating to the mining industry. However, these authorities have no joint website.

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# Thailand

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	Yes
Indigenous and local community rights	None
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	1–5 years, depending on the type of exploration license
Mining license	Maximum 30 years
Able to use tenement as security	No
Royalty payable to government	Yes
Classification system used	None

## 1 Summary

Mining production in Thailand has continued to expand as a result of growing demand from both the domestic and international markets. Thailand's mineral commodities include basalt, cement clay, gold ore, gypsum, lignite, limestone, rock salt, shale (industrial rock-cement) and silver ore, comprising both "industrial minerals" and "energy minerals."

While recognizing the importance of the mining industry, the government has emphasized the importance of ensuring that Thailand's environment and natural resources are fully protected against damage from mining activities. Therefore, mining projects are subject to a range of preventative and control mechanisms.

In May 2016, the government issued a cabinet resolution proposing the shutdown of all gold mines in Thailand by the end of 2016. In December 2016, the National Council for Peace and Order exercised its absolute power by issuing an order suspending all gold mining operations and gold mining related activities from 1 January 2017 ("**NCPO Order**"). According to the NCPO Order, related agencies are restricted from issuing or renewing gold prospecting licenses, mining leases and metallurgical processing permits with immediate effect. The suspension shall continue until the national minerals management policy committee

# Thailand

decides otherwise. Although mine operators have to suspend their operations, they still have a duty to rehabilitate mining areas as per the measurement specified in the Environmental Impact Assessment Report. The rationale for issuing the cabinet resolution and the NCPO Order is that the value of producing gold in Thailand per annum, which is approximately THB 3.6 billion, is substantially outweighed by the environmental and social cost incurred. In addition, the level of protest against gold mines in affected communities has become much stronger recently. Therefore, from the government's perspective, the drawbacks of mining gold outweigh the benefits.

## 2 Legal framework for mining

Mining in Thailand is regulated under the Minerals Act, B.E. 2560 (A.D. 2017) ("**Minerals Act**"), effective from 29 August 2019. The Minerals Act superseded the Minerals Act, B.E. 2510 (A.D. 1967) ("**Previous Minerals Act**"), and consolidated the Previous Minerals Act and the Mineral Royalty Act into one legislation. The Department of Primary Industries and Mines (DPIM), within the Ministry of Industry (MOI), is responsible for the supervising and promoting the mining industry, including mineral trade and setting safety and pollution-control requirements. Applications to operate in the mining industry can be divided into six categories, according to their operational stage:

- (a) prospecting and exploration;
- (b) mining;
- (c) mineral processing and metallurgical processing;
- (d) mineral possession, transport and royalty payment;
- (e) purchase, sale and storage of minerals; and
- (f) mineral import and export.

Thailand has a codified system of law. The major legislative codes are the Civil and Commercial Code, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code, the Revenue Code and the Land Code. The content of each code is drawn from the laws of other countries with codified systems, common law systems and the traditional laws of Thailand.

Although the Constitution of the Kingdom of Thailand, B.E. 2560 (A.D. 2017) stipulates the principle that persons assembling to form a community, local community or traditional local community have a right to maintain and exploit the natural resources, environment and biological diversity within their area, the Minerals Act provides that no person may undertake prospecting or mining activities in any area, regardless of the rights over the area, unless they have received a prospecting and/or mining license. Therefore, minerals effectively belong to the state.

Oil and gas activities are regulated separately from mining. The Petroleum Act, B.E. 2514 (A.D. 1971), as amended in 2017, governs the exploration, production, storage, transportation, sale and disposal of petroleum. Oil and gas activities fall under the ultimate authority of the Department of Mineral Fuels, within the Ministry of Energy.

## 3 Restrictions on foreign investment

The Minerals Act itself does not impose any restrictions on foreign investment in exploration and mining operations.



# Thailand

However, the Foreign Business Act, B.E. 2542 (A.D. 1999) ("**FBA**") governs foreigners' business conduct in Thailand. The term "foreigner," under the FBA, is defined to include companies in which a majority of shares is held by foreign nationals and/or foreign entities.

The FBA seeks to prohibit or restrict foreigners from conducting certain business activities listed under the relevant schedules attached to the FBA. Mining is one of the restricted businesses listed under Schedule 2 of the FBA.

Foreigners may only operate businesses listed under Schedule 2 of the FBA if:

- (a) at least 25% to 40% of the company's shares (depending on the decision of the Minister of Commerce with the approval of the Cabinet) are held by Thai individuals or juristic entities; and
- (b) the number of Thai directors is not less than two-fifths of the total number of directors.

A foreigner seeking to conduct restricted business is required to obtain a Foreign Business License (FBL) prior to commencing the business (unless there are circumstances exempting it from this requirement).

In practice, foreigners seeking to conduct mining activities may be required to submit an application to the DPIM to obtain Mining Leases (MLs) prior to being able to obtain the FBL.

Additionally, mining operators may be eligible to obtain promotion from the Board of Investment (BOI).

Lastly, where foreigners undertake to provide certain services in relation to mining operations, for example, a mining contractor, then the foreigner may be deemed to be conducting a "service business," which is listed as a restricted business under Schedule 3 of the FBA (but falls outside the conduct of mining activities under Schedule 2) and for which an FBL must be obtained. However, in these cases, the foreigner is not subject to the specific shareholding and director ratio requirements which apply to businesses listed under Schedule 2 as outlined above.

## 4 Government or local participation requirements

The government may participate in mining activities through projects belonging to government agencies or state enterprises, or through joint projects between the public and private sector. However, there is no precedent for government engagement in mining activities.

## 5 Land tenure and priority

The Minerals Act creates a system of mining tenure separate from land tenure. Therefore, landholders do not have any ownership rights to minerals, although they may be entitled to compensation for the loss of the use of their land due to mining activities.

## 6 Indigenous or local community rights

There are no specific requirements under Thai law relating to indigenous people or other similar considerations.

## 7 Environmental protection and rehabilitation obligations

Under the Enhancement and Conservation of the National Environmental Quality Act, B.E. 2535 (A.D. 1992), as amended in 2018, mining operations of all sizes must have an Environmental Impact Assessment (EIA) Report

# Thailand

prepared and submitted to the Office of Natural Resources and Environmental Policy and Planning (ONEP). An EIA Report contains details of the operations' structure and activities, an assessment of these activities' environmental impact, and the proposed environmental protection measures. For private sector projects, the EIA Report will be reviewed by ONEP and an expert committee consisting of members qualified or specializing in mining, as well as representatives from the DPIM and other related agencies. For government agencies, state enterprises or joint projects between government agencies and the private sector, the EIA Report must be submitted to an expert committee and the National Environmental Board (NEB) for a feasibility assessment. Thereafter, ONEP, acting as the secretariat of the NEB, will review and provide comments on the EIA Report. The EIA Report will then be forwarded to the cabinet for approval.

Some specific types of mining operations are classified as operations which may cause serious impact to the community and, thus, an Environmental and Health Impact Assessment (EHIA) Report must be prepared and submitted at the ML application stage. These mining operations include underground mining in a mine designed to cave in after mining activities are completed with no supporting poles or replacement of materials to prevent cave-in, lead mining, zinc mining, mining of metal ores using cyanide, nitrate or lead in the production process, mining of metal ores with arsenopyrite as an associated mineral, coal mining employing motor vehicles in conveying coals out of the mining area, and offshore mining.

Pursuant to the Minerals Act, when applying for an ML, an applicant is required to submit a plan regarding rehabilitation, development, utilization and monitoring of the impact on the environment and public health during the mine's operation and after the closure thereof.

In addition, the minister is empowered to issue a notification to set out the rules regarding a buffer zone delineation for mining, preparation of basic information regarding the environment and public health, standards and methods regarding the control of pollution emissions or other things that may affect the environment and are derived from mining, minerals processing and metallurgy.

The Minerals Act also empowers the minister to designate mining operations, whether by location or type of minerals, which shall require the establishment of a committee for the control and monitoring of the impact caused by the mining operations.

Representatives at local level will be involved and take part as members of the provincial minerals committee, which involves permission for MLs for Category 1 mining operations (to be explained further below).

The Minerals Act imposes additional obligations on ML holders. For example, ML holders are required to provide a guarantee for the rehabilitation of the mining area and the alleviation of the persons affected by mining according to the rules specified by the Minerals Committee under the Minerals Act ("**Minerals Committee**"). In addition, for Category 2 and Category 3 mining operations (to be explained further below), ML holders shall procure insurance for claims regarding injuries to third parties or damages to third parties' property. Insurance procured by ML holders shall have a limit specified by the Minerals Committee.

## 8 Exploration licenses

### 8.1 Scope

Under the Minerals Act, mineral prospecting and exploration covers geological, geochemical, or geophysical surveying; drilling, pitting, or trenching; or any other distinct method or combined methods to appraise a quantity of minerals in a specific area. Prospecting or exploration is not allowed, regardless of a person's

# Thailand

rights to the land, unless a Prospecting License (PL), an Exclusive Prospecting License (EPL) or a Special Prospecting License (SPL) has been granted.

PL: A PL is granted for mineral prospecting and exploration within a designated area of an administrative district or a province. It is issued by the local officials in such locality, and is non-exclusive and non-transferable.

EPL: An EPL is a document granted to an applicant for the exclusive prospecting and exploration within a designated area. It is issued by the DPIM Director-General and is non-transferable.

As opposed to two types under the Previous Act (Inland and Offshore Prospecting), there is currently one type of EPL, that is, the EPL for Inland Prospecting. Each application is limited to an area not exceeding 2,500 rai (four square kilometers). However, the MOI's policy is not to grant this type of EPL for any area exceeding 1,250 rai (two square kilometers), except where an investment promotion certificate is granted for the prospecting and mining of minerals that will be used as raw materials in a metallurgical process or in a factory.

SPL: An SPL is granted for exclusive prospecting and exploration for a specific set of circumstances within a designated area. The area for inland prospecting must not exceed 10,000 rai (16 square kilometers), and the area for offshore prospecting must not exceed 500,000 rai (800 square kilometers). This license is issued by the DPIM Director-General, with approval of the Minerals Committee, and is non-transferable.

## 8.2 Duration

A PL is valid for one year. An EPL is valid for two years while a SPL is valid for five years.

No type of exploration license can be renewed.

## 8.3 Steps to acquire an exploration right

After the relevant application form has been filed with local officials (i.e., mayors or a president of a Tambon Administrative Organization, as the case may be) and the Local Mineral Industry Official (LMIO), the officials examine the completeness of the form, the relevant documents, and the area intended for prospecting to ensure it is not a prohibited area.

Local officials issue the PLs. The LMIO forwards applications for EPLs and SPLs to the governor of the relevant province, the DPIM and the Minerals Committee for approval and issuance.

The time required depends on the circumstances of each individual case and, more importantly, the availability of the DPIM Director-General and the Minerals Committee (for EPLs and SPLs). The process can take longer than one year.

## 8.4 Relationship with landowners

The applicant is not required to own the land. However, the landowner's prior consent must be obtained before the exploration can proceed.

## 8.5 Obligations of the holder

PL: The license holder must comply with the conditions specified in the PL. Mineral prospecting can only be conducted by geological, geochemical, or geophysical surveys. Prospecting methods that directly collect

# Thailand

mineral samplings, such as pitting, trenching, and drilling, are not allowed. A report on the results of the prospecting is not required. The license holder may surrender the PL before its expiration.

EPL: Prospecting must be conducted according to the approved working plan and under the supervision and responsibility of a certified geologist or mining engineer. The license holder must submit a report detailing the results of the operations and prospecting work undertaken in the first 180 days after receiving the EPL. This report must be submitted using the prescribed forms to the LMIO within 30 days before the end of the 180-day period.

A final report must be submitted, in the same manner, detailing the results of the operations and prospecting work undertaken between the time the initial report was submitted and within 30 days before the expiration of the EPL. The license holder may also surrender the EPL before its expiration.

SPL: Prospecting for minerals must be conducted according to an approved working plan and under the supervision and responsibility of a certified geologist or mining engineer. The license holder must report the results of the operations and prospecting works to the DPIM every 180 days.

The license holder is required to spend a certain amount on prospecting expenses in each obligation year as specified in the SPL. At the end of each obligation year, if the license holder has not fully complied with the obligation, the difference must be paid to the DPIM within 30 days.

If the license holder incurs prospecting expenses in excess of the prospecting obligation, the excess may be carried forward and deducted from the obligations in the subsequent obligation year.

If the license holder has complied with the conditions and obligations of the SPL, and the prospecting results indicate that the whole area or parts of the area contain no targeted minerals or contain insufficient values to mine, the license holder may surrender the SPL or parts of the area thereof by submitting an application to the LMIO. The revocation or the surrender of the area becomes effective on the date of submission and the holder is relieved of the remaining obligations.

## 9 Holding tenements

The Minerals Act does not provide for holding tenements to bridge the gap between when exploration is finished and development starts.

## 10 Development/production tenements

### 10.1 Scope

An ML is required to conduct mining operations for general minerals, excluding gold (currently prohibited by the NCPO order), within a designated area. Mining operations are split into three categories, based on the size of the mining area, EIA requirements for the operation, the type of mine, area of mining, geography of the mineral deposits, mining methodology, and the impact on environmental quality and public health. Which authority issues the mining lease depends on the category.

- (a) Category 1: limited to an area not exceeding 100 rai (0.16 square kilometers);
- (b) Category 2: limited to an area not exceeding 625 rai (one square kilometer); and
- (c) Category 3: offshore and underground mining operations, and any mining operations that are not in Categories 1 and 2.

# Thailand

Nevertheless, mining operations not exceeding an area of 100 rai (0.16 square kilometers), but which need an EIA, will be deemed as Category 2 mining operations.

While an ML will generally not exceed an area of 625 rai (one square kilometer), an ML for areas under an SPL may be granted for mining operations not exceeding 2,500 rai (four square kilometers) per application. Underground mining operations may not exceed 10,000 rai (16 square kilometers) per application. Offshore operations may not exceed 50,000 rai (80 square kilometers).

The LMIO, with the approval of the provincial minerals committee, will be authorized to issue MLs for Category 1 mining operations. MLs for Categories 2 and 3 mining operations will be issued by the DPIM Director-General, with the approval of the Minerals Committee.

There is no limit to the number of MLs that may be applied for. In practice, a mining operator may apply for multiple MLs.

In addition to the relevant fees for application, the holder of an ML must pay a special subscription fee at a rate not exceeding 10% of the mining royalty tariff.

These fees must be paid to the DPIM and are in addition to any fees that must be paid to the landowners.

Other licenses that may be required include an SPL and separate licenses for industrial rock quarry mining and ore dressing. The application procedure differs for each license. If a large mineral deposit is discovered, the MOI may invite tenders and grant an exclusive contract for exploration and development of the area. Bidders must submit an offer containing special benefits of interest to the state.

## 10.2 Duration

The term of an ML may not exceed 30 years. However, where any ML has a term of less than 30 years, the holder may apply for an extension provided that the total period of validity does not exceed 30 years. An ML may not be transferred or subleased without the ML issuers' approval.

## 10.3 Transition from exploration/holding right to mining right

A PL holder has no exclusive right to apply for an ML with respect to mineral deposits within the PL area. Other persons can also apply for the ML, provided that such persons are able to provide the DPIM with reliable evidence showing the discovery or existence of minerals in the area in support of the application. An example of such evidence includes a letter from the person used to apply for an ML for the same area certifying that there are minerals discovered in the area or exploration findings conducted by government agencies in that area certified by a geologist or a mining engineer.

However, EPL and SPL holders generally have exclusive rights to apply for an ML for the area under its respective EPL or SPL. Persons other than those who own or possess such area as per the Land Code are not allowed to apply for an ML for the same area.

## 10.4 Steps to acquire a right

The steps for acquiring an ML can be divided into three stages. In the submission stage, an applicant submits an ML application form accompanied by supporting documents and pays the applicable fees to the LMIO.

In the processing stage, the applicant accompanies an official to survey and demarcate the prospective mining area. The results of the survey and relevant maps are sent to the DPIM. Upon completion of the demarcation of the requested mining area, the LMIO posts the announcement of the application. If there are

# Thailand

no objections raised within 60 days, the LMIO can then arrange for a public hearing. After this, the LMIO examines the completeness of and gathers all relevant documents as well as the provincial governor's opinion for submission to the DPIM and, arranges the meeting of the Minerals Committee or the provincial minerals committee as the case may be.

If the prospecting mining area is in a special area, such as a national reserve, certain watershed areas or an area within 50 meters of a main roadway or public watercourse, further area-specific requirements may apply. With underground mining, for instance, due to its impact on the use, possession and environment of the surface land, a public hearing must be held by the minister after the applicant submits the EIA Report. Further, if the mining area is within another person's property, on a public domain or on reserved land of the state, the applicant must obtain written consent from the public or private owner.

At approval stage, the Minerals Committee or the provincial minerals committee considers the application. After the respective committee approves the application, the DPIM Director-General or LMIO then issues an ML to the applicant.

## 10.5 Relationship with landowners

There are no specific requirements under Thai law relating to indigenous people.

The Minerals Act does, however, require a mining operator to obtain the consent of the landowner to be able to conduct mining operations in the relevant area of land.

## 10.6 Obligations of the holder

The holder must comply with the terms and conditions stipulated in the ML (as well as the work plan and special remuneration committed with the DPIM upon submission of the ML application).

General expenditures include an annual area utilization fee calculated based upon the total mining area, as well as a special subscription fee not exceeding 10% of the royalty rate payable for the minerals produced.

The ML Holder must commence mining within one year from the date of the receipt of the ML.

Further, general labor law provisions apply to the mining industry, including those contained within the Civil and Commercial Code and specific labor law acts, such as the Labor Protection Act, B.E. 2541 (A.D. 1998), as amended in 2019, and the Labor Relations Act, B.E. 2518 (A.D. 1975), as amended in 2001.

Notably, the Labor Protection Act stipulates that the maximum amount of allowable working hours for work that may be dangerous to the health and safety of employees, including work conducted underground, underwater, in caves, in tunnels or in places with limited air ventilation, shall not exceed seven hours and the total working hours in one week shall not exceed 42.

# 11 Assignment of and security over tenements

## 11.1 Assignment

The assignment and the transfer of a ML will require the approval of the ML's issuer (i.e., DPIM Director-General or the LMIO). The transfer application and required supporting documents must be submitted.

## 11.2 Security

An ML cannot be mortgaged, pledged or assigned as security under Thai law.

# Thailand

## 12 Royalties

Mining operators must pay a mineral royalty tariff. The mineral royalty tariff is a form of tax specifically collected by the state from mining operations. The applicable rates for the minerals royalty tariff are based on the price of metal in the respective ores. The current rates for various minerals range from 2% to 15% as stipulated in the Ministerial Regulation issued in 2018, under the Minerals Act.

## 13 Mineral reporting and classification

There is no legal classification system for reporting mineral resources and mineral reserves. In practice, the DPIM will classify the ore reserves based on the reserves in the mining lease areas, and in the areas with mineral potential.

## 14 Other key issues

### 14.1 Usual structure of venture

A limited liability company (both private and public) is usually used to conduct mining operations in Thailand.

Therefore, the foreign shareholding restrictions under Thai law should be considered in cases where foreigners (as defined under the FBA) will invest in such companies in Thailand.

Where the foreign party wishes to maintain control of the mining company, it may be necessary to have certain control mechanisms in place.

For example, the company's shares may be split into preference and ordinary shares, whereby the holders of the preference shares have greater or lesser voting rights. Notwithstanding the foregoing, there would have to be reasonable economic returns which justify one shareholder having more limited rights.

In connection with the above, the MOI has issued the Notification of the MOI Re: Prescribing Prohibition Against Actions That are Considered a Control Over a Mining Business by a Foreigner and Prohibition Against the Application for License for the Benefit of Other Persons, B.E. 2560 (2017) ("**Notification**") to prohibit corporate structures or transactions which ultimately provide foreigners with "control" over the mining business in Thailand.

The key elements to look at when determining whether there is "control" by foreigners in each of the prohibited conducts listed in the Notification appear to be whether (i) foreigners hold 50% or more of the voting shares in the company; or (ii) foreigners have the ability to appoint or remove 50% or more of the directors.

Examples of the actions considered to be control over a mining business by a foreigner and prohibited are as follows:

- (a) control over a business by allowing a foreigner, agent, or nominee to hold shares in the business, whether directly or indirectly;
- (b) control over a business through a foreigner holding shares either in person or via an agent or nominee, whereby these shares have greater voting rights in a shareholders' meeting than the number of shares that are actually held, or are shares that have higher privileges than shares held by Thai shareholders;

# Thailand

- (c) control over a business by allowing a foreigner to have control or influence over policy-making, management, operation, or appointment of directors and high-level executives, whether directly or indirectly;
- (d) control over a business through a legal relationship with source of investment and loans from a foreigner or an affiliated juristic person, such as loan guarantees, loans with interest at a lower rate than market rates, business risk guarantees, or granting of credit, which is not of arm's-length; and
- (e) control over a business through transfer pricing transactions or price collusion with a foreigner or affiliated juristic person.

## 14.2 National Minerals Management Policy Committee

The Minerals Act calls for an additional committee to be established, called the National Minerals Management Policy Committee (NMC), which is empowered to propose strategies, policies and minerals management master plans ("**Master Plans**"). Master Plans will be prepared and updated by the NMC every five years.

## 14.3 Restricted mining areas

Under the Minerals Act, mining in preserved areas or for preserved minerals specified in Master Plans is prohibited. In addition, mining activities are restricted in the following areas:

- (a) Class A Watershed Area: Mining activities are prohibited in the areas designated by the cabinet as Class A Watershed Area. An exploration license or ML for mineral deposits in such areas cannot be issued without permission from the cabinet;
- (b) Wild Animal Sanctuary: Under the Wildlife Reservation and Protection Act, B.E. 2535 (A.D. 1992), as last amended in 2014, mining activities are prohibited in any area designated by the cabinet as a wild animal sanctuary. In compliance with this Act, the DPIM does not grant an exploration license or ML for mineral deposits in a wild animal sanctuary;
- (c) National Park Area: Per the National Park Act, B.E. 2504 (A.D. 1961), as last amended in 2016, mineral explorations and productions are prohibited in any area designated by the cabinet as a national park. The DPIM does not grant an exploration license or ML for mineral deposits in a national park;
- (d) Military Safe Zone: By virtue of the Act on Military Safe Zones B.E. 2478 (A.D. 1935), the cabinet is empowered to issue a royal decree specifying any area to be a military safe zone. Once the area is designated as a military safe zone, any person who wishes to obtain an exploration license or ML for mineral deposits in such area must obtain permission from the Ministry of Defense to engage in mining activities in the area. The permit letter from the Ministry of Defense must be submitted to the DPIM in support of an application for an exploration license or ML; and
- (e) Land Reform Area (LRA): In light of a recent Central Administrative Court decision, the authority no longer allows mining activities in the area designated as an LRA under the Agricultural Land Reform Act B.E. 2518 (A.D. 1975) ("**ALRA**"), as last amended in 1989. Please see more information regarding the LRA under "Land for agricultural purposes" below.

## 14.4 Export

Exports of the following minerals are subject to restrictions:



# Thailand

- (a) more than 50 grams of tin;
- (b) gold, tantalum, thorium, columbium (known as niobium) or any radioactive minerals;
- (c) more than two kilograms of copper, zinc or iron; and
- (d) more than one ton of dolomite, barite, pyrophyllite, feldspar, gypsum or kaolin.

Persons who wish to export these products must obtain a mineral export license.

## 14.5 Taxes

### 14.5.1 Corporate income tax

All companies in Thailand were previously subject to a corporate income tax of 30% of net profits, although the government issued Royal Decree No. 577 to reduce corporate tax rates from 30% to 20% for 2015. On 4 March 2016, the Revenue Code Amendment Act (No. 42) was enacted to permanently reduce the corporate income tax rate to 20% of net profits from 2016 onwards. Most payments to foreign companies, such as dividend and interest payments, are subject to income tax. The taxpayer must withhold the tax at a rate ranging from 10% to 15%, subject to the applicable double taxation agreement. Corporate income tax is imposed on the net profit of a fiscal year. If a company incurs a loss, it may carry it forward for five consecutive years but may not carry the loss back.

### 14.5.2 Value-added tax (VAT)

According to the Revenue Code, a company or business that sells goods or services and earns an annual gross revenue equivalent to or exceeding THB 1.8 million in a calendar year must apply for VAT registration.

VAT is levied on sales or services in Thailand and the import of goods into Thailand at a rate of 7% (as of July 2019). Export of goods and services rendered in Thailand and utilized outside Thailand, and aircraft or sea vessels engaging in international transportation, are subject to 0% VAT, which entitles the VAT registrant to receive an input VAT refund.

## 14.6 Overlapping tenements

An exploration license or ML holder only has the right to explore or extract a specific type of mineral in the area as specified in the exploration license or ML certificate. If, in the same area, a different type of mineral is discovered, the holder of the exploration license or ML has no right to explore or produce such mineral. In such case, a new exploration license or ML for the discovered mineral must be obtained.

Given the above, an exploration license or ML does not give the holder an exclusive right to explore or extract all natural resources that exist in the area under the exploration license or ML. It is possible that a permit to explore or produce other kinds of natural resources, i.e., petroleum concession, may be granted for the area under exploration license or ML.

## 14.7 Land for agricultural purposes

In 1975, Thailand enacted the ALRA. The purpose of this law is to facilitate the distribution of land plots in the area demarcated as "LRA" to farmers who do not have adequate land for their agricultural uses.

Any person who wishes to utilize any plot of land in LRA for purposes other than agriculture must obtain permission from the Agricultural Land Reform Office (ALRO). By virtue of ALRA and ALRO Regulation re:

# Thailand

Permission to Extract Natural Resources in Land Reform Area B.E. 2541 (A.D. 1998) ("**ALRO Regulation**"), the Agricultural Land Reform Committee is vested with the power to permit a person to conduct mining activities in LRA.

Nevertheless, in 2013, the Central Administrative Court revoked the ALRO Regulation, as the court held that it is not consistent with the purpose of the ALRA and that the ALRO or the Agricultural Land Reform Committee has no authority to grant permission to use LRA for other purposes than agriculture under the ALRO Regulation. The case has been brought to the Supreme Administrative Court. In 2017, the ALRO Regulation was eventually revoked by the Supreme Administrative Court. Therefore, the Agricultural Land Reform Committee no longer grants permission for use of LRA for mining activities.

## 14.8 Water licenses

A mining tenement does not include a right to the water necessary for mining and mineral processing, which needs to be negotiated or obtained separately.

If a mining project involves the following activities, permission from the LMIO must be obtained as per the Minerals Act:

- (a) diverting or drawing water from public waterways, whether such waterways are inside or outside of the mining area; and
- (b) blockage, destruction or deterioration of public waterways.

In addition to permits under the Minerals Act, the mine operator may have to obtain permits under another law, i.e., the Irrigation Act, B.E. 2485 (A.D. 1942) (in cases where the operator wishes to draw water from a public reservoir).

## 14.9 Skilled labor and visas

The main law governing working condition in Thailand is the Labor Protection Act, B.E. 2541 (A.D. 1998), as last amended in 2010, pursuant to which, an employer is required to comply with a variety of minimum standards including maximum working hours (seven hours per day for works in mine), minimum rate of pay, severance payment in case of termination, weekly holidays, 13 days traditional holidays and six days of annual leave. There are provisions for certain maximum periods of paid sick leave (30 days per year), paid military leave (60 days per year) and paid maternity leave (45 days).

Under the Foreigners' Working Management Emergency Decree, B.E. 2561 (A.D. 2018), all alien workers are required to obtain a work permit prior to working in Thailand. The act lists certain occupations that are reserved exclusively for Thai nationals, for which a work permit cannot be granted. Generally, foreigners are prohibited from working in manual and industrial labor and some professional occupations. With certain exceptions, all foreigners must obtain a work permit from the Department of Employment, Ministry of Labor, before commencing work in Thailand. The granting of a work permit is discretionary.

Normally, the validity of a work permit is one year, except in the case of work permits issued to foreign experts and technical staff given permission to work in Thailand under BOI promotion. In such cases, the permit will last for the period stipulated under BOI approval.

## 14.10 Infrastructure

Access to infrastructure, including highways, railways or public waterways, is normally taken into consideration when determining the commercial feasibility of the project. It should be noted that, in

# Thailand

Thailand, there are various laws governing access to infrastructure. For example, if a mine operator wishes to connect the project site to a highway, permission from the Highway Department is required, pursuant to the Highway Act, B.E. 2535 (A.D. 1992), as last amended in 2006. Also, there are various licensing requirements in cases where the mine operator wishes to construct infrastructure as a part of the project. For instance, if the project plan includes construction of a port for shipment of minerals, permission from the Marine Department must be obtained beforehand, as per the Act on Navigation in Thai Waters B.E. 2456 (A.D. 1913), as last amended in 2007. If a power plant is to be constructed as a part of a mining project to generate electricity for use in mining or mineral processing, an Electricity Generation License under the Energy Industry Act B.E. 2550 (A.D. 2007) and Regulated Energy Production Permit under the Energy Development And Promotion Act B.E. 2535 (A.D. 1992) must be obtained.

## 14.11 Security of tenure

Security of tenure is still an issue for the mining industry in Thailand. In this respect, there are no definitive guarantees that the PL holder will obtain the right to conduct the mining operations in the area in which it conducted exploration. This is because other applicants would not be prevented from submitting an application to obtain an ML for that area.

As for the holders of an EPL and a SPL, although others may be prevented from submitting an application to obtain the ML, there is still an exception which would allow the landowner to submit an application.

Even if no one else submits an application to obtain an ML in competition with the holder of the PL, the EPL and the SPL, such license holders would still be required to submit all the required information and documents to obtain an ML. Failure to submit the required documents and/or information may lead to the ML not being issued to the license holders.

Lastly, it should be noted that the Minerals Act empowers the Minister, with the approval of the cabinet, to change the area under the PL, EPL, SPL, PML or ML, if there is a necessity to use this area for the benefit of public utility works, defense of the nation or other public benefits. In these cases, the relevant license holders cannot claim damages from these changes.

## 14.12 Protection for foreign investors

The Investment Promotion Act protects BOI-promoted companies against nationalization, competition from state enterprises, monopolies on the sale of similar products, price controls and export restrictions.

In addition, Thailand has entered into various bilateral and regional trade and investment agreements that guarantee to protect foreign investments against certain government measures (e.g., expropriation), such as the Thailand-Australia Free Trade Agreement ("**TAFTA**"). The TAFTA outlines standards of treatment and protections for Australian investors in Thailand, and gives investors, including mining investors, the right to refer disputes relating to the covered investments to international arbitration.

## 14.13 Insurance

One of the duties of ML holders who conduct Categories 2 and 3 operations is to take out insurance against liability for loss of life, physical and property damage of third parties in the amount required.

# Thailand

## 15 Useful websites

Agricultural Land Reform Office ( <i>this page is only accessible in Thailand</i> )	<a href="http://www.alro.go.th/alro_en/main.php?filename=index">http://www.alro.go.th/alro_en/main.php?filename=index</a>
Department of Business Development	<a href="http://www.dbd.go.th/dbdweb_en/main.php?filename=index">http://www.dbd.go.th/dbdweb_en/main.php?filename=index</a>
Department of Primary Industries and Mines	<a href="http://www.dpim.go.th/en/">http://www.dpim.go.th/en/</a>
Office of Natural Resources and Environmental Policy and Planning	<a href="http://www.onep.go.th/">http://www.onep.go.th/</a>
Revenue Department	<a href="http://www.rd.go.th/publish/index_eng.html">http://www.rd.go.th/publish/index_eng.html</a>
Royal Forest Department	<a href="http://www.forest.go.th/index.php?lang=en">http://www.forest.go.th/index.php?lang=en</a>
Thailand Board of Investment	<a href="http://www.boi.go.th/index.php?page=intro&amp;language=en">http://www.boi.go.th/index.php?page=intro&amp;language=en</a>

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# Turkey

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	No
Indigenous and local community rights	No
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	In effect
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically four years (except for Group IV minerals which can extend up to nine years)
Mining license	Varies between 10–50 years
Able to use tenement as security	Yes
Royalty payable to government	Yes – amount depends on commodity

## 1 Summary

Although dependent on imports for some major commodities such as iron, the Republic of Turkey possesses vast mineral resources and is one of the world's richest countries in terms of mineral variety. Turkey's primary target minerals are gold, silver, copper, chrome, lignite and coal. The Turkish Constitution and the Mining Code (No. 3213) ("**Mining Code**") provide that all natural resources, including mines and related exploration and exploitation rights, are subject to the exclusive ownership and disposition of the Turkish State, without regard to ownership of the real property where these natural resources are located. Investment and production have increased in the sector over the last decade with the liberalization of Turkish mining regulation, the privatization of a number of state-owned enterprises and new investment incentives.

The Mining Code underwent a major amendment on 4 February 2015 ("**2015 Amendment**"), changing several key provisions and concepts, including the transferability of mining licenses, reporting of mining activities, supervision of mines, license fees and mining operation activities. A further amendment dated 20 August 2016 ("**2016 Amendment**") introduced a new Turkish Geology Data and Drilling Information Center ("**Center**") and a National Mineral Resource and Reserve Reporting Commission ("**Commission**") to enhance the supervision of mining activities. After the 2016 Amendment, the Mining Code has undergone some minor

changes in 2017 and in 2019, mostly related to royalty amounts, license fees, other figures and submissions to the governmental authorities.

The Mining Activities Permit Regulation published on 21 June 2005 and the Regulation on Mining published on 21 September 2017 are the main secondary legislation governing the mine sector ("**Mining Activities Regulations**"). The Regulation on Mining was enforced two years after the 2015 Amendment, which aims to improve the ambiguity in the implementation of the new Mining Code provisions.

Turkish citizens and legal entities are entitled to engage in mining operations by virtue of (i) an exploration license; (ii) an operation license; and (iii) operation permits granted by the General Directorate of Mining and Petroleum Affairs ("**General Directorate**"). An exploration license grants the license holder the right to carry out exploration activities; and, in case any minerals are detected within the exploration license area, the license holder is entitled to an operation license for conducting extraction on such reserve. Issuance of an operation license is not sufficient to start extracting ore. Upon the issuance of the operation license, mining license holders must obtain all necessary environmental permits, such as an environmental impact assessment, as well as access rights to the underlying land. The operation license, by itself, does not grant rights to the underlying land, and the license holders must lease, or else gain rights (such as ownership or usufruct rights) over the area to be used for mining activities.

President's Decree No. 2018/8 dated 11 September 2018 requires private entities to obtain permission from the relevant ministries, in our case, from the Ministry of Energy and Natural Resources (MENR), to utilize state-owned lands. As a result, in addition to regular mining licenses and permits, mining operations on state-owned lands will be subject to the relevant ministry's permission.

The license holder will be entitled to operate the mine only upon the issuance of the required environmental permits and land-use rights. The General Directorate will issue an operation permit in the name of the license holder for an area of potential or proven reserves, which grants the right to extract ore. Operation of a mine without environmental permits and an operation permit may lead to administrative fines, cancellation of the operation license or even criminal liability in some cases.

## 2 Legal framework for mining

The Constitution provides that all natural resources and related exploration and exploitation (mining) rights belong to the state, without regard to the ownership of the real property where the natural resources are located ("**Site**").

Turkey is a civil law country. The Constitution and the Turkish Civil Code (No. 4721) ("**Civil Code**") set out the general rules in relation to the ownership of natural resources, whereas the Mining Code, the Mining Activities Regulations, and other implementing regulations, govern mining operations in Turkey. Natural persons and legal entities can engage in mining operations under exploration and operation licenses and operation permits granted by the General Directorate pursuant to the Mining Code. The Mining Code also regulates the establishment of usufruct rights and site easements on real estate subject to the mining licenses and activities. The Civil Code, furthermore, decrees limiting private ownership of mines on the grounds for the public interest.

The MENR and the General Directorate are the main regulatory and supervisory authorities for mining operations. While the MENR sets out the general rules and policies for mining operations, the General Directorate is mainly responsible for day-to-day operations, including granting licenses relating to mining rights, supervising mining operations and taking necessary measures to support exploration and operations.

# Turkey

Pursuant to the 2016 Amendment, both the Center and the Commission are established and currently operating under the auspices of the General Directorate. The Center's objective is to collect geological data produced during mining exploration, research and production activities. The Center will also archive maps and cross section information obtained by drilling activities. The Commission's objective is to collect data and information regarding the exploration and operation of mineral reserves in line with international scientific and technical standards. The Commission also sets the reporting standards for mining activity reports.

All mining rights and operations, including the transfer, acquisition and cessation of mining rights and related encumbrances, must be registered with the General Directorate and recorded in the mining registry. The mining registry is public. Mining rights are only valid if they are registered in the mining registry.

Under the Mining Code, all substances in the earth's crust that have an economic value (except petroleum, natural gas, geothermal and water resources, for which exploitation is subject to other laws and regulations) are classified as minerals. The mining laws categorize minerals into five groups, each being subject to different treatment for licensing purposes:

- (a) Group I (a): sand and gravel used in construction and road works;
- (b) Group I (b): brick and roofing tile clay, cement clay, pozzolanic rocks, rocks used in the cement and ceramic industries, and minerals not classified under the other groups;
- (c) Group II (a): rocks used in crushed form that are derived from calcite, dolomite, limestone, granite, andesite, basalt, and that are used to produce aggregate, ready-made cement or asphalt;
- (d) Group II (b): stones produced in block such as marble, travertine, granite, andesite, basalt, and stones used for decorative purposes;
- (e) Group II (c): stones such as calcite, dolomite, limestone, granite, andesite, basalt used in integrated cement, limestone and calcite crushing facilities;
- (f) Group III: salts in solution and obtained from the sea, lakes and spring water, carbon dioxide gas (except for geothermal, natural gas and areas with petroleum) and hydrogen sulphide (provisions of the Petroleum Law (No. 6326) are reserved);
- (g) Group IV (a): several minerals listed under the Mining Code including boron, sodium, lithium and calcium;
- (h) Group IV (b): ores listed under the Mining Code that are mainly energy sources such as coal, lignite and anthracite;
- (i) Group IV (c): metals listed under the Mining Code, including gold, silver, platinum, copper, zinc, iron, manganese, nickel and other minerals, and rare earth minerals such as cerium, rubidium and bismuth;
- (j) Group IV (c): radioactive minerals and materials that contain elements such as uranium, thorium and radium; and
- (k) Group V: precious gem stones, including diamond and sapphire.

## 3 Restrictions on foreign investment

Only (a) Turkish citizens; (b) legal entities incorporated under the laws of Turkey; or (c) state agencies and authorized state-owned enterprises, their subsidiaries and affiliates, and other public entities are permitted



# Turkey

to engage in mining operations in Turkey ("**Eligible Parties**"). Foreign mining companies wishing to engage in mining operations in Turkey, therefore, must engage through subsidiaries established under the laws of Turkey. Under Turkish law, there is no distinction between domestic and foreign capital in Turkish companies. Companies established in Turkey with foreign capital can hold mining rights in a manner equivalent to domestic capital companies.

There are no prohibitions, restrictions or requirements for foreign investors engaging in mining activities in Turkey through a Turkish company, except with respect to real estate. Turkish companies with direct or indirect foreign shareholding of over 50% are restricted from acquiring real estate in strategic locations of the military or locations close to military bases. They must obtain prior clearance from the relevant governmental authority. In case of an acquisition by a foreign person, a notification must be made within one month following the buyout if the target company holds any real estate.

Even if the relevant real estate is located in a location that is not restricted as described above, Turkish companies with foreign shareholding still need to make a filing to the governorship of the relevant city to determine whether the real estate is in a restricted area. This is a straightforward process.

Under Decree No. 32 on the Protection of the Value of Turkish Currency, persons residing outside of Turkey can freely transfer funds in Turkish currency or foreign exchange into Turkey from abroad. Funds in Turkish or foreign currency can be freely remitted abroad from Turkey via banks.

## 4 Government or local participation requirements

There are no government participation requirements in Turkey. Pursuant to the Mining Code, state bodies, state agencies and authorized state-owned enterprises, their subsidiaries and affiliates, and other public entities can engage in mining operations. In particular, the Mineral Research and Exploration Institution, established pursuant to Law No. 2804, an affiliated entity of MENR, can carry out mining exploration operations along with scientific works relating to mining.

## 5 Land tenure and priority

The Mining Code provides that in the event there are privately owned lands in an exploration license area, the license holder can request from the General Directorate the establishment of a usufruct right over this land, with a mechanism similar to expropriation. The license holder may also choose to lease or purchase such land.

If the land is owned by the Turkish Treasury or is under the disposition of the state, the license holder must sign a lease agreement or a usufruct right agreement with the state. Rental income or adequate compensation amounts will not be collected for mining operations performed on sites owned by the treasury or under the disposition of the state.

## 6 Indigenous or local community rights

There are no requirements or distinctions applicable to indigenous people or similar ethnic or other groups. Additionally, mining activities to be conducted on sites are not subject to any local or indigenous community approval. Besides, as mentioned above, the Constitution provides that all natural resources and related exploration and exploitation (mining) rights belong to the state, without regard to the ownership of the real property where the natural resources are located.



## 7 Environmental protection and rehabilitation obligations

The main regulations governing environmental issues in Turkey are the Environmental Law (No. 2872), the Environmental Impact Assessment Regulation published on 25 November 2014 ("**EIA Regulation**") and the Environmental Permit and License Regulation published on 10 September 2014. The principal regulatory authorities that administer environmental legislation are the Ministry of the Environment and Urban Planning ("**Ministry of Environment**"), the Ministry of Agriculture and Forestry ("**Ministry of Forestry**") and the local directorates of the Ministry of Environment and the Ministry of Forestry.

The Mining Code and its secondary regulations require license holders to obtain environmental permits in accordance with the relevant legislation for sites where mining operations are performed.

Failure to comply, depending on the severity of the non-compliance, may result in the suspension of operations at the Site, as well as administrative penalties, cancellation of the mining license and criminal liability in some cases.

Mining license holders must obtain a unified environmental permit under the Environmental Permit and License Regulation and an approved environmental impact assessment depending on the classification of the mining project in question. Under the EIA Regulation, certain mining operations may either be subject to (i) an environmental impact assessment report ("**EIA Report**"); or (ii) qualification criteria after which the Ministry of Environment decides whether an EIA Report is necessary ("**Qualification Criteria**"), following an application by the project owner.

An EIA Report is required for the following mining operations:

- (a) open-pit mining with a surface area of 25 hectares or more;
- (b) open-pit coal production with a surface area of 150 hectares or more;
- (c) enrichment facilities using biological, chemical, electrolytic or thermal processes and their waste facilities;
- (d) asbestos operation and/or enrichment facilities, facilities using 200 tons/year and more asbestos; facilities producing asbestos as end-product with 10,000 tons/year and more capacity;
- (e) ore crushing, sifting and/or washing facilities with a capacity of more than 400,000 tons/year.

Other mining operations are subject to the Qualification Criteria, including all mine extraction works that are not automatically subject to the EIA reporting requirement (e.g., marble and decorative stones cutting; processing and sizing facilities with or over 5,000 m<sup>3</sup> and/or 250,000 m<sup>2</sup> capacity annually; and perlite and similar mineral expansion facilities as stated under the EIA Regulation).

In addition to the environmental permits and approvals explained above, other permits may be required depending on the specific conditions of the Site ("**Additional Permits**"). Additional Permits include permits required for mining in military and security zones, municipal areas for which a zoning plan has been drafted, areas with protected cultural and natural objects, wildlife protection areas, pasture areas, potable and utility water basins and state-owned areas. In certain areas, other authorities (such as the Ministry of Forestry for mining operations in forests) grant permits in accordance with special laws. Additionally, a property owner's written approval is required if mining operations are to be carried out within 60 meters of private buildings or within 20 meters of privately owned lands.

## 8 Exploration licenses

### 8.1 Scope

Obtaining an exploration license is the first step required to engage in mining operations; save for the operations of Group I, Group II (a) and Group II (c) minerals for which an operation license can be issued without first obtaining an exploration license. All operation and exploration licenses are issued and provided by the General Directorate, except for the operation license for Group I minerals, the exploration licenses are granted by the local administration through a tender process.

Except for Group II (b) and Group IV minerals, the explorations licenses for the other mineral groups can only be obtained through a tender process held by the General Directorate. Group V minerals have a different licensing procedure and certification. The General Directorate issues an "exploration certificate" for conducting exploration activities for Group V minerals.

The size of the area for which the exploration license or certificate will be granted ("**Exploration Area**") varies depending on the group of the mine. The General Directorate may grant exploration licenses up to (a) 10 to 20 hectares for Group I; (b) 100 hectares for Group II (b); (c) 500 hectares for Group III; (d) 2,000 hectares for Group IV; and (e) 1,000 hectares for Group V. If exploration operations for Group III and Group IV mines are conducted completely offshore, the General Directorate may grant an exploration license for up to 50,000 hectares. As for the operation license area restrictions, the General Directorate may directly grant operation license up to (a) 50 hectares for Group I (b); (b) 100 hectares for Group II (a); and (c) minerals.

### 8.2 Duration

The term of an exploration license is limited to the aggregate of the pre-exploration, general exploration and detailed exploration periods, depending on the type of the mineral. Exploration operations occur in three periods:

- (a) Pre-exploration Period: During the one-year pre-exploration period, the license holder must complete the minimum exploration activities. The license holder must submit a pre-exploration activity report to the General Directorate at the end of the period, and documents evidencing its investment costs. "Minimum exploration activities" are not defined under the Mining Code, but license holders during the pre-exploration period typically carry out systematic exploration methods, including sample collection through drilling, geologic map surveying and geophysics studies, to find deposits within the Exploration Area. Following the General Directorate's positive evaluation of the activity report, the license holder is entitled to commence the general exploration period.
- (b) General Exploration Period: The general exploration period is two years for Group IV minerals and one year for other groups. During this period, the license holder must complete its general exploration activities. At the end of the general exploration period, an exploration activity report and documents evidencing investment costs must be submitted to the General Directorate. Additionally, license holders for all groups, except Group IV mines, must also apply for an operation license by the end of this period. However, for Group IV license holders, by the end of the general exploration period, the General Directorate may grant four years for a detailed exploration period upon submission of the activity report and proof that sufficient investment has been completed.

- (c) Detailed Exploration Period: The detailed exploration period is a four-year period during which the license holder must explore the proven reserves granted only to Group IV minerals. The proven reserves must be documented in a detailed exploration report, along with the investment costs. Following the General Directorate's evaluation, the license holder may apply for an operation license.

The 2015 Amendment has introduced a feasibility period, which can only be granted to Group IV (b), (c) and (ç) minerals. Holders of licenses for these groups can apply to the General Directorate if additional time is needed to conduct feasibility studies for the mining project. The feasibility period is two years.

The General Directorate may allow an exploration license holder to (a) conduct market research, pilot works and development operations after the license holder applies to the General Directorate with an exploration activity plan; and (b) obtain and ship samples for testing from the minerals extracted as a result of exploration activities.

## 8.3 Steps to acquire an exploration right

- (a) A request for an exploration license is addressed to the General Directorate.
- (b) An applicant must first submit the standard forms, including information on the applicant and the site for which an exploration license is requested.
- (c) On the same day, the General Directorate informs the applicant whether the site is available for exploration. If the site is available, the General Directorate issues a document setting out the available areas on the site, reserving them for the applicant for two months.
- (d) An applicant must submit completed standard forms, which include information about the applicant and the requested site. During that period, the applicant must submit further documents regarding the identity of the applicant, technical specifications of the project, such as the preliminary survey report and the exploration work plan, proof of the financial capability of the applicant, and the license fee.

If the General Directorate approves the documents, it issues an exploration license and registers the license at the mine registry established within the General Directorate. The exploration license becomes effective upon registration.

In line with the Regulation on Authorized Persons published on 3 June 2016, the applicants must also ensure that the reports, projects and technical instructions to be submitted to the General Directorate are prepared by a legal entity certified to submit these documents to the General Directorate.

## 8.4 Relationship with landowners

As explained above, the license holders can request from the General Directorate the establishment of a usufruct right over privately owned lands in an exploration license area. The license holder may also lease or purchase such land.

In the event the land is owned by the Turkish Treasury, or is under the disposition of the state, the license holders must sign a lease agreement or an usufruct right agreement with the state.

## 8.5 Obligations of the holder

The exploration license holders must pay an annual license fee to the General Directorate. 100% of the license fee will be transferred to the budget of the General Directorate. Exploration license fees are calculated based on a matrix considering the size of the exploration license area, the phase of the exploration license (i.e., pre-exploration, general exploration or detailed exploration) and the coefficient; exploration license fees range from approximately TRY 1,500 to TRY 8,000. License fees are adjusted annually using the adjustment rate in the Tax Procedure Code. Sepiolite, jet and saltpan minerals are exempted from license fees.

Prior to the 2015 Amendment, exploration license holders were required to deposit a certain amount of cash to the General Directorate as security for their compliance with the applicable laws and environmental obligations. The General Directorate had the authority to confiscate this security upon certain violations of the Mining Code. The 2015 Amendment has canceled this security obligation. Instead, the General Directorate imposes high monetary fines for Mining Code violations.

## 9 Holding tenements

### 9.1 Scope

There is no particular system for holding tenements to bridge the gap between completing exploration and starting development.

### 9.2 Rights and obligations

If the exploration license holder fulfills its obligations under the Mining Code, it may obtain an operation license upon an application.

## 10 Development/production tenements

### 10.1 Scope

Mining operation rights under the Mining Code include preparation for the construction of facilities, production, sale and further exploration. To be entitled to operate a mine and extract ores, an exploration license holder must firstly obtain (a) an operation license for proven, potential and possible reserve areas, whereby they continue to explore potential and possible reserves and afterwards; (b) an operation permit to mine proven reserve areas for initiating the extraction, processing and production activities. Exploration certificate holders wishing to exploit Group V minerals must obtain an operation certificate instead of an operation license and operation permit.

Operation license: For Group II (b), Group III and Group IV minerals, the license holder is required to apply to the General Directorate to obtain an operation license before the end of the exploration license period. As mentioned, an operation license for Group I, Group II (a) and Group II (c) are obtained without first obtaining an exploration license.

Operation Permit: Following the issuance of the operation license, the license holder must (a) determine the potential or proven reserve; (b) obtain all required environmental permits for the mining project; and (c) secure the land-use rights for the land required for the mining project. Upon fulfillment of these conditions, the General Directorate will issue an operation permit to the license holder. The license holder may have more than one operation permit within the same operation license area, if there are more than one

underlying potential or proven reserve located on such area. An operation certificate is sufficient for Group V minerals to be operated and a separate operation permit is not required.

An operation license holder may continue exploration activities on operational mining areas. In such a case, the possible reserves in the operation license area must be converted to potential or proven reserves within five years for Group IV, and within three years for Groups I, II, III and V. If possible reserves have not been converted to potential or proven reserves within the time allowed, the unconverted possible reserves are excluded from the scope of the operation license.

## 10.2 Duration

The respective terms of Group I (b), II, III and IV mining licenses may be issued for at least 10 years and are determined based on the proven and potential reserves and their work plans. At the operation license holder's request, the General Directorate may extend the term based on a new exploitation work plan. The General Directorate considers certain facts, including whether (a) the license holder has made the necessary investment for adequate operation of the reserve; (b) the license holder constructed the necessary facilities; and (c) the license holder's previous operations have been conducted in compliance with the previous work plan. The operation license cannot exceed (a) 30 years for Group I minerals; (b) 40 years for Group II Mines; and (c) 50 years for Group III, Group IV and Group V minerals. The MENR can extend the total operation period for Group I and Group II minerals. However, for Group III, Group IV and Group V minerals, the Council of Ministers can extend the total operation period. The term of the operation permit is the same as the underlying operation license.

An operation certificate, which is granted to Group V minerals for operation, is issued for a five-year term, which may be extended upon request, provided that sufficient reserves exist, the new project is approved and the certificate holder has duly conducted production operations throughout the term of the operation certificate.

## 10.3 Transition from exploration/holding right to mining right

As explained above, at the detailed exploration period stage, the proven reserves must be documented in a detailed exploration report, along with investment costs. Following the General Directorate's evaluation, the license holder may apply for an operation license, as explained below.

## 10.4 Steps to acquire a right

An exploration license holder may proceed to obtaining an operation license (or the operation certificate in case of Group V minerals) if it has complied with the following requirements ("**Criteria to Proceed**"):

- (a) Periodic Activity Reports: Mining right holders must submit a resource and/or reserve report to the General Directorate, including information on (i) the operations carried out during the relevant period; and (ii) resources or reserves and quality.
- (b) Minimum Activity Requirement: Mining right holders must satisfy the minimum activity requirements set forth under the mining laws which, generally, include collecting and analyzing samples from the surface, surveying maps, drilling operations and three-dimensional modeling of resources or reserves.
- (c) Minimum Investment Requirement: Mining right holders must submit financial documents demonstrating the total investment made, which must not be less than the minimum investment amount set forth in the mining laws.

- (d) Feasibility Report Requirement: If the license holders qualify for the feasibility period for Group IV (b), (c) and (ç) minerals, after the expiration of the two-year feasibility period, the license holder must submit a feasibility report.

Applications vary depending on the mineral group:

- (a) Group I (a): Special provincial administrations (or the governorships in metropolitan municipalities) grant operation licenses for Group I (a) minerals through tenders, unless the site is privately owned. If the site is privately owned, after obtaining the approval of the landowner, Eligible Parties apply to the special provincial administration to obtain an operation license. Special provincial administrations grant operation licenses after an estimated price determined based on the type, reserve and location of the mineral is paid.
- (b) Groups I (b), II (a) and II (c): Applicants must submit an exploitation work plan including an environmental compliance report prepared by a mining engineer, a record showing that the facility does not bear an accrued but unpaid debt, and the operation license fee.
- (c) Groups II (b), III, IV, V and VI: Applicants meeting the criteria to proceed are only required to submit an operation work plan and a document indicating the environmental compliance report and the fees have been paid until the expiration of the exploration license term.

Following the issuance of the operation license and within three years thereafter, the license holder must submit to the General Directorate the land-use permits/agreements, the environmental and administrative permits and the EIA decision of the Ministry of Environment, to obtain an operation permit.

## 10.5 Relationship with landowners

The Mining Code provides that in the event there are privately owned lands in an area subject to a pending mining license application, the relevant lands can either be (a) purchased; (b) leased; (c) expropriated (applicable only for the operating period); or (d) an usufruct right can be established over the land. Upon failure to reach agreement with the landowner, the license holder may apply to the MENR for expropriation of the land, provided the license holder will bear the related costs and the MENR decides that the expropriation of the land is required for the public benefit.

If the land is owned by the Turkish Treasury or is under the disposition of the state, the license holder must sign a lease agreement or usufruct right agreement with the state. Rental income or adequate compensation amounts will not be collected for mining operations performed on sites owned by the treasury or under the disposition of the state.

Special regulations apply to special environmental protection areas, national parks, wildlife protection and development areas, coastal areas subject to protection under the Coastal Law, first-degree prohibited military zones, areas marked in a zoning plan as first-degree protected areas, forestry lands, olive groves, agricultural lands and pastures. Each of these areas has its own laws restricting their utilization by private persons and companies. While most of these areas (such as forests, agricultural lands and pastures) can be used for mining operations with the administration's prior approval and/or licensing process and certain fees; however, others (such as prohibited military zones and coastal areas protected under the Coastal Law) are off-limits.

## 10.6 Obligations of the holder

An operation license holder must submit information on its annual operations and sales on the forms specified in the mining laws, together with production maps setting out production details and a resource/reserve report (if exploration operations have been carried out). The General Directorate may impose an administrative fine of approximately TRY 47,000 if the license holder fails to submit the required information.

An operation permit holder must, at a minimum, commence preparatory works at the mine within one year of obtaining the operation permit. Operation permit holders must engage in production for at least three of the five years from the issuance of the operation permit, and total production must not be less than 10% of the annual production specified in the exploitation work plan ("**Production Requirements**"). If the Production Requirements are not satisfied, the General Directorate may impose an administrative fine of approximately TRY 78,000 and two administrative fines in consecutive five years will result in revocation of the license.

The 2015 Amendment replaced the annual operation license fees and security obligations with a universal operation license fee. Operation license fees are calculated based on a matrix considering the type and group of the minerals, the operation license area and the coefficient. 70% of the license fee is deposited to the General Directorate and 30% of the license fee is deposited as an environmental compliance guarantee. License fees are adjusted annually using the adjustment rate in the Tax Procedure Code. The operation license fees for 2019 are:<sup>1</sup>

- (a) Group I (a): from TRY 23,000 to TRY 31,000;
- (b) Group I (b): from TRY 28,000 to TRY 31,000;
- (b) Group II (a) and (c): from TRY 28,000 to TRY 233,000;
- (c) Group II (b): from TRY 31,000 to TRY 47,000;
- (d) Group III: from TRY 23,000 to TRY 47,000;
- (e) Group IV: from TRY 31,000 to TRY 109,000; and
- (f) Group V: from TRY 16,000 to TRY 31,000.

An exploitation work plan includes an undertaking to rehabilitate the site after the license expires in accordance with environmental laws. The operation license holder must also deposit an environmental guarantee before requesting an operation permit. An operation permit will only be granted after the applicant obtains all necessary Additional Permits.

In the event that the term of the license terminates or a license holder wishes to relinquish the mining area, the license holder must rehabilitate the area by taking all necessary health and safety measures to ensure the area does not pose a danger to nearby residents. However, rehabilitation may also be conducted by the relevant governorship or other governmental authorities but, even then, the license holder will bear the responsibility of the rehabilitation, including costs. These costs will be met by the environmental compliance guarantee priorly deposited by the license holder, which constitutes 30% of the license fee. If the costs exceed the amount of the guarantee, the governmental authority grants one month to the license holder to pay the remaining rehabilitation expenses. Unless otherwise provided in the mining laws, if a license holder

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<sup>1</sup>Fee estimations are based on approximate numbers provided on General Directorate website.

who has carried out production operations wishes to relinquish an area, it must submit health, safety and environment-related reports and maps relating to the licensed area to the General Directorate. If the licensed area has not been fully rehabilitated, the General Directorate and Ministry of Environment may, after inspection, grant the license holder additional time to complete the rehabilitation. If the license holder fails to complete the rehabilitation within the time allowed, the relevant governmental authority will complete the rehabilitation activities. Costs will be covered by the deposited guarantee and the exceeding amount will be requested from the license holder accordingly.

## 11 Assignment of and security over tenements

Under the Mining Code, exploration and operation license holders can pledge their mining rights. Operation license holders can establish a mortgage on the operation license as security for present or future borrowings for mining operations. With the operation license, the following items are within the scope of the mortgage: shafts, pits and tunnels for mining operations; machines, buildings and all kinds of motor vehicles used over or underground; tools and equipment used for extraction, dressing or melting minerals and other ore-handling activities; and operational supplies that are an integral part of the operation license. The mortgage term cannot exceed the license period. Both the mortgage to be established on a mining license and the pledge over a mine's ore deposits must be registered with the mine registry. The ore deposits subject to the pledge can only be sold with the pledgee's written consent.

## 12 Royalties

A license holder must pay a royalty to the state. State royalties are collected at rates over the pithead sale price. The pithead sale price declared by the license holder cannot be lower than the market price, which the General Directorate announces every year. The pithead sale price for run-of-mine ores is calculated by subtracting the cost of the enrichment process and transportation (including the amortization of the machinery and equipment) from the sale price.

The state royalty rates are:

- (a) Group I (a): 4%;
- (b) Group I (b): 4%;
- (c) Group II (a) and (c): 4%;
- (d) Group II (b): 4.5%;
- (e) Group III: 1% for spring salts; 5% for the remaining minerals;
- (b) Group IV: the rate for gold, silver, platinum, copper, zinc, lead, chromium, aluminum and uranium oxide is calculated based on the matrix provided in the Mining Code<sup>2</sup>, 8% for radioactive minerals and other radioactive matters except for uranium oxide and %2 for other minerals; and
- (c) Group V: 4%.

There are certain incentives under the Mining Code regarding state royalties. With the exception of Group I, Group II (a) and Group II (c) minerals used in construction, if minerals are processed in Turkey in a license

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<sup>2</sup> This structure provides an increasing state royalty rate proportional to a mineral's declared price in the London Metals Exchange. For example, for gold, if the dollar price/oz. of gold is below USD 800, the state royalty is 1%, while if the price of gold increases above USD 2,101, the state royalty is 15%.



# Turkey

holder's plant, a 50% exemption from royalty payments applies; and if these processed minerals are gold, silver and platinum of Group IV (c), however, 40% of the state royalty will be exempted. Additionally, Group IV (c) minerals that are processed into metals in the license holder's integrated plants are subject to a 75% exemption from royalty payments.

## 13 Mineral reporting and classification

Please see Section 2 for mineral classifications and sections 8 and 10 for reporting obligations for each licenses.

## 14 Other key issues

### 14.1 Usual structure of venture

In Turkey, the most common types of structure of ventures used by private parties conducting mining operations do not differ from other sectors. Joint-stock companies (JSCs) and limited liability companies (LLCs) are the most preferred structures. This is because JSC and LLC shareholders are only liable for the JSC/LLC's obligations to the extent of their capital contributions to share capital, except where LLC shareholders are liable for public debts to the extent they cannot be recovered from the company. Both JSCs and LLCs can be incorporated by one or more shareholders. JSCs, however, require a more sophisticated corporate governance structure compared to LLCs.

JSCs can carry out an initial public offering and have their shares listed on Turkey's only stock exchange, Borsa Istanbul (formerly the Istanbul Stock Exchange), while LLCs shares cannot be offered to the public or listed on Borsa Istanbul.

### 14.2 Restriction on exports/government take

The Ministry of Economy is entitled to restrict or prohibit exportation on the grounds of an extraordinary event affecting the market, for example, shortage of goods subject to export, public safety, public moral, health, environmental protection or protection of items having an artistic, historic or archaeological value. Furthermore, under Law No. 2840 regarding the processing of certain minerals, boron minerals can only be explored and processed by the state, and the provisions of the Mining Code are not applicable to boron minerals. Law No. 3284 on Restricting the Export of Certain Scrap Metals provides restrictions on exporting scrap metal, such as iron, copper and tin.

### 14.3 Taxes

As explained in Sections 8 and 10 above, tenements and license fees differ for exploration and operating licenses. An operation license holder must also pay royalties to the state collected from extracted minerals and determined by the pithead sale price.

There are certain value-added tax and corporate tax advantages for different groups of minerals. Under the Value-Added Tax Law, deliveries made to individuals or legal entities engaging in gold and silver exploration and extraction operations are exempt from value-added tax. Council of Ministers Decree No. 2012/3305 provides that all mine operations and exploration investments benefit from the following incentives under certain conditions: value-added tax exemption, customs duty exemption, corporate tax advantages, social security premium support, interest support and land allocation. These incentives do not apply to investments in operations relating to Group I minerals, investments in crushed stone and mining operations to be carried

out in Istanbul. Under the amendments introduced to Council of Ministers Decree No. 2012/3305 on 15 February 2013, power plants using domestic coal can also benefit from these incentives.

## 14.4 Overlapping tenements

No more than one license will be issued for the same group of minerals on a site. Licenses for different mineral groups, however, can be granted for a single site. Additionally, if mining operations overlap with an investment realized for the public interest, the investor or mining right holder can apply to MENR for determination of the priority of the overlapped projects. MENR will resolve the issue after inspecting the area and communicating with the relevant the ministries in connection with the overlapping investment, depending on the mine type and the project status.

## 14.5 Security of tenure

Security of tenure is granted to private entities through mining rights provided by the General Directorate by virtue of the mining licenses.

## 14.6 Protection for foreign investors

Under the Foreign Direct Investment Law No. 4875, foreign and local investors are treated equally, and all entities incorporated in Turkey under the laws of Turkey are deemed Turkish companies, regardless of their shareholding. Additionally, there are bilateral investment treaties in force that provide a number of guarantees to nationals of countries that are parties to the treaties. The right to resolve investment disputes by international arbitration in the absence of an arbitration agreement is afforded by these treaties. Turkey has also entered into bilateral treaties for the avoidance of double taxation with 80 countries.

## 14.7 Royalty agreements (transfer of mining operation rights)

Royalty agreements are executed between the mining operation permit holder and a third party for the processing, production and trade of the exploited minerals. Basically, the license holder grants the right to operate the mining area, as a whole or part, to the third party. These royalty agreements are subject to the approval of MENR, by considering whether the mining area is large enough to carry out mining activities and the effect of the operation activities. A copy of these agreements are provided to the General Directorate and registered with the mine. Only one royalty agreement can be executed for a mining area or the specific part of a mining area.

## 14.8 Transfer of licenses

Mining licenses can be transferred to Turkish citizens and companies established under Turkish laws and engaged in mining activities. Transfer of a mining license from one entity to another is subject to pre-approval of MENR. Once MENR approves the contemplated transfer, the license holder entity will be notified and the transfer can then be consummated. The MENR approval process contains a diligent examination of the transferee and transferor. Due to the mining legislation's lack of stipulated deadline for the approval process, however, it is not possible to estimate the timing. Accordingly, a straightforward process cannot be guaranteed. On the other hand, the required documents for the pre-approval submission are straightforward such as transfer agreement, information about the transferee and transferor, board of directors' resolutions of the transferee and transferor entities approving the license transfer, trade registry gazette records, documents evidencing the financial liquidity efficiency, tax and social security clearance letters, and documents showing that the license holder entity does not have an accrued but unpaid debt to the state

# Turkey

arising from the mining legislation. The transfer will be effective as of the date of registration to the mine registry.

The transferee becomes the mining license holder after the transfer of the license. The transferee assumes all obligations and rights granted to the license in question under the mining legislation. Prior to the transfer of a license, all the remaining duties and fees for the license and the guarantee for compliance with environmental obligations must be deposited, and state royalties must be paid. The transferee is required to apply to the General Directorate for the transfer of the license and must pay a transfer fee twice the exploration or operation license fee equal to the amount (as the case may be) and a declaratory document stating that the transferee has the financial capability to cover the respective amounts provided under the mining legislation for different types of mining projects.

## 14.9 Labor cost incentives

The Communiqué regarding incentives for labor costs of underground coal facilities ("**Labor Cost Communiqué**"), published on 26 June 2016, provides certain labor costs incentives to private real or legal persons holding an operation license for producing lignite and pit coal through underground mining facilities. The Labor Cost Communiqué sets forth that the social security premiums of employees within the scope of the Labor Cost Communiqué are to be reduced in line with a formula provided under it. The Labor Cost Communiqué is expected to enhance the profitability of lignite and pit coal producers.

## 15 Useful websites

Ministry of Energy and Natural Resources	<a href="http://www.enerji.gov.tr/">http://www.enerji.gov.tr/</a>
General Directorate of Mining and Petroleum Affairs	<a href="http://www.mapeg.gov.tr/Anasayfa.aspx">http://www.mapeg.gov.tr/Anasayfa.aspx</a>
General Directorate of Mineral Research and Exploration	<a href="http://www.mta.gov.tr/v3.0/">http://www.mta.gov.tr/v3.0/</a>
Turkish Pit Coal Authority	<a href="http://www.taskomuru.gov.tr/">http://www.taskomuru.gov.tr/</a>
General Directorate of Turkish Coal Enterprises	<a href="http://www.tki.gov.tr/tr/Anasayfa">http://www.tki.gov.tr/tr/Anasayfa</a>
Chamber of Mining Engineers	<a href="http://www.maden.org.tr/">http://www.maden.org.tr/</a>

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# Ukraine

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	None
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Minerals of local importance – up to three years Minerals of national importance – up to five years Oil and gas fields – up to 10 years Term of licenses can be extended
Mining license	Minerals deposits – up to 20 years Oil and gas deposits – up to 20 years (onshore); up to 30 years (continental shelf and exclusive economic (maritime) zone) Term of licenses can be extended
Able to use tenement as security	No
Royalty payable to government	Yes

## 1 Summary

The use of minerals is conducted in accordance with the general procedure set out under the license on subsurface use. Specific provisions may apply for certain types of minerals.

Depending on their importance, all minerals are divided into the categories of local or national importance, with a simplified procedure for obtaining rights to use minerals of local importance.

Foreign legal entities and citizens may exercise subsurface use rights on the same basis as Ukrainian entities. However, in practice, foreign mining companies may face various legal obstacles in obtaining all necessary licenses and permits, due to the somewhat ambiguous legislation and its conflicting interpretation by the Ukrainian authorities. For this purpose, the establishment of a Ukrainian subsidiary may be required.

# Ukraine

Minerals are under the exclusive ownership of the Ukrainian people, as represented by the state, and can only be granted for use. As for extracted minerals, the subsurface user has the right to dispose of minerals extracted under the relevant permit, unless otherwise provided by the applicable legislation.

Guarantees for investment activities in mining depend upon the form of such activities. Investment activities in Ukraine are usually conducted:

- (a) through corporate joint ventures (usually in the form of a limited liability company or a joint stock company with foreign investment);
- (b) under duly registered joint activity agreements without the establishment of legal entities; or
- (c) under production sharing agreements (specific to the mining sphere).

The most effective instrument of protecting foreign investments is to enter into an agreement for the sharing of mining activity outputs – a so-called “production sharing agreement” (“PSA”). Investments made in accordance with a PSA are specifically regulated by a separate law.

## 2 Legal framework for mining

Mining activities in Ukraine are regulated by applicable acts adopted by Verkhovna Rada of Ukraine (“**Parliament**”), in accordance with the Constitution of Ukraine, as well as by various governmental regulations.

The principal laws regulating subsurface use in Ukraine are the Subsurface Code 1994 (“**Subsurface Code**”) (which sets forth the principal terms and conditions for subsurface use and for the protection of subsurface resources), the Mining Act 1999 and the Production Sharing Agreements Act 1999 (“**PSA Act**”). There are also other legislative acts that stipulate environmental, labor and security regulations applicable to mining activities in Ukraine.

The following regulatory bodies supervise compliance with mining legislation in Ukraine:

- (a) the Ministry of Ecology and Natural Resources (“**Ministry of Ecology**”), which oversees the use and protection of subsurface resources;
- (b) the State Service on Geology and Subsoil (“**State Geology Service**”), which regulates mining works and is coordinated by the Cabinet of Ministers (“**CMU**”) through the Minister of Ecology;
- (c) the State Labor Service, which supervises geological studies and the production and protection of subsurface resources and is coordinated by the CMU through the Minister of Social Policy;
- (d) the State Commission on Mineral Reserves (“**Mineral Reserves Commission**”), which carries out state expertise of data on minerals and assesses mineral reserves on its readiness for industrial development; and
- (e) the State Scientific and Industrial Enterprise “State Informational Geological Fund of Ukraine” (“**GeoInform**”), which collects, stores, analyses and grants use rights to geological data.

Other agencies charged with overseeing aspects of the mining industry include territorial departments of the above-mentioned bodies, municipal councils and local executive bodies.

# Ukraine

The use of minerals is conducted in accordance with the general procedure established under the License on Subsurface Use ("**License**"). However, specific provisions apply for oil and gas, gas produced from coal deposits (methane), uranic ore and groundwater.

The oil and gas sector is regulated by, among others, the following acts of the Parliament:

- (a) the Oil and Gas Act 2001, providing for key issues related to the exploration, production and transportation of oil and gas, the licensing of such activities and certain environmental issues;
- (b) the Pipeline Transport Act 1996, which regulates the transportation of hydrocarbons, defines the permitted types of transport pipelines (along with their relative significance), and provides for statutory rights and obligations of pipeline operators;
- (c) the High-Pressure Pipeline Lands Act 2011, which establishes the legal and organizational basis of using land in restricted areas with high-pressure pipelines, as well as the basis for commercial activity at such areas; and many additional subordinated legislative acts regulating specific and procedural issues related to the exploration and extraction of hydrocarbons; and
- (d) the Natural Gas Market Act 2015, which establishes the main principles of operation for the natural gas market, limits the permitted state control in Ukraine's gas sector and regulates relations between natural gas suppliers and consumers.

## 3 Restrictions on foreign investment

The Subsurface Code clearly envisages that foreign legal entities and citizens may exercise subsurface use rights on the same basis as Ukrainian entities. However, in practice, foreign mining companies may face various legal obstacles in obtaining all necessary licenses and permits, due to the somewhat ambiguous legislation and its conflicting interpretation by the Ukrainian authorities.

Therefore, a foreign company seeking to engage in the exploration and/or extraction of minerals on the territory of Ukraine may have to establish a Ukrainian subsidiary. Normally, such subsidiaries are established as limited liability companies or joint stock companies. There are no restrictions in respect of the maximum permissible percentage of foreign investments in the charter capital of a Ukrainian company engaged in mining activities.

However, Ukrainian legislation envisages that a Ukraine-based mining company, which is wholly owned by a foreign company, may own in Ukraine only non-agricultural land that is located: (a) within a populated area, in case such company acquires an already-constructed real estate object or intends to further construct real estate objects for conducting commercial activity in Ukraine; or (b) outside of a populated area, in case such company acquires an already-constructed real estate object.

The entry of a foreign legal entity into the Ukrainian mining market, especially if a Ukrainian legal entity is established, will be regarded as a foreign investment. Foreign investments fall under specific legal regulations and investors are granted several benefits where such investments are duly registered. The benefits to foreign investors<sup>1</sup> include state guarantees for the protection of foreign investments (i.e., a prohibition of nationalization or requisition, unless such are made for the purpose of rescue operations in case of natural disaster, accidents, epidemics and so on).

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<sup>1</sup> Article 1 of Foreign Investment Act 1996 defines foreign investors as legal entities, established under foreign legal order, which conduct investment activity in Ukraine.

# Ukraine

Starting from June 2016, foreign investments made in Ukraine are no longer subject to the state registration, which was previously obligatory for foreign investment to exercise the benefits and guarantees provided by legislation.

Investment protection is also one of the basic grounds of the Energy Charter Treaty ratified by Ukraine. Ukrainian legislation does not separately regulate the issue of funding of mining activities and mining companies are free to choose their funding options. In practice, Ukraine-based mining companies would typically use, among others, loans from shareholders, loans from banks, issuance of securities and public offerings. In this context, it should be noted that, under Ukrainian law, Licenses are not transferable and therefore cannot be used to secure the mining company's financial and other obligations.

## 4 Government or local participation requirements

There are no state mandatory participation rights in a legal entity holding a License. Nor are there any requirements for local Ukrainian ownership over such entity.

## 5 Land tenure and priority

Minerals are under the exclusive ownership of the Ukrainian people, represented by the state, and can only be granted for use.

Ukrainian legislation provides a clear distinction between surface rights and subsurface minerals rights. Surface rights comprise ownership and use rights to the land, while subsurface rights may exist only as a use right and not ownership. Licenses are usually granted for subsurface use rights.

As for extracted minerals, the Subsurface Code provides that the holder of the License has the right to dispose of the minerals extracted under the License, unless otherwise provided by applicable legislation or by the License.

## 6 Indigenous or local community rights

There are no requirements to employ only local citizens. Legal entities conducting mining activities are free to employ foreigners, which are equal in their rights and obligations to local citizens, except for the necessity to obtain work permits, the statutory requirements to obtain which have recently been eased.

However, in the case of setting up a Ukrainian company, the founders must appoint the top manager of the Ukrainian company. In practice, a Ukrainian citizen is commonly appointed as director, at least for an initial temporary period of two to three months, until all formalities relating to employing a foreign CEO are sorted.

## 7 Environmental protection and rehabilitation obligations

Under Ukrainian law, there are certain types of activities that may only be commenced after the environmental impact assessment (EIA) procedure is conducted and the state authority has issued a positive EIA report. Mining activities are mostly subject to an EIA. Depending on type of mining activity, the EIA report is issued by local departments or the Ministry of Ecology.

Pursuant to the Subsurface Code, subsurface users must ensure the safety of people, property and environment. Subsurface use rights will be terminated if the methods of use affect the condition of the subsurface, lead to pollution of environment, or are harmful to human health.



If mineral reserves are exhausted, or if it is determined to be inexpedient or impossible to further develop a deposit, specific procedures of conservation and liquidation of mineral deposits must be performed.

## 8 Exploration licenses

Pursuant to the State Geological Service Act 1999, geological exploration is defined as “special work and research aimed at obtaining information on the subsurface to meet the needs of society.” Geological exploration may include a stage such as research and industrial development of mineral deposits of national importance (i.e., the stage at which the extraction of a limited amount of minerals is conducted to determine the minerals’ value, refinement of geological and technical parameters required to assess the minerals’ amount and justification for selecting a rational method for further mineral extraction).

### 8.1 Scope

Subsurface use rights for geological exploration are confirmed by the exploration license issued under the Subsurface Use Licensing Regulation 2011.

Subsurface users are entitled to conduct geological exploration, including research and industrial development of deposits, in accordance with the conditions of the License and within a determined area. Moreover, subsurface users exercise rights on the extension of term of subsurface use.

Geological exploration may be conducted on account of state budget or private exploration enterprises and is subject to state registration with Geoinform.

### 8.2 Duration

Exploration licenses are issued, in general, on an auction basis to winners of such auctions, for a requested term within established periods. Such licenses are issued, in particular, for up to:

- (a) three years – geological surveys of fields of minerals of local importance;
- (b) five years – geological surveys of mineral deposits including research and industrial development of deposits of national importance;
- (c) 10 years – geological surveys of oil and gas fields, including research and industrial development onshore and in an exclusive economic (maritime) zone;
- (d) 20 years – geological surveys of oil and gas deposits, including research and industrial development of hydrocarbons with further extraction of oil and gas (onshore oil and gas deposits); and
- (e) 30 years – geological surveys of oil and gas deposits, including research and industrial development of hydrocarbons with further extraction of oil and gas (oil and gas deposits within continental shelf and exclusive economic (maritime) zones).

Conditions of geological exploration as well as programs of exploration works are set forth in the subsurface use agreement. A subsurface use agreement is an integral part of the License and is concluded between the State Geology Service and the subsurface user.

Rights granted under a License may not be bestowed, sold or otherwise disposed to other legal entities or individuals. The transfer of such rights to the charter capital of the legal entity or their contribution to joint activity is also prohibited.



The Licenses may be renewed (not more than two times), or re-issued (for example, in case of a change of name of the holder of the License). The License may also be retained in the event of a spin-off or change of company's legal form (for example, reorganization from JSC to LLC).

The fee for obtaining the License is calculated depending on the applicable procedure of its issuance.

Subsurface use must start within two years from the first day of the validity of the License (180 days for oil and gas deposits, one year for gas produced from coal deposits (methane)).<sup>2</sup>

## 8.3 Steps to acquire an exploration right

Under the Subsurface Use Licensing Regulation 2011, Licenses are issued by the State Geology Service separately for each type of subsurface use.

As mentioned above, Licenses are usually issued to winners of auctions for a requested term within established periods.

Auctions are held by the State Geology Service in accordance with the Subsurface Use Licenses Auctions Regulation 2011. An agreement on the sale and purchase of the License ("**Agreement**") must be concluded with the winner of the auction within five business days after holding the auction. The Agreement can provide that the winner of the auction obtain positive EIA report within six months from the date of execution of the Agreement. If this is the case, the winner of the auction is required to pay for the License within 30 calendar days from the date the positive EIA report is obtained.

In certain cases, Licenses may be granted without an auction, subject to approval from the designated state authorities (for instance, licenses for geological exploration or extraction of minerals of local importance are obtained on a non-auction basis). A decision on the issuance of the License without an auction must be made within 30 days after all required approvals from state authorities as well as proposals of the Ministry of Ecology are obtained.

While the Subsurface Use Licensing Regulation 2011 requires that certain approvals be obtained, unless such approvals (refusals) are provided by the state authorities within 45 calendar days starting from the date the State Geology Service provided the state authorities with all necessary documents, such approvals are deemed to be granted.

## 8.4 Relationship with landowners

Land rights in Ukraine are regulated by the Land Code, adopted on 25 October 2001 ("**Land Code**"). Land allocated for the use of subsurface is referred to as industrial land and can be provided for mining activities to the subsurface user holding the License.

A land plot for mining purposes is commonly used on the basis of lease right.

Foreign legal entities may acquire ownership rights to land plots in the non-agricultural category, on which their immovable property is situated (within or outside population centers) and within population centers, for the purpose of construction of objects related to commercial activities in Ukraine. In Ukraine an individual/legal entity can register its ownership rights to immovable property, which is located on the leased land plot.

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<sup>2</sup> Failure to satisfy a specified requirement for commencement of activities is a ground for termination of rights on subsurface use through annulment of the License (except for activities under the PSA).

To purchase a land plot, a foreign legal entity is required to register a permanent representative office, which is entitled to conduct commercial activities in Ukraine.

Importantly, the Land Code does not provide for the right of private land ownership with respect to Ukrainian companies with 100% foreign investment. Therefore, only joint companies, founded with the participation of Ukrainian and foreign legal entities and individuals, may acquire ownership rights to land plots in the non-agricultural category, according to general procedures provided for Ukrainian and foreign legal entities.

Rights to land plots that constitute state or municipal property must be sold on a competitive basis (land auctions), save for cases envisaged by the Land Code. However, pursuant to the Land Code, rights to land plots, which will be exploited for the purposes of subsurface use, are sold on a non-auction basis.

## 8.5 Obligations of the holder

According to the Subsurface Code, subsurface users are obliged to, among other things:

- (a) use the subsurface in accordance with the purposes for which it was granted;
- (b) secure the completeness of geological exploration, as well as the reasonable, complex use and protection of subsurface;
- (c) ensure the safety of people, property and the environment; and
- (d) restore land plots which are disturbed during subsurface use to conditions suitable for their further public use and so on.

A subsurface use agreement commonly provides for an obligation of the subsurface user to notify the State Geology Service of the creation, acquisition, transfer of ownership or use rights to geological information. The notification of transfer of rights to geological information must be made no later than 10 days prior to such transfer.

Such notification is not accompanied by the disclosure of geological information to the State Geology Service. Since such information is privately owned, its disclosure is subject to written consent of, and the terms designed by, its owner.

Obligations of the subsurface user arise from the moment of obtaining the License or from the moment the PSA becomes effective, except if set forth otherwise by such agreement.

## 9 Holding tenements

### 9.1 Scope

The Subsurface Use Licensing Regulation 2011 envisages that an individual/legal entity who has conducted geological exploration of a deposit at its own expense, has calculated the mineral reserves and this calculation was approved by the Mineral Reserves Commission, and has applied for the License within three years of the Mineral Reserves Commission's approval – enjoys the right to be granted the License for the extraction of minerals from the relevant subsurface plot **on a non-auction basis**.

An individual/legal entity wishing to obtain a License for the extraction of minerals on a non-auction basis must file the application along with all required documents with the State Geology Service, as prescribed by the Subsurface Use Licensing Regulation 2011. The State Geology Service will issue the License to the

applicant within 30 days starting from the date all required approvals from the state authorities as well as proposals of the Ministry of Ecology are obtained.

In the event of a positive decision by the State Geology Service, the applicant must pay the fee for the issuance of the License within 45 days after the date on which the State Geology Service sends a notification of its decision. The amount of such fee is defined on a case-by-case basis and is determined in accordance with the original selling price of the License to be sold at auction, which, in turn, is determined in accordance with the License Auctions Original Selling Price Regulation 2004.

The Subsurface Use Licensing Regulation 2011 also envisages that, in case of refusal of the State Geology Service to issue the License, such refusal may be challenged in the prescribed manner (i.e., with the competent court).

## 9.2 Rights and obligations

The holder of a retention lease may carry out further geoscientific programs and feasibility studies.

It can be issued over all or part of the area within an exploration license, but typically only over the area identified as having mineral potential.

Statutory fees apply per annum, per square kilometer and for renewals.

## 10 Development/production tenements

### 10.1 Scope

The law requires that the extraction of minerals only be performed pursuant to the License, in accordance with approved projects and plans and the rules on technical exploitation and subsurface protection, as previously approved by the Ministry of Ecology, or by permanent commission (for extraction under the PSA).

Terms and conditions of minerals extraction, as well as programs of extraction works, are set forth in the subsurface use agreement. A subsurface use agreement is an integral part of the License and is concluded between the State Geology Service and the subsurface user.

### 10.2 Duration

The procedure for obtaining extraction licenses is, in general, the same as for exploration licenses. However, extraction licenses are granted for up to:

- (a) 20 years – extraction of minerals; and
- (b) 30 years – extraction of oil and gas within a territory of a continental shelf or exclusive economic (maritime) zone.

The scope of rights under extraction licenses, renewal conditions and other terms, in general, is similar to that described in Section 8 above.

### 10.3 Transition from exploration/holding right to mining right

The law requires that subsurface use be started within two years from the first day of validity of the License (180 days for oil and gas deposits).

Upon completion of a geological survey of a deposit, data on discovered mineral reserves is subject to state expertise, which certifies the sufficiency and completeness of the survey as well as the degree of readiness of a deposit for industrial development. Such expertise is carried out by the Mineral Reserves Commission, pursuant to the Mineral Reserves Assessment Regulation 1994. Expertise is performed based on the agreement on carrying out of expertise and assessment of mineral reserves concluded by the subsurface user (its authorized representative) with the Mineral Reserves Commission.

If, according to the report, the mineral reserves are estimated and approved as geologically surveyed, such reserves are further registered in the State Balance of Mineral Reserves, and only then can be transferred for industrial development (i.e., extraction).

## 10.4 Steps to acquire a right

Once the mineral reserves are estimated and approved as geologically surveyed, an individual/legal entity wishing to commence extraction of minerals must obtain an extraction license. The procedure for issuance of extraction licenses is, in general, the same as for exploration licenses (please see Section 8 above).

## 10.5 Relationship with landowners

A subsurface user is required to obtain rights to a land plot, within which the extraction of minerals is intended to be performed. The procedure for obtaining such rights is similar, regardless of the type of minerals (please see Section 8 above).

Apart from rights to a land plot for extracting minerals, a subsurface user must obtain a mining allotment, i.e., rights to a particular subsurface area, which will be granted to the subsurface user by the State Labor Service or, in respect of areas with minerals of local importance, by local self-government bodies. The procedure for issuance of mining allotments is regulated by the Mining Allotments Regulation 1995.

Subsurface use rights are evidenced by the act of provision of mining allotment to the subsurface user.

Pursuant to the Mining Act 1999, it is not required to obtain mining allotment for the purposes of oil and gas extraction.

## 10.6 Obligations of the holder

Subsurface users may be bound by quotas for the extraction of particular types of minerals established by the CMU.

A subsurface use agreement commonly provides for an obligation of the subsurface user to notify the State Geology Service of the creation, acquisition, transfer of ownership or use rights to geological information. The notification of transfer of rights to geological information must be made no later than 10 days prior to such transfer.

Such notification is not accompanied by the disclosure of geological information to the State Geology Service. Since such information is privately owned, its disclosure is subject to written consent and the terms of the owner.

Subsurface users must ensure the safety of mining works, and arrange medical examinations, qualification and re-qualification of employees. Specific requirements are foreseen for the professional qualification of the managing board.

The law also provides for certain types of obligatory insurance applicable to mining activities.

## 11 Assignment of and security over tenements

Rights granted under a License may not be bestowed, sold or otherwise disposed to other legal entities or individuals. The transfer of such rights to the charter capital of the legal entity or their contribution to joint activity is also prohibited.

## 12 Royalties (rental fees for subsurface use)

By law, subsurface use is subject to royalties in Ukraine, if it relates to either:

- (a) the extraction of minerals; or
- (b) the activities not connected with the extraction of minerals, for example, storage of oil and natural gas, or its related products, growing flowers, mushrooms, vegetables and other plants, wine seasoning and so on.

## 13 Mineral reporting and classification

The law requires subsurface users to report extracted and remaining resources to Geoinform. In particular, the balance report and regular specific reports, depending on the type of minerals, must be completed and submitted by the subsurface user.

Depending on their importance, all minerals are also divided into those of local and national importance, with a simplified procedure for obtaining rights to use minerals of local importance.

## 14 Other key issues

### 14.1 Usual structure of venture

Mining activities in Ukraine are usually conducted by legal entities in the form of limited liability companies and joint stock companies. As indicated, foreign legal entities are not required to establish a local subsidiary. However, it may be practical to do so given the needs of day-to-day activities and the requirement to interact with the state authorities, among others, for taxation purposes.

At the same time, foreign legal entities are required to establish permanent representative offices in Ukraine for obtaining ownership rights on land plots or performance of the PSA.

### 14.2 Export

The export of certain minerals is restricted by licensing requirements and quotas, except for export under the PSA. Currently, export of silver and gold requires an export license.

The CMU has recently been extending on an annual basis the earlier-established ban on export of silver and gold of Ukrainian origin.

Export operations are also subject to export duty, which is calculated on the basis of the customs cost of exported goods.

## 14.3 Taxes

As indicated above in Section 12, subsurface use is subject to royalties payments in Ukraine, if it relates to either:

- (a) the extraction of minerals; or
- (b) the activities not connected with the extraction of minerals, for example, storage of oil and natural gas, or its related products, growing flowers, mushrooms, vegetables and other plants, wine seasoning and so on.

Taxpayers involved in extraction of minerals calculate the taxable object for the royalty tax' purposes pro-rata to the amount of minerals:

- (a) extracted from the subsurface onshore, within Ukraine's continental shelf and the exclusive (maritime) economic zone;
- (b) produced from the mine waste; and
- (c) extracted during the execution of works, subject to State Geology Service's prior approval.

Royalty rates vary depending on the type of mineral recourses and the deposit depth, for instance:

- (a) extraction of oil or gas condensate from deposits to or below 5,000 meters is subject to royalty rates at 31% and 16% respectively;
- (b) extraction of natural gas:
  - o from deposit depth to or below 5,000 meters, is subject to royalty rates at 29% and 14% respectively, among other things, if sold to Naftogaz;
  - o from Ukraine's continental shelf and/or the exclusive (maritime) economic zone, is subject to royalty rate at 11%;
  - o in the course of execution of joint activity agreements, is subject to royalty rate at 70%, and
  - o from new wells drilled after 1 January 2018, is subject to incentive royalty rates at 12% (produced from deposits above 5,000 meters) and 6% (produced from deposits below 5,000 meters). A special protection clause in the Tax Code 2010 guarantees that the incentive royalty rates applicable to natural gas production from new wells remain unchanged until 1 January 2023.

Taxpayers not involved in the extraction of minerals calculate the taxable base and royalty rates with the reliance on: the volume of the subsurface used; and the type and method of its use. Separately, Ukrainian legislation provides an exemption from taxation of the use of underground constructions at a depth less than 20 meters.

The transportation of oil and oil products through oil pipelines and oil product pipelines – as well as for the transit transportation of ammonia through pipelines – is also subject to royalties in Ukraine.

## 14.4 Transparency

On 18 September 2018, the Mining Industry Transparency Act became effective ("**Transparency Act**").

The Transparency Act provides that an individual/legal entity who carries out extractive activities must annually submit to the Ministry of Energy and Coal Industry reports on payments made to the State of Ukraine; publish such reports on such individual/legal entity's websites; submit to the Ministry of Energy and Coal Industry information on material conditions of agreements on subsurface use as well as extracts therefrom within one month from the date of execution of/amending such agreements.

In general, the report on payments comprises information on royalties, taxes, other fees paid to the government in connection with mining, information on amounts of minerals extracted, average quantity of employees that were employed, ultimate beneficial owners of the legal entity during a given period and audited financial statements (if a legal entity is required under the law to procure an audit of its financial statements).

## 14.5 Overlapping tenements

Separate Licenses must be obtained for each type of subsurface use. At the same time, there are no restrictions against holding different types of Licenses simultaneously.

One applicant may obtain a license for extraction of one type of minerals from several closely located deposits, if expediency of joint development is confirmed by the Mineral Reserves Commission. Activities related to geological exploration and extraction of different types of minerals may be conducted within one subsurface plot under several Licenses.

## 14.6 Water licenses

As a general rule, for the purpose of using underground water resources (including, among others, pumping of underground water, using such water and discharging polluting substances), the legal entity must obtain a license for the use of underground water.

Such license is issued without the payment of a fee; however, the use of underground water resources is subject to royalty payments.

The law provides for certain exemptions from the general requirement to simultaneously obtain the License and a license on the use of underground water. In particular, land users and land owners have a right to extract (within the territory of the respective land plot) underground water (except for mineral water) for all purposes (except for production of drinking water), if the total volume of extraction does not exceed 300 m<sup>3</sup> per day per each water intake.

## 14.7 Labor issues

Conceptually, both local and foreign legal entities may engage individuals in Ukraine, pursuant to either employment agreements (or employment contracts, where appropriate) regulated by the Labor Code 1973 ("**Labor Code**"), or so-called "service agreements" regulated by the Civil Code 2003 (for example, an independent consultant agreement). In the latter case, the individual should be registered as an entrepreneur with the local tax office prior to signing the service agreement.

As a rule, employment agreements must be concluded for an unlimited period. However, in a few specified circumstances, the Labor Code allows for an employment agreement to be concluded for:

- (a) a limited period agreed upon by the parties; or
- (b) the period required to complete a given amount of work.

In particular, the Labor Code provides that an employment agreement may be concluded for a limited (i.e., definite) term only if the nature of the employee's work or the "employee's interests" make it impossible to establish an employment relationship for an unlimited term. However, this provision affects only employment agreements, and is not applicable to employment contracts.

The Foreign Nationals and Stateless Individuals Act 2011 provides that foreign nationals who lawfully reside in the territory of Ukraine enjoy the same rights and opportunities (including employment) as Ukrainian citizens.

The International Private Law Act 2005 states that the employment relationships of foreign nationals and stateless individuals working in Ukraine are not governed by the laws of Ukraine, provided that either:

- (a) such foreign nationals and stateless individuals work with diplomatic missions or representative offices of international organizations, unless otherwise provided for in international agreements to which Ukraine is a party; or
- (b) the employment agreement which provides for the performance of works in Ukraine was concluded outside Ukraine, unless otherwise provided for by such employment agreement or international agreement to which Ukraine is a party.

The Employment Act 2012 ("**Employment Act**") provides that Ukrainian companies, entities and organizations are only entitled to employ foreign nationals and stateless individuals subject to obtaining a work permit from the local offices of the Ministry of Social Policy, unless otherwise provided for by the applicable international agreement to which Ukraine is a party.

In the case of foreign nationals employed by representative offices of foreign companies in Ukraine, they must obtain permits issued by the Ministry of Economic Development and Trade in the form of service cards, valid for up to three years.

## 14.8 Protection for foreign investors

Guarantees for investment activities in mining depend upon the form of such activities. Investment activities in Ukraine are usually conducted: through corporate joint ventures (usually in the form of a limited liability company or a joint stock company with foreign investment); under duly registered joint activity agreements without the establishment of legal entities; or under a PSA (specific to the mining sphere).

## 14.9 PSA

The most effective means of protecting foreign investments is to conduct mining activities under a PSA. An investment under a PSA is specifically regulated by the PSA Act.

PSAs are entered into between the investor(s) and the state, as represented by the CMU. The PSA Act allows foreign individuals, legal entities as well as foreign associations of legal entities to conclude a PSA. The investor is selected at the tender subject to certain exceptions (for example, in the case of a PSA regarding fields of minerals of local importance, it can be entered into on a non-auction basis).



# Ukraine

According to the PSA, the state procures all necessary licenses and permits, as well as acquisition of rights to land by the investor, and the investor explores and develops mineral/oil/gas deposit(s). The state and the investor share minerals/oil/gas intake on the terms of the PSA. The term of the PSA cannot be longer than 50 years.

For the duration of the PSA, the investors enjoy, among other things, the following incentives:

- (a) the investor and its subcontractors are exempt from licensing and quota requirements when importing the equipment necessary for their performance under the PSA; the same applies when such equipment is shipped out of Ukraine upon termination of the PSA; such equipment is also not subject to value added tax (VAT) or customs duties (with the exception of customs fees);
- (b) any product obtained by the investor is subject to VAT when sold within Ukraine, but is not subject to VAT, other taxes or customs duties when exported out of Ukraine;
- (c) depreciation rates, other than those provided by applicable legislation, may be established in the PSA;
- (d) profits received under the PSA are exempt from profit repatriation tax;
- (e) funds received under the PSA are exempt from any restrictions on conversion into Ukrainian or foreign currency, and may be repatriated abroad under the terms and conditions of the PSA; any requirements for the mandatory sale of foreign currency are not applicable to such funds;
- (f) during the period of the PSA's validity, the rights and obligations of an investor will be regulated under the legislation in force at the time of the PSA's signing;
- (g) employment of foreigners in Ukraine, engaged by the investor for the purposes of execution of the PSA, must be made according to the simplified procedure of issuing work permits; and
- (h) forcible withdrawals of funds from bank accounts opened in Ukraine by the investor to finance its operations under the PSA are not permitted.

## 15 Useful websites

Ministry of Ecology	<a href="http://www.menr.gov.ua/">http://www.menr.gov.ua/</a> (default Ukrainian version) <a href="http://eng.menr.gov.ua/">http://eng.menr.gov.ua/</a> (English version)
State Geology Service	<a href="http://www.geo.gov.ua/">http://www.geo.gov.ua/</a> (default Ukrainian version)
State Labor Service	<a href="http://dsp.gov.ua/">http://dsp.gov.ua/</a> (default Ukrainian version)
Geoinform	<a href="http://geoinf.kiev.ua/">http://geoinf.kiev.ua/</a> (default Ukrainian version)
Ukrainian minerals interactive maps	<a href="http://minerals-ua.info/">http://minerals-ua.info/</a> (default Ukrainian version)

# Ukraine

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## 1 Summary

Unlike other countries, in the United States, title to mineral rights is established by tracking through a series of historical instruments — there is no government guarantee of title and it is common for purchasers to rely on title insurance, title opinions from lawyers and representations, warranties and indemnification undertakings from the seller. Both federal and state law apply to most mining projects, depending largely upon whether the mineral is situated in land where both surface and subsurface rights are held by private owners (common in the eastern United States), the mineral rights have been reserved to the Federal Government (much land west of the Mississippi River) or the mineral rights have been severed from the surface rights. Mining operations trigger a comprehensive array of environmental procedures and regulations which are administered by multiple federal and state agencies. Acquisitions of major mining assets or rights (as of 2009, in excess of USD 90 million) can trigger an obligation to obtain clearance under the Hart-Scott-Rodino Act (**HSR Act**).

## 2 Legal framework for mining

The United States is a common law country. The United States Constitution establishes a federal (i.e., national) system of government. The constitution delegates certain powers to the federal government, including the power to enact laws (delegated to the Congress, which consists of elected officials from each state); the power to implement and enforce the laws written by Congress (delegated to the President of the United States and ultimately the various federal agencies responsible for the day-to-day enforcement and administration of the laws); and the power to interpret the laws written by Congress (delegated to the court system). All powers not delegated to the federal government remain with the individual states, each of which maintains a similar system of government. Both state and federal law can impact on mining projects in the United States.

**Mineral rights on private land:** Under state law, mining rights on privately owned lands are generally tied to the common law property concept of “mineral rights.” In the United States, a holder of a mineral right generally has the right to explore and develop the minerals and other valuable materials lying below the surface of the property, subject to compliance with applicable environmental and safety laws and provided state and local land use laws do not restrict mining activities in the particular area.

Mineral rights are distinct from “surface rights” (i.e., the right to use the surface of the land for residential, recreational, agricultural, commercial or other purposes). Mineral rights may be severed from the surface estate and sold to third parties, or the seller may reserve the mineral rights and only sell the surface rights.

By way of historical context, most landowners in the eastern United States have traditionally owned both the surface and subsurface rights to their land. Land west of the Mississippi River was often deeded to

individuals by the federal government to encourage settlement of the west, but the federal government began reserving the mineral rights to this land in the early twentieth century.

References to private lands in this chapter refer to lands where both the surface and subsurface rights are owned by private parties.

Mining laws applicable to public land: Broadly speaking, there are three general types of minerals on public lands which are available for mining under federal law, as follows:

- (a) Locatable minerals, which may be located within a mining claim on public land and mined under the General Mining Act of 1872 (the **General Mining Law**). These minerals include metallic minerals such as gold, silver, lead, copper, nickel and iron, and nonmetallic minerals such as gemstones and limestone suitable for making cement.
- (b) Leasable minerals, which are on public lands that may be leased to private parties for exploration and development pursuant to a lease granted by the federal government under the Mineral Leasing Act of 1920 (the **Mineral Leasing Act**). These minerals include fossil fuels such as coal, oil, oil shale and gas, as well as phosphorus, potash, and other chemical minerals such as sodium and potassium.
- (c) Salable minerals, which may be acquired under a permit issued by the federal government under the Materials Act of 1947. These minerals include basic natural resources such as sand, gravel, rock and other construction materials. Given their high weight and low unit price, these minerals are typically used locally and are not addressed in this chapter.

Administrative oversight of mining on public lands: Approximately 640 million acres (roughly 28%) of the surface land of the United States is owned and administered by the federal government. Most federal minerals that may be acquired by location and maintenance of a mining claim (i.e., locatable minerals) exist on lands primarily in Alaska and the western contiguous United States. The US Bureau of Land Management (BLM) manages the surface of these lands. Most federal minerals in the eastern United States are leasable minerals on National Forest lands, the surface of which is managed by the US Forest Service (the Forest Service). Though management of the surface of these lands is split between the BLM and the Forest Service, the BLM manages the subsurface minerals on all federal public lands.

## 3 Restrictions on foreign investment

US citizenship: With respect to private land, non-US citizens and residents can own real property in the United States. In general, there are no citizenship requirements or foreign investment restrictions specifically applicable to mining privately owned land.

With respect to public land, the General Mining Law limits the location of minerals on public land to citizens of the United States and those who have declared their intention to become US citizens. US domestic corporations are considered US citizens under this law, regardless of the citizenship of the corporation's stockholders, and thus may make locations and hold mining claims.

Mineral deposits covered by the Mineral Leasing Act may only be leased to US citizens and to US domestic corporations except if shareholders of such domestic corporation are citizens of another country whose laws deny similar or like privileges to citizens or corporations of the United States.

CFIUS requirements applicable to mining acquisitions: Non-US entities that seek to acquire a controlling interest in a US entity involved in mining operations may be subject to investment oversight by the Committee on Foreign Investment in the United States (CFIUS), which is charged with reviewing the national

security implications of foreign investment in US companies and business operations. If CFIUS determines that an acquisition may pose a threat to national security, it may impose conditions on the transaction or refer the transaction to the President, who has the authority to suspend or prohibit the transaction, or unwind a completed transaction.

CFIUS reviews typically begin with a 30-day investigatory period, which may be extended to a further 45 days for a more intensive investigation. Notification of a transaction to CFIUS is voluntary (unlike the mandatory HSR Act filings described below); however, CFIUS may institute its own investigations in certain cases. If the parties make a voluntary filing and CFIUS takes no action in the 30-day investigatory period, the transaction is secure from later challenge under the relevant laws.

CFIUS has recently increased its focus on "critical infrastructure," which is defined in the relevant regulations as "a system or asset, whether physical or virtual, so vital to the United States" that their degradation or destruction would have a debilitating impact on national security.

Though CFIUS is not specifically required to review foreign investment in US mining operations, relevant factors to consider when determining whether to notify CFIUS voluntarily include the acquirer's nationality and degree of control, the type and size of the mining asset, and the mine's location.

Note, however, that the United States Congress recently adopted the Foreign Investment Review Modernization Act of 2018 (FIRRMA) that will result in significant changes to oversight by CFIUS. In particular, FIRRMA expands the scope of covered transactions to include, among other things, (a) a purchase, lease or concession by or to a foreign person of real estate located in proximity to sensitive government facilities, and (b) "other investments" in certain US businesses that afford a foreign person access to material nonpublic technical information in the possession of the US business, membership on the board of directors, or other decision-making rights, other than through voting of shares. It also expands CFIUS's review period from 30 to 45 days and allows an investigation to be extended for an additional 15-day period under extraordinary circumstances, but provides for an abbreviated filing or "light filing" process through a new "declarations" procedure that could result in shorter review timelines. The most significant provisions of FIRRMA will not take effect until February 13, 2020 or 30 days after the US Department of Treasury publishes in the Federal Register a determination that the necessary regulations, organizational structure, personnel and other resources are in place to administer those provisions. The US Department of Treasury issued proposed regulations to implement FIRMMA in September 2019 so this remains an evolving aspect of the law as of the date of this guide.

## 4 Environmental protection and rehabilitation obligations

Mining operations in the United States implicate a comprehensive array of environmental regulations implemented by multiple federal and state regulatory agencies. These regulations extend to the completion of pre-mining environmental assessments and the procurement of air and water permits required for active mining operations. Effective management of mining waste materials, including mine tailings and waste rock, is also required under federal and state environmental laws.

In many cases, a party wishing to construct a mine must first conduct a preliminary environmental assessment (EA) and, if necessary, a comprehensive environmental impact statement (EIS) under the Federal National Environmental Policy Act (NEPA). NEPA environmental reviews are particularly important in connection with surface mining operations likely to impact wetlands and other waters of the United States. In most cases, NEPA assessments are conducted at the direction and oversight of the United States Army Corps of Engineers which has jurisdiction over the issuance of so-called Section 404 dredge and fill permits under the Clean Water Act. The BLM oversees all NEPA reviews for mining projects on public lands.

Preparing an EA/EIS is often a time-intensive process and increasingly subject to challenges from regulatory agencies and environmental groups. An EIS typically includes a description of the proposed project, a description of the affected environment, a range of alternatives to the proposed project and an analysis of the environmental impact of the proposed project. No permits will be issued until the EA/EIS process concludes in either a "Finding of No Significant Impact" from the relevant governmental authority, or the project proponent agrees to implement acceptable mitigation measures to address identified impact to the environment.

The initiation of mining operations following the successful completion of the NEPA process will require the procurement of air permits under the Clean Air Act and water discharge permits under the Clean Water Act. These permits are typically issued by state regulatory agencies. Air permits generally address the control and management of dust during active mining operations. Increasingly, however, methane and other greenhouse gas emissions are becoming the subject of regulation and required controls. Water discharges from mine-processing operations and resource storage impoundments are also managed through permits which impose treatment requirements and discharge limitations on the mine. Mine tailings and waste rock must also be managed and properly disposed of under state and federal waste management regulations.

## 5 Indigenous or local community rights

**Native American tribal lands:** Mining is not expressly prohibited on Native American tribal lands in the United States. Tribal lands are considered held in trust by the United States (i.e., as fiduciary) on behalf of a particular Native American tribe or tribal federation. Mineral rights on tribal lands may be acquired by lease or other agreements with the relevant tribes and approved by the US Department of the Interior. The relevant lease or other agreement must comply with the applicable federal laws that govern such transactions with Native Americans.

**National Forest land:** Forest Service regulations require that mining rights be exercised on National Forest land in a way that minimizes adverse environmental impact on surface resources. A person seeking to explore and develop minerals within National Forest lands must comply with Forest Service regulations, which, depending on the nature of the surface disturbance, can trigger a notice of intent to operate or approval of a plan of operation with respect to the proposed or ongoing mining activities, as well as compliance with relevant environmental laws.

**Withdrawn areas:** Areas withdrawn from mineral entry (i.e., not available for location or leasing) include National Parks, National Monuments, Indian reservations, federal wildlife refuges and other wildlife protection areas, military reservations and most reclamation projects.

## 6 Exploration licenses

### 6.1 Tenements

#### (a) Private Land

As long as the mineral rights have not been severed from the surface rights, private landowners are generally free to explore for minerals on their own land in compliance with applicable environmental laws, and state and local land use laws. A third party seeking to conduct exploration activities on privately owned land generally needs to acquire the right to do so from the landowner (and the mineral rights holder if such rights are owned by a different private party) either pursuant to a lease or outright purchase.

(b) General Mining Law

Under the General Mining Law, US citizens (including domestic corporations) have the statutory right to explore and discover valuable mineral deposits on public land that is open to mining claim location.

(c) Mineral Leasing Act

Under the Mineral Leasing Act, non-coal mining rights are generally subject to competitive bidding but the BLM may issue prospecting permits that provide the exclusive right to prospect on and explore lands available for leasing to determine if a valuable deposit exists of phosphate, sodium, potassium, sulphur, gilsonite or a hardrock mineral. If a permittee demonstrates the discovery, during the term of the permit, of valuable mineral deposits of the type of mineral for which the permit was issued, the BLM may issue a preferential lease right to that permittee outside of the competitive bidding process. Exploration permits are also available under the Mineral Leasing Act, but these are not common as they offer no preferential rights to an ultimate mineral lease.

Coal exploration licenses are available on federal coal lands, which comprise approximately 570 million of the 700 million acres of federally owned subsurface mineral rights. The BLM also administers this process. A coal exploration license does not give the licensee any preferential lease rights with respect to the coal deposits that it may ultimately discover.

## 6.2 Terms

(a) Private Land

In general, there are no terms or fees payable to third parties specific to mining exploration activities conducted by private landowners who hold fee simple title to both the surface and subsurface rights on their own land. The terms, renewal rights, fees and other rights with respect to exploration by third parties on privately owned land are generally subject to the terms of the lease or other agreements pursuant to which the exploration rights were obtained.

(b) General Mining Law

Both a notice filing and a plan of operations (for activities greater than casual use) in connection with exploration activities on public lands remain in effect for a term of two years and may be extended for an additional two years. No annual fee is required but the rights holder must provide a financial guarantee sufficient to cover the costs of reclamation and any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements. The BLM may also require the establishment of a trust fund to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining maintenance requirements.

(c) Mineral Leasing Act

Non-coal prospecting permits issued under the Mineral Leasing Act remain in effect for two years. Depending on the type of mineral, these permits may be extended for up to four additional years. The permit holder is required to pay an annual rent at a rate based on the particular mineral.



Coal exploration licenses are valid for two years and may not be extended. These licenses normally cover 25,000 acres which must be contained entirely within one state. The applicant is required to post a bond prior to being granted the license in an amount sufficient to ensure compliance with the license and the exploration plan, and to cover compensation for damages to surface improvements.

### 6.3 Steps to acquire an exploration right

#### (a) Private Land

In general, there are no notice or approval requirements that are specific to mining exploration activities conducted by private landowners who hold fee simple title to both the surface and subsurface rights on their own land. Such private landowners are generally free to conduct exploration activities on their own land in compliance with applicable environmental laws, and state and local land use laws. Notice and approval requirements with respect to third-party exploration activities on privately owned land would generally be set forth in the lease or other agreements pursuant to which the exploration rights were obtained and may also be provided for under applicable environmental laws, and state and local land use laws.

#### (b) General Mining Law

While US citizens have a statutory right to explore for mineral deposits on public land, federal regulations broadly provide that anyone intending to develop locatable mineral resources must prevent unnecessary or undue degradation of the land and reclaim disturbed areas.

Federal regulations establish three levels of activities in connection with the BLM's surface management program:

Casual use - This level includes activities that involve no or negligible surface destruction (e.g., collection of rock and mineral specimens using hand tools, use of battery-operated sensing devices). No permit is required for this type of activity.

Notice level operations - Generally, these are activities beyond casual use (e.g., that involve the use of explosives and/or earth-moving equipment). A notice of operations must be submitted 15 calendar days before the commencement of exploration causing surface disturbance of five acres or less of public lands on which reclamation has not been completed.

Plan level operations - A plan of operations must be approved by the BLM for all other surface disturbance activities beyond casual use and other than notice level operations.

A full environmental assessment and reclamation bonding are required in this context.

#### (c) Mineral Leasing Act

Before being issued a prospecting permit with respect to the leasable non-coal minerals identified in section 5.1(c) above, the applicant must submit an exploration plan describing how the applicant intends to determine the existence and workability of a valuable deposit, the potential environmental impact, and proposed reclamation measures. The applicant may begin exploration activities only after the exploration plan is approved.



Exploration activities on federal coal land can only be undertaken pursuant to an exploration license issued by the BLM. Upon filing the application, which must include an exploration plan, the applicant must also publish a "Notice of Invitation" in a newspaper of general circulation in the area where the license is being sought. Federal regulations require this notice for the purpose of inviting other parties to participate in exploration under the license on a pro rata cost-sharing basis. The BLM must prepare an environmental assessment or environmental impact study, if necessary, before issuing the exploration permit.

## 7 Holding tenements

There are no holding tenements as such. The protections once a discovery has been made are set out in Development/production tenements.

## 8 Development/production tenements

### 8.1 Tenements / rights available

#### (a) Private Land

As in the context of exploration rights, as long as the mineral rights have not been severed from the surface rights, private landowners are generally free to develop the minerals on their own land in compliance with applicable environmental, safety, and state and local laws. The process for third parties to obtain mining rights from private landowners and mineral rights holders on privately owned land generally consists of negotiating the applicable terms of the lease or other agreement that will provide for the relevant mining rights.

#### (b) Mining Claims under the General Mining Law

Nature of the claim: A federal mining claim is a particular parcel of public land valuable for a specific "locatable" mineral deposit or deposits, over which an individual has asserted a right of possession. If a claim or site meets all applicable federal and state requirements, the claimant has an exclusive possessory right to the surface land in order to develop and extract the mineral deposits found on the mining claim. There are 19 states where mining "locations" may be made: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

Manner of "location": Mining claims are physically "located" by clearly marking the boundaries of the surface area of the deposit (typically by erecting posts or monuments at the four corners of the site) and posting a notice at a conspicuous place (typically on a post or monument at the discovery point) in compliance with applicable federal and state requirements.

Types of claims: The two primary types of mining claims are "lode" and "placer" depending on the character of the deposit. Lode claims are located on veins or lodes of quartz or other rocks in place bearing gold, silver, copper or other valuable mineral deposits. Placer claims are essentially all deposits other than lode claims and often consist of an alluvial deposit of valuable minerals usually in sand or gravel. Federal law limits the size of individual lode and placer claims but there are no limits on the number of such claims that a person may hold. Federal law also permits the acquisition of up to five acres of non-mineral land for purposes of establishing a mill site. All mining claims must be recorded with the proper BLM field office and the relevant state agencies.

**Marketability requirement:** While examples of locatable minerals include gold, silver and copper, there is no exhaustive list of the types of minerals that fall into this category. The law requires that the mineral deposit be valuable in order to give rise to a mining claim. The general test for whether a deposit is valuable under the General Mining Law is whether a prudent person would consider investing time and money to develop the deposit (the so-called "prudent person" test). Federal agencies have refined this test to focus on whether the claimant can show a reasonable prospect of making a profit by developing, extracting and disposing the minerals on the claim (the so-called "marketability" test).

**Rights afforded to the claim holder:** Under the General Mining Law, the locator of a valid mining claim or site on which the locator has discovered a marketable mineral deposit, and who has performed all required acts of location, acquires the exclusive right of possession of the surface land to develop and extract the mineral deposits found on the mining claim. This right is similar to an easement because the United States retains paramount title to the land and may challenge the validity of the claim. The possessory right may be maintained by the claim holder indefinitely as long as the claim holder remains in compliance with applicable law, although the right may be abandoned in certain circumstances.

The General Mining Law also allows the mining claim holder to apply for a mineral patent, which transfers fee simple title to the claim (i.e., surface and subsurface rights) to the claim holder, making it private land. However, a moratorium on accepting patent applications has been in effect since 1994. No new federal mineral patents will be issued until the moratorium is lifted. Until patented, valid federal mining claims are typically referred to as "unpatented" mining claims.

**Protection prior to discovery:** Prior to the discovery of a valuable mineral deposit and, hence, prior to acquiring the exclusive right to possess the surface land that arises upon perfecting a valuable mining claim as described above, a bona fide prospector is afforded protection by the state common law doctrine of *pedis possessio*. Under this doctrine, a claimant who has peacefully and in good faith staked claims in search of valuable minerals may exclusively hold the claims while in actual physical possession of the ground claimed, diligently working in good faith toward making a discovery, and excluding others from the claim.

**Transferability of mining claims:** Both patented and unpatented mining claims are real property interests (representing fee simple title to the land in the case of a patented mining claim) and may be sold and transferred to third parties in their entirety or in part.

## (c) Leases under the Mineral Leasing Act

**Nature of the lease:** In general, mineral leases under the Mineral Leasing Act are awarded through a competitive bidding process managed by the BLM. However, the holder of a prospecting permit may be awarded a preferential lease outside of the competitive bidding process if the permit holder demonstrates that it has discovered a valuable deposit (in accordance with the prudent person and marketability test) within the period covered by the prospecting permit. The lessee under a federal mineral lease enjoys all rights granted under the lease to develop and extract the mineral deposits within the area covered by the lease.

**General terms of federal non-coal mineral leases:** Federal leases for non-coal minerals have differing terms depending on the particular mineral. Sodium leases, for example, have 20-year terms and may be renewed for successive 10-year periods at the end of each term. Phosphate and potassium leases,

however, have indeterminate terms which are subject to readjustment at the end of each 20-year period. The annual rental rate is specific to the particular mineral.

Holders of federal leases for non-coal minerals are also required to pay annual production royalties computed as a percentage of the quantity or gross value of the output of the produced mineral. Federal regulations establish minimum royalty rates but the royalty rate for a competitive lease is set forth in the government's notice of the lease sale. The BLM also requires posting of a bond for each non-coal mineral lease in an amount determined by the BLM to ensure compliance with the terms and conditions of the lease, but not less than USD5,000.

General terms of federal coal leases: Federal coal lease regulations specify maximum aggregate lease holdings (i.e., 75,000 acres in any one state and no more than 150,000 acres throughout the United States). Additionally, failure to produce commercial quantities of coal within ten years after lease issuance could result in termination of the lease.

Federal coal leases carry an annual rental rate of not less than USD3 per acre. Annual production royalties are payable at the rate of 12.5% of the gross value of the coal produced if severed by surface mining methods, and at 8% for coal severed by underground mining methods. As with non-coal leases, the BLM requires posting of a bond in an amount determined by the BLM to ensure compliance with the terms and conditions of the lease.

Transferability of Mineral Leases: Federal mineral leases and permits generally may be assigned or subleased with the consent of the US Department of the Interior to persons who are qualified to hold the leases and permits.

## 8.2 Terms of Rights

### (a) Private Land

As in the context of exploration rights, as long as the mineral rights have not been severed from the surface rights, private landowners are generally free to develop the minerals on their own land in compliance with applicable environmental, safety, and state and local laws. The process for third parties to obtain mining rights from private landowners and mineral rights holders on privately owned land generally consists of negotiating the applicable terms of the lease or other agreement that will provide for the relevant mining rights.

Private landowners who hold fee title to both the surface and subsurface rights may freely exercise their development rights in compliance with applicable environmental, safety, and state and local laws. The respective rights and obligations of a third-party lessee of mineral rights are generally established by contract, subject to certain limitations under applicable state dormant mineral rights statutes. For example, some states have adopted dormant minerals statutes that allow surface owners to terminate third-party mineral rights that have been dormant for an extended period of time (e.g., 20 years). Similar provisions may also be set forth in the lease agreement itself.

### (b) General Mining Law

Rights afforded to the claim holder: Under the General Mining Law, the locator of a valid mining claim or site on which the locator has discovered a marketable mineral deposit, and who has performed all required acts of location, acquires the exclusive right of possession of the surface land to develop and extract the mineral deposits found on the mining claim. This right is similar to an

easement because the United States retains paramount title to the land and may challenge the validity of the claim. The possessory right may be maintained by the claim holder indefinitely as long as the claim holder remains in compliance with applicable law, although the right may be abandoned in certain circumstances.

The General Mining Law also allows the mining claim holder to apply for a mineral patent, which transfers fee simple title to the claim (i.e., surface and subsurface rights) to the claim holder, making it private land. However, a moratorium on accepting patent applications has been in effect since 1994. No new federal mineral patents will be issued until the moratorium is lifted. Until patented, valid federal mining claims are typically referred to as “unpatented” mining claims.

Holders of federal mining claims are generally required to pay an annual maintenance fee per claim and to perform a minimum amount of assessment work. Since 1992, however, the claimant may pay the annual maintenance fee (USD165 for every lode claim and USD165 for every 20 acres of placer claims or portion thereof, as of 2019) in lieu of performing the annual assessment work. Failure to meet these annual requirements will result in the claims being forfeited.

(c) Mineral Leasing Act

General terms of federal non-coal mineral leases: Federal leases for non-coal minerals have differing terms depending on the particular mineral. Sodium leases, for example, have 20-year terms and may be renewed for successive 10-year periods at the end of each term. Phosphate and potassium leases, however, have indeterminate terms which are subject to readjustment at the end of each 20-year period. The annual rental rate is specific to the particular mineral.

Holders of federal leases for non-coal minerals are also required to pay annual production royalties computed as a percentage of the quantity or gross value of the output of the produced mineral. Federal regulations establish minimum royalty rates but the royalty rate for a competitive lease is set forth in the government’s notice of the lease sale. The BLM also requires posting of a bond for each non-coal mineral lease in an amount determined by the BLM to ensure compliance with the terms and conditions of the lease, but not less than USD5,000.

General terms of federal coal leases: Federal coal lease regulations specify maximum aggregate lease holdings (i.e., 75,000 acres in any one state and no more than 150,000 acres throughout the United States). Additionally, failure to produce commercial quantities of coal within ten years after lease issuance could result in termination of the lease.

Federal coal leases carry an annual rental rate of not less than USD3 per acre. Annual production royalties are payable at the rate of 12.5% of the gross value of the coal produced if severed by surface mining methods, and at 8% for coal severed by underground mining methods. As with non-coal leases, the BLM requires posting of a bond in an amount determined by the BLM to ensure compliance with the terms and conditions of the lease.

### 8.3 Foreign ownership restrictions and government participation

US citizenship: With respect to private land, non-US citizens and residents can own real property in the United States. In general, there are no citizenship requirements or foreign investment restrictions specifically applicable to mining privately owned land.

With respect to public land, the General Mining Law limits the location of minerals on public land to citizens of the United States and those who have declared their intention to become US citizens. US domestic

corporations are considered US citizens under this law, regardless of the citizenship of the corporation's stockholders, and thus may make locations and hold mining claims.

Mineral deposits covered by the Mineral Leasing Act may only be leased to US citizens and to US domestic corporations except if shareholders of such domestic corporation are citizens of another country whose laws deny similar or like privileges to citizens or corporations of the United States.

CFIUS requirements applicable to mining acquisitions: Non-US entities that seek to acquire a controlling interest in a US entity involved in mining operations may be subject to investment oversight by the Committee on Foreign Investment in the United States (CFIUS), which is charged with reviewing the national security implications of foreign investment in US companies and business operations. If CFIUS determines that an acquisition may pose a threat to national security, it may impose conditions on the transaction or refer the transaction to the President, who has the authority to suspend or prohibit the transaction, or unwind a completed transaction.

CFIUS reviews typically begin with a 30-day investigatory period, which may be extended to a further 45 days for a more intensive investigation. Notification of a transaction to CFIUS is voluntary (unlike the mandatory HSR Act filings described below); however, CFIUS may institute its own investigations in certain cases. If the parties make a voluntary filing and CFIUS takes no action in the 30-day investigatory period, the transaction is secure from later challenge under the relevant laws.

CFIUS has recently increased its focus on "critical infrastructure," which is defined in the relevant regulations as "a system or asset, whether physical or virtual, so vital to the United States" that their degradation or destruction would have a debilitating impact on national security.

Though CFIUS is not specifically required to review foreign investment in US mining operations, relevant factors to consider when determining whether to notify CFIUS voluntarily include the acquirer's nationality and degree of control, the type and size of the mining asset, and the mine's location.

Note, however, that the United States Congress recently adopted the Foreign Investment Review Modernization Act of 2018 (FIRRMA) that will result in significant changes to oversight by CFIUS. In particular, FIRRMA expands the scope of covered transactions to include, among other things, (a) a purchase, lease or concession by or to a foreign person of real estate located in proximity to sensitive government facilities, and (b) "other investments" in certain US businesses that afford a foreign person access to material nonpublic technical information in the possession of the US business, membership on the board of directors, or other decision-making rights, other than through voting of shares. It also expands CFIUS's review period from 30 to 45 days and allows an investigation to be extended for an additional 15-day period under extraordinary circumstances, but provides for an abbreviated filing or "light filing" process through a new "declarations" procedure that could result in shorter review timelines. The most significant provisions of FIRRMA will not take effect until February 13, 2020 or 30 days after the US Department of Treasury publishes in the Federal Register a determination that the necessary regulations, organizational structure, personnel and other resources are in place to administer those provisions. The US Department of Treasury issued proposed regulations to implement FIRMMA in September 2019 so this remains an evolving aspect of the law as of the date of this guide.

## 8.4 Steps to acquire a right

### (a) Private Land

As in the context of exploration rights, as long as the mineral rights have not been severed from the

surface rights, private landowners are generally free to develop the minerals on their own land in compliance with applicable environmental, safety, and state and local laws. The process for third parties to obtain mining rights from private landowners and mineral rights holders on privately owned land generally consists of negotiating the applicable terms of the lease or other agreement that will provide for the relevant mining rights.

(b) General Mining Law

Rights afforded to the claim holder: Under the General Mining Law, the locator of a valid mining claim or site on which the locator has discovered a marketable mineral deposit, and who has performed all required acts of location, acquires the exclusive right of possession of the surface land to develop and extract the mineral deposits found on the mining claim. This right is similar to an easement because the United States retains paramount title to the land and may challenge the validity of the claim. The possessory right may be maintained by the claim holder indefinitely as long as the claim holder remains in compliance with applicable law, although the right may be abandoned in certain circumstances.

The General Mining Law also allows the mining claim holder to apply for a mineral patent, which transfers fee simple title to the claim (i.e., surface and subsurface rights) to the claim holder, making it private land. However, a moratorium on accepting patent applications has been in effect since 1994. No new federal mineral patents will be issued until the moratorium is lifted. Until patented, valid federal mining claims are typically referred to as “unpatented” mining claims.

(c) Mineral Leasing Act

Nature of the lease: In general, mineral leases under the Mineral Leasing Act are awarded through a competitive bidding process managed by the BLM. However, the holder of a prospecting permit may be awarded a preferential lease outside of the competitive bidding process if the permit holder demonstrates that it has discovered a valuable deposit (in accordance with the prudent person and marketability test) within the period covered by the prospecting permit. The lessee under a federal mineral lease enjoys all rights granted under the lease to develop and extract the mineral deposits within the area covered by the lease.

## 8.5 Relationship with landowners

Depending on the type of property (e.g., private land, public land, tribal land, National Forest land) and the type of project, different requirements apply to the interaction between stakeholders in the property as described throughout this chapter.

## 8.6 Obligations of the holder

(a) Private Land

Private landowners who hold fee title to both the surface and subsurface rights may freely exercise their development rights in compliance with applicable environmental, safety, and state and local laws. The respective rights and obligations of a third-party lessee of mineral rights are generally established by contract, subject to certain limitations under applicable state dormant mineral rights statutes. For example, some states allow surface owners to terminate third-party mineral rights that have been dormant for an extended period of time (e.g., 20 years), while other states provide that

the mineral rights automatically revert to the surface owner if use conditions are not met for a period of time. Similar provisions may also be set forth in the lease agreement itself.

(b) General Mining Law

Holders of federal mining claims are generally required to pay an annual maintenance fee per claim and to perform a minimum amount of assessment work. Since 1992, however, the claimant may pay the annual maintenance fee (USD165 for every lode claim and USD165 for every 20 acres of placer claims or part thereof, as of 2019) in lieu of performing the annual assessment work. Failure to meet these annual requirements will result in the claims being forfeited.

(c) Mineral Leasing Act

The lessee must continue to comply with the lease in all respects including, in particular, its obligation to pay the annual rent when due as well as the royalty rate stated in the lease (or the federally mandated minimum royalty if the lessee is not producing the minimum quantities contemplated by the lease). The BLM may institute proceedings to terminate the lease if the lessee does not comply with the provisions of the Mineral Leasing Act and other laws and regulations applicable to the lease, or if the lessee defaults on any of the lease terms and such default continues for 30 days after written notice from the BLM.

(d) Federal coal leases

A key requirement of federal coal leases is that the lessee is subject to the conditions of diligent development and continued operations. Within 10 years from the date the lease was issued, the lessee must diligently develop the lease by producing the commercial quantities of coal required under the lease; otherwise, the lease will terminate at the end of such 10-year period. Once commercial quantities have been produced, the lease must remain in continued operation by annually producing commercial quantities of coal. In lieu of continued operation, the lessee may pay advanced royalties for no more than 20 years during the life of the lease. Federal regulations also establish performance standards applicable to federal coal leases.

## 9 Key Issues

### 9.1 Title

In the United States, unlike in other countries, title to real property, including subsurface mineral rights, is established from a series of instruments (including deeds) by means of which title can be traced. There is no government guarantee of title.

Owners and acquirers of US real property interests typically seek protection against defects in title by obtaining title insurance from licensed title companies, title opinions from qualified lawyers, or representations and warranties and indemnification from the seller, or a combination of the foregoing.

A title insurance policy insures against the risk that the owner's interest in the property is not valid. Once a title policy is obtained, if any break in the past chain of title is found which would invalidate the owner's claim to ownership of the property, the title company will be responsible for any losses up to the value of the policy, which is often the purchase price of the property (but can be increased as improvements to the property are made).

When acquiring federal mineral leases from a third party, or when acquiring an ongoing mining operation on public land for example, the acquirer typically seeks to verify the title to the relevant mineral rights that are driving the transaction. In the US mining industry, this title verification typically comes in the form of a title opinion issued by a lawyer licensed to practice law in the state where the relevant real property asset is located.

The nature of the particular mining rights being acquired will dictate the type of review that the lawyer must conduct in order to issue its title opinion. For example, if the relevant asset is an unpatented mining claim, among other things, the opining lawyer will need to examine the records in the appropriate BLM state office to determine whether the claim is situated on public land that was in fact open for location of a mining claim at the time the claim was located. Depending on the volume and nature of the particular mining rights at issue, the title examination process can become quite cumbersome.

## 9.2 Antitrust

An acquisition of mining assets or rights can trigger a notification obligation under the HSR Act if it satisfies the applicable notification thresholds. Under the HSR Act, acquisitions valued in excess of USD90 million as of 2019 (this figure is adjusted annually) generally trigger a notification obligation, barring the application of an exemption.

With respect to the energy and mining industries, there are two specific exemptions in the HSR rules that bear mention. The first is commonly referred to as the “unproductive real property” exemption, which exempts from the HSR Act acquisitions of real property, including natural resources and assets incidental to the ownership of the real property, that have not generated total revenues in excess of USD5 million during the 36 months prior to the acquisition. This exemption applies irrespective of the amount of consideration being paid for the unproductive real property. The second exemption applies to acquisitions of carbon-based mineral reserves, subject to certain limitations depending upon the type of reserves being acquired. Acquisitions of up to USD500 million in reserves of oil, natural gas, or shale or tar sands, or to USD200 million in coal reserves are exempt from the HSR Act’s notification requirements.

In the event that a transaction triggers a notification obligation under the HSR Act, each party must notify the relevant US antitrust agencies and receive HSR clearance prior to closing the transaction. After receipt of any HSR notifications from the parties, the US antitrust agencies have an initial 30-day period to review the transaction and evaluate whether it presents a potential competitive concern. If such a concern is identified, then the initial period can be extended to allow for a more thorough investigation, which typically lasts several months.



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# Venezuela

Law	Civil law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	None
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	Low
Rehabilitation bonds or guarantees	Yes
Exploration license	Three years, with extension of one year
Mining license	Typically 20 years, with extensions
Able to use tenement as security	Yes
Royalty payable to government	Yes. Amount depends on commodity
Classification system used	N/A

## 1 Summary

Venezuela is a country with extraordinary mining potential. Almost every mineral, metallic and otherwise, is found in Venezuela. However, Venezuela's mining industry is relatively underdeveloped in comparison with the industry levels of other Latin American countries. The vast Venezuelan territory was explored as early as the sixteenth century by German bankers in search of precious mineral resources. British, French, South African, Italian, Canadian, Russian, Chinese, Iranian and US miners, to name a few nationalities, have looked for diverse types of minerals throughout Venezuela, but only a handful of projects have reached sustained production status.

Generally, large mining projects have significant government participation or are controlled by the state. This is particularly the case of the iron ore industry, nationalized 40 years ago; the gold industry, nationalized in 2011, which requires that all gold produced in Venezuela must be sold to the Venezuelan Central Bank. In 2013, the government issued a decree reserving for the Venezuelan state the direct exploration and production of certain nickel and associated mineral deposits located in the states of Aragua and Miranda, and, in 2016, the government issued another decree reserving for the state the direct exploration and production of niobium and tantalum mineral deposits. In 2017, the government added diamond, copper and silver mineral deposits, and coal mineral deposits in 2018.

# Venezuela

The government has been working on restructuring mining policy throughout the country. The new mining policy is expected to lead to an industry structure similar to the current structure of the oil industry. Therefore, mining activities will be conducted directly by the state, by wholly owned state entities or by mixed companies allowing for private participation, but with the state holding more than 50% of the capital stock. Small mining activities will also be permitted in designated areas. The date of adoption of this anticipated general reform is still uncertain.

## 2 Legal framework for mining

The general operational framework is contained in the 1999 Constitution of Venezuela, the 1999 Mining Law, the 2001 Regulations thereto, in the 1974 Decree-Law reserving iron mining exploitation activities for the state, and in the 2015 Decree-Law reserving mining exploration and exploitation activities of gold and other strategic minerals for the state ("**Gold Reserve Law**")

There is both federal and state legislation. While federal legislation is applicable to metallic minerals, state legislation applies to non-metallic minerals and varies from state to state. Currently, there are 23 states in Venezuela. Legislation covers exploration, exploitation, usufruct, holding, circulation, transport, and internal or external marketing of the extracted substances. Non-metallic minerals located in the capital district are also subject to special legislation.

Another important instrument is the declaration of jurisdiction of the Ministry of Petroleum and Mining (MPM) over all matters related to mining and foreign investment in the mining sector. Recently, the President of Venezuela ordered the creation of the Ministry for the People's Power for Ecological Mining Development ("**Ministry for Mining**") for the first time, establishing a ministry for mining separate from oil and gas.

Venezuela has a civil law based legal system.

All minerals belong to the state. As a consequence, private mining requires government authorization.

During the last few years, the administration has been working on restructuring mining policy throughout the country. Gold mining was recently reserved for the state, and private participation is limited to shareholding of less than 45% of the capital stock of mixed companies under state control. The Gold Reserve Law allows the National Executive to declare any mineral "strategic" through a decree, and, as a consequence, the regime established in the Gold Reserve Law will apply to those "strategic minerals." The expected new general mining policy would lead to an industry structure similar to the current structure of the oil industry, under strict state control. Accordingly, mining activities will be conducted directly by the state, by wholly owned state entities or by mixed companies allowing for private participation, but in which the state holds more than 50% of the capital stock. Small mining activities will also be permitted in designated areas. However, the date of adoption of this anticipated general reform is uncertain.

Oil and gas activities are regulated by a separate set of legislative regimes, comprising the 2001 Organic Law of Hydrocarbons, amended by the law reprinted in Official Gazette No. 38,493 of 4 August 2006; the Organic Law of Gaseous Hydrocarbons, published in Official Gazette No. 36,793 of 23 September 1999; and its Regulations, published in Special Official Gazette No. 5,471 of 5 June 2000.

According to Official Gazette No. 40,960 of 5 August 2016, niobium (Nb) and tantalum (Ta) are declared strategic minerals for the purposes of their exploration and exploitation, and are therefore subject to the regime provided for in the Gold Reserve Law. Additionally, copper, diamond, silver and coal are also strategic minerals according to Official Gazette No. 41,122 of 27 March 2017 and Official Gazette No. 41,472 of 31 August 2018, respectively.

# Venezuela

On 3 July 2018, the government issued Decree No. 3,513, published in Special Official Gazette No. 6,387, according to which it reserved for the National Executive the activities of exploration and exploitation of feldspar mineral deposits and other minerals associated with it, which are located in the areas called: La Gloria 3, La Gloria 4 and Hato San Antonio; located in the municipalities of San Carlos, Lima Blanco, Tinaco and Falcón in the Cojedes State.

Additionally, the activities of exploration and exploitation of (i) feldspar mineral deposits located in Palo Grande, Bruzual Municipality of Yaracuy State; (ii) titanium mineral deposits located in San Quintín, Manuel Monge Municipality of Yaracuy State; and (iii) phosphatic rock mineral deposits located in Los Monos – La Linda, Libertador Municipality of Táchira State, and other minerals associated with these minerals, according to Presidential Decree No. 3,858, published in Official Gazette No. 41,643 of 29 May 2019, are reserved.

## 3 Restrictions on foreign investment

Restrictions on foreign investment apply to small and artisan mining and to mining rights on properties located near the Venezuelan borders. Foreign governments cannot hold mining rights in Venezuela. Foreign-state entities or foreign state-owned/controlled companies need prior authorization from the National Congress.

## 4 Government or local participation requirements

Mining for gold and for other minerals declared as strategic require mandatory participation of the government, except for small or artisan mining. Gold mining can only be performed by wholly owned state companies or mixed companies where the government holds at least 55% of the capital stock.

## 5 Land tenure and priority

All minerals located within state boundaries are the property of the relevant state until the mineral is extracted. Mining legislation creates a system of mining tenure separate from land tenure. Therefore, generally landholders do not have any ownership right to minerals, although they may be entitled to compensation for the loss of the use of land due to mining activities.

## 6 Indigenous or local community rights

The rights of indigenous people are protected in the Constitution and in the Organic Law of Indigenous People and Communities ("**Indigenous People's Law**") published in Official Gazette No. 38,344 of 27 December 2005. Under Article 11 of the Indigenous People's Law, all activities relating to the use of natural resources and other development projects on indigenous land or habitats are subject to the information and previous consultation procedure established in the aforementioned law.

## 7 Environmental protection and rehabilitation obligations

In general, enforcement of Venezuela's environmental laws and regulations has been lax. As time passes, however, the Ministry of Eco-socialism and Waters continues to press for full compliance with environmental rules. The fact that criminal courts may also enforce environmental laws increases the risk for parties that fail to comply, particularly given that criminal courts have no knowledge of, and very little experience in, environmental matters.

Article 15 of the Mining Law requires that all mining activities be performed in compliance with applicable environmental legislation. Decree No. 2,219, published in Special Official Gazette No. 4,418 of 27 April 1992

governs renewable natural resources, including the exploration and extraction of minerals. Mining activities are also subject to the technical standards that regulate the control of hazardous waste generation and handling (Decree No. 2,289), the control of contamination generated by noise (Decree No. 2,217), activities that cause changes in the flow and obstruction of riverbeds and sedimentation problems (Decree No. 2,220), liquid effluents (Decree No. 883), the control of air pollution (Decree No. 638) and the opening of trails and access roads (Decree No. 2,226). Likewise, mining activities require compliance with Environmental Impact Statement (EIS) requirements before initiating the exploitation phase of a particular project.

The authorizations for the establishment of mining projects include the obtainment of land occupation and resource affectation authorizations, in accordance with the guidelines described above.

Bonds must be posted in favor of the Ministry of Eco-socialism and Waters to secure the fulfillment of environmental obligations. The administrative trend is to demand that mining concessionaires repair all environmental damage existing in their areas, even if the same has been previously caused by third parties.

## 8 Exploration licenses

### 8.1 Scope

Although the Mining Law establishes five different kinds of right to carry out mining activities (directly by the National Executive, concessions for exploration and subsequent exploitation, exploitation authorizations for small miners, mining communities, and artisan mining), the only form of right of commercial and industrial importance is the mining concession.

Any national or foreign individual or legal entity domiciled in Venezuela and capable according to law may obtain mining rights, excluding rights for small mining carried out individually or in communities. Small mining is reserved for Venezuelan citizens or Venezuelan legal entities, while artisan mining is reserved for Venezuelan citizens. Venezuelan public officials and specific relatives of such officials, as well as foreign governments and companies dependent on such governments or controlled by them, are prohibited from acquiring mining rights or require prior authorization.

Concessions are not applicable for gold and other strategic minerals for which a special regime is applicable. Only wholly owned state companies or mixed companies where the government holds at least 55% of the capital stock can perform the exploration and exploitation activities of those minerals.

Concessions for exploration and subsequent exploitation confer upon their holders the exclusive right to explore the granted area and to select the surface determined by technical, financial and environmental studies for their further exploitation.

Areas are oriented according to the Universal Transversal Mercator (UTM) projection system or any other major technological advancement adopted by the Ministry of Mining.

Concessions for exploration and subsequent exploitation are awarded for plots of land that must be divided into lots with an area that may vary from a minimum of 493 hectares to a maximum of 513 hectares, with a total extension not exceeding 6,156 hectares (i.e., 12 lot units). The maximum number of lots that may be granted to the same holder is two, that is, 24 lot units.

The concessionaire is entitled to select from the explored lots up to a maximum of six adjacent lots (covering in aggregate not more than half of the original extension) for exploitation purposes.

## 8.2 Duration

Concessions may not exceed a term of 44 years. Concessions provide for an exploration term of no more than three years, with one extension of one year. The exploitation term may not be more than 20 years as of the date of publication of the respective exploitation certificate, with a maximum of two 10-year extensions granted at the discretion of the Ministry for Mining.

## 8.3 Steps to acquire an exploration right

The application for a concession for exploration and subsequent production is filed with the Ministry for Mining and must include the following items:

Identification of the applicant, indicating domicile, nationality, status and in what capacity he/she is acting; if it is a company, the name or purpose, domicile and place of incorporation. In the case of foreign companies, they must fulfill the requirements of the Commercial Code and other applicable regulations, and be represented by a Venezuelan or foreign attorney-in-fact domiciled in Venezuela.

Indication of the type of mineral, estimated surface and the boundaries of the area requested, geographical location together with a sketch of the area applied for, duly signed by a mining engineer, a geodesist or a surveyor or any other professional legally authorized to do so, the designation given by the applicant, special advantages offered to the republic and other information required by law.

Declaration as to whether the land is vacant, protected or private property, and neighboring properties, and in this last case, the name of the owner.

Proof, to the satisfaction of the Ministry of Mining, of the applicant's technical, economic and financial capacity.

Any other information established in the regulations or requested by the Ministry of Mining, per the procedures established in the Organic Law of Administrative Procedures and other laws regarding the matter.

Should the concessionaire offer special advantages pursuant to Article 35 of the Mining Law, these must be introduced in a separately sealed envelope, which is to be opened by a committee composed of the Minister, Legal Advisor and Manager of Mining Concessions, upon their decision-making.

The Ministry of Mining will approve or deny the request for the mining concession and will notify the interested party within 40 days. This time frame can be extended for a period of up to 10 working days if deemed appropriate by the MPM. If no notification is issued, the request is deemed denied as a matter of law.

Any interested third party has 30 days in which to file an opposition. If there is an opposition, an administrative procedure is initiated at the Ministry of Mining, and the Ministry of Mining's decision is the final administrative ruling on the subject. The parties may appeal the Ministry of Mining's decision.

Should there be no opposition, or when the request for opposition has been denied, the Ministry of Mining will grant the concession if all requirements under the Mining Law have been fulfilled, and will issue the exploration title by means of a resolution to be published in the Venezuelan Official Gazette within 20 days following the maturity date of the term of opposition or the decision whereby the opposition was denied. The concession holder must register the aforementioned resolution in the corresponding registry of the judicial district of the place of the concession within 20 consecutive days following its publication.

Usually, compliance with non-mining legislation is a prerequisite to conducting mining activities, and at times, mining projects remain suspended for years until all bureaucratic paperwork, permits and clearances are obtained.

On 14 May 2018, the Ministry of Mining issued Resolution No. 0010, published in Official Gazette No. 41,396, establishing the Single Mining Registry (SMR). The SMR functions through a computer platform called the Integrated Management System for Ecological Mining Development (IMSEMD). All individuals or public or private legal entities that develop or intend to conduct primary, related or auxiliary mining activities must register in the SMR. The registration is an indispensable requirement to carry out any application or request for authorizations, strategic alliances, constitution of joint ventures, association and/or contracts before the Ministry of Mining.

Evidence of registration in the SMR is an electronic certificate, which will be valid for three years. Any extension thereof will be subject to online review and/or update of the relevant data of by the IMSEMD.

## 8.4 Relationship with landowners

Generally, the holder of mining rights has preference over the landowner, except in cases of agricultural developments. The holder of mining rights is granted expropriatory powers vis-à-vis landowners and the power to obtain easement rights if necessary to conduct mining operations.

## 8.5 Obligations of the holder

The holder must conduct mining operations in accordance with the terms of the relevant mining deed, the Mining Law and other applicable legislation. The holder must follow a schedule as established in a pre-approved plan. The holder must file a monthly and an annual report on all mining activities carried out during the relevant period.

# 9 Holding tenements

## 9.1 Scope

Once exploration is completed, the holder must select production lots. A petition for issuance of the relevant exploitation certificates will ensue, and until they are granted, the holder cannot initiate development/production activities.

## 9.2 Duration

A mining concession is typically issued for a term of up to twenty years and is renewable for two further 10-year terms.

## 9.3 Rights and obligations

The holder of a mining concession must conduct exploration activities during a three-year term plus a one-year extension, and must select the exploitation plots in areas not to exceed one half of the original exploration area. No exploitation plot can exceed 513 hectares.

Statutory fees as surface taxes apply per annum, per hectare.



## 10 Development/production tenements

### 10.1 Scope

As mentioned above, concessions confer upon the holder exploration rights and, furthermore, with the approval of the Ministry of Mining, production and development rights.

Concessions confer upon their holder the exclusive right to explore and exploit the mineral substances granted and which are found within the area awarded (tailings are included in the mineral granted.)

A mixed company holding gold or strategic minerals mining rights does not have rights to other minerals within the area of mining activities. It requires special authorization from the relevant ministry.

### 10.2 Duration

The concessionaire must begin exploitation of the lots of land selected for such purpose within seven years from the date of publication of the exploitation certificate in the Official Gazette.

The exploitation term is limited to a maximum of 20 years, extendable for two periods of 10 years. In any case, the concession term may not exceed a maximum of 44 years. Certain surface fees or superficial taxes must be paid.

### 10.3 Transition from exploration/holding right to mining right

The right arising from the mining concession is a real property right. However, the Ministry of Mining must first authorize and grant a permit to alienate, encumber, lease or subcontract the property for exploitation. To obtain this authorization, the concessionaire must have carried out prior activities and required investments for presentation of the development and exploitation program, which should be filed 30 days before the commencement of the development/production process.

During the exploration term, the concessionaire must present to the Ministry of Mining the plans of the plots of land selected for exploitation and the technical, financial and environmental feasibility studies of the concession to be granted the exploitation certificate.

Prior to the initiation of exploitation, the concessionaire needs to submit to the Ministry of Mining a performance bond to cover the exploitation and development program for an amount equal to 5% of the estimated income based on annual sales.

### 10.4 Steps to acquire a right

During the exploration term, the concessionaire must file a request for the exploitation certificate with the Ministry of Mining, attaching the plans and studies of the technical, financial and environmental feasibility of the concession, along with a document soliciting its approval and requesting the expedition of the exploitation certificate. The Ministry of Mining will publish the request in the Official Gazette.

Upon publication of the request, any interested third party has 30 days in which to file an opposition.

Once the plans and studies for exploitation are admitted, the Ministry of Mining will issue its approval by means of a resolution in 30 days, which shall order that the exploitation certificate be granted in a period of 30 days counted from the publication of the resolution in the Official Gazette. The concession holder must



# Venezuela

register the aforementioned resolution in the corresponding registry of the judicial district of the place of the concession within 30 days following its publication.

It is not possible to predict the time it takes to grant the exploitation certificate.

## 10.5 Relationship with landowners

Generally, the holder of mining rights has preference over the landowner, except in cases of agricultural developments. The holder of mining rights is granted expropriatory powers vis-à-vis landowners and the power to obtain easement rights if necessary to conduct mining operations.

## 10.6 Obligations of the holder

Generally, the holder of mining rights has preference over the landowner, except in cases of agricultural developments. The holder of mining rights is granted expropriatory powers vis-à-vis landowners and the power to obtain easement rights if necessary to conduct mining operations.

## 11 Assignment of and security over tenements

### 11.1 Assignment

The right arising from the mining concession is a real property right. However, the Ministry of Mining must first authorize and grant a permit to alienate, encumber, transfer, lease or subcontract the mining concession.

### 11.2 Security

Security is subject to authorization from the Ministry of Mining and requires registration with the corresponding registry office.

## 12 Royalties

In mining of gold and other strategic minerals, the state has a right to 3% to 13% in royalties over the value of the final mineral product. The rate can be increased by way of a special advantage. For other minerals the rates vary from 3 to 4%.

## 13 Mineral reporting and classification

There are no mineral reporting and classification rules in Venezuela.

## 14 Other key issues

### 14.1 Export

Export of gold is severely restricted by applicable legislation. Similar restrictions do not apply to other minerals.

### 14.2 Taxes

The holders of mining rights must pay a surface tax for each hectare, starting in the fourth year of the concession, calculated in tax units per hectare, and an exploitation tax equal to:

# Venezuela

- (a) 3% of the commercial value, in Caracas, of the refined material, for gold, platinum and metals associated with platinum. A special reduction of the applicable tax (1%) will apply if the gold is sold to the Central Bank of Venezuela;
- (b) 4% of the commercial value in Caracas, for diamonds and other precious stones; and
- (c) 3% of the commercial value, at the mine, for other minerals, which includes costs until the extracted mineral, whether or not crushed, is deposited in the vehicle that is to carry it outside the limits of the area awarded, or to a plant for refining.

On 29 December 2017, the National Constituent Assembly enacted the Constitutional Law on the Tax Regime for the Sovereign Development of the Mining Arch, published in Official Gazette No. 41,310, by which it establishes a special income tax regime applicable to the income of territorial source derived from the sale of gold produced in the "Arco Minero del Orinoco" National Strategic Development Zone, to the Central Bank of Venezuela or to the authorized subjects under Article 31 of the Gold Reserve Law.

## 14.3 Usual structure of venture

The preferred corporate structure is a corporation (*compañía anónima*) incorporated in Venezuela and registered with the Ministry of Mining. However, the type of structure should be carefully evaluated from a tax standpoint.

## 14.4 Protection for foreign investors

The usual protection under bilateral and multilateral investment treaties is available. Domestic legislation also grants that same standard of protection.

## 14.5 Special advantages

Private persons may be required to offer special advantages, stipulated by the Ministry of Mining, to the republic whenever requesting a concession. These advantages normally refer to aspects such as the supply of technology, payment of special contributions, internal supplies, provision of infrastructure, social endowment, and obligations to train and specialize in mining, among others.

## 15 Useful websites

Ministry of Petroleum	<a href="http://www.minpet.gob.ve/index.php/es-es/">http://www.minpet.gob.ve/index.php/es-es/</a>
Ministry of Mining	<a href="http://www.desarrollominero.gob.ve/">http://www.desarrollominero.gob.ve/</a>
Ministry for Eco-socialism and Waters	<a href="http://www.minec.gob.ve/">http://www.minec.gob.ve/</a>
National Institute of Geology and Mining	<a href="http://www.ingeomin.gob.ve/">http://www.ingeomin.gob.ve/</a>
Ministry of Indigenous People	<a href="http://www.minpi.gob.ve/">http://www.minpi.gob.ve/</a>

# Venezuela

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# Vietnam

Law	Civil Law
Member of New York Convention	Yes
Foreign investment regulation	Yes
Local party ownership requirement	No
Indigenous and local community rights	Yes
Land tenure	Mining rights are separate from surface rights
Environmental protection regulation	High
Rehabilitation bonds or guarantees	Yes
Exploration license	Typically 48 months, with extensions for another 48 months
Mining license	Typically 25–30 years, with extensions
Able to use tenement as security	No
Royalty payable to government	Yes
Classification system used	None

## 1 Summary

Vietnam has a relatively diverse selection of mineral resources, with more than 60 kinds of minerals having been discovered. However, mineral deposits in Vietnam are mainly of small or medium sizes. Resources found in quantities that can serve long-term mining and export are oil and gas, bauxite, rare earths, titanium, coal, limestone, silica sands, facing stone, building stone and mineral water. Resources found in smaller quantities, which are mined mainly for domestic consumption, include iron ore, chromium, manganese, copper, tin, lead-zinc, tungsten, gold, antimony, uranium, feldspar, kaolin, talc, fluorite, barite, graphite, dolomite, phosphorite, bentonite and diatomite.

The number of enterprises engaged in mining has rapidly increased during the past decade. However, the industry is still dominated by the state-owned Vietnam National Coal and Minerals Industries Corporation (“**Vinacomin**”). Foreign investment in the mining industry in Vietnam is increasing, but still occupies a low share in comparison with other economic sectors, and is mainly concentrated in the oil and gas sector.

This chapter provides a general overview of the primary laws governing mining activities in Vietnam, except for those activities connected with various specific minerals (for example, oil and gas).

# Vietnam

## 2 Legal framework for mining

The legal system in Vietnam is civil-law based. The mining industry in Vietnam is mainly regulated by the Law on Minerals and its guiding documents. Relevant laws also include those on land, water resources, environmental protection, royalties, planning and investment.

The Constitution of Vietnam provides that underground natural resources, as well as resources in territorial waters, on the continental shelf and in the air space, fall under the ownership of the entire people of Vietnam. The Law on Minerals provides that the government (i.e., the administrative body of the state) is in charge of the management of mining activities in the country, with various authorities being allocated different powers.

The key regulatory bodies that administer the Law on Minerals include:

- (a) the Ministry of Natural Resources and Environment (MONRE), which manages mining activities at a nationwide level, including the issuance of or making proposals on regulations implementing the Law on Minerals, and the issuance of mining-related licenses for mining projects (except for certain mining projects of smaller scale or less importance);
- (b) the Ministry of Industry and Trade (MOIT), which is in charge of technical and commercial aspects, such as drawing up master plans for mineral exploration, exploitation and processing, regulating mine designs and supervising mineral exports;
- (c) the Ministry of Construction (MOC), which is in charge of minerals being construction materials, including drawing up master plans and supervising export activities for these materials; and
- (d) provincial people's committees, which manage mining activities at a provincial level, including making proposals on areas subject to mining restrictions or prohibition in the relevant provinces, and issuance of mining-related licenses for mining projects on minerals being construction materials, or small-scale projects.

In addition, investment projects in the mining industry are also subject to the investment law, with the Ministry of Planning and Investment (MPI) and the provincial departments of planning and investment (DPIs) being the authorities in charge.

## 3 Restrictions on foreign investment

Although there is no express provision on foreign ownership restrictions under the law in the mining industry, the master plans for different types of minerals are among the bases for the authorities' assessment of mining projects. These master plans often contain the policy on investment forms. Normally, foreign investment is sought in large-scale projects that need strong financial capacity or high technology to develop. This gives the authorities certain discretion to decide whether to approve foreign ownership in a project or not.

## 4 Government or local participation requirements

There are no requirements for government or local participation, except for the oil and gas sector. Neither the requirements for local Vietnamese ownership are required.

# Vietnam

## 5 Land tenure and priority

The Constitution provides that underground natural resources, as well as resources in territorial waters, on the continental shelf and in the air space, fall under the ownership of the entire people of Vietnam. Until it is extracted, the mineral is the property of the entire people of Vietnam under the management of the government. The mining regulations separate mining tenure from land tenure, under which landholders have no private ownership rights to minerals. They are, however, entitled to some compensation for the loss of any use of land as a result of mining activities.

## 6 Indigenous or local community rights

Vietnamese laws do not provide for special rights to ethnic minority groups or indigenous people affected by mining activities. However, in cases where investors lease land from government authorities to serve their mining activities, the people residing or farming on the land (if any) would normally be compensated for their interests in the land as part of the site-clearance process.

## 7 Environmental protection and rehabilitation obligations

To apply for exploration licenses and exploitation licenses, depending on the nature and the size of the relevant projects, investors must prepare either environmental impact assessment (EIA) reports or environment protection commitments under the environment regulations. These documents must be approved by the competent environmental authorities and included in the application dossiers for relevant licenses.

After the completion of the construction of environmental protection works and prior to the project operation, the environmental authority will conduct an inspection of the environmental protection works and measures to ensure that they comply with EIA reports and regulations.

Before conducting mineral exploitation activities, the holders will have to pay a deposit for environmental rehabilitation and restoration to the relevant environment protection funds to guarantee their obligations to rehabilitate and restore the environment at the end of the project.

If a mining facility needs to discharge pollutants into the environment, then the investor would need to apply for certain pollutant discharge permits from the competent environmental authorities.

## 8 Exploration licenses

### 8.1 Scope

A party wanting to apply for an exploration license must prepare an exploration proposal plan compatible with relevant master plans in accordance with the Law on Planning and seek appraisal and approval by MONRE or the provincial people's committee.

A party can apply for an exploration license subject to certain principles, namely:

- (a) mineral exploration licenses shall be granted only for areas in which no party is lawfully conducting mineral exploration or exploitation, and which are not banned or temporarily banned from mineral activities, national mineral reserves areas or areas in which geological baseline surveys are being conducted for minerals of the same kind of minerals being applied for; and

- (b) each organization or individual shall be granted no more than five mineral exploration licenses, excluding expired ones; the to-be-explored total area for a specific mineral under all licenses must not exceed two times the exploration area under a single license.

The size of an exploration area under a specific exploration license for a kind or group of minerals is stipulated as follows:

- (a) not exceeding 50 square kilometers for gemstone, semi-gemstone and metallic minerals except bauxite;
- (b) not exceeding 100 square kilometers for coal, bauxite and non-metallic minerals on land, with or without water surface, except minerals to be used as common construction materials;
- (c) not exceeding 200 square kilometers for minerals of all kinds in the continental shelf, except minerals to be used as common construction materials;
- (d) not exceeding two square kilometers on land or one square kilometer in water surface areas, for minerals to be used as common construction materials; and
- (e) not exceeding two square kilometers for mineral water and natural thermal water.

The current fees payable for issuance of an exploration license is from VND 4 million to VND 15 million (approximately USD 200 to USD 750), depending on the size of the exploration area.

## 8.2 Duration

A mineral exploration license is valid for 48 months at most and may be extended multiple times for a total maximum duration of 48 months. Upon each extension, the licensed organization or individual must return at least 30% of the exploration area stated in the granted license.

Where the license has expired but the dossier for extension is being verified by the competent state authority, the organizations and individuals involved must postpone the work until the license is extended or refusal to grant a license extension is issued.

## 8.3 Steps to acquire an exploration right

For areas subject to auction of the exploitation right, the entities winning the relevant auctions will be entitled to apply for exploration licenses for the relevant areas.

For areas not subject to auction of the exploitation right, the licensing authorities will select the entities to conduct a mineral exploration on the basis of application and, if there is more than one entity applying, will conduct an evaluation in terms of equity capital, previous involvement, and commitments to use the minerals for domestic use according to the relevant master plan. A party that is incompetent to conduct mineral exploration must sign contracts with eligible organizations. A party applying for an exploration license must have equity capital of at least equal to 50% of the total investment capital for the implementation of the mineral exploration project. Business households may explore minerals for use as common construction materials if they fully meet the conditions set by the government.

Having completed the application filling requirements, the license will be issued within 90 days by the competent state management agencies, i.e., MONRE or the provincial people's committee where the mineral areas are located.



## 8.4 Relationship with landowners

In Vietnam, the land is owned by the people as represented by the state. Therefore, entities engaged in mineral activities must rent the land from competent government authorities according to the land law, unless they do not use the land surface layer or their mineral activities do not affect the use of land surface of organizations and individuals that are lawfully using such land. A land lease contract will terminate upon the expiration of the relevant mineral exploration license or mineral exploitation licenses, and will be correspondingly adjusted upon the return of the part of the mineral exploration or exploitation area. People residing or farming on the land (if any) would normally be compensated for their interests in the land as part of the site clearance process.

## 8.5 Obligations of the holder

An exploration license holder is subject to the following obligations:

- (a) to pay a licensing fee and fulfill other financial obligations provided by law;
- (b) to strictly comply with the mineral exploration license and implement the approved exploration project;
- (c) to report to the licensing agency for consideration and approval changes in exploration methods or volumes which result in an increase of over 10% in estimated expenses;
- (d) to compensate for damage caused by exploration activities;
- (e) to notify the exploration plan to the provincial people's committee of the locality in which they will conduct mineral exploration before implementation;
- (f) to collect and store mineral-related information and report exploration results to state management agencies in charge of minerals; and report other activities to competent state agencies under law;
- (g) to perform site and environment recovery when the mineral exploration license expires; and
- (h) other obligations provided by law.

## 9 Holding tenements

### 9.1 Scope

An exploration license holder is entitled to the following rights:

- (a) to use mineral-related information pertaining to the exploration purpose and area;
- (b) to conduct exploration according to the mineral exploration license;
- (c) to take away from the exploration area, even abroad, specimens with volume and types suitable to the characteristics and requirements of analyses and experiments under the approved exploration project;
- (d) to be prioritized to obtain a license for exploring minerals in the exploration area;
- (e) to request the extension of the mineral exploration license, to return it or return part of the exploration area;



# Vietnam

- (f) to transfer the mineral exploration right;
- (g) to lodge complaints or lawsuits against decisions revoking the mineral exploration license or other decisions of the competent state agencies; and
- (h) other rights provided by law.

## 9.2 Duration

The exploration license holder might apply to extend the license (subject to the maximum cap of 48 months) if the following conditions are met:

- (a) the amount of work items under the original license has not yet been completed or there is a change in the geological structure or method of exploration compared to the approved exploration project at the time of the submission;
- (b) within 45 days of the expiration date of the license, the holder submits to the competent state management authorities the extension dossier with a clear explanation of the reason for the extension proposal; and
- (c) up to the point of application for extension, the holder has complied with the obligations listed under items (b), (c), (d), (e), (f) in the section on obligations of license holder as above.

## 9.3 Rights and obligations

During the extension period, the exploration license holder will continue to enjoy the rights that they have under the original license.

# 10 Development/production tenements

## 10.1 Scope

Development operation of a mine can only occur after an exploitation license for that mine has been issued. According to the Law on Minerals, organizations and individuals licensed for exploitation have the following rights:

- (a) to use mineral-related information pertaining to the exploitation purpose and area permitted for exploitation;
- (b) to exploit minerals under the exploitation license;
- (c) to further explore mineral deposits within the permitted area and depth and, before exploration, notify the volume and duration of such exploration to competent licensing state management agencies;
- (d) to store, transport, sell and export the exploited minerals under law;
- (e) to apply for an extension or return of the exploitation license, or return part of the exploitation area;
- (f) to transfer the exploitation right;
- (g) to lodge complaints or lawsuits against decisions revoking the exploitation license or other decisions of the competent state agencies;

- (h) to rent land under the land law according to the approved exploitation investment project or mine design; and
- (i) other rights provided by law.

Depending on the type of minerals, the exploitation capacity and area, the fees for issuance of an exploitation license currently range from VND 1 million to VND 100 million (approximately USD 50 to USD 5,000). In addition, holders of exploitation licenses also must pay a fee for the grant of exploitation right, which is determined based on the price, deposit, quality, kind or group of minerals and exploitation conditions.

## 10.2 Duration

An exploitation license is valid for 30 years at most and may be extended multiple times with the total extension period not exceeding 20 years. The area and depth-based boundary of an exploitation area will be considered on the basis of the mining investment project suitable for mineral deposits permitted for mining design.

Where the license has expired but the dossier for extension is being verified by the competent state authority, the organizations and individuals involved must postpone the work until the license is extended or refusal to grant a license extension is issued.

## 10.3 Transition from exploration/holding right to mining right

For areas subject to auction of exploitation right, if the areas have not been explored, the winners of the auctions will have the right to conduct exploration.

For areas not subject to the auction of exploitation right, organizations and individuals licensed for exploring minerals are prioritized to obtain exploitation licenses for the approved mineral deposits.

The priority right to conduct exploitation is only applied for mineral deposits that have already been explored under the exploration licenses and approved by the competent authorities. The application for exploitation licenses must be made within six months after the expiration of the mineral exploration licenses. No specific administrative fee is attached to the exercise of the priority right. If an organization or individual fails to apply for an exploitation license within this period of time, the priority right will be lost. If the authorities grant exploitation licenses to other organizations or individuals, such organizations or individuals must reimburse the exploration expenses corresponding to the licensed deposits to the organizations or individuals that have conducted the exploration.

If the organizations or individuals that wish to explore minerals need to conduct field surveys and take surface specimens to serve the selection of areas for the elaboration of mineral exploration projects, they can only do so after obtaining written approval from the provincial people's committees of localities in which the to-be-explored areas are located.

## 10.4 Steps to acquire a right

Vietnamese authorities divide mineral activity areas into (i) areas subject to auction of the exploitation right; and (ii) areas not subject to auction of the exploitation right, based on certain criteria.

For areas subject to auction of the exploitation right, exploitation licenses are granted to the winners of relevant auctions organized by the authorities. For areas not subject to auction of the exploitation right, exploitation licenses are granted on an application basis. As mentioned above, organizations and individuals

licensed for exploring minerals are prioritized to obtain exploitation licenses for the approved mineral deposits.

## 10.5 Relationship with landowners

In Vietnam, the land is owned by the people as represented by the state. Therefore, entities engaged in mineral activities must rent the land from competent government authorities according to the land law, unless they do not use the land surface layer or their mineral activities do not affect the use of land surface of organizations and individuals that are lawfully using such land. A land lease contract will terminate upon the expiration of the relevant mineral exploration license or mineral exploitation licenses, and will be correspondingly adjusted upon the return of the part of the mineral exploration or exploitation area. People residing or farming on the land (if any) would normally be compensated for their interests in the land as part of the site clearance process.

## 10.6 Obligations of the holder

Organizations and individuals licensed for exploitation have the following obligations:

- (a) to pay a fee for the grant of the exploitation right, licensing, royalties, taxes, and charges, and fulfill other financial obligations under law;
- (b) to ensure the schedule of mine infrastructure construction and exploitation activities stated in the exploitation investment project and mine design;
- (c) to register the date of the commencement of mine infrastructure construction and the date of the commencement of exploitation with the competent licensing state management agencies and notify them to the people's committees at all levels in the locality in which the mines are located before construction or exploitation;
- (d) to exploit to the maximum all main and accompanied minerals; to protect mineral resources; to ensure labor safety and sanitation and take measures to protect the environment;
- (e) to collect and store information on the results of further exploration for mineral deposits and exploitation results;
- (f) to report exploitation results to the competent state management agencies under MONRE regulations;
- (g) to compensate for any damage caused by exploitation activities;
- (h) to create favorable conditions for other organizations and individuals to conduct scientific researches permitted by the state in the exploitation area;
- (i) to close mines, restore the environment and rehabilitate the soil when the exploitation license expires; and
- (j) other obligations provided by law.

# Vietnam

## 11 Assignment of and security over tenements

### 11.1 Assignment

A license holder may assign their exploration and exploitation rights to another party. The assignment must be approved by the respective competent state management agencies.

The assignment must be executed in contract form and specify the assignment value at the time the assignment takes place as well as the responsibilities of the party receiving exploitation rights to continue the outstanding obligations of the transferer up to the point of assignment.

### 11.2 Security

Vietnamese mineral law does not recognize the right of license holders to use their tenements as security. However, license holders may mortgage their land use right and assets attached to the land under the land law.

## 12 Royalties

Royalties vary depending on the types of minerals. Currently, royalties generally range from 6% to 27% of the sale price.

## 13 Mineral reporting and classification

Other than the respective reporting obligation of license holders as mentioned in Sections 8 and 10 above, license holders must also comply with an annual reporting requirement to reflect the progress of their minerals activities. The reporting period is calculated from 1 January to the end of 31 December of the reporting year.

During the exploitation process, the license holder must report any new minerals in the approved exploitation areas. Before the application for an extension, the return of the license or part of the mining area, or the assignment of the mining rights, license holders must prepare a report on the current situations of the minerals activities to the competent mineral authorities to prove the fulfillment of the relevant obligations at such point in time.

## 14 Other key issues

### 14.1 Usual structure of venture

Foreign investors may invest in mining in Vietnam by either direct investment (setting up new companies under the form of 100% foreign-owned or joint venture with local partners, contributing capital to existing companies, or signing business cooperation contracts with local partners without setting up a legal entity) or indirect investment (purchasing shares in existing companies).

As mentioned above, foreign shareholders currently may not own more than 49% of the total shares in public companies.

## 14.2 Taxes

A holder of exploitation rights in Vietnam is subject to certain main taxes and fees as follows:

- (a) enterprise income tax;
- (b) value-added tax;
- (c) natural resources tax;
- (d) import/export duties;
- (e) fees for the issuance of exploitation license;
- (f) reimbursement of the mineral exploration costs;
- (g) fees for environment protection;
- (h) deposit to environmental protection fund;
- (i) fees for the grant of exploitation right;
- (j) fees for use of geological and mineral documents;
- (k) fees for participation in the mineral exploitation right auction (in case of participating in an auction); and
- (l) land rental (in case of leasing land).

## 14.3 Overlapping tenements

Except for the oil and gas sector, the law does not contain specific provisions on this issue. In principle, exploration and exploitation license holders have the obligation to conduct their activities within the licensed area. Therefore, if they want to expand their activities to adjacent areas, they would need to apply for new licenses.

## 14.4 Water licenses

The use of water for mineral activities purposes must be licensed by the competent state authorities, i.e., MONRE or the provincial people's committee. Parties using water resources for exploiting and processing minerals must take measures to collect and process used water to meet technical regulations and standards on sewage quality before discharging into water sources. Parties discharging sewage into water sources must be licensed by the competent state authorities.

## 14.5 Skilled labor and visa

The policy of the government is still to limit the use of foreign nationals in positions/jobs which can be handled by Vietnamese persons. As such, foreign nationals cannot take manual jobs. In the past, the government imposed a cap on foreign employees and required employers to train local employees to gradually replace foreign nationals. Now, to prevent low-quality foreign labor, the government asks for the pre-approval of a foreign labor usage plan before the official submission of work permit applications. Therefore, the authorities have a chance to refuse use of foreign nationals in a job/position that a Vietnamese person can handle. Contractors are also required to give priority to Vietnamese employees in

their projects in Vietnam. In practice, there have been cases where the relevant authority did not allow companies to recruit foreign nationals for certain positions. However, there is no clear criteria on jobs that can be handled by Vietnamese employees.

In addition, among the various criteria for a work permit, a foreign worker must be a manager, executive, expert or technician. The work permit application for managers and executives must include documents proving that foreign nationals are managers or executives. They can be work permits, labor contracts, or appointment letters showing that they work or have worked in managerial/executive positions.

Most foreign nationals who wish to work in Vietnam must obtain a work permit unless they qualify for any of the exemptions. In general, the provincial-level Department of Labor, War Invalids and Social Affairs has the authority to grant work permits to foreign nationals working for a company located outside an industrial zone and an industrial zone authority will issue work permits to foreign nationals working for companies located in an industrial zone.

## 14.6 Master plan

All mineral activities must be compatible with the relevant master plans in accordance with the Law on Planning.

Master plans for mining activities include master plans for geological baseline mineral surveys, master plans for exploration, exploitation, process and use of general minerals, master plans for exploration, exploitation, process and use of radioactive minerals, and master plans for exploration, exploitation, process and use of construction materials. These master plans are classified as national industry master plans and are prepared by relevant ministries or ministerial-level agencies as well as inspected and approved by the prime minister. The preparation of these master plans will be based on national general master plans as well as national marine spatial and land-use master plans.

The preparation of master plans for geological baseline mineral surveys will take into account the implementation results of master plans for geological baseline mineral surveys in the previous year and any indications of newly discovered minerals.

The preparation of master plans for exploration, exploitation, process and use of general minerals, of radioactive minerals and of construction materials will take into account the overall demands of minerals from industries, results of the geological baseline mineral surveys, the scientific and technologies advances in exploration, exploitation of minerals and implementation results on the previous year as well as results on strategical environmental assessments.

## 14.7 Security of tenure

As discussed above, an exploration license holder has a priority right to apply for exploitation of approved mineral deposits. However, an exploration license can be withheld by the authorities if the holder fails to conduct exploration within six months following the effective date of the license (unless it is due to force majeure), or the holder commits certain violations without curing them within a period of time, or the exploration area is declared to be banned or temporarily banned from mineral activities.

An exploitation license can be withheld if the holder fails to build mine infrastructure within 12 months following the effective date of the license, or fails to conduct exploitation within 12 months of the proposed commencement date, unless due to force majeure events, or the holder commits certain violations without curing the same within a period of time, or the exploitation area is declared to be banned or temporarily banned from mineral activities.

# Vietnam

In case an exploration or exploitation area is declared banned or temporarily banned from mineral activities, the license holder will be compensated for the damages that the license holder suffers from such declaration.

## 14.8 Protection for foreign investors

The Law on Investment of Vietnam provides for a number of measures on investment protection, notably the following:

- (a) Guarantee regarding the investors' assets, under which investors' lawful assets will not be nationalized or confiscated by an administrative measure. In the event that the state makes a compulsory purchase or requisition of the property of an investor, due to reasons of national defense or security, or due to national interest, a state of emergency, or to combat or prevent natural disasters, the investor will be paid or compensated in accordance with the provisions of law concerning compulsory purchases and requisitions of property and the provisions of other relevant laws;
- (b) Guarantee regarding the change of law, under which if a new law provides greater investment preferential treatment, the investor will be entitled to enjoy the preferential investment treatment under the new law. If a new law provides lesser preferential investment treatment, then depending on the actual situation, the investor is either (i) entitled to continue applying the investment preferential treatment under the previous law; or (ii) entitled to take certain measures to protect its interests, such as deducting the investor's actual damage against taxable income, adjusting the operational objectives of the investment project, or obtaining certain assistance to remedy the damages; and
- (c) Guarantee regarding the remittance of foreign investors' assets to foreign countries, under which the investor, after having fully performed the financial obligations towards the State of Vietnam, is entitled to remit the following assets abroad: invested capital, proceeds from the investment liquidation, income from the business investment activities, and monies and other assets in the investor's lawful ownership.

## 15 Useful websites

Ministry of Natural Resources and Environment of Vietnam	<a href="http://www.monre.gov.vn">http://www.monre.gov.vn</a>
General Department of Geology and Minerals of Vietnam	<a href="http://www.dgm.gov.vn">http://www.dgm.gov.vn</a>
Ministry of Construction	<a href="http://www.moc.gov.vn/">http://www.moc.gov.vn/</a>
Ministry of Industry and Trade	<a href="http://www.moit.gov.vn">http://www.moit.gov.vn</a>
Ministry of Labor, War Invalids and Social Affairs	<a href="http://www.molisa.gov.vn">http://www.molisa.gov.vn</a>
Ministry of Planning and Investment	<a href="http://www.mpi.gov.vn">http://www.mpi.gov.vn</a>
Vietnam National Coal – Mineral Industries Holding Corporation Limited (Vinacomin)	<a href="http://www.vinacomin.vn/">http://www.vinacomin.vn/</a>

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