Mining

Contributing editors
Michael Bourassa and John Turner

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Mining 2017

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2005
Thirteenth edition
ISSN 1748-3085

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Mining 2017

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Mining*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes India and the United Kingdom, and a new article on mining in Japan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael Bourassa and John Turner, of Fasken Martineau DuMoulin LLP, for their continued assistance with this volume. We, and the editors, are grateful to general counsel at several mining companies for providing commentary on existing questions and ideas for additional questions.

GETTING THE DEAL THROUGH

London
June 2017

Global financing alternatives: a primer on royalty and stream financing

Nancy Eastman, Brian Graves and Frank Mariage
Fasken Martineau

The mining financing environment today

The past half-decade has been a challenging one for mining companies, whether producers, developers or explorers. Falling commodity prices have restrained revenues, a legacy of cost inflation during the supercycle has kept expenses high, and continued uncertainty in the international economy has made future prospects uncertain. As a result, the availability of financing through traditional equity and debt markets has become constrained and often dependent on brief windows opening when metal prices rise temporarily. Indeed, from 2009 to 2016, equity financings for mining companies listed on the Toronto Stock Exchange or TSX Venture Exchange (being the principal market for mining companies) fell from C$22.2 billion to C$9.3 billion, representing an impressive drop of 58 per cent (TMX Group).

Notwithstanding these challenges, two broad needs for financing have been evident – the need to generate funding for operations, including new mine development and expansions, and for companies with substantial debt loads (including some of the world's largest miners), the need to relieve overburdened balance sheets by reducing existing debt.

Against this background, the focus for many mining companies has been on 'alternative' financing options. Foremost among these have been two forms of funding – mineral royalties, which have a long history in the mining industry but which only recently have become mainstream options for generating funding, and metal streams, which are a more recent innovation but have some features in common with royalties. Of course, such alternative financing options remain challenging and somewhat inaccessible in many cases, for early stage 'greenfield' projects.

Nevertheless, 2016 was a record-breaking year in many respects in the royalty and streaming sector, which saw the combined market capitalisation of the world's royalty and streaming companies rise by over US$10 billion to US$27 billion, US$1.7 billion in aggregate equity raises by these companies, and approximately US$1.6 billion in transactions completed (*Global Mining Observer*). These eye-popping numbers have caused many to observe that such 'alternative' sources of funding have now become part of the mainstream.

This article offers a brief perspective on royalties and streams as financing options – their history, characteristics (including some key similarities and differences) and recent developments, all with a view to understanding what we might expect from them as the industry continues what appears to be a slow and long-awaited recovery.

Mineral royalties

The royalty is born

Mineral royalties, which provide generally for periodic payments by a mine owner or operator to a third party based on mineral production over the life of a mine (or sometimes a shorter period based on volume production, for example), have been around for decades but have evolved over the years to meet the needs of the time. Early royalties were often created (i) as a speculative sweetener or upside for a mining company wanting to divest of its interest in a mineral property but not quite ready to give up completely on the property's potential (known or unknown on the date of sale), or (ii) under a joint venture agreement upon a non-contributing partner's interest being diluted below a certain threshold level. In each case, these royalties emerged as part of the consideration for the acquisition of rights in a mining property. They did not cost the purchaser anything up front (and remained a challenge to quantify in most cases), but represented additional upside that the seller and any transferee royalty holder could receive. Often the royalty grant would consist of a single paragraph in a lengthy purchase and sale or joint venture agreement. As properties advanced to production and royalty payments were paid, such one-paragraph provisions gave rise to disputes and disagreements about calculating the royalty and the rights of the holder. As a result, more detailed royalty provisions were developed in the relevant agreements with more comprehensive schedules setting out the terms. Today, royalty agreements form stand-alone documents, and it is not uncommon for such agreements to be as lengthy as, for example, an asset purchase agreement to which it is attached as a schedule.

As royalties took on value of their own, they became assets that holders could sell for valuable consideration. With this realisation came the first royalty companies that purchased portfolios of royalties as their main business model. The business models of these early royalty companies involved the acquisition of existing royalties. By 2005 there were several publicly traded royalty companies worldwide.

Types of royalties

Though a number of different types of royalties exist, most are built on either a revenue-based or profit-based interest in a mining venture. The most common types of royalties are:

- Net smelter returns (NSR) – This type of royalty offers an interest in the proceeds paid to the miner by a smelter or refiner. Generally, the only costs deducted from the royalty are those associated with the transportation of goods and the cost of smelting or refining the product.
- Net profit interests (NPI) – This royalty structure is based on profit after the cost of production is deducted. The specific deductions that will apply are negotiated in the royalty agreement, and vary from project to project. Typically they include operational expenses, such as commercial operation costs and taxes. However, payment of the NPI will often begin only after capital costs have been paid off and the list of applicable deductions is often very diverse, thereby delaying payment (often significantly).
- Gross royalties or gross overriding royalties (GR/GOR) – Unlike both NSRs and NPIs, GRs and GORs are revenue-based royalties that do not typically suffer the same deductions as profit-based ones. These royalties are based on the total revenue from the sale of the commodity, with few, if any deductions.

The evolution of 'pure' royalty financings

In 2012 equity capital markets effectively dried up for mining companies and many were forced to look at alternative sources of financing. The needs of the time had changed and royalty portfolio companies reacted quickly. The next natural evolution to their business model was to purchase new royalties for valuable consideration in the form of an up-front purchase price (some royalty companies even began offering mining companies to pay for the renewal fees of their mining rights in exchange for a royalty thereon). With this development, royalties expanded past being merely part of the consideration in a purchase or joint venture agreement to becoming their own stand-alone financing vehicles. Paying valuable consideration for a royalty naturally meant

that the purchaser was in a position to negotiate more detailed terms and increased rights as a royalty holder, for example:

- What rights did they have to a site visit or audit of the payor's records?
- How the price of the mineral or product was determined and what deductions were reasonable in calculating the payments?
- What restrictions could they impose on the operator?
- What happened if the operator transferred the underlying mining property?
- Could they be granted security for any unpaid royalty payments due to them?

Protecting a royalty interest – royalties under scrutiny

The mining industry for years had an expectation that royalties in many jurisdictions would 'run with the land' and therefore survive a transfer of the underlying property, whether owing to a private transaction or bankruptcy proceeding. Royalties that became valuable assets were worth fighting over and led to many courts considering the relevant legal issues. In the Canadian context, in 2002 the Supreme Court of Canada decision in *Bank of Montreal v Dynex Petroleum Ltd* ([2002] 1 S.C.R. 146) made it reasonably clear that under Canadian law a 'royalty interest' can be an interest in land if (i) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a mere contractual right, and (ii) the interest out of which the royalty is carved is itself an interest in land. Subsequently, court decisions in Canada referred to this two-step test, but because each royalty in question was different, and the relevant laws of each province or territory differed, the analysis sometimes produced different results. In the civil law jurisdiction of Quebec, the Court of Appeal recently declared that 'civil law is a complete system, and care must be taken not to adopt principles from foreign legal systems without questioning their compatibility with our law' (*Anglo Pacific Group PLC v Ernst & Young Inc*, 2013 QCCA 1323). The Court then went on to say, in citing the *Dynex Petroleum* decision of the Supreme Court of Canada, 'that word of caution is required because the appellant seeks to indirectly import certain common law notions applicable to mining royalties' (*Anglo Pacific Group PLC v Ernst & Young Inc*, 2013 QCCA 1323).

The important point to take away is that not all royalties are created equal. This is especially true when looking at the way in which courts and tribunals have dealt with royalties in other countries worldwide. Clearly drafting a royalty agreement in light of the laws of the local jurisdiction is an important first step in creating a royalty that will protect the interests of the royalty holder. In addition, as discussed above, several contractual rights can be built into a royalty agreement to give the holder important rights and to subject the grantor to certain restrictions.

Metal streams

What is a metal stream?

A metal stream is essentially a financing technique structured as a commercial arrangement, namely a long-term contract for the purchase and sale of production from an identified mineral property. As such, in some ways it resembles an offtake arrangement, while in other ways it can be likened to a royalty with some additional features of a debtor/creditor relationship.

Under a stream, the purchaser (typically a specialised streaming company) is granted the right to purchase from time to time a quantity of metal representing a percentage of production from the mine at a significant discount to the spot market price of the metal, all in exchange for an up-front cash payment that constitutes a deposit against purchases to be made under the stream. As the reference mine produces, the purchaser pays the mining company the discounted cash price for metal purchased (ie, per pound or ounce of product). In the early years of the stream, the difference between the prevailing spot price and this discounted cash price is applied to reduce the amount of the upfront cash deposit; once the deposit is exhausted, the purchaser only pays the discounted cash price for the remaining life of the stream. The stream generally is intended to be a long-term obligation of the mining company, often life-of-mine or for a term of 25 years or more.

Streams are a relatively recent innovation in the industry, with the first such transaction having been entered into in 2004. The majority of deals have traditionally been done by a handful of specialised royalty and streaming companies that have built their business models around this type of financing. However, given the substantial number of large, high-value transactions that have been completed in the past five years, the market has seen a number of new entrants. To date, most streams have been in relation to mines in Canada, the United States and Latin America, although in recent years there have been a limited number of deals completed on assets in Africa, Europe and other jurisdictions.

Stream economics and flexibility

The economic and commercial terms of stream arrangements are inherently flexible and can be customised to particular circumstances. This flexibility is evident from a number of features of recent streams, including the following.

The commodity being streamed can be the primary product of the mine or a by-product.

While the first streams were exclusively on precious metals, streams have evolved to apply to a more diverse range of commodities including base metals and even diamonds.

For streams undertaken for the development or expansion of a specific project, the upfront deposit must be used for that project; however, where a stream is on a proven producing asset, the proceeds can be used for any purpose, including to reduce debt.

The terms of the stream typically do not give the purchaser control over operational decisions at the mine, and they generally do not require the mining company to commit to meeting any ongoing financial ratio tests.

The commercial terms of streaming arrangements need to be carefully structured to achieve the tax planning objectives of the parties, since the accounting and tax treatment of the upfront deposit is often critical to the financial viability of the stream. In addition, for mining companies with outstanding debt that are subject to oversight by credit rating agencies such as Standard & Poor's or Moody's, it may be important to ensure that the upfront deposit is not treated as debt or else it may impact on their credit ratings and/or inadvertently results in their being offside their debt covenants.

Royalties and streams compared

Though there is no standardised structure for either royalty or stream agreements, there are many similarities which typify both. There are some significant differences to consider when deciding which to pursue.

Similarities	Differences
Upfront payment for future consideration.	Royalties typically paid in cash, streams involve deliveries of metal or metal credits.
Long-term obligation.	A stream provides ongoing cash flow to the producer after payment of the up-front deposit; a royalty does not.
Both can be the subject of a mortgage of the underlying property or other security interest on the project assets, or a parent guarantee.	A stream involves delivery of fungible metal with reference to production from a particular mine, a royalty provides the holder with an interest in actual production from a mine.
Usually no maximum/minimum amounts required to be delivered or paid.	Streams are commodity-specific, royalties can be on all minerals.
Risk/reward allocation is similar, both covenant light for the producer.	Different tax, accounting and rating agency treatment.
Purchaser/holder has little or no input on operational matters at the project.	Royalties are typically structured so as to 'run with the land' in the event of a transfer of the underlying mineral properties; it is generally accepted that streams do not.

Recent developments

In the streaming space, one of the most significant development over the past two or three years has been their use by some of the world's largest mining companies as vehicles to raise funding to repay outstanding debt and ameliorate their balance sheets. In the two-year period from 2015–2016, each of Vale, Glencore, Barrick Gold and Teck Resources sold streams on existing producing assets with up-front

deposits exceeding US$500 million. These deals seem to have been the result of these companies dealing with a 'perfect storm' of high leverage, tight equity and credit markets and limited alternative disposal opportunities, and as a result this concentration of large deals may not repeat itself any time soon. However, their sheer size captured market attention and had the result of bringing streams increasingly into the mainstream consciousness.

At the same time, there seems to be a growing appetite among mining companies to insist on provisions enabling the seller to terminate, in whole or in part, its streaming obligations for a premium. This seems to be evidence that miners are increasingly viewing streams as yet another tool in their financing toolbox that can be adopted as needed, but which can also be unwound when markets change and a shift to other financing opportunities begins to look more attractive.

Looking ahead

As the mining industry begins to slowly recover from the recent turmoil, and with the resurfacing of traditional equity and debt markets, will royalty financings continue to be popular alternative financings for mining companies? Will investors look to creatively tweak the 'standard' royalty or look to newer financing vehicles such as streams? While the use of royalties rose in popularity as an alternative to raising funds in the capital markets, they are likely here to stay not as an alternative but as just another mainstream option in the financing packages available to mining companies.

One way or another, it seems clear that in the current global mining climate, both royalty and stream agreements will doubtless remain key financing options for some time to come.

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Mining in Japan

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Overview

Principal law governing mining activity in Japan

The principal law that regulates the mining industry in Japan is the Mining Law (Law No. 289 of 20 December 1950). The mining right is defined in the Mining Law of Japan as the generic name for the prospecting right and the digging right. It is necessary to obtain a prospecting right to conduct exploratory digging and a digging right to conduct digging for production.

Special treatment of certain types of mineral

The 'Specified Mineral' procedure is different from the one for any other types of minerals. With respect to a Specified Mineral, a tender bid must be conducted for each specified area to be designated by the government, whereby the most competitive applicant will be granted the mining right for such specified area. The Specified Minerals designated under the Mining Law of Japan is as follows:

- oil and combustible natural gas;
- gold ore, silver ore, copper ore, lead ore, bismuth ore, tin ore, antimony ore, mercury ore, zinc ore, iron ore, iron sulfide ore, manganese ore, tungsten ore, molybdenum ore, nickel ore, cobalt ore, uranium ore, thorium ore and barites, which constitute hydrothermal deposits located subsea or beneath the sea;
- copper ore, lead ore, zinc ore, iron ore, manganese ore, tungsten ore, molybdenum ore, nickel ore and cobalt ore, which constitute sedimentary deposits located subsea or beneath the sea; and
- asphalt.

Mining rights for minerals other than Specified Minerals are granted on a first-come first-served basis, whereby the mining right will be granted to the applicant who has lodged the application faster than the other applicants.

Ownership of land and mineral

Regardless of the registration of the mining rights, the surface rights of the land shall be kept by the landowner. On the other hand, minerals are deemed to belong to the nation before they are dug out. However, once they are dug out over the land, the minerals shall become the property of the holder of the relevant mining right, either prospecting right or digging right, as outlined below.

Prospecting right

Reservation of preference of application for a prospecting right

With respect to a Specified Mineral, the most competitive applicant will be granted the prospecting right; accordingly, nothing is 'reserved' by merely submitting the first (or faster) application.

For types of minerals other than Specified Minerals, on the other hand, the applicant with precedence over the land is determined according to the 'time of dispatch of the application'. The time of dispatch of the application is to be proven by certification of the time of the undertaking issued by the post office that delivers the application. If the applicant is the first person to dispatch an application for a prospecting right, the applicant will have precedence over any others for the area, unless and until such application is rejected by the Ministry of Economy, Trade and Industry (METI) thereafter.

Regardless of whether it is a Specified Mineral or not, after the applicant is granted a prospecting right, the applicant will then have precedence over any others for the area pursuant to such prospecting right, as long as such prospecting right remains valid.

Assessment period of application

For a Specified Mineral, a tender bid period (eg, six months) is designated by the government, after which each application is assessed. The period for assessing the application for the Specified Mineral depends on the situation. For minerals other than the Specified Mineral, on the other hand, METI's standard review period is around six months, in addition to the statutory consultation with local government taking around three months; therefore, the standard period for assessment of an application for prospecting right is nine months in total.

Review process of application

The items to be reviewed by METI with respect to an application for a prospecting right are the same both for the Specified Mineral and other types of minerals. No mining right, either prospecting or digging right, can be granted unless the applicant is a Japanese national or a Japanese corporation. As long as the applicant is a Japanese corporation, however, the shareholder thereof may be a foreigner (it can be a foreign-controlled entity).

Subject to these conditions, METI will review, among others, the applicant's financial basis, technical ability and social reliability. The financial basis is verified by looking at the amount of funds necessary to conduct the relevant mining activities and the source of such funds (eg, own funds, group company loan or bank loan), as well as by looking at the applicant's balance sheet and profit or loss statement. Technical ability will be verified by looking at the management structure of the technicians and the experience of each technician, in particular verifying whether the technicians are experienced concerning the type of mineral for which the application is submitted.

Denial of granting a prospecting right

As noted above, for a Specified Mineral, the most competitive applicant will be granted a prospecting right.

For the other types of minerals, whenever the requirements explained in the paragraph above are not satisfied in METI's opinion, the application must be rejected. As explained in the first paragraph of this section, the applicant will lose precedence if its application is rejected by METI. There are two ways in which the applicant can appeal against such rejection: appeal against METI itself; or sue METI before the court.

Minimum work obligation upon granting of a prospecting right

There is no requirement for minimum work obligation or expenditure upon the applicant is granted a prospecting right. However, the holder of the prospecting right has to begin some exploratory digging work within six months of the prospecting right being granted. The meaning of 'begin the exploratory digging work' will be determined based on the situation; but one of the benchmarks is whether the work set out in the operational plan for the planned mining activities – which must be submitted to METI – has been commenced.

Negotiation with landowner

In principle, this depends on the individual negotiation with the landowner. If the individual negotiation is not successful, the holder of a

mining right can seek METI's permission to enter the land without the landowner's approval.

Extension of tenure of prospecting right
A holder of a prospecting right can extend the prospecting right by two years just twice, which means the duration of the prospecting right may be six years in total as a maximum. However, the prospecting right for oil and combustible natural gas is valid for four years, extendable twice (those obtained before the amendment of the Mining Law in 2012 are valid for two years, extendable three times).

In any case mentioned in the preceding paragraph, the holder of prospecting right must satisfy the following requirements in order to extend the prospecting right:

- he or she must demonstrate that it has diligently explored the minerals;
- it is necessary to continue the exploration activity to confirm the status of the mineral deposit; and
- the prospecting right's holder has paid the mining lot tax.

Taxation related to prospecting right
There are two types of Japanese local tax on mining activities, whereas there is no national tax.

A mining lot tax is imposed proportionate to the size of the mining area for which the mining right is granted (either a prospecting right or digging right).

A mineral product tax is imposed proportionate to the amount of the minerals produced. As far as there is any production of minerals, the mineral product tax will be imposed even if only the prospecting right is granted.

Digging right
Conversion from a prospecting right to a digging right
As mentioned above, for the Specified Mineral, the most competitive applicant will be granted the digging right; accordingly, no other applicant will be granted the same right for the same specified area.

For the other types of minerals, in order to apply for a digging right the applicant must demonstrate that it has found the mineral deposit and it makes commercial sense to dig for the minerals, given the amount and quality thereof. There is no statutory system under the Japanese Mining Law to convert a prospecting right into a digging right automatically; however, the applicant can maintain precedence over the mining area by applying a digging right while its prospecting right is valid.

Review process of application for a digging right
The review process of the application for a digging right is almost the same as the one for a prospecting right. However, in case of application for a digging right, the applicant must submit an explanatory document outlining the location, strike, dip, thickness and any other information regarding the status of the mineral deposit discovered under the prospecting right.

Denial of granting digging right
The same as for the prospecting right.

Minimum work obligation upon granting of digging right
This is the same as for the prospecting right. The applicant must commence the work set out in the operation plan for the purpose of digging the minerals within six months of the digging right being granted, whether it is construction of production facilities or any other digging activities.

Negotiation with landowner
The same as for prospecting rights.

Tenure of digging right
Unlike the prospecting right, there is no tenure for the digging right, which lasts forever after the digging right is registered in the official mining registry. However, if the digging right's holder discontinues digging activity for over one year, the digging right may be revoked at METI's discretion.

Recent developments in the Mining Law
In 2011, the Japanese government discussed how to procure minerals such as oil and gas, and methane hydrate, given the recent trend towards 'resource nationalism' arising in oil-producing countries. To address this problem, the amendment to the Mining Law was effectuated in January 2012, under which the Specified Mineral regime noted above was introduced, whereby the most competitive applicant will be granted a mining right for a Specified Mineral such as oil and gas.

Under the Mining Law as amended in 2012, the Japanese government was scheduled to examine the enforcement of, and any other situation around, the amended Mining Law five years after the amendment, which is January 2017. The government is supposed to discuss and take any actions as necessary as a result of such examination.

Given the situation above, in 2016 the interim report prepared by METI's task force (the Interim Report) noted, as a substantial issue with respect to the Mining Law, that any legal system must be established whereby private companies with more financial and technical capability, including foreign companies, are likely to participate in the mining activities in Japan, an issue that is due to be discussed in more depth in 2017, according to the Interim Report.

The Interim Report also noted that:

> *it is clear that the Specified Mineral system, which was introduced in the 2012 amendment law, has not been sufficiently utilised, given that the specified area designated so far is only one in the onshore area and zero in the offshore area. The reason why would be the fact that there are so many pending applications in the offshore area which have been lodged but not yet been approved (nor denied). No specified area under the new Mining Law can be designated over such area for which any application has been pending in such a way.*

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As such, this kind of 'pending application' problem must be solved as soon as possible, according to the Interim Report.

In addition, the Interim Report also pointed out the problem of 'sequential development', whereby a holder of a mining right prioritises the development of the surrounding mining areas, while he or she makes leaves pending the development of the area for which he or she has been granted a mining right. This kind of 'sequential development' logic has been frequently used as an excuse for certain mining rightholders to stall the development of a mining area. The Interim Report suggests that the requirement for approval of the postponement or discontinuation of development of a mining area should be reconsidered, for instance, to strengthen the assessment of records of actual activity in such surrounding areas, which the holder of a mining right is claiming as the reason for his or her wish to postpone or discontinue mining activities there.

Whoever wishes to undertake mining activities in Japan must be careful about the above-mentioned movement towards further amendment to the Mining Law and the related discussion by the Japanese government.

Latin America overview

Florencia Heredia and Maria Paula Terrel
HOLT Abogados

Latin America continues to be a relevant jurisdiction for mining investments. In spite of the down cycle and difficulties faced by the industry, the region still remains attractive and certainly a part of the world to continue watching.

With abundant strategic natural resources, it has been the target of much foreign direct investments in recent times. In a complex global economy, considering Brexit and the changes in the US after the elections, to name but a few events, many see this region as one with a promise of growth.

Economic and political variations have always characterised the region and this has certainly played a role in the amount and speed of investments that Latin America has received, particularly in long-term activities such as mining and energy.

Some countries have a track record of stronger institutions, while others still show weak agencies and episodes of low-quality institutionalisation. This notwithstanding, it can be stated that the region has improved substantially and has come a long way, evolving from economic instability to a more reliable economic and political framework.

Along these lines, the region started a process of shifting from populist-oriented governments to a more moderate business-oriented environment (eg, Colombia, Argentina with President Macri's election and Peru with Kuczynski's election).

In parallel to these political trends and shifts, the down cycle in the commodities and mineral prices, and scarce access to financing, have resulted in a substantial decrease in exploration over the whole region and in addition budget reductions in most of the mining companies have obliged companies to focus primarily on more efficient and fewer operations. The exception to this trend has been lithium exploration, which has substantially increased in the 'lithium triangle' comprising Bolivia, Chile and Argentina during 2016 and remains steady in 2017. If predictions about the use and demand for electric cars and battery usage become reality, we will certainly see a substantial increase in lithium production, which will necessarily result in investments in the construction and operation of processing plants.

Regarding the mining legal framework, Latin America has a long-standing tradition of mining legislation in most of the countries, with a concession system regime based generally in the public utility of the activity. Natural resources belong to the state (either federal or provincial depending on the political organisation of the country) and are granted to particulars through the granting of an administrative law concession. During the 1990s most Latin American countries modernised their legal frameworks, which mainly aimed at including foreign investor-friendly legislation to attract long-term investments in the sector. These regimes proved to be quite successful during that decade. In recent years, more jurisdictions have started to add to this trend of legislative reforms to promote the sector, one notable example being Ecuador.

In parallel, an awareness of sustainable development started to grow and to coexist with the mining sector.

The current trend is relates more to the identification and impacts of the benefits that the mining sector can bring to communities and how such can effectively transform the lives of the communities and stakeholders involved. These issues are indeed at the heart of the discussion and play a crucial role in any project to be developed.

The mining industry faces big challenges all around the world and Latin America is certainly no exception. With projects located in remote areas, as well as others near more populated regions, the interaction and joint work of government, companies and communities has become the new norm.

Specific aspects for analysis

In spite of the industry situation, and even when mining is still running slowly, it could be stated that in general terms the mining sector has grown in some of the traditional mining countries, such as Peru and also in other non-traditional mining-oriented countries, for example, Argentina regarding lithium, and new players are starting to be included in the region (eg, Ecuador and Panama with Cobre Panama – one of the largest open pit copper projects – owned as of 2013 by First Quantum Minerals).

When investing in the mining sector in Latin America, there are some aspects that may vary from country to country and that can become quite relevant to understanding the business environment, legal implications and social perceptions. All those factors are to be considered and weighed up when deciding upon an investment.

Federal and unitary/centralised states

The political organisation of a country represents the way the country is constitutionally organised and how the territory is divided and governed. In this respect, certain countries have a federal organisation whereby there is a federal government that coexists with provincial governments and the sphere of power and competence is mainly set by the constitution.

The main Latin American countries with a federal organisation are Argentina, Brazil and Mexico. On the other hand, there are other countries that have a centralised organisation, this meaning a central government and certain territorial decentralisation, although main competence and power lies within the central government. Examples of this kind of organisation would be Chile, Peru and Colombia, although each with differences.

This difference in the political organisation of the countries is highly relevant, especially in the natural resources sector. The domain of the resources belongs to the state as traditionally this has been the historic concept in all Latin American legal regimes. Therefore, natural resources originally belong to the provincial states (provinces or states in a federal organisation) or to the central state. This is no small difference, since the granting authority for mining concession will be vested in the provinces or states or the central state, as the case may be.

Provinces or states within a federal country usually have their own constitution and legislation, notwithstanding, in certain areas they would also be bound by federal laws. Sometimes these boundaries are not clear. However, and apart from specific legal considerations, the main impact on natural resources is the power to rule and decide on the specific policies related to the mining industry, even within the scope of a federal or national resources policy.

In recent times, this has become a major difference in some countries (eg, Argentina, for which the Fraser Institute in its Investments Attractiveness Index began considering the investment environment in the country, in particular examining mining provinces).

Countries with a federal organisation have, in a way, proven to be more complex to deal with, since mining policy may differ within the boundaries of the same country.

National mining companies

Another feature interesting to consider is the fact that in certain countries (eg, Chile and Peru), the existence of national mining companies and mining companies owned by local investors has played a significant role in the approach to the sector. Codelco and the Luksic Group in Chile, or Hochschild in Peru would be examples of national companies in the sector.

This is a fact acknowledged by researchers and poll consultants, although opinions are not unanimous as to how this may affect the country's mining perception by the general population.

This notwithstanding, it is a fact that communities have shown, in recent years, that the general perception of mining is that it is mainly conducted by foreign companies that take away from the country a non-renewable resource, owned by the people, and relevant for future generations. In our view, the real issues lie in the effective benefits that mining projects can provide in the near and long term for the impacted communities even after the closure of the mine regardless of who is exploiting the resources or has access to the profits. This would explain why certain countries where the state, either national or provincial, created national mining companies (eg, YMAD in the province of Catamarca in Argentina) has not always been successful per se.

Mining public policy and state interaction

Countries that have shown a long-term and steady mining policy have seen many results. Chile is certainly the best example of this statement. Countries that have balanced economies and stable political and legal frameworks are proven to be the ones considered for investors over others that lack these features. In this sense, the public policies that governments establish and that the state, as such, honours, would be the main drivers to attract investments in the mining sector. Policies that promote a sector and are sustained and successful throughout different governments' terms are a key factor.

In addition, the different legal frameworks used to regulate activity may impact the way long-term investments settle. Legal regimes that provide for a more discretionary role of the granting authority seem to be less reliable in the view of investors when considering the country as a potential target.

In summary, the way the state, through its different agencies and bodies, interacts and intervenes in the sector is crucial. The existence of due controls, compliance with the laws and the correct exercise of the faculties and discretionary power acknowledged by law is a guarantee for investors and for the community's confidence in the system.

Communities, indigenous peoples and social conflict – perception of the industry

As part of the evolution and development of environmental and human rights international law, participation of communities gained a significant role in Latin America. Many laws started to acknowledge this right (which derived from various concepts), especially the consultation scheme it utilised. Today, even when most of the countries have included consultation as a key concept and right in the extractives industries, there are still many areas of uncertainty in terms of procedure. When and how to conduct consultation proceedings is not always crystal clear.

Latin America has never been a calm region in terms of social conflict and its history gives evidence to this statement. However, today the region has found much stability with the exception of certain countries (eg, Venezuela).

Causes for social conflict may vary substantially from country to country. Mining may be one of these causes in certain countries (eg, Peru and Colombia, where informal mining and other factors play a significant role).

In recent years and depending on the country, the issues related to indigenous peoples and their interaction with the mining sector have also played a significant role.

Environmental protection and water resources feature highest on the agenda of all communities as regards the mining sector. Accidents that may occur in the industry (eg, the Veladero spill in the province of San Juan, Argentina or the Samarco case in Brazil), do not help to build confidence within communities and therefore reinforce the negative perceptions of the industry.

Effective benefits that include basic infrastructure and, in general terms, the improvement of the quality of life of those communities impacted by mining projects, would erase much of the grounds for social unrest and conflict.

In line with this and in more recent times, there is a trend towards territorial zoning that would identify the specific mining areas to be developed in accordance with a sustainable development plan agreed with the community.

A brief review of the situation in some Latin American countries follows, in alphabetical order.

Argentina

With a promotional regime enacted in the 1990s, which attracted large-scale mining investors, Argentina gained a position within the countries with mining activity in the region, for the first time. However, exchange control restrictions as well as other discouraging measures of recent years removed the country from the consideration of mining investors.

The new government of President Macri immediately issued policies that included the removal of most of the restrictions for exchange controls, other macroeconomic measures, the holdouts settlement and the abrogation of the export tax for the main minerals, making the country start to look attractive for many sectors including mining.

There has been an increase in lithium exploration and deals during 2016 and continuing in 2017 in the north-west of the country. While the lithium market is quite specific and particular, it is expected that this trend will be followed in connection with other minerals, specifically gold, copper and silver for which the country has a major potential, and as the markets for financing and the prices start to ramp up. First Quantum's Taca Taca copper project in the province of Salta continues to be one of the promising projects in the country.

Repeated spills in the Veladero project owned by Barrick have caused much concern and new protocols for environmental controls and precautionary measures are being analysed.

Argentina is a very agriculture-oriented country, particularly with regards to cattle, and whether it could become a mining country remains in question. However, there is no doubt about the geological and human potential that the country possesses, which, in conjunction with adequate public policies both at provincial and federal levels, could help develop the mining sector and contribute significantly towards the country's economy. In this regard, the Macri administration is working to enact the New Mining Federal Agreement, which recreates the federal agreement of the nineties, though in a new framework that aims to harmonise the mining conditions and environment in the provinces. This new agreement is expected to be passed by the National Congress and provincial legislature during this year.

Brazil

In spite of the iron ore market's cyclical difficulties, Brazil, the industrial giant of Latin America, still focuses on this mineral and the existing reserves in view of an increasing future demand from Asian countries. However, companies have had to adjust to the market situation and reduce costs in all aspects of operation and, consequently, also disinvest in certain areas.

Still, Brazil has extensive areas to be explored, with potential discoveries to be made and certainly remains a strong mining jurisdiction. Infrastructure in such a vast region is an issue that certainly needs investment and modernisation; some are of the opinion that this area could attract investment with the creation of public and private partnerships. After a major political crisis, the current government has a much more pro business and non-interventionist approach in general and specifically towards the mining sector.

In past years there was much discussion about a mining code reform, which was finally not passed. However, the current government is working on modernising and updating the Mining Code.

A major environmental incident was highlighted in 2016: the Samarco incident that caused the destruction of a small town. A special entity (Fundacao Renova) was created in order to restore the affected areas and the communities that suffered as a result of the incident. There are a number of court proceedings in place that need to be resolved.

Brazil is a big player in Latin America, and is a country with many unexplored areas that most probably will continue to be included on a shortlist for investors. Existing relevant projects can be quoted as an example of the activity in the sector, for example, Expansao de

Minas-Rio, Anglo American; Tocantinzinho, a gold project owned by Eldorado Gold; Volta Grande, a gold project owned by Belo Sun.

Chile

Chile is without any doubt 'the mining country' in Latin America and has been for a number of decades. As of 1974, with the enactment of the Foreign Investment Statute regulation to attract foreign investments, the country has shown a rising growth curve in the mining sector, although with a slower pace over the past few years.

Mining is part of the Chilean identity and national sentiment. Codelco, the national copper giant, has been key to building and maintaining this sentiment. In addition, due to the history of the sector in the country, mostly related to policies to promote and foster investments, local mining companies have emerged in the past years. Having consolidated their position in the country they have embarked on a path to internationalisation. The Luksic family with the Antofagasta Group and Lundin are examples of such companies.

One of the main factors for Chile, being host to so many investments, both foreign and local, lies in its steady and consistent mining policy and legal framework, which has lasted for many years. The country has been able to build confidence and respect by honouring its laws and policies.

A prolonged strike by the employees of the Escondida mine, the world's largest copper mine owned by BHP Billiton, was undoubtedly a topic of world news. The conflict was resolved successfully and the mine returned to operation.

In recent times, environmental issues and indigenous peoples' rights have become aggressively part of the agenda for mining projects and the government. This is probably a trend that will continue rising and certain developments may be seen in this regard. It is interesting to note is that what has actually somehow changed is the perception of people of the mining industry, which is still a big part of the national identity.

In terms of projects, Freeport McMoran has announced the expansion of El Abra project and BHP is working towards a desalination plant project in Antofagasta.

Colombia

This country is a success story from a general perspective. It has gone through many changes in the past decade, transitioning from a very difficult jurisdiction to a quite attractive region for mining investors. For many years it was impossible to avoid considering guerrillas and drug cartels when referring to Colombia. Fortunately, for some time now, the situation has changed significantly and the country ranks quite high in investors' surveys.

Abundant mining resources and political and economic stability are key factors promoting the sector. A National Development Plan (2010–2014) was launched, and mining and energy were considered relevant engines for the growth of the economy.

As in many countries nowadays, environmental and social aspects are essential components of mining projects playing a more significant role, in particular indigenous peoples rights and their interaction with mining projects are to be considered.

Specifically in the case of Colombia, reserve areas where mining is restricted or prohibited are taken seriously and a territorial zoning has consequently been established. During 2016 the 'paramps' reserve protected areas, were finally identified and determined. Within the areas identified as 'paramos' no environmental licences for mining projects are to be granted.

A very relevant change for the sector, was the ruling by the Constitutional Court establishing that each municipality can decide, based on public referenda, whether to allow mining activities within their jurisdiction. This ruling confirmed the mechanism already used in the Cajamarca municipality where the La Colosa project owned by Ango Gold was banned after a public referendum that resulted in a 97 per cent vote against it.

Mexico

Mexico is a leading world producer in silver and also has a rich geology. Around 70 per cent of mining exploration concessions in Mexico are vested in foreign investors, mainly Canadian companies. This notwithstanding, the country lost some of its mining attractiveness owing to the energy reform approved mid-2014 where mining became subordinate to the extraction and exploitation of hydrocarbons, and a new taxation regime for minerals was created. Today the government is working to improve these conditions

Due to the low prices in the mining industry, activity has decreased in general overall. Mexico has such geological potential and will probably remain to be considered by investors despite the factors mentioned above. The gold project Limon-Los Guajes of Torex Gold is an example.

The states of Sonora, Chihuahua, Durango, Sinaloa, Zacatecas, Jalisto, Guerrero and Oaxaca host the main and biggest gold mines in the country.

As a general trend, social and environmental matters are playing a key role.

Ecuador

Ecuador is a country with a huge mining potential since approximately only 10 per cent of its territory has been explored so far. This fact alone undoubtedly has made the country a good prospect for mining investors.

Ecuador has gone through a process of legislative reforms to include and promote the mining sector in the country and in the governmental agenda. In recent years an investments stability regime was implemented together with the necessary tax incentives to make the country competitive. In addition, the Ministry of Mining was created in 2015, which has given an important relevance to the area.

As a result of this state policy, a number of exploration projects are currently in place, the highlight being the Lundin project 'Fruta del Norte', which will probably be the chief one of many to come.

Peru

Peru is a country with a strong mining tradition and, together with Chile, represents one of the two best established mining jurisdictions in Latin America. With the reforms conducted in the 1990s mainly with the enactment of a promotional regime (Promotion of Investment in Mining Act 1991) and amendments to the General Mining Law of 1992, investments in the mining sector started to grow significantly. In fact, even when most countries started to mandatorily increase their tax burden on mining projects, as of approximately 2010, in order to have a greater share in profits, in Peru the government took the path of agreeing an increase with the private sector and consequently minimised the impact or alteration of tax stability conditions granted to projects.

Being a country rich in many resources, mining has an extremely relevant role in the country's economy and it could be further stated that it is one of the engines of its economic growth. Antamina and Cerro Verde are two of the country's main projects.

However, mining is an industry that may awake social conflict and Peru is not an exception to this statement. Actually, and according to many analysts, most of the causes for social unrest lie in the mining sector and a number of mining projects have been paralysed due to this factor. Causes for these social conflicts are related to economic, labour, social and environmental issues and among them informal mining has a key role as well as other industries or sources of labour manpower.

It is interesting that initiatives related to community development funds in certain regions and projects have not always been effective in addressing communities' needs and expectations and also show that they have not been well handled for various reasons.

The newly elected President Kuczynski and his administration are continuing and improving the policies to develop the mining sector in all areas possible of the country.

The China factor

China has become a big player in the natural resources sector and Latin America is one of the targets for investments of Chinese companies. China exports manufactures to Latin America, and Latin America imports commodities to China. To some extent this could also result in an opportunity for more cooperation and innovation. The China-Latin American relationship could potentially result in a huge capital injection for the region.

Cultural differences certainly play a role, and with time such differences may be overcome and transformed to opportunities. Even when China has already invested in the mining sector and has presence in some countries (eg, Peru), this relationship is expected to continue evolving and will be interesting to watch. Recent evidence of this trend is the joint venture announced in the past few months between Barrick

and Shandong for the Veladero and Pascua Lama projects, both located in the province of San Juan, Argentina and the latter also being a binational project with Chile.

Concluding remarks

Mining can be a very relevant contributor to the economy of Latin America. The mining industry can provide not only materials essential for all sectors of the economy of a country, but also employment and governmental revenues.

Latin America represents approximately 48 per cent of the world's copper reserves, 50 per cent of the world's silver reserves, more than 60 per cent of the world's lithium reserves, 20 per cent of the gold reserves and an undetermined percentage of the world's potash reserves.

These approximate figures give an idea of the huge geological potential that the region has. In addition and, despite certain issues in particular countries, there is also a good environment for long-term investment.

Many will argue that certain reforms should be addressed in order to adapt and adjust to more current times, and therefore make the countries more competitive. This is very true. The way forward should include adaptations and improvements in areas such as environmental, taxation, public transparency initiatives, concession regime and code innovation, the closure of mines and its related impact on communities, as well as other more specific local measures.

The new governments in Latin America are showing good evidence of taking this route and aiming to promote mining policies that contemplate the sensitive issues that the extractive sector entail.

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Angola

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Angola is one of the richest countries in the world in natural resources, such as diamonds, iron ore, phosphates, copper, gold and manganese, among other valuable natural resources. However, its true mineral potential is yet to be unlocked, despite the significant exploration and mining projects already implemented, in particular in the diamond subsector.

Once a major iron ore, gold and copper producer, Angola's mineral development was greatly impaired after the independence in 1975 (save for diamond mining) by almost 30 years of civil war, which ended in 2002. Angola has since resumed mineral mining. In 2007, mining activity represented 5 per cent of Angola's GDP. In 2009 Angola's government approved a National Geology Plan (PLANAGEO) in a clear effort to diversify its mining activity. Angolan supervisory authorities repeatedly reinforced this commitment, which became a top priority in the 2013–2017 National Development Plan.

According to the World Bank, Angola's second-largest export is diamonds. This strategic focus on the mining sector appears to be the way forward to overcome the economic crisis caused by the drop in oil prices. The Angolan Ministry of Finance has recently agreed on new credit facilities from Chinese Banks for PLANAGEO. The mining sector's role in the future of the country is expected to increase in the short term.

2 What are the target minerals?

A very significant portion of Angola's abundant and varied natural resources remains unexplored. At this point, target minerals include diamonds, gold, iron ore, manganese and copper.

3 Which regions are most active?

The most active or at least most promising regions in terms of mining potential, are Lunda North, Lunda South, Uíge, Huíla, Cuanza-North and Malange.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Angola's legal system is civil law-based.

5 How is the mining industry regulated?

The mining industry is regulated at state level by the Constitution of the Republic of Angola, Law 31/11, of 23 September 2011 (Mining Code) and some additional statutory and regulatory acts.

However, the Angolan mineral regime may be broadly described as a 'contractual system'. Laws and regulations take second place to contracts in the definition of the material terms and conditions, which are often found in the relevant mineral investment contracts granting the mineral rights along with the detailed operational and economic terms and conditions and the conditions for the exercise of the mineral rights.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The Mining Code is the cornerstone of the Angolan mineral regime, and governs the exploration and mining of all minerals. This law regulates exploration, evaluation, reconnaissance, mining and marketing of mineral resources in general. Besides the Mining Code, the following are also relevant for the mining sector:

- Presidential Decree 231/16, of 8 December 2016, which classifies rare metals and rare earth elements as strategic minerals;
- Presidential Decree 163/16, of 29 August 2016, which approves the rough diamonds sale policy;
- Presidential Decree 158/16, of 10 August 2016, which sets forth administrative offences and relevant penalties;
- Presidential Decree 174/15, of 15 September 2015, on regularisation of inactive mineral licences;
- Law 14/15, of 11 August 2015, which approves the Private Investment Law (PIL);
- Order 255/14, of 28 January 2014, of the Ministry of Geology and Mines, on monitoring of posting of bonds and payments of surface fee and royalties under the Mining Code; and
- Order 2/03, of 28 February 2003, of the Central Bank of Angola, which establishes the foreign exchange regime applicable to holders of mineral rights.

The Ministry of Geology and Mines (MGM), the Ministry of Finance and the Angolan Central Bank (BNA) are the main regulatory entities. The national concessionaire for diamonds, rare metals and rare earth elements (Endiama EP), and the national concessionaire for gold (Ferrangol EP) are vested with certain regulatory and supervisory powers in respect of the minerals falling within their authority as Concessionaires. Also noteworthy is the Market Regulation Agency for Gold (set up by Presidential Decree 2/14, of 2 January 2014), whose main purpose is to organise, regulate and supervise the gold market.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Mining Code refers to secondary legislation for the classification of reserves, although that legislation has yet to be enacted. In its absence, mineral resources and mineral reserves should be classified in accordance with internationally accepted methods and systems, to be approved by the MGM.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The state is the owner of all mineral resources according to the Angolan Constitution and the Mining Code, and the state sets forth the terms and conditions for their concession, exploration and mining, which

gives it effective control over the grant of mining rights. Under the Mining Code, state-owned, mixed-ownership or private companies may be granted and enforce mineral rights for exploration and mining.

In contrast to the former Mining Law, the state is entitled to participate in mineral production in consideration for the grant of mineral rights for mining and marketing, through a state-owned company with at least a 10 per cent shareholding in the company to be set up for the mining stage, or a participation (or both) in kind (minerals produced) in a proportion to be defined (the proportion increases directly with the increase in the internal rate of return of the project).

As mentioned in question 6, Endiama EP is the national concessionaire for diamonds, rare metals and rare earth elements, and Ferrangol EP is the national concessionaire for gold. However, both concessionaires may establish unincorporated or incorporated joint ventures with other Angolan or foreign partners for the performance of their operations.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Concession decrees granting mineral rights are published in the Angolan Official Gazette and there is also a public registry for mining companies.

The executive branch produces and compiles all data on mineral resources and mineral reserves, but may authorise other public or private entities to perform those activities in duly justified cases. Private entities wishing to invest in the mining sector may consult available mining data at the MGM; however, no official databases are available online.

Holders of exploration licences must submit periodic reports containing all data and information acquired during the programme on production and marketing of mineral substances and mineral activities carried out in order for the MGM to be able to monitor and inspect mineral activities. Holders must also submit an updated work programme and a forecast of the minimum expenditures to be made in the following year.

Given the statutory requirement of a public tender to grant mineral rights over strategic minerals (ie, diamonds, gold, radioactive minerals, rare metals and rare earth elements), or in areas of high geological potential, MGM is required to publish a list of the areas up for award and the relevant terms of reference in the Angolan Official Gazette or in a widely read newspaper, at least once a year and within question 1.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The Mining Code adopts a single-contract model for the entire mineral process. The former legal framework foresaw two separate contracts for mineral projects: one for exploration, evaluation and reconnaissance, and another for mining and marketing. The Mining Code divides mineral activities into three stages (reconnaissance and exploration, appraisal and mining), explicitly stating that the rules, rights and obligations for the three stages will be set forth in the relevant mineral investment contract.

Under the former legal regime, in addition to spontaneous applications, the state could organise public tenders or issue invitations to tender for the award of exploration licences for one or more previously designated areas. Conversely, the Mining Code clearly prefers public tenders, which can be either optional or compulsory, depending on the geological potential of the relevant area or the 'strategic' classification of the mineral in question.

Minerals are classified as 'strategic' if warranted by their economic importance, use for strategic purposes, or specific technical mining aspects. The mineral's rarity, relevant impact on economic growth, high demand on the international market, significant job creation, importance for state-of-the-art technology, positive influence on the balance of payments or importance to the military industry are deemed as fundamental factors to be weighted by the executive branch when classifying a mineral as strategic. Diamonds, gold and radioactive minerals are expressly defined as strategic minerals in the Mining Code and rare metals and rare earth elements were also recently defined as strategic minerals in Presidential Decree 231/16, of 8 December 2016.

If no public tender is required, mineral reconnaissance, exploration, evaluation, appraisal and mining rights will be granted on a 'first come, first served' basis. The applicant is basically required to demonstrate that it possesses the technical and financial capacities required to carry out the mineral activities for which it has applied.

The following titles are issued for mineral rights:

- exploration title, for the reconnaissance, exploration, evaluation and appraisal of mineral resources;
- mining title, for the mining of mineral resources;
- mineral permit, for the exploration or mining of mineral resources used in civil construction; and
- mineral ticket, for artisanal mining.

Among several other obligations, holders of mineral rights must:

- ensure the hiring of Angolan technicians and workers and provide training and technical and vocational instruction to the employees;
- apply the methods most suited to obtain maximum yield consistent with market economic conditions, environmental protection and sound exploitation of the mineral resources, without carrying out rapacious mining;
- relinquish the initial area covered by the mineral rights for exploration stepwise;
- ensure and enforce compliance with the rules on health and safety at work and the requirements of the environmental impact assessment study;
- report on the impact of the mineral activities on land occupancy and environmental characteristics; and
- repair the damage caused to third parties by the performance of geological–mineral activities.

As noted above, under the single-contract model, all mineral rights (from exploration to marketing, including evaluation, reconnaissance and mining) are formally granted from the outset pursuant to the mineral investment contract. However, the holder of the relevant mineral rights is required to obtain an exploration title – issued at the same time with as the approval and gazetting of the mineral investment contract – and a mining title, as a condition for the exercise of the rights granted to it. The transition of a given mineral project from the exploration stage to the mining stage is basically subject to the preparation and approval of a 'technical, economic and financial viability study'. The mining title is then issued after the study is approved (which must include an environmental impact study), and the holder of the relevant rights can exercise its mining and marketing rights from then on.

11 What is the regime for the renewal and transfer of mineral licences?

Exploration, evaluation and reconnaissance rights may be granted for an initial period of up to five years and extended by successive one-year periods up to a maximum seven years. If the seven-year period proves insufficient to prepare or complete the feasibility study, the holder of the mineral rights may apply for and be granted an exceptional one-year extension.

Mining rights are granted for a period of up to 35 years (which includes the exploration and appraisal stage), extendable by one or more 10-year periods. Holders applying for extension must justify their application by submitting the relevant technical, operational and other grounds. Extensions are only granted if the applicant is not in breach of its legal and contractual obligations.

Mineral rights may be transferred upon specific authorisation from the MGM or the Head of the Executive, as applicable, which is only granted to prospective assignees that meet the same (technical and financial) requirements as the original rights holders. Although mining laws do not specifically address the issue, changes of control of the holders of mineral rights or their parent companies are typically notified to the MGM. No consent or authorisation is legally required per se, but it is an expression of courtesy that will help maintain a sound institutional relationship with the relevant authorities and avoid

charges that the change of control at stake was actually a way of circumventing the authorisation required for the transfer of the relevant mineral rights.

12 What is the typical duration of mining rights?

See question 11 for the duration and extension of mineral rights. The rights' duration notwithstanding, concession contracts may be terminated early and concession titles withdrawn in some instances:

- termination or withdrawal is triggered under specific contractual clauses;
- the project becomes technically or economically unviable;
- breach of legal obligations, contractual obligations or obligations arising from the concession title;
- abandonment, suspension or reduction of the mineral operations, save as provided for in the Mining Code, the title or the contracts;
- suspension of mineral operations due to force majeure events, as defined in the contract or concession title;
- the concession holder is convicted of a crime of aggravated contempt, because it failed to perform acts provided for in the Mining Code or ordered by the relevant authority;
- reconnaissance, exploration, evaluation and appraisal or mining of mineral resources not included in the contract or concession title; and
- performance of the contractual obligations is impossible.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

As a rule, Angolan public entities are not required to be directly or indirectly involved in concessions in Angola under the mining laws and regulations (except as regards the minerals mentioned above (ie, diamonds, rare metals, rare earth elements and gold)). Angolan law does not require local partners in concessions either. Foreign mining companies may be awarded concessions, but local companies (owned by Angolan nationals) also engage in the exploration and mining of minerals. The national concessionaires (Endiama and Ferrangol) may partner with local or foreign entities in connection with mineral projects, as members of unincorporated joint ventures set up for the exploration stage and as shareholders of the companies incorporated for the mining stage.

The award of mineral mining and marketing rights entitles the state to participate in mining concessions. Other than that, there are no industry-specific rules or restrictions on corporate structures, nor are there mandatory participations or ownership interests reserved for national associates. However, preference is to be given to national partners or companies when setting up a business partnership.

Diamond artisanal mining is the exception to the rule: only Angolan citizens are allowed to carry out the relevant mining operations and only Angolan citizens or legal persons whose share capital is majority-held (two-thirds, to be exact) by Angolan citizens may be awarded exploration and mining rights of civil construction minerals and mining rights of mineral-medicinal waters.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Investors are afforded broad legal guarantees:

- the unrestricted right to mine the mineral resources discovered during exploration, except as expressly provided for in the Mining Code or ancillary legislation;
- the right to freely dispose of and market the mining products;
- the right to recover investment expenses incurred during the reconnaissance, exploration, evaluation and appraisal stage from the mining proceeds; and
- the right to be compensated for any losses resulting from actions limiting the exercise of mineral rights, under the law or the mineral investment contract.

The PIL reinforces these guarantees by offering additional protection to foreign investment, namely in matters of expropriation.

In contrast to the former legal framework, which foresaw arbitration in Angola as the proper mechanism to resolve any disputes that could not be resolved amicably between the parties, the Mining Code is silent on the proper venue to resolve disputes, leaving it up to the dispute resolution clauses of mineral investment contracts. Contracting parties tend to include arbitration clauses in their agreements; however, disputes arising from termination of the concession contract or withdrawal of the concession title must be resolved by national courts, and disputes on the significance or insignificance of minerals extracted during the reconnaissance, exploration, evaluation and appraisal stage for purpose of assessment of the relevant tax should be settled by the Minister responsible for the mining sector.

Angola is a signatory of the New York Convention and so international arbitral awards are recognised and enforceable in Angola, provided they are handed down in another contracting state. The Convention will come into force in Angola on 4 June 2017.

The Angolan Constitution states that courts are independent and cannot accept any form of interference from any other public body. Their decisions are final (subject only to appeal) and prevail over other entities' decisions.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Holders of exploration licences or mining titles do not acquire surface rights in relation to the concession areas. If the land belongs to private persons or is in the private domain of the state or of public law corporate bodies, holders of mineral rights will need the consent of the relevant owners or occupants to use or exploit the land, on the terms that may be agreed between the parties. This consent is also required for any geological-mineral investigation works involving use of the land. Consent is presumed given in case of deposit of the annual rent and the provisional bond set forth in the Mining Code.

If the concessionaire fails to reach an agreement with the owners or occupants of the land within the boundaries of any demarcated area during the mining phase it is barred from starting any operations until it either purchases the land or the state expropriates the land for reasons of public interest, pursuant to the law.

Conversely, private owners of a surface right over a certain area are not entitled to carry out exploration or mining activities without first securing the relevant exploration licence or mining title.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

As mentioned in the answers to questions 8 and 13, the state is entitled to participate in the mineral production (either through a minimum 10 per cent shareholding in the company holding the mining rights, a production-sharing mechanism, or a combination of the latter). Endiama is involved in projects in connection with diamonds, rare metals, rare earth elements, and Ferrangol is involved in projects in connection with gold, as members of the relevant unincorporated joint ventures or as shareholders of the companies holding the relevant mineral rights.

The project company is required to establish a legal presence in the country (eg, a subsidiary organised and run under Angolan law, or a local branch of a foreign company), just as any other company wishing to engage in activities that require a physical presence in Angola. The set-up of foreign special-purpose vehicles or registration of any special-purpose vehicle branches in Angola, although not legally prohibited per se, is a practical impossibility in light of state participation requirement.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Mining Code lists mineral investment contracts' termination events and the grounds for withdrawing concession titles and also foresees the possibility of redeeming the concession area for reasons of public utility in the event of discovery of strategic mineral resources or minerals subject to a special framework (whose mining is in the higher interest of the national economy), subject to a fair compensation to the holder of the relevant mineral rights.

The compensation will be calculated on the basis of:

- the amount of the investment made in the exploration, evaluation, reconnaissance and appraisal stage;

- the unrecovered amount of the investment made in the exploration, evaluation, reconnaissance and appraisal stage, in case the project has already moved on to the mining stage; and
- the value of the assets redeemed (including real estate property acquired for the exercise of the mineral rights), the average estimated profit for the next 10 years of mining and the outstanding debts.

18 Are any areas designated as protected areas within your jurisdiction and which (in general terms) are off-limits or specially regulated?

Under the Mining Code, mineral rights may be awarded for areas in the territorial or maritime domain under the jurisdiction of the Republic of Angola that have not been granted for the carrying out of other activities, or that are not allocated to the same. The executive branch may also declare portions of the national territory with considerable mineral potential as 'mineral reserve areas', which will then be restricted in terms of movement of people and goods.

To date, no areas of the Angolan territory have been declared as mineral reserve areas.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Industrial tax

The Mining Code brought the industry-specific industrial tax rate from 40 per cent under the former Mining Law down to 25 per cent. For purposes of determining the taxable income, costs of exploration, evaluation and reconnaissance, contributions to the Mining Development Fund, among others, are considered as tax deductions additional to those provided for in the general tax law.

Royalty (tax on the value of mineral resources)

The Tax Regulations levy a royalty on the value of extracted mineral resources. The tax rates currently in force are as follows: strategic minerals and precious metals and stones – 5 per cent; semi-precious stones – 4 per cent; metallic minerals – 3 per cent; and construction materials of mining origin and other minerals – 2 per cent.

Surface fee

This fee is levied on the concession area awarded and is only payable during the exploration phase. The surface fee value varies according to the size of the concession area, the type of mineral explored and the exploration year in question, and can range from US$2 to US$40 per square kilometre. These amounts are doubled in the event of extension of the exploration period.

Contribution to the Mining Development Fund

The Mining Code establishes a contribution to the Mining Development Fund. However, no such fund has yet been formally established. In spite of this, Angolan authorities have already asked a number of mining companies to pay the contribution, and the companies made the payments.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Investments in the mining sector are covered by the Mining Code and, on a subsidiary basis, the PIL. Tax advantages and incentives are negotiated and set out in the individual mineral investment contract.

Holders of mineral rights subject to industrial tax may obtain tax incentives by way of deductible costs. Tax incentives must be applied for with the Minister of Finance and are subject to an MGM opinion. The application for tax exemptions is discussed and negotiated during the contractual stage of the investment procedure and is attached to the contract, after approval by the negotiations committee and issue of a favourable opinion by the MGM. The negotiations committee is comprised of representatives of the MGM, the national concessionaire (if applicable), the Ministry of Finance (in the event fiscal and customs benefits and exemptions are to be negotiated) and a regulatory authority (should it be created).

Incentives may be granted for the following acts with relevance to the Angolan economy: (i) acquisition of supplemental goods and services on the local market; (ii) carrying out of mineral activities in remote areas; (iii) contribution to the training and development of local human resources; (iv) carrying out of research and development activities in cooperation with Angolan academic and scientific institutions; (v) local processing and dressing of minerals; and (vi) significant contribution to increase exports.

Holders of mineral rights may also apply for and be granted investment premiums (uplift), grace periods for the payment of income tax (whenever they are covered by any of the above-mentioned situations) and any other type of tax incentive provided for by law.

The Executive Branch may also authorise tax and customs exemptions to Angolan companies exclusively engaged in the processing, dressing and cutting of minerals extracted in the country.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is no specific legislation on this matter in Angola, nor are there any tax stabilisation agreements in place. In turn, most (if not all) mineral investment contracts contain specific provisions on stability and supervening circumstances, which may, to a certain extent, protect the investors' rights and interests in this regard.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

Financial commitments on the part of the state are not to be expected even in the absence of any specific provision on the matter, as state participation in the mining and marketing projects (as opposed to exploration projects) is a legal requirement (notably by means of a shareholding interest in the relevant mining companies).

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

No. Gains resulting from the transfer of mineral rights will be taken into consideration when assessing the transferor's liability in terms of industrial tax (corporate income tax). However, a 2 per cent conveyance tax may apply in certain cases.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between duties, royalties and taxes payable by domestic parties and foreign parties.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Mining activities are primarily carried out through locally incorporated companies and branches of foreign corporations. Mining concessions (under which the mining or production phase is developed), however, are usually reserved to companies incorporated under the laws of Angola – though the companies may be entirely foreign-owned. The concept of 'trust' does not exist in and is not recognised by the laws of Angola.

In general, there is little operating difference between a branch and a subsidiary in Angola, the main differences being:

- A subsidiary is a separate legal entity, while a branch has no autonomy from the foreign company that sets it up – namely, its head office.
- The liability of the shareholders of a company is in principle limited to the amount of the company's share capital, while a foreign company is fully responsible for the liabilities arising from the branch activities.
- As the branch and head office are the same legal entity, the company would be governed on corporate matters by one law only: the personal law of the company, typically the one where the company has its registered offices.
- Conversely, corporate documents issued by the foreign company at the head office level (minutes of shareholders' meetings, board resolutions, powers of attorney, etc) will always be subject to a

more cumbersome and expensive procedure, involving translation and several tiers of legalisation.

The costs of registering a branch are broadly similar to those of incorporating a local company, although the latter are slightly higher.

26 Is there a requirement that a local entity be a party to the transaction?

See question 13.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Angola has yet to adhere to any double taxation treaties. The Angolan National Assembly has approved the following bilateral investment treaties between Angola and the following countries: Portugal, Germany, Italy, Namibia, South Africa, Switzerland, the United States, Cuba and Russia.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Private parties generally fund their mining activities in Angola with loans granted by national and foreign banks. There is a stock market in the pipeline and a number of statutes on the matter have been enacted, but it has not been completely set up yet.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Typically, the government does not finance mineral projects; private parties take out loans with banks or funds to fund their operations.

30 Please describe the regime for taking security over mining interests.

The Mining Code expressly provides that mineral rights may be pledged by way of credit security, but only to secure credits contracted by the holder of the relevant mineral rights to finance the activities covered by the concession title. The pledge is created by delivering an authentic copy of the title and the concession contract for the relevant mineral rights to the pledgee.

The holder of the mineral rights does not forfeit possession or the exercise of the mineral rights pledged and must still comply with all its legal and contractual obligations. Mineral rights pledged may not be transferred by the relevant holder, nor encumbered again, without the express prior authorisation of the pledgee.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The Mining Code does not impose specific restrictions on the importation of machinery and equipment or services required in connection with exploration and mining.

In addition, holders of mineral rights benefit from a customs duties exemption on the importation of goods for exclusive and direct use in carrying out mineral exploration, evaluation, reconnaissance, mining and processing operations. The exemption does not cover stamp tax, statistical tax and miscellaneous service fees.

In the interest of protecting local industries, the exemption does not apply if goods of the same or a similar quality (available for delivery within a reasonable delay) and at a price not exceeding by more than 10 per cent the cost of the imported item, are available in Angola.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No standards apply, although there is nothing preventing the parties from applying any standards they may deem appropriate.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Holders of mineral rights are allowed to market the products of mining, in accordance with the conditions set forth in the Mining Code and the provisions of the relevant sale and purchase contracts.

Export of minerals extracted in Angola is subject to licensing by the relevant body of the Ministry of Commerce and to customs clearance by the Customs National Service. The MGM needs to be notified. The relevant entity must issue a certificate of origin for all minerals extracted in and exported from Angola. The importation of any mineral in the national territory is subject to the prior favourable opinion of the MGM. When allowed, such operation is always subject to standard customs clearance under the general terms of the law and to licensing by the Ministry of Commerce. The body responsible for the mining sector is notified of the technical and quantitative data of importations of mineral resources as soon as the relevant operations are carried out, for statistical and monitoring purposes.

Regarding strategic minerals, the executive branch may set up one or more marketing companies, with a view to purchasing minerals directly from the producers, in an open market regime. The executive branch may promote the acquisition of certain types of strategic minerals by the above-mentioned companies if it is required to do so to create a public reserve, guarantee strategic stocks, prevent the fall of market prices or for any other reason of public interest. It should also be highlighted that Angola is party to the Kimberley Process Certification Scheme (KPCS), and has adopted the international system of certification of diamonds for exportation. Under the Mining Code, and for the same reasons that led to the adoption of the KPCS for diamonds, including those stated in United Nations General Assembly Resolution 55/56, a similar certificate of origin should be issued for other strategic minerals that are to be exported.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The foreign exchange regime applicable to mining activities in Angola is set forth in the Mining Code, the BNA Order 2/03 and in certain provisions of the PIL. General foreign exchange law, notably Law 5/97, of 27 June 1997, applies to all matters on which the above statutes are silent, as well as its ancillary regulations and instructions and orders from the BNA.

Subject to the control of the BNA, approval of mineral investment contracts entitles foreign investors to repatriate dividends, pro rata to their investment, provided that they imported no less than US$1 million. Capital operations and import of funds are equally subject to foreign exchange restrictions, even though applicable regimes vary. For example, the governor of the BNA is entitled to make an assessment of whether, in a given period, the requested transfer of funds would result in difficulties in the balance of payments, in which case he or she may impose conditions or suspend the transfer altogether.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Specific environmental requirements may be found in the Mining Code and in a contractual annex to exploration licences and mining titles dealing with environmental impact and recovery. The annex, in particular, covers such areas as environmental impact, preservation, recovery and rehabilitation (the precise regime in each case depending on the scope of the mineral rights awarded). The general framework within which such provisions operate is derived from environmental statutes, most significantly the following:

- the General Environmental Law;
- the Decree on Environmental Impact Assessment;
- the Decree on Environmental Licensing; and
- the Decree on Environmental Audits.

The national and regional sector strategy and programmes in the fields of environment and sustainable development, as well as the

Update and trends

Driven by the need to diversify the Angolan economy, the executive branch remains focused on PLANAGEO's financing and implementation. Development of the mining sector and attraction of foreign investment are the two underlying goals.

Presidential Decree 231/16, of 8 December 2016, is the latest legislative initiative, which opened the 'select strategic minerals club' (diamonds, gold and radioactive minerals) up to rare metals and rare earth elements.

international instruments which Angola has subscribed, including without limitation, the Convention on Biodiversity, the Cartagena Protocol, the Agenda 21, and the International Convention on Waste, also apply to mineral activities.

The relevant regulatory body is the Ministry of Environment.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Projects that by their nature, dimension or location bear upon the environmental and social balance and harmony shall be subject to environmental impact assessment (EIA), which shall be made an integral part of the mineral investment contract. Operations in the mining phase are subject to such requirement.

As regards exploration, evaluation and research activities, much will depend on the activities in each case. Where such research work includes, for instance, the execution of trenches, pits, holes, drilling or perforations, and any work associated with it, the impact upon the environment may be such that an EIA may become legally necessary before the mining phase is reached.

It should also be noted that the granting of environmental licences is subject to the payment of a fee.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The holder of the exploration licence or mining title is liable for any damages caused by geological and mining activities. Penalties may be assessed and the holder is further subject to the obligation to pay damages, regardless of contractual provisions.

Generally, in the mandatory EIA it is already set forth how the closure of the project will be handled from an environmental standpoint as well as the environmental financial charges and the relevant financial guarantee.

Mining titles frequently focus on the actions necessary for recovery and rehabilitation purposes (for example, dismantling and removal of facilities and infrastructures, reforestation, social rehabilitation, watercourse restoration).

Holders of mineral rights are further required to set up a legal reserve for purposes of mine closing and environmental restoration, of an amount corresponding to 5 per cent of the investment.

38 What are the restrictions for building tailings or waste dams?

The above-mentioned EIA must take contain various information, including a waste management plan (along with the assessment of the effects of the project on the environment; the social impact of the projects; the environmental management plan; the environmental monitoring programme; the environmental audits, as well as the respective environmental reports; the environmental restoration programmes; the site abandonment plan; the environmental financial charges; the financial guarantee for the environmental charges; the plans for the use of water; the waste management plans and the control of hazardous substances).

Moreover, holders of mineral rights are especially required:

- to comply with the obligations deriving from the environmental impact study and the environmental management plan, on the terms established therein;
- to take the measures necessary to reduce the formation and propagation of dust, waste and radiation in mining areas and surrounding areas;
- to prevent or eliminate the contamination of waters and soil, using appropriate means to that end;
- not to reduce or in any other way prejudice the normal water supply to populations;
- to carry out mineral operations so as to minimise damage to the soil;
- to reduce the impact of noise and vibrations to acceptable levels as determined by the relevant authorities, when using explosives in the vicinity of settlements;
- not to discharge in the sea, water currents and lagoons contaminant waste which is harmful to human health, wildlife and flora; and
- to inform the authorities of any occurrence which has caused or may cause environmental damage.

The Mining Code contains special rules for the protection of water resources (ie, in the mining process) mineral operators must adopt the following measures for protection of water resources:

(i) build decanting basins for sediments extracted during the ore processing stage, thus avoiding the pollution and/or siltation of the rivers and lagoons;
(ii) create water recycling circuits, so as to allow the reuse of water during the various mineral production stages;
(iii) perform periodic water analysis in various spots of the rivers existing within the concession, in order to allow for its quality to be controlled; and
(iv) keep updated records with information relating to (i), (ii) and (iii) above.

Finally, a technical manager must exist in each mining concession, who is entrusted with the technical responsibility for the safety of the mine under his or her supervision, for the technical conditions for the mining thereof and for the proper execution of the mining plan.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Further to the specific provisions in the Mining Code, Angolan General Labour Law (Law 7/15, of 15 June 2015) contains the key principles, rules, requirements and procedures applicable to employment in the mining industry. There is also a fairly extensive number of ancillary statutes and regulations to consider. The principal regulatory body is the Ministry of Public Administration, Employment and Social Security.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Apart from environmental rules applicable to all industries and the rules mentioned in question 38, there are no specific rules on recycling mining waste products. There are also no specific titles to explore and exploit mining waste in tailings and waste piles.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Holders of mineral rights must employ Angolan individuals over expatriates, preferably members of local communities.

The general principle under Presidential Decree 43/17, of 6 March 2017, is that at least 70 per cent of the workforce of an Angolan or foreign employer that employs more than five workers must be Angolan nationals. This principle is considered by the Angolan authorities as the minimum standard for the structuring of a company's workforce. Therefore, only 30 per cent can be foreign, non-resident employees.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Angola has no specific legislation on the matter.

The Mining Code has a number of provisions on the rights of local communities residing in areas where mineral activities are to be carried out, including the right to be consulted during the preparation of the EIA, and prior to any decisions being made that could affect their living conditions or rights. Such consultation is absolutely mandatory in the event that a mining project is likely to destroy or damage any assets or cultural or historical heritage belonging to the local community as a whole. Holders of mineral rights must relocate, at their expense, any local community that is displaced by reason of the mineral operations, and all traditions, customs and practices of local communities must be taken into account in the relocation process.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Angola has no specific legislation on the matter.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Angola has no specific legislation on the matter.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Corruption is specifically addressed in a few statutes in Angola, such as the Law on the Criminalization of the Infractions relating to Money Laundering (Law 3/14, of 10 February 2014), and the Public Probity Law (Law 3/10, of 29 March 2010). There are also scattered provisions in the Criminal Code, the Customs Code and Public Procurement Law.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes. Particular attention is paid to the United States Foreign Corrupt Practices Act and the United Kingdom Bribery Act.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

No.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

As mentioned in question 13, the only restrictions relate to mineral rights for diamond artisanal production, which may only be granted to Angolan citizens, and those relating to minerals for civil construction or mining rights of mineral-medicinal waters, which may only be granted to companies organised under Angolan law in which Angolan citizens hold at least two-thirds of the capital.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Besides the bilateral investment treaties mentioned in question 26, bilateral cooperation treaties for the mining sector were entered into with Cuba (Presidential Decree 91/14, of 25 April 2014), Mozambique (Resolution 90/09, of 6 October 2009), Democratic Republic of the Congo (Resolution 8/08, of 21 January 2008) and South Africa (Resolution 33/05, of 5 August 2005).

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining has been a crucial industry for certain provincial jurisdictions and local communities, and is expected to become an important engine of the whole Argentinian economy. The trend and forecasts indicate that the mining sector's overall contribution to the country's GDP will be increased in the coming years, as projects in the portfolio start being developed and new funds from foreign direct investment are allocated to greenfield exploration.

After many years of non-reliable official industry statistical information to be provided, the current administration is committed to producing and publishing credible and reliable economic data soon.

In accordance with the report made in 2014 by Argentina's Chamber of Mining Enterprises, the mining industry has been one of the largest contributors of foreign currency to the country, and represented 5.8 per cent of Argentina's total exports in that year. Mining is still in the early stages of development. As Argentina is an agricultural country, the mining sector only represented 1 per cent of national GDP between 2005 and 2012, and in subsequent years it was reduced owing to the fall in mineral prices. The most important sector is the metallic, followed by industrial minerals and non-metallic minerals. Copper concentrate, together with doré bullion accounts for 90 per cent of revenue of the metallic sector, and about 77 per cent of the total contribution of the mining sector at national level.

2 What are the target minerals?

Argentina's main target minerals are gold, silver, copper (metallic), potash and lithium (non-metallic). In recent years there has been a growing interest in fracking sands, intended to supply the needs of Argentina's flagship shale oil and gas deposit Vaca Muerta. Other targeted minerals include boron, molybdenum, zinc and lead. During 2016 an increasing trend regarding lithium exploration took place and it is expected that the interest in this mineral will continue, Argentina being one of the few countries with rich reserves in this mineral.

3 Which regions are most active?

Most of Argentina's deposits are located in the Andes region (alongside Argentina's west border) and the Deseado massif in the Patagonian province of Santa Cruz.

The most active provinces in mining production are San Juan, Catamarca and Santa Cruz, which host Argentina's largest producing mines. The provinces of San Juan, Salta and Santa Cruz are the most active in mining exploration (early stage and advanced exploration).

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Argentina's legal system is civil law based. Its pillars are the National Constitution (NC) and the National Civil and Commercial Code (NCCC).

5 How is the mining industry regulated?

Argentina is a federal republic, consisting of 23 autonomous provinces and the autonomous city of Buenos Aires, organised under the NC. Each province enacts its own provincial constitution. As a result, the mining industry is regulated at national, provincial and municipal levels.

While the national congress enacts the substantive mining legislation, through the Argentinian Mining Code (AMC) and related legislation, the provinces are empowered to regulate the procedures related thereto (which cannot conflict the substantive legislation). Municipal governments have jurisdiction in permitting related issues.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal law that regulates the mining industry is the AMC, which sets forth the rights, obligations and procedures referring to the exploration, exploitation and use of mineral substances, creating the legal framework that governs the relationship between the state and the miner (through an exploration permit or a mining concession) and between the miner and third parties.

Other key regulations are as follows:

- the provincial mining proceeding codes;
- the Mining Investment Law No. 24,196, as amended by Law No. 25,161 (MIL);
- the Federal Mining Agreement, approved by Law No. 24,228; and
- resolutions 12/2012 and 13/2012 of the National Secretariat of Mining.

Other material regulations which, although not strictly mining in nature, affect the industry, are as follows:

- national and provincial environmental regulations;
- Archaeological and Paleontological Heritage Protection Law No. 25,743;
- foreign exchange regulations;
- border zone restrictions;
- Rural Lands Law No. 26,737; and
- provincial zoning laws.

The provinces are the granting authorities of the mining legal concessions. Depending on the administrative structure of each province, the relevant provincial mining authority may either be a Mining Direction belonging to the provincial administrative branch, or a Mining Court, belonging to the provincial judicial branch.

Major amendments to industry regulation in 2015–2016 are as follows:

- the newly enacted NCCC, which impacts, from different angles, all issues and activities surrounding mining and other industries;
- Law No. 27,111, which raised the value of the mining fee by four times, after being fixed for approximately 20 years (this indirectly impacts the amount of the investment plans that miners are required to submit and comply with, as such are calculated based on the value of the mining fee);
- the elimination of export taxes on mineral concentrates and doré bullion, which levied exports of such minerals in the range of 10 per cent and 5 per cent respectively;
- the lifting and relaxation of many foreign exchange restrictions, which had affected the inflow and outflow of foreign currency into Argentina; and

- the derogation of the province of Santa Cruz's largely questioned 1 per cent tax on real estate mining property, which levied the reserves and resources of provincial-hosted projects that obtained feasibility.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Argentina lacks a specific regulation in this field. Local geologist associations have been lobbying – with the support of professional bars and industry chambers – for the implementation of an Argentinian Code on classification and reporting of mineral resources and mineral reserves, based on the guidelines and standards set forth by the Committee for Mineral Reserves International Reporting Standards.

Notwithstanding the foregoing, since the vast majority of investments in the mining industry are undertaken by foreign companies, the resources and reserves of Argentinian-hosted projects are usually classified and reported by the controlling entities in accordance with the system in force in their place of incorporation or listing (mostly Canada or Australia).

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Provinces are the original owners of the natural resources existing within their territories, although they are not allowed to exploit such resources directly. The relevant mining rights are granted by the provinces to third parties by way of a legal concession.

Once a mining concession is granted, the title holder owns all the in-place deposits within the boundaries of the property, no matter the mineral substance contained therein.

Surface landowners lack proprietary rights over the mineral deposits, which may only be obtained by means of a legal concession. Exception is made with regards to certain types of industrial and non-metallic minerals, in which surface landowners have priority rights or exclusivity rights, depending on the type of mineral.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Law No. 24,466 created a National Database of Geological Information, managed by public entity SEGEMAR, whose mission is to obtain, process and make available to the public all information generated by the geological and geophysical research and exploration activities conducted within the Argentinian territory.

The national government and other national entities, as well as the miners' beneficiaries registered under the MIL are required to periodically supply and source to the database all the mining-geological information produced, with the exception of that which qualifies as confidential.

Even though the information should be publicly available, in practice, access to such may not be direct or straightforward. It is expected that this situation will be improved in the coming years.

In addition, certain provinces make material mining cadastral information available.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The AMC provides for two types of mining rights: exploration permits and mining concessions, both of which are granted on a first come, first served basis.

Exploration permits are exclusive authorisations to explore a certain area during the time and to the extent provided by the AMC. The exploration permit is opposable with regard to third parties, and holders of such will have exclusivity rights to apply for and obtain a mining concession within the area covered by such permit.

Mining concessions grant its titleholder the right to conduct further exploration works after a discovery has taken place, and to exploit all the in-place deposits within the boundaries of the mine. Mining concessions are not subject to a life-term, and therefore, to the extent the titleholder does not incur in any of the concession termination events set forth in the AMC, the concession will last until the extinction of the mineral reserves.

The two essential obligations to keep the title of a mining concession in good standing are the payment of an annual mining fee, and the lodgement of and compliance with an investment plan. Non-compliance with these obligations provides for the termination of the concession.

To obtain an exploration permit, the miner needs to lodge an application including a minimum work plan, an estimation of the investments to be made, and pay a provisional exploration fee. The area shall be free of previous mining rights in force. Mining concessions are granted on mine discoveries (which may or may not have an exploration permit as precedent) and mines that are vacant on account of expired concessions.

11 What is the regime for the renewal and transfer of mineral licences?

Exploration permits are not renewable, and no person can be granted successive permits over the same area within one year from its expiry. Mining concessions are not subject to a life-term, thus they do not need to be renewed.

The transfer of title mining rights (or change of control) is not subject to governmental approval, although certain formalities may apply (ie, public deed in case of surveyed mines). Once the title has been assigned, the transfer documents need to be filed with the authority, which registers such in the public registries for publicity purposes with regard to third parties.

Notwithstanding the foregoing, certain governmental approvals may be required for the transfer (and change of control) with respect to the surface lands.

12 What is the typical duration of mining rights?

As already explained under question 10 mining rights can involve exploration permits and mining concessions. Exploration permits have a limited duration in time and expire according to the AMC regulations since they are intended to allow for an exclusive area and within such mining concessions can be apply for.

Mining concessions do not have a duration in time; they will follow an iter to become a mine that will be in legal existence until the minerals are exhausted.

This notwithstanding, mining concessions can be revoked if the main conditions to keep them are not fulfilled. These conditions – as explained in question 10 – are the annual mining fee payment and the investments plan. Additionally, a mining concession can eventually be revoked if a mine has been inactive for more than four years in accordance with the terms of section 225 of the AMC.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction between the mining rights that may be acquired by domestic or foreign parties. This notwithstanding, foreign companies need to register in Argentina as a local vehicle (incorporation of a branch or as a shareholder of a local company) in order to own mining rights or conduct activities that exceed the threshold of an 'isolated act of commerce'. Also, certain restrictions and prior approvals apply to the acquisition of lands by foreign entities.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The NC provides for a general and comprehensive protection to property rights, stating that it may not be violated and no inhabitant can

be deprived thereof except by virtue of a judgment based on law. Argentina has an independent judicial system, organised under the rule of law and the principle of due process. Depending on the issue discussed, the courts with jurisdiction on the matter may be either national or provincial.

With regards to the enforcement of foreign arbitral awards, Argentina is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Should there be no treaty between Argentina and the relevant jurisdiction, the relevant procedural laws of each province shall apply. For instance, procedural codes usually provide that in order to have an arbitral award recognised and enforced without further discussion of its merits, such must comply with different requirements (ie, the arbitral tribunal must have had valid jurisdiction, the dispute may be validly referred to arbitration under Argentinian laws or the arbitral award must not violate public policy under Argentinian law).

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mining rights form a different property from the land in which the deposits are located, thus title to the mining rights does not entail title to the surface land.

The AMC allows for different kinds of mining easements, such as easement of road, occupation, water use and transport, infrastructure and any other necessary use of land that would allow for an easement placement.

Technically surface rights holders should not be entitled to oppose the request of any easement since such would be based on the public utility of the mining activity. They could only challenge the compensation if considered unsuitable. Therefore, the AMC sets forth certain legal tools in favour of the miner for purposes of achieving access to the surface lands, such as the right to obtain easements (use and occupation, road, water) and even the right to demand the compulsory sale of the surface land. Notwithstanding the foregoing, owing to the complexity of implementing these processes in practical terms, and the increasing reputation and social costs associated, it is always advisable for both parties to reach an agreement.

Also, where the surface lands are state-owned, miners have the right to access such lands and use them without the need of paying any monetary compensation.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The AMC restricts – as a general rule – the government ability to exploit mining rights, although such restriction is not applicable to state-owned entities.

The AMC allows governments (or their state-owned entities) to conduct exploration works within their territory without the need of obtaining a prior permit, and have exclusive areas of special interest for mining prospecting purposes. In such cases the AMC allows private parties to participate in these areas of interest by public tender. The successful bidder of an area may apply for one or more exploration permits or mining concessions within that area, which are to be governed by the general provisions of the AMC, notwithstanding any such further obligation that may be applicable in accordance with the tender rules.

We note that to increase the share in the mining profits, provincial state-owned mining entities have started to show more interest in participating in mining projects developed by private companies. A trend along this line with new joint ventures and associations started a couple of years ago and may still continue based on the general principle of stakeholders' participation. However, the situation of the sector and low mineral prices has had an impact on the government's views and approach to this matter.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The NC provides that expropriation for reasons of public interest must be necessarily established by law and previously indemnified. This constitutional guarantee applies to all significant interests that a human being or a legal entity can possess (including mining rights). Furthermore, section 16 of the AMC provides that mines might be expropriated only for reasons of public interest of a higher level than the privilege recognised to them under section 13 of the AMC, which states that the exploration, exploitation and concession of mines have the status of public benefit.

Law No. 21,499 regulates the procedure applicable to expropriations decided at the national level. According to this regulation, the indemnification for the expropriation only comprises the objective value of the asset or right and those damages that are a direct and immediate consequence thereof. If no settlement agreement is reached on the value of the expropriated property, the matter shall be decided by a judicial court. Provinces have their own expropriation rules, in line with the national ones.

There are no specific rules for valuation and indemnification of expropriated mining rights.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

National Parks Law No. 22,351 prohibits the performing of any kind of economic activity (except tourism) within certain protected areas, located all along the Argentinian territory. Mining activities are specifically prohibited therein, as well as in the establishment of industrial sites. We may also note that there are many areas considered 'protected areas' or 'reserve areas' regulated locally within the boundaries of each province that may allow activities or restrict them in some way (including mining activities); this is a matter that requires a case-by-case analysis.

In addition, National Law No. 26,639 of Minimum Standards for the Preservation of Glaciers and Periglacial Environments establishes a general prohibition rule that bans the development of all those activities that negatively affect the natural condition of glaciers, involving destruction, removal or interference with their progress. Mining exploration and exploitation activities are specifically prohibited.

Special reference must be made to Law No. 3,105 of the Province of Santa Cruz, enacted in 2009, which created an Area of Special Mining Interest (within which it is allowed to conduct mining activities). The law also identifies certain areas that are excluded from the Area of Special Mining Interest Law.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Argentina is organised as a federal country, in which the taxing power is distributed between the national government and the provinces. In addition, municipalities also hold taxing power faculties within a limited scope.

As a general rule, entities carrying on mining activities in Argentina are subject to the general taxation framework applicable to all companies, which comprises income tax, VAT, alternative minimum income tax, gross turnover tax, etc.

With regards to specific duties payable by the mining sector, the provinces, as owners of the mineral resources, are entitled to collect a royalty payment to be calculated as a percentage of the pithead value of the mineral extracted. The MIL capped the royalties to be collected by the provinces at 3 per cent. Provinces that have adhered to the MIL – which most have – are legally committed not to exceed this cap.

Export taxes on mineral concentrates and doré bullion have recently been removed.

It is worth noting that some provinces have been considering increasing the mining royalty, although from a legal perspective, such would require that the relevant province waives its adherence to the MIL. In recent times, provinces had also initiated a trend to create additional taxes or fees in order to participate in a more relevant degree in the benefits of the projects.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The MIL builds a promotional regime that provides for certain tax incentives and benefits for companies duly registered thereunder, which has proven to be especially useful for large-scale mining projects.

The main features and benefits of the MIL are as follows:

- tax stabilisation: 30 years of tax stabilisation;
- cap on royalties: 3 per cent on the pithead value;
- income tax benefits:
  - deductibility benefits: right to deduct each year from their income tax return 100 per cent of the amounts invested in prospecting, special research, mineral and metallurgical tests, pilot plants, applied research and other works performed for the purpose of determining the technical and economic feasibility of a project. In the cases of expansion of existing projects or starting new projects, the above referred deductions may be recognised in the fiscal year in which production commences. In addition, beneficiaries are allowed to deduct provisions of cost to prevent and remedy any environmental damage derived from their activity up to 5 per cent of their operational costs;
  - accelerated depreciation benefits: investments on housing, transportation, construction of plants and equipment in connection with the necessary infrastructure for mining activities (including gas pipelines, transmission lines, roads) may be depreciated within three years, in accordance with certain rules set forth thereto; and
  - capital contributions: any income derived from the contribution of mines and mining rights as payment for the subscription of shares of registered beneficiary companies are exempt from income tax. Such contributions must be maintained on the beneficiary's books for a minimum term of five years, except where otherwise authorised by the National Mining Authority. The relevant capital increase and issue of shares is exempt from stamp taxes;
- VAT benefits: beneficiaries that purchase or import new capital assets or services that are directly or indirectly applied to mining activities may obtain a relief in the financial impact of VAT by means of two special mechanisms:
  - advance VAT reimbursement; or
  - interest-free loan;
- import benefits: exemption on duties and other charges in relation to the import of capital assets associated to local projects; and
- other tax benefits: assets associated to mining projects under the MIL are exempt from alternative minimum presumed income tax.

In addition to the federal advantages, most Argentine provinces foresee the following:

- exemption or reduced gross turnover tax rates on the local commercialisation of minerals;
- export of minerals is not subject to gross turnover tax in any province; and
- stamp tax exemptions.

The scope and extension of each benefit depends on each jurisdiction.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The MIL provides a 30-year tax stability applicable to the project's tax burden in force as at the filing of a feasibility report. The MIL works as a general framework applicable to all mining companies that comply with its requirements. There are no tax stabilisation agreements.

Consequently, the total tax burden applicable to the project at the national, provincial and municipal levels will not be increased as a result of any new tax, duty or charge. The benefit works as a cap, thus if taxes are abrogated or tax rates decreased, stabilised projects will benefit from those changes.

General information exchange regimes and customs duties regulations are likewise included in the law (except for exchange rate, reimbursements and refunding of taxes as a result of exports that are governed by different specific laws). Indirect taxes (eg, VAT and excise taxes) and social security contributions are excluded from the tax stability benefit.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government does not have carry rights in mining projects. Notwithstanding this, it had become common practice in certain provinces that mining rights were awarded to state-owned companies, which in turn enter into farm-out or option agreements with private third parties and retain free carry rights or options over these properties or over the vehicles through which these are held.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of mining rights is subject to capital gains tax, which varies depending on the condition of seller. This tax also applies in case the transfer is accomplished by transferring the shares of the Argentine vehicle.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There are no substantial distinctions between resident and non-resident investors from an Argentine tax perspective. The only factor that could lead to tax differentiation is for business entities or vehicles resident in non-cooperative jurisdictions with tax transparency (as a general rule, this includes those with which Argentina has not got an in-force convention for information exchange or is not in the course of negotiating an international treaty including an information exchange clause).

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

There are different business vehicles available to conduct mining activities under Argentinian law, although the structures most commonly used are the *sociedades anonimas* (SA) (similar to corporations) and branch offices.

The advantages that derive from the use of SAs are related to the shares structure and therefore flexibility in transfer and related arrangements and the isolation of responsibility. In turn, branches enjoy certain advantages over SAs (eg, there is no requirement of having at least two shareholders, neither of having a majority of residents in Argentina to form the board).

The newly enacted NCCC foresees a new type of vehicle, the single shareholder corporation (s*ociedad anónima unipersonal*), which would stand as a good alternative for foreign investors, since only one shareholder is required (in contrast to SAs, which require at least two). Due to certain requirements and costs entailed, these vehicles may not be suitable for small-scale business. Also, intercompany funding may not prove as flexible as in other entities. Given its recent creation, as yet it is uncertain how this vehicle will be accepted by market players.

26 Is there a requirement that a local entity be a party to the transaction?

There is no need for such a requirement, although foreign companies need to register in Argentina as a local vehicle to own mining rights or conduct mining activities.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Argentina has subscribed to over 50 bilateral investment treaties for the reciprocal protection and promotion of investments. If a dispute under these agreements cannot be settled amicably, the national or private company concerned may choose to submit the dispute for resolution in the courts of the party that is a party to the dispute; or for settlement by binding arbitration either at the International Centre for Settlement of Investment Disputes or in accordance with UNCITRAL arbitration rules. The UK, the US, Canada, Australia, Russia and China are some of Argentina's counterparties. Additionally, Argentina is a member of the WTO, has participated as an observer to the Investment Committee of the OECD and is a member of the Multilateral Investment Guarantee Agency.

Argentina has also entered into double taxation treaties with Germany, Australia, Belgium, Bolivia, Brazil, Canada, Chile (already signed, though not in force), Denmark, Spain, Finland, France, Italy, the Netherlands, Norway, the UK, Russia, Sweden and Switzerland. Under these treaties, reduced withholding rates are contemplated for

dividends, royalties, interest and capital gains or business profit clauses for types of income not specifically treated.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Argentina lacks a developed capital market to allow the funding of mining companies.

Provided that most mining companies conducting mining activities in Argentina are controlled by foreign entities, the financing of local projects is mostly obtained by the companies' headquarters in overseas jurisdictions. Usually, exploration activities are funded by equity finance in the Toronto stock exchange (TSX), TSX venture exchange, Australian securities exchange and London's alternative investment market. At a production stage, besides equity finance, corporate debt (by the controlling entities) and project finance have played a role in Argentina's largest producing mines.

Resource-oriented private equity funds as well as streaming and royalty finance companies also provide funding to the sector.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

There are no local agencies or pension funds providing specific financing to the sector. However, certain credit facilities for the acquisition of capital assets may be obtained from the local banking sector.

30 Please describe the regime for taking security over mining interests.

Surveyed mines are considered 'real estate' properties and are therefore capable of being mortgaged. These mortgages comprise related easements and water rights.

Mortgages need to be passed into public deeds and registered with the relevant mining authority.

In cases of exploration permits and mining concessions of mines not yet surveyed, since these do not qualify as real estate properties, it is not legally possible to grant a mortgage over such rights. This notwithstanding, other rights may be granted for purposes of securing these assets (eg, pledges of the local vehicle shares, guarantee trusts, irrevocable powers of attorney).

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

In the past, Argentina had an overall import-restrictive policy (not specifically targeted at the mining industry), but this is gradually being removed and relaxed by the current national administration.

In general terms, there are no specific restrictions on the importation of machinery and equipment or services for the mining industry. This notwithstanding, National Mining Secretariat Resolutions 12 and 13 of 2012 created a framework applicable to mining companies registered under the MIL, aimed at prioritising the sourcing of local products and services. Under this regime, companies are required to report on a quarterly basis to a Mining Technical Assessment Group, their forecasted acquisition of goods and services, and provide evidence when such cannot be acquired locally. The opinion of such body is to be taken into account for the relevant import process.

It should be noted that this regulation was enacted under the restrictive policy of the former national administration, and it is yet uncertain how this will evolve and be applied by the current authorities.

Also, it is worth mentioning that used capital assets are subject to certain import requirements.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no specific standard conditions and agreements covering equipment suppliers that are used in our jurisdiction. However, it is worth noting that there are certain specific mining regulations currently in force that refer to mandatory hiring of freights and acquisition of goods or services to be supplied or provided by local companies.

On 28 May 2012, the Secretary of Mines issued Resolutions 12 and 13, which relate to this matters and aim to encourage the national industry as first supplier for the mining industry. Notwithstanding that both resolutions are being reviewed by the mining authorities, they are still in force, though it can be stated that in practical terms they are being applied in a more flexible way.

Both resolutions aim to establish measures and actions that would stress the process for the substitution of imports and thereby reinforce the national industry. In this sense, these resolutions set forth the obligation for all mining companies registered under the Mining Investments Law regime (MIL) to: (i) hire the services of national freights in order to export minerals and (ii) establish a department of substitution of imports that will interact with the mining authority by way of presenting a schedule of the estimated demand for goods and services.

In addition, the provinces usually have their local procurement regulations which also need to be addressed.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

As a general rule, there are no restrictions on the export of minerals. Exception is made with regards to the export of nuclear minerals, concentrates and derivatives, which enjoy a specific treatment.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The inflow and outflow of funds to and from Argentina is subject to a complex set of foreign exchange (FX) regulations that are subject to constant change. Argentina's current administration has removed and relaxed material FX restrictions. Moreover, the FX policy of the new administration provides for certainty and clarity on regulations and their application.

As a general rule, FX transactions (the purchase, sale and cross-border transfer of foreign currency) in Argentina can only be made in the local FX market upon prior authorisation of the Central Bank, except for those transactions specifically foreseen under the FX regulations that may be conducted without prior authorisation.

There is no restriction on the inflow of funds resulting from capital contributions or indebtedness, although such funds are required to meet a 120-day minimum mandatory waiting period in order to be repatriated. It is worth noting that the current administration has recently removed the 'mandatory deposit', which provided for an interest-free mandatory deposit for 365 calendar days of 30 per cent of the funds transferred into Argentina (unless a specific exemption applied to the case).

With regards to the proceeds from the export of minerals, Argentine residents are required to repatriate to Argentina and sell these proceeds in the local FX market. Nonetheless, companies will be allowed to then repatriate these amounts to their jurisdictions by means of dividends payable by the local vehicle to its shareholders or by servicing intercompany debt, where applicable.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The NC and specific Minimum Standards Laws such as the General Environmental Law No. 25,675 are the main sources of environmental legislation, together with the following:

- the Complementary Title of the Environmental Protection for Mining Activity of the AMC, as amended by Law No. 24,585;
- the Complementary Rules approved in 1996 by the Federal Council of Mining; and
- provincial local procedural regulations.

There are also many other national and provincial environmental protection regulations (eg, on hazardous and industrial wastes, protection

of archeological and paleontological heritage, water effluents and gas emissions, and conservation of natural resources, flora and fauna).

Regarding regulatory and enforcement authorities, according to article 41 of the NC, the national government must issue basic regulations containing minimum standards on environmental protection, natural resources, natural and cultural heritage, biological diversity, and environmental information and education, while the provincial governments must issue the provisions required to complement said basic regulations in order to effectively implement the protection provided by the NC, adapting them to their own environment and development modalities and peculiarities. In this sense, at a national level, the environmental legal framework is administrated by the Ministry of Environment and Sustainable Development. At a provincial level, and regarding the mining industry in particular, the environmental and enforcement authorities are, in certain cases, the mining authorities themselves.

Update and trends

In December 2015, President Macri was elected and consequently in 2016 a new government and administration started its office in our country. Owing to a fundamental change in the policies towards foreign investments, it is expected that investments will arrive in the country and the mining sector will certainly be one of the areas to consider by investors.

In this regard, the new Macri administration is envisioning a new mining policy that intends to harmonise the conditions for mining investments in the different provinces of the country. The Secretary of Mines is working towards the enactment of a new Federal Mining Agreement that could set the fundamentals for this harmonisation process.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

According to the AMC, as amended by Law No. 24,585, prior to the commencement of any of the different phases of mining activity, an environmental impact report (EIR) shall be submitted to the relevant provincial enforcement authority, provided that, until approval has been obtained, no mining activity shall be performed.

The EIR shall be assessed with a technical, scientific and legal administrative process of analysis and assessment and once the process has concluded, the enforcement authority shall issue the environmental impact statement (EIS), containing the terms under which the activity shall be performed in connection with the environment, the community and the authority. In some cases, the environmental authorisation requires summoning the affected community to an obligatory public hearing, although the opinions or objections of the attendants do not force administrative decisions.

The specific procedural rules applicable to the authorisation process, as well as the time it might take to obtain the relevant permit, vary from province to province.

It must also be mentioned that the EIS must be updated – at least every two years – through the filing of a new EIR containing the results of executed environmental actions, as well as the new facts that have been generated.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

According to the AMC, the environmental protection rules established by Law No. 24,585 are applicable to all those activities related to the closure of the mine. However, currently, neither the AMC nor any other national or provincial regulation provides detailed specific rules for closing procedures.

Annex III of the Complementary Rules (which determines the contents of the EIR for the exploitation stage) establishes that an environmental management plan shall include: 'Actions concerning the cessation and abandonment of the exploitation and post-closure monitoring'.

This is the only regulatory disposition related to the closure of mines contained in the AMC and its complementary regulations.

No specific bonds, guarantees or assurances are required. Note, however, that the MIL requires companies to allocate an annual amount to a reserve fund to finance prevention and remediation tasks. The amount of this reserve is left to the decision of the mining company. In addition, as a general requirement foreseen under Law No. 25,675, environmental insurance needs to be taken out by any company conducting activities that might involve a risk to the environment.

38 What are the restrictions for building tailings or waste dams?

The construction and operation of tailings or waste dams are mostly subject to local regulations, which may vary from province to province. In this sense, national regulations contained in the AMC establish certain general principles concerning technical conditions applicable to mining exploitation, though with a low degree of detail. As regards alarm systems and emergency drills, the AMC provides that in the event of an accident or whenever there is reason to fear that a serious accident might occur, the manager of the mining project shall notify the mining authority without delay. The mining authority will then decide the urgent necessary measures to be adopted to eliminate all danger or mitigate existing damages. At the same time, the mining company shall observe its own action plan for environmental contingencies, which shall be submitted and approved as a condition precedent to obtain the relevant environmental permit. Again in this respect, it shall be noted that specific requirements concerning emergency drills and responsibilities related to the rescue of people may vary from province to province, since national rules do not regulate such. Futhermore, it shall be noted that according to the AMC, the relevant mining authority shall visit once a year (at least) the mining projects subject to its jurisdiction and, additionally, when it becomes aware of an accident or of any violation of applicable regulations. Above this minimum, each provincial mining authority has its own inspection schedule that is managed according to its own criteria of opportunity and need.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Health and safety at work in Argentina is governed by Law No. 19,587 and Decree No. 351/1979, as amended and complemented. In addition, the mining industry has specific rules established under Decree No. 249/2007.

Labour Contract Law No. 20,744 is the main source for regulating employer and employees' relationships in Argentina. This law governs the relationships of all workers independently of their nationality and place of execution of the labour agreement as long as the activities are conducted in Argentina.

Other sources of regulation are the NC and applicable international treaties, the Employment Injuries Act and the Collective Bargaining Agreement Act. Local and specific industry collective bargaining agreements should also be considered.

The enforcement authorities of these regulations are the National Superintendence of Work Risks, the National Ministry of Labour, Employment and Social Security and the relevant provincial authorities.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Management of industrial waste products is mainly regulated by Law No. 24,051 of Hazardous Wastes, to which most of the provincial jurisdictions have adhered, and Law No. 25,612 of Integrated Management of Industrial Wastes and Services Activities, which provides the minimum mandatory standards of environmental protection applicable to waste derived from industrial processes or from service-related activities.

There are other relevant environmental provisions such as Law No. 23,922, which adopts the Basel Convention governing cross-border movements of hazardous waste; Law No. 25,018, which provides the minimum standards on management of radioactive waste; Law No. 25,670, which provides the minimum standards on management of polychlorinated biphenyls; Law No. 25,916, which provides the minimum standards on management of household waste; and Law No. 26,011, which adopts the Stockholm Convention on persistent organic pollutants.

Title holders of mining concessions have the right to exploit the wastes generated by the mining exploitation, in compliance with the

applicable environmental rules. Additionally, even when the AMC contains general provisions referring to the possibility of having third parties conducting mining activities over wastes products, we note that this is not common practice and moreover we stress that such provisions were established a century ago for more basic mining operations and may not be appropriate today for large-scale mining projects.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Foreign workers must obtain a residence permit from the Argentine national migrant authorities.

The temporary residence permit for migrant workers is granted for a limited period of time. The applicants of this type of permit must comply with certain conditions, including being sponsored by a local company (which needs to be registered before the RENURE). Nationals of the Southern Common Market (eg, Brazilians) do not need to be sponsored by local companies.

Additionally, certain provinces establish a mandatory minimum threshold of local employees to be hired by mining companies.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are no specific CSR regulations in force at the national level applicable to mining companies. Exception is made regarding those liabilities and obligations foreseen under the general environmental legal framework.

We note that the national mining authority is promoting the creation of an Environmental and Social Responsibility Fund, to be funded with private contributions of 1 per cent of mining exports, payable by the mining companies. No further details regarding the structure and implementation of this fund are available as of this date.

At the local level, is quite common that provincial and municipal governments agree with the mining companies, on a case-by-case basis, the assumption of certain commitments aimed at compensating the affected communities. Also, a trust fund has recently been created by the province of Santa Cruz with the agreement of some of the mining companies operating in the province.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

According to the NC, the National Congress has to guarantee the indigenous peoples of Argentina the ownership of the lands they have been traditionally occupying and their participation in issues related to their natural resources and in other interests affecting them.

Accordingly, the recently enacted NCCC establishes that indigenous communities have the right to possess and own those lands they have traditionally occupied, as well as those other lands that might be adequate and sufficient for human development. Although this right still needs to be further regulated by a special law, it is expected that – following ILO Convention 169 – the exploitation of natural resources that might have an impact on indigenous habitats, would be subject to prior information and consultation of the concerned indigenous communities.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

In 1992 Argentina ratified, through Law No. 24,071, ILO Convention 169 related to Indigenous and Tribal Peoples (1989), and the ratification of the UN Declaration on the Rights of Indigenous Peoples (2007) is expected to take place soon.

Moreover, and as part of soft law, International Finance Corporation performance standards are also guidelines that are being taken into account by exploration and mining companies currently investing in Argentina.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Argentina is a party to the Inter-American Convention against Corruption (ratified by Law No. 24,759) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (ratified by Law No. 25,319).

Law No. 25,188 (the Statute on Ethics in the Exercise of Public Office) was enacted in order to implement the Inter-American Convention against Corruption and the Argentine Criminal Code (as amended by Laws Nos. 25,188 and 25,825) punishes bribery, meeting the standards of the OECD Convention.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Given the extraterritorial reach of anti-bribery and foreign corrupt practices regulations, and the fact that most mining companies conducting mining activities in Argentina are controlled by entities headquartered overseas, market participants – principally major mining companies – have started paying attention to these regulations.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The national government is currently working on the implementation of the EITI.

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Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Argentina does not restrict foreign ownership of mining rights. The Foreign Investments Law No. 21,382 establishes that foreign investors that invest in economic activities in Argentina will have the same rights and obligations that the NC and other laws award to local investors. This notwithstanding, foreign companies need to register in Argentina as a local vehicle to own mining rights.

In addition, Decree-Law No. 15,385/1944, as amended, establishes that the acquisition, rental or lease of real estate properties located within a security zone (mainly borderlands) by foreign companies requires prior governmental approval. Although there is a special exemption for mining permits and concessions, this exemption does not comprise the surface land over which the mining rights are located. Rural Lands Law No. 26,737, as regulated by Decree No. 274/2012, also establishes certain limits to the acquisition or possession of rural lands by foreign investors.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Argentina is signatory of numerous bilateral investment treaties that – as a general rule – are applicable to the mining industry.

Regarding mining in particular, Argentina has ratified a Mining Integration and Complementation Treaty with Chile (which provides special facilities for the development of mining projects located all along the international border, including easy border crossing and a legal framework for tax coordination) and has signed documents for cooperation and technical assistance memorandums with the US, Canada, Russia, China, India, Germany, Korea, Mexico, Brazil, Ecuador, Venezuela, Bolivia, Uruguay and Chile, among others.

Australia

Simon Fraser and Tanya Denning*

Ashurst Australia

Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining is Australia's largest goods-producing industry, representing 6 per cent of GDP in 2015–2016 and directly employing approximately 230,000 people. The sector was one of the major contributors to GDP growth in 2015. According to the Department of Industry and Science, mining has represented a 'disproportionately large share of GDP growth in recent years due to high commodity prices and the resultant mining investment boom'.

In 2016–17, Australia's resources and energy export earnings are forecast to jump by 30 per cent. Iron ore is set to remain as Australia's largest export earner.

As Australia transitions to higher commodity production in the medium term, exports of energy and resources commodities are expected to be a key driver of GDP growth.

2 What are the target minerals?

Key minerals in Australia include iron ore, metallurgical coal, liquid natural gas, thermal coal, gold, crude oil, copper, alumina, nickel, aluminium, zinc and lead. Reported 2015–16 financial year export volumes and production quantities are set out below.

Commodity	Export value 2015–16	Production quantities 2015–16
Iron ore	A$48.6 billion	836.1 megatonnes
Metallurgical coal	A$20.1 billion	189.3 megatonnes
Liquid natural gas	A$16.9 billion	83.6 megatonnes
Thermal coal	A$15 billion	250.8 megatonnes
Gold	A$16 billion	284 metric tonnes
Crude oil	A$5.5 billion	317 kbd
Copper	A$8.2 billion	990 kilotonnes
Alumina	A$6.1 billion	20,550 kilotonnes
Nickel	A$3 billion	216 kilotonnes
Aluminium	A$3.3 billion	1,649 kilotonnes
Zinc	A$2.7 billion	1,155 kilotonnes

3 Which regions are most active?

Mining is widespread across Australia. In New South Wales, the main mining areas include the Hunter Valley region (primarily coal) and the Broken Hill region (silver, lead and zinc). In Queensland, there is the Bowen Basin (coal), Mount Isa (lead, silver, copper and zinc) and Mount Morgan (gold, silver and copper). The main mining region in Victoria is the La Trobe Valley (coal and gold). South Australia's Olympic Dam Mine is a large source of copper, and also has the largest known single deposit of uranium in the world.

However, Western Australia has benefited most from the mining boom, with its Goldfields-Esperance (gold and nickel), Peel (aluminium) and Pilbara (iron ore) regions producing the majority of the country's mining exports.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Australia's legal system is common law-based. Legislated law, which interacts with decisions made by an independent judiciary, is passed at three levels of government: federal, state or territory, and local. Mining regulation is primarily state- and territory-based.

5 How is the mining industry regulated?

Mining regulation in Australia is primarily state- and territory-based. The starting point is that most minerals are owned by the state or territory in which the minerals are located (there are some areas where private landowners hold title to certain minerals). State and territory governments also have certain taxation powers, for example, to collect resource royalties and stamp duty.

Mining proponents within Australia should also be aware of the interaction between state and territory legislation and Commonwealth legislation affecting their projects. For example, even if mining exploration and production operations are conducted within a state's boundaries under state mining legislation, there is a significant overlap of Commonwealth laws, which may, potentially, be relevant. Significantly, the Commonwealth has certain powers in relation to native title, employment, the environment, access to infrastructure, taxation and foreign ownership.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Mining regulation in Australia is primarily state- and territory-based. The key mining regulations and regulators applicable to each state and territory are set out in the table below.

	Key mining legislation	Key mining regulator
Queensland	Mineral Resources Act 1989 (Qld) Mineral and Energy Resources (Common Provisions) Act 2014 (Qld)	Department of Natural Resources and Mines
New South Wales	Mining Act 1992 (NSW)	Department of Industry (Resources & Energy)
Western Australia	Mining Act 1978 (WA)	Department of Mines and Petroleum
South Australia	Mining Act 1971 (SA)	Department of State Development
Northern Territory	Mineral Titles Act 2010 (NT) Mining Management Act 2001 (NT)	Department of Mines and Energy
Victoria	Mineral Resources (Sustainable Development) Act 1990 (Vic)	Department of Economic Development, Jobs, Transport and Resources
Tasmania	Mineral Resources Development Act 1995 (Tas)	Department of State Growth

As mentioned in question 5, there is also Commonwealth legislation that may affect a project in relation to native title, employment, environment, access to infrastructure, taxation and foreign ownership.

Major amendments to existing mining legislation in Queensland have occurred in the past 12 months with the ongoing common resources tenure reform project and commencement of the Mineral and Energy Resources (Common Provisions) Act 2014 (Qld), and in New South Wales with several amendments to the Mining Act 1992.

In addition, recent amendments to Queensland's Environmental Protection Act 1994 (Qld) will also be relevant to the mining industry.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The JORC Code, produced by the Australasian Joint Ore Reserves Committee, sets minimum standards for the public reporting of minerals exploration results, mineral resources and ore reserves. The Code provides a mandatory system for the classification of a report according to levels of confidence in geological knowledge and technical and economic considerations contained in the report. The current edition of the Code was published in December 2012.

The Code applies to annual and quarterly company reports, press releases, information memoranda, technical papers, website postings and public presentations of exploration results, mineral resources and ore reserves estimates, among other things.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

While the details vary from jurisdiction to jurisdiction, in general, minerals are owned by the state or territory in which the minerals are located. Private parties can apply for a mining tenement, which gives the holder the exclusive right to explore for minerals in, or extract minerals from, the area specified in the tenement in accordance with its conditions. The tenement overlays the underlying land title and generally enables the tenement holder to obtain access to the land for the prescribed exploration and mining purposes, subject to the payment of compensation to the landholder. Other tenements may also be required and may be granted to permit construction of infrastructure ancillary to a mine, such as roads, bores, pipelines and power lines. They may be granted over land that is subject to an existing interest, such as a mining lease or any other interest (and third-party interests can be granted over the top of existing licences).

There are some limits on the access that a mining tenement applicant can obtain over private land without the agreement of the relevant landowner. These circumstances tend to be very limited. The mining legislation of each state and territory prescribes these limits.

In certain limited circumstances where private landowners do hold mineral rights in the land, a private landowner must still obtain a mining tenement prior to exploration. In some states, the government can grant mining tenements to explore for and mine privately owned minerals if this is not being done by the owner of those minerals.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The laws of each state and territory appoint an administering department and minister to maintain registers of mining titles and interests. Some of this information is available to the public. The information that is publicly available varies considerably between jurisdictions.

A list of the key databases for the relevant states and territories is set out to follow.

State	Online database
Queensland	www.business.qld.gov.au/industry/mining/mining-online-services/mining-permit-search
New South Wales	www.resourcesandenergy.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/minview
Western Australia	www.dmp.wa.gov.au/Mineral-Titles-online-MTO-1464.aspx
South Australia	www.minerals.statedevelopment.sa.gov.au/exploration/tenement_information
Northern Territory	http://strike.nt.gov.au/;jsessionid=zfv88xs5rvzk9w9y3ad2gkl6
Victoria	www.energyandresources.vic.gov.au/earth-resources/maps-reports-and-data/geovic
Tasmania	www.mrt.tas.gov.au/portal/en/database-searches

The entry of a tenement or interest in a tenement on a register is generally not conclusive proof of title to that interest or tenement, but failure to enter a dealing on the register may make a transfer of an interest or tenement 'of no force'. This means that a party can generally rely on the register to take title free of unregistered interests. Various jurisdictions permit the registration of some (but not all) dealings with respect to a tenement. The limit on the types of dealings that can be registered means that a search of the tenements register may not provide a complete record of all interests affecting the relevant mining tenement, as there may be various unregistered interests that are not recorded.

The Australian Stock Exchange (ASX) imposes disclosure obligations on listed resource companies. The obligations include reporting on exploration results, mineral resources and ore reserves. The Corporations Act 2001 (Cth) also imposes reporting obligations on companies.

Geoscience Australia is an agency of the Australian government. It collates and publishes data annually as well as carrying out its own geoscientific research. Geoscience Australia's data and mapping tools are available online.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Mining tenements are regulated by each state and territory under separate legislative regimes, and the rights and obligations of tenement holders vary accordingly. However, most states and territories have three classes of mining tenements: exploration licences, mining leases and retention licences.

Set out below are the general characteristics of each of the main type of tenements.

	Exploration licence		Retention licence
Purpose	Exploration for mineral sources, drilling for core samples	Development and production of minerals from lease area	Title over mineral discovery where mining is impracticable
Coverage	Designated contiguous area; limited extraction rights	Designated area taken out of the exploration licence	Area sufficient to cover identified mineral resource, plus additional land for future mining operations
Period	Usually granted for five years (may be renewed); often subject to surrender of a portion of the area during each year of the term of the tenement	As specified in the relevant state or territory law (eg, the period approved by the minister in Queensland, and 21 years in WA). May be renewed	Usually granted for five years (may be renewed)

	Exploration licence		Retention licence
Rights	Land entry Drilling surveys and recovery on an appraisal basis Usually confer a priority right to apply for a mining lease over minerals discovered within exploration area	Land entry Mining operations to develop and extract minerals from mining lease area Operation of production facility (usually subject to obtaining additional licences) Disposal of minerals recovered subject to royalty payment	Exploration and recovery on an appraisal basis Protects interests of the licence holders where production is likely to become commercially viable
Obligations	Rent Expenditure commitments Reporting obligations Security deposit Restrictions on amounts of minerals that can be extracted	Rent and royalties To develop and commercialise discovery Reporting obligations Security deposit	Rent Licensee may be required to carry out works programme to establish nature, extent of resource and commercial feasibility Security deposit

Tenements may be granted subject to conditions, mainly to regulate the manner in which activities may be conducted. Exploration licences will typically have 'minimum expenditure' conditions, as well as time limits on exploration, while mining leases will require a certain level of expenditure. There will also be reporting obligations, which may exist under legislation and conditions attached to the tenement. These obligations require the tenement holder to provide regular reports to the relevant government department.

Tenement holders are usually required to submit a development plan to the relevant government department to obtain approval to develop a mine. Tenement holders are also often required to lodge security deposits when licences are granted to ensure the performance of environmental and rehabilitation obligations.

Annual rental payments are generally required under each tenement based on area, and royalties must be paid based on the amount of the mineral extracted under a mining lease.

If a tenement holder does not comply with the conditions of a licence or obligation set out in legislation, including the rental or royalty obligations, various compliance or enforcement tools (depending on the state or territory legislation) may be used. These include cancellation of the licence or imposition of a penalty on the holder of a tenement. Most jurisdictions also provide for third parties to seek forfeiture (and be rewarded with the tenement) or fines, depending on the level of under-expenditure or non-compliance. Forfeiture is the ultimate sanction and a pillar of the 'use it or lose it' system in Australia.

The relevant state and territory laws set out the requirements regarding mining lease applications. Generally, applications are made to the relevant state mining department and may involve a process of public notification and objections. The relevant state mining department will generally require evidence of agreement being reached with the landholders underlying the mining tenement.

In most states and territories, an exploration licence is a prerequisite to a mining lease, but does not provide an automatic right to acquire a mining lease.

State Agreements

A feature of Australia's resources law is the use of agreements between governments and project proponents that facilitate the implementation of large-scale resource projects (State Agreements). State Agreements are written contracts between the state and a project developer ratified or authorised by an Act of Parliament to provide a detailed framework for the development and operation of a specific project. These agreements are particularly prevalent in Queensland, South Australia (where they are called indentures) and Western Australia (where there are around 65 State Agreements currently on the state's books).

The key benefit of a State Agreement is the process of statutory endorsement outlined above. Typically, this process may grant the project proponent certain 'dispensations' from the law that would otherwise apply in respect of the relevant project.

The terms of each State Agreement are drafted much like an ordinary contract, but as alluded to above, a peculiar feature is that they are ratified by an Act of Parliament. The content of a State Agreement must be reviewed on a case-by-case basis because the rights, obligations, terms and conditions for the development of a project depend on what has been negotiated, and what is ultimately agreed, between the state and the relevant project proponent.

Some of the key features commonly negotiated by a project proponent under a State Agreement include the following:

- proposal mechanisms: a 'proposals' regime, whereby the proponent is required to prepare detailed proposals for the establishment of the mining operations under the State Agreement;
- undertaking to grant tenure: an obligation on the state to make tenure available for the project, upon approval of development proposals;
- infrastructure: the right to construct critical infrastructure, such as ports and railways;
- superior tenure rights: the grant of mining tenements on a 'successive' renewal basis over larger areas than otherwise would be possible; and
- concessions and protections: concessional or fixed royalty rates, limited exemptions from duty liability and specific protections against adverse state interference.

While a State Agreement may override certain laws under the state's mining legislation, the agreement will not typically grant the project proponent a dispensation from environmental protection laws or aboriginal heritage processes. The State Agreement also cannot override a Commonwealth Act, so processes under the Native Title Act 1993 (Cth) will generally apply.

11 What is the regime for the renewal and transfer of mineral licences?

The details of the regime relating to renewal of mining tenements varies from jurisdiction to jurisdiction. However, some general observations are provided in the table below.

Tenement	Renewal options
Exploration licence	Usually granted for five years, often subject to surrender of a portion of the area during each year of the term of the tenement Exploration licences may be renewed
Mining lease	Granted on the terms specified in the relevant state or territory law (eg, the period approved by the minister in Queensland, and 21 years in WA) Mining tenements may be renewed
Retention licence	Usually granted for five years, and may be renewed

State and territory mining legislation prescribes the requirements for the transfer of mining tenements. Generally, the transfer of a mining lease will require ministerial approval. The application will typically need to be accompanied by the agreement effecting the transfer, details of the transferees' technical and financial capability and the consent of any person holding a mortgage or caveat interest in relation to the tenement. Some jurisdictions impose restrictions on transferring tenement applications.

12 What is the typical duration of mining rights?

The duration, renewal and cancellation procedures in regards to mining tenements vary between states and territories.

Exploration licences

With the exception of New South Wales, the maximum duration of exploration licences across all states is five years. In New South Wales, the maximum duration is six years. An application for the renewal of a current licence must be submitted prior to the expiration of the current licence.

While each state and territory reserves the right to cancel an exploration licence in specific circumstances, common grounds for the revocation of a licence are failure by the licensee to comply with licence conditions, failure to use the land or perform the activities for the purposes of which the licence was provided, and failure to pay any required fees.

Mining lease

In New South Wales, Western Australia and South Australia, a mining lease may be obtained for a maximum duration of 21 years. In Victoria, the maximum duration is 20 years. In Queensland, Tasmania and Northern Territory the maximum duration is at the discretion of the relevant minister.

Mining leases can generally be renewed. The periods in which an application for renewal can be made differ from states and territory to state and territory and range from 12 to two months prior to expiration of the current lease (or as prescribed by the terms of the licence in the Northern Territory and Victoria).

A mining lease is liable to forfeiture in all states and territories in specified circumstances (for example, if the lessee contravenes the conditions of the lease agreement, if the lessee carries out activities other than those provided for in the lease, if the lessee contravenes applicable legislation, if the lessee fails to make required payments and if the land is required for public use).

Retention licences

Retention licences (or mineral development licences in Queensland) may be obtained for a maximum duration of five years in Queensland, Western Australia, South Australia and Tasmania. In Victoria, the maximum duration is 10 years. Retention licences in all states are renewable on application, subject to certain conditions.

In Queensland, Western Australia, Victoria and Tasmania a retention licence may be revoked for the licensee's failure to comply with licence conditions. Other grounds of revocation, such as failure to make any required payments and reports, or to carry out activities for the purposes of the licence, apply depending on the jurisdiction.

In South Australia, the Mining Act 1971 (SA) does not include cancellation provisions. However, it imposes a penalty of A$120,000 for the breach of a condition of a retention licence.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Foreign persons proposing to acquire an interest in certain mining tenements need to make an application to the Foreign Investment Review Board for approval (see question 48).

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by way of mining tenements granted from the relevant state or territory governments. These tenements typically provide the holder with the exclusive right to explore for or extract specified minerals in specified areas as stated in the tenement. These rights are also subject to obligations under the relevant legislation and any other conditions specified in the tenement.

Australia is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which has been given effect in the International Arbitration Act 1974 (Cth). This legislation provides that courts in Australia may only refuse to enforce foreign arbitral awards (including those dealing with mining disputes) in limited circumstances.

A court in Australia may refuse to enforce a foreign arbitral award only if the following applies:

- a party to the arbitration agreement was under some incapacity at the time when the arbitration agreement was made or the arbitration agreement was not valid;
- the party resisting enforcement was not given proper notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to present its case in the arbitration;
- the award deals with a dispute outside the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the award is not binding or has been set aside or suspended;
- the subject matter of the dispute is not capable of settlement by arbitration; or
- to enforce the award would be contrary to public policy.

Recent decisions from various courts in Australia demonstrate that the courts are reluctant to intervene in arbitral awards, and that there is strong judicial commitment to the enforcement of foreign arbitral awards in accordance with the New York Convention. Unless one of the limited grounds for refusing to enforce a foreign arbitral award can be shown to the satisfaction of the court, that foreign arbitral award will be enforced in Australia.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Each state and territory has a unique land tenure regime. In most states and territories, the different types of tenure include estates in fee simple, leasehold estates, and Crown land such as forests, roads and reserves.

Mining proponents can secure interests in land by purchasing an estate, holding a lease or licence, or receiving a permission from the relevant minister for Crown land.

However, in most states and territories, a mining proponent does not need to hold an interest in the underlying land title before a tenement is granted. Instead, the mining company can enter into an agreement with the relevant landholder to secure required rights and provide compensation. In fact, in most states and territories, the government will generally require evidence of the acquisition of required surface access rights and compensation arrangements between the mining company and relevant landholder before a mining lease is granted.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

In Australia, governments or their agencies rarely participate directly in mining ventures. Private enterprise conducts the exploration and production operations. Entities gain the right to undertake exploration and production activities through mining tenements granted by the relevant authority under statutory regimes.

There is generally no local listing requirement for a project company. However, it is common for foreign investors to hold interests in projects through locally incorporated companies.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The mining legislation in each state and territory contains provisions regarding cancellation of mining tenements as a result of non-compliance with the relevant legislation or the mining instrument itself. In these circumstances, compensation would not be provided to the mining proponent.

Further, in some states and territories, the government can compulsorily acquire land for mining interests, provided that certain procedural steps are met. In those circumstances, compensation would generally be provided to the relevant landholders.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are some limits on the access that a mining tenement application can obtain over private land without the agreement of the relevant landholder. These circumstances tend to be very limited. The mining legislation in each state and territory prescribes these limits.

For example, most state and territory legislation prohibits access to private land in residential areas or near to key industrial infrastructure such as power stations. This is not usually a major concern as most mining projects are in remote locations. Further, most state and territory legislation prohibits works that may affect heritage places codified under regulations such as buildings built before a certain period.

Access to Crown land such as state forests, roads, land reserved for indigenous Australians and other reserves for exploration and mining activities is generally restricted and varies according to the

land category and the state or territory in which the activity is carried out. Often, approval from the relevant minister is required to conduct exploration and mining activities on Crown land.

In addition, Australian law recognises and protects the traditional connection to land of Aboriginal and Torres Strait Islanders People (indigenous Australians). The key issues requiring consideration for a mining proponent include the following:

- whether the project affects land where native title does or may exist, in which case processes in the Native Title Act 1993 (Cth) will need to be followed;
- the potential for the project to affect places or objects within the landscape that are of cultural significance to indigenous Australians; and
- whether the land proposed to be used for a project is reserved under state- or territory-based legislation introduced for the benefit of indigenous Australians.

Areas and objects of archaeological importance or cultural heritage significance to indigenous Australians are protected from harm under Commonwealth, state and territory laws.

Also, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) sets out specified matters of national environmental significance. It lists the circumstances in which a mining project may need to be referred to the federal government and the requirements for having the impacts on those specified matters assessed, evaluated and approved (with conditions). Large resources projects are frequently referred under this regime, either to afford certainty or because they are likely to affect one or more of the listed matters of national environmental significance.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Royalties

Each state and territory currently imposes royalties relating to the extraction of minerals. The rates of royalty imposed differ between states and territories and between different commodities.

Some examples of the royalties imposed are set out in the table below.

State/mineral	Basis of calculation
Queensland (coal)	7% of the value of the coal up to A$100 per tonne, 12.5% of the value between A$100 and A$150 per tonne and 15% of the value thereafter
Queensland (iron ore)	A$1.25 per tonne, if average price is up to A$100 per tonne. If average price is greater than A$100 per tonne, the tax increases proportionately to the increased price Discount of 20% if processed in Queensland and metal content is at least 95%
New South Wales (coal)	Depends on type of mining: • open cut mining: 8.2% of value of mineral; • underground mining: 7.2% of value of mineral; and • deep underground mining: 6.2% of value of mineral
Northern Territory (most minerals)	20% of net sales value of mineral If the net sales value is A$50,000 or less (no royalty is payable) If the net sales value is more than A$50,000, the royalty payable is reduced by A$10,000
South Australia (coal)	5% of value of mineral
South Australia (gold and cobalt)	3.5% of value of mineral
Western Australia (coal)	Depends on the import and export status: • if exported: 7.5% of value of mineral; and • if not exported: A$1 per tonne (adjusted each year on 30 June in accordance with comparative price increases)
Western Australia (iron ore)	Depends on type of ore: • beneficiated ore: 5% of value of mineral; and • all other iron ore: 7.5% of value of mineral

Income tax

Broadly, a non-resident company will only be subject to tax on income that is sourced in Australia, subject to the application of any applicable double tax agreement (DTA). If a DTA applies to a non-resident company, the company will only be taxed on income attributable to any permanent establishment it has in Australia (other Australian sourced income such as dividends, interest, royalties and payments for construction and related activities are subject to a withholding tax regime).

Under a DTA, Australia generally has the right to tax the profits attributable to the non-resident company's permanent establishment. The profits are subject to tax at the corporate tax rate of 30 per cent. The term 'permanent establishment' is defined in a DTA. There are also provisions in a DTA that can deem a permanent establishment to exist or not exist in specified circumstances. Ultimately, a determination of whether a non-resident has a permanent establishment will be based on the activities undertaken by the non-resident in Australia.

Withholding taxes

Only certain forms of income derived by non-residents are subject to Australia's withholding tax regime, such as interest payments and dividends.

Capital gains

Broadly speaking, a non-resident shareholder is only subject to capital gains tax (CGT) in respect of a gain derived from the disposal of the following:

- Australian real property (including mining and petroleum interests);
- shares in a 'land rich' Australian company (ie, more than 50 per cent of the market value of the company's assets relate to Australian real property) and the interest held by the non-resident passes the 'non-portfolio interest test' (ie, if the interest is of 10 per cent or more in the company). The 10 per cent test is applied on an associate inclusive basis with a 'look back' period of up to two years before the disposal; or
- assets used in carrying on business at, or through, an Australian permanent establishment.

Since 1 July 2016, purchasers of such assets are required to withhold and remit to the Australian Taxation Office (ATO) 10 per cent of the purchase price if the vendor is a non-resident or, in the case of real property, is unable to provide an ATO clearance certificate. The vendor will receive a tax credit in respect of the withheld amount, provided it has been remitted to the ATO.

Goods and services tax (GST)

The Commonwealth government imposes GST on supplies made by entities that are registered, or required to be registered, for GST. An entity is required to be registered for GST when its annual turnover from supplies connected with Australia (having regard to the previous 12 months and the following 12 months) exceeds A$75,000. An entity can elect to register for GST if it is carrying on an enterprise.

GST is imposed at a rate of 10 per cent. Supplies can be subject to GST if they are connected with Australia and made in the course or furtherance of an enterprise. Some transactions are not subject to GST because they are GST-free (such as exports) or are input taxed (such as financial supplies and supplies of precious metals in some circumstances). Except to the extent an acquisition is related to making input taxed supplies, an entity that is registered, or required to be registered, for GST can claim back as input tax credits any GST incurred on its costs and expenses, subject to holding a valid tax invoice.

Participants in a joint venture can notify the Commissioner of Taxation that it is a GST joint venture. Where a joint venture is a GST joint venture, the joint venture operator (either one of the joint venturers or another entity) has the responsibility, on behalf of all of the participants, to account for GST liabilities, input tax credit entitlements and adjustments relating to the operations of the joint venture. Supplies

that are made by the joint venture operator to other participants are not subject to GST.

Stamp duty

All states and territories impose stamp duty on the transfer of interests in real property and goods transferred with real property (in South Australia, from 1 July 2016, the transfer of goods, with or without real property, is not subject to duty). Stamp duty can also apply to transfers of business assets (in Western Australia, Northern Territory, Queensland, and New South Wales until 30 June 2016), transfers of shares and units (in New South Wales until 30 July 2016), the grant of mortgages over property to secure loans (in New South Wales until 30 June 2016). Different rates apply in each state and territory and the rates also vary between different types of transactions.

In South Australia, since 1 July 2016, duty on transfers of 'non-residential, non-primary production real property' is being phased out and will be fully abolished from 1 July 2018. Land to which the reduction in duty applies is land that is being used 'other than for residential purposes or for primary production'.

All states and territories impose stamp duty on certain acquisitions of interests in companies or trusts that own Australian real property. This is known as 'landholder' duty. The duty is generally imposed on the value of the land held by the relevant entity (or the value of land and goods in New South Wales and Western Australia) and is imposed at the same rate as that imposed on the transfer of land.

Tenement obligations

Tenement	Obligations
Exploration licence	Rent, expenditure commitments, reporting obligations, security deposit and restrictions on amounts of minerals that can be extracted
Mining lease	Rent and royalties, to develop and commercialise discovery, reporting obligations and security deposit
Retention licence	Rent, licensee may be required to carry out works programme to establish the nature and extent of resource and commercial feasibility, and security deposit

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The Australian government has recently implemented an 'Exploration Development Incentive' scheme. This scheme is designed to encourage shareholder investment in small exploration companies undertaking greenfields exploration projects in Australia with no taxable income by allowing them to provide exploration credits, which are a refundable tax offset for Australian resident shareholders. The incentive only applies to entities that have not started production and are not connected with an entity that has started production.

Parties carrying on mining activities may be eligible to claim upfront deductions for certain types of capital expenses relating to activities such as exploration and prospecting and the rehabilitation of mining sites. Additionally, certain mining capital expenditure may be deductible over the life of a project.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is no legislation that deals with tax stabilisation. Tax stabilisation agreements – such as 'freezing' or 'equilibrium' agreements, which are designed to provide certainty to investors – have not been made in Australia.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

There is no carried interest scheme in Australia.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

All states and territories impose stamp duty on the transfer of interests in real property. Whether the transfer of a licence is a dutiable transaction will depend on a number of factors, including the nature of the rights conferred by that licence and the state or territory legislation that governs the transaction.

Generally, a non-resident will be subject to capital gains tax in respect of a gain derived from the disposal of mining and petroleum interests.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

A party's status as a non-resident company can affect the royalties and taxes for which it is ultimately liable. For instance, particular forms of income derived by non-resident companies may be subject to withholding tax, and purchasers of property from non-residents may be required to withhold part of the purchase price.

A non-resident entity is only liable to pay tax on income that is sourced in Australia (if there is no DTA), or that it earns in respect of its Australian permanent establishment (if a DTA applies). Such an entity may also be required to pay tax on capital gains it makes in respect of certain assets.

There is no distinction between domestic parties and foreign parties in relation to the payment of stamp duty (other than for residential property in Victoria, Queensland and New South Wales) and GST. Stamp duty and GST will be payable if the requirements of the particular legislation are satisfied regardless of the residency of the party.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Private parties can carry out mining activities by obtaining approvals and directly investing as an individual entity. However, more commonly, mining proponents carry on mining activities through a range of different business structures such as joint ventures and farm-in agreements. These structures are discussed further below.

Joint ventures

It is common in Australia to conduct mining activities as part of a joint venture. Different arrangements may be required for ventures formed for various mining related activities (ie, exploration, production and the operation of an infrastructure facility).

The joint venture agreement generally states the scope, purpose and duration of the joint venture, identifies the assets committed to it, describes and quantifies the interests of the participants and provides for the operation, management and control of the venture. The agreement also covers the making of 'called sums', the holding and expenditure of funds, the apportionment of liability, the consequences of default, the use and disposal of the output of the venture and the assignment of interests and withdrawal from the venture.

There are two types of joint venture commonly used in Australia – incorporated and unincorporated joint ventures. Each structure has different legal and taxation implications that need to be carefully considered and assessed having regard to the commercial objectives of the parties.

We provide a high level summary of the general characteristics of (and differences between) incorporated and unincorporated joint ventures, as follows:

- an incorporated joint venture is operated by a special purpose company in which the joint venturers are shareholders. The joint venture has its own separate legal personality. A shareholders' agreement between the parties is entered into and, at the same time, the special purpose company is formed to own and control the venture, with an agreed number of directors appointed by each party; and
- an unincorporated joint venture involves parties agreeing to cooperate in relation to a commercial undertaking, with the parties holding their interests and entitlements in the venture separately rather than jointly. As there is no company structure, the contract (ie, the joint venture agreement) between the parties will govern their relationship, the operation of the venture and their obligations to each other. Less corporate regulation makes this structure particularly attractive to private parties in some cases.

On 30 March 2017, the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) was introduced into Federal Parliament. It proposes to amend the scope of the current joint venture exception to cartel conduct under the Competition and Consumer Act 2010 (Cth). The amendments seek to ensure that legitimate joint commercial activities are exempt from Australia's cartel laws by, among other things, extending the joint venture exception to 'arrangements' and 'understandings' (and not just formal contracts) containing cartel provisions, and to joint ventures for the acquisition of goods and services (in addition to production and supply joint ventures).

Farm-in agreements

As mentioned above, the particular arrangements in respect of each joint venture will invariably differ depending on the terms of the relevant joint venture arrangements. However, a particular form of joint venture that is worth discussing in some further detail are those which involve a farm-in or farm-out arrangement.

Farm-in agreements are often used in conjunction with a joint venture structure to share the risk of the exploration and development stages of a tenement. In a typical farm-in agreement, the owner of a tenement would offer to sell part or all of its tenement to another entity in return for the farmer funding or completing 'work' on the tenement. The farm-in agreement would generally specify the financial contribution to be made, or work required to be carried out, within a certain time frame in exchange for transfer of a proportionate interest. Following transfer, the parties may enter into a joint venture agreement to govern how they will work together to further develop the tenement and carry out mining operations.

26 Is there a requirement that a local entity be a party to the transaction?

No. Foreign companies can transact to acquire or dispose of interests without a local party to the transaction. However, foreign companies should be aware of the foreign investment approval scheme described in question 45. This scheme includes special provisions applicable to the acquisition of interests in certain mining tenements.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Australia has entered a number of bilateral investment treaties (otherwise known as 'investment protection agreements') with other states since entering its first such treaty with China in 1988. However, these treaties do not significantly affect the way in which foreign entities structure their operations in Australia.

Generally speaking, bilateral investment treaties to which Australia is a party provide investors with a range of protections, such as guarantees against discriminatory treatment or expropriation without compensation. These treaties also generally include dispute settlement procedures that can be utilised by investors in certain circumstances. However, there have only been a very small number of reported claims by Australian or foreign investors under bilateral investment treaties.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Private parties will often finance mining activities through equity markets or debt financing, depending upon factors such as the nature of the proposed activities, the risk profile of the project, the structure of the transaction (eg, an unincorporated joint venture) and the stage of the project (eg, pre-feasibility study, greenfield project development, expansion, stockpile or working capital financing). A number of mining companies are listed on the ASX, which can engage in equity or capital raising to finance mining activities.

There are a number of other potential sources of finance. For example, some Australian projects receive funding from Export Credit Agencies (ECAs), which are government owned or backed institutions that provide financial support for transactions that are in some way connected with the country of the ECA. ECA support for a mining project might be provided on a 'tied' basis, in the sense that the participation of the ECA is dependent on the procurement of equipment, materials or services from the country of the ECA.

Project proponents in Australia should also consider how the environmental and social impact of their proposed activities might influence the availability or conditions of project finance. For instance, a large number of financial institutions have adopted the 'Equator Principles', which provide a voluntary benchmark for assessing and managing environmental and social risk in major development projects.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The government itself does not provide direct finance for mining projects in Australia.

In some circumstances, Australia's ECA, EFIC, may provide financial support where the commercial market is not willing to provide it, subject to the project satisfying EFIC's Australian content and export requirements.

Australia's sovereign wealth fund, the Future Fund, holds equity investments in large mining companies like BHP Billiton and Rio Tinto, but has not provided debt funding directly for specific projects. Australia's pension funds have generally steered away from greenfield mining projects due to the uncertainty of returns.

The Australian government's Northern Australia Infrastructure Facility is a $5 billion fund which has the ability to provide grants of financial assistance (in the form of loans, guarantees and other financial mechanisms) for the construction of infrastructure, which may include infrastructure in connection with mining projects. Among other mandatory criteria that must be satisfied for a grant of financial assistance under the NAIF, the applicant must show that (i) the finance provided by NAIF will not exceed 50 per cent of total debt for the proposed project, (ii) the loan will be able to be repaid or refinanced and (iii) the project is located in or will have a significant benefit for Northern Australia.

30 Please describe the regime for taking security over mining interests.

Mining tenements are regulated by each state and territory under separate legislation and the regimes regarding taking security over mining interests vary accordingly.

In most jurisdictions, mining tenements can be subject to a 'mortgage', which is a charge on the tenement for securing money or money's worth. Generally, a fixed or floating charge is lodged as an attachment to the prescribed form with the relevant mining regulator. Once registered, the mortgage will be noted on the relevant tenement instrument, which is publicly searchable. A mortgage over a mining tenement is not the same as a mortgage over real property interests. It will not necessarily afford the mortgagor priority interests in the same way as a mortgage over real property interests.

In most states and territories, a caveat can be lodged over mining tenements. The registration of a caveat generally prohibits the transfer of the tenement without the consent of the caveat holder. Some states require the tenement holder's consent before a caveat is lodged, but most do not. The caveator will have to provide the mining regulatory with evidence of its interest in the tenement. The key benefit of a caveat is that the caveator receives notices of any intended dealings concerning the mining tenement. Once registered, the caveat is noted on the relevant mining tenement instrument, which is publicly searchable.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are currently no restrictions on the importation of new mining equipment. However, new equipment may be subject to an inspection by the Department of Agriculture and Water Resources to ensure that it is in fact new and free of contamination.

Used equipment requires an import permit. Under the current regime, a condition of the permit is that the equipment arrives in a 'clean as new' state. Contaminated equipment will be refused entry into the country and exported at the importer's or owner's expense.

The Department of Agriculture and Water Resources is currently reviewing import conditions for used machinery. Proposed changes include:

- classification of used machinery prior to import;
- mandatory offshore cleaning of high risk used machinery;
- reduced onshore intervention for importers with a demonstrated history of compliance;
- removing the requirement for lower-risk used machinery inspections to be performed by accredited biosecurity officers; and
- an option for used machinery to be cleaned onshore in extenuating circumstances, at the importer's expense.

Where occupational health and safety is concerned, state regulations dictate that an importer must identify hazards and assess and reduce risks associated with the equipment.

There are no specific tariffs on the importation of mining equipment, though depending on where the equipment was manufactured, importers may have to pay a customs duty (usually 5 per cent). Goods and Services Tax (GST) of 10 per cent will also generally be payable on importation of mining equipment. However, the GST amount can generally be claimed back as an offset/refund. Approval can also be sought to defer the GST on importation until lodgement of the relevant return, which coincides with the claiming of the offset.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no Australian standard conditions or agreements covering equipment supplies, however, FIDIC conditions of contract are available. In general, the market is considered to be buyer friendly.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are two Commonwealth-administered mineral export controls that specifically concern rough diamonds and uranium respectively.

Rough diamonds may only be exported to countries that participate in the Kimberley Process Certification Scheme, and must be accompanied by an Australian Kimberley Process Certificate. The Kimberley scheme is an international initiative to stem the flow of conflict diamonds, and imposes extensive requirements on its members to ensure that their rough diamonds are 'conflict-free'. Certificates are issued by the Department of Industry, Innovation and Science.

At a state and territory level, only South Australia, the Northern Territory and Western Australia allow the exploration and mining of uranium. Queensland and New South Wales permit exploration only, while Victoria does not permit either.

Mining and planning approvals in project specific indentures and state acts may also impose restrictions on the processing, export or sale of minerals. Such restrictions can include, but are not limited to, capped production quantities and project specific practice codes.

At the federal level, under the Customs (Prohibited Exports) Regulations 1958 (Cth), permission to export uranium or other nuclear material must be obtained from the Minister for Resources, Energy and Northern Australia or an authorised person.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no specific restrictions on the use of foreign debt to fund exploration or extraction. There are also no restrictions on the use of proceeds from the exportation or sale of minerals.

For details of Australia's foreign investment restrictions see question 48.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Each state and territory has enacted legislation regulating environmental matters and the approval process in that state or territory.

The key environmental legislation and regulator for each state and territory is set out below.

	Key environmental legislation	Key environmental legislator
Queensland	Environmental Protection Act 1994 (Qld)	Department of Environment and Heritage Protection
New South Wales	Protection of the Environment Operations Act 1997 (NSW)	Environment Protection Authority
Western Australia	Environment Protection Act 1986 (WA)	Environmental Protection Authority
South Australia	Environment protection Act 1993 (SA)	Environment Protection Authority
Northern Territory	Environmental Assessments Act 1982 (NT)	Northern Territory Environment Protection Authority
Victoria	Environment Protection Act 1970 (Vic)	Environment Protection Authority
Tasmania	Environmental Management and Pollution Control Act 1994 (Tas)	Department of Primary Industries, Parks, Water and Environment

Importantly, there are also environmental requirements included in the mining legislation for each jurisdiction (see question 5). Other legislation may also be relevant in particular jurisdictions (eg, the Radiation Protection and Control Act 1982 (SA) and the Development Act 1993 (SA) in South Australia).

As a result of amendments to Queensland's Environmental Protection Act 1994 (Qld) in April 2016, the Queensland regulator can now issue a statutory environmental protection order (EPO) to a broader range of entities. An EPO – which can require the recipient to take a stated action, including commencing or ceasing stated activities – can now be issued not only to the person carrying out the mining activities, but also to a broad range of 'related persons' (including entities and individuals that have influence over, or get a significant financial benefit from, the mining activities). EPOs issued to 'related persons' are also called 'chain of responsibility' EPOs.

On 27 January 2017 the Queensland regulator finalised its Guideline 'Issuing "chain of responsibility" environmental protection orders under Chapter 7, Part 5, Division 2 of the Environmental Protection Act 1994'. The Guideline provides additional detail about how the regulator will make decisions relating to chain of responsibility EPOs.

Queensland government reforms to water legislation also commenced in December 2016. Legislative amendments sought to align the water rights of mining tenure holders with petroleum tenure holders. The changes established underground water rights for holders of a mineral development licence or mining lease, subject to compliance with underground water obligations and associated measurement and reporting requirements.

Victoria's environmental protection regime is currently under review. Under the proposed reforms, Victoria's Environmental Protection Agency will take greater responsibility for environmental compliance and enforcement in relation to mining operations. Businesses will be required to take preventative action to mitigate the risk of harm to the environment.

There is also significant federal legislation dealing with environmental matters, including the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

The EPBC Act is concerned with the protection of specified matters of national environmental significance. It sets out the circumstances in which a mining project may need to be referred to the federal government and the requirements for having the impacts on those specified matters assessed, evaluated and approved (with conditions).

Large resources projects are frequently referred under this regime either to afford certainty or because they are plainly going to affect one or more of the listed matters of national environmental significance.

In some cases the federal government has delegated supervision of the environmental impact assessment part of the process to state and territory governments, although EPBC Act approvals must, nevertheless, still be made by the Federal Environment Minister. This means that in some cases the EPBC Act assessment process can be combined

with the relevant state or territory assessment process, thereby avoiding some duplication and potentially reducing time taken to approval.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Environmental approvals

Regulatory environmental approvals must be obtained before the commencement of exploration or production stages, and the mining company must adhere to the terms and conditions of those approvals, as well as to the requirements of general environmental regulations, throughout the mining life cycle.

Environmental approvals are only granted following detailed assessment of impacts and, in Australia, these processes are largely governed by state and territory legislation administered by the relevant environmental regulator in each jurisdiction.

The key matters to be addressed in the impact assessment are as follows:

- managing air, water, land and noise impacts;
- protection of flora, fauna and habitat; and
- recognising and preventing impacts to objects or sites significant to indigenous communities.

The assessment work can take considerable time and resources with the environmental impact statements produced for large projects typically running to thousands of pages. Frequently, the assessment is also open to public consultation and appeals (including by third parties in some jurisdictions).

A determination about the proposed project is then made by the relevant environmental regulator with approval generally being given by the relevant state or territory minister, usually subject to conditions designed to minimise the environmental impact. It may also be necessary to obtain approval from the federal environmental regulator. The mining company (and in some cases its executive officers) will be liable for any non-compliance.

Government facilitation of approvals process

In some states the approval processes for major mining projects receive special assistance from a centralised government coordinating authority, which facilitates the planning and coordination of government agencies involved in the approvals processes and may also assist in securing access to land and infrastructure needed for the project.

Beyond facilitation, some states and territories commit to seeking the passage of project-specific legislation to ratify agreements between the government and the proponents of the mining project (ie, State Agreements). Each agreement specifies the rights, obligations, terms and conditions for development of the project and establishes processes for ongoing relations between the government and the proponent.

Each state and territory has a separate process for planning and approvals. In New South Wales, for example, if state-significant development consent is granted for a project other statutory approvals are not required to be obtained (this is not the case in Queensland or Western Australia). In South Australia the mining legislation includes a development approval process.

Planning approvals

Like all development activities, mining projects involve the construction of buildings, roads and other infrastructure, which may require local government or state government planning approval. In some jurisdictions, planning approval is integrated into the project approvals process or may be subsumed by the mining and environmental approvals processes.

Planning approvals are controlled by state and territory planning legislation and standards. Local governments may have a key role under this legislation in formulating and administering planning schemes. Assessments for issuing permits under planning schemes need to take account of the potential for a mine or mineral processing project to affect future uses of the area.

Time frames

The time frame for obtaining the necessary environmental permits will vary, depending on the nature and scale of the proposed activities and likely impacts. By way of example, it may take two years or more to obtain the approvals necessary for the production stage of a large mining project, with the environmental impact assessment process taking up the bulk of this period.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Generally the closure and remediation of a mining project in Australia involves five stages, as follows:

- care and maintenance: the period following temporary cessation of mining operations;
- closure: mining operations completely cease and infrastructure is removed;
- decommissioning: any leftover infrastructure removed and services end;
- rehabilitation: activities undertaken to return the land to a certain condition; and
- relinquishment: approval by the relevant regulator that certain completion requirements have been met and the mining tenement surrendered.

This closure and remediation process is largely regulated as part of the approval processes under each state and territory's mining and environmental laws, with standards and criteria often set during environmental impact assessment work. Each jurisdiction also has mine closure processes in legislation, regulations and guidelines containing certain completion requirements that must be met before a tenement can be relinquished.

State and territory governments generally require security bonds such as a bank guarantee or other form of financial assurance to be provided in advance of construction work commencing to guarantee the company's 'cradle-to-grave' environmental performance. If the mining company defaults on its remediation obligations (eg, due to insolvency), the relevant regulatory agency can then draw on the bond to defray the costs incurred in carrying out remediation work.

If the company has discharged all its rehabilitation obligations, the security will be released by the regulator.

The quantum of security required by the regulator is typically calculated on the basis of the likely costs and expenses that would be incurred by the government if they were required to rehabilitate and restore a mine site if the mining company failed to so. This calculation will take into account factors such as the planned activities, term of the tenement and area of planned disturbance.

The Queensland government has now passed the Environmental Protection (Chain of Responsibility) Bill 2016 which amends the Environmental Protection Act 1994 (Qld) to allow environmental obligations to be imposed on environmental authority holders, as well as a broad range of 'related persons'. The Bill allows the Department of Environment and Heritage Protection (DEHP) to amend an environmental authority to impose financial assurance conditions. The amended Bill also provides that a court may only stay the amount of financial assurance required if the administering authority holds security of at least 75 per cent of the amount required. Notably, the Bill allows the DEHP to issue environmental protection orders requiring 'related persons' to rehabilitate sites.

38 What are the restrictions for building tailings or waste dams?

In Queensland, construction and operation of tailings dams and waste dams for mining projects will generally be authorised as part of a mine's approval under the Environmental Protection Act 1994 (Qld), and will be subject to conditions. The conditions will generally deal with matters such as design, construction and operation, inspections (typically required annually), reporting, and emergency procedures.

In Victoria, the design, construction and operation of tailings dams for mining projects are subject to approval and conditions imposed by the Department of Economic Development, Jobs, Transport and Resources. A Work Plan, including a tailored Emergency Response Plan for the facility, is required to be lodged and approved before construction or operation of a tailings dam can commence. Once operational, an annual audit and review of the facilities should also be undertaken, with the report to be submitted to the Department.

In New South Wales, the construction and operation of tailings dams and waste dams are subject to environmental assessment and

approval under the Environmental Planning and Assessment Act 1979 (NSW), and will be subject to conditions. Dams are also regulated under the Mining Act 1991 (NSW) through the mining lease or other tenement. A mine manager is required to be appointed under the mining legislation who will be directly responsible for mining operations on the tenement including any tailings or waste storage dam. Tailings and waste dams usually also require an environmental protection licence and will be regulated by the Environment Protection Authority under the Protection of the Environment Operations Act 1997 (NSW). The Dams Safety Committee has authority under the Dams Safety Act 1978 (NSW) to regulate prescribed tailings dams and waste dams. In prescribing a dam, the Committee requires that the owner (or operator) conducts a risk assessment of the magnitude and seriousness of any adverse consequences if the relevant dam was to fail. The Committee publishes detailed guidance sheets on its website which contain its requirements for the building and operation of these dams, including dam surveillance and emergency plans. For example, the Committee normally requires that tailings and waste dams have emergency spillways or reliable flood mitigation measures. In the event of an emergency, the Minister can give the Committee approval to take full charge and control of the dam and to conduct any necessary works, in which case the dam owner (or operator) may be required to pay any costs or expenses incurred by the Committee.

In South Australia, a licence is required to build tailings dams and waste dams. The design, construction and operation of the tailings dam must be in accordance with the Environment Protection (Water Quality) Policy, the mine's approved programme for environmental protection and rehabilitation and any other relevant environmental licence granted by the EPA. For uranium mines, an approved radioactive waste management plan is required to address the construction, operation, monitoring and reporting of the tailings dam, as a licence condition.

In Western Australia, a tailings dam for a mining project may require approval under the Environmental Protection Act 1986 (WA). Conditions relating to the operation and management of the tailings dam may be imposed on these environmental approvals. The WA Department of Environment Regulation is due to release an Environmental Standard for Tailings Storage Facilities for public consultation in June 2017. Requirements can apply to tailings dams for mining projects through measures including conditions imposed on the grant of mining tenements under the Mining Act 1978 (WA), mining proposals under the Mining Act 1978 (WA), project management plans under the Mines Safety and Inspection Act 1994 (WA), and associated guidance documents.

In addition, occupational health and safety legislation in force in each jurisdiction imposes broad obligations on entities in respect of work undertaken by them or on their behalf, including activities forming part of, or connected with, construction work. As a general proposition, those duties would apply to the construction of dams. The particular duty holders and the scope of each duty holder's duty will depend on the particular circumstances, including the extent to which they have management and control of construction-related activities. Some jurisdictions have also enacted mine safety legislation which operates concurrently with general OHS legislation and which may impose obligations relating to the construction of tailings or waste dams.

The above is not exhaustive. Corresponding provisions and obligations will apply in other State and Territory jurisdictions, which would need to be considered in any given case in those jurisdictions.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Employment and industrial law

Legislative framework

Currently, the centrepiece of the Australian industrial relations legislative framework is the Fair Work Act 2009 (Cth). The Fair Work Act applies generally to corporate employers (foreign, trading or Australian constitutional corporations) and their employees.

Safety net entitlements

The Fair Work Act governs a system of minimum terms and conditions of employment that cannot be undercut in an individual contract. These 'safety net entitlements' can be found in the following:

- the National Employment Standards, setting a statutory minimum for leave entitlements, termination of employment, maximum hours of work and flexible working arrangements;
- modern awards, prescribing the minimum terms and conditions relating to employers and employees in particular industries (ie, mining, construction, and oil and gas) and occupations;
- long-service leave legislation, prescribing entitlements to leave for employees with long periods of service. A portable long-service leave scheme applies to the black coal mining and construction industries; and
- superannuation legislation, prescribing superannuation contributions to be made by employers on behalf of employees to recognised superannuation funds. Some states and territories have specific legislation dealing with superannuation contributions in the coal and oil shale mining industries.

Enterprise agreements

An employer and its employees may negotiate a collective enterprise agreement that sets out the minimum conditions of employment that will apply in a particular business. As a general principle, industrial action (ie, a strike or work ban) is only allowed during negotiations for a new enterprise agreement.

Enterprise agreements are required to pass a better-off overall test, administered by a government tribunal known as the Fair Work Commission. In short, the proposed agreement is measured against the award provisions, which, but for the agreement, would apply to see if they are, in a global way, met and exceeded. Once an enterprise is approved and while it operates, the award against which the agreement was measured ceases for the time being to apply. While enterprise agreements operate to the exclusion of awards, they operate in conjunction with the National Employment Standards.

There is a facility for multiple enterprise agreements (which are not common) and for a greenfields agreement where a new enterprise or project is being established.

An enterprise agreement other than a greenfields agreement must have the approval of a valid majority of employees employed in the enterprise who will be covered by the agreement.

Unions

The Fair Work Act permits active participation by unions in employment matters. The level of unionisation varies from industry to industry, but is comparatively high in the mining, construction and resources industries.

Employees have a right under the Fair Work Act to choose to belong or not belong to a union or a particular union, or to involve a union in enterprise bargaining on their behalf.

The Fair Work Act provides that unions are the default representative for employees in enterprise bargaining. Generally speaking, to put in place enterprise agreements for new projects (greenfields agreements), there is a requirement for agreement with unions. (In certain circumstances, it will be possible to put in place a greenfields agreement without union agreement, provided that particular legislative criteria are satisfied.)

Unions are entitled, through an officer or employee holding a relevant permit, to enter premises where their members or eligible members work in each of the following situations:

- holding discussions with those employees the union is entitled to represent;
- investigating a suspected breach of industrial laws; and
- investigating a suspected breach of state or territory work health and safety laws.

Transfer of business

The Fair Work Act generally provides that where there is a transfer of business situation (eg, there is a transfer of assets, an outsourcing or insourcing of work or the relevant entities are related) and employees transfer to a new employer but keep performing substantially the same work, any enterprise agreement covering these employees will be binding on the new employer.

Unfair dismissal
Under the Fair Work Act, subject to various exceptions and eligibility rules, employees are able to claim reinstatement or compensation if they can prove that termination of their employment was harsh, unjust or unreasonable.

Adverse action
An employer must not take any 'adverse action' against an employee (eg, dismissal, not giving the employee his or her legal entitlements, changing the employee's job to his or her disadvantage, treating the employee differently from others) because the employee has a workplace right, has exercised a workplace right or proposes to exercise that workplace right.

Workplace rights include the following:
- receiving a benefit or having a role or responsibility under a workplace law (such as the Fair Work Act), a workplace instrument (such as a modern award or enterprise agreement), or an order made by an industrial body (such as an order made by the Fair Work Commission);
- commencing or participating in a process or proceeding under a workplace law or instrument (such as taking court action); and
- being able to make a complaint or inquiry about employment.

An employer must not take adverse action against an employee because the employee engages in or proposes to engage in 'industrial activity' such as belonging to or participating in a union or participating in lawful industrial action.

Discrimination
Unlawful discrimination in employment and employment related activities is regulated by federal, state and territory anti-discrimination legislation.

The laws have wide coverage prohibiting discrimination on a number of grounds listed in the legislation (eg, age, sex, pregnancy, carer's responsibilities, race and disability). Unlawful discrimination can also occur in the context of non-employment relationships and in broader business activities, including the provision of goods and services to customers.

Limits on certain senior management employment termination benefits
The termination benefits of senior management personnel are generally limited to the amount of salary received in the previous 12 months unless shareholder approval has been obtained.

Work health and safety (WHS)
WHS legislation
On 1 January 2012, new WHS laws commenced in most jurisdictions in Australia. This followed a lengthy process of national review and harmonisation of Australia's WHS laws. As of 1 January 2015, the new WHS laws operate in all jurisdictions in Australia except Victoria and Western Australia. In Victoria and Western Australia, existing WHS laws continue to operate, although Western Australia has indicated an intention to introduce harmonised legislation.

Some states and territories have specific laws that regulate WHS in the mining industry, and for oil and gas facilities located onshore and in coastal waters. WHS on offshore oil and gas facilities located in Commonwealth waters operates under a national statutory framework, separate to the state and territory WHS laws.

These industry-specific WHS laws prescribe particular safety measures, systems and processes that must be implemented or complied with by employers in the particular industry. Specialist government regulators have been established in some jurisdictions to monitor and enforce compliance with these laws.

Liability
Under the WHS laws, the primary duty of care is imposed on a person who conducts a business or undertaking. This person must ensure, so far as is reasonably practicable, the health and safety of workers. A worker includes direct employees and also other workers such as contractor personnel.

The WHS laws also impose obligations on those who manage or control workplaces and on those who design, manufacture, import and supply plant, substances or structures for use at work. Duties also apply to those who install, construct or commission plant or structures for use at work.

Officers of corporations have duties to exercise due diligence to ensure that the relevant business or undertaking complies with the WHS laws. Workers also have duties to take reasonable care for their own health and safety and to ensure their acts or omissions do not adversely affect the health or safety of other persons.

Safety management system
Persons who conduct a business or undertaking generally comply with the WHS duty of care by developing and implementing a safe system of work that has various components. These components include a risk management system and management structure that identify the positions having responsibility for applying the risk management system.

Compulsory workers compensation
The states and territories each have legislation in place that regulates workers compensation in the event of a workplace injury or illness. An employee does not need to prove a fault by the employer to be entitled to workers compensation. The employer is required to obtain appropriate insurance against the risks of workers' compensation claims.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

In Queensland, management and recycling of mining waste products will generally be authorised as part of a mine's approval under the Environmental Protection Act 1994 (Qld), and will be subject to conditions. In certain circumstances, the transport of such waste may also be subject to additional information and tracking requirements under the Environmental Protection Regulation 2008 (Qld). Subject to relevant approval obligations, the mining lease holder will have the right to exploit mine waste products such as tailings.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Apart from the requirement for foreign workers to have a valid visa, there are no other restrictions or limitations imposed on the use of domestic and foreign employees for mining activities. Apart from the requirement for foreign workers to have a valid visa, there are no other restrictions or limitations imposed on the use of domestic and foreign employees for mining activities. The federal government recently announced reforms to the employer-sponsored skilled migration program (the 457 visa program) to be implemented before March 2018. The list of eligible occupations for a 457 visa has been reduced, including a number of positions in the mining industry. Existing 457 visas will remain in effect. However, from March 2018 the 457 visa will be abolished and replaced with the temporary skills shortage visa.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Australia has no direct CSR laws. However, CSR principles are indirectly incorporated in numerous state and federal laws, including the following:
- the Corporations Act 2001 (Cth), which provides protection against insolvent trading and protects the rights of creditors in the event of insolvency;
- the Fair Work Act 2009 (Cth): this Act applies, generally, to corporate employers and their employees and sets a system of minimum terms and conditions of employment that cannot be undercut in an individual contract;
- WHS laws: each of the states and territories have in place WHS legislation. The WHS laws impose a primary duty of care on a person who conducts a business or undertaking. This person must ensure, so far as is reasonably practicable, the health and safety of workers.

Some states and territories have specific laws that regulate WHS in the mining industry and for oil and gas facilities located onshore and in coastal waters;
- the Competition and Consumer Act 2010 (Cth), which provides protection for consumers and businesses against various unfair and anti-competitive practices, including misleading and deceptive conduct and cartel conduct;
- the Native Title Act 1993 (Cth) provides a process for recognising and protecting native title. The right to negotiate process provides for good faith negotiation to occur between the parties for a period of six months prior to the involvement of the National Native Title Tribunal;
- cultural heritage laws: areas and objects of archaeological importance or cultural heritage significance to indigenous Australians are protected from harm under Commonwealth, state and territory cultural heritage laws. This protection is afforded regardless of whether heritage is listed on a register or is otherwise identified or located; and
- the ASX Listing Rules include provisions regarding the conduct and reporting obligations of mining companies.

Further, Australia is a 'designated country' for the purpose of the Equator Principles. Designated countries are those countries with robust environmental and social governance and laws to protect their people and the natural environment. The Equator Principles are a voluntary industry developed risk management framework. For Equator Principle financial institutions, the Equator Principles provide standards for identifying, assessing and managing the social and environmental risk of financing large infrastructure, resources and industrial projects.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

A licence holder's relations with indigenous Australians can be a key determinant of the successful implementation of a mining project in Australia.

From a legal perspective, the issues requiring consideration include:
- whether the project affects land where native title does or may exist, in which case processes in the Native Title Act 1993 (Cth) will need to be followed;
- the potential for the project to affect places or objects within the landscape that are of cultural significance to indigenous Australians; and
- whether the land proposed to be used for a project is reserved under state- or territory-based land legislation introduced for the benefit of indigenous Australians.

An emerging theme in negotiating with indigenous Australians is the development of international standards on 'free prior and informed consent'. While strictly separate to the legislative framework set out in the Native Title Act and Australian cultural heritage legislation, proponents also need to have regard to the broader policy framework when considering how to approach indigenous land access issues and matters that may affect their 'social licence to operate'.

Native title overview

Native title is the set of rights and interests of indigenous Australians over land and waters arising from their traditional laws and customs. These rights are recognised by Australia's common law.

The Native Title Act is Commonwealth legislation that establishes the system through which native title is integrated into the Australian legal system. It applies in each state and territory. The Native Title Act has four objectives, which are reflected in its operation:
- protection of native title: to provide for the recognition and protection of native title;
- validation of prior invalid tenures: to provide for, or allow, the validation of historic actions that may have been invalidated because of the existence of native title;
- validity of future acts: to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- native title claims resolution process: to establish a mechanism for determining claims to native title.

Where does native title exist?

In general, native title does not exist over, or has been extinguished by, freehold title. It can exist in relation to Crown land and much of Australia is composed of Crown land. For example, in Western Australia over 90 per cent of the state is Crown land.

Extinguishment of native title by grant of certain tenures and construction of public works

The Native Title Act confirms that the grant of certain classes of land tenure, including freehold and leases conferring exclusive possession, as well as the construction of public works, have extinguished native title. It is usual to review the area of a proposed project to assess whether native title to the relevant land parcels may continue or whether it has been extinguished. If extinguished, there is no need to consider the requirements of the Native Title Act any further.

Compensation claims

In a landmark decision handed down in 2016, the Federal Court ordered the Northern Territory Government to pay A$3,300,261 to the Ngaliwurru and Nungali Peoples as compensation for the impact of land grants and public works on their native title (over an area of about 23 square kilometres). This decision is the first ever assessment of native title compensation in Australia. The award comprised compensation for economic loss, non-economic loss (caused by loss of traditional attachment to the land and associated pain and suffering) and interest on the economic loss. A significant increase in the number of compensation claims across Australia is anticipated as a result of this decision, which may amount to billions of dollars in compensation payable by government and possibly non-government parties.

Native title claims

Indigenous Australians have made several hundred claims seeking recognition of their native title through the processes in the Native Title Act. Many claims have been determined in favour of native title claimants, and there are large areas of land in Australia where native title has been formally determined to exist. For mining proponents, in practical terms, there is not a great difference between determined native title holders and registered claimants. Both enjoy the same procedural rights under the Native Title Act in respect of the grant of mining tenements.

Future land use

The Native Title Act protects native title from invalid interference by setting out a regime that governs all 'acts' (such as the grant of tenures and mining licences) that occur on land and waters after 1 January 1994 that affect native title (called 'future acts'). A future act will be valid if it is done pursuant to the requirements of the Native Title Act.

The procedural requirements associated with the particular classes of future acts vary. Generally, the greater the impact on native title rights, the more onerous the procedural requirements.

As an alternative to the 'right to negotiate', a proponent may seek to negotiate an 'indigenous land use agreement' (ILUA). This type of voluntary agreement may record multiple consents and approvals from a native title group. These agreements are registered with the National Native Title Tribunal. When registered, these agreements bind all affected Indigenous Australians and provides greater certainty for project proponents.

A significant native title decision handed down earlier this year found that the Native Title Act requires all named applicants for a native title group entering an ILUA must be parties to, and execute, the ILUA. In circumstances where named applicants have passed away or refuse to sign, the claim group will need to replace the applicant pursuant to Native Title Act processes. This decision also means that any ILUAs which have already been registered may not be valid where one or more applicants have failed to execute the ILUA. Ultimately, this decision means that ILUAs will require more time and be more costly to negotiate, authorise and register. Legislative amendments to the Native Title Act are currently being considered.

In most cases, the creation of a right to mine or the compulsory acquisition of native title for use by a non-government party will attract

the 'right to negotiate'. This requires a minimum of six months' good faith negotiation as to the terms on which the acts proposed can occur, between the relevant state or territory, the tenure applicant and registered native title holders or claimants. These agreements commonly involve the payment of money, provision of employment opportunities to native title group members and protection for areas of cultural heritage significance. If no agreement is reached, the National Native Title Tribunal can determine whether the grant or compulsory acquisition can proceed.

In most cases, the future act processes will not confer a right of veto to native title claimants and holders over whether a project will proceed. However, the processes can be time-consuming and can create critical delays if not managed carefully. Some projects cannot be implemented without an indigenous land use agreement to ensure that the project is valid from a native title perspective. In those circumstances, the native title claimants have a veto. This is usually dictated by state policy or legislation rather than the Native Title Act. An indigenous land use agreement requires the consent of the relevant native title parties and can therefore operate as a veto in some circumstances.

Aboriginal cultural heritage overview

Areas and objects of archaeological importance or cultural heritage significance to indigenous Australians are protected from harm under Commonwealth, state and territory laws. Indigenous cultural heritage is protected, irrespective of whether the heritage is listed on a register or is otherwise identified and located.

The states and territories each have their own aboriginal cultural heritage protection laws, which vary considerably across the jurisdictions. Queensland, Victoria and New South Wales, in particular, impose significant approval obligations and significant monetary penalties if unauthorised harm to indigenous cultural heritage occurs. Proponents may also be ordered to stop work if protected heritage is at risk of harm. In practice, regardless of the specifics of the regulatory regime, cultural heritage protection requirements are often time-consuming with onerous approvals to obtain, which can cause considerable delay to a project.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (Commonwealth Heritage Act) also operates to protect areas or objects of particular heritage significance at imminent risk of harm. In those circumstances, under the Commonwealth Heritage Act, the minister can require the works to stop.

The laws regarding heritage protection in Australia have become considerably stricter in the past decade. The penalties, statutory obligations and risk of being ordered to stop work after construction has commenced mean that it is important to assess and address cultural heritage risk early in any major project.

Obtaining an approval to conduct a project that will impact aboriginal cultural heritage will require the proponent to engage with indigenous Australians with a traditional connection to the land in question. Proponents will often, but not always, be dealing with the same indigenous Australian group in connection with both native title and cultural heritage approvals.

State and territory land rights schemes overview

Many states and the Commonwealth in the Northern Territory have established schemes allowing the transfer of freehold interests in certain public lands to indigenous Australian groups with connection to those lands. Reserves created for the benefit of indigenous Australians also exist in many states. There are, as a result, large areas of land held as freehold by indigenous Australians for the benefit of their communities.

The use of this land for mining and infrastructure projects will require the consent of the relevant community and is tightly regulated. As a result, the agreements that need to be negotiated in respect of these lands can be more difficult to negotiate and more favourable to indigenous Australians than native title agreements. It is also possible for native title to exist over these areas.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Australia has ratified numerous international instruments that incorporate CSR principles, including the following:

- the International Covenant on Civil and Political Rights 1966 (ICCPR): Australia has also ratified the first and second protocol to the ICCPR;
- the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR): Australia has also ratified the protocol to the ICESCR;
- Universal Declaration on Human Rights 1948;
- Equal Remuneration Convention 1951;
- Discrimination (Employment and Occupation) Convention 1958;
- the Convention on the Elimination of All forms of Discrimination Against Women 1979;
- Employment Policy Convention 1964;
- the Occupational Safety and Health Convention 1981: Australia has also ratified the protocol to the Occupational Safety and Health convention; and
- the UN Declaration on the Rights of Indigenous Peoples 2007.

It is important to note that the obligations contained in the above treaties, conventions or protocols are not legally binding until incorporated into Australian legislation.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Commonwealth and all Australian states and territories have legislation criminalising bribery and corruption and practices to disguise such conduct (eg, false accounting). The Commonwealth has laws prohibiting bribery of Commonwealth and foreign public officials. The states and territories have laws against the bribery of their own public officials and also against secret commissions (commercial bribery). In New South Wales, Victoria and the ACT, the same legislative provision is used for both public and commercial bribery. In Queensland, Tasmania, the Northern Territory and Western Australia, there are provisions dealing specifically with public sector bribery and separate provisions dealing with secret commissions (which can be applied in both the public and commercial context).

Bribery of a foreign public official

This is prohibited under section 70.2 of the Commonwealth Criminal Code. It prohibits the offer or provision of a benefit to another person (or causing this to be done) when the benefit is not legitimately due and is intended to influence a foreign public official in the exercise of their duties in order to obtain or retain business or a business advantage that is not legitimately due. 'Benefit' is defined broadly to include any advantage and is not limited to money or property. 'Foreign public official' is also defined broadly to include government employees (including employees of corporations where the foreign government has a controlling interest), members of the executive, legislature, judiciary or military, a person performing official duties under a foreign law and employees of public international organisations.

The legislation applies to Australian citizens and residents, Australian incorporated companies or to anyone else if the conduct occurs wholly or partly in Australia. It would be sufficient, for example, if relevant email communications were made from Australia for there to be 'conduct occurring partly in Australia'. It is no defence that such payments are customary. A defence is available for facilitation payments that are minor payments for routine government actions (ones to which an individual has an existing entitlement) where specified details concerning the payment are recorded as soon as practicable after it was made.

Organisations must therefore take great care in providing benefits such as gifts, corporate hospitality and political or charitable donations.

On 31 March 2017, the Australian government released a public consultation paper seeking submissions on a draft Bill to introduce new and wider foreign bribery offences. The proposed reforms include the introduction of new offences of failing to prevent bribery and recklessly bribing a foreign public official, clarifying or simplifying elements of existing offences, and extending the definition of 'foreign public official' to include candidates for office. If implemented, the reforms would significantly increase the scope and enforceability of Australia's foreign bribery laws.

Domestic bribery (public and commercial)

Bribery of Commonwealth public officials is prohibited under section 141.1 of the Commonwealth Criminal Code. It prohibits the dishonest offer or provision of benefits with the intention of influencing a Commonwealth public official in the exercise of their duties or where the actual or expected receipt of the benefit would tend to influence the official in the exercise of their duties. While the legislation dealing with bribery of public officials in Queensland, Tasmania, the Northern Territory and Western Australia is slightly differently worded, it is broadly similar to the Commonwealth provision.

All states and territories have prohibitions on the payment of secret commissions that can be applied in both a public and commercial context. While the wording differs across the jurisdictions, broadly the provisions prohibit the giving to or receiving of payments by agents (or offers to do so) to induce the agent to do or not do something in relation to the affairs of the agent's principal or which would tend to influence the agent to show favour or disfavour. In some jurisdictions an 'agent' is defined to include particular categories of person (eg, employees, agents, officers of companies or lawyers) but the definitions are broad and usually cover anyone who would legally be classified as an agent.

Each state and territory has their own broad-based anti-corruption commission to investigate public sector corruption. Although the remit of each commission differs, all of them have broad investigative powers to obtain search warrants, compel production of documents and examine witnesses. The Commissions prepare reports following their investigations, which are referred to prosecuting authorities when they contain recommendations for prosecution.

Practical operation of Australia's anti-bribery provisions

The Australian legislative provisions dealing with domestic bribery all require payments to be made 'corruptly' or 'dishonestly'. While there is some debate as to what this means, the better view is that it does not require a person to have a subjectively improper intent; it is enough that they intend to influence a person or official. A person's intention is inferred from all the circumstances of the case. The amount and frequency of any benefit, whether it coincides with any critical decision by the other party (eg, a tender outcome) and whether there is some genuine commercial justification for the benefit (eg, transport and accommodation for a government official for a necessary site visit to a project), are all factors taken into account in determining whether a person's intention was corrupt or dishonest. In states and territories other than New South Wales, South Australia and the ACT, there is a reverse onus of proof which means that the person who gave or received the payment (or offered to do so) must prove that it was not done with an improper motive. For commercial bribery, if there is no element of secrecy (ie, the principal is aware of the benefit), there is no bribe, so when providing gifts or hospitality (eg, to the employee of a company), communicating the fact of the gift to a range of people within the company (especially if they are senior) can be protective.

Corporate criminal liability for the acts of officers, employees or agents is much easier to establish under Commonwealth law than under state or territory law. In the states and territories, companies are generally only liable for the acts of their officers, employees or agents where there is knowledge at senior management or board level of what they have done. In contrast, the Commonwealth has broad provisions to impute liability to companies for the acts of their officers, employees and agents, both where there is express or tacit approval at board or senior management level of what has occurred but also where the company had a culture that encouraged non-compliance or failed to encourage compliance.

Employees of companies which cover up breaches of bribery provisions will likely be in breach of Commonwealth, state or territory false accounting provisions and directors or officers whose conduct has allowed bribery to occur risk a breach of their duty to manage the affairs of the company with due skill and diligence.

There are stringent penalties for breach of the various anti-bribery provisions, comprising both imprisonment and fines. For Commonwealth offences it is up to 10 years' imprisonment or a fine of around 10,000 penalty units (which currently equals A$1.8 million) for individuals and for a company it can be up to 100,000 penalty units or three times the value of the benefit to the company (if ascertainable) or 10 per cent of the company's annual turnover. There are also civil consequences to bribery. A contract awarded as a result of a bribe may be deemed unenforceable and a contract with an agent whom it is known is using bribes will also not be enforced.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Large and sophisticated transnational organisations frequently pay heed to the regulation effected by the Bribery Act 2010 (UK) and Foreign Corrupt Practices Act 1977 (US), even where their organisations have no jurisdictional nexus to the UK or the US, on the basis that there is extensive regulatory guidance, including in the form of guidance papers, provided by the Ministry of Justice (UK) and the Department of Justice (US) derived from more extensive and long-standing regulatory experience in those jurisdictions.

There is no equivalent guidance document in Australia, where there have been historically limited numbers of domestic bribery prosecutions and only a couple of prosecutions arising out of foreign bribery, although, following OECD criticism of Australia's record, there is now a push at Commonwealth level to facilitate a greater number of prosecutions. A Senate inquiry is due to report mid-year and a consultation paper on deferred prosecution agreements has just been released, which proposes the introduction of such agreements into Australia, drawing significantly on principles and processes put in place for such agreements in the UK and the US.

Multinational companies will also pay significant attention to 'in country' advice obtained concerning local anti-bribery and corruption laws in jurisdictions in which they operate.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

On 6 May 2016, the Australia government announced that Australia will join the EITI. However, Australia is yet to implement the EITI Standard or to be formally recognised by the EITI as a 'candidate' for recognition as being compliant with the EITI Standard.

In May 2015, a multi-stakeholder group (comprising government, civil society and industry) provided a report to government on a domestic pilot programme in which three state governments, the Commonwealth and eight companies participated to assess the practical application of EITI principles in Australia.

The report set out a methodology for the implementation of EITI methodology suitable for Australian circumstances and recommends a voluntary, light-touch reporting model. The Australian government is yet to confirm whether it will follow the recommendations of the report in progressing toward implementation of the EITI Standard.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Foreign investment approval – who needs to apply?

Investments by foreign persons in Australia are regulated under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). Foreign persons include Australian subsidiaries of foreign companies.

Acquisitions by foreign persons of mining and production tenements require prior clearance of the federal treasurer under the FATA, in the following cases:

- an acquisition by an enterprise or national of the United States, New Zealand or Chile (excluding a foreign government investor, such as a foreign government, state-owned enterprise or sovereign wealth fund), if the value of the tenements exceeds A$1.094 billion (this amount is indexed annually); or
- an acquisition by any other foreign person (including a foreign government investor from the United States, New Zealand or Chile), regardless of the value of the mining and production tenements.

Mining and production tenements include rights conferred under Australian law (including state and territory laws) to recover minerals, oil or gas in Australia or from the seabed or subsoil of the offshore area, other than a right to recover minerals, oil or gas for the purposes of prospecting or exploring for minerals, oil or gas.

Update and trends

Native title

In a landmark decision handed down in 2016, the Federal Court ordered the Northern Territory Government to pay $3,300,261 to the Ngaliwurru and Nungali Peoples as compensation for the impact of land grants and public works on their native title (over an area of about 23 square kilometres). This decision is the first ever assessment of native title compensation in Australia. The award comprised compensation for economic loss, non-economic loss (caused by loss of traditional attachment to the land and associated pain and suffering) and interest on the economic loss. A significant increase in the number of compensation claims across Australia is anticipated as a result of this decision, which may amount to billions of dollars in compensation payable by government and possibly non-government parties. The Commonwealth, States and Territories are largely liable for native title compensation, but this liability may be 'passed on' to third parties in some circumstances (either by legislation or contractually). Project proponents and infrastructure providers should carefully review their contractual arrangements to identify the extent of any compensation liability associated with their project or infrastructure, and should be aware of native title claims affecting their projects. Mining and petroleum tenement holders should check the terms and conditions of their tenements and any contractual arrangements with the State to see if liability has been passed on to them.

A significant native title decision handed down earlier this year found that the Native Title Act requires all named applicants for a native title group entering an ILUA must be parties to, and execute, the ILUA. In circumstances where named applicants have passed away or refuse to sign, the claim group will need to replace the applicant pursuant to Native Title Act processes. This decision also means that any ILUAs that have already been registered may not be valid where one or more applicants have failed to execute the ILUA. Ultimately, this decision means that ILUAs will require more time and be more costly to negotiate, authorise and register. Legislative amendments to the Native Title Act are currently being considered.

Increased environmental activism

Environmental activism has increased dramatically in Australia recent years, causing delays to a number of major resources projects. One notable example is the sustained campaign of environmental activism in relation to Adani's Carmichael Coal Mine and Rail Project. This proposed project is set to extract a total of 2.3 billion tonnes of coal over a period of 60 years. Although proposed in 2010, the project did not receive state and federal approval until late 2016, owing in large part to a spate of judicial review applications made in respect of a number of approvals for the project. Another mining project that has been met with significant environmental activism has been the Alpha Coal Project, which is intended to produce 30 million tonnes of coal per annum over a period of 30 years. The progress of the Alpha Coal Project has also been delayed as a result of environmental activism, with a challenge to the project's environmental authority making it all the way to the High Court this year. State and federal governments have been called upon to enact measures to prevent environmental activists from delaying resources projects in this way going forwards.

Chain of responsibility

The Queensland government has passed the Environmental Protection (Chain of Responsibility) Bill 2016, which amends the Environmental Protection Act 1994 (Qld) to allow environmental obligations be imposed on environmental authority holders, as well as a broad range of 'related persons'. The Bill allows the Department of Environment and Heritage Protection (DEHP) to amend an environmental authority. The amended Bill outlines when a person has a relevant connection with a company and whether to issue a related person with an environmental protection order. The amendment excludes landowners not connected with mining activities, the beneficiaries of native title or cultural heritage agreements and entities that have not significantly benefited financially from the relevant activities from being a 'related person'. The DEHP may consider whether a related person took 'reasonable steps' to ensure a company has complied with environmental obligations. As there is now significant scope for 'related persons' to be personally liable for breaches of the environmental obligations, all members associated with companies have an increased interest in ensuring companies comply with all Queensland environmental responsibilities.

Acquisitions of exploration tenements by foreign persons may also require clearance under the FATA in some cases, such as where:

- they are being acquired by a foreign government investor; or
- the relevant lease or licence gives rights to occupy Australian land and the term of the lease or licence (including any extension or renewal) is reasonably likely, at the time of acquisition, to exceed five years.

Acquisitions of certain interests in the following may also need prior clearance under the FATA:

- other kinds of Australian land;
- an entity the value of whose interests in Australian land (inclusive of mining and production tenements) exceeds 50 per cent of the value of the entity's total assets; or
- an entity the total value of whose legal or equitable interests in exploration, mining and production tenements exceeds 50 per cent of the entity's total assets by a foreign government investor.

There is an exemption for certain acquisitions of interests in Australian land (including mining or production tenements) from the Australian government or a government body that may apply in relation to acquisitions by non-government foreign investors.

Australia's Foreign Investment Review Board (FIRB) has issued a Guidance Note on foreign investment in mining (Guidance Note 24), which may be found on FIRB's website (www.firb.gov.au).

What should be included in the notification?

Where a proposed investment requires clearance, it is an offence, and criminal and civil penalties may be imposed, if the investment is made without having obtained prior clearance. Clearance for a proposed acquisition is required to be sought from the treasurer through the FIRB.

The FIRB website contains a checklist setting out what needs to be included in any application to FIRB. As of 2015, applications are now made online via the FIRB website.

At a minimum the application will need to include information about the following:

- the relevant parties;
- the investment (including its nature, the method of acquisition, its value and the timetable); and
- the investor's intentions (immediate and future with respect to the investment).

As the government considers each application against national interest considerations, the application should also indicate how the proposal will impact the following:

- national security;
- competition;
- other Australian government policies (including tax and environmental matters); and
- the economy and community.

The application should also include information about the character of the investor.

On receipt of the application (including payment of the prescribed fee – see below), the treasurer initially has 30 days to decide whether to prohibit the acquisition on the basis that it would be contrary to the national interest. FIRB has an additional 10-day period to advise the applicant of its decision. FIRB may also seek to extend the 30-day statutory period by one of the two following means:

- the treasurer can make an interim order to extend the time for its decision by up to a further 90 days (the existence of an interim order would be made public as it is required to be published in the Commonwealth Gazette); or
- it may (and often does in practice) ask the applicant to agree to an extension of time (this would normally occur on a confidential basis).

As noted, FIRB will normally consult all relevant government departments and agencies before making a recommendation to the treasurer in relation to the application. This is normally done on a confidential basis.

The vast majority of applications are cleared. Clearance may be given on a conditional or unconditional basis. The treasurer may also impose conditions (ie, additional to the tax-related 'standard conditions' mentioned below) if the treasurer is satisfied that doing so is necessary to ensure that the proposed investment is not contrary to Australia's national interest.

The treasurer has published certain tax related standard conditions that will generally be imposed on foreign investment approvals to make clear the requirements of and expectations for foreign investors. The conditions include, among other things, compliance with Australian taxation laws, provision of documents or information that is required to be provided to the ATO under Commonwealth taxation law and notification to FIRB after making the proposed investment and after a termination event in relation to the investment (eg, cessation of control). Additional tax related conditions may also be applied where a significant tax risk is identified in a particular case. These may include requiring the investor to enter into advance pricing arrangements with or seek rulings from the ATO, or comply with other directions from the ATO that are specific to their circumstances.

Fees payable

A foreign person will be required to pay a non-refundable fee before FIRB will assess a proposed acquisition. Generally, a fee for an application to acquire an interest in a mining or production tenement is A$25,300 or, for a foreign government investor, A$10,100.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Australia has entered into 21 current bilateral investment treaties with countries including Indonesia, the Philippines and China.

Australia has 10 FTAs in force with countries that include China, Korea, Japan, Malaysia, Singapore, Chile, New Zealand and the Association of South-East Asian Nations. The Trans-Pacific Partnership has been concluded but not yet signed by the participating countries, being, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the US and Vietnam.

In addition, Australia has seven FTAs under negotiation, which include the Australia–India Comprehensive Economic Cooperation Agreement and the Indonesia–Australia Comprehensive Economic Partnership Agreement.

Australia currently has 44 tax treaties with countries including Malaysia, Chile, Japan and New Zealand. Australia and Germany signed a revised tax treaty in 2015, but it is not yet in force.

* *The authors would like to thank John Sartori (partner) and Matt Hartsuyker (senior associate) for their contribution to corporate and mining matters, Gavin Scott (partner), Tammy Kamil (lawyer), Jo Slater (senior associate) and Grace Carstensen (lawyer) for their contributions to native title matters, John Briggs (partner), Caroline Ammundsen (partner), Tony Hill (partner), Cheyne Jansen (senior associate), Paul Wilson (senior associate), Montana Linkio (lawyer) and Luke Salem (lawyer) for their contributions to environment matters, Geoff Mann (partner), Ian Kellock (partner), Bronwyn Kirkwood (senior associate) and Kristina Popova (lawyer) for their contributions to tax matters, Gaelan Cooney (partner), Zoe Wiszniewska (senior associate) and Michelle Gaynor (lawyer) for their contributions to finance matters, Jane Harvey (partner), George Cooper (partner) and Dominic Fleeton (senior associate) for their contributions to employment and health and safety matters, Jeremy Chenoweth (partner), Melissa Yeo (senior associate) and Daniel Welsh (lawyer) for their contributions to disputes matters and Alyssa Phillips (partner) and Nathan Lindsay (lawyer) for their contribution to competition, anti-bribery and corruption matters. All are lawyers at Ashurst Australia.*

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry has significant relevance to the Brazilian economy, accounting for approximately 3.9 per cent of the Brazilian GDP in 2015. Since 2006, mineral exploitation has increased, reaching its production peak in 2011 with approximately US$53 billion generated in proceeds from mining activities. In 2016, Brazilian production reached US$24 billion, and the difference in comparison to 2011 is primarily owing to the decrease in the mineral commodities prices, particularly iron ore, which corresponds to three-quarters of Brazilian mineral production.

Expectancy of a bill of law (5.807/2013) that rose from a governmental proposal to introduce new mineral regulations in Brazil back in 2013 put on hold the decisions of companies and new investors to begin financing new operations in the country. Nevertheless, setbacks in the Brazilian economy resulted in investment opportunities for foreign investors to acquire cheap mining rights, resulting from the currency fluctuation that placed the US$ well in advantage as regards the local currency.

Recent actions show that the Brazilian government is aware that creating a transparent and independent regulatory agency for the mining sector (replacing the current National Mineral Production Department) and enacting new legislation (different from the bill of law proposed in 2013) to review the royalties contribution for mineral exploitation is paramount to ascertain legal certainty to the investors and guarantee the attraction of the investments necessary to reboot the industry's job generation capacity and development.

2 What are the target minerals?

Considering Brazil's extensive territory it holds great geological diversity of metallic and non-metallic minerals, including some that have gained global relevance (ie, niobium and tantalite) and which the size of the mineral reserves stands out. However, the target minerals, as per the amount exported by Brazil in 2015 and 2016, are iron ore, bauxite, aluminium, niobium, copper, manganese, kaolin, gold and others.

3 Which regions are most active?

The most active mineral regions in Brazil are in the states of Minas Gerais (reserves of gems, iron ore, gold, manganese, aluminium, graphite, bauxite and niobium), Mato Grosso (reserves of manganese and iron), Pará (reserves of gold, iron ore, aluminium, copper, nickel and manganese), Bahia (reserves of bauxite, iron, nickel and chrome) and Rondônia (reserves of tin, gold, manganese and diamonds). There are mineral activities in other Brazilian states as well but not as mature.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Brazilian system is civil law-based. The Federal Constitution, enacted on 1988, organises the country as a federal republic formed by the union of the states and municipalities, and the Federal District (Brasília). Each of the 27 states of the union is empowered to adopt its own constitution and laws observing the principles and provisions stated in the Federal Constitution.

5 How is the mining industry regulated?

The National Department of Mineral Production (DNPM) is the federal agency entitled to regulate mining activities in Brazil. The main legal diploma regulating mining activities in Brazil is Decree Law No. 227/1967, the Brazilian Mining Code. Although primarily regulated by the Federal Constitution and federal laws, mining activities are also subject to state and municipal laws, particularly on taxes, environmental and soil usage matters.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The Federal Constitution and mining laws at federal level regulate, primarily, the mining industry in the country, along with other state and local regulations in relation to taxes, environmental licensing and soil usage matters.

The Brazilian Mining Code (Decree No. 227/1967) grants authority to the Ministry of Mines and Energy and the environmental protection authorities, especially the Brazilian Environmental and Renewable Resources Institute (IBAMA) and the Federal Environmental Protection Agency (EPA), which, along with the DNPM, are the main regulatory bodies supervising mining activities.

The legislative branch has powers to enact all the laws that are relevant to the mining industry. Nevertheless, the DNPM, although considered a department working hierarchically under the Ministry of Mines and Energy (under the executive branch), has powers to issue regulations to set the operational guidelines of the Brazilian mining industry. Regulations issued by the DNPM must stay within the general competence attributed to that body under applicable law. In this sense, the DNPM works similarly to a regulatory agency, with powers to inspect, regulate and penalise the industry players, within the limits of the powers granted to it by federal laws.

For many years now a new mining code has been expected. However, no major amendment was passed last year.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no classification system for reporting mineral resources and mineral reserves set in Brazil by the DNPM. There is no distinction between resources and reserves, as in other jurisdictions, and Brazilian mining legislation only establishes standards for determining different levels of certainty on the existence of a deposit, such as in measured reserve, indicated reserve and inferred reserve.

In this sense, a measured reserve is the tonnage or volume of ore calculated by the dimensions verified in surface geological mapping, underground trenches, galleries, underground work and drilling, and in which the amount is determined by the results of detailed sampling. The inspection, sampling and measurement must be as thorough as possible and the geological characteristics well defined to ensure that the geological features (dimension, form and grade of the deposit) can be accurately determined. The tonnage and grade must be rigorously defined within the limits established with a margin of error of no more than 20 per cent.

An indicated reserve is the tonnage and grade of ore partially measured based on specific samples or production data and partially by

estimates based on geological evidence at a reasonable distance from the actual sampling. Finally, an inferred reserve is an estimate made based on the knowledge of the geological characteristics of the mineral deposit, with little or no exploration work carried out.

Notwithstanding the above, the JORC Code is the most common system contractually used by private parties for assessing mineral resources and mineral reserves for projects in Brazil.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The Federal Constitution determines under article 20, item IX, that the Union (ie, the Brazilian federal state) has ownership over all mineral resources on the ground, including metallic minerals. Private parties obtain the right to explore the minerals through the granting of an authorisation by the federal government represented by the DNPM. The exploitation rights over any minerals, however, are granted through a concession issued by the Ministry of Mines and Energy.

There is no entailment of ownership or possession rights in connection with the mining rights for the land underlying the mining rights. However, the mineral rightholders shall have access to and use of the areas to be explored and exploited, and rights of way and easement over private and public lands. Should the surface rights belong to a third party, they may be acquired by mutual agreements between the mining company and the surface rightholders. If surface rights are not acquired by the mining companies, their holder shall be entitled in any event to a compensation fee for the occupation of the area, and an indemnification for any damages caused to the land, as further explained in question 10.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Mining investors and new players interested in engaging in exploration and other mining activities in Brazil may obtain general information related to the area, statistics on mining activities and general technical information through the DNPM's website. The DNPM provides preliminary publicly held information on existing exploration licences and mining concessions, geographic coordinates of mining titles and information on titleholders. However, mineral assessment reports are not publicly released to third parties even though holders of exploration licences must file it with the DNPM.

The Brazilian Geological Survey Company (CPRM), a government-held company subordinated to the Ministry of Mines and Energy, carries out regularly geological studies and evaluation of the Brazilian natural resources. Because of that, the CPRM accumulated geological and georeferenced information and construed a comprehensive database of documents, charts, maps and images. The CPRM's website contains studies, surveys and mineral evaluations that are openly available to the general public.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Private parties may acquire two main types of mining rights in Brazil: exploration licences and mining concessions. Exploration licences work on a first-come, first-served basis, providing the licence holders with the right to access the properties and execute exploration activities, having previously executed an agreement with the surface owner, if the case may be.

Exploration licences can be granted for a period of one to three years, being its extension permitted upon its request by the titleholder to the DNPM and its respective authorisation, for an equal period. The exploration licence represents a preliminary stage upon which the licensee must carry out the exploration work and, if successful, submit the supporting evidence of such success to the DNPM on the existence of mineral reserves in the licence area.

The following obligations must be complied with by the titleholders: (i) initiate the exploration works within 60 days, counted from the date of publication of the licence or from the obtainment of access to the relevant properties; (ii) inform and notify the DNPM of any discoveries of ores not included in the titleholder's authorisation; (iii) not interrupt the exploration activities without reason for more than three consecutive months or for more than 120 non-consecutive days during the term of the licence; (iv) pay all relevant fees; (v) request the DNPM's previous authorisation (ie, an extraction permit) before removing any substances from the licence area for analysis and industrial experiments; (vi) pay any required compensation to the surface owner or possessor for purposes of occupation of the land and any losses or damages caused to it in relation with the exploration works; and (vii) prepare and present the final exploration report to the DNPM.

Upon the analysis and approval of the exploration report by the DNPM, the licence holder may apply for the mining concession within the term of one year. Additionally, the individuals or companies holding exploration licences must comply with the following conditions, among others, in order to obtain the mining concessions:

- successful conclusion of the exploration programme of the mineral reserves;
- provide proof of economic feasibility to exploit the explored reserves;
- provide proof of its financial capability in order to execute such exploitation; and
- provide the required environmental licences for the project.

On the other hand, the mining concessions may be granted to companies or individuals in relation to specific types of mineral deposits in the concession area, being valid until total depletion of such mineral deposits. Should the concessionaire find any other types of mineral in the concession area it is required to notify the DNPM of such finding and, upon its request to the DNPM, may include the other mining rights in its mining concession.

As per the provided in the Brazilian Mining Code, the request to obtain a mining concession is made to the Ministry of Mines and Energy, containing the detailed geological and geophysical information on the licence areas under request, and including the:

- description of the mineral deposits to be exploited;
- the description of the mining field's topographical location and the indication of its neighbouring concession areas;
- a map of the area to be mined, appointing its boundaries and the properties affected by the intended mining activities, with the names of the surface landholders;
- reference to any easements that may be required in the area;
- the exploitation's working plan with a description of the mining method, scale of production and processing facilities; and
- evidence that there are enough sources and availability of funds to complete the work on the mine.

Once the mining concession is granted by the Ministry of Mines and Energy, the concessionaire has to comply with a series of obligations, such as:

- begin the mining operations within six months of the publication of the concession's granting announcement in the Official Gazette of the Union;
- execute the works in the concession area as provided for in the Plan of Economic Development of the deposit, which was approved by the DNPM;
- as mentioned above, extract solely the substance indicated in the concession or its addendum;
- inform and notify the DNPM of the discovery of any new substance not included in the concession;
- follow the mining activities as provided in the applicable legislation;
- have a qualified individual supervising the work;
- refrain from intentionally obstructing or hampering the future development of the deposit;

- accept liability for all losses or damages caused to third parties as a result of the mining works;
- refrain from causing air or water pollution as a result of the mining works;
- use the water sources in accordance with technical instructions and requirements, protecting and preserving it;
- refrain from suspending the mining works for more than six months without the DNPM's previous authorisation;
- maintain the mine in good conditions throughout any suspension period;
- rehabilitate any areas degraded by the mining activities; and
- pay royalties to the government and landowner.

11 What is the regime for the renewal and transfer of mineral licences?

Mining concessions are granted for an indefinite period of time and, therefore, are not subject to renewal. All provisions related to the renewal of the exploration licence are listed on the answer to question 10. Additionally, applications for mining rights are also not transferable in Brazil.

The applicable law authorises the free transfer of mineral licences subject to the DNPM's approval. The assignment of mining licences or concessions requires that any interested individual or company comply with the requirements laid down in the law and in the applicable DNPM regulations for the purposes of completing the transfer.

The transfer of interests in mining companies, the tangible or intangible assets of the mining operation and product sale contracts do not require the DNPM's prior authorisation. However, the execution of a security interest upon these assets may compromise the development of the mining concession in itself. Furthermore, the transfer of interests in mining companies will be subject to the DNPM's prior authorisation in case the mining rights are located within an area of 150km of Brazil's borders.

12 What is the typical duration of mining rights?

Both the application for mining rights and the mining licence are valid, each one, individually, for a period of one to three years, and may be renewed for an equal period upon authorisation from the DNPM. Mining concessions are granted for an indefinite period of time and, therefore, are not subject to renewal.

Non-compliance by the licence holder or mining concessionaire of the obligations provided in the regulation may result in sanctions that will range from warnings, fines or forfeiture of said mining licence or mining concession. In addition, if verified by the DNPM, the following infractions will result in the forfeiture of the application for mining rights, mining licence or mining concession:

- formal abandonment of the mine;
- non-compliance with the term to begin or re-start the exploration or exploitation works, despite previous warnings or fines;
- deliberate practice of exploration works in disagreement with the conditions provide in the authorisation licence, despite previous warnings or fines;
- continuance of ambitious exploitation or extraction of a substance not included in the Exploitation Authorisation, despite previous warnings or fines; and
- non-compliance with repeated audit requests, characterising a third repetition within an interval of one year of infractions with fines.

Further, the DNPM may declare void all mining licences or mining concessions when these are granted or issued in disagreement with the provisions of the Brazilian Mining Code. This annulment will be promoted ex officio on the following cases: intentional imprecision on the definition of the exploration or exploitation areas; and when transfers or assignments of mining licences or mining concessions are in non-compliance with the legal and regulatory requirements, including its approval by the DNPM of said transfer or assignment.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The Brazilian Mining Code determines that only domestic individuals or companies may apply for or acquire mining rights in Brazil. This does not restrict, however, foreign companies or individuals to hold total ownership of Brazilian entities active in the mining sector, as long as the company applying for or acquiring a mining right is duly incorporated and headquartered in Brazil.

This rule is excepted only by mining rights located within an area of the country called the 'border zone', which is defined as the area within 150km from the dry borders of the country. Any mining companies holding mining rights or willing to carry out exploration or exploitation activities in the border zone must be controlled and managed predominantly by Brazilians. Thus, mining rights located in the border zone may not be acquired by foreigners nor by a Brazilian company controlled by foreign parties.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Brazil has an independent judicial system under which the ruling of courts and domestic arbitration awards can be enforced against any party in any part of the Brazilian territory. Its judicial system is organised under the rule of law and based on constitutional principles such as due process of law and full defence. The rule of law and due process are also followed by the authorities on the administrative level, as provided in the applicable legislation. Intermediary administrative decisions can be challenged or appealed before a superior court, and a final decision of the administration can be challenged with the competent judicial courts.

As mentioned above, domestic arbitration awards are freely enforceable in Brazil, however, foreign arbitration awards require prior ratification by the superior courts, whereby it is confirmed that the validity of the arbitration procedure and the due process of law were followed. This ratification does not modify the award's decision.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The Brazilian Constitution provides that there is no entailment of ownership or possession rights with the mining rights for the land underlying them (the mining rights), which belongs to the federal government. The mineral right holders have access and use to the areas to be explored and exploited, and rights of way and easement over private and public lands. Should the surface rights belong to a third party, they may be acquired by mutual agreement entered into by the mining company with the surface rightholders upon the determination of a compensation fee for the occupation of the area and indemnification for the damages caused to the land.

Should the mineral rightholder and the surface rightholder not be able to reach an amicable understanding, the miner may resort to legal action with the local courts to establish the compensation fee that shall be paid to the surface rightholder. This compensation must be paid to the surface rightholder because of the occupation of the area and any damages that may be caused to the property by the execution of the mining activities therein. Courts generally grant reasonable market prices.

In addition, the federal government has some limitations on the acquisition and lease of rural lands in Brazil by foreign individuals and legal entities with foreign control. These limitations, however, have to be analysed on a case-by-case basis depending on the size of the land, since they could require prior approval by the government.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The government and state agencies are not allowed to take part or participate in mining projects in Brazil.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are no provisions in law regarding government expropriation of licences. We are not aware of any expropriation of mining licences taking place in Brazil.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Brazilian legislation designates as a protected area (known as legal reserves) 20 per cent of every rural property in Brazilian territory. The exceptions to this rule are for properties located in the Cerrado or in the Amazon Forest regions, in which the legal reserve is extended to 35 per cent and 80 per cent, respectively. In both cases, these legal reserves must be demarcated and registered by the landowner with the Real Estate Registry. In this sense, the law also determines requirements that must be met: the legal reserve must be duly forested or under a reforestation plan, with native vegetation that cannot be used for developing industrial activities. The reforested vegetation cannot be cut down within the legal reserve if the company wants to change the location of the reserve, except if previously authorised by the local environmental protection agency. If the regeneration is being carried out in areas of the Atlantic forest, the cutting down of vegetation may be a prohibitive obstacle to the environmental licensing.

Should the property contain caves or acheological sites these must be mapped and a study prepared to assess their relevance, and then submitted to the environmental protection agency. The environmental protection agency shall decide on the preservation or not of the caves or archeological sites, as well as if a compensation for these areas will be necessary, upon the analysis of the assessment studies.

The national conservation units system is regulated by Law No. 9,985/2000, which consists of an area so declared by the government with important environmental features and resources with the purpose of conversation and sustainable development. Conservation units are classified into two types: full protection or sustainable use. Full protection conservation units have the purpose of preserving nature, allowing only the indirect use of its natural resources. On the other hand, sustainable use conservation units have to make nature conservation compatible with the sustainable use of part of the natural resources.

Also, DNPM may establish that certain areas are off-limits for mining activities because of strategic interest, for instance, if certain areas are necessary for the development of infrastructure projects and it is established that mining activities conducted in that area may impact the projects. All off-limits areas are indicated on the DNPM's system and can be identified by parties interested in applying for mining rights.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The main taxes, duties and contributions levied on mining companies operating in Brazil as a condition for them to obtain or continue the mining concession are:

- annual fee per hectare (TAH);
- financial compensation for the exploitation of mineral resources (CFEM);
- payment due in connection with surface rights;
- inspection taxes on mining resources;
- corporate income tax (IRPJ);
- social contribution on profits;
- import duty;
- excise tax (IPI);
- social integration plan (PIS) and social welfare tax (COFINS);
- state VAT (ICMS);
- property tax;
- municipal service tax (ISS);
- financial transaction tax (IOF); and
- payroll taxes.

These taxes, duties and contributions are required to be paid in different moments during the development of the mining activity, depending on the stage of the exploration works or during the entire period of the concession, and all payments have to be made in kind and in Brazilian currency.

Below is a short description of each of the taxes, duties and contributions mentioned above.

TAH

A fee owed for purposes of occupation and use of the area, under which all exploration targets are subject to the TAH. Currently the annual fee corresponds to 3.06 reais per hectare covered by a licence for mining exploration, increasing to 4.63 reais per hectare, upon the extension of the licence's term.

CFEM

This is a royalty payment serving the purpose of compensating the states and municipalities for the economic use of the mineral resources in their territory, similar to a tax. It is owed by the legal entities that exploit or extract mineral resources, payable upon sale of the mining product from the mine or other mining deposit or beneficiation of the mining product or its consumption by the mining entity. It varies as a percentage of the net revenue from the sale of mineral products, depending on its type. In general, the rates vary from 0.2 per cent to 3 per cent depending on the kind of mineral product. Upon the calculation of CFEM, transport, sales, tax and insurance costs are deducted.

Payment due in connection with surface rights

Brazilian mining law provides that the surface rights holder of the location of the mine has the right to a statutory royalty equivalent to one half of the CFEM, ranging from 0.2 per cent to 3 per cent.

Inspection taxes on mining resources

It is a tax imposed on mining activities in the states of Pará, Minas Gerais, Mato Grosso and Amapá, levied at amounts of up to approximately US$3 per tonne or exploited ore, payable to the state where the ore is exploited. Some of the mining companies and mining associations are challenging the legality of these state laws in view of the Federal Constitution.

IRPJ

This is the corporate income tax, of which the basic rate calculation is 15 per cent based on yearly or quarterly 'adjusted actual profits'. When the taxable income exceeds 240,000 reais yearly or 60,000 reais quarterly, an additional 10 per cent rate is added to the standard 15 per cent rate.

Social contribution on profits

This is the contribution payable on profits and the current applicable rate is 9 per cent on yearly or quarterly adjusted book profits for all companies (excepting financial institutions).

Import duty

Heavy mining equipment brought to Brazil may benefit from tax incentives or full exemption; nevertheless, all products imported are subject to import duty that shall be levied on the 'customs value' of such product, pursuant to GATT rules and calculated on the cost insurance and freight value. This duty rate is selective and will depend on the product's tariff classification.

IPI

This the value-added tax paid upon the importation or sale or other transfer of industrialised and partially industrialised products. The rate depends on the type of product.

PIS/COFINS

PIS and COFINS are social contribution taxes levied at different percentages on the company's gross revenues. There are two applicable regimes: cumulative – rates of 3 per cent and 0.65 per cent, respectively, without any generation or use of credits; or non-cumulative – rates of 7.6 per cent and 1.65 per cent, respectively, with generation of credits in the acquisition of goods or services that can be offset with debts of the same contributions. Such contributions are also levied on the importation of services (with rates of 7.6 per cent and 1.65 per cent) and goods (with rates of 2.1 per cent and 9.65 per cent).

ICMS

This is levied on the distribution of goods, intercity and interstate transportation and communication services. It is payable during all stages of the product's sale not only by the producer, but also by the consumer.

Property tax
In general, there is a levy of rural land tax (ITR) for mining activities, for which the triggering event is the property, usage and possession of real estate located outside the urban area, and its calculation depends on the value of the property alone, without taking into consideration any improvements.

ISS
This is a tax imposed on any kind of services performed by companies or self-employed professionals, with a maximum rate of 5 per cent, its assessment being based on the price of each services and also assessed on services provided by non-residents to Brazilian residents (import of services).

IOF
This is a tax assessed to certain credit transactions and open-market currency exchange transactions, among other financial transactions, being levied at variable rates.

Payroll taxes
Certain taxes and contributions payable by the Brazilian companies in benefit of their employees, depending on the total value of their remuneration, such as social security contributions and severance funds. These taxes and contributions may increase payroll costs by roughly 28 per cent to 35 per cent of gross wages.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Brazilian authorities have the prerogative of granting tax benefits and incentives to private parties executing mining activities. The main incentive programmes available in Brazil at federal level are:

- the Amazon Development Programme, offered by the Amazon Development Agency for mining projects located in the Amazon region;
- the North-east Development Programme for projects in the north-east part of the country, supported by Banco do Nordeste;
- the Special Regime for the Acquisition of Equipment and Machinery by Exporters;
- tax-related programmes to enhance Brazilian exports (eg, the special customs regime of the drawback programme and the internal drawback programme); and
- a regime that allows the reduction of import duties on machinery and equipment not available in Brazil (special customs regime Ex-Tarifário).

Additionally, at state level, the most common tax benefits are related to state tax exemptions (ICMS, ie, state VAT), deferral, assumed credits and suspension or reduction of the assessment basis. State governments also hold the prerogative of granting incentives to mining operations either through a reduction in the taxable base of the ICMS of through deferral.

Further, local tax authorities may grant tax benefits to mining companies on a case-by-case basis through direct negotiations.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Brazil in principle does not enter into tax stabilisation agreements. The general limits to increase and create taxes are set in the Brazilian Federal Constitution and valid for all taxpayers.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to any carried interest or free carried interest in mining projects in Brazil.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

There is no transfer tax imposed on the transfer of licences. However, there are taxes on capital gains that shall be levied as a withholding tax over the positive difference between the total investment made in connection with a mining licence and the amount obtained with the sale of said licence to any third party. The withholding income tax over capital gains is based on a progressive rate (the rates vary according to the amount of the capital gain, within the rage of 15 per cent to 22.5 per cent).

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no discrimination between the duties, royalties and taxes payable by domestic and foreign parties.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

There are several types of contractual frameworks that may be used for the purposes of developing a mineral project in Brazil. Investors may operate through stand-alone vehicles (ie, incorporated entities) or in association with one or more foreign or local partners. Those arrangements are typically set up through joint ventures, partnerships, risk-sharing agreements or option agreements.

Taking into consideration, as mentioned above, that only local companies incorporated and headquartered in Brazil are authorised to hold mining rights, the incorporation of a local subsidiary is necessary for the purposes of any stand-alone initiatives. In this sense, limited liability companies (LLCs) are usually the preferred vehicles for holding mining rights and carrying out exploration initiatives. In Brazil, LLCs must have at least two stakeholders, which can be either legal entities or individuals holding the company shares and executing the company's articles of incorporation. In an LLC each stakeholder is responsible for the payment in full of its equity in the company's capital stock, although all stakeholders are jointly and severally liable for any amounts of capital not fully paid-in. Recently a specific type of LLC was introduced (EIRELI) where its incorporation may take place with only one stakeholder. In contrast to a standard LLC, in an EIRELI certain requirements of minimum capital shall apply.

Another option is to incorporate a more complex, sophisticated and costly type of legal entity, very similar to a corporation, typically called an SA. The capital stock of an SA is divided into shares, and the company is allowed to raise capital through public or private subscriptions. Similarly, the shareholders of an SA are liable solely for the value of the shares purchased or subscribed for. SAs are authorised to increase capital stock and raise funding through public offers at local markets if they are duly registered with the Brazilian Exchange Commission. In this case, their shares may be traded on the local stock exchange or on the over-the-counter market. SAs not listed on the stock exchange are authorised to sell their shares only through private trading. The management consists of a board of directors or a board of officers, where the board of directors must have at least three members and the board of officers is required to have at least two members.

26 Is there a requirement that a local entity be a party to the transaction?

As mentioned above, only local companies incorporated and headquartered in Brazil are authorised to hold mining rights. However, those local companies can be held by non-Brazilian entities. The only exception to non-Brazilian ownership is when mining activities are carried out at the 'border zone' (as defined in question 48) since any companies developing mining activities in the border zone must be controlled and managed predominantly by Brazilian individuals.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

In 2014 the Brazilian Ministry of Foreign Affairs developed a new model for bilateral cooperation and investments treaties. Several of those treaties were executed by the Brazilian federal government over the past two decades but none has been ratified by the Brazilian National Congress to date.

Brazil is signatory of double taxation avoidance treaties with 33 different countries, namely: South Africa, Germany, Argentina, Austria, Belgium, Canada, Chile, China, South Korea, Denmark, Equator, Slovakia, Spain, Philippines, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Netherlands, Peru,

Portugal, Czech Republic, Switzerland, Trinidad and Tobago, Turkey, Ukraine and Venezuela. Those treaties, in general, provide tax relief in the form of reduction or elimination of taxes withheld on dividends, royalties and interest payments remitted abroad. In addition, corporate taxes paid in other countries through foreign subsidiaries operating in Brazil may be used to offset income tax paid in Brazil.

Finally, Brazil is a founding member of MERCOSUL, which is also known as the Southern Cone Common Market, and the purpose of this treaty is to promote, along with the other members, the free movement of goods, services, people and currency, with the adoption of a Common Standard Rate (TEC) and a common regional commercial policy. The countries that are part of MERCOSUL are Brazil, Paraguay, Uruguay, Argentina and Venezuela (currently suspended for non-compliance of political requirements). Associate members are Bolivia, Chile, Peru, Colombia, Ecuador, Guyana and Suriname.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Mining companies in Brazil have available the following financing options (i) the banking system, (ii) the securities market upon the company's registration with the São Paulo Stock Exchange, (iii) the international capital markets, and (iv) the international financing markets. Considering that in Brazil interest rates are among the highest in the world, using local banking system is not an effective option unless funding can be obtained with the Brazilian Development Bank – BNDES through some of their subsidised credit lines. Also, the São Paulo Stock Exchange does not have a history of fund raising for greenfield projects. As a matter of fact, there are only a couple mining companies today listed at the São Paulo Stock Exchange.

Having said the above, typically funding for the non-major mining companies in Brazil are obtained through the international capital markets or international financing markets. For example, the Toronto Stock Exchange in Canada is a major hub for companies raising funds to invest in mining projects in Brazil.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The Brazilian Development Bank – BNDES through their subsidiary Bradespar and some of the major pension funds in Brazil through private equity funds do provide direct financing to mining projects. However, due to their financing policy the projects considered for investment are normally large projects and nowadays non-green field.

30 Please describe the regime for taking security over mining interests.

Mining companies holding a mining concession are allowed to encumber their rights in accordance with the Mining Code. However, any liens (such as pledges, leases, etc) to these concessions have to be registered with the DNPM for purposes of validity and enforcement. Taking security over exploration permits and other kinds of applications are currently not allowed.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

No restrictions or limitations are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction activities. However, in Brazil heavy taxes are applicable to the importation of goods and services in general (ie, not only those related to mining activities), which may end up acting as practical restrictions on its importation.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no standard agreements when it comes to contracting suppliers in Brazil. There are certain contractual principles in Brazil that cannot be ignored by the parties when entering into a contract. The Brazilian Civil Code provides for mechanisms to avoid unbalanced contractual obligations. As a matter of fact, a contract perceived to be unfriendly to a party could be argued as null under Brazilian law.

In the past decade there was an increase in Brazil in the use of alternative dispute resolution methods, those being through arbitration, based in Law 9.307/1996, or through mediation, which is a far newer concept established only recently by Law 13.140/2015. When it comes to arbitration this kind of alternative dispute resolution mechanism has been successfully and commonly used in Brazil also in equipment supply agreements. However, considering the costs associated with an arbitration there are certain types of equipment supply agreements where such dispute resolution method although efficient may not be recommendable.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

No restrictions or limitations are imposed on the processing, export or sale of metallic minerals, and they can be freely processed or sold domestically or outside of Brazil. There are no export quotas, licencing or other mechanisms to limit the mining production's exportation. Manufactured products on the other hand may enjoy some tax benefits and incentives for purposes of exportation.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Brazilian legislation currently does not impose limitations on the import of funds or use of the proceeds from the export or sale of metallic minerals. Thus, all of the export transactions' proceeds may be kept abroad, what is usually useful in pre-export financing. All foreign-exchange transactions are carried out through authorised local commercial banks with the participation of a registered broker at the commercial exchange rate, except for certain transactions that are authorised at the tourist exchange rate. Access to foreign exchange can be obtained through those local authorised commercial banks and are in no way tied to export performance.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Brazilian Constitution provides that the federal union, the states and municipalities are all entitled to supervise compliance with environmental laws and impose administrative sanctions such as fines, interdictions or restrictions on activities.

Each state has its own environmental agency, that along with IBAMA (the federal environmental agency covering interstate projects or activities with high potential for environmental impact) are the main governmental bodies responsible for environmental licensing of mining activities. There is no environmental code compiling all environmental laws, which are laid down through numerous federal, state, and municipal regulations. However, the main environmental related principles and rules are stated in the Brazilian Federal Constitution, the Forestry Code, Federal Laws Nos. 6.938/1981 and 7.805/1989, Decrees Nos. 98.812/1990 and 97.632/1989, and regulations from the Environmental National Council (CONAMA).

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

With the purposes of assessing and preventing potential risks to the environment the licencing process in Brazil is typically conducted by the state EPA where the mining project is located, and is divided into three stages: grant of the preliminary licence, grant of the installation licence, and, finally, grant of the operation licence.

Before starting any project constructing stage, mining companies must apply and obtain a preliminary licence upon submitting an environmental impact study report (EIA/RIMA) to the respective environmental agency. After the environmental control, reclamation and decommissioning plans have been approved by the environmental

Update and trends

In November 2015, the worst environmental accident ever in Brazil occurred in relation to the mining company Samarco Mineração SA (joint venture between Vale SA and BHP Billiton Brasil Ltda), in the city of Mariana, state of Minas Gerais. Samarco's Fundão dam collapsed, leaking approximately 62 million cubic metres of mineral waste, which resulted in 19 casualties and immeasurable environmental damage. In response to said incident, the DNPM strengthened its regulation and supervision pertaining mining dams, along with the environmental authorities.

The DNPM's reaction to the incident was immediate, with the enforcement of existing laws (as mentioned in question 38, Federal Law No. 12.334/2010, DNPM Ordinance No. 416/2012, Resolutions No. 143/2012 and 144/2012 enacted by the National Council of Water Resources and Ordinance No. 526/2013 of the Ministry of Mines and Energy), and the creation of additional steps in relation to licensing processes throughout 2016 until the beginning of 2017 when the DNPM issued DNPM Ordinance No. 70.389/2017 detailing the creation of the Mining Dams Safety Management Integrated System and other matters related to the assurance of the integrity of the mining dam, such as the required qualification for individuals to be technically responsible for mining dams, the procedure of revision of the Mining Dam Emergency Action Plan, among others.

All in all, as of 2016 it is fair to say that licensing and operating mining dams in Brazil are clearly subject to a more comprehensive set of rules and scrutiny by mining and environmental authorities.

agency the mining company will be able to apply for the installation licence, prior to the commencement of construction. Finally, actual mining activities can only take place after the issuance of the operation licence, which presupposes the implementation of the requirements indicated in the environmental control plan.

Additionally, other permits may be necessary for the development of activities and products' use, such as: (i) if used, transportation, storage, trade or manufacture of certain chemicals and explosives considered controlled products; (ii) use of chainsaws to clear the area; (iii) co-processing the final disposal or transportation of residues; (iv) use of residues in rehabilitation or degraded areas; (v) wastewater discharge; (vi) deforestation; and (vii) water capture, among others.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Mining companies have to submit studies to the environmental authorities related to the mitigation and compensation measures to obtain its installation licence. These studies must address the reclamation and decommissioning of the mined areas, containing the measures to be implemented throughout the mining process and at its end in order to prevent severe degradation of the area and to minimise impact on the environment.

The decommissioning plan for the project must also be filed with the DNPM for purposes of evaluation and determination of further measures and requirements in relation to the efficiency and safety of the mining activities as well.

When mining companies file their applications to close a mine, those applications must also present: (i) a report on the work performed to that date; (ii) characterisation of the remaining resources; (iii) a topographic and landscape report considering stability, erosion control and drainage aspect; and (iv) a work and financial chronogram of the proposed decommissioning activities. Therefore, approval for mine closure is granted by the Ministry of Mines and Energy when the applicant can prove compliance with the decommissioning plan, especially environmental conditions.

38 What are the restrictions for building tailings or waste dams?

Federal Law No. 12.334/2010, DNPM Ordinance No. 416/2012 (currently under revision), Resolutions No. 143/2012 and 144/2012 enacted by the National Council of Water Resources and Ordinance No. 526/2013 of the Ministry of Mines and Energy provide the main regulatory framework for construction of tailing and waste dams. Tailing and waste dams require a prior dam safety plan, which shall be composed of: (i) general information in relation to said dam; (ii) plans and procedures; (iii) registries and controls; (iv) periodic safety revision of the dam; and in the case of dams with a high potential of damage to the environment and local communities, the dam safety plan must also contain (v) an emergency action plan. The level of detail of the content of each of those items will vary depending on the complexity of the dam.

The person in charge of the dam safety plan must be the engineer registered with the Regional Council of Engineering, Architecture and Agronomy as the one technically responsible for implementing the plan in all of its aspects.

Revision of said dam safety plan may vary from five to 10 years, depending on how the dam is classified in terms of potential risks. Also, revisions shall occur whenever there are any structural changes or amendments in the classification of the tailings or waste deposited in the dam. The team executing said revision shall be multidisciplinary. Regular inspections also have to be executed by the mining company at least every 15 days.

Law No. 12.334/2010 determines in its article 15 that the National Policy of Dam Safety shall provide the population with an education and communication programme on the safety of dams.

Finally, mining companies are liable for identifying and declaring emergency situations, and take all actions described in the applicable dam safety plan, especially with regard to the local population of potentially affected zones, local public authorities, environmental authorities and the DNPM.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Ministry of Labour and DNPM are the main bodies responsible for issuing health, safety and labour laws applicable to the mining industry. DNPM Ordinance No. 237/2001, enacted the Mining Regulations, which under item 22 provides the work, health and safety rules that should be observed by mining companies. These rules determine standards for work procedures and safety conditions, emergency operations and personnel training, among others.

Additionally, the Consolidation of Labour Laws, which is the equivalent to a labour laws code, regulates work health and safety programmes that must be observed by all companies, including mining companies, covering occupational health control programme, prevention programme for environmental risks, in-house commission for prevention of accidents in mining activities and risk-management programme among others.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

DNPM Normative Opinion No. 46/2012 determines that while the waste products of mining areas have no economic value, they shall not be assets of the Union nor the mining company. Therefore, mineral substances that may exist in the tailings or waste are subject to the same legal treatment as of in situ minerals (ie, not exploited). This means that to enjoy any economic benefit from products wasted or in tailings, a mining company depends on the existence of a specific licence.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

In order to work in Brazil, foreign employees must obtain work or residence visas. The law provides that two-thirds of a Brazilian company's employees must be Brazilian citizens, and two-thirds of its payroll must be reserved to pay Brazilian employees. Exceptions are only allowed to individuals from member countries from MERCOSUL, also known as the Southern Cone Common Market, Argentine, Uruguay and Paraguay. Those limitations are valid for any kind of activity in Brazil and not only for mining activities.

Further, for each US$200,000 invested in a Brazilian company a permanent visa can be obtained for a foreigner to occupy a managerial position – be an officer – in such Brazilian company. Said amount may be reduced if a certain number of jobs are created in Brazil within a certain period of time.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are no specific corporate social responsibility laws or obligations applicable to the mining industry. In terms of community engagement or CSR, the mining industry in Brazil shall be subject to the same general environmental laws and regulations applicable to other kinds of activities with environmental impact, as described in question 34. The Brazilian environmental agency (IBAMA) is the principal federal regulatory body for administering those laws and regulations, including licensing and enforcement.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Brazilian legislation does not authorise mining activities in areas reserved for indigenous populations. Specific laws determine which areas are indigenous. The Federal Constitution also determines that any mining activity in indigenous areas require prior approval of the Brazilian National Congress, and that the indigenous communities have the right to receive royalties from the exploitation of any deposits located in their lands. Nevertheless, these specific provisions related to the payment of royalties have to be regulated by the Brazilian Congress prior to its implementation.

In Brazil there is also another type of traditional community known as the Quilombolas, which is composed of the descendants of slaves who escaped from slave owners before the abolition of slavery in 1888. The Federal Constitution provides that Quilombolas are in essence entitled to obtain title deeds and the ultimate ownership of the land they occupy. Mining activities in these areas, although not prohibited, shall engender payment of compensation rights by mining companies to those local communities in order to operate.

In sum, mining rights in Brazil cannot exist on indigenous land. On Quilombolas lands they can. However, to carry out mining activities under those rights, mining companies must deal with local communities and agree on the compensation to be borne by the mining company.

44 What international treaties, conventions or protocols relating to CSR issues (including indigenous peoples) are applicable in your jurisdiction?

Brazil applies the International Labour Organization Convention (ILO) No. 169, dated 27 June 1989, also known as the ILO Indigenous and Tribal Peoples Convention, that references the rights of ownership and possession over lands occupied by an indigenous population and the natural resources pertaining to the land.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Federal Law No. 12.846/2013 provides on the administrative and civil liability of legal entities for the practice of acts against the public administration at national or foreign level, among other matters. Although still in the earlier stages of enforcement, the successive corruption scandals and the ongoing investigations hatching all over the country caused companies to look seriously into this legislation and increase internal controls and put in place effective compliance systems as ways to reduce and limit exposure for their business, management and stake holders in general.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

With several Brazilian companies doing business abroad and seeking public and private finance in the United States, the United Kingdom and Europe, the attention of Brazilian companies have shifted in recent years from an isolated internal Brazilian view to a much broader one seeking to understand and assess exposure under the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, for instance. Also, the enactment of Federal Law No. 12.846/2013, described in question 45, and the increasing enforcement abroad against Brazilian companies of foreign anti-corruption regulations have also contributed to forcing Brazilian companies to pay closer attention to foreign legislation governing anti-bribery and foreign corrupt practices, especially the FCPA.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

EITI standards are not currently implemented in Brazil and therefore the country has not enacted any rules to adopt the applicable standards uphold by the EITI.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign ownership restrictions in Brazil considered relevant to the mining industry in Brazil, except for: (i) mining activities carried out within an area of the country called the 'border zone', which is defined as the area within 150km from the dry borders of the country. Any mining companies willing to carry out exploration or exploitation activities in the border zone must be controlled and managed predominantly by Brazilians; and (ii) the acquisition and lease of rural lands. Any acquisitions or leases of rural land by foreigners and local companies controlled by foreigners must follow the restrictions set forth in the law,

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which essentially limits the size of the properties to be owned by foreigners and local companies controlled by foreigners in Brazil.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Brazil is a founding member of MERCOSUL, which is also known as the Southern Cone Common Market, and the purpose of this treaty is to promote, along with the other members, the free movement of goods, services, people and currency, with the adoption of the TEC and a common regional commercial policy. The countries that are part of MERCOSUL are Brazil, Paraguay, Uruguay, Argentina and Venezuela (currently suspended for non-compliance of political requirements). Associate members are Bolivia, Chile, Peru, Colombia, Ecuador, Guiana and Suriname. A company incorporated under Brazilian law could benefit for the MERCOSUL treaty, although there are no specific benefits in the MERCOSUL treaty in relation to mining activities.

Apart from the MERCOSUL there are no specific international investment treaties signed by Brazil applicable to mining activities undertaken or sponsored by foreign companies.

Canada

Michael Bourassa and John Turner*

Fasken Martineau

Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining accounts for a significant portion of Canada's economy. Natural Resources Canada pegged domestic mineral production at C$40.8 billion in 2016, with production value declining 4.7 per cent from C$42.8 billion in 2015.

The Canadian mining and mineral processing industry employs nearly 373,000 people in mineral extraction and related support activities, such as smelting and refining, fabrication and manufacturing. It also accounts for more than half of Canada's rail freight and high portions of the country's port and marine cargo.

Canada's mining and exploration companies are also dominant players in the global mining industry. In 2015, Canadian companies had mining and exploration assets worth C$170.8 billion located in more than 100 countries, including regions such as the US, South America, Africa, Australasia and Europe. Canadian companies have interests in over 6,300 properties in more than 100 countries, including projects held domestically and those in locations such as the US, South America, Africa, Australasia and Europe. Canadian mining companies' assets abroad total an unprecedented C$153.2 billion.

Almost 50 per cent of the world's public mining companies are listed on the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSX Venture), with 40 new mining listings in 2016. In the past five years (2012–2016) 46 per cent of global mining equity financings value was raised on TSX and TSX Venture, while in 2016 they handled 33 per cent of the equity capital raised globally for mining (C$9.4 billion) and 57 per cent of financing transactions.

2 What are the target minerals?

Canada is a leading global producer of several minerals and metals, ranking at the top in the global production of potash, and is a major producer of primary aluminium, cobalt, diamonds, gold, nickel, platinum group metals, salt, titanium concentrates, and uranium. Key exports include aluminium, coal, copper, diamonds, gold, uranium, nickel, potash, zinc, iron ore and steel.

3 Which regions are most active?

All provinces and territories produce minerals, but Ontario, Quebec, British Columbia and Saskatchewan are the largest producers.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Canada's legal roots are firmly entrenched in the systems of its founding nations: England and France. The federal government, nine of the 10 provinces, and the three northern territories have adopted a common law legal system similar to the common law systems in the UK, the US and Australia.

Quebec has adopted a civil law based system that has some similarities with countries throughout Europe, Asia, South America and parts of Africa that have such a civil law-based legal system (although some aspects of the Quebec system are governed by federal laws, and are therefore common law-based).

5 How is the mining industry regulated?

Canada's legal, regulatory and policy environment promotes mineral exploration, mining operations and investment. Mining law is divided between the federal and provincial governments. Ownership of lands and minerals generally belongs to the province in which they are situated. The provinces have jurisdiction over mineral exploration, development, conservation and management. The federal government shares jurisdiction with the provinces on some related matters (for example, taxation and the environment) and has exclusive jurisdiction over areas such as exports, foreign investment controls and nuclear matters.

The exception is uranium, a strategic mineral, which is also regulated by federal laws. Although exploration is an exclusively provincial matter, the federal government regulates all downstream aspects, including mining and milling, processing, transporting and export.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Federal and provincial legislation affecting mining activities tends to fall into two main categories. The first relates to the essentially private matters of title and taxation, while the second concerns economic, social and environmental policies. Significant decision-making powers are delegated to subordinate bodies or officers to deal with the complexity of the various matters dealt with under the second category.

Each province and territory has its own laws regulating mining activity (with varied names such as the Mineral Act, the Mining Act, the Mineral Resources Act, and the Mineral Exploration and Tenure Act). Some provinces have, over the years, amended their legislation to take into account current attitudes related to environmental protection, sustainable development and consultation with local communities, in particular, aboriginal communities (in the Canadian context, they are often referred to as 'first nation' communities). As examples of new legislation in this regard, the November 2012 regulations to Ontario's amended Mining Act provided for a new regime, which came into force on 1 April 2013. Similarly, the Quebec Mining Act was amended (and save for certain exceptions, came into force 10 December 2013) and now contains provisions specific to first nation communities, including a provision whereby the government of Quebec must draw up, make public and keep up to date a consultation policy specific to the mining sector (however, the consultation policy has yet to be finalised and made public).

Federal and provincial or territorial laws and regulations related to environmental protection, labour and employment relationships, occupational health and safety matters, etc, also apply to mining activities.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Canada adheres to the CIM Standards, which were adopted in 2005 to establish definitions and guidelines for the reporting of exploration information, mineral resources and mineral reserves in Canada. They are incorporated by reference into the Canadian Securities Administrators' National Instrument 43-101 (NI 43-101), which sets the standards for all technical public disclosure for mineral projects. Mining companies listed on the TSX and TSX-Venture must comply with NI 43-101. The CIM is a member of the Committee for Mineral Reserves International Reporting Standards and the CIM Standards are consistent with other

members: Australia, Chile (National Committee), South Africa, the UK (National Committee), the US and Western Europe.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

All lands and minerals that have not been granted to private persons are owned by the Crown (which in Canada refers to either the federal or provincial government in the name of Her Majesty the Queen), in the case of lands and minerals within the territory of a province, vested to it by the Canadian Constitution. The federal government owns minerals underlying federally owned lands, including, for example, reservations set up for many of Canada's first nations, federal national parks, public harbours, and in the Northwest Territories, Nunavut and underlying Canada's territorial sea and continental shelf.

Generally, minerals underlying lands within the territory of a province (privately owned or Crown lands) belong to the Crown in right of such province. Mineral rights are obtained and maintained through mining laws (see question 6), typically, for exploration activities (in Quebec, other than surface mineral substances), by staking or map-designation of mining claims, performing prescribed exploration or assessment work and then obtaining leases or similar forms of tenure to conduct mining operations. The provincial governments (and in some cases the federal government) set out operating terms and conditions on leased mineral lands and may impose taxes and royalties. The contractual capacity of the Crown as owner provides a means by which governments supplement their authority as legislators.

Once private parties obtain the right to mine Crown minerals through the legislated leasing process, such minerals are held by the private party for the tenure of the lease (In Quebec, the right to extract minerals belongs to the holder of a lease but the minerals remain the property of the Crown until extraction). Subject to compliance with general laws and in some provinces, obtaining government consents, the leases can be encumbered for security purposes in financings, transferred and renewed.

There are some areas in certain of the Canadian provinces where minerals or mining rights are privately held, either because of land grants made in the 1800s and early 1900s (or in the case of Quebec, as early as the 1600s) when minerals, in whole or in part, or the right to mine, were attached to surface right or land grants, or as a result of earlier mining legislation that provided for grants of 'freehold' tenure or outright ownership of mineral rights or substances. In those instances, if a company is interested in acquiring rights to explore or develop such privately held minerals or mining rights, it is a matter of private negotiation with the owner. Mining activities on those lands are, nevertheless, subject to the same environmental, labour and other laws as those applicable to mining activities involving Crown minerals.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Information and data related to exploration and mining activities in Canada are available through the following:

- provincial and territorial mining recorders' offices – these provide services related to staking, ownership and mining claim maintenance, including receiving 'assessment work' reports and filings of exploration activities;
- provincial geological surveys – most provinces gather geological information, and may conduct broad ground or aerial surveys and publish maps, reports and digital data on geology and other technical information (eg, www.geologyontario.mndm.gov.on.ca);
- provincial and territorial land title and registry offices – these record information about the title of leasehold and freehold property (including minerals). This information is available (usually online) for a fee; and
- Natural Resources Canada publishes Commodity Reviews www.nrcan.gc.ca/mining-materials/publications/18733) and maintains a detailed listing of Canada's operating mines and mineral processing facilities (www.nrcan.gc.ca/mining-materials).

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Prospectors can explore 'open' Crown lands (or in Quebec, lands that are privately owned), with a prospecting permit, and can 'stake' the mineral rights if the land has not already been located and recorded by another party. These rights are acquired on a first come, first served basis. Land can be located on the ground through traditional staking methods (namely, cutting claim posts and blazing claim lines, in Quebec using government issued tags), but most provinces have now adopted 'map designation' in lieu of ground staking, where claims are delineated online on a grid system based on global positioning system technology (in either instance, claims that are 'ground staked' or 'map designated' are referred to as being 'located').

Mining claims that are located and recorded are generally referred to as 'unpatented' mining claims (in Quebec, merely 'mining claims') and are subject to certain payments and prescribed exploration or assessment work obligations. Failure to meet such requirements within time periods set by law or regulations can result in automatic forfeiture of the claim and the subject area will become open for staking by others (a use it or lose it type regime). Many provinces now allow for payments in lieu of meeting applicable prescribed exploration or assessment work requirements in order to renew mining claims. The conversion of a mining claim to a lease varies by province, but generally can be done after a specified assessment work requirement has been met (the need for a discovery prior to lease conversion is no longer required in most provinces) (in Quebec, the conditions that a claim holder must meet in order to obtain a mining lease include having to establish the existence of indicators of the presence of a workable deposit). No other party can acquire a mining lease over the particular area other than the claim holder. Leases are usually for 21 years or longer with an opportunity to renew if mining activity is occurring or if it can be shown that the lessee is committed to developing the mineral potential on the leased area (in Quebec, the first term of a mining lease is 20 years, renewable for 10 years but not more than three times, except at the discretion of the minister for additional terms of five years each).

11 What is the regime for the renewal and transfer of mineral licences?

In most provinces mining claims can be transferred by filing a simple transfer form and paying a fee to the government. The transfer and new owner would then be noted on the abstract or register for the mining claim. For lease transfers, consent of the government may be required from the particular mining department (eg, in Ontario, section 81(14) of the Mining Act restricts transfer of a lease until the consent of the Minister of Mines is obtained). In Quebec, there is no fee or consent required for a transfer of interests in mining rights such as those granted by a mining claim or a mining lease. However, in order to have effect against the government (the Crown in right of the Province of Quebec), evidence of the transfer must be filed at the public register.

12 What is the typical duration of mining rights?

The duration of mining claims and leases is summarised in questions 8, 10 and 11. Generally, the ability to extend or renew a mining claim or lease is in the control of the holder. Governments do not have the ability to revoke or cancel mining claims except in the case of fraud or misrepresentation. As stated earlier, mining claims will forfeit automatically (with no act required on the part of the government) for failure to complete exploration or assessment expenditures within the prescribed period of time. Regarding leases, the provincial mining ministry will normally have authority to cancel or revoke rights where the lessee fails to comply with the terms of the lease or fails to pay annual rent, taxes or royalties, or both.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction in Canada between the acquisition of mining rights by domestic and foreign parties.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by independent administrative tribunals. Appeals against these tribunals' decisions lie with the Canadian courts. Mineral tenures are generally granted by Canada's free-entry mining system, which limits the government's involvement in disputes over mining rights. In all other situations, the exercise of governmental discretion over mining rights and disputes is subject to the rules of Canadian administrative law.

The provinces have broad jurisdiction over most international arbitrations and have passed legislation governing the conduct and enforcement of international arbitral proceedings. Canada's federal Commercial Arbitration Act applies to arbitrations involving the federal Crown and Crown-owned corporations as well as to maritime and admiralty matters. In 1986, Canada adopted the UNCITRAL Model Law on International Commercial Arbitration and signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Canada signed the International Convention on the Settlement of Investment Disputes (ICSID Convention) in December 2006. After a seven-year delay, Canada ratified the ICSID Convention on 1 November 2013 and it came into force on 1 December 2013.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

In all but some very remote parts of Canada, the Crown lands available through the claim-staking and leasing process consist only of the mining rights because the surface rights are owned privately by another party. The owner of the mining rights is nevertheless entitled to conduct exploration and even mining activities on the leasehold interest, subject to compensation (and in some cases, advance notice) to the surface rights owner. Disputes arising in these situations can be settled through special tribunals (eg, the Mining and Lands Commissioner in Ontario) or through the courts. However, a mining rights lessee would be well advised to negotiate the acquisition of the surface rights privately.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Governments do not participate in mining projects in Canada and limit their role to one of regulation. However, in Quebec, there are government entities that do invest and sometimes retain ownership interests in such projects and, indeed, have even sometimes acted as proponents of such projects (eg, Ressources Québec, a wholly owned subsidiary of Investissement Québec).

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are general statutes dealing with expropriation in Canada, which provide for compensation. Mining tenure cannot be expropriated or cancelled unilaterally by governments. Instances of expropriation might include land needed for transportation corridors (road and rail), transmission lines and parkland.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Responsibility for environmental protection, including setting aside areas as parks and other forms of protection from development, is shared by the federal and provincial or territorial governments. Local governments can also protect certain areas from development by creating parks or specifically protected areas, or by limiting development through the enactment of by-laws and official community plans. Development is restricted according to the level of protection assigned to a protected area.

As of 2015, 10.6 per cent (over 1 million km2) of Canada's terrestrial area and 0.9 per cent of Canada's marine territory is protected. Larger protected areas are typically located in Northern Canada. In the past 20 years, the total area protected has increased by about 70 per cent, and in the past five years it has increased by almost 10 per cent. Protected areas are lands and waters where development and use is restricted by legal or other means for the conservation of nature. Protection does not always isolate areas from use and development, including limited amounts of industrial activity and harvest of biological resources (Environment and Climate Change Canada).

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Corporations carrying on mining activities in Canada are subject to the general income tax rules applicable to all corporations. Federal income tax is levied under the Income Tax Act (Canada); the provinces and territories also have their own income tax statutes. A number of unique tax measures and rules also apply specifically to Canada's mining industry.

As a general matter, royalties and mining taxes are imposed separately from income taxes by the province or territory in which the minerals are mined. The rates and basis for calculation of royalties and mining taxes vary depending upon the type of mineral and the jurisdiction. In some jurisdictions, many minerals are not subject to provincial mining taxes or royalties. In other jurisdictions, the mining tax is levied on the basis of a progressive-rate system based on the mining profits or value of output, depending upon the particular jurisdiction. When the tax is computed by reference to mining profits, the rules for computing mining profits generally differ significantly from those applicable for income tax purposes. In many cases, an attempt is made to roughly calculate the mining profits at the pithead by permitting a processing allowance.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Recognising that mining is a highly cyclical and capital-intensive industry with a long lead time between initial investment and commercial production, the income tax systems and provincial mining taxes provide a generous treatment of exploration and other intangible expenses. They allow mining companies to recover most of their initial capital investment before paying a significant amount of taxes.

Canada's Income Tax Act segregates exploration and development expenses into various pools and permits deductions for the pools in a specified order. The classification of an expense into a particular pool depends upon the date the expense was incurred, the nature of the expense and certain other considerations. Precise rules govern how these exemptions can be calculated. Examples of these exemptions are as follows:

- Canadian Exploration Expenses (CEE) – expenses incurred to determine the existence, location, extent or quality of a mineral resource in Canada and expenses incurred prior to the commencement of commercial production to bring a new mine into production (recent changes to the definition of CEE will include the costs associated with undertaking environmental studies and community consultations that are required in order to obtain an exploration permit);
- Canadian Development Expenses (CDE) – expenses incurred prior to the commencement of commercial production to bring a Canadian mineral resource into commercial production;
- earned depletion allowance – certain depletion allowances are permitted as deductions from income since mineral resources are wasting assets;
- purchase and sale of resource properties – the cost of acquiring a Canadian resource property is generally deductible on an annual 30 per cent declining-balance basis as a CDE; and
- flow-through shares – corporations carrying out exploration in Canada can pass on the deduction associated with certain types of expenses to shareholders by issuing flow-through shares.

Most machinery, equipment and structures used to produce income from a mine or an oil or gas project are currently eligible for a capital cost allowance (CCA) rate of 25 per cent on a declining-balance basis.

In addition to the regular 25 per cent CCA deduction, accelerated CCA is provided for certain assets acquired for use in new mines or eligible mine expansions. The accelerated CCA takes the form of an additional allowance that supplements the regular CCA deduction.

The Income Tax Act was amended in 2013 to phase out the additional allowance available for mining (other than for bituminous sands and oil shale, for which the phase-out was completed in 2015). The additional allowance will be phased out over 2017–2020. Taxpayers will be allowed to claim a percentage of the amount of the additional allowance otherwise permitted under the existing rules according to the following schedule:

Transition schedule						
Year	2013–2016	2017	2018	2019	2020	After 2020
Percentage	100%	90%	80%	60%	30%	–

The definition of CEE in the Income Tax Act was amended in 2013 to gradually remove certain pre-production mine development expenses from the definition of CEE and gradually treat such expenses as CDE. In accordance with the current definition of CEE, in addition to the expenses associated with the physical exploration for the resource, eligible expenses can include the cost of certain environmental studies and community consultations that are carried out for the purpose of facilitating the physical exploration, however, certain of these expenses have not qualified and have been treated as part of the cost of a licence. Provinces and territories are increasingly requiring mining, oil and gas companies to undertake environmental studies and community consultations (eg, with local communities, neighbouring landowners, traditional and recreational users of the land) as a pre-condition to obtaining a permit or licence to explore. However, where environmental studies and community consultations are a pre-condition to obtaining such permit or licence, the expenses may be treated as part of the cost of the permit or licence. As part of the 1 March 2015 Federal Budget, the Canadian government announced that the rules would be amended to provide that CEE treatment would not be denied for the cost of otherwise eligible environmental studies and community consultations solely because they are a pre-condition to obtaining an exploration permit or licence. The cost of obtaining a permit or licence does not qualify for CEE treatment and is not eligible for flow-through share treatment. As a result, certain expenses related to environmental studies and community consultations have been treated differently for tax purposes from one jurisdiction to another depending upon the requirements of the regulator. To ensure the appropriate treatment of such expenses, the definition of CEE has been amended for expenses incurred after February 2015 to include the cost of otherwise eligible environmental studies and community consultations required to obtain an exploration permit or licence.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Canada does not have legislation for tax stabilisation and no tax stabilisation agreements are in force.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

This is not the practice in Canada. The federal and provincial governments do not get involved by holding any interests in mining projects (with the exception of that noted in question 16, but such interest would never be carried).

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Canadian residents are subject to income tax on gains arising from the transfer of leasehold interests.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Canadian residents are subject to tax on their worldwide income. A non-resident of Canada is subject to Canadian income tax on income from employment exercised in Canada, income from carrying on business in Canada and gains arising from the disposition of 'taxable Canadian property', which include any interest in resource properties in Canada. A non-resident corporation that carries on business in Canada is also liable to pay branch taxes equal to 25 per cent of its profits, to the extent such profits are not reinvested in the Canadian business.

Certain types of property income paid to a non-resident by a Canadian resident (including rents and royalties) are subject to a 25 per cent non-resident withholding tax. Canadian income taxes payable by a non-resident of Canada may be reduced or be eligible for exemptions under an applicable tax treaty. In some provinces, there is potential for non-residents to be subject to land transfer taxes and equivalent duties on the acquisition of mining properties in Canada at tax rates that are higher than those imposed on Canadian residents.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Canada's open, free-market economy allows for a wide range of business structures and forms, including corporations, partnerships, limited partnerships, joint ventures and trusts.

Corporations are popular with offshore investors because they are relatively simple to establish, can grow with the business, and offer flexibility in terms of business and tax planning. Corporations can be incorporated under the federal Canada Business Corporations Act or the laws of a province (each province has its own business corporations' legislation).

Offshore investors typically prefer to carry on business in Canada through a Canadian subsidiary because of concerns about limited liability, privacy, creditor protection and a local preference for dealing with a Canadian company. Financing options from Canadian lenders tend to be more favourable for locally incorporated subsidiaries compared with branch offices of foreign business concerns.

26 Is there a requirement that a local entity be a party to the transaction?

There is no such requirement, although for tax planning or other reasons, a foreign entity may choose to conduct Canadian activities through a local entity.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Canada has developed an extensive network of bilateral and multilateral free trade and investment protection treaties, together with a network of double taxation agreements to promote and encourage foreign investment in the Canadian mining sector.

Canada is an original member of the World Trade Organization and is a signatory to numerous bilateral and multilateral free-trade agreements (FTAs), many of which contain both trade and investment protection provisions. The most influential in terms of day-to-day imports is the North American Free Trade Agreement (NAFTA) with the US and Mexico. Canada has 10 other FTAs that are in force. In August 2014, Canada and the EU signed the Canada–European Union: Comprehensive Economic and Trade Agreement (CETA). CETA contains a chapter protecting investors and their investments in Canada and the EU. Though CETA has been signed, it has not yet been ratified by Parliament. It is likely to come into force in 2016. In March 2014, after almost 10 years of negotiations, Canada finally signed an FTA with South Korea.

While Canada's FTA template calls for the inclusion of investor protection provisions in all such agreements, Canada has also concluded stand-alone foreign investment and protection agreements (FIPAs) with some 40 countries, 28 of which are in force. It is currently negotiating FIPAs with 11 additional countries including India, Indonesia and Vietnam. In 2014, the Canada–China FIPA entered into force.

Canada has some 90 bilateral taxation treaties with other countries, eight treaties that are under negotiation or re-negotiation and 11 treaties signed, but not yet in force. Such treaties are generally based on the Organisation for Economic Co-operation and Development (OECD) model for tax convention and alleviate double taxation of companies

doing business in both jurisdictions. Among treaties of interest for foreign investors in the Canadian mining sector are the Canada–Barbados Double Taxation Agreement, signed in 1980 and the Canada–Cyprus Double Taxation Agreement, signed in 1984.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

At the exploration stage, mining activities not financed by 'grubstakers' (a term used by Canada's mining industry for private funds) or under a farm-in arrangement are often financed by the issuance of common shares (stock exchange listed or otherwise), the sale of limited partnership units or the sale of flow-through shares.

At the extraction stage, financing is more frequently by debt instruments, which are often in the form of syndicated loans from chartered banks or their overseas agencies. Some production financing is also done by means of business unit, unit issuance, production payments, advances against the purchase price, offtake agreements, streaming arrangements and royalties.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Governments will sometimes provide funding of infrastructure required to regions requiring transportation in order to make projects in the area viable. More importantly, various pension funds in Canada have actively invested in projects across Canada and internationally. In December 2015 the Boston Consulting Group released a study following a survey commissioned by, and which focused on, the 10 largest public sector pension funds (ranked here by size of net pension assets under management): the Canada Pension Plan Investment Board (C$265 billion), the Caisse de dépôt et placement du Quebec (C$192 billion), the Ontario Teachers Pension Plan Board (C$154 billion), PSP Investments (C$112 billion), the British Columbia Investment Management Corporation (C$104 billion), the Ontario Municipal Employees Retirement System (C$73 billion), the Healthcare of Ontario Pension Plan (C$61 billion), the Alberta Investment Management Corporation (C$50 billion), the Ontario Pension Board (C$22 billion) and the OPSEU Pension Trust (C$18 billion).

30 Please describe the regime for taking security over mining interests.

The land registry and title regimes are regulated by province and are similar in many respects. The following is an example from Ontario: in respect of patented freehold and leasehold title, the land registry system governs title and registration matters. A lender can take security over the subject property and register a mortgage, charge or debenture against the subject property in the relevant land registry office by submitting a mortgage, charge or debenture, together with the requisite fee, electronically. Under the Mining Act (Ontario), there is an additional requirement in connection with charging leasehold interests. Prior to registration, a lender is required to submit a full copy of the executed mortgage, charge or debenture together with the requisite fee and confirmation that all rents have been paid to the Ministry of Northern Development and Mines (MNDM) and obtain the consent of the Minister or an officer duly authorised by the Minister prior to registration of a mortgage or charge over the subject leasehold property. The consent process generally takes between four and six weeks. In respect of mining claims, a lender can record a mortgage, charge or debenture over the subject property with MNDM by submitting a fully executed copy of same with the requisite fee.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Canada does not control or restrict the importation of industrial machinery or equipment. Most goods from most countries of origin can be imported upon the payment of the applicable customs duties and taxes. As a general rule, the applicable customs duties are relatively low or, in many cases, no duty is assessed. The exact amount of duty payable is dependent on the classification of the equipment and its value.

Anyone importing goods into Canada must register with Canada Border Services Agency to obtain an importer number. A non-resident can register and can act as the importer of record into Canada.

Foreign workers coming to perform work in Canada require permits from the federal government and, if coming to provide services in the Province of Quebec, an authorisation from the latter. Qualified technical workers are exempt from the requirement to obtain a work permit if they come temporarily to supervise installation, or provide training work in association with the sale of equipment to a Canadian company. In other circumstances, when a work permit is needed, the requirements vary depending on the nature of the work and the nationality of the incoming worker. Certain professionals from countries with which Canada has signed a free-trade agreement, such as NAFTA, benefit from facilitative provisions to obtain work permits.

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32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Equipment supply agreements in Canada do not typically follow a standard form. Equipment suppliers tend to have their own forms which they will present to the purchaser. The ability of the purchaser to negotiate the supplier's standard form will depend on many things, including the amount of the deal, and its relationship with the supplier. Disputes are generally referred to arbitration.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Some provinces require extracted minerals to be processed domestically, notably in Canada by Ontario's Mining Act (section 91), and in-province by Newfoundland's Mineral Act (sections 31(5) and 31.1) and as a requirement of the lease. In the absence of legislation, some provinces may attempt to negotiate processing requirements for a specific period of time as part of the general approvals process. In Quebec, for example, a mining lease application, must be accompanied by a variety of documents, including a scoping and market study as regards processing in Quebec and such a study must also accompany an application for renewal of a lease at the end of its initial term (as well as at time of renewal of the subsequent 10-year terms). In addition, when granting such a lease, the government of Quebec may, on reasonable grounds, require that economic spinoffs within Quebec of mining mineral resources be maximised.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Canada imposes no controls on the import or export of capital and has no repatriation, domestic use or export performance requirements.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Both federal and provincial (and, in Canada's North, territorial) environmental laws apply to the mining industry.

The federal government has legislative jurisdiction over fisheries, navigable waters, federal lands (including Indian reserves and federal national parks) and environmental matters of international and

inter-provincial concern. Certain projects may be required to complete a federal environmental assessment under the Canadian Environmental Assessment Act, 2012 (CEAA 2012). The CEAA 2012 is most generally administered by the Canadian Environmental Assessment Agency, although the National Energy Board and the Canadian Nuclear Safety Commission may be in charge of the federal environmental assessment depending on the nature of the project (eg, some uranium mines projects require an environmental assessment under CEAA 2012, which would be administered by the Canadian Nuclear Safety Commission).

The provinces and territories are generally responsible for matters within their boundaries. Each province and territory has adopted laws dealing with environmental protection to regulate the discharge of mine effluents, atmospheric emissions, water resources, the management of solid waste, noise and other environmental impacts. These laws provide a regulatory framework to prohibit and limit the discharge of contaminants into the environment. This regulatory framework provides for a permitting system to authorise, subject to various conditions, activities that may have an impact on the environment. Most provincial and territorial jurisdictions require that mining projects be subject to an environmental impact assessment prior to the issue of the required authorisations.

Whether a project will be subject to an environmental assessment under provincial, territorial or federal environmental laws typically depends on the type and size of the project, the types of approvals required for the development of the project and the significance of the potential environmental and socio-economic impacts that could arise from the project. The outcome of the environmental assessment may result in the regulators imposing conditions or restrictions with respect to the environmental impact of the project.

The provinces and territories have also adopted requirements with respect to mine reclamation and closure as well as the requirement to provide financial guarantee. These are generally administered by provincial or territorial ministries responsible for mines or natural resources.

All three levels of government provide also a legislative framework in the event of failure to comply with the laws or by operating in violation with the term of, or without having first obtained, the necessary permits.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Depending on the type, location and size of a mining project, it may be subject to both federal and provincial or territorial permitting requirements and environmental assessment processes. In Canada's North (Yukon, Northwest Territories and Nunavut), the federal environmental assessment legislation generally does not apply. In Canada's North, environmental assessments are regulated by local laws, namely the Mackenzie Valley Resource Management Act (Northwest Territories), the Yukon Environmental and Socio-economic Assessment Act (Yukon) and the Nunavut Land Claims Agreement (Nunavut).

In all jurisdictions, where a proposed project is subject to environmental assessment, the project may not proceed before the environmental assessment process is complete and a positive determination is granted.

The environmental assessment process typically requires the preparation of an environmental study (potentially also a social impact study) and public information or consultation. The thresholds for triggering the process and requirements for information disclosure and public consultation vary depending on the particular jurisdiction in which the assessment takes place. Generally, the process seeks to identify impacts so that they can be addressed through the implementation of mitigation measures. The provincial and federal governments are also required to consult with aboriginal communities whose rights may be impacted by the proposed project.

The time required to complete the process varies depending on the location and can be lengthy in certain jurisdictions. One should anticipate at least two years to complete the environmental assessment process, although the timing can vary depending on the level of assessment required and the complexity of the proposed project.

Recently, in March 2017, the province of Quebec adopted Bill 102, which amended the Environment Quality Act, and which will significantly impact the province's environmental assessment and review procedure. The changes will afford the government with greater flexibility in subjecting projects to the Environmental Assessment Procedure, will provide the public with opportunities to intervene in the process prior to the conduct of an environmental impact assessment, and will ensure greater transparency in the authorisation process.

The federal government has introduced measures to avoid duplication of the environmental assessment process in circumstances where both federal and provincial environmental assessment processes are triggered with respect to the same project. Eight provinces and territories (not including Northwest Territories, Nunavut, Prince Edward Island, Nova Scotia and New Brunswick) have entered into cooperation agreements with the federal government with a view to avoiding duplication.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Canada's provinces and territories impose mine closure and reclamation obligations. Generally, this requires the preparation and filing of a mine closure plan before mine production can proceed. As part of the plan, mine closure costs are estimated and financial guarantee must be provided to the government to cover the closure costs. Increasingly, progressive reclamation obligations are being considered. The method used to calculate the amount and the acceptable forms of financial guarantee (eg, letters of credit, government bonds, cash, mine-reclamation trusts) vary depending on the jurisdiction.

In addition, a federal environmental assessment may be required for the decommissioning and abandonment of projects that meet the 'designated project' thresholds under the CEAA 2012.

38 What are the restrictions for building tailings or waste dams?

The regulation of tailings and waste dams in Canada falls under provincial and territorial jurisdiction. There is no regulation in place designed to regulate specifically mine dams. As such, the applicable regulations are those pertaining to general dam and mining safety (Dam Safety Regulation). Interestingly, only three of 13 provinces in Canada have adopted damn safety regulations: Alberta, British Columbia and Quebec.

Taking Quebec as an example, any construction or alteration of a high-capacity dam must be accompanied with a rehabilitation plan to be approved by the Minister (Mining Act, section 232). The plan must contain a description of the rehabilitation procedure to be put in place for the tailing activities and a description of the infrastructure needed to prevent any environmental damage that might be caused by the dam's presence. Depending on the type of dam, approval for construction is contingent on either an impounded water management plan or an emergency action. In both cases, an engineer will design a plan describing all the procedures to be followed in particular during situations in which persons or property are at risk. Inundation plans must be kept up to date and forwarded to local municipalities in the event of an emergency. Though the legislation is silent with regards to the professional requirements of a person in charge of the operation and management of a dam, every high-capacity dam must regularly undergo a safety review by an engineer to assess its safety in terms of good practice and regulatory safety standards. Mining facilities may be inspected by the authorities 'at any reasonable time', and depending on their category, dams will be inspected between one and 12 times per year.

In British Columbia, tailings storage facilities are regulated under the Mines Act, the Health, Safety and Reclamation Code for Mines in BC (the Code), the Environmental Management Act, and the Environmental Assessment Act. The manager of each mine with a tailings facility must designate a tailing storage facilities qualified person (typically an engineer) to ensure safe management and operation of all tailings dams. Tailings storage and water management facilities and associated dams must be inspected annually; they are also inspected periodically by the provincial government. The Code requires that mines develop and implement a surveillance monitoring programme to safely operate and monitor the condition and performance of tailing storage facilities, dams, structures and associated facilities in order to avoid or detect and address any changes, deterioration or hazardous conditions. While mines are not explicitly required to conduct emergency drills with the local communities, the Mines Act and the Code require mine managers to develop and maintain a Mine Emergency Response Plan to ensure that sufficient personnel, equipment and facilities are available

for emergencies. More specifically, at both underground and open pit mines, trained mine rescue personnel are also required.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Canada's Constitution divides the authority to enact labour and employment laws between the federal government and the provinces and territories. Approximately 90 per cent of employees in Canada fall under the jurisdiction of provincial or territorial laws. While the laws and statutes vary between jurisdictions, there is a fair amount of uniformity across the country regarding basic labour and employment matters.

Employment statutes regulate matters such as minimum employment standards, labour relations, human rights, occupational health and safety, workers' compensation, universal health insurance and privacy.

Minimum employment standards laws cover minimum wages, hours of work, overtime hours and premiums, rest and meal periods, mandatory holidays, holiday periods and pay, leaves (pregnancy, parental, emergency, family medical), termination notice and severance pay and unjust dismissal hearings (in some jurisdictions).

Labour relations statutes govern how employees may become represented by a trade union, as well as the rights and obligations of unions and employers once a union is designated to represent a group of employees. Such union 'bargaining units' are generally limited to a particular business establishment in a defined location or locations.

In addition to these statutes, many non-union employment rights are governed by common law and enforced through the courts. Unionised employees' rights are generally enforced through tribunals.

The principal federal law governing occupational health and safety matters is Part II of the Canada Labour Code. Most of the provinces and territories have specific statutes and regulations dealing with mining operations.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Any processing of mining waste products generally would need to be conducted pursuant to approvals issued under provincial environmental protection legislation or in some instances pursuant to the Federal Transportation of Dangerous Goods Act. Regarding the ownership rights to tailings (for purposes of the remainder of this paragraph, may include waste piles), these rights often still remain with the companies who originally processed and mined the minerals and deposited the tailings on their own, or adjacent, properties. In other circumstances, the rights might be held by the owner of the property where the tailings currently lie (and not with the mining company that processed such ore). In either instance, ownership depends on the contractual arrangements and intention of the parties at the time the tailings were deposited. In situations where the Crown owns the tailings, the lands are not likely to be open for staking and would be subject to a remediation process. Any company wishing to process such tailings would need to obtain a special lease or permit from the Crown and to file a closure plan which contemplated long-term remediation of the site.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Canada's rules for foreign workers and business visitors apply to the mining industry. To work in Canada, a foreign national needs to apply for a work permit. The federal government administers the Temporary Foreign Worker Program through Immigration and Citizenship Canada, the Ministry of Employment and Social Development Canada (ESDC) and the Canada Border Services Agency.

Generally, a labour market impact assessment (LMIA) from ESDC is needed before issuance of a work permit. ESDC ensures that the employment of foreign workers does not deprive Canadian workers of an employment opportunity. Quebec Immigration also participates in decisions in Quebec. There are several exemptions to the LMIA requirement, including the intra-company transfer exemption and the NAFTA professionals exemption. In the latter case, issuance of a work permit follows a simpler procedure.

Business visitors from visa-exempt countries can be admitted to Canada to participate in business meetings without having to go through any particular formalities. Those from non-visa-exempt countries need to apply for a temporary resident visa to a Canadian embassy or consulate abroad.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

While Canada does not have an overarching CSR law, myriad federal, provincial and territorial laws apply, including health and safety, labour relations, environmental protection and assessment and in a few rare cases agreements with aboriginal people. Some form of environmental assessment is usually required to develop a mining project. When first nation communities assert aboriginal rights, aboriginal title or treaty rights to a particular area, the Crown may owe a duty to consult with them or seek a workable accommodation in respect of any Crown decisions that may infringe those rights. While the duty to consult or seek a workable accommodation with aboriginal peoples is a legal duty imposed on the Crown and not on private parties, many private parties have consulted with and sought to accommodate aboriginal peoples' interests by entering into agreements with them.

A number of jurisdictions have legislated the requirement for private parties to consult and even enter into agreements. More still are contemplating regulations that will try to push some of the Crown's obligations onto project proponents. The decision of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* SCC 44 (2014) recognised the Tsilhqot'in Nation as holding aboriginal title to approximately 1,900km2 of territory in the interior of British Columbia. Consent of an aboriginal group having proven aboriginal title is a practical requirement (although governments may act without consent, the bar is set very high to justify such action). This decision represents the first successful claim for aboriginal title in Canada and may lead other first nations in British Columbia to pursue aboriginal title in their traditional land-use areas.

On 1 November 2012, the Ontario government's new consultation regulations under the Mining Act came into effect. Mining companies are required to submit exploration plans or obtain exploration permits prior to conducting activity on mining claims or leases as of 1 April 2013. A necessary component of such plans or permits is to satisfy the government that the company has consulted with aboriginal peoples in the vicinity of the property. Ontario is the first Canadian jurisdiction to incorporate consultation requirements in its mining statute. The province of Quebec followed Ontario's example with an amendment of the Mining Act which came into force in 2015. The Mining Act now contains provisions specific to Native communities, including a general statement that the Mining Act must be construed in a manner consistent with the obligation to consult Native communities. On 24 January 2017, the Quebec Ministry of Energy and Natural Resources published an orientation paper in which the ministry commits to take into account social acceptability through the creation of a board responsible for assessing the social acceptability of projects. It remains unclear whether this additional process will form part of the regulatory approval process or be parallel to the current environmental impact assessment procedure.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

While many aboriginal peoples have signed treaties with the Crown and have constitutionally protected treaty rights, many have not. Large parts of Canada are, therefore, subject to claims based on aboriginal title or aboriginal rights. Although mineral rights can often (but not always) be obtained without involvement of aboriginal people, in most of Canada any exercise of mining rights will involve a Crown licence or permit, which, in turn, is likely to engage the Crown's duty to consult with any affected aboriginal group. Additionally, a recent Supreme Court of Canada case has established that consent of an aboriginal group having proven aboriginal title is a practical requirement (although governments may act without consent, the bar is set very high to justify such action). Only one first nation in Canada has proven aboriginal title, and

Update and trends

In the face of strong governmental focus on environmental protections, growing regulation and monitoring across the mining sector continues. The recent decision on AuRico Metals Inc's Kemess underground project by British Columbia's provincial government is an important precedent for the future of large-scale mining operations. The Kemess gold and copper mine in northwest British Columbia was granted permission for construction and operation to begin. Following environmental studies and sufficient First Nations' consultation, the project was approved by the British Columbia Environmental Office. However, with it came with 87 legally binding conditions. Each focuses on requirements that will reduce or eliminate potential environmental consequences and all must be met throughout the life of the project. Given these stipulations, it is clear that the mitigation and prevention of environmental contamination will remain an influential part of government regulation and monitoring of mining projects.

Some major transactions involving Canadian mining companies that occurred in the past year are:

- 11 January 2016 Barrick Gold Corporation's sale of non-core assets in Nevada to Kinross for US$610 million;
- 10 March 2016 First Quantum Minerals Ltd's sale of its Kevitsa Mine in Finland to Boliden AB for US$712 million;
- 19 July 2016 TMAC Resources Inc's C$92 million bought deal financing advanced their Hope Bay gold project in Nunavut;
- Also on 19 July 2016, Goldcorp Inc acquired Kaminak Gold Corporation, with key goal deposit near Dawson, Yukon;
- 20 October 2016 Centerra Gold Inc's merger with Thompson Creek Metals for US$1.1 billion; and
- 30 November 2016 Kirkland Lake Gold Inc's merger with Newmarket Gold Inc, creating a new mid-tier gold company.

much of Canada is covered by treaties that already deal with the aboriginal title issue.

Additionally, there are specific (and usually not expansive) areas within Canada set aside for the use and benefit of aboriginal communities called Indian reserves. There are Indian reserves in most parts of Canada. Management and control of the reserve land is provided for under the Indian Act, with some powers being vested in the band and some powers in the Federal Department of Indigenous Affairs and Northern Development.

Property rights and rights to minerals on reserves are governed primarily by two provisions of the Constitution Act of 1867. The pattern of rights to minerals on Indian reserves is complicated and very uneven, both between and within provinces. The various federal–provincial agreements affecting minerals were concluded more for administrative expedience than for legal clarification. Provincial assertions add to the doubts that the agreements leave unresolved.

Moreover, the returns to Indian bands from mineral development, to the extent that development occurs, are often meagre. The combination of complexity, contested legal entitlement and inadequate returns has had a dampening effect on mineral exploration on reserves.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Canada has adopted a number of voluntary aspirational conventions regarding CSR that, because of their nature, are not directly applicable within Canada, including:

- the UN Declaration on the Rights of Indigenous Peoples (2007);
- the UN's Guiding Principles on Business and Human Rights (2011);
- Voluntary Principles on Security and Human Rights (2000);
- the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011); and
- OECD Guidelines for Multinational Enterprises (1976).

These documents are used as touchstones by civil society in judging mining operations within Canada and mining operations undertaken internationally by Canadian companies. The government of Canada has recently indicated that it will implement the UN Declaration on the Rights of Indigenous Peoples in Canada; however, there is no decision yet on how that will be accomplished.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Generally, The Corruption of Foreign Public Officials Act (CFPOA) is Canada's principal law aimed at prohibiting bribery and corruption of foreign public officials for the purpose of obtaining or retaining business in foreign markets. Violation of the law can result in fines of up to any amount at the discretion of the court or up to 14 years' imprisonment. The CFPOA applies to a transaction or attempted transaction when it is committed in whole or in part in Canada or when there was a 'real and substantial' link between the offence and Canada. The CFPOA also applies to Canadian citizens wherever those Canadians are located and to permanent residents who return to Canada after committing an offence under the CFPOA. The CFPOA also includes a separate criminal offence for illicit accounting for the purpose of hiding a bribe to a foreign public official.

Specific to the mining sector, in 2013, following the G8 summit leaders issued a communique agreeing that raising global standards of transparency in the extractive sector will reduce opportunities for corruption. The Canadian government committed to launching consultations with stakeholders to develop a mandatory reporting regime for extractive companies. Arising from this, the Extractive Sector Transparency Measures Act (ESTMA) became law on 1 June 2015. The purpose of ESTMA is to deter corruption of both Canadian and foreign public officials in the mining (and oil and gas) sector. As of this date, ESTMA imposes on Canadian extractive issuers and certain privately held companies in the extractive sector a detailed reporting requirement for payments made to Canadian and foreign governments including any corporation established to perform government duties or functions. Reporting obligations will not apply to aboriginal governments and corporations established to perform aboriginal government functions until 1 June 2017.

Payments to government payees must be publicly reported no later than 150 days after the end of the company's fiscal period if the total of all payments in a particular category of payment is at least C$100,000 for a financial year. ESTMA defines 'payments' to include taxes (excluding consumption and personal income taxes), royalties and fees.

ESTMA's reporting obligation applies to all entities listed on a stock exchange in Canada, engaged in the 'commercial development' of minerals (and oil and gas), including their exploration or extraction. It also applies to the acquisition or holding of a licence or other authorisation to carry out any of these activities. It also applies to any other corporation engaged in the commercial development of oil, gas or minerals that has a place of business in Canada or does business in Canada or has assets in Canada and meets two of the following three conditions in one of its two most recent fiscal years: at least C$20 million in assets, at least C$40 million in revenue and at least 250 employees.

Penalties for non-compliance can be severe. Failing to meet ESTMA's reporting obligations is a criminal offence punishable by a fine of up to C$250,000 per day that the offence continues. A reporting violation of six months' duration subjects a company to criminal liability of up to C$45 million. Moreover, any officer, director, or agent of a company subject to the reporting obligations that directed or authorised or participated in this reporting failure is equally liable to the same criminal punishment.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes. The US Foreign Corrupt Practices Act, like the CFPOA, prohibits the offering, promising, or authorising or the giving of anything of value to a foreign official for the purpose of obtaining or retaining business. It also has an extraterritorial reach: it not only applies to US corporations or any person acting on behalf of such corporations or US citizens, nationals, or residents, it also applies to foreign and US issuers or foreign persons and entities while in the territory of the US. Companies also pay attention to the UK Bribery Act, which has a similar coverage.

Also, the 11 December 2015 announcement by the US Securities and Exchange Commission (SEC) of proposed rules issued under the US Dodd-Frank Wall Street Reform and Consumer Protection Act requires certain issuers to disclose payments made to the US federal government or foreign governments for the commercial development of oil,

natural gas or minerals is a mandatory reporting regime for extractive companies. Once the SEC adopts the final version, these rules will be similar to the ESTMA: extractive issuers must disclose payments of at least C$100,000 during the same fiscal year to the US government or any foreign government regarding the commercial development of oil, natural gas or minerals or the acquisition of a licence for any such activity, and categories of payments match the type of payments covered in the ESTMA. This means that any Canadian companies listed in the US will be required to publicly report payments made to any government including payments to any level of Canadian government. Also, under section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) the SEC is directed to 'issue final rules that require each resource extraction issuer to include in an annual report ... information relating to any payment made ... to a foreign government or the [US] Government for the purpose of the commercial development of oil, natural gas, or minerals'. In August 2012, the SEC issued reporting rules for resource extraction issuers. This was 'vacated' in July 2013 by the US District Court for the District of Columbia on grounds that the SEC exceeded its mandate in requiring unrestricted public disclosure of all reported payment information without exception for payments in countries where the local laws expressly prohibit such public disclosure. In June 2016, the SEC again issued reporting rules (SEC transparency rule) requiring extractive issuers to disclose payments such as those under the ESTMA of at least US$100,000 during the same fiscal year to the US government or any foreign government regarding the commercial development of oil, natural gas or minerals, or the acquisition of a licence for any such activity. However, following a vote by the US Congress to repeal the SEC transparency rule under the Congressional Review Act, a law that permits Congress to abrogate agency regulations, the US Administration signed the repeal vote into law on 14 February 2017. Nevertheless, while the June, 2016 SEC transparency rule has been repealed, the SEC is still subject to the legal obligation imposed under section 1504 of Dodd-Frank to issue rules mandating disclosure of payments to foreign governments remains in force unless and until it is repealed. Companies in Canada will be paying attention to statements from the SEC on any proposed transparency rules issued for comment, the content of these proposed rules or any actions by Congress to repeal the relevant transparency provisions of Dodd-Frank.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Canada has also signed the OECD International Convention on Combating Bribery of Foreign Officials (1997), which, although not directly applicable, is the genesis for the Corruption of Foreign Public Officials Act 1999 that criminalises the bribing of foreign officials. Additionally, on 16 December 2014, Canada enacted the Extractive Sector Transparency Measures Act, and brought it into force on 1 June 2015. This act fulfils an EITI-like role by requiring extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad. Taking into account the division of powers set out under the Constitution Act of 1867, the province of Quebec adopted a mirror piece of legislation, namely the Act respecting transparency measures in the mining, oil and gas industries, which came into force on 21 October 2015. Both under the Canada (federal) and Quebec acts, payments made to Indigenous governments will have to be reported as of 1 June 2017, following a deferral of two years.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

The Investment Canada Act (ICA) is a law of general application. While it does not set out specific foreign ownership limits or restrictions with respect to the mining industry, it contains provisions requiring pre-transaction approval of certain investments in Canada by non-Canadians. Under the ICA, acquisitions of Canadian businesses by non-Canadians may be subject to a 'net benefit to Canada' review if certain specified thresholds are exceeded or a 'national security' review at the discretion of the Minister of Innovation, Science and Economic Development, or both.

The Non-Resident Ownership Policy in the Uranium Mining Sector, as set out in a letter issued by the then Minister of Natural Resources in 1987, remains the current statement of Canadian policy with respect to the foreign ownership of Canadian uranium-producing mining properties. The policy provides that:

- a minimum of 51 per cent Canadian resident ownership is required for uranium-producing mining properties in Canada;
- resident ownership for uranium-producing properties in Canada of less than 51 per cent may be permitted if control in fact by Canadians can be established (as defined in the ICA); and
- exemptions to the ownership restrictions may be granted by cabinet only if Canadian partners in a mining development cannot be found.

The policy does not apply to foreign participation in uranium exploration in Canada but will apply if such exploration activities result in a uranium-producing mine.

While comments have been made from time to time regarding the general need to liberalise the policy, there has been no formal announcement by Canada that it has any immediate intention to do so. However, under the CETA between Canada and the EU, Canada has agreed that European investors, in seeking an exemption to the policy, will not be required to demonstrate that a Canadian partner cannot be found.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Canada is a signatory to numerous FIPAs and many of its FTAs, including NAFTA and the latest agreements with the EU and South Korea, contain investment protection chapters. As a general rule, these

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provisions protect investments in the mining industry by requiring national treatment for foreign investments and prohibiting expropriation without compensation, restrictions on the repatriation of funds and performance requirements. As noted in question 27, Canada has 30 bilateral FIPAs now in force including one with China that came into force in 2014. On 29 February 2016, the legal review of the Canada and EU CETA was completed, and Canada and the EU agreed to set up a permanent dispute settlement system along with other significant modifications to the investment protection dispute resolution provisions.

While most chapters of CETA are expected to be provisionally applied, the investor protection chapter of CETA is not likely to be provisionally enforced. Instead, CETA's investor protection is unlikely to come into force until the entire agreement is ratified by all national members of the EU.

Some of the information contained in this chapter was drawn from Fasken Martineau's 2014 Canadian Mining Law, which was edited by Chuck Higgins (www.fasken.com/canadian-mining-law-book-2014).

* *With special thanks to contributors Peter Kirby, Claude Jodoin, Christopher Steeves, Pierre-Olivier Charlebois, Clifford Sosnow, Gilda Villaran, Alison Lacy, Kevin O'Callaghan, David Johnson, Andrea Centa, Huy Do, Doug New, Martin Ferriera Pinho, Emilie Bundock Rosalind Cooper, Zach Romano, Aïda Mezouar, Orlee Wertheim, Denis Dupont and Jianping Zhang.*

Chile

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry in Chile is historically the most significant economic activity in the country. Up to 2013, the mining sector constituted 11.1 per cent of the Chilean GDP, which makes this sector the most important part of the national economy. Also, up to 2013, this industry accounted for 3.1 per cent of all occupations in the country when considering only the direct contracts of the mining companies and not the wide-ranging industries related to mining. Finally, considering the income from royalties and other general taxes and duties, this sector made a 10.1 per cent contribution to national revenues.

Taking into account the above-mentioned data, it is possible to state that this industry is, without doubt, crucial to the country. This fact is highly considered in the relevant legislation, driving Chilean mining law to focus on stimulating and protecting investments and projects.

Geographically and geologically, Chile has favourable conditions for mining activities, combining attractive mineral resources with the advantage of short distances between the extraction sites and the exporting facilities, which, in addition to the intense government investment in transportation infrastructure during the past 15 years, makes transit through the country fast, easy and safe.

2 What are the target minerals?

The main metallic target mineral is copper. However, there are several important projects concerning other minerals such as molybdenum, gold, silver, zinc, lead and iron.

Regarding non-metallic minerals, the most significant are lithium and nitrate.

3 Which regions are most active?

The mining industry is located mainly in the northern area of the country and spread along the Andes mountain chain. The province with the highest income provided by mining is Antofagasta. Other relevant political districts in the industry are the regions of Tarapacá, Atacama, Valparaíso and the Libertador General Bernardo O'Higgins.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system is civil law-based.

5 How is the mining industry regulated?

Chile is a unitary country consisting of one state with a central government. Politically, it is divided into 15 regions, each region divided into provinces. Within the provinces, the minimal administrative structures are the municipalities. The law has effect over the whole territory of the country and any special or territorially limited effects are the exception to the rule.

According to the Constitution of the Republic of Chile, the state has the exclusive ownership of all mines, including guano deposits, metal bearing sands, salt deposits, coal and hydrocarbon deposits and fossil substances, except for surface clays, sands, rocks and other materials directly used for construction. The exploration and exploitation of such substances may be granted through a judicial procedure to any person or company by means of a mining concession.

Moreover, liquid and gaseous hydrocarbons, lithium or deposits of any kind in maritime waters under national jurisdiction, or deposits of any kind located in whole or in part, in areas that, by law, have been classified as important to national security with mining activities, shall be excluded from mining concessions.

The Mining Code sets the framework regarding the activity as such, whereas there are several special regulations that deal with special aspects (eg, the Foreign Investment Statute, environmental protection statutes and mine closure procedures).

Regional governments, provinces and municipalities and other administration entities have little or no authority over the mining sector and they are restricted mostly to grant extraction permits over surface clays, sands, rocks and other materials directly used for construction, which are located within national property under their administration.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The most relevant laws regarding mining are the following:

- the Constitution of Chile, setting the cornerstone of property over every economic activity;
- the Mining Code (Law No. 18,248), which is the main legal body regarding mining activities and sets the framework for Decree No. 1/1986, establishing the Regulation of Mining;
- the Law of Mining Concessions (Law No. 18,097), which focuses on the mechanism of concession of the deposit;
- the Law of Foreign Investment (Law No. 20,848), which replaces Decree-Law No. 600 and creates the new legal framework for foreign investment; and
- the Special Tax for the Mining Industry (Law No. 20,026), which is a special regulation concerning taxation over mining activities.

The main governmental entity related to mining activities is the Mining and Geology National Service (Sernageomin), which approves the technical features of a project.

Regarding the new Law of Foreign Investment, it is important to mention that it replaces Decree-Law No. 600, maintaining, however, some of its benefits. Decree-Law No. 600 was one of the mechanisms established for the entry of capital into Chile. Under this optional mechanism, foreign investors were authorised to bring capital, physical goods or other authorised forms of investment into Chile, through the execution of a foreign investment contract with the state of Chile. On the contrary, under Law No. 20,848, foreign investment contracts shall not be entered into with the Chilean state – investors' rights shall be evidenced through a certificate granted by the Foreign Investment Promotion Agency.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

A commission created by Law No. 20,235 established a code for the reporting of mineral resources and reserves. The commission was formed by mining experts and members of the public sector and its report is based on the Australian Joint Ore Reserves Committee. It is

also recognised by the Committee for Mineral Reserves International Reporting Standards.

The code mentioned above defines mineral resources as a concentration or occurrence of a natural, solid, organic or non-organic fossilised material in such form, quality and quantity that there is a rational prospect of its technical or economic potential. Moreover, for this code the concept of mineral reserve also includes the diluted materials surrounding the site of the resource that can also be contaminated as an effect of the mining.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

As mentioned in question 5, the Chilean state has the exclusive ownership over all mines, excluding surface clays, within the territory of Chile. The exploration and exploitation of such substances may be granted through a judicial procedure to any person or company by means of a mining concession. Both kinds of concession are given the same status as a real estate property right and any encumbrance or appropriation by third parties is susceptible to be challenged at the courts. Also, the said concession only grants rights on the mineral substances but not on the surface land in which they are located. In order to obtain the necessary rights to execute the exploration or exploitation over the surface land, the Chilean Mining Code sets forth a system of mining easements, which are granted through a judicial procedure, contemplating the necessary compensation to the surface land owner.

Also, as mentioned in question 5, liquid and gaseous hydrocarbons, lithium or deposits of any kind in maritime waters under national jurisdiction and deposits of any kind located in whole or in part in areas that, by law, have been classified as important to national security with mining effects, shall be excluded from mining concessions. Regarding the latter substances, not subject to a mining concession, they may be explored or exploited directly by the state or by one of its companies, by means of an administrative concession or by special operation contracts under the requisites and conditions set by the president of Chile specifically for each case by a Supreme Decree.

Finally, regarding surface clays, sands, rocks and other materials directly used for construction, they belong to the owner of the surface land. However, if the surface land is under public administration, such as a municipality, said municipality shall be entitled to grant extraction permits over said materials.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

There are several agencies holding information related to geographic, economic or commercial facts about the mining industry. Generally, this information is public and any private actor may request it from the relevant authority.

Among the most important information holders are the Undersecretary of Mining, Sernageomin and the Chilean Copper Commission (Cochilco).

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

In the Chilean legislation, private parties may acquire several mining rights. These are mining claims (mining exploitation concessions under constitution process), mining petitions (mining exploration concessions under constitution process), mining exploration concessions (reconnaissance licences) and mining exploitation concessions (mining licence). All of these different kinds of mining rights are acquired on a 'first come, first served' basis.

Mining concessions are considered as real immoveable rights, having the same legal status of a property, but only regarding the mineral substances. Also, mining concessions entitle its holder to request the necessary access over the surface land through the constitution of mining easements for both exploration and exploitation concessions, with the obligation of adequately compensating any damage to the land owner. To this rule, however, some exceptions may apply. Additionally, the exploration licence grants preferential rights for requesting an exploitation licence.

Concerning the main obligations of the rights holder, they are obliged to pay the necessary annual fee for either exploration or exploitation licences. The avoidance of complying with this obligation to obtain and comply with all the pertinent administrative authorisation such as environmental approvals, health and safety procedures, labour, taxation and municipal regulation may cause the loss of the concession.

11 What is the regime for the renewal and transfer of mineral licences?

An exploration mining concession is given for a period of two years, renewable for another two years. Holding this type of concession gives priority to apply for an exploiting mining concession, which is granted to the requesting party without a limit of time. Both kinds of concession are granted after a judicial writ submitted to the competent court. In Chilean law, a concession is equivalent to a real estate property right, but differing as to the dominion over the land where it is constituted.

Concessions can be transferred to any private or public entity fulfilling the formal requirements, which are similar to any sale of property in the related regulation. This kind of right is also susceptible to be given as collateral to any kind of commercial operation.

12 What is the typical duration of mining rights?

Regarding the duration of mining rights please see answer to question number 11. Mining concessions cannot be revoked or cancelled by the government due to the property right that its holder has over such concessions which is guaranteed by article 19 No. 24 of the Chilean Constitution.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There are neither special requirements nor distinctions between nationals of foreign countries or Chilean parties. As such, there is no necessity or desirability of having a domestic partner for the activity.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected in the same way as property rights and others of similar characteristics. There are no special courts concerning mining, as it is considered part of the general jurisdiction of the civil courts of each district.

The judiciary system in Chile is independent and respectful of the rule of law and due process.

Chilean law follows the rules of the New York Convention of Recognition and Enforcement of Foreign Arbitral Awards, which makes international arbitration awards fully valid and enforceable in the country.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The holder of a mining concession may acquire any kind of rights contained in the Chilean legislation over the surface property. Therefore, the interested party can constitute dominion, settle easements or pact leases over it. Nevertheless, the proprietor of the surface land is entitled to ask the mining licensee to remedy any damage caused by the operation of the mine; however, he or she cannot oppose the request for mining easements.

The Mining Code also considers the possibility for a series of easements the licence holder can impose to the landowner of the surface land. Examples are the permit to transit and to construct pipelines, ports and railways, among others.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

There is no special right for the Chilean government and its agencies to engage in mining activities. Moreover, the relevant regulation forces the state to act through state-owned companies, which require a special law to exist and are treated commercially as if they were private companies.

There is no local listing requirement needed for mining projects.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Constitution of Chile establishes that, only in cases where there is a public need, is it possible to proceed on expropriation of any right of particulars. In the case of a mining licence, the legislation establishes a procedure to protect and to justly determine the price of the dispossessed. The procedure is both administrative and judicial and it is designed to reduce the eventual involvement of the government in the final decision. The relevant legislation is the Organic Law of Expropriation Procedures (Decree No. 2,186 of 1978).

This piece of legislation follows the international standard for prompt, adequate and effective compensation in the case of expropriation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There is no cohesive body of legislation containing regulations regarding protected areas. Therefore, there are several classifications of areas that are restricted to economic exploitation or human activities. This structure is made considering the location's importance either environmentally or culturally.

These areas are well delineated by the relevant authorities, and the level of human activities they can be subject to is variable with consideration of their characteristics. Some of the protected areas allow economic activities, yet there are still specific restrictions or requirements that must be fulfilled beforehand (eg, in protected indigenous or cultural areas).

Another relevant regulation is set out in article 17 of the Mining Code, which lists several authorities from which the mining company must request permits before proceeding to extraction activities.

Generally speaking, most of the environmentally restricted areas are located in the southern provinces of the country, away from the populated centres, which, considering that the more active mining provinces are in the northern part of the country, make them of limited interest from the mining perspective.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The general tax regime applicable to mining activity is dependent on the size of the operation.

Small mining operations with a maximum of five employees are subject to an overall income tax with a fixed rate calculated according to a formula that takes into account the average price of copper and the company's sales.

Larger companies, for instance stock corporations or limited responsibility partnerships, whose annual sales do not exceed 36,000 tonnes of metallic non-ferrous minerals or 2,000 annual tax units, regardless of the type of mineral, are considered to be medium-sized.

Medium-sized mining operations are subject to a presumptive tax regime, under which the taxable income of the period is presumed to be a certain percentage of their net sales, being subject to the general tax rates (explained below). This percentage ranges from 4 to 20 per cent according to the average copper price during the tax period.

Companies exceeding the previous criteria are considered large mining operations. These entities will be subject to the general income tax regime. As such, they are subject to income tax, which from 2016 will be 24 per cent, and a global complementary or additional tax, depending on whether the contributor is a Chilean or foreign national.

There is a royalty, or specific mining tax, over mining activities that covers any concessionaire who extracts and commercialises minerals in any type of production. The rate of this tax is progressive and follows the volume of the company's production. The rule is the following: companies whose annual sales exceed the equivalent of 50,000 tonnes of fine copper pay a progressive rate of between 5 and 14 per cent, companies whose annual sales are between the equivalent of 12,000 and 50,000 tonnes of fine copper pay a progressive rate of between 0.5 and 4.5 per cent and companies whose annual sales are equal to or less than 12,000 tonnes of fine copper are exempt from the royalty.

The value upon the tonnes of fine copper is calculated as according to the average value of grade A copper registered at the London Metal Exchange.

Finally, other duties and fees applying to any business are also applicable to mining activities. As such, these companies are subject to municipal and stamp duties and VAT.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

There is no cohesive body of legislation for the incentives to the mining activities to be found. The most relevant investment incentive is the one contained in Law No. 20,848, described in question 20.

There is a special tax regime and other minor benefits granted for mining and industrial activities operating in isolated provinces of the northern and southern regions of the country.

Other incentives, contained in the general tax regulation include accelerated depreciation of assets, VAT refunds in qualified cases and deferred payment of custom duties over the importation of certain goods, among others.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Since 1974, most foreign investors in the country choose the rights granted by Decree-Law No. 600. Under these rights, investors bringing capital, physical goods or any other kind of investment from abroad could choose to sign a foreign investment contract with Chile. According to the statistics issued by the Foreign Investment Committee, by 2011, at least 56.5 per cent of the capital brought in from abroad used this mechanism.

One of the features of this scheme was the existence of a stabilisation clause. Under this special tax regime investors could choose either to be subject to the standard tax regime or to choose a special regime that sets an invariable rate of additional tax on profit remittances at 42 per cent, unmodified for a period of 10 years. The investor could exit from this regime at any time in favour of the standard regime, but could not subsequently return to the special regime.

This latter structure was replaced by Law No. 20,848. This new legislation is applicable to foreign direct investment, which is defined as 'the transference to the country of foreign capital or assets owned by a foreign investor or controlled by it, for a total amount equivalent to or higher than US$5 million or its equivalent in another currency, implemented through convertible foreign currency, physical assets in any state or form, earning reinvestments, credit capitalisation, technologies in its diverse forms capable of being capitalised or credits associated to foreign investment coming from related companies'.

Foreign investors shall be protected by the applicable Chilean law and no new stabilisation clauses shall apply. However, the ones already executed by the Chilean state shall remain in force.

Law No. 20,848 mandates that the president issue a 'Fostering and Promotion Strategy for Foreign Investment'. This strategy seeks to spur and streamline foreign investment in Chile, positioning the country as an international hub for business and investment. This strategy will consist of a diagnosis of Chile's international competitiveness, including an evaluation of the capacity of the Chilean economy to add value in the production of goods and services through the promotion of foreign investment, along with the definition of long- and mid-term recommendations.

In order to promote and simplify foreign investment in Chile, the new legal regime sets up the creation of the Foreign Investment Promotion Agency, which will be charged with promoting and attracting foreign investment and implementing the Fostering and Promotion Strategy for Foreign Investment. This agency will be the legal successor of the current Foreign Investment Committee.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

There is no governmental entitlement to a carried interest or free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

There is no specific tax regarding the transfer of licences. However, there must be considerations regarding the rules about capital gains contained in the Income Tax Law as licences have regulations similar to the transfer of real state property rights.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between Chilean nationals and foreign nationals concerning the taxes they must pay.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The usual mechanisms used by foreign investors are stock companies, limited liability partnerships and agency or branch offices. The most flexible of them is the stock company, whereas the one that provides relatively better taxation conditions is the limited liability partnership. As any mechanism presents benefits and deficiencies, it is the investor who is entitled to choose between them.

26 Is there a requirement that a local entity be a party to the transaction?

There is no specific requirement for a local partner to be part of the transaction.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

See question 46.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Traditionally, project finance has been the most used mechanism for large investments in the mining industry. Concerning medium-sized projects, local or syndicated banking loans tend to be the favoured option.

Another available option is the bond market, although this has not yet been exploited by many mining companies. Additionally, the stock market has not been significant in financing mining projects.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Neither the government nor its agencies are involved in direct financing for mining projects. However, there are some programmes for fostering investment and technology, focused on mining, funded by the national treasury.

Pension funds are allowed to invest in both domestic and foreign financial markets. Therefore, they are free to invest in mining companies at their will. However, no specific legislation targets these investments on mining projects.

30 Please describe the regime for taking security over mining interests.

Under the rules of the Mining Code, the mining licence is considered as a real estate property right. As such, it is possible for the proprietor to mortgage it as collateral for obtaining credit in similar conditions to that of real estate.

For this purpose, the applicable regime is the same as the general rules regarding real estate and contracts of mortgages.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There is no specific limitation or restriction upon mining machinery or equipment, the general rule being that all kinds of goods can be imported into the country.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

In general terms, be-spoken contracts are used in Chile (as opposed to standard conditions such as FIDIC) although large international companies have prepared its own templates for procurement and other services or works contracts. Generally, these types of contracts are owner friendly although it heavily depends on current market conditions and bargaining powers of each party.

In relation to disputes, there is an increase in the use of technical experts to solve technical disputes; although still cannot be labeled as a trend. These types of alternative dispute mechanisms are more common in large international projects.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The general principle in the international commerce regulation is that there are no export quotas or a mechanism that prohibits or prevents the marketing of goods abroad.

However, there is one restriction contained in Law No. 16,624. This regulation imposes on all copper producers generating over 75,000 tonnes per year, that they reserve a percentage of their production for the national industry. Cochilco is the entity in charge of the determination of such percentage.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The governing principle of the international currency exchange in Chile is the free flow of capital. This guiding principle has been progressively implemented since 1990 and has changed the role of the Central Bank of Chile from a comptroller and restrictive agency to a supervisor and an information holder. Accordingly, regulation is lenient and mainly establishes that funds must be brought to the country via the formal capital market, consisting of banks, certain exchange bureaus, stockbrokers and some entities approved by the Central Bank.

The Central Bank requests a series of procedures and requirements with the aim of maintaining updated information about the amount and origin of the capital. The relevant regulation for these purposes is contained in the Compendium of Foreign Exchange Regulations.

This regulation establishes that investments and profits must be transferred outbound from and inbound to the country via the rules of chapter XIV of said compendium.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The main environmental laws in the country are Law No. 19,300 (the Environmental Framework Law), Law No. 20,417, which created the Ministry for the Environment, the Service of Environmental Assessment and the Superintendency of the Environment and Law No. 20,551 (Regulating Mines and Installations Closure).

This regulatory structure is set on a nationwide basis, with few exceptions to the procedure, and forces all provinces to follow the same process once they have received environmental approval applications. The exceptions are limited and the process is designed to incorporate any local or special features of the location where the project is located. Additionally, the information regarding these special features is generally public and the relevant agencies are holders of such information.

The main agencies overseeing environmental issues are the Ministry of the Environment, the Superintendency of the Environment and the Environment Assessment Service. Also, regarding mining, Sernageomin plays a relevant part in every aspect of the project and in the planning and approval of the mine closure procedure.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Mining projects are expressly mentioned as one of the activities subject to the Environmental Impact Assessment Service. This service requires the project to submit either an environmental impact declaration or an environmental impact study. The difference between the necessity of the submission of either of these documents is reliant on the environmental concerns of the project and the specific criteria to determinate it and, therefore, the relevant law and regulation. Generally speaking, the declaration is needed for minor projects where the potential harm to the environment is limited, whereas the study focuses on major and more environmentally perilous activities.

In consideration of the process, the authorities, once receiving the documentation required, have 120 days to deliver a decision on the application. If, after this period, there is no official response, there is a legal presumption that the project is authorised. However, there are several deferrals to this term and usually the final authorisation takes between four and 12 months.

Once the operations are authorised, the Environmental Assessment Service will produce a global environmental permit certifying that the project complies with the environmental requirements.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Law No. 20,551 sets the procedure and measures the mining companies must perform regarding mine closure. The core idea behind this legislation is that the mine closure is an integral part of the operation of the project and it must be considered and implemented progressively through its exploitation. It also implements the 'polluter pays' principle.

As such, the mining company must establish a guarantee up to the value of the implementation of all the closure and post-closure measures previewed in the closure plan. The amount of this guarantee is determined considering the cost of remediation and closure and post-closure measures. The specific time for the submission of this guarantee is set following the rules regarding the assumed life of the deposit, taking into consideration the estimated life of the extraction operation.

The relevant authority for this procedure is Sernageomin.

38 What are the restrictions for building tailings or waste dams?

Supreme Decree No. 248 from 2007 for the "Approval, Design, Construction, Operation and Closure of Tailings Dams" establishes technical requirements and safeguards for those facilities. All the specific measures regarding environmental impacts and safety mechanisms for communities are determined case by case by the environmental authority and the National Service of Mining and Geology, depending on the exact location of the dam and the level of risks that its construction presents.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Decree No. 132/2004 is the relevant regulation in relation to mining health and safety. The main objective of this Decree is to establish a general framework to protect the life and integrity of the workers of the mining industry and of the activities closely related to it, and to protect the installations, infrastructure, machinery, buildings and premises that make mining operations possible.

The government agencies overseeing this purpose are Sernageomin and the regional office of the Ministry of Health.

The Labour Code sets a general employment framework, being the main legislation concerning the conditions and characteristics of the jobs that can be offered and the employees that any company can hire. The principal governmental agencies are the Ministry of Employment and the Employment Inspection.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Decree No. 248/2007 of the Ministry of Mining regulates the management of mining waste. It states that any mining company may deliver a management project to Sernageomin applying for its authorisation to start building tailings ponds or waste piles. After its approval, the mining operator must send quarterly reports to Sernageomin with the conditions of such tailing ponds and waste piles and its maintenance.

Additionally, the owner of the mine concession from which the waste is extracted is the only entity permitted to explore and exploit such waste. Notwithstanding, if the mine concession is expired or the wastes are abandoned the owner of the mine concession where the waste is located will be entitled to explore or exploit them.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no special restrictions and limitations regarding the nationality of employees in the mining industry. However, there is an extensive regulation concerning the general conditions a foreign national must have to be allowed to work in the country and the responsibilities that the employer must fulfil.

Concerning this, the main condition the legislation imposes on the employer is that a maximum of 85 per cent of the total direct work force can be foreign employees. Nevertheless, there are some exceptions to this rule, which are dependent on the size of the company and the technical level of the employee.

Another relevant item regarding foreign employees is the fulfilment of general migratory conditions and the surveillance of the corresponding visa.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There is no legislation regarding CSR in Chile. However, it is recommended that a mining company undertakes its own policies.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

There is a special status for indigenous lands and natural resources within the national territory. This status is set by Law No. 19,253, the Indigenous Law, and Convention 169 of the International Labour Organization.

According to this legislation, indigenous people cannot be detached from their land by any means without the approval of the Indigenous Development National Corporation.

As a result of the former rule, the exploitation of a mining project might be hindered and the mining company must be aware of any indigenous land affected by its operations.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

There is no specific legislation concerning CSR. However, there is some regulation about the rights of the indigenous people derived from the membership of Chile of Convention 169 of the International Labour Organization.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Chile has no specific anti-bribery legislation as the regulation is spread over several acts and decrees. However, the rules on this regard are tight and governmental agencies are strict on its execution. Outstanding legislations on this matter are:

- international treaties on the context of Chile as a member of the OECD 1997 Convention on Bribery of Public Servants on International Transactions;
- Decree No. 1,879/1998 (Inter-American Convention against Bribery);
- Law No. 20,414 on Transparency and Modernisation of the State;
- Law No. 20,285 of 2008, on Access to Public Information, granting access to individuals to any kind of information held by governmental agencies;
- Law No. 20,393, on Criminal Liability of Corporations, covering matters related to financing terrorism, money laundering and bribery. This legislation was one of the bills the Chilean government was compelled to approve as the application of Chile to the OECD was enacted; and
- Law No. 19,880, on the Basis of Administration of the State, setting the framework on which the government, its agencies and public servants must conduct and operate. One of the most important features of this act is the 'Principle of Integrity' of public servants, stating they must perform their activities on the highest legal and moral levels.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

There is no binding legislation related to adopting any foreign anti-bribery regulations. However, Chilean companies are free to subject themselves in this issue to any higher standard they choose.

As Chile is a member of the OECD, there are two laws that national companies take into consideration. These are the US Foreign Corrupt Practices Act and the UK Bribery Act.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Chile is not a member of EITI. Additionally, individuals' or companies' income tax payments are not public information. However, there are detailed statistics of the incomes received by the Treasury from the mining industry.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no restrictions in Chile related to the ownership of a mining project by foreign nationals.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

In the past 30 years, the Chilean economy has progressively become more open to the world. Under this policy, Chile has signed free trade agreements with more than 60 countries, the two most important being those with the US and the EU. To date, Chile is also a relevant participant in the elaboration of the Trans-Pacific Partnership treaty.

As such, for most products, custom duties are minimal and restrictions to either imports or exports tend to be few.

In the mining field in particular, the country has three main treaties that are worth mentioning: the Mining Treaty with Argentina, the Mining Treaty with the Asia-Pacific Economic Cooperation (APEC) and membership of the International Copper Study Group (ICSG). The Mining Treaty with Argentina created a permanent body whose mission is to review and propose legislation and solutions to binational controversies and difficulties that any mining project may have. One of the main examples of the execution of this treaty is the Pascua Lama project.

Regarding the APEC and the ICSG memberships, Chile is an active participant in identifying modern solutions to mining problems and delegates of the Ministry of Mining concern themselves regarding the most recent situations in the international forum.

Finally, Chile is a member of the Kyoto Protocol and the Stockholm Convention. Also, it has signed several double taxation treaties with Argentina, Canada, Mexico and South Korea, among others.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining is one of the major issues upon which the policies of the national government are based. Owing to the economic flows that are derived from royalties, income earned by the development of this industry makes up about 25 per cent of the tax revenue of the country. Notwithstanding the above, in 2016, mining and quarrying were the sectors that decreased the most in Colombia in connection with the gross domestic product. Colombia is a country with high expectations in relation to the mining industry, but does not have a developed mining industry.

With the issuance of the National Council for Social and Economic Policy Document No. 3,762 of 2013, the government established a guide to chart mining policy, thereby managing mining districts that arise and mining projects of national interest that have been identified, with which it aims to advance environmental issues, in order to expedite administrative procedures in mining projects of great importance to the nation.

2 What are the target minerals?

Colombia has an abundance of underground wealth.

Coal is the main mineral produced in the country, because of the amount of reserves that have been identified. By 2016, production of coal increased by 6 per cent in comparison with 2015, and in 2017 it is expected to meet a similar production level to 2016.

Other minerals mined in Colombia are gold reef, alluvial gold, silver, clay, copper, iron, gravel, sand, gemstones, ferronickel, asbestos, kaolin, lime, limestone, silicates, phosphates, sulphur and salt, among others.

Colombia is the largest producer of emeralds in the world and the increase in gold production has been significant in recent years.

The following tables show the increase in the production of some minerals, according to the records of the Mining Planning Unit, from 2003 to 2016.

	Mineral fuel	Metallic minerals		
Year	Coal (K ton)	Copper (concentrated) (ton)	Iron mineral (ton)	Nickel contained in ferronickel (ton)
2003	50,028	7,270	625,002	46,482
2004	53,888	7,840	587,222	48,818
2005	59,675	8,756	607,559	52,749
2006	66,192	2,902	644,151	51,137
2007	69,902	4,196	623,930	49,314
2008	73,502	5,248	473,273	41,636
2009	72,807	5,688	280,773	51,802
2010	74,350	3,555	77,048	49,443
2011	85,803	4,042	174,459	37,817
2012	89,199	1,191	809,224	51,975
2013	85,496	0	710,047	49,319
2014	88,577,980.03	19,956.28	676,180.24	41,221
2015	85,547,513.82	0	901,736.03	10,607
2016	90,511,989.29	-	715,692.33	37,091.43

	Non-metallic minerals			
Year	Sulphur (ton)	Limestone (for cement) (ton)	Sea salt (ton)	Land salt (ton)
2003	73,024	9,835,890	235,772	207,741
2004	97,586	10,027,653	294,343	231,721
2005	64,660	12,017,866	428,957	215,962
2006	47,438	11,992,615	389,630	248,245
2007	48,999	13,229,235	309,557	204,090
2008	56,892	12,699,133	386,461	245,170
2009	54,367	11,448,581	356.797	255,332
2010	59,556	11,766,895	139810	288,676
2011	58,073	13,364,860	116,265	305,706
2012	27,007	6,696,801	206,604	313,664
2013	0	4,065,276	136,708	337,185
2014	48,513	0	105,577	340,263
2015	17,559	3,277,093	59,140	358,299
2016	-	12,799,982.05	218,557.07	345,636.5

	Precious minerals			Gemstones
Year	Gold (kg)	Silver (kg)	Platinum (kg)	Emeralds (thousand carats)
2003	46,515	9,511	841	8,963
2004	37,739	8,542	1,209	9,825
2005	35,786	7,142	1,082	6,746
2006	15,683	8,399	1,438	5,734
2007	15,482	9,765	1,526	3,389
2008	34,321	9,162	1,370	2,122
2009	47,838	10,827	929	2,945
2010	53,606	15,300	997	5,230
2011	55,908	24,045	1,231	3,402
2012	66,178	19,368	1,460	1,211
2013	55,745	13,968	1,504	2,620
2014	57,015	11,499	1,135	1,967
2015	53,961	9,256	785	2,168
2016	61,805.29	10,247.37	916.97	2,386,994.83

3 Which regions are most active?

Colombia has a number of mineral production regions, and among the most important ones are the following.

Precious metals
Gold production can be found in the departments of Antioquia in the north-west region, Chocó in the west, Tolima in the south-west and Santander in the north-east of the country.

Coal
Coal production can be found in departments such as Guajira and Cesar in the north, Santander in north-eastern Colombia, Valle del Cauca in the south-west, Cundinamarca in the interior and Boyacá in the north-east of the country.

Copper
Copper production is found in the departments of Tolima in the south-west and Chocó in the west of the country.

Emeralds
Emerald production is mostly found in the department of Boyacá in the north-east and in some areas of the department of Cundinamarca in the interior of the country.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Colombian legal system is civil law-based. The system is based on the fundamental regulations of the 1991 Political Constitution, the laws issued by Congress, regulatory decrees handed down by the executive branch or the national government (led by the President of the Republic) and resolutions that can be issued by several state agencies, among which are those arising from the National Mining Agency.

5 How is the mining industry regulated?

Mining activities in Colombia are regulated by Law No. 685 of 2001 (the Mining Code). Environmental laws and judgments related to ethnic communities' rights should also be taken into account in order to undertake mining activities in Colombia.

The Mining Code is the main mining regulatory framework of Colombia. It is important to highlight that in mid-2013 the government issued several decrees regulating the Mining Code, allowing development of the Mining Code of 2001.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The main law governing the mining industry is the Mining Code and its supplementary regulations.

In Colombia there are other laws, decrees and resolutions that regulate issues that are part of the mining industry, and, in this regard, the most important ones are the following:

- the Constitution of Colombia, articles 330, 332, 360 and 361 concerning subsoil resources;
- Law No. 99 of 1993 on environmental licences on mining activities;
- Law No. 141 of 1994, which regulates the royalties' national system, as amended by Legislative Act No. 5 of 2011;
- Law No. 685 of 2001 (the Mining Code);
- Law No. 1,658 of 2013, regarding the use of mercury in mining activities;
- Decree No. 2,811 of 1974 (the Code of Natural Resources);
- Decree No. 3,573 of 2011, through which the National Environmental Licensing Authority (ANLA) was created and other provisions are issued;
- Decree No. 933 of 2013, by means of which provisions on formalising traditional mining are issued and mining glossary definitions are amended;
- Decree No. 480 of 2014, by means of which the conditions and requirements for the conclusion and implementation of formalisation of mining subcontracts are regulated;
- Decree No. 2,041 of 2014, whereby Law No. 99 of 1993 regulates environmental licences;
- Decree No. 276 of 2015, by which measures related to the National Register of Marketers are adopted; and
- Law No. 1,753 of 2015 (the National Development Plan), by which mining is prohibited in moorland and wetland ecosystems.

We also consider it important to mention that as per the Constitutional Court's judgment of 2014, the regional authorities (municipalities) must be consulted before the granting of a concession agreement. In addition to the above-mentioned, by means of judgments C- 273 and T-445 of 2016, the Colombian Constitutional Court declared article 37 of the Mining Code (Law 685 of 2001) unenforceable, granting to the regional authorities (municipalities) the power to determine whether or not mining activities are allowed in their territory.

There are several principal regulatory bodies that administer the laws related to mining.

Ministry of Mines and Energy
Decree No. 968, dated 18 May 1940 created the Ministry of Mines and Energy and modified the organisation of the Ministry of National Economy that was in charge of subsoil resource. In 1968, the administrative reform set the management of primary energy sources of the ministry, by means of which it was responsible for resources of gas, oil, coal and radioactive minerals. Currently, this ministry is responsible for conducting the mining policy.

National Mining Agency
Decree No. 4,134 of 2011 set up the National Mining Agency, which is responsible for organising the management of mineral resources and the distribution of functions among the entities that comprise it, such as the Secretaries of Mines of which there is only one in the region of Antioquia. It is responsible for the administration of mineral resources, promotion thereof, management of collection and distribution of the economic considerations outlined in the Mining Code. This is in order to develop the titling, registration, technical assistance, capacity, control and monitoring functions of the obligations arising from the titles and applications for mining areas.

Colombian Geological Service (SGC)
The SGC was created in 1916 under the name of the National Scientific Organisation. Since then it has been devoted to the research of mineral resources and the study of subsoil. Currently, the SGC, among other functions, is responsible for the collection and management of information regarding subsoil.

Antioquia's Secretary of Mines
Antioquia's Secretary of Mines serves as the mining authority delegated by the National Mining Agency for the mining rights that are in their jurisdiction.

Mining and Energy Planning Unit
The Mining and Energy Planning Unit aims to design the energy policy of the country. It also corresponds to such entity managing the mining industry. Among its most important functions is to set base prices for the settlement of royalties.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Colombia has an information system for reporting mineral resources and mineral reserves through basic mining forms, which must be filed with the mining authority twice a year. The concessionaire must report the progress of works, whether for exploration or for exploitation activities.

The reports obtained by the Mining Agency are forwarded to the SGC, which is responsible for updating the database to be provided to the public.

In order to calculate the reserves of a mining project, drilling studies should be conducted. In Colombia, there are several companies that specialise in these studies to ensure the reserves of the field, which are guaranteed by the international SGS certificate.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

In Colombia, the government is the owner of the subsoil, hence it has complete control over mining rights in our jurisdiction.

The right to explore and exploit the Colombian subsoil can be granted to private parties through a mining concession contract, which is granted for a 30-year period, extendable for an additional 30-year period.

The concessionaire will be the owner of the extracted minerals, but the government will always continue being the subsoil's owner.

The Mining Code does not grant rights to the subsoil, notwithstanding the above, it is established that the Colombian government will respect prior rights and titles granted over minerals and even over the subsoil.

Indeed, there existed a legal institution called Acknowledgement of Private Property, which is accepted and respected by the mining authority, by virtue of which private parties were granted with rights over subsoil provided that they had fulfilled the following requirements:

- the private party possessed or owned land where a mine was located;
- the private party had been granted with title over the mine or a final judgment had acknowledged the subsoil's private property;
- the documents required to obtain the acknowledgment were filed with the Ministry of Mines and Energy before 23 June 1972; and
- the private party had started mining activities within the area before the filing of the documents mentioned in the point above.

It is important to highlight that by means of judgments C- 273 and T-445 of 2016, the Colombian Constitutional Court declared article 37 of the Mining Code (Law 685 of 2001) unenforceable, granting to the regional authorities (municipalities) the power to determine whether or not mining activities are allowed in their territory.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The files corresponding to mining applications and to mining concession contracts are available to the general public and several studies that have been conducted by the SGC are also available.

Currently, the National Mining Agency is responsible for collecting the information supplied by miners in connection with their mining activities.

Concessionaires are obliged to file the basic mining forms.

The SGC conducts geoscience surveys and the results are available through a geo-reference system called SIGER.

According to the above, the National Mining Agency receives information from the holders of concession contracts and, in turn, it must forward such information to each one of the entities responsible for their management. For example, in order to establish what areas are available to be contracted, the information must be on the National Mining Cadastre.

The Mining Cadastre is responsible for registering the mining rights under contract with the state, thereby identifying free areas.

This dependence is important as it identifies the mining areas available and limits the receipt of tenders for the same areas. Information on free or contracted mining areas can be obtained directly from the Mining Cadastre Office and it may be verified on the website www.simco.gov.co.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Through mining concession contracts, private parties acquire the rights to explore and exploit the areas granted in a concession.

The right is acquired by submitting a mining application with the mining authority and complying with the legal requirements to obtain the respective mining concession contract.

The obligations of the holder of a mining concession contract are described in the minutes of such contract, which is based on the current mining legislation.

Some of the obligations are:

- to pay royalties as consideration for the exploitation of minerals;
- to pay the surface canon fee in the exploration stage and construction and assembly stage;
- to constitute an insurance policy that guarantees compliance with mining and environmental obligations under the mining concession contract; and
- to file biannual and annual basic mining forms.

Under the current Mining Code the only valid title to explore and exploit is the mining concession contract, which grants both the rights to explore and to exploit.

The requirements for obtaining a mining concession contract are described in article 271 of the Mining Code.

11 What is the regime for the renewal and transfer of mineral licences?

Article 77 of the Mining Code establishes the procedures to be fulfilled by the concessionaire to extend the concession contract. It is important to note that this article was modified by the National Development Plan and regulated by Decree No. 943 of 2013, which determined new requirements and the budgets to meet in order for the concessionaire to obtain an extension of a mining concession contract.

The law establishes that the requirements that must be met in order to extend the stages of the mining contract are as follows:

- extension of the exploration stage: this stage usually lasts three years, but may be extended for up to 11 additional years. The National Development Plan establishes that the titleholder must explain the financial reasons that support the extension of the exploration stage;
- construction and assembly stage: this stage usually comprises a three-year term, ranging from the completion of the exploration phase to the beginning of the exploitation phase. This stage could be extended for an additional year; and
- extension of the exploitation phase: in this phase the mining production is developed and if the exploration has not been extended, it usually lasts 24 years, otherwise the operation period will be effective for a period, which added to the previous two stages, shall not exceed 30 years. This step may be extended for a period of 30 additional years. The extension of the exploitation phase must be requested at least two years before the end of the exploitation period. The National Development Plan determines that the mining authority could establish new conditions as a requisite to grant a time extension to the mining concession contract and to agree on different compensations other than the royalties. It is important to highlight that this provision was challenged before the Constitutional Court on 18 August 2015.

Article 22 of the Mining Code states that to transfer the mining rights to a third party, the concessionaire of the mining right must file a notice of transfer of its mining rights with the Mining Authority.

As per the Mining Code terms, the only requirement to complete the assignment is to be up to date with the obligations under the mining concession contract. Notwithstanding that, the National Development Plan determines that in order to assign mining titles the assignees shall be required to demonstrate their financial capacity for the exploration, exploitation, execution and development of the project. Also, in practice, the Mining Authority issues a resolution authorising the assignment, which is sent to the Mining Registry.

12 What is the typical duration of mining rights?

Mining concession contracts are generally granted for 30 years and can be extended for a period of 30 additional years. Article 77 of Law 685 of 2001, regulated by Decree 943 of 2013, and the National Development Plan determine the conditions that must be met by a concessionaire to obtain the extension of the concession agreement. The conditions set forth in the law are:

- The extension request must be filed at least two years before the expiration date of the concession agreement.
- The concessionaire must file a building and works plan (PTO) for the extension period.
- The concessionaire must be up to date with the obligations under the corresponding mining concession contract.
- The concessionaire must meet all the economic, technical, social and environmental requirements established in article 4 of Decree 943 of 2013.

The Mining Authority can revoke the concession agreement based on article 112 of Law 685 of 2001, as follows:

- dissolution of the title holder' company;
- lack of financial capacity that prevents the concessionaire to comply with the obligations under concession agreement;
- non-performance of the building and works activities during the terms determined in the law, or its non-authorised suspension for more than six continuous months;
- lack of total and timely payment of the economic obligations;
- lack of previous notice to the Mining Authority of the assignment of the mining rights;
- non-payment of the imposed fines;
- serious and repeated breach of the technical regulations of the exploration and exploitation;
- breach of the regulation regarding the areas excluded and restricted from mining;
- serious and repeated breach of any other obligation derived from the concession agreement; and
- if the concessionaire causes the royalties to be paid to a different municipality by declaring a different origin of the exploited minerals.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Under Colombian law, there is no difference regarding the requirements to be awarded with a mining concession contract, between national and foreign parties.

This right for foreign nationals to be treated the same as Colombian nationals is expressly established in article 18 of the Mining Code.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Disputes between the mining authority and the concessionaire are governed by Colombian law.

The Colombian state, as contracting party of the mining title, should be represented by the National Mining Agency and in the event that a dispute arises because of the revocation or invalidity of the mining title, the said situation shall be resolved at national administrative level.

Moreover, the differences that may arise in connection with the sale of securities and transfer of rights thereof, because this refers to private transactions between individuals, can be resolved through the courts or by national arbitration, or international arbitration when it is with foreign nationals, if the parties so agree.

Further, international free trade treaties usually include clauses that allow foreign investors to go to an arbitration court.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests? ?

First, it is important to clarify that mining concession contracts do not grant surface rights.

Nevertheless, mining in Colombia is considered as an 'activity for the pursuit of the general public benefit'.

Taking into account the aforementioned condition, the Colombian legislature has determined that mining easements are legal or compulsory, which means that they are validated by the legislature's intent. Hence, it is not necessary to obtain a judgment from any administrative or judicial authority for the concession title holder to establish a mining easement.

Further, the landlord of a property in a mining concession is not allowed to oppose the imposition of a mining easement.

The intervention of an authority, which in this case is the mayor of the city where the mining concession is located, will only be necessary to determine the compensation or deposit amount (compensation) due to the landlord by the title holder as a consequence of the easement imposition.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

In principle, all natural and legal entities are authorised to be granted with a mining concession contract.

In Colombia, salt extraction is managed partly by private parties through a mining concession contract granted by a public tender and partly by a state-owned company. Notwithstanding this, the legal entity's contract covers the management of the mines only, rather than it being a full concession contract.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

In Colombia, there are general provisions related to expropriation of private property, but the Mining Code does not make any reference to expropriation of mining concession contracts.

In order to expropriate properties in favour of the mining industry, an administrative process should be carried out, which is very similar to the exercise of mining easement. This legal concept protects the rights of the mine holders, thanks to the mining industry's character of social interest.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

As per the Colombian Mining Code's terms, in Colombia there are areas excluded from mining and areas where mining can be carried out with certain restrictions.

The areas excluded from mining are areas that were declared and delimited according to laws in force such as the protection and development of renewable natural resources and environment.

Nevertheless, based on a previous decision of the environmental authority granting an area extraction, the mining authority may authorise a title holder to carry out mining activities in an excluded area.

Restricted areas

As per the Mining Code, the restricted areas, and associated provisos, for mining are the following:

- within the urban perimeter of cities and municipalities, except in areas in which mining activities are prohibited;
- in areas occupied by rural constructions, including orchards, gardens and surrounding lots, as long as they have the owners' or holders' agreement and there is no danger to the health and integrity of their inhabitants;
- in areas of special archaeological, historical or cultural interest, as long as there is an authorisation from a competent authority;
- on beaches, low tide areas and in fluvial routes served by public companies of transportation and the use of which continues to be established by a competent authority, if such authority, under certain technical and operative conditions indicated by it, has previously allowed that such activities are carried out in the abovementioned routes;
- in areas occupied by a public work or attached to a public service, as long as:
  - the title holder obtains previous authorisation from the manager of the works or services;
  - the applicable laws to the works or services are not discordant with the mining activity that will be carried out in the area; and

- the mining activities to be carried out in such areas do not affect the stability of constructions and installations necessary for the works or services;
- in areas constituted as indigenous mining areas, as long as the corresponding communities' authorities had not previously exercised their preferential right to obtain the mining title to explore and exploit;
- in areas constituted as Afro-Colombian mining zones, as long as the corresponding communities' authorities had not previously exercised their preferential right to obtain the mining title to explore and exploit;
- in areas constituted as mixed mining areas, as long as the corresponding communities' authorities had not previously exercised their preferential rights to obtain the mining title to explore and exploit; and
- in areas delimited as moorlands.

In addition to the above, it is important to mention that, per the terms of the judgments C- 273 and T-445 of 2016, regional authorities (municipalities) could determine areas excluded from mining activities in their territory.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

During the exploration, construction and assembly phases, concessionaires are obliged to pay an annual canon fee.

The Mining Code establishes the obligation to make surface rental payments for the stages of exploration, construction and installation or during extensions to the mining contract that has been retained for exploration during the operation period. Payment of this obligation must be made in advance of the development of the concession contract.

The surface fee is a compensation in favour of the state, which has, as its counterpart, the right to explore the subsoil and to carry out the infrastructure required for the production period.

Once the stage of construction and installation ends, the production stage must begin, for which there is another consideration in favour of the state, such as royalties, which are an obligation on the basis of the mineral being extracted effectively.

During the exploitation phase, concessionaires must make royalty payments as consideration for the exploitation of minerals, and calculation of such payments is made based on the price of minerals in accordance with the resolution issued for that purpose by the Mining and Energy Planning Unit.

Further to royalty payments, for private companies that develop mining activities there is no special tax regime. Thus, mining companies are also obliged to fulfil income tax, withholding tax and VAT obligations in Colombia. In general terms, income tax for business operations in Colombia is based on profits at a tax rate of 34 pe cent and an income surplus tax of 6 per cent for taxable year 2017. Law 1819 (tax reform recently enacted) establishes a tax on dividends paid by Colombian companies to foreign shareholders at a rate of 5 per cent or 35 per cent depending on whether profits were taxed at the corporate level prior distribution. Tax on dividends applies to profits obtained by companies as of 1 January 2017.

VAT tax is based on consumption at a general tax rate of 19 per cent calculated on the gross payment. As a general rule, payments from Colombia to abroad are subject to an income withholding tax at a rate of 15 per cent and a VAT withholding tax of 19 per cent, both determined on the gross payment.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The principal tax incentives applicable to private parties carrying on mining activities are as follows.

Article 143-1 of Law 1819 of 2016 (Tax Reform) established a special regime that allows amortisation of assets related to the evaluation and exploration phases for non-renewable natural resources operations such as: seismic services, acquisition of exploration rights, exploratory perforations, sampling, excavation, activities related to the assessment of commercial project viability, labour costs and any kind of costs and acquisitions needed for the assessment and exploration of non-renewable natural resources, as long as such expenses are subject to be capitalised in accordance to accountancy rules.

Further, in accordance to article 189 of the Colombian Tax Code, private parties are able to deduct the net equity value of assets that are directly linked to mining activity in order to assess presumptive income tax.

Certain mining activities are normally excluded from local taxes, as long as royalty payments for exploitation of minerals are higher than local taxes.

It is also worth mentioning that temporary introduction into the country of foreign-made heavy machinery intended to be employed in mining activities does not generate VAT, according to the Colombian Tax Code article 428(e)). However, in cases of permanent introduction of heavy machinery intended to be employed in mining activities, although VAT is triggered, such VAT paid at the moment of acquisition or importation are able to be discounted from taxpayer's income tax for the corresponding taxable year. Furthermore, VAT triggered as such can be paid in three instalments: 40 per cent at the acquisition moment and 60 per cent in the following two years.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Formerly, Law No. 963 of 2005 allowed tax stability contracts to be signed between foreign investors and the Colombian government, however, that law was repealed and there is currently no legal provision that allows the subscription of such agreements within the country.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to a carried interest or to a free carried interest in mining projects. It is only entitled to annual canon fee payments and royalties.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of a mining concession contract will generate income tax or capital gains tax, depending on the profit obtained as a result of the transaction and the number of years in which the mining concession contract was possessed by the transferor.

In those terms, transferring a mining concession contract that was possessed by a concessionaire for fewer than two years would generate income tax at the rate of 34 per cent and a surplus at the rate of 6 per cent for the taxable year 2017.

On the other hand, transferring a mining concession contract that was possessed by a concessionaire for more than two years would trigger capital gain tax, subject to a 10 per cent tax rate applicable to the profits arising from the transaction.

Withholding taxes might apply if the acquirer is a Colombian taxpayer.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Domestic parties are eligible to be taxed on profits. Thus, Colombian taxpayers are allowed to deduct costs and expenses related to their business activities. On the contrary, foreign entities, unless a permanent establishment is incorporated in Colombia, are subject to income withholding tax based on gross income.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Foreign companies establish branch offices in order to contract mining areas of interest with the state, by virtue of which it should be noted that the activities of exploration and exploitation of minerals are included in their social purpose. This is one of the major business structures realised by foreign companies in order to acquire mining rights in Colombia.

Other business structures used by private parties in mining activities are agreements such as option agreements and joint ventures.

26 Is there a requirement that a local entity be a party to the transaction?

No, as a matter of fact, the only local entity that needs to be party to the transaction is the Mining Authority, which executes mining concession contracts as a representative of the Colombian government.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Tax treaties that have been signed between Colombia and other jurisdictions are as follows:

- Spain – Law No. 1,082/2006;
- Chile – Law No. 1,261/2008;
- Switzerland – Law No. 1,344/2009;
- Canada – Law No. 1,459 /2011;
- Mexico – Law No. 1,568/2012;
- India – Law No. 1,668/2013;
- South Korea – Law No. 1,667/2013;
- Portugal – Law No. 1,692/2013; and
- the Czech Republic – signed on 22 March 2012.

All of the above treaties are in force, with the exception of that with the Czech Republic, which is not yet applicable.

Bilateral investment treaties that have been signed between Colombia and other jurisdictions are as follows:

- Chapter XVII of the G2 Free Trade Agreement (FTA) with Mexico – Law No. 172/1994;
- Chapter IX of the FTA with Chile – Law No. 1,189/2008;
- Chapter XII of the FTA with the Northern Triangle (Guatemala, El Salvador and Honduras) – Law No. 1,241/2008;
- Chapter X of the FTA with the United States – Laws Nos. 1,143/2007 and 1,166/2007;
- Chapter VIII of the FTA with Canada – Law No. 1,363/2009;
- Agreement on Reciprocal Promotion and Protection of Investments (ARPPI) with Spain – Law No. 1,069/2006;
- ARPPI with Switzerland – Law No. 1,198/2008;
- ARPPI with Peru – Law No. 1,342/2009;
- ARPPI with China – Law No. 1,462/2011;
- ARPPI with India – Law No. 1,449/2011; and
- Chapter V of the European Free Trade Association (EFTA) – Law No. 1,372/2010.

All of the above treaties are in force; however, the agreement with EFTA is only currently in force with Liechtenstein and Switzerland.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal source of financing to private parties on mining activities is foreign investment.

Currently, the domestic public securities market does not play any role in financing the mining industry. Only two companies, which undertakes alluvial exploitation, ares listed on Colombia's stock exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No, the government does not provide direct financing to mining projects neither do its agencies or major pension funds.

30 Please describe the regime for taking security over mining interests.

In Colombia, it is possible to pledge mining interests, future production and all assets related to mining activity.

The procedure is quite simple, it is only necessary to have an agreement by means of which the pledge is imposed and the registration of said agreement with the Register over Moveable Assets for publicity purposes. It is advisable to inform the Mining Authority of the encumbrance.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

In principle, in Colombia there are no restrictions related to the importation of machinery and equipment or services required in connection with exploration and extraction.

The restrictions on the import of goods are based on the Harmonised Tariff Schedule, therefore, it would be necessary to analyse each case to determine if such restrictions apply.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

To our knowledge there are no standard conditions or templates of agreements used in Colombia that cover the equipment supply. Usually this kind of transactions, are performed through a supply agreement that follows the commercial code dispositions, as well as customary local law. There are no provisions that lead us to think that the market is friendlier to the supplier or buyer. To our knowledge there are no specific trends regarding dispute resolution of equipment supply agreements. As a general rule, disputes related to supply agreements in Colombia are resolved through the courts or arbitration.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Colombian regulations in force state the following requirements in order to carry out the export of minerals:

- Payment of applicable royalties.
- The exporter must carry out its registration in the Sole Record of Marketing (RUCOM).
- It is required to have the certificate of origin issued by the Authorised Mining Operator.
- Obtaining the approval of the royalties payment made by the exporter through the Single Window for Foreign Trade (VUCE).

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

According to Colombian law, the branches of foreign companies that perform activities of exploration and exploitation of petroleum, natural gas, coal, ferronickel or uranium, or services related to the hydrocarbon sector, are subject to the foreign exchange special regime.

Under this regime, these branches shall channel through the exchange market, and register the initial capital investment (assigned capital) and the supplementary investment by filing forms with the Colombian Central Bank within six months of closing of annual activities of the branch.

It is important to take into account that the branch is not obliged to reimburse the amounts related to export operations or any other type of operation to the Colombian exchange market.

On the other hand, subsidiaries of foreign companies that perform activities of exploration and exploitation of petroleum, natural gas, coal, ferronickel or uranium, or services related to the hydrocarbon sector, are subject to the foreign exchange general regime.

Under this regime, the subsidiaries must also register their investments with the Colombian Central Bank, as for foreign branches, but must reimburse the amounts related to export operations or any other type of operations to the Colombian exchange market.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Colombia has the Natural Resources and Environment Code issued on 1974 (Decree 2811 of 1974) along with an Environmental Law System, which includes laws, decrees and resolutions issued by the environmental authorities, such as the Environment Ministry and the regional environmental authorities.

The most important rules governing environmental issues in the mining industry are as follows:

- Law No. 99 of 1993, by means of which the Ministry of Environment was created, the public sector responsible for the management and conservation of the environment and renewable natural resources was rearranged, the National Environmental System, was organised and other provisions affecting mining activities were arranged;
- Law No. 1,753 of 2015, by which prohibition of mining on moorland and wetlands was established; and
- Law No. 1,333 of 2009, through which the environmental penalty procedure was established and other provisions were issued.

The environmental law has evolved since the promulgation of the Code of Natural Resources issued in 1974, and all regulations that arose from said regulation have had a significant effect on mining activities.

We highlight the following on environmental licensing, which, among many regulations, may govern some mining activities depending on their particular situation:

- Decree No. 2,811 of 1974, by which the National Code of Renewable Natural Resources and Environmental Protection was issued; and
- Decree No. 1,076 of 2015, by which the Unique Regulatory Decree for the Environment and Sustainable Development Sector was issued, effective as of 27 May 2015.

There are regional and local rules governing the protection of natural resources, which are in line with national standards.

The principal authorities that manage natural resources in environmental matters are the following.

The Ministry of Environment and Sustainable Development

The Ministry of Environment and Sustainable Development is responsible for the plan of the environmental policy of the country. This entity was created by Law No. 99 of 1993 and serves as the highest environmental authority.

The National Authority for Environmental Licences (ANLA)

The ANLA, established by Decree No. 3,573 of 2011, is in charge of monitoring and controlling projects, works or activities subject to licensing, permits or environmental procedures at the national level. The environmental procedure required in order to obtain an environmental permit for mining projects, whenever they are governed by a national order, must be submitted to this entity.

Regional autonomous corporations

These are state entities that manage environmental resources in regional order. As the name suggests, they are autonomous and, to that extent, they may issue regional regulations in order to ensure a healthy environment in the regions. One of their responsibilities is to be the authority of regional order to meet and deal with environmental licences for mining projects that are located in areas of influence.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Environmental permits depend on the stage of the mining project.

During the exploration phase, only specific permits for the use of renewable resources are required (eg, wastewater discharge permit, water concessions and forest harvesting permit).

To start the construction and assembly phase and to undertake exploitation activities, it is necessary to previously obtain an environmental licence, which will be valid for the duration of the mining project. According to Decree No. 1076 of 2015, the process of obtaining an environmental licence could take approximately seven months. Notwithstanding the above, in practice, it could take longer.

The procedure for obtaining an environmental licence must be followed stringently.

The applicant must submit a petition to the competent environmental authority in order for it to indicate whether the project should have an 'environmental diagnosis of alternatives', which, usually, is not required for mining projects. This document must contain a description of the project, its scope and the location of the site.

Once exploration of the mining area has been carried out, the interested party shall submit to the competent environmental authority the environmental impact study, among others, with which the area to be intervened is determined, as well as the management to be given to the natural resources. With this study, the environmental authority shall issue an environmental licensing process start-up administrative certificate.

With the evaluation of the environmental impact study, the authority shall visit the mining project in order to verify that everything presented by the interested party in the document is genuine and meets the legal requirements. In the event additional information is required, the authority shall request this information only once, under the penalty to understand this procedure is withdrawn, with the aim of streamlining environmental processes.

Once the documentation has been evaluated and the visit conducted, the environmental authority shall decide on the request, granting the environmental licence when it has fulfilled all the requirements that have been established by law.

The documents that must accompany the environmental impact study are the following:

- a project location plan based upon Colombian cartography;
- the estimated investment and operation cost of the project;
- power duly granted when the procedure is performed through a lawyer;
- payment evidence for the environmental licence services assessment, which can be liquidated previously by the authority, if the applicant so desires;
- an identification document or certificate of existence and legal representation in the case of legal persons;
- a certificate issued by the Ministry of the Interior regarding the presence or absence of ethnic communities in the project area;
- evidence of filing the preventive archaeology programme with the Colombian Institute of Archaeology;
- a certificate from the Land Management Special Administrative Unit, describing denuded areas where overlapping of macro and micro areas are located by said unit;
- the format approved by the environmental authority for preliminary verification of the documentation; and
- a copy of the mining title (concession agreement) duly executed and registered before the National Mining Register.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

During the closure and remediation process, the concessionaire is obliged to carry out the following:

- to undertake the necessary works as well as the environmental measures for the mine closure;
- to obtain and maintain an insurance policy during the three years following the termination of the concession contract; and
- to pay all labour obligations arising from the operation of the mine.

38 What are the restrictions for building tailings or waste dams?

The construction and operation of tailings or waste dams shall be previously authorised by the environmental authority. In the case of mining industry, the construction and operation of the dams required for the project is usually included in the respective environmental licence. Such facilities are subject to regular inspections by the environmental authority (usually once a year, although the frequency may vary depending on the project and the respective environmental authority). It must be taken into account that every employer must have a written Health and Security Policy, which must be implemented in all of the employer's places of work and with respect to all employees and contractors, as well as an Internal Industrial Health and Safety Regulation. The mentioned Policy and Regulation must be informed to the Occupational Health and Safety Committee (COPASST), which is the committee in charge of promoting the occupational health programme and the responsible body to implement the Occupational Health and Safety Management System (SG-SST), in accordance with the purposes specified in the applicable programme. In this respect, every employer that has more than 10 employees must establish a COPASST for a term of two years. However, employers with fewer than 10 employees must appoint a security and health watchman, who will carry out the evaluation of health and security matters. The health and security watchman can be an employee.

Update and trends

In 2016, the Constitutional Court issued Judgments C- 273 and T-445 by means of which article 37 of the Mining Code (Law 685 of 2001) was declared unenforceable, granting to the regional authorities (municipalities) the power to determine whether or not mining activities are allowed in their territory. In view of this, municipalities must be consulted whenever a new concession contract is to be awarded.

In addition to the above-mentioned, through a popular consultation, the municipality of Cajamarca banned mining activities within its territory.

The first gold mine in Colombia began production in 2017, and another two gold mines will begin construction at the end of 2017.

Furthermore, regarding underground works, the employer in title of a mining right, must hire a technician, professional or specialist in health and safety matters in the place of work. Employees who carry out mining underground works must be trained by the respective authorities, in order to carry out their work in a safe manner. However, it is also the employer's responsibility to train its employees regarding health and security matters and to incorporate a Medicine, Hygiene and Industrial Security Committee, when its principal activity is mining.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The legal framework governing health and safety and labour in the mining industry is defined in the Mining Code, Decree No. 1885/2005, which replaced the Decree No. 1335/1987, that provides the safety regulations for underground works, Decree No. 222/1993, which corresponds to the hygiene and safety regulations for open-cast mining and Decree No. 035/1994, which includes various dispositions regarding mining safety, Decree 1443 de 2014 and Decree 1072 of 2015, regarding the Occupational Health and Safety Management System SG-SST, Decree 1295 of 1994 and Law 1562 de 2012, related to labour risks and Law 100 of 1993 regarding the Social Security System .

The principal regulatory bodies that administer the aforementioned laws are the Ministry of Mines and Energy, the Ministry of Labour and the Ministry of Health and Social Protection.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Waste products are classified in regular waste, hazardous waste and radioactive waste, under Colombian Law. As a general rule, in order to make the final disposal of regular or hazardous waste it is necessary to hold an environmental licence that is granted by the regional autonomous corporations or the National Authority for Environmental Licences. In addition, there are several requirements to be met regarding the generation, transportation, storage, reuse and final disposal of hazardous waste. In practice, it is common for mining companies to hire third parties duly authorised by an environmental licence in order to manage their waste.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Mining Code provides that the title holders must prefer employing Colombian citizens over foreign nationals for the execution of studies, projects, mining and environmental activities, as long as the Colombian citizens have the required skills and qualifications. Such provision is also applicable to independent contractors.

Further, the aforementioned Code also provides that the concessionaire's payroll shall maintain the following proportions:

- 70 per cent of the total amount of pay to qualified, specialised and trust and management employees must be intended for pay to all such Colombian employees; and
- 80 per cent of the total gross amount of the payroll must be allowed to pay ordinary Colombian employees.

Nevertheless, upon request of the title holder, the Ministry of Labour may authorise a temporary decrease on the above-mentioned limits when there is a demonstrated need to have Colombian staff trained by foreign nationals.

Any foreigner that will enter into a labour or a services agreement with a company domiciled in Colombia, must obtain the respective visa before the Ministry of Foreign Affairs or before any Colombian consulate abroad, which will allow the foreigner to carry out the respective activities in this country. The respective type of visa for the foreigner will depend on his or her nationality and the specific activities that will be carried out in Colombia. Once the visa is granted to the foreigner, he or she will be able to work in this country; however, he or she will have to comply with labour regulations as the rest of Colombian citizens.

Furthermore, the employer that hires foreigners must register them before Migracion Colombia's Report System (SIRE), at the moment of hiring them and at the moment in which their labour or commercial relationship has terminated.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Colombia does not have community engagement or CSR laws applicable to the mining industry. In consequence, there are no regulatory bodies to administer those laws.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The indigenous communities and the Afro-Colombian communities have a preferential right to be granted a mining concession contract in the areas declared as Indigenous or Afro-Colombian mining zones, respectively.

The indigenous communities and the Afro-Colombian communities also have the right to be consulted about mining projects to be undertaken within their territories or that could somehow affect them.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Colombia has not adhered to any international treaty, convention or protocols relating to CSR issues.

Notwithstanding the above, mining companies in Colombia usually comply with international CSR standards.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

As a commitment to be part of the OECD, the president of Colombia sanctioned Law No. 1,778 on 2 February 2016, by means of which it is ruled that the responsibility for bribery and transnational corrupt practices lies with companies. The competence to investigate and penalise these kinds of conduct was granted to the Superintendency of Corporations.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

As Law No. 1,778 was recently sanctioned, Colombian companies are beginning to implement the proper mechanisms to avoid bribery and transnational corrupt practices.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Colombia was accepted as an EITI candidate at an International EITI board meeting on 15 October 2014. To our knowledge no specific legislation regarding disclosure of payments by resource companies to government entities in accordance with the EITI Standard have been issued.

The EITI Report that covers Colombia's extractive sector for 2014–2015 was published in January 2017.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign ownership restrictions in Colombia relevant to the mining industry. Foreign mining concessionaires receive the same treatment as Colombian citizens and entities.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

The international treaties subscribed by Colombia that are relevant to the mining industry are as follows:

- the Amazon Cooperation Treaty (3 July 1978);
- Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries;
- the Rio Declaration on Environment and Development (June 1992); and
- the Minamata Convention on Mercury (October 2013).

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Dominican Republic

Nathalie Santos and Brooke Macdonald

Distinctive Law

Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining has been a significant part of the Dominican economy since before the Republic was founded. What is currently the largest known gold deposit in Latin America, Pueblo Viejo, began producing in 1505 during the Spanish colonial period, although commercial production began in 1969. Pueblo Viejo was operated by a state-owned corporation from 1975 to 1999 when the oxide resource was depleted. At present, the project is currently a joint venture between two large international gold companies, and produces over 1 million ounces annually.

Concerning production of other metals, bauxite has been mined since the 1950s, as well as non-metallic minerals such as salt, gypsum and cement. Production of ferronickel began in 1972 at the Falcondo mine near Bonao, which is currently in operation after a long time on care and maintenance owing to low nickel prices and low nickel grades. It was sold in 2015 to a specialist mining holding company, which recently obtained approval to operate by the transfer of mining rights (exploitation concession).

In recent years, mining has proven to be the fastest growing sector of the Dominican economy. In 2016, GDP growth of 7.4 per cent made the Dominican Republic the fastest growing economy in the region, and mining has been the greatest contributor to this growth. In 2016, the mining sector represented 26 per cent of GDP growth. According to an economic study by the Ministry of Energy and Mines, the mining sector in the period 2010 to 2016 exported minerals valued at over US$6 billion (74.42 per cent gold, ferronickel 11.32, copper 7.54, silver 4.23, and bauxite 1.26).

2 What are the target minerals?

The target minerals are gold, silver, copper, bauxite and nickel, as well as non-metallic industrial minerals such as gypsum, limestone, marble and other stone and sand. Some zinc is produced at the Pueblo Viejo and Cerro de Maimon projects.

3 Which regions are most active?

For metallic minerals, the most active area currently is the Tireo formation in the west, which hosts the Romero low-sulphidation gold and copper deposit, with the Ginger Ridge gold discovery and the Candelones gold deposit in the north-west of the country also ranking highly. Other prospective areas include the Los Ranchos formation, which hosts the Pueblo Viejo mine and the Maimon formation, which hosts the Cerro Maimon mine. Los Ranchos is a mostly high-sulphidation epithermal gold and silver system and Maimon is a volcanogenic massive sulphide copper, gold and silver system. More information can be found at the official website of the National Geological Service (SGN) (see question 9).

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system is civil-law based.

5 How is the mining industry regulated?

The Dominican Republic is a unitary state. Jurisdiction over mines and minerals is vested in the central government, pursuant to the Constitution and as established in special laws. The Constitution states that minerals are owned by the state, which has the power (exercised through the Mining Law and Regulations) to regulate their exploration and exploitation through concessions, agreements, licences and permits. Municipalities and their boroughs have some degree of autonomy from the central government in matters of regulatory, budgeting and administrative faculties, but their powers only affect the operation of the mining project rather than the granting of rights.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal laws are the following:

- the 2010 Constitution;
- the 2012 Organic Law governing the National Development Strategy, Dominican Republic 2030 (Law No. 1-12), being the state's policy to develop the mining industry until the year 2030;
- the 1971 Mining Law (the Mining Law);
- the 1998 general regulations to the Mining Law (Decree No. 207-98) (Mining Regulations);
- the 2000 Environmental Law (Law No. 64-00) (the Environmental Law), since every mining project is subject to an Environmental Evaluation Process (EEP);
- the 2014 Environmental Regulations (Environmental Regulations), which regulates the EEP;
- the 2004 Protected Areas Law (Law Sectorial No. 202-04), which sets forth the protected areas of the Dominican Republic and the kinds of activities authorised within those areas;
- the 2009 Decree establishing New Protected Areas (Decree No. 571-09), which regulates the buffer zone of the protected areas and the activities authorised within the buffer zone;
- the 2007 Law of the National District and Municipalities (Law No. 176-07), which fixes the territorial divisions of the Dominican Republic and authorises the activities (land uses) to be developed within their jurisdiction;
- the 2013 law creating the Ministry of Energy and Mines (MEM) (Law No. 100-13);
- the 2015 Resolution approving a technical protocol for auditing visits to monitor and control the activities at exploitation and exploration concessions and processing plants;
- the 2016 regulation (No. R-MEM-REG-047-2016) governing the exportation of amber and larimar;
- the 2016 regulation (No. R-MEM-REG-002-2016) governing the quantities, form and weight of samples for analysis and study during the exploration phase; and
- the 2016 regulation (No. R-MEM-REG-035-2016) streamlining the mineral concession application process.

The principal regulatory bodies are the following:

- the MEM, which grants exploration, exploitation and processing (beneficiation) concessions on the advice of the Mining Department (DGM) (prior to 2013 final approval of concessions

was vested in the Secretariat (now Ministry) of Industry and Commerce. Approval by the DGM and MEM can be a lengthy process);
- the DGM, which evaluates concession applications for approval or rejection by the MEM;
- the Ministry of Environment, which grants environmental authorisations (see also question 10); and
- municipalities through their city councils (authorisations to operate projects within municipal jurisdictions).

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Dominican Republic has not adopted any formal classification system for reporting mineral resources and mineral reserves. Companies operating there typically report their resources and reserves using the classification system required by the country where their publicly traded parent company is listed, for example, National Instrument 43-101 (Council standards) in the case of Canadian listed companies, the Joint Ore Reserves Committee in the case of Australian listed companies or the South African Code for the Reporting of Mineral Resources and Mineral Reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

In the Dominican Republic, mineral rights are distinct and severed from the surface estate. While surface rights correspond to the legitimate owner (title holder) of the real property, the minerals in the subsoil belong to the state, but concessions may be granted to any interested party that complies with the requirements of the Mining Law. All individuals and legal entities, whether Dominican or foreign (except foreign governments unless approved by the executive branch, members of the Dominican government, elected officials and their relatives, among others), may be holders of mineral rights. The Mining Law covers the prospecting, exploration, exploitation and processing of all minerals.

All areas of the country are open to mining concessions apart from declared 'fiscal reserves' (except by special agreement with the executive branch), protected areas, existing exploration and exploitation concessions and areas subject to pending applications for concessions that are vested with a priority right. The acquisition of mineral rights is subject to an administrative procedure, in which the DGM and MEM evaluate the eligibility of the applicant under criteria of economic solvency, experience with mineral exploration and mine development, among others. Applications for concessions are granted on a first come, first served basis with prospectors given priority to apply for an exploration concession over areas that were the subject of surface reconnaissance, and holders of exploration concessions given a priority to apply for an exploitation concession over areas covered by the exploration concession, provided the applications are made prior to the expiry of the existing concession and all other requirements are complied with.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The SGN within the MEM maintains a basic geological database that can be accessed by the public online at their website (www.sgn.gob.do). More detailed geological reports (which may include geophysics, geochemistry, and hydrogeology) can be purchased from SGN. The reports are sorted by the topographic quadrangles to which they relate.

The status of issued and pending concession applications can be found at the DGM's website (www.dgm.gob.do). However, the official legal status of mineral rights should be verified through certifications issued by the DGM at the request of an interested party and confirmation at the Mining Public Registry. Every 30 days the DGM releases a map on its website showing land areas available for application. Such areas can also be confirmed in the Land Title Office of the DGM.

Concessionaires are required by the Mining Law to file a biannual progress report and an annual operational report with the DGM. These reports are considered confidential while the mineral concessions are in force. Nonetheless, concessionaires are requested to indicate which portions of the information can be shared for scientific and cultural purposes, and the separation of such non-confidential information is handled by the sub-department of mines of the DGM.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Concessions for exploration (up to a maximum of 30,000 hectares per concession either in total or separate concessions, held by the same individual or entity or group of entities under common control) confer on the holder the exclusive right to locate and evaluate minerals within the concession (including the right to carry out geophysical and geochemical studies, drilling and complementary activities). The holders of exploration concessions are given a priority to apply for an exploitation concession over the exploration concession area at any time. The applications are made prior to expiry of the existing concession and when all other requirements are complied with.

Concessions for exploitation (mine development licence) (up to a maximum of 20,000 hectares per concession or in total if separate concessions are held by the same individual or entity or group of entities under common control) are granted for up to 75 years and confer on the holder the exclusive right to exploit minerals (including operating a processing plant) for which the concession has been granted. Operating a minerals processing plant without being the holder of an exploitation concession requires a separate authorisation from the MEM.

Exploitation concessions grant the right to exploit, beneficiate and sell the minerals and concentrates extracted from the area of the concession, subject to obtaining the required environmental authorisations.

Obligations are:
- payment of yearly concession fees;
- filing of biannual progress and annual operational reports, and, for processing plants, an annual production report;
- initiating activities not later than six months after the granting of an exploration concession and one year in the case of exploitation and processing plant concessions (these periods can be extended on prior notification to the DGM for duly proven reasons including force majeure or economic hardship (eg, adverse market conditions created by an unforeseen drop in the price of a commodity));
- not suspending exploration activities for more than six consecutive months or two years in the case of exploitation and processing plants authorisations;
- notifying the DGM of the concessionaire's legal domicile, legal representative and administrator;
- compliance with environmental regulations, among others; and
- carrying out exploration and mining activities with the least damaging method and technology to avoid unnecessary environmental disturbance to the surface land owner, and remedying any resulting disturbance or damage.

Concessions (including fixtures such as processing plant and accessions such as machinery) are considered property rights of limited duration, not susceptible to partition, and may be encumbered to secure financing. Mineral rights may be transferred in the same way as other property rights (but see question 11, regarding the MEM approval of transfers of exploitation concessions).

Mineral rights including encumbrances should be recorded in the Public Mining Registry to give constructive notice to third parties.

The requirements for applying for exploration and exploitation concessions, including required supporting documentation, can be found at the DGM's website. Any gaps in the procedures set forth in

the mining and environmental laws and regulations will be governed by the 2013 Administrative Procedures Law No. 107-13.

11 What is the regime for the renewal and transfer of mineral licences?

Exploration concessions are granted for a period of up to three years and can be extended on an application made within six months of their expiry. This extension can be up to two additional periods of one year each for a total of five years. The granting of renewals is dependent on payment of annual concession fees and timely filing with the DGM of biannual and annual activities reports. After the five-year period, the procedure to renew is contained in the Mining Regulation, and is similar to that for a new concession.

Concessions are transferable, but in the case of an exploitation concession any proposed transferee should be pre-cleared with the MEM. This involves registration of the transaction at the Public Mining Registry, after the MEM determines if the new holder complies with the criteria to acquire mining concessions, including economic solvency, technical expertise and recognised mining background. There is no legal obligation to report a change of control of the concessionaire or its foreign parent company (eg, on a takeover).

12 What is the typical duration of mining rights?

See questions 11 and 17.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The Dominican Republic is a member of the World Trade Organisation, and, as a result, domestic legislation aims for national treatment. Specifically, Foreign Investment Law No. 16-95 guarantees foreign investors equal treatment in the ownership of property, except with respect to foreign governments (foreign governments cannot be granted mineral rights unless previously approved by the executive branch).

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Concessions are considered contracts of adhesion with the state, governed exclusively by Dominican law, the lex situs, and are subject to the exclusive jurisdiction of Dominican courts. If, however, the dispute concerns a contractual matter, for example, interpretation of an option or joint venture agreement, or a special lease of mining exploitation rights agreement with third parties or the government, that does not affect title to, or transfer or encumbrance of the mineral rights, then a foreign arbitral award should be enforceable under the terms of Law No. 489-08, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Inter-American Convention on Commercial Arbitration (Panama Convention), provided it is not unenforceable by reason of any of the items listed in article 45(a)–(g) of Law No. 489-08. To enforce an international arbitration decision, a request must be presented before the district court.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mineral rights are considered a public utility and, in principle, enjoy a preference over any other use of the land, with some restrictions, as when located in highly populated areas, cemeteries, public parks, among others, as well as the obvious exceptions such as fiscal reserves and protected areas.

In the case of exploration, ownership of surface rights by the concessionaire is not required. The only requirement applicable is to obtain the consent of the landowner to carry on exploration activities. In the event temporary occupation cannot be negotiated, the DGM can authorise the activities after consulting with the landowner and confirming his or her reasons for refusal are unjustified.

In the case of mine development and construction of processing plants, a legally enforceable temporary occupation or permanent ownership of the surface land is required (eg, lease, usufruct, option or purchase agreement). If acquisition of surface land title is desired and cannot be negotiated, an expropriation procedure exists in the Mining Law, but it is seldom used.

Surface prospecting does not require a concession, only the permission of the surface landowner, but aerial reconnaissance must be authorised by special permit. Manual alluvial gold mining operations (ie, panning) do not require a concession, but must not interfere with the activities of concession holders. Concession holders enjoy legal servitudes, including rights of access and temporary occupation, water use and rights of way.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

There is no right of governments to participate in exploration or mining projects per se, unless it is otherwise agreed among the parties involved. In exceptional cases duly justified and with prior approval of Congress, the executive branch may enter into special contracts with foreign mining companies that are wholly or partly owned by foreign governments.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Dominican Constitution protects the right to property; therefore, no person may be deprived of this right unless justified by reasons of public utility and following due process that includes compensation paid to the owner. Additionally, the Dominican Republic is party to international agreements that protect foreign investment and prevents the Dominican government from engaging in expropriation, nationalisation or any other measure of a similar nature affecting foreign investment except in the case of a public utility and under the condition of non-discriminatory treatment and in accordance with the legal provisions that guarantee fair and effective compensation.

In terms of compensation, there is no specific law for its determination. However, there are some standards established by law and international treaties on how the payment must be calculated, for example, market value and, payment must be made in freely convertible currency, with no delays, no matter the national origin of the beneficiary.

The DGM has the power to cancel or nullify a concession, under the terms established in the Mining Law. Nullity can be declared if the concession was granted to unqualified persons or foreign governments on areas of a previously declared fiscal reserve or on previously granted concession areas or where a prior application is pending, or when exceeding the maximum limits of exploration or exploitation hectares.

The DGM also has the power to declare that the concession has been forfeited or lapsed when the applicant has failed to comply with the obligations imposed under the Mining Law, including the following:

- not beginning exploration activities within six months;
- not beginning mine development (exploitation) activities or processing plant projects within a year;
- ceasing operation for more than two consecutive years for exploitation and for processing plants, and six months for exploration projects;
- lack of payment of mining concession fees, royalty or income tax; or
- failure to timeously file the biannual progress report and annual operational reports (see the complete list of such obligations in question 10).

These terms can be extended at the prior request of the interested party under justified reasons such as force majeure, among others.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Articles 17 to 20 of the Mining Law allow the government to set aside 'fiscal reserves' within mining areas, where it may let out 'special contracts' outside the concession regime, provided it respects the vested interests of existing concessionaires.

The Environmental Law determines the National System of Protected Areas that includes all the declared protected areas of the country. The protected areas are declared in Sectorial Protected Area Law No. 202-04 establishing the permitted activities within each

category of protected area, and in Decree No. 571-09 that creates new protected areas and their buffer zones.

In general, no mining activities are allowed within the boundaries of protected areas or buffer zones. The buffer zone is an area of 300 metres around the outer limits of the protected areas, where less restrictive activities are permitted.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Duties

Annual concession fees on exploration and exploitation concessions are set forth in the Mining Law and are minimal. For example, for exploration concessions under 5,000 hectares the fee is 20 Dominican cents per hectare, given that it has not been updated since 1971. Customs duties may apply on some imported equipment and machinery.

Royalties

Production royalties in the case of exploitation concessions are 5 per cent of the gross sales price and are creditable against income tax payable in respect of the same fiscal year. Actual royalties payable, along with any tax incentives, will be included in the special mine development agreement negotiated with the government.

Taxes

While a detailed discussion of corporate taxation in the Dominican Republic is outside the scope of this chapter, in general, mining companies pay income tax at the rate of 27 per cent on their net taxable income, an 18 per cent value added tax, a 10 per cent dividend withholding tax and a 5 per cent contribution of net profits to the municipality or municipalities where the mining operation is located.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

There are no tax incentives specifically directed at mining activities. However, some tax incentives may be negotiated by special mining agreements if authorised by the legislative and executive branch.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There are no provisions preventing new taxes or an increase of already established ones.

The Foreign Investment Law guarantees the ability to remit profits and repatriate capital without any prior authorisation or registration. Investments should be registered where it is necessary to prove the foreign direct investment amount in the event of future exchange controls.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

There is no legal provision mandating a carried interest.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The capital gain on the sale of a concession is taxed as ordinary income at the rate of 27 per cent. The cost basis of the asset may be adjusted for inflation before calculating the tax in Dominican Republic pesos.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No. The Investment Law No. 16-95 guarantees equal treatment to national and foreign investors.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Business organisations are governed generally by the Business Associations Law No. 479-08. While it is possible to operate through a domiciled branch of a foreign entity, this is not recommended as it can expose the foreign parent to liability. Probably the most common form of business organisation for a large mining venture in the Dominican Republic is still a corporation (SA). A Dominican SA must have at least two shareholders and a minimum authorised capital of 30 million Dominican pesos.

More common for junior exploration companies, mainly because of lower payment in capital requirements, is the limited liability company (SRL). A Dominican SRL must have at between two and 50 members (or shareholders) and a minimum authorised capital of 100,000 Dominican pesos. Like an SA, the members (or shareholders) of the SRL enjoy limited liability, and unlike an SA, a board of directors is not mandatory (only a general manager is required). Default rules in the company law govern in the absence of detailed by-laws governing, for example, rights of first refusal on capital increase or transfer of an interest. A Dominican SRL is a taxable entity and is not the equivalent of a United States LLC with pass-through tax treatment to the shareholders. It is possible to convert an SRL into an SA should the company enter into development and be able to meet the more stringent capital requirements. There are other commercial and civil entities, but they are not commonly used in the Dominican mining industry.

Contractual joint ventures and trusts exist under local law. Contractual arrangements are more commonly used during the exploration phase of a project. Once a production decision has been made, equity joint ventures can be used to limit liability because the Mining Law does not recognise more than one registered concession holder.

26 Is there a requirement that a local entity be a party to the transaction?

No.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

In 1976, the Dominican Republic entered into an international agreement with Canada to avoid double taxation, and entered into a similar agreement with Spain in 2011. There has been a treaty since 1989 with the United States for the sharing of tax information and there are numerous signed treaties covering protection and promotion of investments, namely with Argentina, the Caribbean Community, Central America, Chile, Cuba, Ecuador, Finland, France, Morocco, Spain, Switzerland, Taiwan and the United Kingdom.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Most exploration and mining projects are financed with foreign direct investment, equity financing in the case of publicly traded exploration companies and traditional bank project financing in the case of the larger mine development projects. There is a small domestic stock exchange in the Dominican Republic, which has been growing since 2005 (mainly as a source of capital for local enterprises), but to date it has not been used to raise equity for mineral exploration or mine development projects.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No, but the government has taken an important legal initiative with the implementation of Law No. 189-11, concerning Mortgage Market Development and Trusts in the Dominican Republic. This law introduces the figure of the trust creating a tool that might be used in the financing of projects in different industries including mining. This scenario has encouraged financial institutions to seek opportunities to offer financing for mining projects using this legal figure.

30 Please describe the regime for taking security over mining interests.

Most of the traditional security interests available in other Latin American civil law systems exist in the Dominican Republic, such

as a pledge of the shares of the local company that holds the mineral and surface rights, a mortgage of the mining concession itself, chattel mortgages over personal property such as plant and equipment, conditional assignment in the event of default of the borrower's contracts with suppliers and off-take smelters and a pledge of the bank account of the borrower, among others, containing the sales proceeds. There is no equivalent of the common law floating charge.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no restrictions.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no standards for equipment and supplies. The equipment and supplies market is regulated by the provisions of the civil code and general contract law.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no restrictions.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Environmental Law governs economic activities, projects or developments (including mining projects, prospecting, exploration, exploitation, processing plants, refineries) that may impact the environment. This law establishes the EEP obligation, along with the main classification of project according to the magnitude of their impact. First, the law only indicates licences and permits, which require submission of an Environmental Impact Study and Environmental Impact Declaration respectively. Later, the implementation of the regulation that rules the system of environmental authorisations, creates four different categories of licence:

- category A for activities with a high environmental impact (environmental permit);
- category B for activities with a medium to high recognised impact (environmental record);
- category C for low impact activities (environmental Certificate of Minimum Impact); and
- category D for minimum impact activity.

The type of mining activity determines the classification or category of environmental authorisation that must be requested, its procedure, the correspondence committee for approval, and the obligations and responsibility of the holder torts the environmental authorisation and regulation.

The EEP is handled by the Vice Ministry of Environmental Management. Mining projects are also required to submit to a review by the Vice-Ministry of Soil and Water, the Environmental Evaluation Department and the Environmental Quality Department.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The Environmental Regulations classify projects into category A projects that can have the most adverse environmental impact (the Ministry of Environment has 190 days to approve or reject once all required documents are submitted), category B projects that result in moderate disturbance to the environment (125-day approval period) or category C projects that result in only minimal environmental disturbance (60-day approval period).

Mine development and operations are considered category A activities requiring the approval of an environmental impact study (EIA). The procedure is as follows:

- prior analysis: an application is made to the Department of Environmental Services and Authorisations and a prior review is undertaken;
- review and evaluation of the EIA: following a technical review, a recommendation is made to the Environmental Validation Committee (CVA) to request additional information or reject or approve the EIA; and
- the decision by the Validation Committee (highest committee of all, presided by the Minister of Environment): after review, the CVA may either request additional information, reject the EIA, or approve the EIA and issue the corresponding permit.

In the case of exploration projects, for activities like drilling and trenching, for both metallic and non-metallic minerals, an environmental permit is required. The Ministry of Environment has 125 days to approve or reject an application, once all required documents are submitted. The environmental permit is subject to the presentation of an environmental impact declaration, which is less detailed than an EIA, and the decision of the Technical Committee of Evaluation. The procedure for the evaluation is the same as for the environmental licence.

Finally, for early stage exploration activities, such as stream sediment sampling, rock chip sampling, mapping and geophysical studies, a company can request a review under category C, if the work programme does not include trenching, opening of access roads, or other activities that can cause environmental disturbance. Category C requires only a mitigation study and the issuance of an environmental 'certificate'.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The holder of an environmental authorisation can incur administrative, civil and criminal liability. The obligation to remediate the environment may be a consequence of some non-observance of the environmental authorisation or non-compliance with the law. There can also be liability to third parties.

In terms of the closure and remediation process for a mining project, there is no specific regulation or procedure or actions to be taken at this stage. However, certain obligations may be established within the mining concession document itself, or through a special agreement with the government, as well as in the environmental authorisation, where detailed actions may be required to mitigate the impact on the construction, operation, closure and remediation phases. An important example of a special agreement is the one made by the government for the Monte Negro Fiscal Reserve (Pueblo Viejo mine), in which a large part of the negotiation concerning the mine was to establish an obligation of the company to help remediate past and existing environmental damage.

A complete list of environmental obligations would be contained in the concessions title, environmental authorisation and special agreements with the government. However, the environmental regulation establishes the obligation of executing the Environmental Management and Suitability Plan, applicable to all companies regardless of whether there is a special agreement or not, which covers all the actions and measures to be taken at all stages of the project (construction, operation, closure and remediation), and which is first approved by the Ministry of Environment in the course of the EEP. The environmental legislation also mandates the posting of an environmental bond equal to 10 per cent of the planned investment for the execution of the aforementioned plan (Environmental Management and Suitability Plan). This bond is a condition to the validity of the authorisation, as well as its subsequent renewal or modification.

38 What are the restrictions for building tailings or waste dams?

Tailing ponds or waste dams have the same restrictions as any other activity that may cause damage to the environment, and are regulated by the Environmental Law and related regulations. If the tailing pond or waste dams are to be managed by a third party, this requires an

Update and trends

In 2016, the Ministry of Energy and Mines granted 44 metallic and non-metallic concessions for exploration and exploitation, and created seven regulatory protocols to improve transparency in the sector.

On 18 April 2016, the Ministry of Energy and Mines issued an objection to Falcondo for exporting minerals because the transfer of the company that acquired the project in 2015 was not yet approved by the government, allegedly as a consequence of pending documentation not delivered in a timely fashion by the company. However, in the following days this objection was properly addressed by the company and the government, and on 25 April 2016, the Ministry of Energy and Mines granted the authorisation to Falcondo to operate the mine and the objection was withdrawn.

Falcondo immediately restarted operations and increased its production in a Mining Plan contemplated for the years 2016–2020, excluding the controversial area of Loma Miranda that a year before didn't obtain the required social licence and therefore the Ministry of Environment did not grant the environmental permit to exploit that area. This is still a sensitive subject, but the government is open to approve the activity on the area when a company obtains its social licence. The operation of Falcondo has created more than 1,000 jobs, has exported more than 9,761 metric tonnes of ferronickel, and has paid the Dominican government US$2.4 million in taxes.

Another important project developed by CORMIDOM discovered a deposit of copper, gold, silver and zinc of 8.4 million tonnes in the following proportion: 209,760-copper, gold 405,000 oz, silver 14,087 million oz, zinc 275,150 tonnes.

Currently, the Dominican Republic has mining or mineral exploration operations in 24 provinces, and 2016 has been very active assisting all the fledgling mining companies developing exploration projects in the country.

According to a study prepared by the Ministry of Energy and Mines, during the period of 2010 to 2016 the mining sector exported minerals valued at over US$6 billion.

Another important note on mining is the development of the ROMERO project, which consists of an underground mine for gold, silver and copper extraction in the town of San Juan de la Maguana. This deposit is estimated to contain 5 million oz of gold from which 3 million oz are set to be extracted in the first stage of the project. However, the permitting process is not yet concluded and the operator is still waiting for the granting of the exploitation concession by the Ministry of Energy and Mines.

The Dominican government has formed a commission to follow up the implementation of the Extractive Industries Transparency Initiative.

additional authorisation from the Ministry of Energy and Mines. The law identifies this activity as high impact and must be treated as such in the environmental impact study. Other applicable regulations related to water quality or hazardous waste may be applicable depending on the nature of the tailing or waste facility. In the case where the tailing facility is also a component of a main mining project and not an individual project operated by a third party, then it is covered by the environmental authorisation for the project in which provisions will indicate the obligations of the company or person in charge. Additionally, all projects of any kind require an Environmental Management and Suitability Plan to obtain an environmental authorisation to operate. This plan contemplates every stage of the project and involves all the mitigating activities to be executed by the project to prevent any potential environmental damage or risk.

There is no legal provision that expressly prescribes the qualifications of the person in charge of handling dam waste. This will normally be covered in the Environmental Management and Suitability Plan.

There is no legal provision establishing the frequency of periodic inspections; frequency is at the discretion of the environmental authority. However, the regulation indicates the power of the authority to implement an environmental audit and the obligation of the project to inform, document and allow the authority to freely circulate within the installations.

There is no legal provision requiring an alarm system. However, it could be required at the discretion of the Ministry of Environment and Natural Resources during the environmental evaluation process in the as part of the Contingency Plan of the Environmental Management and Suitability Plan or in the complementary provisions of the environmental authorisation.

There are no requirements for emergency drills with the local community.

Rescue of people in case of dam failure is a joint responsibility. The Environmental Law establishes that the consequences of environmental disasters caused by negligent behaviour are the exclusive responsibility of the person or entity that caused it. The responsible party must reclaim the area or resource destroyed if possible and is subject to civil and criminal liability for failure to do so adequately.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The national authority is the Ministry of Labour. The Labour Law is mainly regulated by Law No. 16-92 (Labour Code), Law No. 87-01, which created the Dominican Social Security System, Law No. 116-80, which created the National Institute of Technical and Vocational Training and the Rules of Implementation for the Labour Code Decree No. 56-10. The Dominican Republic is also a member of the International Labour Organisation.

This domestic legislation covers the individual employee in any private labour relationship. According to the Labour Code, any relationship in which a person provides a service under conditions of dependency, direct direction or delegated direction for remuneration is considered an employee, notwithstanding that the relationship has been documented as that of an independent contractor.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The is no special regulation that applies to management and recycling of mining waste products other than the ordinary regulation of waste that applies for any other development. The Dominican regulation for waste management is established in the General Environmental Law and provides the power of the Ministry of Environment and Natural Resources to incentivise clean technologies to avoid contamination and recycling of waste. The law also forbids the disposal of hazardous waste. Complementary to the General Law of Environmental and Natural Resources, special laws regulate different types of waste (eg, hazardous and solid waste, among others).

In terms of environmental regulation, the responsibility for the waste falls on the generator or operator unless this responsibility is transferred to a separate entity with the capability to handle such waste. In this case, the waste generator has the obligation to report all information related to the company handling the waste as well as making sure that the company hired for this activity is in good standing with the environmental authorisation for providing such services.

Holders of an exploitation concession have the right to handle waste products in tailing ponds and waste dumps without having to acquire an additional authorisation for a processing plant. Any third party that is not the concession holder but is engaged in handling waste (of any kind) or exploring for and exploiting mining waste in tailings ponds and waste dumps is required to obtain an environmental authorisation and the corresponding processing plant authorisation from the Ministry of Energy and Mines.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Labour Code mandates that at least 80 per cent of employees be Dominican, as well as 80 per cent of the payroll going to Dominican nationals. For technical or executive level employees, these conditions do not apply.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There is no specific regulation governing corporate social responsibility. Nonetheless, through compliance with environmental obligations, a project may benefit from positive relationships with its community. Likewise, there is an ongoing trend of self-development of social responsibility actions, with the purpose of obtaining a 'social licence' with the community. An example is the environmental permitting consultation process, where the company's relationship with the locals may determine the granting of the authorisation.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

As a result of events occurring during the Spanish colonial period, the Dominican Republic has no surviving natives, aboriginals or indigenous people.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The Dominican Republic is a party to some of the most important international treaties on fundamental rights, the environment and sustainability, including understanding CSR as the key that leads to sustainable development, the UN Global Compact, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises, the UN Principles for Responsible Investment, the ILO Tripartite Declaration, as well as other important documents such as the Declaration of Rio+20 (the Future We Want). However, as in many other jurisdictions, the rules governing CSR are part of international 'soft laws', as a result of which their implementation is mostly voluntary, since there is no domestic legislation.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Currently there are many legislative provisions concerning corruption, as well as many organisations in charge of their implementation. Most notably, Law No. 448-06 on Bribery in Trade and Investment was specially designed to penalise any civil servant that requests or accepts, directly or indirectly, any object of value for him or herself or any other person in exchange for doing or preventing a certain action affecting trade and national or international investments. The sanction for such actions is three to 10 years in prison, along with a fine of twice the amount or value of the bribe (the amount of which must always be greater than 50 minimum wages). As for the person providing or offering the bribe, the penalty is the same. Furthermore, if the briber is a company, the director or any other responsible person may be prevented from acting in that capacity for two to five years, while the company may be suspended from operating for five to 10 years and subject to a fine of quadruple the mentioned amount (from 100 minimum wages upwards), among other sanctions.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

The Dominican Republic is a member of the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption, which supports the States Parties without disregarding the principles of sovereignty, non-intervention and judicial equality. The States Parties are Antigua and Barbuda, Argentina, the Bahamas, Belize, Bolivia, Brazil, Canada, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

In February 2016, the Dominican Republic was admitted as the 50th country in the EITI. In the next 18 months, the Dominican Republic may be declared a 'compliant country'.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

No; see question 8.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

See question 27.

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Ecuador

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The quality and quantity of Ecuadorian mineral resources is very similar to that of its neighbours, such as Chile and Peru, who have managed to develop their mining potential. However, most of Ecuadorian territory is still unexplored. In fact, according to the *Financial Times*, Ecuador has some of the most attractive gold, silver and copper deposits in Latin America, nevertheless, production has been almost non-existent. There are many reasons for the delay in developing this industry, but if we have to choose the main reason, we would point to erred public policy regarding the mining industry and the absence of legal security, owing to legislation largely inspired by the oil industry. In terms of the mining industry's importance in Ecuador, considering the tendency for decreasing oil prices and given the fact that traditionally Ecuador is an oil dependent country, we do not see any industry other than mining capable of attracting investments to develop the country.

2 What are the target minerals?

The principal minerals targeted in Ecuador are gold, silver, copper, lithium, rare earth, potash, iron, uranium and coal. Ecuador has a much wider geological potential but, to an extent, the minerals targeted depend on global trends and the interest of individual companies.

3 Which regions are most active?

The most important gold and copper deposits discovered to date are located in the south-east of Ecuador, principally in Zamora Chinchipe, Morona Santiago, Azuay and El Oro provinces. However, it is also important to consider Imbabura province in the north of Ecuador since there is also considerable mining potential in this area. There are non-metallic mineral deposits in the south of the country and in particular in the province of Azuay.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Ecuadorian legal system is civil law-based.

5 How is the mining industry regulated?

According to the Constitution, the state owns all minerals and non-renewable natural resources within the national territory. These minerals and resources are considered as strategic sectors, which are managed, regulated, controlled and governed by the state. The state can, on an exceptional basis, delegate the development of extractive sectors to individuals or entities by granting mining concessions for a term of 25 years. Thus, the concessionaire will have the exclusive right to explore, exploit, process and sell any metallic minerals within the concession. When a project is considered in the range of large-scale mining, prior to the commencement of the exploitation phase, the concessionaire must first sign an exploitation contract with the Ecuadorian state. This contract is not needed when a project is in the range of artisanal, small or medium-scale mining.

The Mining Act defines artisanal mining as that which is carried out for the subsistence of family units through the use of manual equipment or portable devices.

The daily production ranges for artisanal mining are:

- for metallic minerals: up to 10 tonnes in underground mining and up to 120 cubic metres in alluvial mining;
- for non-metallic minerals: up to 50 tonnes; and
- for construction materials: up to 100 cubic metres in alluvial deposits and 50 tonnes for hard rock open-pit mining.

The daily production ranges for small-scale mining are:

- for metallic minerals: up to 300 tonnes in underground mining, up to 1,000 tonnes in open-pit mining and up to 1,500 cubic metres in alluvial mining;
- for non-metallic minerals: up to 1,000 tonnes; and
- for construction materials: up to 800 cubic metres for alluvial terrace mining and up to 500 tonnes for open-pit mining.

The daily production ranges for medium-scale mining are as follows:

- for metallic minerals: 301–1,000 tonnes in underground mining, 1,001–2,000 tonnes in open-pit mining and 1,501–3,000 cubic meters in alluvial mining;
- for non-metallic minerals: 1,001–3,000 tonnes; and
- for construction materials: 801–2,000 cubic metres for alluvial terrace mining and 501–1,000 tonnes for hard rock open-pit mining (quarries).

Any range that exceeds those established for medium-scale mining is considered as large-scale mining.

By way of amendments to the Mining Law introduced on 16 July 2013, the process for obtaining environmental permits to carry on mining activities was simplified (see question 35).

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Overall, there are several legal provisions regarding the mining industry within the Constitution. Added to that, there is the Mining Act that was enacted on 29 January 2009, further modified by the amendment passed on 16 July 2013 as well as the General Mining Regulations and the Small-Scale and Artisanal Mining Regulations that were promulgated on 4 November 2009. There is also the Mining Environmental Regulations for Mining Activities promulgated on 27 March 2014.

The principal regulatory body that regulates and controls the industry is the Mining Ministry, created in February 2015, which replaced the former Ministry of Non-Renewable Natural Resources (MNRNR). The other relevant bodies are the Ministry of the Environment, the Mining Regulation and Control Agency (ARCOM) and the National Geological Mining Investigation Institute (INIGEMM). In addition, with the Mining Act, the national mining company (ENAMI-EP) was created, which is responsible for developing state mining projects by itself or in association with private or public companies, or both.

On this regard, there is no doubt that the government of Ecuador has redoubled its efforts to recover lost time and draft a more appropriate legal framework in order to attract local and foreign investments in the mining sector. Undoubtedly, these changes were accelerated with the creation of the Mining Ministry in February 2015, which further indicates the importance this industry has for the government – the work done by the new Mining Ministry has certainly been significant and positive.

Regarding major amendments, during 2016, there were some really important legal adjustments for investors. In order of importance, in our opinion, they are as follows.

The official demise of the Mining Mandate on 6 April 2016

Through Ruling No.002-16-SAN-CC, the Constitutional Court handed down a sentence in two cases of non-compliance, which resolved that Constitutional Mandate No. 6 (otherwise known as the Mining Mandate), published in Official Gazette No. 321, dated 22 April 2008, was left null and void after the promulgation of the Mining Law issued on 29 January 2009. This judicial and official acknowledgement of the repeal of the Mining Mandate is essential for the development of the industry, as there was never legislation to repeal it, whatsoever, and there were individuals in the public sector that claimed that its standards remained in effect. The Mining Mandate, issued by the Constitutional Assembly in 2008, extinguished the mining rights of more than 2,000 concessions for causes that were not included in mining legislation at the time, thereby creating a standstill that pushed the industry to the brink of collapse. The ruling by the Constitutional Court is a key piece in the development of an environment with juridical security, as demanded by any foreign investor.

The reimbursement of VAT for mineral exporters

Mineral exporters were impeded from recovering the VAT paid during the production process, as permitted for all exporters in any other industry, due to a tax standard that was originally created for the petroleum industry and subsequently included for the mining industry. Through the reforms introduced by the Organic Law of Incentives for Public-Private Associations and Foreign Investment, mineral exporters can now recover VAT paid during operations as of 1 January 2018. Despite the future date for the application of this benefit, there is no doubt that this will make investments more attractive in small, medium and large-scale projects in our country.

The opening of the mining cadastre

On 1 March 2016, the Mining Ministry issued Ministerial Agreement No. 2016-002, which contains the Guidelines for Granting Metallic Mining Concessions. This was very good news for the mining industry, because the mining cadastre is now open after eight years of being closed following the devastating effects of the Mining Mandate, enacted in April 2008. The process being carried out by the Mining Ministry has received overwhelming acceptance on the market, as more than 1,900,000 mining hectares have been reserved, of which 650,000 hectares have been granted, representing committed investments for more of US$120,000,000 for initial exploration.

The issue of the Surplus Value Act

On 27 December 2016, the Surplus Value Act was executed, introducing an interesting amendment for the mining sector in relation to the windfall profit tax. In a nutshell it extends to 48 months, the deadline to pay the aforementioned tax after pre-production investments in the mining project have been recuperated

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

On 17 March 2016, the Mining Regulation and Control Agency (ARCOM) enacted the Mineral Resources and Reserves Regulations, which in general terms follows international standards such as the Australian Joint Ore Reserves Committee, the Canadian National Instrument NI 43-101, the UK Reporting Code and the South African Code for Reporting of Mineral Resources and Mineral Reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

As mentioned above, the state owns all minerals and non-renewable natural resources that are within the national territory (see question 5). However, mining concessions may also be granted to private parties. In this case, the concessionaire will have the exclusive right to explore, exploit, process and sell any metallic minerals within the concession.

A mining concession is granted for up to 25 years and may be renewed for an equal period. Once the mining concession has been granted, in large and medium-scale mining the concessionaire is subject to the following phases and terms:

- up to four years of initial exploration;
- up to four years of advanced exploration; and
- up to two years of economic evaluation of the deposit, which can be extended for an additional two-year period.

During the final phase, the concessionaire must apply for the commencement of the exploitation phase of the project. Within six months of beginning the exploitation phase, the concessionaire, in the large-scale mining category, must sign a mining exploitation contract with the Ecuadorian government, although negotiations may begin during the economic evaluation phase. As indicated, artisanal, small- and medium-scale mining operations do not need to sign a mining exploitation contract with the Ecuadorian government

It should be noted that ownership of mining concessions is distinct from ownership of the surface land.

According to the Mining Act, in order to obtain a new mining concession in a free area, applicants must participate in a public bidding process with the new concession being awarded to the successful bidder in accordance with the Guidelines for Granting Metallic Mining Concessions. If a concessionaire wishes to transfer an existing concession to a third party, authorisation from the mining authorities must first be obtained. However, it is important to consider that a new mining concession cannot be transfer, at least for two years, from granting date. ENAMI and state-owned companies of the international community have the right to access new mining concessions in any free area of the country without participating in a public bidding process.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

In general terms, ARCOM keeps a register of all the concessions that exist in the country. A referential map of the location of mining concessions and filings of concessions could be accessed through the website of the Mining Regulation and Control Agency in the following link http://geo.controlminero.gob.ec.

According to the Mining Act, all mining concessionaires should submit technical and financial reports of their activities in compliance with the Mining Act. Submitting these reports is an annual legal duty of the mining concessionaries in order to have their concessions in good standing. The Mining Ministry is the institution responsible for receiving annual exploration reports, investment plans and production reports from mining concessionaires.

ARCOM and the National Geological Mining Investigation Institute are the government agencies responsible for carrying out technical analyses of national geological information and collecting information for the national database. This information is public, but unfortunately not all is available online.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Individuals or corporations may acquire mining concessions, which are granted by the Mining Ministry following a public bidding process. The Mining Act recognises four mining categories: artisanal, small-scale, medium-scale and large-scale. Production ranges for each category were noted in question 5.

Existing mining concessions can be transferred, provided that prior authorisation from the mining authorities has been obtained.

The main obligations of mining rights holders are:

- to pay annual mining conservation patent fees;
- to present annual exploration reports and investment plans;
- to present biannual production reports;
- to pay mining royalties to the state when in the exploitation phase;
- to obtain an environmental licence prior to commencing activities;
- to obtain administrative authorisations prior to commencing activities;
- to ensure at least 80 per cent of its workforce are Ecuadorian;
- to comply with the environmental management plan;
- to comply with the regulatory and the mining title duties and obligations;
- to train their personnel; and
- to maintain information regarding their operations, etc.

11 What is the regime for the renewal and transfer of mineral licences?

According to article 36 of the Mining Act, a mining concession is granted for up to 25 years and may be renewed for an equal period upon a written petition by the mining concessionaire to the Mining Ministry. Indeed, it is possible to transfer mining rights prior authorisation by the Mining Ministry. The aforementioned authorisation is based on a technical report prepared by ARCOM and an environmental report prepared by the Ministry of the Environment. As noted above, a new mining concession cannot be transfered for at least for two years from the granting date.

12 What is the typical duration of mining rights?

As explained in the previous question, a mining concession is granted for up to 25 years. According to the Mining Act, it may be renewed for an equal period upon a written petition by the mining concessionaire to the Mining Ministry (see question 11). There is not a specific condition that needs to be meet in order to renew the mining concession.

On the other hand, according to article 108 of the Mining Act, the Mining Ministry may exercise its legal authority and consequently declare the mining rights terminated in cases where the concessionaires have rendered themselves liable to such termination, for the reasons laid down in articles 69, 79, 81, 93 and 125 of the Mining Act. Throughout any termination procedure, the right to due process shall be guaranteed. This includes the basic guarantees enshrined in article 76 of the Constitution. The process of declaring termination may be officially instigated by the Mining Ministry or be initiated in response to a complaint by a third party that has been duly investigated by the Mining Ministry, or be initiated at the request of other ministries with a connection to mining activity. The administrative procedure shall be subject to the terms of the Mining Act and its General Regulations.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Domestic and foreign parties are equally entitled to acquire mining rights in Ecuador.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

According to Ecuadorian legislation, mining is considered to be of public interest, which means it is in a special category and is granted more protection than other private interests, including land ownership. If a concessionaire suffers any form of disruption as a result of a third party's actions, concessionaires can file an administrative relief action in ARCOM, which can take either direct or indirect preventive measures.

The Mining Act specifically states that, in the event of a dispute arising out of an exploitation contract made between the Ecuadorian state and a mining concessionaire, such a dispute can either be resolved by the local courts or may be submitted to international arbitration. However, the dispute can only be submitted to international arbitration if arbitration provisions are included in the contract. The seat of arbitration must be a Latin American country as required by the Constitution. Foreign international awards are fully enforceable in Ecuador.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Private parties may acquire any form of surface rights, from ownership of the surface area to leases, usufructs, easements, etc. If a mining concessionaire wishes to acquire an easement over a surface area in order to develop its mining operations, it can either enter into an agreement with the surface owner or request that ARCOM impose an easement. It should be noted, however, that foreigners (individuals or corporations) cannot acquire any surface rights within border zones considered to be an area within 20 kilometres of the national border (see question 48). Surface rights holders cannot oppose these requests since, as said above, mining rights are considered of public interest.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

According to article 315 of the Constitution, the State may participate in the development and management of natural resources through public enterprises such as the ENAMI-EP or through mixed public–private enterprises in which the state should be the majority shareholder. The ENAMI-EP may also participate in partnership or in association with other entities, public or private (see question 22).

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Constitution guarantees the right to private property and prohibits any kind of confiscation. On an exceptional basis, the Constitution declares that the expropriation of property – including mining concessions – for reasons of public benefit or social interest may be declared, at a fair value, restitution and payment. However, there are no specific rules for valuation and compensation to determine how much a private individual could receive due to the expropriation of a mining concession.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

In Ecuador, there are various areas that are considered protected, mainly for environmental reasons. As a general rule, the Constitution establishes that the extraction of non-renewable resources, including logging, in protected areas is prohibited. However, such resources can be exploited on an exceptional basis if requested by the President to the National Assembly. In this case, the National Assembly has to qualify the presidential request as a matter of public interest.

Notwithstanding the above-mentioned, it is important to clarify that within protected forests mining activities can be carried out once an environmental authorisation has been obtained. The specific environmental authorisation will depend on the mining phase of the concession.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

As a general provision, the Constitution provides that the state is entitled to receive a share of the benefits resulting from the exploitation of non-renewable natural resources, which is not to be less than that received by the concessionaire carrying out the exploitation. The

Mining Act more specifically establishes that the state's share consists of various duties, taxes and royalties, including annual patent fees, income tax, VAT, 15 per cent of the concessionaire's profits (this is distributed to the concessionaire's employees), windfall profit tax in the case of large-scale mining and royalties depending of the category of the mining title.

Added to the items mentioned above, the Guideline for Granting Mineral Mining Concessions establishes that in order to file a request for a new mining concession, it is necessary to pay a fee equivalent to five times the current minimum wage per application (in 2017, each application costs US$1,875). This amount is not subject to reimbursement if the interested party is not awarded the mining concession after going through the bidding process established in the Mining Act and the Guideline. If a party is awarded a mining concession, it needs to pay a fee equivalent to twice the current minimum wage in order to register the minute award and the amount of one current minimum wage to register the mining title with ARCOM.

Duties

More specifically, mining concessionaires have a number of financial obligations under the Mining Act, including the requirement to pay annual conservation patent fees, except in the artisanal mining category. The conservation patent fees payable for concessions are calculated as follows:

- for small-scale mining: a sum equivalent to 2 per cent of the current minimum wage, multiplied by the number of hectares in the concession;
- for medium-scale mining: a sum equivalent to 2.5 per cent of the current minimum wage, multiplied by the number of hectares in the concession and regardless of the mining phase; and
- for large-scale mining:
  - initial exploration phase: a sum equivalent to 2.5 per cent of the current minimum wage, multiplied by the number of hectares in the concession;
  - advanced exploration phase: a sum equivalent to 5 per cent of the current minimum wage, multiplied by the number of hectares in the concession; and
  - exploitation phase: a sum equivalent to 10 per cent of the current minimum wage, multiplied by the number of hectares.

The minimum wage for 2017 is US$375.00.

In addition, mining concessionaires are required to pay additional fees for the use of water. These fees are set out in the Water Act and the Authorisation for the Use of Water Resolution granted by the National Water Secretariat. The Ministry of the Environment also sets fees with regard to the environmental licence.

Taxes

Mining concessionaires are also required to pay various taxes, both direct and indirect. Direct taxes include income tax, which is currently 22 per cent and payable on income less expenses. In large-scale mining, the mining concessionaire must pay 3 per cent of their profits to their employees and 12 per cent of their profits to the state, as part of the benefits share system, whereas in medium-scale mining is 5 per cent to the employees and 10 per cent to the state and in small-scale mining is 10 per cent for employees and 5 per cent to the state. Finally, if mining concessionaires send money abroad, a 5 per cent currency exit tax is payable.

As for indirect taxes, VAT, at a rate of 14 per cent is payable on goods purchased and services rendered. As previously indicated (see question 6), the amendments, introduced in December 2015, will allow mineral exporters to recover VAT as of 1 January 2018. Finally, the same amendment permits all gold acquisitions by individuals or holders of mining concessions to also have a 0 per cent VAT rate as of 1 January 2018.

Customs duties and other charges imposed by customs are payable when importing goods to Ecuador.

In addition, a windfall profit tax of 70 per cent is payable only after 48 months after pre-production investments in the mining project have been recuperated. To calculate the windfall profit tax, metal prices are equal to their 10-year rolling average plus one standard deviation. For reference, the average price of gold over the past 10 years (plus one standard deviation) was US$1,435 per ounce and the current price of gold is US$1,231 per ounce. As mentioned, this tax only applies in the large-scale mining category.

Further, with regard to municipal taxes, liability for the following taxes should be borne in mind:

- municipal patent: the maximum annual tax that can be paid, calculated according to a concessionaire's assets, is US$5,000;
- municipal tax equivalent to 0.15 per cent of the concessionaire's assets; and
- rural land tax.

Concessionaires are also required to pay a contribution to the Superintendency of Companies, which is currently set at 0.1 per cent of the concessionaire's real assets.

Capital gains tax is also a variable on this section (see question 23).

Royalties

Finally, with regard to royalties, the Mining Act states that during the exploitation stage, mining concessionaires must pay a royalty depending on the mining category. Artisanal miners do not have to pay any royalty at all. Small-scale mining is required to pay a royalty equivalent to 3 per cent of the sales of the principal and secondary minerals, medium-scale mining is required to pay a royalty equivalent to 4 per cent of the sales of the principal and secondary minerals and large-scale mining is required to pay a royalty not less than 5 per cent and not higher than 8 per cent of the sales of the principal and secondary minerals. The General Mining Regulations provide more detail, stating that the royalty is calculated on the gross income, less refining and transport costs.

On the other hand, the percentage of royalties payable by concessionaires carrying out non-metallic mining activities is calculated according to production costs.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Companies that reinvest their profits in the country are entitled to a 10 per cent reduction in the income tax payable on the amount reinvested in production assets, provided the assets are to be used to purchase new machinery or equipment that are used as part of their production activities, such as the purchase of goods related to investigations or technology to improve their productivity, generate production diversity and to increase employment. Further, deductions can be made when activities are carried out in economically depressed areas or frontier zones and citizens resident in such areas are employed.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Overall, article 82 of the Constitution guarantees the principle of legal certainty, recognising clear, ex-ante legal rules that shall be respected by all the state authorities. Further, after the promulgation of the Organic Code of Production the state allows the possibility of signing 'investment protection agreements' with both domestic and foreign investors, in order to provide tax stability and other related incentives.

On 29 December 2014, the government enacted an amendment to the law, which opens up the possibility to investors investing over US$100 million to negotiate and execute a Legal and Tax Stability Agreement, thereby allowing investors to stabilise the regulations during the term of the agreement.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

According to article 315 of the Constitution and article 16 of the Ecuadorian Mining Act the State may participate in mining projects through public or mixed public-private enterprises in which the State should be the majority shareholder.

With the enactment of the current Mining Act the national mining company ENAMI-EP was created in order to manage mining activity for the sustainable use of mining resources. The company may carry out its duties independently, or in partnership or association with other entities, public or private, in accordance with the legal provisions.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The National Assembly of Ecuador enacted, under the Organic Law for Production Incentives and Prevention of Tax Fraud, various amendments to Ecuador's Income Tax Code, including the introduction of the

taxation of capital gains, effective as of 29 December 2014. This law includes provisions for a capital gains tax on the profits derived from the direct or indirect sale of shares by companies either domiciled or with permanent establishments in Ecuador.

Further amendments to the law were enacted under Decree No. 580, which came into force on 13 February 2015, which amended or clarified the previous law. Decree No. 580 established a threshold whereby the indirect taxation does not apply to holders of shares of a non-resident company if the real value of the rights representing the capital of the company resident in, or with a permanent establishment in, Ecuador is less than 10 per cent of the real value of the company that is not a resident of Ecuador. Decree No. 580 also established a threshold whereby the indirect taxation does not apply if the cumulative annual sale of shares for an individual is less than US$3.4 million.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Domestic and foreign parties are required to pay the same duties, royalties and taxes (see question 19).

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

While foreign companies could open a branch in Ecuador, this idea is not often used, as not only is there a risk that the foreign parent company may be held accountable for any of the branch's liabilities, but also it is more expensive and takes longer to set up a branch than to incorporate a local company. In addition, local companies can have broader corporate objects, whereas the corporate object of a branch must be exactly the same as that of the parent company.

As for joint ventures and trusts, although these structures are permitted in accordance with Ecuadorian legislation, they are not often used.

As such, the most common business structure is to incorporate an Ecuadorian company. There are many forms of company, the most common being corporations and limited liability companies. In many ways the forms of company are very similar; for example, they must have at least two shareholders. However, the principal differences between the two are that, in the case of limited liability companies, the maximum number of shareholders is 15 and a shareholder may only transfer shares if the prior consent of all the other shareholders is obtained. Although it depends on the needs of each interested party, as such restrictions do not apply to corporations, this is the most common form of business structure used. In the event of a joint venture, this structure can be reflected in the share ownership of the local company.

26 Is there a requirement that a local entity be a party to the transaction?

Any foreign entity is required by law to be domiciled in Ecuador. In addition, for tax planning reasons, it is quite often advantageous to incorporate a local company.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Ecuador has signed agreements for the promotion and protection of investments with Paraguay, Romania, Finland, Germany, United Kingdom, France, Sweden, The Netherlands, Venezuela, China, Chile, Switzerland, Canada, US, Argentina, Bolivia, Peru, El Salvador, Cuba, Nicaragua, Honduras, Spain and Italy.

Additionally, Ecuador has also entered into double taxation treaties with Germany, Argentina, Belgium, Brazil, Canada, Chile, South Korea, Spain, France, Italy, Mexico, Romania, Singapore, China, Switzerland, Andean countries and Uruguay and it is, therefore, advisable for foreign entities to use these jurisdictions if possible. If foreign entities wish to use jurisdictions that are considered to be tax havens, it should be noted that Ecuador imposes punitive taxes.

It is important to bear in mind that as of the closing of this edition, the National Assembly approved the denunciation of 12 foreign investment protection treaties. Consequently, the government of Ecuador is on the verge of finalising the termination process of these treaties, including the Foreign Investment Protection Agreement entered into by Ecuador and Canada (Canada–Ecuador FIPA). It must be noted that all investments and commitments to invest made by Canadian investors prior to the termination of the Canada–Ecuador FIPA are protected for a period of 15 years from the date of the termination. The termination of the Canada–Ecuador FIPA shall become effective one year after the Ecuadorian government notifies the Canadian government of the termination of the Canada–Ecuador FIPA. Therefore, it is highly recommended that any and all investments and commitments to invest by a Canadian investor be protected through an investment protection agreement entered into directly by the investor with the government of Ecuador, in order to stipulate the treatment that shall be given to the investment, the rights of the investor and international arbitration.

To provide some background, on 28 September 2009, President Correa sent a request to the National Assembly of Ecuador (NA) to approve the denunciation of BITs entered into by Ecuador with certain major capital exporting countries, including Canada. The other countries affected by this request include Argentina, Chile, China, Finland, France, Germany, Netherlands, United Kingdom, United States, Switzerland, Sweden and Venezuela. Following the National Assembly's official notification that their approval of the treaty denunciation first required a Constitutional Court (CC) ruling, the President filed on 6 January 2010, a submission to the CC requesting a favorable ruling to initiate the denunciation process. On 4 November 2010, a CC ruling was published on the Official Gazette approving the denunciation of the Canada–Ecuador FIPA because the CC considered that the provision of articles XIII and XIV were contrary to the Constitution of 2008. On 3 May 2017, the NA approved the denunciation of 12 BITs, including the Canada–Ecuador FIPA. Following this approval, the government of Ecuador is in a position to issue a termination notice any time. The termination of the Canada–Ecuador FIPA shall be effective one year after the notification is made.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Financing for mining operations generally comes from abroad as there are very limited local financing sources because financial entities such as banks consider mining activities to be high-risk investments. In addition, there are no government financing sources for mining activities. The mining industry, therefore, relies heavily on direct foreign investment, either by entrepreneurs, international investment banks, private equity funds or trusts.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Although government agencies and pension funds are permitted to provide direct financing to mining projects, historically, this has not occurred. Currently, in Ecuador, financing for mining projects is entirely private and, due to the lack of experience in mining, government agencies do not have any interest in providing funds for this type of project.

30 Please describe the regime for taking security over mining interests.

The personal nature of mining rights contradicts several norms of the Mining Act, which treat the said rights as if they were property rights. However, because they are personal rights, suitable guarantees can be set up for lenders to a mining project.

Although whether it is possible to pledge the mining rights arising from a mining concession is open to question, it is feasible to establish an industrial pledge over a mining concessionaire's assets. A mining concessionaire could, therefore, grant a number of distinct and independent security interests, one over the mining rights arising out of the mining concession and the other over the buildings, machinery, tools, etc, located in the mining concession, in accordance with the terms of article 576 and onwards of the Ecuadorian Commercial Code.

Both the mining rights arising from a mining concession and the contractual rights stemming from the exploitation contract can

be pledged as guarantee assignments to parties lending to a project. Pursuant to the Civil Code, any right can be waived or assigned and, thus, property, personal, litigation and inheritance rights, among others, can be assigned.

The following conditions must be met to ensure that a guarantee assignment is an effective guarantee for parties lending to a mining project:

- first, a financial entity, not domiciled in the country or qualified as a subject entitled to mining rights must be allowed to be an assignee of mining rights; and
- second, the authorisation for the guarantee assignment and any other requirement needed for the formalisation thereof should be in place at the time said assignment is granted so that if the mining concessionaire defaults, the financial entity can automatically step into the project without needing any other kind of procedure or authorisation.

In addition to the above-mentioned guarantees, a pledge over the shares held by the holding company in the company operating the mining project would be another option. The holding company could also place its shares in a guarantee trust in favour of the lenders to the projects.

Finally, the guarantee system also allows for an industrial pledge on the minerals obtained from the deposit, as well as on the current and future cash flows from the sale of said minerals.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Generally, there are no restrictions regarding such importation.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are not specific standards used in the Ecuadorian jurisdiction to cover equipment supplies but the Ecuadorian market is absolutely friendly with the supplier and buyer of industrial equipment used for the mining sector. In terms of dispute resolutions, usually, the parties prefer to include international arbitration clauses in the equipment supply agreements rather than litigate in domestic courts.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no restrictions regarding the processing, export or sale of minerals obtained from mining operations. The principle of free trade is enshrined in the current legislation and minerals can be freely exported, provided all of the relevant taxes have been paid (see question 19).

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Ecuador does not impose any form of restriction regarding the importation of funds to be used for mining operations, nor on the use of proceeds resulting from the sale or exportation of minerals.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental legislations that apply to the mining industry are the Constitution, the Environmental Management Act, the Mining Environmental Regulations, the Unified Text of Secondary Environmental Legislation, the Forestry and Conservation of Natural Areas and Wildlife Act, the application of social participation mechanisms established in the Environmental Management Act Regulations, the Water Act and the Prevention and Control of Environmental Contamination Act. It is important to note that the Environmental Act was enacted on April 2017 and will enter into force on April 2018. The Environmental Act encompasses all the environmental legislation in one single body.

The regulation and control bodies are the Ministry of the Environment and its regional environmental offices and, with regard to water resources, the National Secretariat of Water.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Through amendments to the Mining Law introduced on 16 July 2013, the process for obtaining the environmental permits was simplified. With the new regulations, environmental permits can be summarised as follows:

- for artisanal mining: environmental fact sheets need to be approved;
- for small-scale mining: environmental licences allow concessionaires to carry out exploration and exploitation activities simultaneously; and
- for medium- and large-scale mining:
  - environmental fact sheets must be approved for the initial exploration stage, which is a different and much simpler process than the environmental impact assessments required in the past;
  - an environmental declaration will need to be approved for the advanced exploration stage, instead of the more complicated environmental impact assessment; and
  - an environmental licence will need to be approved for the exploitation on the basis of an environmental impact assessment.

When the concessionaires have completed all the requirements for the approval of the environmental licence, this must be granted within six months of the presentation of the required documentation. Should the competent authority fail to respond within this time frame, this shall be taken as tacit agreement to the commencement of mining activities. In other words, the law establishes positive administrative silence for the approval of environmental licences.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

All environmental impact studies must contain an environmental management plan, which in turn must contain a plan for the partial or total closure of the mining operations. Among other details, the plan must contain details regarding the dismantling of facilities, remediation and rehabilitation of affected areas, etc. The concessionaire must provide an annual budget for these closure activities, approved by the environmental authorities.

With regard to guarantees, the concessionaire is required to provide a bank guarantee or take out an insurance policy, which must remain in force until the total closure of mining operations, in order to guarantee compliance with the environmental management plan.

38 What are the restrictions for building tailings or waste dams?

There are no restrictions for building tailings or waste dams. Nevertheless, according to the Mining Act and the Environmental Management Act Regulations, it is necessary to have an environmental licence prior benefiting from tailing ponds and waste piles. Added to that, the mining concessionaire must comply with the regulations and technical specifications contained in the Mining Act, Environmental Management Act Regulations and the Unified Text of Secondary Environmental Legislation (see question 40). The company in charge of the operation and management of dam waste must demonstrate technical evidence and credentials to support its experience in this kind of infrastructure. Inspections of mining projects by local authorities are really common, especially since 2016. An alarm system is not mandatory, but according to the legal framework it is advisable to prevent environmental disasters; it is a common practice within private mining companies operating in Ecuador. In terms of responsibilities for a dam failure, the immediate action is to prevent any human/infrastructure loss, thus, the government will use all their resources in that line. There is a specific government entity named the Risk Management Secretariat that deals with any kind of natural disaster. As a common

practice, companies must also provide all the necessary support to the above-mentioned end.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal legal provisions regarding health and safety, as well as labour laws are set out in international agreements to which Ecuador is a party, including the International Labour Organization, the Constitution and various Ecuadorian laws and regulations, including the Labour Code and the General Labour Risks Insurance Regulations, among others. Labour law in Ecuador is complex and biased in favour of employees; the rights granted to employees by legislation cannot be waived or challenged. The Labour Code regulates the forms of labour contracts, holidays, minimum wages, bonuses and other benefits, maternity leave, unions and collective contracts, strikes and compensation, among other matters. The Social Security Act governs social security benefits and all companies must affiliate their employees to the Ecuadorian Social Security Institute (IESS).

The IESS and the Ministry of Labour, together with its labour inspectors, are responsible for ensuring compliance with labour and social security legislation.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

According to article 43 of the Mining Act, mining waste products in tailing ponds and waste piles are part of the mining concession, therefore, the mining concessionaire has the right to freely exploit and benefit from them. However, according to the Mining Act and the Environmental Management Act Regulations, it is necessary to acquire an environmental licence prior to exploiting and benefiting from mining waste products in tailing ponds and waste piles. The mining concessionaire must follow the regulations contained in the Mining Act, Environmental Management Act Regulations and the Unified Text of Secondary Environmental Legislation.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Mining Act states that no more than 20 per cent of a mining company's employees can be foreign. Further, preference should always be given to Ecuadorian specialised technical personnel, and only if there are none should foreign personnel be contracted. Any foreign employees must have a work visa and comply with all applicable labour and immigration requirements, including the obligation to train Ecuadorian personnel in their field of expertise.

In addition, when hiring, mining companies must favour workers living in the area of influence of the project and have policies regarding the integration of employees' families in place.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

All mining activities must respect the principle of 'sumak kawsay', an indigenous principle enshrined in the Constitution in order to ensure that everyone live in a healthy and economically sustainable environment.

Ecuadorian legislation contains many provisions regarding these matters. There are a series of legal provisions regarding CSR in various pieces of legislation, including the Constitution, the Mining Act, the Environmental Management Act and the Citizen Participation Act, among others. Additionally, international CSR principles such as the UN Global Compact and other UN guidelines are applied within mining operations in Ecuador.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

In Ecuador, the collective rights of indigenous communities, nationalities and peoples are recognised in the Constitution and the various international human rights agreements, protocols, declarations and other principles (see question 42).

Indigenous communities, nationalities and peoples must be consulted, freely and with sufficient information, regarding any plans or programmes to explore, exploit or sell non-renewable natural resources located within their land and which could affect them, either environmentally or culturally, or affect their property rights. Further, they have the right to receive a share of the benefits generated by these projects and to receive compensation for any social, cultural or environmental damage caused as a result. The consultation referred to above is mandatory and must be carried out by the competent authorities on a timely basis. It is important to point out that according to international standards and conventions, the result of the consultation process is not legally binding.

It is prohibited to carry out extractives activities in lands belonging to aboriginal people who voluntarily choose to remain isolated. However, such resources can be exploited on an exceptional basis if requested by the President to the National Assembly. In this case, the National Assembly has to qualify the Presidential request as a matter of public interest (see question 18).

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Ecuador is party to a number of international treaties, the principal ones being the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the ILO Convention (169) on Indigenous and Tribal People in Independent Countries and the UN Declaration on the Rights of Indigenous People.

According to the current Constitution, these international agreements are binding and, within them, the provisions of the human rights agreements prevail over the Constitution itself. In addition, the government has developed laws and regulations to protect the right to prior consultation of indigenous communities. It is also important to note that, in the light of a 2012 decision of the Inter-American Court of Human Rights, Ecuador should adopt legislative measures in order to fully facilitate the right of indigenous peoples to prior consultation, and should also modify those laws that may restrict its free and informed exercise.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

With regards to the Ecuadorian legislation on anti-bribery and corrupt practices, it is important to consider the principles enshrined in the Constitution, as well as in the Criminal Code, the Organic Law on Transparency and Social Control and the Organic Law on Transparency and Access to Public Information. The Constitution, along with the aforementioned legislation, develops a very strict legal framework to regulate, control and sanction anti-bribery and corrupt practices.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

As mentioned, there is a strict legal framework regarding anti-bribery and corrupt practices in Ecuador. To this regard, article 417 of the Constitution ratifies that all international instruments and treaties endorsed by Ecuador are part of the domestic legal system. Consequently, companies must comply with the regulations contained in the Inter-American Conventions against Corruption and the UN Convention against Corruption, among others.

It is also possible that US and Canadian companies include in their contracts the reference of the Foreign Corrupt Practices Act and Convention on Combating Bribery of Foreign Public Officials in

Update and trends

In Ecuador 2016 has proved to be an important year for the mining industry.

Despite the general crisis experienced in Ecuador, the mining industry has seen extraordinary progress, in both the public and private sectors, which places the country on the radar of international investors. The main highlights during 2016 include the signing of an exploration contract between Ecuador and Lundin for the development and exploitation of Fruta del Norte; the exceptional results of the Cascabel project of ENSA, owned by SolGold (SOLG); the expectation created on the international market owing to the merger of Odin with Ecuador Gold and Copper, forming a new company known as Lumina Gold Corp (LUM), headed up by mining legend Ross Beaty; and the opening of the mining cadaster by the Mining Ministry in order to grant new areas. Additionally, Australian and Canadian mining exploration companies operating in the country have closed financing operations in recent months, for example, SolGold (SOLG), Salazar Resources (SRL), Cornerstone (CGP) and Lumina (LUM). In general, 2016 was a year full of positive news, providing lots of hope for 2017 – a year with looming difficulties owing to the country's elections.

Ever since the promulgation of the Mining Mandate in 2008, no metallic mining concessions have been issued for industrial mining, due largely in part to the legal requirement for a bidding process to issue new concessions, which is atypical to traditional mining jurisdictions. The current mining authorities, led by Minister Javier Cordova, have made great efforts to foster the granting of new areas to individuals, navigating the difficulties and limitations of the Ecuadorian regulatory system. The process being carried out by the Mining Ministry has received overwhelming acceptance on the market, as more than 1.9 million mining hectares have been reserved, of which 650,000 hectares have been granted, representing committed investments for more of US$120 million for initial exploration. This information was provided by the official website of the Mining Ministry up to 13 February 2017.

Regarding legal aspects, there were two legal matters in 2016 that were really important for investors. In order of importance, in my opinion, they are: The official demise of the Mining Mandate on 6 April 2016. Through Ruling No.002-16-SAN-CC, the Constitutional Court handed down a sentence in two cases of non-compliance, which resolved that Constitutional Mandate No. 6 (the Mining Mandate), published in Official Gazette No. 321, dated 22 April 2008, was left null and void as of the promulgation of the Mining Law issued on 29 January 2009. This judicial and official acknowledgement of the repeal of the Mining Mandate is essential for the development of the industry, as there was never any legislation to repeal it, and there were individuals in the public sector who claimed that its standards remained in effect. The Mining Mandate, issued by the Constitutional Assembly in 2008, extinguished the mining rights of more than 2,000 concessions for causes that were not included in mining legislation at the time, thereby creating a standstill that pushed the industry to the brink of collapse. The ruling by the Constitutional Court is a key piece in the development of an environment with juridical security, as demanded by any foreign investor.

Another important development is the reimbursement of VAT for mineral exporters. This is one of the most important amendments for the mining industry in recent times. Mineral exporters were impeded from recovering the VAT paid during the production process, as permitted for all exporters of any other industry, owing to a tax standard that was originally created for the petroleum industry and subsequently included for the mining industry. Because of the reforms introduced by the Organic Law of Incentives for Public-Private Associations and Foreign Investment (APP), mineral exporters can now recover VAT paid during operations as of 1 January 2018. Although this benefit has not yet been established, there is no doubt that it will make investments more attractive in small, medium and large-scale projects in the country.

Nevertheless, there is still a lot of work to be done. Essentially, the true interest of the state attempting to prevent concessions from falling into the hands of those who are not willing to perform activities in the concessions is not achieved by ignoring the realities of the industry, but rather by fostering conditions that attract the best, serious, responsible miners, and this is achieved by treating them as partners, understanding their needs and acknowledging their legitimate interests in the law. This is how mining is carried out in Chile, Canada and Peru.

Additional measures must be taken in the future to improve and amend the rules of the game and the economic conditions in Ecuador, in an attempt to make mining investments more attractive. For example, there must be modifications to the Mining Law in order for mining rights to be deemed a real right, as is the case in all countries where this industry is developed, and not a personal right, as is the case in Ecuador. The bidding and auction process must be eliminated, as it is not successful in any mining jurisdiction. Additionally, the cost of conservation patents must be reduced to amounts that are competitive within the region. Finally, the maximum term for exploration and other phases must be eliminated, as this is contrary to the rationale of all mining projects, which cannot be dependent upon timelines set forth in a law, but rather are based on the geological conditions of the area and the international market of the commodities.

The fiscal model for the industry must be flexible. It is necessary, for example, to eliminate the windfall profit tax and the recently created capital gains tax, as these are additional burdens on an already excessive tax system, which are not even comparable with the parameters of the region when dealing with mining. The government has made efforts to mitigate the impact of the windfall profit tax and the sovereign adjustment; however, owing to the complexity of the applicable formulas, investors have concerns regarding the effectiveness of the model.

Timely reforms and various derogatory provisions (a few pages of text) would be enough to get remove these obstacles. If the new government believes that mining is the only means of attracting large amounts of foreign investment, which are essential for an economy based on the dollar and with low oil prices, it seems certain that we can replicate and even surpass the positive progress we had in 2016. It is hoped this will come to fruition.

This is a reproduction of the article written by Cesar Zumarraga, 'Ecuadorian Mining Industry, trends in 2017'; published in Minergia in March 2017, www.minergiaec.com/ecuadorian-mining-industry-trends-2017.

International Business Transactions of the Organisation for Economic Co-operation and Development.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

In 2009, the Inter-American Development Bank and the FARO Group signed an agreement to develop the 'Transparency in the Extractive Industry in Ecuador' project, focused on achieving the active participation of public and private companies linked to extractive industries, particularly in the oil sector (idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35400790). The initiative's main objective is the application of the minimum level of the agreed-upon standards, which allow for the transparent handling of information within the sector.

In accordance with this initiative, the Constitution allows for the civil society to participate throughout different levels of government decision-making processes. The right to transparent information is recognised within the Constitution.

Moreover, the Organic Law on Transparency and Access to Public Information, which allows citizens to access public information, is closely related to the aforementioned initiative.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

The Constitution incorporated the prohibition of land (surface rights) acquisition by foreign nationals in border areas, which extends to 20 kilometres from the border. This prohibition does not apply to mining concessions. However, if an area is located within the border area, it is necessary to obtain a prior authorisation from the Ministry of Defence, in accordance with article 41 of the Homeland Security Law.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Ecuador has double tax treaties with Germany, Argentina, Belgium, Brazil, Canada, Chile, South Korea, Spain, France, Italy, Mexico, Romania, Singapore, China, Switzerland, Andean countries and Uruguay. However, as mentioned in question 27, the National Assembly approved the denunciation of 12 foreign investment protection treaties including the Foreign Investment Protection Agreement entered into by Ecuador and Canada.

Relevance of the Foreign Investment Protection Agreement Canada–Ecuador FIPA

The Canada–Ecuador FIPA expressly provides for the right of a party to terminate the treaty by giving one year advance notice. Once termination becomes effective, that is one year after the termination notice is delivered – the Effective Termination Date – all of the articles of the treaty (except for article XVIII, which sets out the termination provision) remain in full force and effect for a period of 15 years for 'investments' or 'commitments to invest' made prior to the effective termination date. Investments or commitments to invest made after the effective termination date will not be eligible for FIPA protection and will have to rely on domestic legislation for protection. Ecuadorian legislation provides for investment agreements, a form of protection discussed at the end of this question.

The termination provisions can be found in article XVIII(2) of the Canada-Ecuador FIPA, as follows:

> *This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Part in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years.*

Based on the express wording found in the Canada–Ecuador FIPA, the interpretation rules found in the Vienna Convention on Law of Treaties, and relevant international law authorities and jurisprudence, article XVIII(2) of the Canada–Ecuador FIPA will allow the investor the right to assert claims under the treaty for a period of 15 years following the termination of the treaty, so long as these claims arise out of 'investments' or 'commitments to invest' made prior to the date on which the termination of the treaty becomes effective – the effective termination date.

Furthermore, in our view the unconditional consent provided by Ecuador to the submission of a dispute to international arbitration in accordance with the provisions of this article XIII of the Canada-Ecuador FIPA, will permit a Canadian investor who has made investments or commitments to invest within the requisite period, the right to invoke the arbitration mechanism for a period of 15 years following the termination of the treaty, notwithstanding any statement or notice by Ecuador withdrawing such consent. In other words, the investor's submission of a dispute to arbitration including the concurrent consent for arbitration, required from the investor, need not be provided in advance of the effective termination of the Canada–Ecuador FIPA (or prior to the date of the giving of notice by Ecuador to the government of Canada, seeking to terminate the treaty).

In order to exercise its right to seek arbitration, the investor would be able to initiate the proceeding pursuant to article XIII at any time within the 15-year survival period, provided it meets the requirements for submitting the dispute to arbitration and providing its consent.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Finland is one of the leading mining countries in Europe and the mining industry plays a very important role in Finland, along with its future growth potential. Finland has the right geology and a long mining tradition. Mining activity in Finland is currently concentrated around gold, platinum group metals, base metals, diamonds and industrial minerals.

Finland offers an attractive investment and operating environment for the exploration and mining industry. There is potential for new discoveries because there are commodities that are currently explored on a small scale or not at all. In contrast to many other countries, Finland also has many high-class geological databases available on the internet. The infrastructure is good, even in rural areas, and there are skilled subcontractors available. Also, the public sector provides many services for the mining industry that would, in other countries, incur large costs.

Finland's mining production has doubled over the past decade and the growth has been especially fast in recent years, albeit the downturn in commodity prices has had its impacts on the Finnish mining and exploration industry. In 2016, the total amount extracted from Finnish mines grew to 117.2 million tonnes, of which 43.7 million tonnes constituted ore or usable minerals as it appears from the report of the mining authority, the Finnish Safety and Chemicals Agency (TUKES). The number of mine workers in the whole mining sector (including construction minerals) in Finland has also increased and the total workforce, including subcontractors, currently numbers around 4,500 people. Out of the 42 mines in Finland, 20 mines reported to have quarried in 2016. Twelve mines in Finland quarried metallic minerals. Three of the biggest mines in Finland account for 86 per cent of all quarried minerals. All in all, the whole Finnish mineral cluster (including the technology and service providers) provides employment for some 30,000 people.

2 What are the target minerals?

The target minerals are as follows:

Metal/mineral	Mining production in Finland	Discovery potential in Finland
Antimony	Deposits	Moderate discovery potential
Beryllium	No deposits	Moderate discovery potential
Cobalt	Mining production	Good discovery potential
Fluorite	No deposits	Low discovery potential
Gallium	No deposits	Low discovery potential
Germanium	No deposits	Low discovery potential
Graphite	No deposits	Moderate discovery potential
Indium	No deposits	Moderate discovery potential
Magnesium	No deposits	Low discovery potential
Niobium	Mining projects	Good discovery potential
Platinum group metals	Mining projects	Good discovery potential
Rare earth metals	Deposits	Good discovery potential
Tantalum	Deposits	Moderate discovery potential
Tungsten	Deposits	Moderate discovery potential
Aluminium	No deposits	Low discovery potential
Chromium	Mining production	Good discovery potential
Iron	Mining projects	Moderate discovery potential
Magnesite	No deposits	Moderate discovery potential
Manganese	Mining projects	Moderate discovery potential
Molybdenum	Deposits	Moderate discovery potential
Nickel	Mining production	Good discovery potential
Rhenium	No deposits	Low discovery potential
Tellurium	Deposits	Good discovery potential
Vanadium	Mining projects	Good discovery potential
Zinc	Mining production	Good discovery potential
Barite	No deposits	Moderate discovery potential
Bentonite	No deposits	Low discovery potential
Boron	No deposits	Low discovery potential
Clay minerals	Deposits	Moderate discovery potential
Copper	Mining production	Good discovery potential
Diatomite	No deposits	Low discovery potential
Feldspar	Mining production	Good discovery potential
Gypsum	No deposits	Low discovery potential
Limestone	Mining production	Good discovery potential
Lithium	Mining projects	Good discovery potential
Perlite	No deposits	Low discovery potential
Quartz	Mining production	Good discovery potential
Silver	Mining projects	Moderate discovery potential
Talc	Mining production	Good discovery potential
Titanium	Mining projects	Good discovery potential
Gold	Mining projects	Unknown
Uranium and thorium	Exploration	Unknown
Soap stones	Mining projects	Unknown
Precious stones	Deposits	Unknown

3 Which regions are most active?

Northern and eastern Finland are the most active regions, although ore bodies are also discovered in other parts of the country.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Finland's legal system is civil law-based.

5 How is the mining industry regulated?

In Finland, national and EU laws regulate the entire country, although the Åland Islands are exempt in some aspects, given their right of self-government. There are mining and other laws in force that regulate the mining industry.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

There is a special mining law in force, namely the new Mining Act, which entered into force on 1 July 2011. The Mining Act takes account of other key legislation applicable to exploration and mining activity, including the Nature Conservation Act, Environmental Protection Act, the Act on the Protection of Wilderness Reserves, the Land Use and Building Act, Water Act, Reindeer Husbandry Act, Radiation Act, Nuclear Energy Act, Antiquities Act, Off-Road Traffic Act, Dam Safety Act and the Occupational Safety and Health Act. Several government decrees have been issued based on the Mining Act such as the Mining Decree, the government Decree on Mine Safety and the Decree of the Ministry of Employment and the Economy on Hosting Equipment in Mines. All laws operate at the national level.

The most important government body for the mining industry is TUKES, which acts as the mining authority. TUKES is responsible for granting permits and supervising and enforcing compliance with the Mining Act. Decisions of TUKES can be appealed to the administrative courts and further to the Supreme Administrative Court. The Ministry of Employment and the Economy is responsible for the general guidance, monitoring and development of activities under the Mining Act.

On the environmental side, the environmental permit required for mining is granted by the competent regional state administrative agency (AVI), whereas the centres for economic development, transport and the environment (ELY centres) manage the regional implementation and development tasks of the state administration.

The ELY centres supervise decisions with respect to environmental and water permits issued by the AVIs and protect the public interest in environmental and water issues. Activities that require an environmental permit, such as mining projects, are supervised throughout their lifetime. ELY centres also act as contact authorities in environmental impact assessment procedures.

Local municipalities are responsible for their own detailed planning and are also the authorities granting building permits.

Finally, in any matters that relate to radioactive substances, the Radiation and Nuclear Safety Authority of Finland (STUK) is the key authority that is involved. The STUK belongs to the administration of the Ministry of Social Affairs and Health.

Effective as of 1 January 2016, the Mining Act was amended so that the right to appeal the mining authority's decisions all the way through to the Supreme Administrative Court is restricted. The possibility to appeal against decisions rendered by the mining authority first to the administrative court and then to the Supreme Administrative Court was, until the end of the year 2015, unrestricted. The amendment alters the current appeal procedure so that appealing the decisions of the administrative courts to the Supreme Administrative Court will, in most cases, only be possible if a retrial permit is granted. The amendment is related to a broader legislative reform aimed at enhancing and accelerating the handling of administrative decisions made by the Finnish authorities. The retrial permit procedure is applied only to such decisions of the mining authority that are rendered on or after 1 January 2016.

The revision of the Environmental Protection Act is currently subject to its third and last phase of amendments. The third phase of amendments concerns streamlining environmental permitting and a Government Bill was given to Parliament on 16 February 2017 for its hearing.

The Finnish government has proposed a partial reform of the Mining Act, which is planned to take effect on 1 July 2017. The proposed reform relates, among other things, to the following.

- The Mining Act currently requires that an applicant must, when necessary, complete a Natura 2000 assessment and an environmental impact assessment (EIA) when submitting a mining permit application and not when the permit is being decided, making the applicant prepare these assessments years before submitting the mining permit application (and hence mineral reserve estimates, etc, might not be up to date). The Mining Act is planned to be revised so that the priority of an exploration permit, gold panning permit or mining permit would be obtained even if the permit application do not include the said assessments, so long as these are provided prior to the permit decision.
- The removal of the one-kilometre exclusion zone (competing permits) applied to reservation notifications.
- Shortening the waiting period (probation period) relating to previous exploration or mining permit areas that have being relinquished or lapsed from three years to two.
- The relinquishment of exploration permits (which is to be deregulated so that the obligation to pay exploration fees would cease to exist as soon as TUKES is notified in writing of the permit holder's intention to relinquish the exploration permit). Furthermore, landowners would no longer be able to appeal from the relinquishment decisions initiated by the permit holder.
- When an operating mine is extended with a new mining area or auxiliary area, the mining safety permit procedures are simplified or updates may not be required at all.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Mainly the Canadian CIM and Australian JORC systems.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Finland has a system according to which the discoverer basically can acquire the rights to the minerals in the ground even if the surface rights are held by the state or a third party. TUKES registers reservations for areas on which exploration permits can be filed and issues exploration and mining permits subject to the legal requirements being met. Currently less than 2 per cent of the total area of Finland is subject to exploration or mining permits or applications of the foregoing.

Exploration

It is possible for private parties to engage in exploration in the form of prospecting work without any permit on areas where the surface rights are held by someone else (private or state). This right is comparable with rights of public access. It is also possible to carry out exploration without an exploration permit but with a landowner's permit, but this does not give any priority to acquiring the exploration or mining permit for the target area.

An exploration permit, granted by TUKES, is always required if the activity poses any risk to people's health, general safety or other industrial and commercial activity, or any deterioration of the landscape or nature conservation. Without exception, an exploration permit is required if the prospecting is targeted for locating or exploring a deposit containing uranium or thorium.

The exploration and mining rights can be acquired by private parties. A potential reservation followed by an exploration or mining permit, or both, gives the priority and title to the minerals in the target area.

There are increasing numbers of reservations, exploration permit areas and mining permit areas but there are still large areas with good or moderate discovery potential available for interested parties.

Mining

A mining permit gives the right to develop a mine and to carry out mining activities. The holder of a mining permit has the right to exploit mining minerals found in the mining area, organic and inorganic surface materials, waste rock and tailings generated as by-products of mining activities. In addition, the holder may exploit other materials belonging to the bedrock and soil of the mining area to the extent that their use is necessary for the purposes of mining operations in the mining area. The mining permit also entitles its holder to exploration within the mining area. The procedures for establishing a mining area

involve the claiming of rights to land use and of other special rights to the areas required for the mining area and auxiliary area of a mine, the determination of compensation and the conducting of required measures of land subdivision.

The decision to grant a mining permit is based on a comprehensive approach, on the one hand taking account of the needs of prospecting and mining, and on the other hand, considering factors such as the status of landowners and private parties sustaining damage. Moreover, impacts of activities on the environment, landscape, land use and safety, the economic use of natural resources and nature conservation, radiation safety and the reconciliation of user needs in different areas need to be taken into account.

Very often the mining company acquires the title (surface rights) to the land through voluntary acquisitions. Should this not be the case, the government may grant a permit to utilise an area for mining even though the surface rights are held by someone else (redemption permit for a mining area). The formal prerequisite for this is that the mining project is in the public interest.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The Geological Survey of Finland (GTK) is the national geological organisation as well as the national geoscience centre responsible for collecting and maintaining geoscientific data in Finland. The GTK's key activities are the mapping and evaluation of natural resources and research and development. In addition to national mapping and geosciences information related to bedrock geology, geophysics, geochemistry and mineral occurrences, the GTK evaluates the ore potential of geological formations to encourage further evaluation by the private sector. All discoveries are tendered to the private sector through the Ministry of Employment and the Economy, and the government has no role in the downstream development of the mineral deposits.

The GTK's databases cover the entire country with exceptional quality and include:

- high-resolution, low-altitude airborne geophysical surveys (to a 40-metre altitude, with 200-metre line spacing);
- regional till geochemical sampling (one sample per 4km^2);
- in-bedrock mapping at a 1:100,000 scale; and
- quaternary geology mapping at a 1:20,000 scale.

Data sets are available in digital geographic information systems form and selected ones are viewable on the GTK's active map explorer web page (http://gtkdata.gtk.fi/mdae/index.html). This web service provides up-to-date information on land tenure, exploration reports, drilling, mines and undeveloped deposits, mineral indications data and bedrock age data in Finland.

Each holder of an exploration permit must submit an annual report to TUKES on the exploration activities that have been carried out and their main results. The report must be submitted in electronic format on the template provided by TUKES. The annual report is divided into two parts, of which part 1 (costs and investments) must be delivered to TUKES during the month of February or March and part 2 (geological surveys) by June.

Once an exploration permit has expired or been cancelled, the exploration permit holder must, within six months, submit to TUKES an exploration work report, the material information pertaining to the exploration and a representative set of drill core samples. The drill core samples are ultimately archived at the drill core archive of the GTK.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Right to carry out prospecting work

In Finland, based on the principle of public access, everyone has the right, even on another's land, to conduct geological measurements and make observations and take minor samples in order to find mining minerals, provided that this does not cause any damage or more than minor inconvenience or disturbance (prospecting work). There are, however, some limitations related to restricted areas.

Prior to commencement of sampling, the person or company has to submit a notification to the owner and holder of a real estate in the prospecting area, which contains contact details and details of the prospecting area, methods used and targeted mining minerals as well as other information set out in the Mining Act.

A private party may make a reservation notification and acquire an exploration or mining permit on a first come, first served basis. Exploration or mining permits are granted if the applicant proves that the conditions set out in the Mining Act are met and there is no impediment stipulated in the Mining Act to the granting of the permit. However, regardless of an impediment specified in the Mining Act, a permit may be granted if it is possible to remove said impediment through permit conditions or by decreasing the size of the area.

Reservation

The reservation notification is filed in written form with TUKES. The notification must include information on the notifier, the target area (reservation area) and a compilation of an exploration plan and other measures in preparation for the exploration permit application.

The reservation notification may not concern an area that forms part of an exploration area, mining area, or gold panning area or is located at a distance of less than 1 kilometre from such an area, belonging to a party other than the applicant on the basis of a permit referred to in the Mining Act. In addition, the reservation notification cannot concern an area that has previously been a reservation area until one year has passed since the expiry or cancellation of the reservation decision.

The reservation gives priority to get an exploration permit and is valid for a maximum period 24 months, within which time an exploration permit application must be filed or the reservation will expire. Should the reservation permit holder carry out small-scale prospecting work, the holder has to give prior notice of prospecting to the landowner of the prospecting area as mentioned above. A reservation does not entitle to exploration, unless the landowner in question gives his or her permit. A reservation cannot be assigned to another party.

Exploration permit

Exploration permits are granted on a first-to-file basis by TUKES, taking into account that a reservation gives priority. Mining permits for uranium and thorium are granted by the Finnish government.

Basically, if exploration cannot be carried out as per the abovementioned prospecting work and the property owner does not consent to exploration, a permit granted by TUKES (exploration permit) is needed. An exploration permit is also always required if the exploration could cause harm to people's health or general safety, damage to other industrial and commercial activity, or any deterioration in value related to the landscape or nature protection values. Further, an exploration permit is required if the targeted minerals are uranium or thorium.

The application for a permit must include reliable information on the applicant meeting the prerequisites for carrying out operations commensurate with the following:

- the permit sought;
- the area and parties concerned;
- a preliminary assessment of the mining minerals in the area, and the basis for such an assessment;
- plans concerning the activities;
- the environmental and other impacts of activities; and
- aftercare measures.

The exploration permit also includes provisions on the following (among others):

- the times and methods of exploration surveys and the equipment and constructions used;
- measures to diminish harm caused to reindeer herding in a special reindeer herding area;
- obligation to report about exploration activities and their results;
- post-exploration measures;
- the waste management plan for extractive waste; and
- collateral securing the post-exploration measures.

The holder of an exploration permit has an obligation to carry out prospecting or a survey. TUKES can decide that an exploration permit will expire if operations have been interrupted continuously for a minimum of one year for a reason given by the permit holder. The person who, in connection with exploration, intends to damage or cut down trees has to inform the landowner in advance. Damage and harm arising from exploration has to be compensated in full. For an exploration permit, the permit holder must pay an exploration fee (see also question 19) and compensate landowners or owners of the water areas for all damage and harm caused to them. The holder of the exploration permit must deliver to the mining authority a detailed annual report on the exploration work carried out in the permit area. After the termination or expiry of the exploration permit, the permit holder must immediately restore the exploration area to the condition required by public safety, remove temporary constructions and equipment, attend to rehabilitation and tidying of the area and restore the area to its natural status as far as possible. The permit holder must also submit to the mining authority, within six months, an exploration work report, the information material pertaining to the exploration and a representative set of core samples accompanied by the drill logs.

Mining permit

Mining permits are, as exploration permits, also granted on a first-to-file basis by TUKES. However, an exploration permit holder has priority to the mining permit in respect of the same area. Mining permits for uranium and thorium are granted by the Finnish government.

The establishment of a mine and undertaking of mining activity are subject to a mining permit granted by TUKES. Even when the mining permit application relates to an area for which an exploration permit has been granted, the mining permit is a new permit and subject to new scrutiny of the project on its merits. The prerequisites for getting a mining permit are that the deposit is exploitable in terms of size, ore content and technical characteristics.

A mining permit entitles the holder to exploit the mining minerals found in the mining area, the organic and inorganic surface materials, excess rock, and tailings generated as a by-product of mining activities and other materials belonging to the bedrock and soil of the mining area to the extent that the use of these is necessary for the purposes of mining operations. The mining permit also entitles the holder to carry out exploration within the mining area.

The mining permit holder is obliged to ensure the following:

- that the mining activities do not cause damage to people's health or danger to public safety;
- that mining activities do not cause significant harm to public or private interests;
- that they reasonably avoid the infringement of public or private interests in relation to the overall costs of the mining operations;
- that excavation and exploitation do not entail obvious wasting of mining minerals; and
- that potential future use and excavation work at the mine and deposit are not endangered or encumbered.

The mining permit holder is obliged to submit an annual report to the mining authority on the extent and results of the exploitation of the deposit and to inform of any essential changes in the information on mineral resources.

In the mining permit, TUKES sets a time limit during which the permit holder has to start the mining activity or such preparatory work that indicates that the permit holder is seriously aiming at actual mining operations. If the time limit is forfeited, TUKES may decide that the mining permit should expire.

Finally, when the mining activities have ended the mining permit holder has two years to bring the mine and any auxiliary areas up to the standards required by public safety and to make the necessary rehabilitation, cleaning and landscaping measures. This includes the measures that have been set out in the mining and mine safety permits.

Redemption permit for a mining area

In most cases the mining company acquires the title to the surface rights through a voluntary purchase. However, should the applicant of the mining permit not hold the surface rights, the applicant has to obtain, from the government, the right to utilise the area for mining (a redemption permit for a mining area). The granting of such permit is subject to the mining project being based on public need and the mining area meeting the requirements set forth in the Mining Act (see question 15).

The holder of the mining permit must also pay an excavation fee to the holders of the surface rights as well as compensate in full for damages or harm to the landowners (see question 19).

11 What is the regime for the renewal and transfer of mineral licences?

Renewal of an exploration permit

An exploration permit is granted for a fixed term of up to four years. The permit can be extended for up to three years at a time for a total period of 15 years. The extension is subject to the following requirements:

- the exploration must have been effective and systematic;
- the determination of the exploitability of the deposit requires follow-up research;
- the permit holder has complied with the terms of the permit; and
- extending the permit does not cause unreasonable harm to private or public interest.

Mining permit

A mining permit is, as a rule, granted until further notice. A permit can also be granted for a fixed term only where there are compelling reasons that relate to, for example, the size and qualities of the deposit and the ability of the applicant to start the mining operation. The term may not exceed 10 years from the date on which the permit gained legal force.

The Mining Act requires TUKES to review the terms of the mining permit every 10 years even for those permits that are valid until further notice. However, the revision of the terms may not materially lower the profit that is derived from the mine.

Transfer of permits

A reservation (for an exploration permit) cannot be transferred.

An exploration permit and a mining permit are transferable. Moreover, an exploration permit application and a mining permit application can be transferred. The transferee has to meet the same legal requirements that are detailed in the Mining Act for a permit holder. For the production of uranium or thorium, a permit pursuant to the Nuclear Energy Act is also required.

The transfer is subject to the approval of TUKES, which generally has to approve the transfer if the formal requirements have been met. However, TUKES may decline to approve the transfer if, for example, the transferee has earlier failed to comply with requirements of the Mining Act.

Change-of-control situations

A change of control in the permit holder (eg, the shareholder of a permit holder company sell its shares to another) does not have to be approved by TUKES in order for the permit to continue to be valid. However, as the exploration permit has a limited term and also because the terms of a mining permit are revised every 10 years, the change of control may lead to changes in the terms of the permit. This could be the case if, for instance, the ability of the permit holder to fulfil the requirements of the permit changed, owing to the change of control.

12 What is the typical duration of mining rights?

See question 11 in respect of duration and extension of mining rights.

TUKES may cancel an exploration permit, mining permit, or gold panning permit if:

- in the permit application, incorrect or incomplete information has been given that essentially affected the conditions under which the permit was given, or the permit consideration in other ways;
- the permit holder no longer meets the requirements for granting of a permit; or
- the permit holder has materially neglected or violated the obligations, restrictions, or permit regulations laid down in the Mining Act.

If the deficiencies, violations or neglect can be corrected or are insignificant, the Mining Authority shall, before making a decision meant above, set a time limit for the permit holder in question to rectify the defect, violation, or neglect.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Parties eligible to apply for an exploration or mining permit are the parties entitled to operate a business in Finland, such as:

- any natural person domiciled within the European Economic Area (EEA);
- any Finnish corporation or foundation; and
- any foreign corporation or foundation that has been established in accordance with the laws of a state belonging to the EEA and that has its registered office, central administration or principal place of business in a state belonging to the EEA and has registered a branch office in Finland.

The National Board of Patents and Registrations may grant a permit to conduct business operations governed by the Mining Act to another natural person as well as to a foreign corporation or foundation. Such a permit is also required for a general or limited partnership unless at least one of the partners in the general partnership or one of the liable partners in the limited partnership is a natural person or corporation that fulfils the above requirements. In addition, a governmental agency may apply for such permits.

In practice, exploration and mining companies usually set up a Finnish subsidiary in the form of a limited liability company through which the activities are carried out.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The supervision of the granting of mining rights, their validity and the compliance with the Mining Act by the holders of the mining rights, is carried out by TUKES, whose decisions can be appealed to the administrative courts and, given that a retrial permit is granted, further to the Supreme Administrative Court. Damage compensation claims and injunctions or other temporary procedural remedies are handled by the local district courts as the first instance. Punishments under the penal code relating to obligations set forth in the Mining Act are also handled by the district courts in the first instance.

Finland is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) and hence foreign arbitration awards with respect to countries belonging to the New York Convention, as a rule, are enforceable in Finland.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Surface rights available for private parties are ownership of land, tenancy or usufruct rights to the surface.

Ownership of land is acquired by purchasing the property by executing a written purchase agreement that must be executed in a specified form. The landowner(s) of a mining area are, however, not under an obligation to sell their property to the mining right holder.

Tenancy is agreed with the landowner in a tenancy agreement, which has to be made in writing and signed by both parties. It is also possible to agree with the landowner on the right to take extractable land resources from a property. The right to utilise extractable land resources from a property can also be carried out by including in the mining permit such areas where there are land resources that are suitable for filling in during mining operations or other material that is required as supplementary material in the processing of the mined products.

Should the mining company not purchase the surface rights, it can obtain usufruct rights to the area needed for mining activity. This takes place either through contractual means or by applying to the government for a redemption permit for a mining area. A redemption permit must be based on a public need and therefore these are not automatically granted. This public need is assessed on the basis of the impact of the mining project on the local and regional economy and employment and society's need for the raw material.

In this case, the title to the land does not transfer to the mining company. However, if the mining area or its auxiliary area causes major inconvenience for the utilisation of the area, the owner of the surface rights may demand that the whole property or a part thereof is redeemed by the holder of the mining permit. The principle of full compensation to the landowner is the rule. There are also some other situations when the owner of the surface rights may demand redemption. Usually, if possible on reasonable terms, the mining companies purchase the surface rights from the landowner through voluntary acquisitions.

The general rule in Finland is that the owner of a property has to use that property in a way that does not cause inconvenience to neighbours. The Mining Act obliges the holder of the mining rights to compensate the landowners, tenants and other parties for damage and inconvenience, whether temporary or permanent, caused by mining or exploration operations.

In determining the compensation payable to the holders of the surface rights, the principles applicable to compensation in the event of expropriation of property for general needs are used, which generally require full compensation to be paid.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The government can participate in mining projects, for example, through voluntary investments in mining companies. The government cannot demand a stake in a mining project if the stakeholders of the project do not agree to this. Mining companies do not have to be listed in Finland. Many companies are listed abroad, such as in Toronto or London and may or may not have a dual listing at the OMX Nasdaq Helsinki Exchange.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are no provisions on government expropriation of licences.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Prospecting work and the granting of an exploration permit or gold panning permit is prohibited in the following areas:

- on the ground of a cemetery, or within 50 metres of such an area;
- in an area used by the Finnish Defence Forces or any area controlled by the Border Guard where movement is restricted or prohibited, or within 100 metres of such an area;
- in an area where movement is restricted or access denied to outsiders;
- on a traffic route or passage in public use;
- within 150 metres of a building intended for residential or work use, or comparable space;
- in an area in horticultural use;
- within 50 metres of a public building or utility, or either a power line with a voltage of over 35,000 volts or an electricity substation; and
- in any other similar area, designated for special use.

However, prospecting work as well as exploration may be carried out in an area referred to above, except for cemeteries, with the consent of the authority or institution competent in the matter, or that of the relevant holder of rights.

Moreover, there are limitations with regard to certain traffic areas, which in certain cases require the consent of the authority or institution competent in the matter, or that of the holder of the rights for exploration whenever the area in question is a street area or market place, a road area of a highway, an airport or another area in aviation use, a railway area, a canal used for public traffic or another such traffic area, or an area within 30 metres of any of the above-mentioned traffic areas. There are also certain limitations with regard to areas that have previously been covered by an exploration permit or mining permit.

The mining area and the auxiliary area to a mine should, in principle, not be located in an area for which an exploration permit or a gold panning permit cannot be granted, based on the above limitations. However, a mining permit may be granted regardless of an impediment referred to above if the mining area cannot be otherwise implemented as a continuous area of a size and shape that facilitates compliance with requirements concerning safety, location of mining activities and mining technology, and the area in question is not cemetery or an area of the Finnish Defence Forces or any of the special traffic areas referred to above.

Mining activities are also basically prohibited in national parks and nature reserves, historical relics and within 200 metres of nationally important facilities.

Finally, exploration activities in a Natura 2000 area are subject to particular scrutiny. TUKES may not grant a permit for an exploration project, if the exploration to be carried out indicates that the project would have a significant adverse impact on the particular ecological value for which the site has been included in, or is intended for inclusion in, the Natura 2000 network.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Private parties carrying out mining activities in Finland are subject to income taxes, value added tax and exploration and excavation fees payable to the landowners. Also, private parties have to pay possible transfer-of-assets tax and real estate tax in the event that such party acquires real estate in Finland.

Income taxes

Income tax is payable on the party's taxable income, calculated in accordance with the relevant tax regulations. Currently, the corporate income tax rate is 20 per cent.

Value added tax (VAT)

VAT is payable on sold goods and services, unless such goods and services fall under a specific exception. The general VAT rate for goods and services is currently 24 per cent, but there are some exceptions relating to certain products and services. VAT is payable by the seller, however, the seller may deduct the input VAT of purchases of goods and services for business purposes, if another VAT taxpayer has supplied them. Should the amount of VAT paid by the VAT taxpayer for the goods and services purchased for the business operation exceed the amount of VAT payable for the sales of goods and services, the VAT taxpayer will be refunded the excess, provided that the purchased goods and services relate to business activities from the sales of which VAT is payable.

Exploration fees

The holder of an exploration permit shall pay annual compensation (exploration fee) to the owners of land included in the exploration area.

The annual amount of the exploration fee per property is:

- €20 per hectare for each of the first four years of validity of the exploration permit;
- €30 per hectare per year for the fifth, sixth and seventh year of validity of the exploration permit;
- €40 per hectare per year for the eighth, ninth and 10th year of validity of the exploration permit; and
- €50 per hectare per year for further years of validity of the exploration permit.

The exploration fee for the first year has to be paid within 30 days of the date the exploration permit gains legal force. The fee for the following years is paid at the anniversary of the first payment.

In addition to the exploration fees, the exploration permit holder has to compensate the landowners and owners of the water areas for all damages caused by the exploration work carried out by the exploration permit holder within the exploration permit area. The exploration permit holder has to deposit a collateral for the purpose of offsetting potential damage and inconvenience and performing after-care measures, unless this is deemed unnecessary in view of the quality and extent of the operations, the special characteristics of the operating area, the permit regulations issued for the operations and the applicant's solvency. The collateral is issued separately for each exploration company taking into account all of the company's exploration permits (or permits to be awarded) and, in practice, the amount is calculated based on the surface area of the land subject to exploration permits.

Based on TUKES' decisions, the amount of the collateral tends to be set as follows:

- €10,000 if the total of all exploration areas is less than 1,000 hectares;
- €20,000 if the total area is between 1,001 and 10,000 hectares; and
- €30,000 if the total area is between 10,001 and 50,000 hectares, and so on.

Should test mining or other similar exploration activities using heavier machinery already be planned in the exploration phase, the collateral is likely to be higher than what has been mentioned above.

Under the previous Mining Act, if the owner of land requested, the claim holder had to provide to the landowner in question a collateral before the commencement of the exploration work. Many landowners, however, did not require a collateral, so in real terms the new Mining Act has meant increased obligations to exploration companies.

Concession and mining fees

If the mining permit holder does not own the surface rights to the mining area (as sometimes is the case), the mining permit holder has to pay an annual compensation (excavation fee) to the landowners.

The amount of the excavation fee per property is €50 per hectare per year. In addition to that, the excavation fee has a variable part of 0.15 per cent of the calculated value of mining minerals included in the metal ores that are excavated and exploited in the course of the year. The calculation is based on the average price of the exploited metals included in the ore during the year and the average value of other products exploited from the ore during the year.

If the permit authority postpones the expiry of the mining permit (before mining activities have started or if they have been suspended) the excavation fee is doubled to €100 per hectare until mining activities commence or resume.

The obligation to pay an excavation fee starts when the mining permit becomes legally valid. The obligation to pay elevated compensation starts when the decision on the new date for commencing mining activity, or continuing activities, becomes legally valid.

For the purpose of the verification of the excavation fee, the mining permit holder has to submit the relevant information to the mining authority no later than on 15 March in the year following the year for which the fee is to be paid. The mining authority confirms the amount of the excavation fee annually.

The excavation fee must be paid no later than 30 days from the date TUKES' decision on the fee enters into force.

The government Decree on Mining contains more specific provisions on the grounds for determining the excavation fee as well as on the information to be submitted to TUKES for the purpose of confirming the fee.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

There are certain governmental subsidies available for the development areas in Finland.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Finland is a country of low political risk, so no stabilisation agreements are available. The permitted range of VAT is subject to EU rules.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

When only permits (licences) are transferred, the transaction can be subject to VAT (which the purchaser of the permits can in many cases deduct (see question 19). Further, the profit made in connection with the selling of the licences is subject to capital gains tax, which, for companies other than corporations, is currently 30 per cent for a capital gain not exceeding €30,000 and 34 per cent thereafter. Capital gains for corporations are usually taxed in connection with their normal corporate taxation. The corporate tax rate is currently 20 per cent.

When, for instance, a junior company is acquired by a mining company through a share transaction, the transaction is usually subject to a 1.6 per cent asset transfer tax and can result in capital gains taxation on the profit that the sellers of the shares make. However, if the junior company whose shares are being sold is owned by a foreign parent

company and neither the junior's parent company nor the purchaser have permanent establishment in Finland, the share transaction is exempt from the asset transfer tax.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no such distinction. However, see question 13.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The most common business structure used to carry on mining activities in Finland is a limited liability company. Foreign companies may also operate through branch offices. Joint ventures (usually in the form of a limited liability company) are also used for cooperation between companies in exploration activities.

26 Is there a requirement that a local entity be a party to the transaction?

The party holding the mining rights under the Mining Act needs to be either a natural or a legal person (corporation) with permanent residence within the EEA or a branch of an association or foundation established in a member country of the EEA. For any other person or foreign corporation or foundation, see question 13.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Finland has entered into a number of tax treaties, which may affect the structuring of foreign entities' operations in Finland. There does not, however, seem to be one preferred way to structure the operations and companies have used a variety of structures.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Most of the parties operating in the mining business in Finland are Finnish subsidiaries of foreign companies, the activities of which are funded through their parent companies by the capital markets in Australia, Canada, Sweden or the UK, or subsidiaries of international mining companies for which the funding comes from the income from the mining company's own production. It has been very difficult to collect private funding for mining operations from the capital markets in Finland as the mining financing sector is not as developed as in many other countries. Lately, however, Finnish investors and banks have been more interested in the possibilities of investing in or financing mining operations. The government-owned investment company, Finnish Industry Investment, has invested in exploration and mining companies whose projects are in Finland and Finnish banks have recently shown an interest in mining activity with some investing in it. Also, some Finnish pension funds have invested in mining companies.

Certain public funding, such as investment grants or development grants for small and medium-sized companies, may be granted by the ELY centres for exploration and mining operations. The Finnish Funding Agency for Technology and Innovation and the state-owned financing company, Finnvera, may also provide funding or guarantees, or both, for exploration and mining companies operating in Finland. Such funding is subject to applicable preconditions, and in addition the authority can, based on the law, use its discretion when deciding on the grants, loans or other public funding. Certain grants for employment may also be available through the employment administration.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Yes, see question 28.

30 Please describe the regime for taking security over mining interests.

The holder of an exploration permit may pledge its preferential right to a mining permit and the holder of a mining licence may pledge the right to exploit the minerals. The pledge becomes effective when TUKES has received a written notification of said pledge. Naturally, a mining company may also pledge other assets.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Generally, there are no special restrictions for the importation of mining machinery and equipment. There are certain specific laws that may affect the importation of machinery and equipment or services required in connection with mining activities such as the importation of explosives, for which a separate permit is needed.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Orgalime is widely recognised and used in Finland. Additionally, engineering companies use the Nordic Standard Terms of Agreement NL01 for business between Nordic countries, while the Orgalime S2000 and S2012 terms are used for wider international business. Additionally, the Finnish general terms IT2015 ELT – Special Terms and Conditions for Deliveries of Equipment, used together with the IT2015 YSE General Terms and Conditions, are used widely for IT-related agreements in business between Finnish companies and sometimes also in international business.

Arbitration clauses are very common in equipment supply agreements. Arbitration under the Arbitration Rules of the Finland Chamber of Commerce is the most common form of dispute resolution when the parties are from different countries and the Finnish party can choose the dispute resolution forum.

Should equipment (or mining minerals) need to be transported, the Road Transport Contract Act, the Railway Transport Act and Sea Act are applicable. The Road Transport Contract Act is based on the international CRM Convention (1956). The Sea Act takes into account the Hague (1924), Hague-Visby (1968) and Hamburg (1978) Conventions. The said domestic legislation is to some extent carrier-friendly.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Commodity minerals are generally not subject to export restrictions. There are certain specific regulations, such as regulations regarding precious metals, which have to be followed in order to bring such metals to the market. Export of uranium and thorium is more specifically regulated and subject to a number of permits.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no specific restrictions or limitations in the mining laws of Finland concerning the import of funds for mining activities or the use of the proceeds.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Environmental laws

The Ministry of Environment, together with subordinated regional ELY centres administer the laws relating to the environment.

The revised environmental protection legislation came into force on 1 September 2014 and some of its provisions during 2015. The revised Environmental Protection Act will eventually be implemented in three phases. The new law will implement, among other things, the EU Directive on Industrial Emissions on a national level in

addition to streamlining the environmental permit granting process and its supervision.

The Water Act controls the use of water resources and structures built along waterways.

The Waste Act prevents the generation of waste and reduces its hazardous or harmful features, promotes waste recovery and other organisation of waste management, prevention of littering and cleaning of sites that have become littered.

The Chemicals Act prevents health and environmental harm and danger of fire and explosions caused by chemicals.

Health and safety laws

The Ministry of Labour, the Ministry of Social Affairs and Health and the Units for Safety at Work administer the health and safety laws.

The Safety at Work Act sets out many standards, according to which an employer shall monitor and take care of the health of every employee. An employer shall also assess the health risks of an employee that are caused by conditions at any particular workplace and remove or minimise those risks.

There are many statutes concerning safe conditions in the workplace and how to handle explosives and various hazardous tools such as laser equipment, according to standards as set out by such statutes.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The nature and scope of the environmental permitting and review process is dependent on the nature of the project and the environmental effects thereof. A mining project requires an environmental permit. Before applying for an environmental permit the applicant may need to carry out an assessment of environmental impacts that is handled by the competent ELY centre – a process that usually takes about one to two years. The environmental permit is granted by the competent AVI, based on a written application that includes a large number of statements, descriptions and other related material on the project. The permits required by the Water Act are often applied for and handled simultaneously with the environmental permit. In addition to the actual review of the permit application during the application process, many parties (such as the local municipality, the owners of real estates and the reindeer owners, if the project is within a reindeer management area) are heard. According to the environmental authorities, obtaining an environmental permit for a new project should take about 10 months, but generally takes about 18 months because in most cases there is a need to ask the applicant to provide further information. The actual length of the granting process depends on the size of the project, tempering and releases, objections to the project and further clarification possibly required by the authorities.

During the exploration phase, it may be necessary for the holder of the exploration permit to make a notification of the exploration work to the environment authorities in case the exploration work planned to be carried out may have a negative impact on the environment. Such notification is handled by the relevant regional environmental permit authority or the local supervising authority (depending on the nature of the actions to be carried out) that may set certain limitations and obligations that need to be followed by the exploration permit holder in connection with the exploration work to be carried out, otherwise the exploration work may be prohibited.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

When the holder of a mining permit relinquishes or loses the mining right, the area covered by the mining permit will be returned to the holder of the surface rights without compensation (assuming that the mining company has not purchased the surface rights). The holder of the mining permit may, however, keep the products of the mine, the buildings built on the surface and equipment in the area for two years. Unless removed within that time period, they become, without compensation, the property of the holder of the surface rights.

In connection with the granting of the mining permit, the permit holder will have to deposit a collateral to the mining authority for the purpose of termination and aftercare measures of mining operations that is sufficient in view of the nature and extent of mining activity, the permit regulations issued for the activity and collateral demanded by virtue of other legislation.

After relinquishing or losing the mining permit, the holder has to, without delay, secure the area in such a way that it fulfils the requirements for safety in general. The mine closure and remediation questions are handled before the commencement of any mining actions as a part of the environmental permit process. The environmental permit includes terms regarding the closure of a mine such as restoration of the environment and prevention of tampering. Such terms, generally, will provide for obligations for removal of buildings, equipment and infrastructure, handling of the waste materials and restoration of the landscape, including the revegetation. The environmental permit includes the terms for closure and restoration, based on which, the costs for such operations can be estimated to a general level. The final closure and restoration activities are confirmed in a closure plan, which has to be delivered for approval to the environmental permit authority prior to closure of the mine.

In connection with the granting of the environmental permit the mining company is required to provide a security for the fulfilment of the closure and restoration obligations. The amount is set by the authorities and the security is generally required in the form of a bank guarantee or bank deposit.

38 What are the restrictions for building tailings or waste dams?

The tailing and waste dam safety requirement are defined in the Dam Safety Act (Patoturvallisuuslaki 494/2009, as amended) and the Government Decree on Dam Safety (319/2010). The act and the decree require that a person planning the construction of the dam as well as the person in charge of the use of dam, surveillance and inspections has the requisite experience taking into account the quality of the dam and danger of disaster. Before a dam is taken into use, it needs to receive a risk classification, and the construction plans of dams and ponds, a risk assessment report and surveillance programme all need to be approved by the environmental permit authority. For dams that may cause substantial danger to life or health of individuals (Class 1), a more detailed risk assessment report is required. These are preconditions for obtaining an environmental permit, the receipt of which is required to carry out mining activities (see question 36).

A dam owner has a general obligation to design and construct a dam in such a way that its use does not constitute any safety hazard. This obligation includes repair and alteration works to the dam. The designer of the dam needs be professionally qualified and the persons in charge of the operation and management of the dam need to have the necessary knowledge.

No specific mine safety permit is required for the dam. However, compliance with the mine safety legislation is required as it is a prerequisite for getting the environmental and other permits for constructing the dam.

The owner of the dam is primarily responsible for the surveillance of the dam. Monitoring frequency depends on the dam. Monitoring can be continuous, weekly or take place over three-month intervals, for instance. Dam inspections include inspections while under construction and when it is taken into use, annual inspections and periodic inspections. The owner of the dam must:

- inspect the condition and safety of a Class 1 and 2 dam at least once a year, and notify the written report prepared on the inspection of a Class 1 dam to the dam safety authority;
- organise a period inspection of Class 1–3 dams at least every five years and, where necessary, more frequently, in which the dam safety authority and rescue authorities have the right to participate; and
- notify via a the written report prepared on the periodic inspection to the dam safety authority.

Emergency planning for dam accidents and rescue operations in the event of an accident are the responsibility of the regional rescue authorities, as set forth in the Dam Safety Act and Rescue Act (Pelastuslaki 379/2011, as amended). Any requirements on alarm systems, emergency drills and responsibilities between the company and the authorities regarding the rescue of people are determined by the regional rescue authorities on a case-by-case basis. The owner of the dam must:

- notify the dam safety authority of emergency calls and exceptional situations related to dam safety;

Update and trends

The biggest event in mining in 2016 was the turnaround of the former Talvivaara multimetallic mine under the new owner Terrafame. The mine was under the threat of closure by its sole owner the Finnish government, but after the mine's water balance was brought under control, the production was successfully ramped up and a new investor, Trafigura, was found to secure financing, the future of the mine looks promising.

The second big event recently was Aurion Resources Ltd's discovery of a new, bonanza-grade gold mineralisation on its Risti Project, which is located in the Central Lapland Greenstone Belt.

On a more general scale, according to the Fraser Institute's Annual Survey of Mining Companies 2016, Finland ranks for the fifth year in the top 10 in the world and is the most attractive country for mining investment in Europe.

The total investments in mining in mining were 54 per cent, excavation 31 per cent and drilling 37 per cent up compared to the year before, and the companies reporting to TUKES, the mining authority, have been budgeting strong growth for 2017. So, 2017 seems set to become another very strong year for Finnish mining and exploration.

- assist the rescue authorities in performing rescue activity together with the dam safety authority; and
- with due consideration of the dam hazard, take the necessary actions to prevent a dam accident and to limit the damages caused by an accident.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Mine safety matters are regulated in the Mining Act and more specific provisions concerning mining safety permit are laid down in a government Decree on Mine Safety (see also question 35).

The general labour laws of Finland are applicable to the mining industry. The principal law regulating labour relations is the Employment Contracts Act. There is also a generally binding collective bargaining agreement applicable to the mining industry.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The government Decree on Mining Waste, the Environmental Protection Act and Waste Act set out the principal provisions on the management and recycling of mining waste. Relevant permit conditions on the management and recycling of mining waste are given in the environmental permit. Should the exploration phase include test quarrying or other measures than mere drilling and generating extractive waste, the Mining Act requires that an exploration permit holder must also prepare a mining waste management plan, unless such plan is already required under the Environmental Protection Act.

As described in question 8, a mining permit entitles the holder to exploit the following:

- the mining minerals found in the mining area;
- the organic and inorganic surface materials, excess rock, and tailings generated as a by-product of mining activities; and
- other materials belonging to the bedrock and soil of the mining area, insofar as the use thereof is necessary for the purposes of mining operations in the mining area.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Generally, a non-Finnish person who intends to engage in paid employment in Finland is required to have a residence permit. A person engaged in an independent business or profession in Finland must have a residence permit for a self-employed person.

However, EU citizens and citizens of Iceland, Liechtenstein, Norway and Switzerland can freely work in Finland if the work lasts for a maximum of three months. After that, they must register their right to reside in Finland, but they do not need a special residence permit. The employee must go to the local police department to register his or her right to reside in Finland. Unless it is withdrawn, registration by a person with the right to reside in Finland is valid until further notice.

Foreign employees who are non-EU citizens and equivalent persons need a residence permit for an employed person if they intend to work in Finland. An alien who has entered the country either with or without a visa is not allowed to engage in paid employment in Finland but has to apply for a residence permit. A residence permit can be granted on the basis of either temporary work or work of a continuous nature.

In granting the permit, the needs of the labour market are taken into consideration. The policy aim of the residence permit is to support the possibility of those who are in the employment market to gain employment. Thus, the availability of the workforce in Finland is also supported. To grant a residence permit for an employed person, the foreign national's means of support must be guaranteed. The employment office will estimate both the labour requirements and the sufficiency of the means of support.

As to Finnish citizens, there are no particular mining law-related restrictions in connection with mining activities. As a rule, an employee must be 18 years or older.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining Act is the main CSR law applicable to the mining industry.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

In respect of the Sami homeland, the mining authority TUKES is obliged to establish what the effects of exploration or mining would be on the rights of the Sami people to maintain and develop their own language and culture. TUKES is also obliged to consider what measures would be required for decreasing and preventing such damage. In this context TUKES needs to cooperate with the Sami Parliament, the local reindeer owners' associations, the competent local administration as well as with the mining permit applicant – the same basically applies for the Skolt people.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Section 8J of the UN Convention on Biological Diversity and the International Covenant on Civil and Political Rights are applicable.

Finland has not ratified the ILO 169 Indigenous and Tribal Peoples Convention of 1989.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Finland is a party to the UN, EU and OECD anti-corruption and bribery conventions and the local legislative regime was revised in 2010 in correspondence with the recommendations of the Group of States on Corruption. Under the Criminal Code of Finland, the acts of bribery and the acceptance of a bribe in business are considered offences. Legal entities may be penalised by a corporate fine and individuals may be prohibited from engaging in business in connection with bribery offences to name a few penalties. Furthermore, the provisions regarding anti-money laundering and accounting offences complement the local sanctions regime against corruption and bribery. As part of the due diligence review of a target mining or exploration company, the buyer should consider if there is a risk of potential criminal or tort liability (or reputational risks), owing to corrupt practices by the target company or its group companies. It is also important to note that Finnish anti-corruption and anti-bribery legislation may be applied extraterritorially and hence the practices of the target company's potential foreign group companies or agents should also be reviewed.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Finnish companies pay attention to the UN and EU international sanctions list concerning, among others, export and import restrictions targeted at persons and entities responsible for objectionable policies or actions.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

No. There is no need for adopting such practices as the Finnish state does not levy any royalties from the extraction of the country's natural resources. However, the Finnish state (through the Finnish Forestry Centre, being a public corporation) is a major landowner in several parts of the country and therefore is often entitled to exploration fees from exploration companies (see question 19). The holder of an exploration permit shall annually disclose the total amount of paid exploration fees to TUKES.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

The Act on Monitoring of Corporate Acquisition gives the government the authority to restrict the transfer of control of companies to foreign nationals should there be a vital national interest.

The act is mainly aimed at change of control situations related to companies in the defence industry and it is very unlikely that the act would be applied in the case of mining sector transactions.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Finland has entered into certain international treaties that apply directly to the mining industry, such as the Convention Concerning Safety and Health in Mines. There are also several other conventions and treaties that relate to the mining industry, for example, through employment and environmental issues.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Gold accounts for approximately 97 per cent of all mineral receipts. According to the Minerals Commission, total gold output in Ghana increased to 3.79 million ounces in 2016, compared with 3.6 million ounces in 2015.

This 5 per cent increase in gold production was as a result of increased purchases of gold from small-scale producers, which more than offset the reduction in gold production from large-scale mining businesses.

In specific terms, whereas the production by the large-scale producers declined by 1 per cent to 2.55 million ounces, the purchases of gold from small-scale miners increased by 20 per cent to 1.23 million ounces in 2016. In 2015, the output of the small-scale sector was 1 million ounces while that of the large-scale sector was 2.5 million ounces.

The small-scale mining sector is estimated to contribute to about 32 per cent of gold production. Notwithstanding the challenging environment, the minerals and mining industry continues to be a significant contributor to the development of the country.

Ghana maintained its position as the 10th largest producer of gold, accounting for 3 per cent of global gold output, in 2015. Purchases of diamond by Precious Minerals and Marketing Company decreased by 28 per cent and total shipments of manganese by the country's sole producer, Ghana Manganese Company, declined by 5 per cent.

The falling gold price as well as the effect of the electricity supply deficit to the mining companies partly led to a 10 per cent decline in gold exports.

According to the Ghana Revenue Authority (GRA), the mining and quarrying sector in 2016 resumed its position as the leading source of direct domestic revenue after being supplanted by the financial and insurance sector in 2015. Total fiscal receipts attributable to the mining and quarrying sector increased by 22 per cent from about US$320 million in 2015 to US$392 million in 2016. The contribution of the mining sector constitutes about 16 per cent of direct domestic revenue.

It is worth noting that the 2016 mining fiscal revenue outturn represents approximately 16 per cent of direct domestic revenue mobilised by the GRA and 5 per cent of total government revenue (including grants).

As well, the fiscal revenue performance of the mining and quarrying sector, which excludes payments of ground rent and dividends to the State, compares favourably with the oil and gas sector's contribution of 972.5 million cedi reported in the 2016 Budget Statement and Economic Policy.

The Bank of Ghana (Ghana Central Bank), indicates that the minerals sector continues to be the leading export earner and improved upon its share in gross merchandise exports from 32.2 per cent in 2015 to 45.5 per cent in 2016 whereas cocoa and crude oil contributed 22.3 per cent and 12.5 per cent respectively. This implies clearly that the proceeds from mineral exports was twice the proceeds of cocoa and more than three times that of crude oil for 2016.

In addition to the mining sector's contribution to the reduction in the depreciation as against other currencies in 2016, the 41 per cent increase in mineral exports was the primary reason for the balance of payments surplus achieved for that year. The Bank of Ghana's Monetary Policy Committee in a report in January 2017 stated that 'For the first time since 2011, the provisional balance of payments in 2016 recorded a surplus. This largely reflected an improvement in the trade balance driven by a rise in gold export receipts and a fall in oil import prices.'

The total workforce employed by mining companies was 11,628 as at the end of 2016 as compared to 9,939 for 2015 indicating an increase of 16 per cent. Out of the number of employees, 190 are expatriates and the rest are Ghanaians.

The mining sector is also a crucial contributor to the attraction of investments into Ghana. The total investments in the sector within the past 10 years have been in excess of US$10 billion. These investments came from companies engaged in gold production, exploration and support services.

2 What are the target minerals?

The main minerals extracted in Ghana are gold, diamond, bauxite and manganese. However, gold currently accounts for over 90 per cent of mining sector revenue and activity in Ghana.

3 Which regions are most active?

The Ashanti belt, which covers most parts of Ghana's Ashanti and Western regions, is most active, particularly when it comes to gold mining and prospecting. The Sefwi belt in the north-west of the Western Region and the Wa-Laura, Bole and Bui belts in the northern regions of Ghana are also very active with a lot of gold prospecting activity.

The Kibi belt in the Eastern Region is very active with diamond and bauxite mining. There is also gold prospecting activity in this area.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Ghana's legal system is based on English common law.

5 How is the mining industry regulated?

The mining industry in Ghana is regulated at the state and national levels by way of mining laws and agreements.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal laws that regulate the mining industry are the Minerals and Mining Act 2006 (Act 703) as amended by the Minerals and Mining (Amendment) Act 2015 (Act 900)(the Minerals and Mining Act), the Minerals Development Fund Act 2016 (Act 912) and the following regulations:

- the Minerals and Mining (Compensation and Resettlements) Regulations 2012 (LI 2175);
- the Minerals and Mining (Support Services) Regulations 2012 (LI 2174);
- the Minerals and Mining (General) Regulations 2012 (LI 2173);
- the Minerals and Mining (Health, Safety and Technical) Regulations 2012 (LI 2182);
- the Minerals and Mining (Explosives) Regulations 2012 (LI 2177); and
- the Minerals and Mining (Licensing) Regulations 2012 (LI 276).

These regulations (the Minerals and Mining Regulations), replaced the Mining Regulations 1970 (LI 665).

The principal regulatory body that administers these laws is the Minerals Commission.

The Minerals and Mining Act aims to:

- develop a national policy on mining and consolidate the disparate laws on mining that existed at the time; and
- increase investment by foreign mining companies in Ghana by removing the uncertainty concerning the availability and conditionality of mining rights and the bureaucratic gridlock that provided opportunities for corruption.

Mining legislation is applied equally to Ghanaians and foreign investors, except for provisions relating to small-scale mining of minerals, which is exclusively reserved for Ghanaians.

The Minerals and Mining Regulations (Health, Safety and Technical) establish environmental, safety, machinery and related guidelines for mining operations.

The Minerals Commission was established under the Minerals Commission Act 1993 (Act 450) for the 'regulation and management of the utilisation of the mineral resources [of Ghana] and the coordination of the policies in relation to them'.

The Minerals Commission is empowered by section 100 of the Minerals and Mining Act to, under the direction of the Minister of Lands and Natural Resources, supervise the proper and effective implementation of the Minerals and Mining Act and Regulations.

The Minerals Commission is required by law to formulate recommendations on mineral policy, monitor the implementation of these policies, assess 'stability agreements' and report to Parliament, as well as to collect data on national mineral resources.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

In Ghana, any of the recognised international classification systems are acceptable including those from Canada, South Africa and Australia.

The Minerals Commission, however, has guidelines for preparing feasibility study reports.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The title or ownership of all minerals, including metallic minerals, is vested in the President of the Republic of Ghana in trust for and on behalf of the people of Ghana.

Mineral rights are granted to private parties to give them the right to mine the minerals in the ground.

There are large areas such as Tarkwa and Obuasi where the mineral rights are privately held by relatively large mining companies. Small-scale and artisanal miners are also permitted to exploit the minerals in those areas. Often, the surface rights are owned separately.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency that collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The Minerals Commission has a geological map of Ghana specifying the probable areas where minerals may be found. The Geological Survey Department is the technical entity responsible for carrying out geological surveys and, therefore, also retains similar data.

Private parties who are granted mineral rights are required to keep records of minerals discovered, results of any geochemical or geophysical analysis, results of any study, survey, test, or other work undertaken in the area covered by the licence as well as interpretation and assessment of such tests and surveys, among others.

The subject matter of the records depends on the type of mineral right granted. And, the holder of the right is required to keep these records at an address notified to the Minerals Commission. The holder of the mineral right is also required to permit officials of the Commission to inspect and make copies of the records.

The holder of a mineral right may also be required to furnish the Commission or the Geological Survey Department with reports kept as part of the required records.

All records kept are, however, confidential and as such, persons to whom they are disclosed are prohibited from divulging information contained in them.

Also, copyright in the information contained in the reports passes to and resides in the Republic, when the person who prepared the reports ceases to hold the mineral rights in respect of which the records were kept, or is not granted any other mineral right in substitution, over the same area. The mining laws require that records of all mineral rights granted should be maintained and must be open to inspection by members of the public. Copies of such records are available to members of the public on payment of the prescribed fees. The database is not yet available online.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

There are three kinds of mining rights in Ghana: reconnaissance licence, prospecting licence and mining lease. Private parties may acquire any or all of them, although the right sequence is to obtain the exploratory licences (reconnaissance and prospecting) and then convert to a mining lease if exploration is successful. The reconnaissance licence allows the holder to engage in initial exploratory work and search for minerals. It gives the holder the right to conduct reconnaissance exercises regarding the reconnaissance area.

However, the holder is not entitled to drill, excavate or carry on any under surface operations. The prospecting licence permits the holder to carry out activities including activities to determine the extent and economic value of any deposit in the prospecting area. The mining lease gives the holder the right to intentionally win minerals, and it includes any operations directly or indirectly necessary or incidental thereto.

The granting of mineral rights is based on a first-come, first-served basis as long as the applicant has met the requirements stipulated in the mining law.

A holder of a reconnaissance licence may apply to obtain a mining lease but not on a preferential basis. From 1 July 2010, the Minerals Commission enacted a new policy concerning the granting of extensions to mineral rights. This was because the Minerals Commission realised that a number of companies were abusing the regime then in place.

Section 34(2) of the Minerals and Mining Act allows for the term of prospecting licences to be no more than three years. Licence holders are obliged to reduce the area of the prospecting licence upon renewal by section 38(1) of the Minerals and Mining Act. In practice, however, the term granted has generally been two years, to ensure companies are kept on their toes.

Following complaints from prospecting licence holders that the two-year term granted was not enough for the completion of their exploration programmes, a further one-year extension was granted without requiring a reduction in the size of prospecting area, if the holders demonstrated performance but needed time to complete their exploration programmes and enable them to make informed decisions with regard to renew their licence.

The Minerals Commission realise that a number of companies abused this privilege and continuously requested extensions even though they were in a position to apply for a renewal of the licence. This practice created problems for the Minerals Commission in its management of the mineral title system.

Consequently, since 1 July 2010, the Minerals Commission has been guided by the following policies in granting extensions:

- only prospecting licences may be extended (reconnaissance licences and mining leases will not be extended);

- an application for extension of a prospecting licence will be granted once, and for a term of one year, especially for those companies active on the ground; and
- no extensions will be entertained for non-performing companies.

A holder of a reconnaissance licence or a prospecting licence may apply for one or more mining leases regarding any or all of the minerals that formed the subject of the licence, prior to the expiry of the licence. However, the blocks that constitute the reconnaissance or prospecting area should not form more than three discrete areas (three separate applications should be submitted) with each consisting of either a block or a number of blocks with common sides.

The grant of the mining lease in these circumstances is subject to compliance with all the terms of the licence held prior to the application for the mining lease. The Minister responsible for Natural Resources is required to grant the application, provided all the application requirements have been met, within 60 days of receipt of the application. Any dispute between the applicant and the Minister is required to be resolved through an alternative dispute resolution mechanism specified under the Minerals and Mining Act.

11 What is the regime for the renewal and transfer of mineral licences?

Under the Minerals and Mining Act, the holder of a reconnaissance licence may, not later than three months before the expiry of the initial term of the licence, apply to the Minister of Lands and Natural Resources for an extension of the term of the reconnaissance licence in respect of all or part of the reconnaissance area. However, since July 2010, the Minerals Commission now generally declines applications to extend reconnaissance licences, based on the policy measure in question 10.

The holder of a prospecting licence may, at any time but not later than three months before the expiry of the initial term of the licence, apply to the Minister in the prescribed form for an extension of the term of the prospecting licence, for a further period of not more than three years in respect of all or any number of blocks that are the subject of the prospecting licence.

Also, the holder of a mining lease may, at any time but not later than three months before the expiry of the initial term of the mining lease or a shorter period that the Minister of Lands and Natural Resources allows, apply in the prescribed form to the Minister for an extension of the term of the lease for a further period of up to 30 years in respect of all or any number of contiguous blocks that are the subject of the lease and in respect of all or any of the minerals subject of the lease.

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

Where the Minister does not give written approval within 30 days, he or she is required to give a written reason within 14 days of receipt of a request by the applicant for the reasons for refusal of the application.

Any dispute arising from a disagreement over the right to extend the term, transfer, assign, mortgage or otherwise encumber a mineral right will trigger the dispute resolution (alternative dispute resolution) provisions in the Minerals and Mining Act starting first with an attempt at an amicable resolution through mutual discussions.

12 What is the typical duration of mining rights?

A reconnaissance licence may be granted for a period not exceeding 12 months. It may be extended, if the Minister of Lands and Natural Resources is satisfied that it is in the public interest to do so, for periods not exceeding 12 months at a time. A prospecting licence may be granted for an initial term not exceeding three years and may be extended for a further period of not more than three years.

A mining lease may be granted for an initial period of 30 years or for a lesser period that may be agreed on with the applicant. It may be extended for a further period of up to 30 years. These extensions are also subject to the payment of applicable fees. Under the Minerals and Mining Act, mineral rights may be cancelled where the mineral rightholder:

- fails to make the required payment on the due date;
- becomes insolvent or bankrupt; or
- knowingly makes a materially false statement to the minister in connection with the mineral right.

The Minister of Lands and Natural Resources may cancel mining leases where the holder has, without good cause, failed to carry out its mining programme for two or more years.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Small-scale mining is reserved exclusively for Ghanaians. Beyond this, there is no distinction between the mining rights that may be acquired by domestic and foreign parties.

In the mining industry there is no requirement that a foreign party should have a domestic partner. However, the government of Ghana, as per the Minerals and Mining Act, has a 10 per cent free carried interest in all mining undertakings, and retains the option to acquire an additional interest on terms to be agreed on by the private party and the government.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The independence of the judiciary is guaranteed under Ghana's 1992 Constitution and mineral rights are subject to the processes of the courts.

There are also dispute resolution provisions under the Minerals and Mining Act, which make room for the application of internationally accepted rules in any dispute including the rules of procedure for arbitration within the UNCITRAL rules.

Foreign arbitration awards in respect of domestic mining disputes are freely enforceable in Ghana in accordance with Ghana's Alternative Dispute Resolution Act 2010 (Act 795).

Also, the holder of a mining lease may enter into a stability agreement with the Minister, as part of the mining lease.

A stability agreement guarantees the holder of the mining lease that it will not be adversely affected by changes in the laws as existing at the time of entering into the agreement. Also, a stability agreement offers protection against additional obligations being imposed on the holder of a mining lease, by new laws or actions taken under those new laws.

Adverse changes specifically mentioned under the Minerals and Mining Act include:

- changes in the level and payment of custom duties or other duties required to be paid on imports;
- changes in the level and payment of royalties, taxes, fees and other fiscal imports; and
- changes in laws relating to exchange control, transfer of capital and dividend remittance.

The power of the Minister to suspend or cancel a licence is also limited.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The grant of an application for a mineral right gives the mineral right holder authority over the land and entitles the rightholder to enter the land subject of the grant. However, the scope of the rightholder's authority over the land, with respect to surface rights, depends on the mineral right granted.

The holders of a reconnaissance and prospecting licences are permitted to enter the land and erect camps or temporary buildings. However, whereas holders of prospecting licences are permitted to make boreholes and excavations, holders of reconnaissance licences are prohibited from engaging in drilling or excavation.

Also, the holder of a prospecting licence may engage in any other activity ancillary or incidental to prospecting.

With regard to mining leases, the holder of a mining lease has the right to erect equipment, plant and buildings for the purposes of mining, transporting, dressing, treating, smelting or refining the minerals specified under the lease and recovered during the mining operations.

The holder or a mining lease is also permitted to stack or dump mineral waste or product in accordance with its Environmental Impact Assessment approved by the Environmental Protection Agency and

may conduct any other activity which is incidental or ancillary to the mining operations.

Under Ghanaian Law, water resources are vested in the Republic and not the owner of the surface right. Thus, the holder of a mineral right may require a water use permit to use a water resource within the area subject to the mineral right. Water use permits are issued by the Water Resources Commission. And, the water use permit issued will only grant the right to use the water for purposes ancillary to the mineral operations.

The holder or owner of surface rights is only entitled to an annual ground rent, compensation for disturbance of surface rights, or resettlement. A surface right holder cannot object to the exercise of surface rights granted to the holder of a mineral right by the Minister. The law allows the mineral rights holder to pay fair, adequate and prompt compensation to the original surface rightholder if there is any disturbance to the surface rights of the owner.

The law requires that the mineral rights must be exercised in a manner consistent with the reasonable and proper conduct of the operations concerned so as to affect as little as possible the interest of any lawful occupier of the land in respect of which such rights are being exercised.

Also, the lawful occupier of any licensed area has the right to graze livestock upon or to cultivate the surface of such land insofar as such grazing or cultivation does not interfere with the mineral operations in the area.

However, where the mineral operations are to be conducted under a Mining Lease and the rightholder has demarcated a mining area within the lease arrear, the lawful occupier of land within the mining area cannot exercise any surface rights. The lawful occupier may only erect a building or structure within the mining area with the consent of the holder of the mining lease or the Minister.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The Minister of Lands and Natural Resources has the right to buy all minerals raised, won or obtained in Ghana and from any area covered by territorial waters, the exclusive economic zone or the continental shelf and products derived from the refining or treatment of these minerals before they are sold (the right of pre-emption). The government may, by an executive instrument, appoint a statutory body to act as its agent for the exercise of the right of pre-emption.

The government is entitled to a 10 per cent free carried interest in the rights and obligations of the mineral operations where the mineral right is for mining or the exploitation of minerals for which the government is not required to make any financial contribution. The government is not precluded from any other or further participation in mineral operation subject to the agreement of the holder. Also, the Minerals and Mining Act gives the Minister the right to require a mining company to issue shares in the company to the Republic for no consideration. The rights attached to the shares is subject to agreement between the Minister and the mining company.

There is no special listing requirement for the project company.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Under article 20 of Ghana's 1992 Constitution, no property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the state unless that possession or acquisition is necessary in the interest of public security, morality, law and order or other public benefit. And the necessity for the acquisition or possession is clearly stated in order to provide reasonable justification for 'any hardship that may result to any person who has an interest in or right over the property'.

Article 20 further indicates that compulsory acquisition of property by the state can only be made under a law that makes provision for the prompt payment of fair and adequate compensation and the person adversely affected by such an action has a right of access to the High Court for the determination of his or her interest or right and the amount of compensation to which he or she is entitled.

As a measure against speculative holding of large areas of land, the law requires the holder of a prospecting licence, prior to or at the expiry of the initial term, to surrender not less than half the number of blocks (one block is 21 hectares) of the prospecting area so long as a minimum of 125 blocks remain subject to the licence and the blocks form not more than three discrete areas, each consisting of a single block or a number of blocks each having a side in common with at least one other block in that area. The Minister of Lands and Natural Resources may, based on a written request for relief, exempt a holder from the obligation to surrender land.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are some restrictions regarding mining in forest areas and water bodies. Other regulators (the Forestry Commission and the Water Resources Commission) play a role in the granting of mineral rights for exploitation of minerals in those areas.

Otherwise, parties have the right to enter upon and erect camps or temporary buildings including installations and the necessary equipment on any land or in any waters that form part of the area licensed for the purpose of reconnaissance prospecting, mining, transporting, dressing, treating, smelting or refining the mineral recovered by him or her during the mining operations. The grant of the mineral right automatically entitles the holder of the rights to all these surface rights.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Private parties carrying on mining activities are required to pay royalty and taxes to the government together with other taxes including corporate tax, rental charges with respect to the area to which the mining right relates, stamp duty (on instruments and documents) and business operating levies and property rates (to local government authorities in areas of operation).

In 2012, corporate taxes were increased from 25 to 35 per cent for mining companies and a uniform regime for capital allowances of 20 per cent for five years for the mining sector. A 10 per cent windfall tax levy on mining companies was announced in 2012, but is yet to be passed into law.

The royalties payments are revenue-based (fixed at 5 per cent of total revenue obtained from mining operations), but corporate taxes are profit-based.

A holder of a mineral right is required to pay an annual ground rent to the owner of the land or successors and assigns of the owner except in the case of annual ground rent in respect of mineral rights over stool lands, which should be paid to the Office of the Administrator of Stool Lands.

With effect from 2013, the annual ground rent has been increased from about US$0.25/km^2 to US$18.57/acre, which is equivalent to US$4,590.99/km^2.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The tax advantages and incentives available to private parties carrying on mining activities include the following:

- reduced customs import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mineral operations (items named in the Mining List);
- transferability of capital;
- transferability of dividends, or deferment of stamp duty;
- immigration quotas in respect of the approved number of expatriate personnel;
- personal remittance quotas for expatriate personnel free from any tax imposed by any enactment for the transfer of external currency out of Ghana; and
- alternative dispute resolution provisions.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Minister of Lands and Natural Resources may, as a part of a mining lease, enter into a stability agreement with the holder of the mining lease (subject to the ratification of Parliament), to ensure that the holder will not, for a period not exceeding 15 years from the date of the agreement, be adversely affected by a new enactment, order, instrument or

other action made under a new enactment or changes to an enactment, order, instrument that existed at the time of the stability agreement and subsequently be adversely affected by subsequent changes to the level and payment of royalties, taxes, fees and other fiscal imports, as well as laws relating to exchange control, transfer of capital and dividend remittance.

The Minister of Lands and Natural Resources on the advice of the Minerals Commission may enter into a development agreement under a mining lease with a person where the proposed investment by the person exceeds US$500 million. A development agreement may contain provisions relating to the mineral right or operations to be conducted under the mining lease, the circumstance or manner in which the Minister of Lands and Natural Resources will exercise a discretion conferred by the Minerals and Mining Act on tax stabilisation as indicated above, and environmental issues and obligations of the holder to safeguard the environment in accordance with any enactment and dealing with the settlement of disputes. A development agreement is subject to ratification by Parliament.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is entitled to a 10 per cent free carried interest in the rights and obligations of the mineral operations where the mineral right is for mining or the exploitation of minerals for which the government is not required to make any financial contribution. The government is not precluded from any other or further participation in mineral operation subject to the agreement of the holder.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Any gain made on the assignment or other disposal of an interest in a mining right is included in ascertaining the income of a mining company from a mining operation, which is taxed at a rate of 35 per cent, computed by operation-to-operation basis.

Also, an instrument transferring a mineral right is required to be stamped. And, stamp duty is charged on the consideration paid for the transfer, at a rate of up to one per cent, depending on the term transferred.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between duties, royalties and taxes payable by domestic parties and those payable by foreign parties. However, specific mining companies have stability, development or investment agreements, which protect those mining companies against adverse effects from changes in laws including those regarding the fiscal regime.
The government has established a seven-member stability agreement renegotiation committee with the aim of renegotiating some of the terms of these agreements and to have standard agreements across the industry.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The mining law requires that mining should be carried on only by bodies incorporated, registered or established under the Companies Act 1963 (Act 179) or the Incorporated Partnership Act 1962 (Act 152) or any other enactment in force for the time being. This is also true of mine-support businesses.

26 Is there a requirement that a local entity be a party to the transaction?

There is no requirement that a local entity be a party to a mining business transaction. However, the government of Ghana is entitled to statutory free carried interest of 10 per cent in all mining undertakings and reserves the right to acquire additional interest on terms to be agreed on by the government and the mining company.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

There are a number of countries with bilateral investment treaties with Ghana, such as China, Denmark, Germany, Malaysia, the Netherlands, Switzerland and the UK.

Agreements have been signed with the following countries but are awaiting ratification: Benin, Burkina Faso, Egypt, France, Guinea, India, the Ivory Coast, Mauritania, South Africa, the US and Zambia.

Countries with investment agreements pending include Australia, Belgium, Canada, the Czech Republic, Ethiopia, Finland, Indonesia, Israel, Jamaica, Korea, Morocco, Nigeria, Pakistan, the Philippines, Singapore, Spain, Togo and Turkey.

The US signed three agreements with Ghana between 1998 and 2000: the OPIC Investment Incentive Agreement, the Trade and Investment Framework Agreement and the Open Skies Agreement.

Ghana also has tax treaties with a number of countries, including Belgium, France, Germany, Italy, the Netherlands, South Africa, Switzerland, Mauritius and the UK.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing available to private parties engaged in mining activities are equity and debt financing from both local and foreign sources.

Currently, only two mining companies (South Africa-based AngloGold Ashanti and Golden Star Resources, incorporated in Canada, with its headquarters in the US) are listed on the Ghana Stock Exchange (GSE), with a significant contribution to market capitalisation. The Ghanaian subsidiaries of both listed companies are, however, not listed on the GSE. The GSE therefore does not play a significant role in financing in the mining industry.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No.

30 Please describe the regime for taking security over mining interests.

A mineral right cannot in whole or in part be transferred, assigned, mortgaged or otherwise encumbered or dealt in, in a manner without the prior written approval of the Minister of Lands and Natural Resources, which approval should not be unreasonably withheld or given subject to unreasonable conditions.

Where the Minister does not give written approval within 30 days, the Minister is required, upon a request by the applicant, to give a written reason for the failure to approve within 14 days of receipt of the request for the reason.

Any dispute arising from a disagreement over the right to extend the term or transfer, assign, mortgage or otherwise encumber a mineral right will trigger the dispute resolution (alternative dispute resolution) provision in the law.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no restrictions on the importation of machinery and equipment or services. Under the mining law plant, machinery, equipment and accessories imported specifically and exclusively for mineral operations benefit from reduced customs import duties if said items are on the mining list.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There is freedom of contract between supplier and buyer governed by private contractual principles and the sale of goods laws. However,

common requirements include the requirement to supply equipment that is environmentally friendly and fit for purpose. Dispute resolution is typically through arbitration.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no restrictions on the processing of minerals. However, a person must obtain a licence in order to be able to export, sell or dispose of any minerals. The licence may be granted with conditions. The application for a licence to sell, export or dispose of minerals by a holder of a mining lease must be accompanied by copies of a refining contract and sale and marketing agreements.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Import of funds for mining activities is subject to the foreign exchange laws of Ghana and the holder of mineral rights is required to transact through entities authorised to deal in foreign exchange, such as the banks. A holder of a mining lease is permitted to retain not less than 25 per cent of net earnings in foreign exchange in an external account for acquiring machinery and equipment, spare parts and raw materials as well as for debt servicing, dividend payment and remittance in respect of quotas for expatriate personnel. Some mining companies have agreements with the government of Ghana that allows them to retain up to 100 per cent of their net earnings for the same purpose.

A holder of a mining lease is guaranteed free transferability, through the Central Bank of Ghana, or in the case of a net foreign exchange earning holder through the external account, in convertible currency of dividends or net profits attributable to the investments of such convertible currency payments in respect of a loan servicing where a foreign loan has been obtained by the holder for his or her mining operations and the remittance of foreign capital in the event of sale or liquidation of the mining operations or any interest therein attributable to foreign investment.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws applicable to the mining industry are the Environmental Protection Agency Act 1994 (Act 490) and the Environmental Assessment Regulations 1999 (LI 1652). The Environmental Protection Agency is the regulatory body that administers these laws.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Mining companies are required to be registered with the Environmental Protection Agency (EPA) and obtain an environmental permit prior to commencement of their operations or project.

The applicant is required to submit an application and pay the requisite fees after which the EPA will carry out an initial assessment and issue a screening report for purposes of determining whether the application:

- is approved;
- is objected to;
- requires submission of a preliminary environmental report (PER); or
- requires the submission of an environmental impact statement (EIS).

Where the EPA is of the view that a significant adverse environmental impact is likely to result from the activities of any undertaking, the applicant shall be asked to submit an EIS on the undertaking in order that the environmental impact of the proposed undertaking can be assessed.

Where an EIS is acceptable to the EPA, it will communicate this in writing to the applicant and issue the environmental permit.

The law provides that the EPA should arrive at its decision within 90 days from the date of receipt of the application. There are exceptions to this time limit including where a hearing is conducted and where a PER is required. Also, the period does not include the period taken to prepare and submit an EIS.

The environmental permit is valid for 18 months, effective from the date of its issue. A mining company will be required to obtain (upon payment of the requisite fees) an environmental certificate within 24 months of the date of the commencement of operations after the EPA has approved a PER or an EIS and issued an environmental permit.

Companies that have received approval for either their PER or EIS are required to obtain an environmental management plan (EMP) within 18 months of commencement of operations and every three years thereafter. The EMP is required to set out steps that are intended to be taken to manage any significant environmental impact that may result from the operation of the project or undertaking.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Mining businesses are required to submit reclamation plans to the EPA and are further obliged to post reclamation bonds regarding their reclamation plans and based on approved work plan for reclamation.

On the termination of a mineral right, the former holder is obliged to deliver to the minister or as the minister directs, the following:

- the records, which the holder is obliged under the Minerals Law to maintain;
- the plans and maps of the area covered by the mineral right prepared by the holder or at the holder's instructions; and
- other documents, including in electronic format if available, that relate to the mineral right.

Failure to deliver the above within 30 days from the date of being called upon to do so by the minister makes the holder criminally liable, and the holder will be liable on summary conviction to a fine of not more than the equivalent of US$10,000 or imprisonment for a term of not more than three years, or both.

38 What are the restrictions for building tailings or waste dams?

The Minerals and Mining (Health, Safety & Technical) Regulations 2012 (LI 2182) primarily govern the construction of tailings storage facilities including hazard classes, embankments, tailings storage facility impoundment, tailings discharge system and safety arrangements for tailings storage facilities.

These facilities are monitored by the Chief Inspector of Mines. Per LI 2182 the design and construction of tailings storage facilities must be done by a qualified engineer approved by the Chief Inspector of Mines.

Each mine with a tailing dam is required to appoint an independent engineer to conduct yearly annual dam safety audits. Although there are no specific requirements for emergency drills with the local communities, tailings facilities are only permitted to be sited in areas where failure of the embankment is not likely to result in a threat to human life.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety, and labour laws applicable in the mining industry include:

- the Minerals and Mining Act 2006 (Act 703);
- the Minerals and Mining Regulations (Health, Safety and Technical) 2012 (LI 2182);
- the Labour Act 2003 (Act 651); and
- the Workmen Compensation Act 1987 (PNDCL 187).

The regulatory bodies include the Minerals Commission and the Labour Commission.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The Minerals and Mining Regulations (Health, Safety and Technical) include provisions on the management and handling of waste products.

Update and trends

In February 2016, the government launched the Minerals and Mining Policy, which is aimed at ensuring that mining is integrated to the economy and contributes to the sustainable development of the country.

AngloGold Ashanti took the government of Ghana to the International Centre for Settlement of Investment Disputes (ICSID) in connection with the restoration of law and order at parts of the Obuasi Mine, which had been taken over by unlicensed illegal small-scale miners.

The Minister for Lands and Natural Resources issued a directive appointing the Precious Minerals Marketing Company Ltd (PMMC) as designated laboratory for assaying in Ghana.

The government of Ghana, pursuant to section 49 of the Minerals and Mining Act, entered into Development Agreements with Gold Fields Ghana Limited and Abosso Goldfields Limited, which provides for some predictability in the fiscal regime.

It places the obligation and the right to explore and exploit waste products in tailings ponds and waste piles on the minerals rights holder.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Minerals and Mining Act provides that a holder of a mineral right shall give preference in employment to citizens of Ghana to the maximum extent possible and consistent with safety, efficiency and economy.

A foreign employee in the mining sector as in any other sector needs a work permit in order to work. Mining companies are required to meet immigration quota requirements regarding the approved number of expatriate personnel. Under the Minerals and Mining Regulations (General), mining companies are required to submit a localisation plan for approval by the Minerals Commission regarding measures to ensure the eventual replacement of expatriates by local or domestic employees.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal community engagement laws applicable are the Minerals and Mining Act and the Minerals and Mining Regulations. The Minerals Commission administers the Minerals Development Fund for purposes of developing communities affected by mining.

The Environmental Protection Agency Act and the Environmental Assessment Regulations also have community engagement provisions. The Environmental Protection Agency is the regulatory body that administers these laws regarding community-involving programmes and projects to mitigate the effect of mining on the environment.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

There are requirements under the mining law regarding the exercise of mining rights in a manner consistent with the reasonable and proper conduct of the operations concerned, so as to affect as little as possible the interest of any lawful occupier of the land in respect of which such rights are exercised and the right of the lawful occupier of any licensed area to graze livestock upon or to cultivate the surface of such land in so far as such grazing or cultivation does not interfere with the mineral operations in the area. The law requires companies to make fair, adequate and prompt compensation for any disturbance caused to the surface rights of the owner.

Other than the above, there are no specific laws on the rights of aboriginal, indigenous or currently or previously disadvantaged people. These requirements do not have any significant effect on the acquisition or exercise of mining rights.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Ghana has ratified the following:

- the International Covenant on Economic, Social and Cultural Rights (in 2000);
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the African Charter on Human and Peoples' Rights;
- the African Charter on the Rights and Welfare of the Child;
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;
- the 2001 Stockholm Convention on Persistent Organic Pollutants; and
- the United Nations Framework Convention on Climate Change, which entered into force in 1994, and finalised the Kyoto Protocol related to that convention in 1997 (not yet in force).

Ghana is party to the 1981 UN Convention on the Law of the Sea, several regional agreements on specific seas and various other treaties addressing maritime pollution.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

There is no single comprehensive or consolidated anti-bribery and corruption legislation. However, there are many statutes, including the 1992 Constitution, which criminalise bribery and corrupt practices, and identify probity and accountability as some of the values that all persons are to uphold.

Other pieces of legislation include the following:

- the Whistleblowers' Act 2006 (Act 720), which provides for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices;
- the Criminal Offences Act 1960 (Act 29), which criminalises extortion and financial crimes;
- the Financial Administration Act 2003 (Act 654), which prohibits bribery by or of an officer or person acting in office connected with the collection or management of disbursement of public or trust money;
- the Anti-Money Laundering Act 2008 (Act 749), which, together with the Anti-Money Laundering Regulations prohibits money laundering, establishes a Financial Intelligence Centre, and provides for records, and information and compliance related to anti-money laundering in Ghana;
- the Economic and Organised Crime Act 2010 (Act 804), which establishes an economic and organised crime office to monitor, investigate and prosecute economic and organised crime; and
- the Public Procurement Act 2003 (Act 663), which seeks to harmonise public procurement processes in public service and ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes, the Foreign Corrupt Practices Act of 1977 and the UK Bribery Act of 2010 legislate those companies with parent companies listed on stock exchanges in the US and UK respectively.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

There is currently a Ghana EITI draft bill in Parliament for consideration.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Foreign nationals are prohibited from participating in small-scale mining operations. These are reserved exclusively for Ghanaians.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

International treaties or conventions applicable to investment in the mining industry include the United Nations Commission on International Trade Law, the Multilateral Investment Guarantee Agency Convention, the Convention of the Settlement of Investment Disputes between States and Nationals of Other States, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Convention on Biodiversity, and bilateral investment promotion and protection agreements between Ghana and other countries.

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Greenland

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Mining industry

1 What is the nature and importance of the mining industry in your country?

At present, there are six exploitation licences in Greenland: a gold mine in south Greenland, a molybdenum mine in east Greenland (under closure), an iron ore deposit, a gemstone deposit, a lead and zinc mine and an anorthosite mine in west Greenland, and a lead and zinc mine in northern Greenland for which licences covering iron, gem stones, anorthosite and one of the lead and zinc mines were granted in 2013, 2014, 2015 and 2016. At the moment none of the mines are operating, but it is expected that the gemstone and the anorthosite mines will start production during summer 2017. Generally, mineral exploration activity has increased in the past 10 years as the world mining community has become more aware of Greenland's mineral potential. It is therefore expected that new mines will be opened in the coming years and that the mining industry will become of great importance to Greenland.

2 What are the target minerals?

The target minerals of the current mining and exploration projects are olivine, molybdenum, coloured corundum (ruby and pink sapphires), eudialyte (zirconium and rare-earth elements), diamonds, iron, lead, zinc and gold.

3 Which regions are most active?

The regions of south-west and west Greenland are the most active regions.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system in Greenland is a civil law system primarily based on written legislation. Greenland is part of the Kingdom of Denmark and is subject to the Danish Constitution, but since 1979 has had an independent status within the Kingdom of Denmark by the implementation of the Greenland Home Rule Act.

Greenland and Denmark have, by referendum, passed the Law on Greenlandic Autonomous government, which came into force on 21 June 2009. This means that Greenland can take over the administration of most areas, but not that Greenland has become an independent state.

The Danish government administers matters such as foreign and defence policy, policing, courts and currency. Greenland's government is responsible for all other areas of legislation, including legislation concerning mineral resources, which Greenland took over shortly after the implementation of autonomous government.

5 How is the mining industry regulated?

The mining industry in Greenland is regulated by an act passed by the Greenlandic Parliament in December 2009. Before the implementation of this act, mineral resources were regulated by a joint Greenlandic-Danish administration. Greenland now has full authority to make decisions regarding principal investments in mineral resource activities, including the granting of licences.

The rules and precedents applicable until 1 January 2010 – when the new act became effective – are generally carried on under the new act. However, a number of important new rules have been introduced.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal law regulating the mining industry in Greenland is the Greenland Parliament Act of 7 December 2009 on mineral resources and mineral resource activities (the Mineral Resources Act). Amendments to the Mineral Resources Act were passed by the Greenland parliament in 2012, 2014, 2015 and 2016. In addition, the government of Greenland issued new and updated Standard Terms for Exploration Licences for Minerals (Excluding Hydrocarbons) in Greenland on 25 June 2013 containing fixed terms applying to all granted licences, which are still valid. Further, an addendum to the Standard Terms specifically concerning payment of royalties was adopted on 1 July 2014.

The administration regarding mineral resources in Greenland is handled by the Mineral Licence and Safety Authority (MLSA) under the Greenland autonomous government authorities. One of the main tasks of the MLSA is the day-to-day administration of licences within the area of mineral resources, as well as it being responsible for technical and geological matters. As of 1 January 2013, the MLSA is no longer responsible for environmental matters, so that decisions concerning the environment are now made by the Environmental Agency for the Mineral Resources Area. Further, as of 1 February 2015, the Ministry of Industry, Labour and Trade is responsible for issues concerning industry and labour policy including social impact assessments and impact benefit agreements for mineral resources companies and similar related socio-economic matters. Further information as to procedures concerning the granting of licences and relevant legislation applying to the area of mineral resources can be found at www.govmin.gl.

There have been no major amendments during 2016.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Article 1 of the Mineral Resources Act sets out the general overall stipulation that such Act aims to ensure that activities under the Act are performed in a sound manner as regards safety, health, the environment, resource exploitation and social sustainability, and appropriately and according to the best international practices under similar conditions.

In practice, this implies that the Greenlandic mining industry may use any kind of standard they want, as long as it is in accordance with good international practice.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Metallic minerals in the ground of Greenland belong to Greenland's government, and prospecting and exploration for and exploitation of mineral resources in Greenland can only be carried out under licences granted according to the Mineral Resources Act.

However, the resident population of Greenland may carry out non-commercial collection of loose minerals without a licence being

required, but only with respect to exclusive licences for exploration and exploitation of mineral resources granted to other parties.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The MLSA provides advice and assistance to private parties who wish to engage in activities of mineral exploration and development in Greenland.

Moreover, their English language website (www.govmin.gl) is an important means of communicating relevant information to the mining industry. On this website there is a wide range of information available, for example, information regarding relevant legislation, application procedures, licence terms, fieldwork, reporting and current licences.

The Geological Survey of Denmark and Greenland, situated in Denmark, provides a wide range of geoscientific information, which can be obtained from their website (www.geus.dk).

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

A licence issued according to the Mineral Resources Act will cover all mineral resources except hydrocarbons, radioactive elements and hydropower, unless otherwise stipulated in the licence.

Prospecting licence

A prospecting licence is non-exclusive, meaning that the granting of such a licence does not preclude the granting of similar licences to other parties and the licence lapses to the extent that exclusive licences may be granted later as regards the area and the resources in question. Further, the licensee has no right prior to other parties when applying for an exclusive exploration licence as regards the area and the resources in question.

The licensee will have no commitments and may surrender the licence at any time with written notice to the MLSA. However, under certain conditions, expenditure made under a prospecting licence may, within three years from the calendar year in which the expenditure was made, qualify as fulfilment of the exploration obligations for one or more exploration licences.

Exploration licence

Applications for an exploration licence shall be submitted to the MLSA, which registers the applications in either batch A (dating between the first and 15th of the month) or batch B (dating between the 16th and the last day of the month).

If the case of competing applications (applications within the same batch and with overlapping licence areas), the Greenlandic government will make a discretionary decision concerning the granting of the licence.

An exploration licence is exclusive, precluding the granting of a similar licence in the same area to other parties. The exploration licence is granted for a period of five years and at the expiry of the first licence period the licensee is entitled to be granted a new licence for the same area for five years. Pursuant to the Standard Terms, at the expiry of the second licence period (years six to 10), the licensee may be granted additional new three-year licences for years 11 to 13, 14 to 16, 17 to 19 and 20 to 22 for the same area, wholly or partly, provided the terms of the licence have been complied with. However, the licensee is not entitled to have such licences granted.

During the licence period the licensee is obliged to spend a fixed minimum of exploration expenses per calendar year calculated as the sum of an amount per licence per year and an amount per square kilometre per year.

Exploitation licence

If a licence holder of an exclusive exploration licence has found and delineated a commercially viable deposit that the licensee intends to exploit and provided the terms of the licence have been complied with, the licensee is entitled to be granted an exploitation licence.

An exploitation licence regarding mineral resources will, as a main rule, only be granted to limited companies domiciled in Greenland, exclusively carrying out activities under the granted licences and not being taxed together with other companies. It is required that such companies may not be more thinly capitalised than the group of which the company forms part, but the company's loan capital must always exceed the shareholders' equity up to a ratio of 2:1. The licensee shall, further, have the necessary expert knowledge and adequate financial background with respect to the exploitation activities in question. The licence is granted for 30 years.

Following the granting of an exploitation licence and prior to commencement of development and production the licensee must submit a development plan (including a closure plan) for MLSA approval and an environmental impact assessment. Further, the Mineral Resources Act stipulates that if an activity is assumed to have significant impact on social conditions, a licence for the activity can be granted only when a social sustainability assessment has been approved by the MLSA. Finally, it is determined in the licence to what extent the licensee is obliged to enter into an impact benefit agreement imposing obligations for the licensee regarding the use of Greenlandic labour and enterprises and also regarding the education of Greenlandic labour.

11 What is the regime for the renewal and transfer of mineral licences?

See question 10. Any direct or indirect transfer of a licence to a third party requires approval by the Greenland government. Indirect transfer means any transfer of ownership interests that will affect the controlling interest of the licensee.

12 What is the typical duration of mining rights?

The exploration licence is granted for a period of five years and at the expiry of the first licence period the licensee is entitled to be granted a new licence for the same area for five years. Pursuant to the Standard Terms, at the expiry of the second licence period (years six to 10), the licensee may be granted additional new three-year licences for years 11 to 13, 14 to 16, 17 to 19 and 20 to 22 for the same area, wholly or partly, provided the terms of the licence have been complied with. However, the licensee is not entitled to have such licences granted.

The exploitation licence is granted for 30 years. The period for exploitation may be extended if warranted by special circumstances, however, the total period cannot exceed 50 years.

A licence may be revoked in the following situations:

- if the licensee breaches the terms of the licence or the provisions laid down pursuant to the Mineral Resources Act or pursuant to the licence, or if the licensee fails to meet specified time-limits;
- if the licensee acts fraudulently while submitting information to the MLSA; or
- if one or more of the parties participating in the licence goes into liquidation or is declared bankrupt.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction between mining rights that may be acquired by domestic and foreign parties.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Decisions, which according to stipulations of the licence depend on the judgment or resolve of the minister for Mineral Resources or the MLSA, are not subject to arbitration. This stipulation does not exclude ordinary reviews by the courts.

In any other case disputes arising between the Greenlandic government and the licensee regarding questions concerning the licence will be decided upon by a board of arbitration.

Concerning enforcement of foreign arbitration awards, the New York Convention applies.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

In Greenland ownership to land cannot be obtained, as all land is owned by the society. However, persons or companies, on application, can obtain a right to use a piece of land for a defined purpose, for example, the construction of a building. When obtaining an exclusive exploration and exploitation licence, the licensee acquires the right to explore and exploit the minerals under the conditions of the licence terms for the area covered by the licence.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

As a main rule the government or state agencies do not have the right to participate in mining projects. However, according to the Mineral Resources Act, section 17(2) a licence may prescribe that a company controlled by the Greenland autonomous government will be entitled on specified terms to join as a participant in the activities covered by the licence.

An exploitation licence regarding mineral resources will, as a main rule, only be granted to limited companies domiciled in Greenland, exclusively carrying out activities under the granted licences and not being taxed together with other companies.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Expropriation is defined as the government taking over private property without the consent of the owner.

According to the Constitution of the Kingdom of Denmark Act, section 73, which also applies in Greenland, the legislature is authorised to make regulation on expropriation within the framework hereof. Expropriation is only possible if the legislation complies with the following conditions:

- that the owner of the property being expropriated is fully compensated;
- that the alienation is motivated by the interests of the public good; and
- that the restraint is authorised by said Act.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are currently 12 protected areas in Greenland. The areas each have their own history and serve to protect unique landscapes or habitats for wildlife, the most famous probably being Ilulissat Ice Fiord which is included on UNESCO's World Heritage list. Further information about the areas in question can be obtained by contacting the MLSA or the Ministry of Nature, Environment and Energy.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The right to perform mining activities is based on an exploitation licence issued by Greenland's autonomous government. Unless otherwise stated in the exploration licence preceding the exploitation licence, the economic terms of an exploitation licence will be as follows:

- taxation according to Greenlandic legislation shall be in force at any time;
- payment of a fee of 100,000 Danish kroner to the MLSA at the granting of an exploitation licence; and
- reimbursement of the MLSA's expenses regarding regulation of the licensee's activities.

In March 2013 a new government in Greenland was elected and the ruling parties' coalition agreement stated that royalty payments would be introduced to the mining industry. In January 2014, the government presented a proposal for an oil and mineral strategy for 2014–2018, which contains a recommendation to introduce a royalty model based on a combination of revenue and profit depending on the specific type of mineral and with a possibility of deducting corporate and dividend tax within the calculated royalty.

As a result thereof the Greenland government has, as per 1 July 2014, adopted an addendum to The Standard Terms for Exploration Licences for Minerals (excluding hydrocarbons) in Greenland regarding terms on the licensee's payment of royalty when the licensee is granted an exploitation licence.

The royalty elements are differentiated for the various types of minerals, and the main terms on royalty are as follows:

- a licensee exploiting minerals, other than rare earth elements, uranium and gemstones, shall pay a sales royalty of 2.5 per cent of the value of minerals (the licensee may on certain terms offset an amount equal to paid corporate income tax and corporate dividend tax against sales royalties to be paid);
- a licensee exploiting rare earth elements shall pay a sales royalty of 5 per cent of the value of the elements (the licensee may on certain terms offset an amount equal to paid corporate income tax and corporate dividend tax against sales royalties to be paid);
- a licensee exploiting uranium shall pay a sales royalty of 5 per cent of the value of the uranium (the licensee may not offset any amount related to paid corporate income tax or corporate dividend tax against sales royalties to be paid); and
- a licensee exploiting gemstones shall pay a sales royalty of 5.5 per cent of the value of the gemstones and a surplus royalty of 15 per cent based on gross profit exceeding 40 per cent (the licensee may not offset any amount related to paid corporate income tax or corporate dividend tax against sales royalties or surplus royalties to be paid).

The more specific terms on royalty for different types of minerals are stated in appendices 1–4 to the addendum to the Standard Terms.

The addendum came into force on 1 July 2014, and it applies to the following licences:

(i) a licence for exploration for minerals (excluding hydrocarbons) in Greenland if the licence is granted on 1 July 2014 or later;
(ii) a licence for exploration for minerals (excluding hydrocarbons) in Greenland if the licence is granted earlier than 1 July 2014 and it follows from the licence, including any addendum or any other amendment to the licence, that the Greenland government may set terms on the licensee's payment of royalties or consideration, including royalties in an exploitation licence granted on the basis of the exploration licence; and
(iii) a licence for exploration for minerals (excluding hydrocarbons) in Greenland if the licence is granted earlier than 1 July 2014 and the Greenland government and the licensee agree that this addendum shall apply to the licence.

This means that the Greenland government cannot lay down terms on royalties when granting an exploitation licence on the basis of an exploration licence granted earlier than 1 July 2014, provided that the original exploration licence has not been amended or does not include any addenda or other terms on royalties (ii). However, the last two exploitation licences that were granted in October 2013 and March 2014 include an agreement between the government and the licensees on the payment of royalties.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

For companies carrying on mining activities, corporate taxation amounts to 30 per cent whereas the corporate taxation of other companies is 31.8 per cent. The tax on dividends for companies carrying out mining activity is 36 per cent regardless of the municipality in which the company is situated, as opposed to other companies that pay a tax on dividends of 42–44 per cent, dependent on their home municipality. Finally, companies carrying on mining activities can bring deficits forward without time limits where other companies have a time limit of five years.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

As a rule, the government is not entitled to a free carried interest in mining projects. However, according to the Mineral Resources Act, section 17(2), a licence may prescribe that a company controlled by the Greenland autonomous government will be entitled on specified terms to join as a participant in the activities covered by the licence.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Capital gains on the transfer of licences are included in the calculation of the corporate taxable income.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between the duties, royalties and taxes payable by domestic licence holders and those payable by foreign parties. However, there is an obligation to withhold tax related to royalties paid by a domestic company to a foreign beneficiary.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Exploration licences can be issued to any legal entity based in or outside Greenland. However, an exploitation licence that forms the basis of the right to carry out mining activities will, as a general rule, only be granted to limited companies domiciled in Greenland exclusively carrying out activities under the granted licences and not being taxed together with other companies (see question 10). These rules apply no matter whether the lender is a company within the same group or not, and whether such companies are domiciled in Greenland or abroad. Also, companies holding exploitation licences are generally required to trade at arm's-length prices and on arm's-length terms.

26 Is there a requirement that a local entity be a party to the transaction?

See question 25.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Greenland has tax treaties with Denmark, Norway, Iceland and the Faroe Islands. Under certain circumstances it might be relevant for foreign entities established in these countries to structure their operations in Greenland, but this will depend on the specific circumstances.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing available to private parties carrying on mining activities consist of equity raised on the international markets. There is no domestic public securities market in Greenland.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No, not currently.

30 Please describe the regime for taking security over mining interests.

According to section 88(2) of the Mineral Resources Act, a licence under said Act cannot be attached by creditors and no systems for perfection of security in mineral licences exist under the laws of Greenland.

As an alternative, provisions stipulating that the licensee be obliged to transfer its mining interests to a lender in the case of default may be considered. In respect of prior approval of transfers in connection with financing, guidance may be found in the principles stipulated in article 23.03 of the Model Licence for Exploration and Production of Hydrocarbons, of September 2014.

If a lender financing the licensee's development and exploitation of hydrocarbons stipulates as a condition for granting the loan that this Licence or any part hereof shall be transferable to such lender at a later date, the MLSA may, in accordance with section 27 (now section 88) of the Mineral Resources Act, grant its prior approval of such transfer subject to specific conditions, without any amendments to the terms of this licence.

Notwithstanding such prior approval, it should be noted that if and when the lender wishes to execute its right to a transfer of the mining interests, an approval of an eligible nominee is to be obtained again in accordance with section 88(1).

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Some types of vehicles are subject to import duty. Otherwise, we are not aware of any restrictions or limitations on the importation of machinery and equipment or services required in connection with mining activities in Greenland.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No standards are used on equipment supplies. The market is neither friendly to the supplier or buyer, as agreements are based on negotiation between the parties. The parties are free to agree on whether disputes are referred to arbitration or to the court.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

According to the Mineral Resources Act the licensee must use Greenland enterprises for contracts, supplies and services unless Greenland enterprises are not technically or commercially competitive. Also, it is possible when granting a licence to lay down the extent to which the licensee must process exploited mineral resources in Greenland. However, minerals may be processed outside Greenland if processing in Greenland would result in significantly higher costs or greater inconvenience.

Further, it may be stipulated in a licence the percentage of exploited minerals the licensee must keep in Greenland for the purpose of sale to persons with permanent residence in Greenland who intend to process the minerals in Greenland.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

We are not aware of any restrictions or limitation on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals. There are no restrictions on foreign investments in Greenland.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The relevant environmental, health and safety laws applying to the mining industry are as follows:

- a general environmental protection law;
- explosives regulations;

Update and trends

The biggest mining news in 2016 was the granting of an exploitation licence to Ironbark A/S. The zinc-lead project in northern Greenland represents one of the world's largest undeveloped zinc-lead resources.

Over the past 10 years, the world mining community has become increasingly aware of Greenland's mineral potential in terms of both size and sophistication. Geologically, much of Greenland is ancient, and similar to many regions elsewhere in the world that have proved fruitful for exploration. While the total number of exclusive exploration licences in 2003 was 19, covering 5,714km^2, the number in April 2017 is 52, covering 10,842km^2. Further, 11 applications for new exclusive exploration licences and prospecting licences are presently being processed by the MLSA, which shows that there is a continuous interest in mineral exploration in Greenland.

- technical regulations for flammable liquids;
- Greenland Building Regulations; and
- the Law on Archaeological Sites and Artefacts.

Greenland has a 'one-door' system administering the country's mineral resources, handled by the MLSA as the authoritative body for all administration. Thus, the mineral resources industry has to apply only to MLSA to obtain the necessary permissions, ensuring efficient administration of mineral resources.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The Mineral Resources Act contains principles and rules for the protection of the environment and social sustainability. By the application and administration of the provisions on protection of the environment, including prevention, reduction and control of pollution, great emphasis is placed on what is obtainable by use of the 'best available techniques' for the activities.

Also, specific rules on climate and nature protection have been laid down. The Greenland government may issue specific regulations on climate and nature protection, including provisions on the application of national or international rules and agreements or guidelines concerning climate and environmental protection.

Prior to commencement of exploitation and development activities, a plan for the activities, including organisation of the production and the production installations must be approved by the Greenland government. In this connection an environmental impact assessment (EIA) report must be prepared. The purpose of an EIA is to identify, predict and communicate potential environmental impacts of a proposed mining project in all its phases from before the commencement of mining to after closure, and to propose measures to address and mitigate these impacts.

If an activity must be assumed to have significant impact on social conditions, a licence for and approval of the activity can be granted only when a social sustainability assessment (SSA) has been made of the performance of the activity and approved by the Greenland government. The SSA report must appropriately demonstrate, describe and assess the direct and indirect impacts of the activity on social conditions as well as the interaction between the conditions, mutual impact between the conditions and cumulative effects on the conditions.

Provided that the licensee submits all relevant information with the application for an exploitation licence, it should not take more than approximately three to six months to obtain the necessary permits. However, there are no rules guaranteeing a maximum processing time.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The licensee shall, within 12 months from the termination of the activities under the licence, remove all installations, buildings, stored items, etc, in the area that has been established for the activities under the licence, except when the non-removal of these installations has been approved by the MLSA. Further, the licensee shall carry out final clean-up activities in the affected area and remedy any remaining damage to the terrain and vegetation caused by the activities.

If the licensee does not comply with the obligations at the termination of the activities such measures may be carried out at the licensee's expense and risk.

The MLSA may request that the licensee provides security for the fulfilment of their obligations at termination of the activities. In practice, security for the estimated closure costs is almost always required prior to commencement of development and production.

38 What are the restrictions for building tailings or waste dams?

Terms and restrictions for building tailings and waste dams are laid down directly in the licence inclusive of the exploitation plan, closure plans and other plans that are approved by the government, and as such there are no detailed rules in legislation in this respect.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The relevant health and safety law applying to the mining industry is the Law on Labour and Working Environment.

With regard to labour laws, the Salaried Employees Act and the provisions of the Holiday Act apply to the mining industry.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

According to section 51 of the Mineral Resources Act, the rules on environmental protection aim to help protect nature and the environment so that society can develop on a sustainable basis. Specifically, the aim – among other things – is to promote recycling and limit problems in relation to the disposal of waste.

In connection with meeting the obligations concerning the protection of the environment the party concerned must ensure and promote the use of the best available techniques, including less polluting facilities, machinery, equipment, processes, technologies, raw materials, substances and materials and the best possible measures for the abatement of pollution, insofar as this is technically, practically and financially possible for the party concerned.

When issuing the specific licence provisions are laid down to ensure that the aim and obligations are achieved in the best possible way considering the concrete circumstances of the project.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

According to the Mineral Resources Act and the standard terms of the licences, the licensee shall employ Greenlandic manpower as far as possible. Where there is a lack of Greenlandic manpower with appropriate qualifications, the licensee may employ personnel from other countries.

Moreover, according to the Aliens Act, residence and work permits can be issued to foreign nationals allowing them to live and work in Greenland for a specified period of time if there is no one in Greenland who can perform a specific function. Also, salary and employment conditions must correspond to Greenlandic standards. Residence and work permits are not required of Danish citizens or citizens from the other Nordic countries (Sweden, Norway, Finland and Iceland). Residence and work permits are issued by the Danish Immigration Service. It should be noted that there are some exceptions from the requirement of residence and work permit in relation to personnel carrying out activities falling within the scope of the Mineral Resources Act.

The Large Scale Projects Act came into force on 1 January 2013. When certain conditions are fulfilled, it is possible that, for example, a large scale mining project, during the construction phase, can use foreign labour on terms that are favourable to the employer, which means that the above-mentioned requirement of employment conditions corresponding to Greenlandic standards does not apply if the project is defined under the Large Scale Projects Act. However, according to the said Act, the employer must ensure that the foreign employees have pay

and employment terms that are acceptable and objectively and factually justified.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There is no such legislation directly regulating these issues. However, the process of preparing a social sustainability assessment is characterised by having a high degree of public participation. The aim is that all relevant stakeholders shall be heard in the process. Also, the impact benefit agreement that is negotiated between the licensee, the relevant municipalities and the government aims to ensure the social commitment through the lifetime of the project from the parties involved.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

According to article 45 of the Mineral Resources Act, the resident population of Greenland may exercise their traditional right to collect and extract mineral resources without requiring a licence under the Mineral Resources Act. However, the right to collect and extract mineral resources can only be exercised in respect of exclusive licences for exploration and exploitation of mineral resources granted to others under the Mineral Resources Act.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

With the exception of some ILO conventions, we are not aware of any international treaties, conventions or protocols relating to CSR issues applying to the mining industry in Greenland.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

There are rules in the Greenlandic Criminal Code against bribery, abuse of public authority and criminal breach of trust.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

The UK Bribery Act 2010 has an indirect impact on Greenlandic companies carrying out business related to the UK.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Greenland is a supportive member of the EITI.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

We are not aware of any foreign ownership restrictions relevant to the mining industry in Greenland.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

We are not aware of any international treaties applying to the mining industry or an investment in the mining industry in Greenland.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining is an important economic activity in India. India is one of the largest exporters of iron ore, chromite, bauxite, mica and manganese, and it is ranked fifth among the mineral-producing countries in terms of volume of production. The mining sector contributes nearly 2.4 per cent to India's GDP.

While there has been private sector participation in mining, the government through its various public sector companies continues to be the largest participant in the domestic mining industry.

Much of India's potential mineral resources are yet to be fully explored. Earlier, governmental policies and legislations had largely focussed on regulation of mines and minerals rather than on exploration and development. Taking cognisance of the stagnation of the mineral industry, various reforms have been initiated by the Indian government allowing for greater private sector participation in mineral exploration, mine development and maintenance.

2 What are the target minerals?

India produces nearly 88 minerals, which include fuel, atomic, metallic and non-metallic minerals. India is a leading producer of several metallic minerals such as chromite, iron ore, zinc, bauxite, manganese, aluminium and copper.

3 Which regions are most active?

India's mining wealth is concentrated in Odisha, Andhra Pradesh, Rajasthan, Chhattisgarh, Jharkhand, Madhya Pradesh and Karnataka. Iron ore reserves are predominantly found in Odisha, Jharkhand, Chhattisgarh, Maharashtra, Goa and Karnataka. Maharashtra, Madhya Pradesh, Odisha, Andhra Pradesh and Karnataka are major areas for manganese reserves. Copper reserves are available in Rajasthan, Madhya Pradesh and Jharkhand. Zinc reserves are predominantly found in Rajasthan, Andhra Pradesh, Madhya Pradesh, Bihar and Maharashtra. Chromite ore reserves are available in Odisha, Manipur, Nagaland, Karnataka, Jharkhand, Maharashtra, Tamil Nadu and Andhra Pradesh.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Indian legal system is common law-based.

5 How is the mining industry regulated?

Regulatory framework

The mining industry is regulated both at the federal and state level. Under the Constitution of India, the states have the power to regulate mines and mineral development. However, this power is subject to the federal laws and regulations on mining.

Mineral classification

Minerals are classified into two types – major and minor. State governments have the power to frame policy and regulate the exploration, extraction and processing of all minor minerals such as building stones, clay and sand. All minerals (other than the minor minerals) are automatically classified as major minerals. The federal government has the power of revision, fixing of royalty, issuing regulations, etc, in respect of major minerals. As metallic minerals are largely classified as major minerals, we have focussed on federal legislations and major minerals in this chapter.

The federal government also has ownership over all offshore minerals (ie, minerals extracted from the sea or ocean floor in the Indian maritime zones such as the territorial waters, continental shelf and exclusive economic zones). The federal government has the right to allot concessions and collect royalty for mining offshore minerals.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The Mines and Mineral (Development and Regulation) Act 1957 (MMDR Act) is the federal legislation which overall regulates the mining sector and ensures that the states exercise their power within a uniform national framework. The Mines Act 1952 sets out the regulations for health and safety in mines and conduct of mining operations. The development and regulation of offshore mineral resources is regulated by the Offshore Areas Mineral (Development & Regulation) Act 2002.

Mining regulatory bodies

The Ministry of Mines is responsible for legislation, policy formulation and administration of mines and minerals in the country. It is principally composed of:

- the Geological Survey of India (GSI), which carries out regional exploration and mapping of mining resources;
- the Indian Bureau of Mines, which maintains the National Mineral Inventory, and is the national regulator for state governments, approving mining plans, closure operations and the conservation of mineral materials;
- the Controller of Mining Leases, which governs modification of mining leases granted before 1972; and
- the Directorate General of Mines Safety is the principle health and safety regulator for this sector.

Significant amendments

In 2015, the Indian government significantly amended the mining laws, through the MMDR Amendment Act 2015, to bring in greater accountability and transparency to the concessionary regime. Some of the key features of the MMDR Amendment Act are:

- the mining concessions are to be granted only through competitive bidding by auction;
- mining concessions are valid for 50 years. The concession is transferrable, but it cannot be renewed after the expiry of the concession period;
- reconnaissance permits for exploration will be granted on a non-exclusive basis to encourage private parties to undertake exploration;
- in connection to notified minerals (ie, bauxite, iron ore, limestone and manganese ore), the state government may reserve a mine for a particular end use. In such cases, it must prescribe the end use before auction of the mining lease. The minerals extracted from a reserved mine can only be utilised for the specified end use and cannot be sold or transferred;

- district mineral foundations (DMF) are to be established for the utilisation of the proceeds from mining operations to develop the local area around the mines; and
- a National Mineral Exploration Trust (NMET) is to be set up to facilitate detailed mineral exploration in the country.

Over the past few years, various other reforms have been introduced to ensure greater private sector participation in the sector, such as:

- the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules 2016 (Mineral Concession Rules), which, unlike the earlier concession rules, provide for the mechanisms for grant of concessions through auction, transfer of concessions, as well as saving clauses to protect the rights of mineral concession licensees under the old regime;
- the Mineral Conservation and Development Rules 2017 (MCDR) which details the rights of the reconnaissance or prospecting licensee or mining lease holders;
- foreign direct investment (FDI) is now permitted upto 100 per cent under the automatic route (ie, without prior governmental approval) to explore and exploit all non-fuel and non-atomic minerals and process all metals as well as for metallurgy; and
- special courts are to be set up to expedite prosecution in illegal mining.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The National Mineral Inventory, under the Indian Bureau of Mines has been following the United Nations Framework Classification for Fossil Energy and Mineral Resources (UNFC) since 2000. It is a globally recognised system that provides a method of standardisation for regulatory and statistical purposes.

The other international system for classification, CRIRSCO (which includes CIM Standards, JORC Code and SAMREC Code), is geared more for public reporting by companies to provide information to investors. UNFC classification, on the other hand, is more beneficial for governmental reporting of mineral resource estimates and forecasts to attract investment and exploration activities. While Indian companies are required to report to the government in the UNFC format, there is no specific system that they need to follow for their quarter or annual reports, memoranda or press releases.

Key definitions and terminology used for reporting mineral resources under these two classification systems have been aligned. However, unlike the CRIRSCO system, where there must be reasonable prospects for eventual economic extraction of mineral resources, the UNFC classification reports on undiscovered or uneconomic minerals reserves as well.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The federal government regulates mining and mineral development and the state government grants concessions, collects royalty and other fees when the mineral is located in land vested in the state. While earlier concessionary rights were granted on a first come first serve basis, under the amended MMDR Act, concessions to all major minerals are granted through an auction. A private party who has a mining lease for particular minerals has full title, albeit with permitted end use stipulations as may be applicable over these minerals.

There are large areas where mining rights are held by private parties and by recent estimates there are nearly 10,621 private mines. The Supreme Court, in 2013, conferred rights to mineral wealth on owners of surface rights rather than vesting them in the state. The Supreme Court, however, is yet to rule on certain aspects of ownership of minerals such as the liability of private owners to pay royalties to the state.

As part of the reforms, under the new regime, a land owner who wants to grant a prospecting licence or mining lease to a third party can do so only with state government authorisation. In cases of such private mining leases, the mining lessee must comply with the federal government mining regulations as well as provide the state government with a security deposit for ensuring compliance with the mine closure regulations.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The National Mineral Inventory of the Indian Bureau of Mines provides a comprehensive overview of exploration, development and mining activities carried out in India by federal and state governments, public sector utilities and private agencies. The inventory provides mineral-wise and state-wise information with regard to location, infrastructure, geology, exploration, physical and chemical properties, freehold or lease hold status, etc.

The GSI carries out geological mapping and acquires geoscience data for the entire country. It generates and disseminates this information to other exploration agencies for accelerating the mineral exploration process.

Under the National Mineral Exploration Policy 2016, the GSI is required to provide all pre-competitive baseline geoscience data free of cost to parties. Other than the GSI, the Directorates of Geology and Mines of certain state governments, the Mineral Exploration Corporation Limited and other government-owned companies also carry out detailed exploration of mining areas and maintain information databases.

The NMET has also been newly created to carry out regional and detailed exploration for minerals. In addition, the Indian Bureau of Mines provides information on the number of mines in operation and their mineral quality either at a cost, or on a restricted access basis at its offices.

As regards reporting, a mineral concession holder is required to provide geophysical data relating to prospecting, mining, and engineering to the GSI and the state government. All mines are also required to mandatory file returns with Indian Bureau of Mines. With a view to encourage private players in exploration, non-exclusive reconnaissance permits (NREP) are also issued to applicants for preliminary prospecting of minerals in various parts of the country. There are also plans to incentivise NREP holders by giving them a right to a share in the future revenues from the mineral block that they discover.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

A private party can obtain an NREP, a mining lease or a composite licence (prospecting licence cum mining lease).

Prior to the MMDR Amendment Act, a prospecting licence separate from the mining lease could also granted but now this has been subsumed under the composite licence.

Currently, mining leases and composite licences are only granted through a competitive bidding process. A composite licence holder has the right to move from prospecting to mining; however, a NREP holder is not entitled to a preferential claim for grant of a composite licence or mining lease. For those rights holders who had been granted reconnaissance or prospecting licences under the old regime prior to the MMDR Amendment Act, a right to obtain prospecting cum mining lease or mining lease, as the case may be, continues to exist.

Obligations of the rights holder include:

- obtaining all necessary permits and consents;
- operating the mine in accordance with the mining plan;
- commencing mining operations within two years of execution of mining lease;
- payment of royalty, dead rent, surface rate or other fees;
- keeping accurate accounts of minerals mined, waste material excavated, employees and all mining plans;
- allowing inspections by the authority;

- restoring the land, to the extent possible, affected by prospecting or mining activity; and
- payment of compensation for all damages, injury or disturbances caused in exercise of its rights.

11 What is the regime for the renewal and transfer of mineral licences?

The state government may renew a reconnaissance or prospecting licence subject to a maximum of five years. A mining lease is granted for a period of 50 years and cannot be renewed.

Other than for captive use, non-auctioned mining leases cannot be transferred by the lease holder. Captive-use mining leases not awarded though an auction can be transferred by paying an upfront fee (equal to 0.5 per cent of the value of the estimated resources) to the state government.

A mining lease or composite lease obtained through auction can be transferred to a third party. Such a transferee would be subject to all conditions and liabilities that the transferor was subject to at the time of the transfer.

12 What is the typical duration of mining rights?

Recently, the term for mining leases has been increased to 50 years, at the end of which, the lease cannot be renewed and is re-auctioned. A reconnaissance permit or prospecting licence may be granted for three years and may be extended subject to a maximum period of five years.

The state or federal government may terminate a lease or licence before its term on the following grounds:

- regulation of mines and mineral development;
- preservation of natural environment;
- control of floods;
- prevention of pollution;
- to avoid danger to public health or communications;
- to ensure safety of buildings, monuments or other structures;
- for conservation of mineral resources; and
- for maintaining safety in the mines.

No such order for premature termination can be made without giving the licence or lease holder a reasonable opportunity of being heard.

A mining lease lapses if an entity fails to start mining operations within two years of the date of execution of the lease or discontinues mining for a period of two years unless the state government is satisfied with the reasons for such delay.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Mineral concessions in India are granted to Indian nationals or entities incorporated in India only. However foreign parties can invest up to 100 per cent in the equity of such companies through the automatic route under Indian FDI policy.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

There are no special courts or tribunals to adjudicate on mining rights. However, the amended MMDR Act provides for the establishment of special courts to deal with cases of illegal mining. Further, the National Green Tribunal may also adjudicate on disputes regarding environmental non-compliance in any mining activity. India has an independent judicial system that consists of the Supreme Court of India as the apex judicial body under which are the High Courts, subordinate courts as well as the various tribunals.

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) as well the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). If a party receives a binding award from a country that is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory that has been notified as a convention country by India, the award would then be enforceable in India.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

A mining rights holder is required to obtain surface rights over the area or obtain the consent of the owner to start prospecting or mining operations.

In relation to government-owned land, the selected bidder is granted surface rights by the government authorities. During prospecting, the approval of the government authority such as the deputy collector needs to be taken to clear vegetation in order to construct drains or use any water in such land. The rights holder is liable to pay surface rent, water cess for the surface area used by him for the purposes of mining operations. The mining lease holder must prior to using any land for new surface operations give written notice to the government authority, which has a right to raise objections and restrict the rights holder's use of the surface.

When private owners grant prospecting licences or mining leases (as discussed in question 8) the land owners may grant surface rights to such third parties according to the terms of their agreement.

Further, the government exercising the power of eminent domain can acquire land for public purposes such as mining under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (LARR Act). However, this is subject to consent requirements from the surface rights holders and such acquisitions can be opposed (see question 43).

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Yes, the government and state agencies have a right to participate in mining projects and the public sector companies tend to dominate in the mining sector. All companies undertaking mining activity must be incorporated in India.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

While there is no formal ability for expropriation, as discussed above in question 12, the government has the right to prematurely terminate a prospecting licence or a mining lease.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Under the Constitution of India, the President of India may notify certain lands as 'scheduled areas' that have a special governance mechanism. Scheduled areas are tribal dominated areas that are underdeveloped and show marked economic disparity. Laws formulated in relation to scheduled areas typically have more restrictions on land acquisitions and transfers (see question 43). Further, the federal or state government may also reserve certain areas (that are not already held under lease or licence) with a view to conserve any mineral. Any mining activity in such reserved areas is only done by government companies.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Royalty – the federal government specifies the royalty payments for each mineral and the state government collects the royalty on mining. Royalty in most cases is charged on ad valorem basis as percentage of the price notified by the government. Any enhancement to the royalty can only be done once in three years.

Dead rent – a mining rights holder is liable to pay either royalty or dead rent in respect of a mining area, whichever is higher. Dead rent is, therefore, meant to be paid when the mine is closed or is being under exploited. Dead rent is fixed by the federal government and is collected by the state. Any enhancement to the dead rent can only be done once in three years.

NMET/DMF contributions – a rights holder has to pay a sum equal to 2 per cent of the royalty as a contribution to NMET. DMF contributions

are to be fixed by the federal government but cannot exceed one-third of the royalty specified.

The rights holder may also have to pay, where applicable, surface rent to the surface rights owners or application fees for the licence or lease that are fixed by the federal government and collected by the state.

The taxes or levies differ in quantum and nature depending on the states. Principal taxes and duties applicable to mining industry are: (i) direct taxes, such as corporate tax or minimum alternative tax; (ii) indirect taxes, such as custom duty, service tax, value added tax; (iii) stamp duty; (iv) water tax; and (v) forest-related taxes, such as forest tax (levied on forest produce removed from forest areas), compensatory afforestation charges (levied to promote afforestation and compensate for deforestation), net present value payments of forest land diverted for mining. Cess is also levied on mineral ores under various legislations.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Special deductions under Income Tax Act, 1961 are allowed for prospecting of minerals. One-tenth of the expenditure on prospecting, extraction and production of certain minerals during five years ending with the first year of commercial production is allowed as a deduction from the total income (subject to the timelines provided in the law). Export profits from specified minerals and ores are eligible for certain concessions.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No. There are no legislations providing for tax stabilisation in India.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No. However, it collects royalty, dead rent, tax and other fees from the licence holder.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Yes. Capital gains tax is applicable on transfer of licences or lease.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

As the mines will be owned and controlled by an Indian entity, no such differentiation exists.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The principal business structure is usually a limited liability company. Private parties when working together may opt for a joint venture company or a special purpose vehicle.

26 Is there a requirement that a local entity be a party to the transaction?

Mineral concessions in India are granted to Indian nationals or entities incorporated in India only.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Mauritius and Singapore have been popular destinations for foreign investments in India, especially owing to their low rate of taxation and specific benefits under the double tax avoidance agreements (DTAA) with India. However, recent amendments to the India–Mauritius DTAA now require Mauritius companies to pay capital gains tax arising out of a sale of shares in India. This has a knock-on effect on the taxation of transactions structured out of Singapore, as the India–Singapore DTAA is co-terminus with the benefits available under provisions on capital gains contained under the India–Mauritius treaty.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Private parties typically finance mining activities through domestic and foreign debt or equity. India has a mature domestic equity capital market, and large mining companies such as NMDC, Rohit Ferrotec, Vedanta Limited are listed on major stock exchanges in India. Privately owned companies also rely on issuing foreign currency bonds, or listing equity on foreign exchanges.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No; however, public sector banks, in addition to private commercial banks and NBFCs, provide debt financing for mining projects in India.

30 Please describe the regime for taking security over mining interests.

A concession holder is free to create encumbrances over the concession obtained through the auction process. The mineral concession is also assignable to a transferee that meets the eligibility conditions. However, no encumbrances can be created over non-transferrable mineral concessions.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no restrictions on the importation of machinery and equipment required for mining activities. However, customs duty and other duties or cess may be applicable on imports. The government, however, is keen to promote mining and exploration and, therefore, provides certain incentives. For example, capital goods imported for mining under the Export Promotion Capital Goods scheme qualify for concessional customs duty subject to certain export obligations. Further, low customs duty is applied on capital equipment used for minerals such as nickel, tin, pig iron and unwrought aluminium.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

The FIDIC standard agreements have been commonly used for equipment supply agreements in India.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Certain forms of iron ore, manganese, and chrome (set out in schedule 2 of the Indian Trade Classification Harmonized System) can only be exported through identified government-owned entities. Additionally, special chemicals, organisms, materials, equipment and technology items such as titanium alloys can only be exported under a licence from the Directorate General for Foreign Trade. Further, if a mine has been reserved for a particular end use, the minerals from it cannot be exported.

Further, to ensure that the minerals are available domestically and to reduce exports, the government may impose high export taxes, which can be revised annually during its annual budget sessions.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Indian fiscal policy provides for capital control restrictions, which prevents free convertibility between the Indian rupee and foreign currencies. However, there have been several steps taken to liberalise both foreign equity and debt recently. While previously, investments in the mining sector beyond 74 per cent required prior governmental approval, the government now allows up to 100 per cent FDI in Indian companies engaged in the mining business (exploration and extraction).

Indian mining companies can also use up to US$750 million in foreign debt from recognised lenders or shareholders without Reserve Bank of India (RBI) approval. However, any such debt can only be utilised towards specific permitted end use such as (i) import or local sourcing of capital goods (including for services, technical know-how and licence fees); (ii) new projects; (iii) modernisation or expansion of existing units; (iv) acquisition of shares of government owned companies; and (v) refinancing of existing foreign debt.

There are typically no requirements to use proceeds domestically and Indian companies can repatriate monies by declaring them as profits, dividends or royalty income. However, in certain cases of repatriation, such as acceleration of loans, or repatriation of court awards, prior RBI approval may be required. There are also no export performance parameters for access to foreign exchange.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws applicable to mining industry include:

- the Environment (Protection) Act 1986 (EPA);
- the Forest (Conservation) Act 1980;
- the Water (Prevention and Control of Pollution) Act 1974; and
- the Air (Prevention and Control of Pollution) Act 1981.

Further, the MMDR Act empowers the federal government to frame rules for conservation and sustainable development of minerals and for the protection of environment by preventing or controlling pollution which may be caused by prospecting or mining operations. The MCDR regulates environmental aspects of mining and provides for sustainable mining.

The principal regulatory bodies are Ministry of Environment Forest and Climate Change (MoEF) and the Central and State Pollution Control Board. Specifically in relation to mining, the Indian Bureau of Mines and the state government also regulate mining.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The Environment Impact Assessment (EIA) Notification 2006 notified by the MoEF under the EPA provisions regulates the grant of environment clearances. The impact on the environment resulting from to a mining project is assessed by an EIA study. Consequently, an environmental management plan is prepared and the environment clearance is granted stipulating conditions to minimise impact on the environment from the project.

Further, in the case of mining projects on forest land, the federal government may stipulate mitigative measures for diversion of forest land, such as creation and maintenance of compensatory afforestation.

The EIA process for mining takes a year, if not longer, as the EIA study has to be conducted over three seasons along with public consultations, followed by review by the appraisal committee. If forest land is involved, then the clearance for diverting the forest land also needs to be obtained in parallel. While, earlier, the process of getting environmental clearance was known to stretch for two years or more, under the present policy to spur industry and development, clearances are granted in less time.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

A mines right holder has to prepare two mine closure plans: a progressive mine closure plan and a final mine closure plan. The progressive mine closure plan is submitted with the mining plan while the final closure plan is submitted for approval two years prior to the proposed closure. The rights holder has to ensure that the protective measures including reclamation and rehabilitation works are carried out according to the approved mine closure plan. The government authority must certify that all protective works in accordance with the final mine closure plan have been carried out.

Further, for concessions granted other than by auction, a financial assurance in the form of bank guarantee has to be furnished for proper implementation of the mine closure plan, failing which the state government may realise this bank guarantee. For concessions granted by auction, if proper closure and remediation according to the mine closure plan is not followed, the performance security can be realised as per the provisions of the mine development and production agreement signed between the parties.

38 What are the restrictions for building tailings or waste dams?

Under the MCDR, the rights holder must ensure that:

- overburden, waste rock, tailings and slimes are stored in separate dumps;
- the waste dams are properly secured to prevent floods and escape of material in quantities that may cause degradation of environment;
- the site for waste dams, tailings or slimes is as far as possible on impervious ground to ensure minimum leaching; and
- the waste dumps are to be suitably terraced and stabilised through vegetation or otherwise.

Inspection of mines is carried out by Indian Bureau of Mines in an order of priority. For example, fully mechanised large mines are to be inspected at least twice a year. Mines, where approved mining plans are modified, have to be inspected based on the increase in production; for example, a mine where production is increased by more than 50 per cent has to be inspected every three months.

While no specific qualifications are detailed for persons in charge of operation and management of dam waste, qualified and experienced mining engineers and geologists need to be employed by mining companies for conducting prospecting and mining works. There are no requirements for mandatory alarm systems or emergency drills with local communities. The government has the primary responsibility for the rescue of people in case of a dam failure; however, under the doctrine of absolute liability in India, the mining companies would be liable for the dam failure or loss of life or injury caused by dam failure.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mines Act sets out provisions regulating mining, health and safety of labour, employment terms, inspection of mines, etc. The Mines Rules 1955 set out the framework for medical examination of labour, basic health and sanitation provisions and welfare amenities for the miners and their families. The Directorate General of Mines Safety is the Indian government agency for safety in mines.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016 (Hazardous Waste Rules 2016) is the primary legislation relating to management and recycling of mining waste products. MoEF in granting environmental clearance for mining operations specifies conditions and restrictions for management and recycling of waste. The State Pollution Control Board in issuing consent to operate also specifies conditions. The lease holder has the right to explore and exploit mining waste products in tailing ponds and waste piles subject to any restrictions under Hazardous Waste Rules 2016.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Under the Mines Rules 1955 women are restricted from being employed in underground mines and in any above-ground mine except between the hours of 6am and 7pm. Further restrictions can also be imposed by the federal government.

The Mineral Concession Rules specify that the rights holder cannot employ a foreign national in the mining operations without the prior approval of the federal government. There are also standalone legislations that govern employment of foreign persons. A foreign employee must have a valid employment visa and be registered under

Update and trends

Greater transparency
In recent years, there has been a push to increase transparency and stop discretionary grant of concessions. The Supreme Court has held that there cannot be an allocation of material resources free of cost or at a consideration lower than their actual worth. Auction is one of the recognised methods for alienation of natural resources. The amendments to the MMDR Act and revision of rules under it were in keeping with this spirit of reform as well as geared towards increasing private participation (see question 6 for detailed analysis). To increase transparency and accountability, the federal government has also introduced the Transparency, Auction Monitoring and Resource Augmentation Portal and Mobile Application in February 2017, which allows users to track the status of the statutory clearances associated with mining blocks.

Development of local communities
The mining industry is concentrated in underdeveloped parts of the country. There has been growing emphasis on the fact that local communities also benefit from the mining activities in their region. The government introduced the DMF and other schemes under it to provide for the welfare and development of local communities.

Conflict between mining and land/tribal rights
Land acquisition in India has been fraught with difficulties and delays. Usually, these are blocked on grounds of unsatisfactory compensation, displacement of poor communities, lack of informed consent and environmental degradation. There are many cases where large-scale projects have stalled or had to be abandoned in India. For example, the POSCO steel project and mining of iron ore in Odisha, which was envisaged back in 2005 (and at the time would have been the biggest FDI investment in India), has now been abandoned owing to multiple judicial and regulatory hurdles it faced in relation to obtaining clearance to divert the land (on which tribal communities reside), environmental clearances and licences.

Bauxite mining in Odisha has faced similar issues. In 2016, Odisha Mining Corporation (OMC) filed an interlocutory application before the Supreme Court challenging the landmark 2013 *Vedanta* judgment. OMC had argued that the resolution of the gram sabhas (a local self-government unit at village level) rejecting mining in the Niyamgiri hills cannot remain perpetually in force and must be reviewed. OMC wanted the Supreme Court to set aside the gram sabha resolutions by reviewing its own judgment on the case. However, the Supreme Court refused to hear the petition and instead directed OMC to approach the appropriate forum for challenging gram sabhas' decision. There have been reports that the OMC may approach the National Green Tribunal for review of the gram sabha resolutions. The outcome of such a ruling may have a significant impact on acquisition of land for mining purposes.

In recent years, there have been attempts to liberalise land acquisition for certain sectors, such as industrial corridors, PPP projects and defence so as to exempt them from the social impact assessment and consent requirements under the LARR Act. Reform was also initiated to allow the government to acquire land for a greater range of private entities and not just private companies. However, this was met with protest and resistance as being anti-poor and anti-tribal rights. There have also been various steps taken to make the environmental or forest clearance process less stringent so as to give greater impetus for development of industries and mining though these attempts have come under criticism as well as legal challenge. There is need for holistic reforms that take into account the concerns of local communities and environment and yet provide a smoother route for setting up mines in India.

the Registration of Foreigners Act 1939 if the visa duration is for more than 180 days.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Companies Act 2013 and the Companies (CSR) Rules 2014 contain the primary CSR obligations of companies in India. The CSR provisions are applicable to companies with an annual turnover of 10 billion rupees and more, or a net worth of 5 billion rupees and more, or a net profit of 50 million rupees. Such companies must spend 2 per cent of their average profit in the past three years on CSR activities. The Companies Act 2013 lists an indicative set of CSR activities such as environmental sustainability, education, sanitation, enhancing vocational skills, etc. Companies may implement these activities taking into account the local conditions after seeking board approval. A report on the CSR policy must be published by the company on its website and if the company fails to spend the prescribed amount, the report should specify the reasons. The Ministry of Corporate Affairs is the principal regulatory body for the Companies Act 2013.

Specifically in relation to mining, the amended MMDR Act provides for setting up of the DMF in all districts affected by mining related operations. A rights holder is required to contribute to the DMF at rates specified by the federal government that cannot exceed one-third of the royalty. The state governments have administrative jurisdiction over the DMFs in their region. Recently, a scheme was also launched meant to provide for the welfare of areas and people affected by mining related operations, using the funds generated by DMFs.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Much of India's mining resources are largely based in underdeveloped tribal areas. One of the major sources of conflict is land acquisition in such tribal areas for mining. The governor of the state is vested with the power to make regulations pertaining to scheduled areas, including the power to 'prohibit or restrict transfer of land by or among scheduled tribes in such areas'.

Various states have enacted their own legislation to deal with issues of land acquisition specific to certain tribal regions. These legislations govern the land rights of the tribals, including the transfer and utilisation of Scheduled Areas in the states, and incidence of tenancy. The major thrust is to define various categories of landholdings among the tribal classes, protect the land rights of the tribals against high rents or transfer of land, regulate the transfer of such lands and make provisions for the restoration of illegally alienated land.

The state government is also required to ensure that the panchayats at the appropriate level and the gram sabha have the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a scheduled tribe. Tribal rights have to be settled and the tribals must agree through the gram sabha before industry or mining companies can get clearance to use tribal land.

The LARR Act is the overarching legislation that governs land acquisition in the country. The LARR Act recognises the special status of tribal lands in the scheduled areas. It provides that acquisition of land must not be made in the scheduled areas as far as possible and when the acquisition does take place, it must be done as a demonstrable last resort. The state government can impose rehabilitation and settlement obligations on the sale and purchase of land acquired through private negotiations and prescribe the limits and ceilings for this purpose.

The Supreme Court has also upheld the cultural and religious rights of tribals over tribal areas. In the 2013 *Vedanta* case, the Supreme Court refused to allow Vedanta, a mining company, from sourcing bauxite from the Niyamgiri Hills, Odisha, which is held sacred by the local Dongria Kondh tribe.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

India is party to many international treaties, conventions or protocols that relate to CSR issues in a general manner. However, there is no mandatory application of these in India in relation to CSR issues. Various global guidelines such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ILO's Tripartite Declaration of Principles on Multinational Enterprises and Social Policy can be voluntarily applied in India.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Prevention of Corruption Act 1988 (PCA) is the principal legislation for prevention of corruption and bribery in India. The PCA criminalises receipt of illegal gratification by public servants and its payment. Such illegal gratification can be pecuniary or non-pecuniary in nature. It is not necessary for there to be an actual payment of bribes; even an attempt to bribe attracts liability under the PCA. The Central Bureau of Investigation is the federal agency that undertakes investigation and prosecution of offences pertaining to bribery and corruption and the states have their own anti-corruption wings. The Central Vigilance Commission established by the Central Vigilance Act 2003 is the primary agency for monitoring all vigilance activity under the federal government. It exercises superintendence over inquiries into offences under the PCA. The federal government has also enacted the Whistle Blowers Protection Act 2011 to protect anyone who exposes wrongdoing in government bodies or projects.

Public officials are further governed by specific service rules that prohibit such officials from receiving gifts, lavish hospitality and other perks beyond certain threshold levels. It also prevents public officials from engaging in other trade or business and employment. The Foreign Contribution Regulation Act, 2010 restricts acceptance of foreign contributions or hospitality by government servants, legislature members, political party candidates, government corporation employees without permission of the federal government. The Lokpal and Lokayuktas Act 2013 provides for an ombudsman body called the Lokpal at the federal level, and Lokayukta, at the state level, to inquire into allegations of corruption against public functionaries.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies are vigilant of the US Foreign Corrupt Practices Act 1977, which prohibits bribing of foreign officials for the purpose of business. It is important as it applies not only to US entities and persons in US but also persons abroad working for US entities. This could affect Indian companies that are in partnership with US-based companies or have an international footprint in the US. The UK Bribery Act 2010 is also relevant to Indian companies as it imposes corporate criminal liability on UK and non-UK based companies having business in the UK, equally, irrespective of whether any part of the offence of giving bribes took place in the UK or not. Companies with ties to France are also likely to pay attention to the new French anti-bribery law Loi Sapin II, which will come into force this year.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

No, India has not adopted the EITI Standard.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Mineral concessions are granted to Indian nationals or entities incorporated in India only. However, 100 per cent FDI is allowed in exploration and mining of all metallic minerals as well as diamonds and precious stones through the automatic route, by way of equity participation in a company incorporated in India. Full FDI with federal government approval is allowed in connection with titanium-bearing minerals.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

While there is no comprehensive international law on mining, a number of treaties, conventions and declarations have provisions for protecting the environment and sustainable development that are relevant to the mining industry in India. These include:

- the Stockholm Declaration 1972, which declares that nations have the right to exploit their own resources pursuant to their own environmental policies but they also have the responsibility to ensure that such activities do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction;
- the United Nations Convention on the Law of the Sea 1982, which regulates deep seabed exploration and mining;
- the Convention on Biological Diversity 1992, which calls on states to promote environmentally sound and sustainable development in areas adjacent to protected areas;
- the United Nations Framework Convention on Climate Change 1992 and Kyoto Protocol 1997 in relation to the decrease of emission of greenhouse gases;
- the Rio Declaration 1992 and Johannesburg Declaration 2002 concerning sustainable development; and
- the Minamata Convention 2013 to protect human beings from harmful mercury emissions.

India is also a signatory to the New York Convention and Geneva Conventions which relate to foreign arbitration.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Indonesia continues to be one of the world's top producers of gold, copper, nickel, tin and coal, and is host to several world-class mines. Indonesia is one of the world's largest exporters of thermal coal.

Given the (softened but enduring) international demand for mining products, the mining industry has become crucial to the Indonesian economy. The industry continues to be a significant contributor to Indonesia's export earnings, economic activity, employment and regional development.

2 What are the target minerals?

Indonesia continues to produce significant levels of coal, gold, copper, nickel and tin. Other minerals targeted by investors in Indonesia include silver, bauxite, iron sands, lead and zinc.

3 Which regions are most active?

Kalimantan and Sumatra are the most active regions for coal mining; Sulawesi and Maluku for nickel mining; Papua, Nusa Tenggara, Sumatra and Sulawesi for gold and copper mining; Bangka Island for tin mining; Bintan Island and West Kalimantan for bauxite mining; and North Sumatra for lead-zinc mining.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Indonesia has a civil law system that was inherited from the Dutch colonial system.

5 How is the mining industry regulated?

The mining industry is regulated at each of the national, provincial and regency or municipal levels of government through laws and regulations. There is a national law (Law 4 of 2009 on Minerals and Coal Mining (Mining Law)) that sets out general provisions, which are further implemented through government, presidential, ministerial and regional regulations (depending on the law's delegation of authority). It is intended that the Mining Law will be either amended or replaced in the near future, since a draft mining bill has recently been prepared by the National House of Representatives. This bill is at an early stage of its development.

The Mining Law is premised on a licensing system, whereas the old mining regime was based on a combination of licensing and contract systems.

Under the old regime, a 'mining authority' (KP) could only be granted to wholly owned Indonesian companies or nationals. A contract, either a 'contract of work' (CoW) (for minerals) or a 'coal cooperation agreement' or 'coal contract of work' (CCoW) (for coal), was initially designed for foreign investors. Foreign investors could not carry out mining activities directly and were required to establish a foreign investment limited liability company (PMA company) as a special purpose vehicle. The relevant PMA company was the entity that entered into a CoW or CCoW with the government.

The Mining Law abolished the KP, CoW and CCoW systems and introduced a new and simplified licensing system in the form of mining business licences (IUPs) (issued as exploration IUPs and production operation IUPs), special mining business licences (IUPKs) (issued as exploration IUPKs and production operation IUPKs), and people's mining licences (IPRs). One significant feature of the Mining Law is that there is now no distinction between the licences issued to local investors and foreign investors (through shareholdings in IUP-holding companies).

KPs issued under the old mining regime were initially honoured, but were required to be converted to IUPs.

The Mining Law continues to recognise existing CoWs or CCoWs, which will continue to be honoured by the government until their expiry, subject to certain 'adjustments' being made to them to comply with the Mining Law. These CoW or CCoW amendments are still subject to negotiation between the CoW or CCoW-holders and the government. According to media sources in mid-April 2017, 21 CoWs and 37 CCoWs have already been successfully amended to satisfy the 'adjustment' obligation; two CoWs were converted into IUPKS; while 11 CoWs and 33 CCoWs have not completed the negotiation process. Media sources also quote the government's intention to conclude the negotiation and amendment of all CoWs and CCoWs by the end of 2017.

Both the national government (through the Ministry of Energy and Mineral Resources (MEMR)) and the regional governments (through governors at the provincial level) have the authority to issue mining licences. Whether the mining licences will be issued by the MEMR or the governor (as appropriate) will depend on the type of materials to be extracted, the area to be covered by the mining licence and whether the applicant is a PMA company (that is, a company with any foreign shareholders). The national government (rather than the relevant regional governments) will issue all new IUPs to PMA companies.

Mining licences can only be granted over areas that have been determined by the MEMR and regional governments as mining areas (WPs) and further designated as mining business areas (WUPs), state reserve areas (WPNs), special mining business areas (WUPKs) or people's mining areas (WPRs).

Regional governments and the MEMR are authorised to issue the following:

- mining business licence areas (WIUPs) for metal minerals and coal;
- WIUPs for non-metal minerals and rocks, as long as certain geographic requirements are met; and
- special mining business licence areas (WIUPKs).

The grant of WIUPs for metal minerals and coal and WIUPKs is by public auction. No public auctions have yet taken place, partly due to the fact that the government has not yet completed a detailed national map of all the areas in which mining is legitimately taking place, and the areas in which mining can take place (that is, WP, WUP, WPN, WUPK and WPR areas). Policy mandates that auction bids for WIUPs and WIUPKS may only be approved by the MEMR after having been approved by the relevant governor, although this process is not regulated.

An IUP will be granted after a WIUP is awarded and an IUP application, which meets all requirements, has been submitted.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The mining regime is premised on article 33 of the 1945 Indonesian Constitution (the Constitution), which provides that land, water and natural resources contained within Indonesia are controlled by the state and must be used for the greatest benefit of the people.

The laws and regulations that regulate the mining industry are divided into those that directly regulate mining activities and those that do not specifically regulate mining, but must be followed when carrying out mining or related activities.

The principal law that directly regulates mining is the Mining Law. To provide specific guidance on the implementation of the Mining Law, the government and the MEMR have issued numerous regulations, including the following.

Government regulations (GR)

- GR 22 of 2010 on Mining Areas;
- GR 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities (GR 23 of 2010);
- GR 78 of 2010 on Reclamation and Post-Mining Activities (GR 78 of 2010);
- GR 55 of 2010 on the Development and Supervision of the Implementation of Management of Mineral and Coal Business Activities;
- GR 9 of 2012 on Categories and Tariffs for Non-Tax State Revenue (GR 9 of 2012);
- GR 24 of 2012 on the Amendment to GR 23 of 2010 (GR 24 of 2012);
- GR 1 of 2014 on the Second Amendment to GR 23 of 2010 (GR 1 of 2014);
- GR 77 of 2014 on the Third Amendment to GR 23 of 2010; and
- GR 1 of 2017 on the Fourth Amendment to GR 23 of 2010 (GR 1 of 2017).

MEMR regulations

- MEMR Regulation 18 of 2009 on the Procedures to Amend Investment in the framework of Contracts of Work and Coal Contracts of Work;
- MEMR Regulation 28 of 2009 on the Administration of Coal and Mining Services Business (MEMR Regulation 28 of 2009);
- MEMR Regulation 34 of 2009 on the Prioritisation of the Supply of Minerals and Coal for Domestic Needs (MEMR Regulation 34 of 2009);
- MEMR Regulation 12 of 2011 on Guidelines for the Determination of Mining Business Areas and the Information System for Minerals and Coal Mining Areas;
- MEMR Regulation 24 of 2012 on the Amendment to MEMR Regulation 28 of 2009;
- MEMR Regulation 27 of 2013 on Procedures and Determination of Share Divestment Prices, and Changes to Investment in Mineral and Coal Mining Business (MEMR Regulation 27 of 2013);
- MEMR Regulation 28 of 2013 on Procedures for the Auction of Mining Business Licence Areas and Special Mining Business Licence Areas for Metal Mineral and Coal Mining Business Activities (MEMR Regulation 28 of 2013);
- MEMR Regulation 32 of 2013 on Procedures for the Grant of a Special Permit in the Mineral and Coal Mining Sector;
- MEMR Regulation 7 of 2014 on Reclamation of Mining Areas and Post Mining Activities for Mineral and Coal Mining Businesses (MEMR Regulation 7 of 2014);
- MEMR Regulation 38 of 2014 on the Application of Safety Management System in Minerals and Coal Mining;
- MEMR Regulation 43 of 2015 on the Evaluation of Minerals and Coal Mining Business Licences (MEMR Regulation 43 of 2015);
- MEMR Regulation 5 of 2017 on Increasing the Added Value of Minerals through Domestic Processing and Refining Activities (MEMR Regulation 5 of 2017);
- MEMR Regulation 6 of 2017 on Procedures and Requirements for the Grant of a Recommendation for the Export of Processed and Refined Minerals (MEMR Regulation 6 of 2017);
- MEMR Regulation 7 of 2017 on the Procedures to Determine Benchmark Prices for Mineral and Coal Sales (MEMR Regulation 7 of 2017);
- MEMR Regulation 9 of 2017 on Procedures and Determination of Share Divestment Prices, and Changes to Investment in the Mineral and Coal Mining Businesses (MEMR Regulation 9 of 2017);
- MEMR Regulation 15 of 2017 on the Procedures for the Grant of Special Mining Business Licences as a Continuation of Operations of Contracts of Work and Coal Contracts of Work; and
- MEMR Regulation 28 of 2017 on the Amendment to MEMR Regulation 5 of 2017 (MEMR Regulation 28 of 2017).

Major amendments to mining laws and regulations over the past year include the following:

- GR 1 of 2017, which is the fourth amendment to GR 23 of 2010, which governs implementation of management of mineral and coal business activities;
- MEMR Regulation 5 of 2017 (as amended by MEMR Regulation 28 of 2017), which revokes the previous MEMR regulation governing the increase in added value of minerals through domestic processing and refining activities (ie, MEMR Regulation 1 of 2014 as amended by MEMR Regulation 8 of 2015);
- MEMR Regulation 6 of 2017, which revokes the previous MEMR regulation governing the procedures for, and setting out the requirements applicable to, export recommendations for processed and refined minerals (ie, MEMR Regulation 5 of 2016);
- MEMR Regulation 7 of 2017, which revokes the previous MEMR regulation governing the procedures to determine benchmark prices for mineral and coal sales (ie, MEMR Regulation 17 of 2010);
- MEMR Regulation 9 of 2017, which revokes the provisions on the procedures and determination of share divestment prices under MEMR Regulation 27 of 2013; and
- MEMR Regulation 15 of 2017, which provides procedures for the replacement of a production operation CoW or CCoW with a production operation IUPK either during or before the end of the term of the production operation period.

The mining industry is also subject to a wide range of laws and regulations on regional governance, investment, forestry, land and the environment, which can have a significant impact on mining projects.

The principal mining regulatory bodies are:

- the MEMR;
- the Directorate General of Minerals and Coal (DGMC);
- the Ministry for the Environment and Forestry (for environmental documents and permits, as well as mining-related issues in forest areas); and
- regional governments (which are divided into provincial governments, regencies and municipalities).

Mining companies that have foreign participation will also come under the auspices of the investment coordinating board (BKPM).

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

DGMC Regulation 569.K/30/DJB/2015 on the Implementation of the Indonesian National Standardisation and Committee Code for Indonesian Mineral Reserves on Exploration Report Results, Natural Reserve Estimates and Mineral and Coal Reserve Estimates (DGMC Regulation 569) was issued on 14 April 2015. As a result of DGMC Regulation 569, IUP, CoW and CCoW-holders became obliged to prepare their reports on mineral resources and reserves based on the Indonesian National Standards (SNI) and the Code of the Indonesian Mineral Reserves Committee (KCMI Code). To date, the most commonly used system in Indonesia has been the Joint Ore Reserves Committee Code and the Guidelines for the Reporting of Identified Mineral Resources and Ore Reserves (which is a joint initiative of the Australasian Institute of Mining and Metallurgy, the Minerals Council of Australia and the Australian Institute of Geoscientists). DGMC Regulation 569 provides a grace period of two years (from 14 April 2015 to 14 April 2017) before IUP, CoW and CCoW holders must use SNI and the KCMI Code.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Under article 33 of the Constitution, the state is deemed to hold title to the minerals in the ground and under the water, for the benefit of the people.

The Mining Law provides that the government may issue relevant mining licences (IUPs or IUPKs) to private parties that wish to participate in mining activities. Holders of mining licences do not have title to the minerals in the ground. They will only have the right to 'own' the minerals or coal they mine after payment of all royalties, dead rent and other necessary exploration and production payments.

Ownership of surface rights does not give ownership to the minerals in the ground, nor does it automatically provide the surface rights owner with a licence to carry out mining activities. There is no separate legal regime that allows the holders of surface rights to automatically hold the mining rights if minerals are found on their land.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

There is currently no public data or information available to private parties (online or otherwise) in relation to mineral assessments.

While IUP or IUPK holders and CoW or CCoW holders must submit periodic reports to the relevant government authority, the information contained in these reports is not publicly available.

The national government, through the DGMC, has established a Sub-Directorate of Area and Information Planning for Minerals and Coal (Sub-Directorate), which is intended to maintain centralised data on Indonesian mining areas.

The information provided by the Sub-Directorate is limited to information on existing IUPs, CoWs and CCoWs. This information is not available online and private parties need to physically visit the Sub-Directorate to gain the information.

The national government does not currently conduct any geoscience surveys (geophysical, geochemical, aeromagnetic or otherwise).

The Mining Law states that the national government must carry out mapping and identify the areas available for mining. Therefore, an effective and comprehensive centralised data and information system on current and available mining areas is expected to be available in the near future. In 2016, MEMR launched the 'Minerba One Map Indonesia' (MOMI) website, which provides integrated mining maps, together with other maps, including forest areas, special terminals, coal terminals, smelter locations and plantations. However, as at mid-April 2017, MOMI is currently only accessible by government officials. Therefore, if the public wishes to obtain MOMI information, a request must be submitted to the relevant government agency, such as MEMR or a relevant regional mining office.

Overlapping mining areas between other mining concession holders and other non-mining or forestry concession areas remain a major concern for the mining industry. As a result, the national government, through the DGMC, has issued a 'clear and clean list', which contains a list of companies and the IUPs held by such companies. In practice, if an IUP appears on the clear and clean list this means that the IUP has been determined not to overlap with any other mining concessions and that the conversion from KP to IUP has been made in accordance with the relevant laws and regulations. According to an MEMR press release issued on 4 April 2017, 8,524 IUPs have been registered nationally, of which 6,002 IUPs have been declared clean and clear, but there remain 2,522 without clean and clear status.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Under the Mining Law, mining activities can only be carried out in areas that have been identified as WPs (which are further divided into WUPs, WPNs and WPRs). WUPs can be further determined as WIUPs, while WPNs (which can be exploited) can be further determined as 'special mining business areas' (WUPKs). WUPKs can be further determined as 'special mining business licence areas' (WIUPKs). Mining rights are granted by way of IUPs within WUPs, IUPKs within WIUPKs, or IPRs within WPRs.

The Mining Law sets out the total areas that may be covered by exploration or production operation IUPs or IUPKs. For metal minerals, the maximum area for an exploration IUP is 100,000 hectares, and 25,000 hectares for a production operation IUP. For coal, the maximum area for an exploration IUP is 50,000 hectares, and 15,000 hectares for a production operation IUP.

An IUPK is a mining licence granted over certain areas that have been identified by the state to be WUPKs. Mining in WUPKs will be prioritised for state-owned and regional government-owned companies. The maximum areas covered by exploration or production operation IUPKs are the same as those for exploration or production operation IUPs. A mining licence for small-scale mining (IPR) has a maximum area of 10 hectares). IPRs are granted following submission of an application to the relevant governor. For coal and metal minerals, the grant of new IUPs or IUPKs is divided into two stages: the grant of the relevant WIUP or WIUPK and the grant of the relevant IUP or IUPK respectively.

The tender process

The grant of WIUPs is carried out by way of a tender process, and the winning bidder must then apply for an IUP. The relevant authority to conduct the tender process for WIUPs will depend on the area to be covered by the WIUP. The tender process will be carried out by the MEMR (if the area straddles more than one province) or the relevant governor (if the area either straddles regencies or municipalities, or is located in only one regency or municipality).

It would appear that a special-purpose mining PMA company would need to be established in order for foreign parties to be able to participate in a WIUP tender (or WIUPK tender under certain limited circumstances), although this requirement is not specifically addressed in MEMR Regulation 28 of 2013.

In the case of WIUPKs, the MEMR will prioritise WIUPKs to be awarded to state-owned or regional government-owned companies. If two or more state-owned or regional government-owned companies seek a given WIUPK, a tender will be conducted. If no such companies seek a given WIUPK, the MEMR will offer it to private business entities through a tender. A private business entity may include a PMA company.

An exception to the tender requirements applies for non-metal mineral and rock mining, in which the grant of WIUPs and IUPs can be made by direct application of an interested party to the MEMR or the relevant governor.

Investment in existing mining companies

Since the Mining Law requires that mining can only be carried out within a WP, no new mining licences can be issued until such time as all the WPs have been determined. In 2014, the DGMC completed the procedure to determine WPs. However, we understand that the government is still not issuing new mining licences due to the fact that there are still 'problem' IUPs not on the clear and clean list. In the interim, investors who are interested in obtaining mining rights have been acquiring interests in existing mining operations. Since the Mining Law appeared to prohibit the transfer of mining licences to third parties, potential investors only sought to acquire interests in entities that already held the relevant mining licence.

Transition from exploration licence to mining licence

According to the Mining Law, it is understood that the holder of an exploration IUP or IUPK is 'guaranteed' to be given a production operation IUP or IUPK (which is the licence required to carry out mining, marketing and sales) in respect of the same commodity within the same mining area.

11 What is the regime for the renewal and transfer of mineral licences?

The Mining Law provides that an IUP or IUPK (production operation) can be extended on expiry. The process to extend an IUP or IUPK is initiated by submitting an application or a written request to the relevant issuing authority (ie, the MEMR or the relevant governor) and the extension will be granted at the discretion of the issuing authority.

After the expiry of the initial term of a production operation IUP for metal minerals (that is, 20 years), the IUP can be extended for two additional terms of 10 years each. After the expiry of the initial term of a production operation IUP for non-metal minerals (that is, 10 years), the IUP can be extended for two additional terms of five years each. As for coal, the term of a production operation IUP is 20 years and such IUP may be extended twice, each time for 10 years. While the Mining Law appears to prohibit the transfer of mining licences to third parties, GR 24 of 2012 permits an IUP or IUPK to be assigned to another entity if the IUP or IUPK holder owns at least 51 per cent of the shares of such other entity.

12 What is the typical duration of mining rights?

Based on the Mining Law, the duration of an IUP will depend on the type of IUP held by the relevant mining company (ie, exploration IUP and production operation IUP). An exploration IUP may be granted for:

- *a maximum of eight years, for metallic mineral mining*
  The eight-year period of the permit covers a general survey for one year; exploration for three years that may be extended twice, each extension for one year, and a feasibility study for one year that may be extended once for one year;
- *a maximum of three years, for non-metallic mineral mining*
  The three-year period of the permit covers a general survey for one year; exploration for one year; and a feasibility study for one year. This period cannot be extended.
- *a maximum of seven years, for specific types of non-metallic mineral mining* (eg, limestone for the cement industry, diamonds and other precious stones);
  The seven-year period covers a general survey for one year; exploration for three years that may be extended once for one year, a feasibility study for one year that may be extended once for one year.
- *a maximum of three years, for rock minin*g
  The three-year period of the permit covers a general survey for one year; exploration for one year; and a feasibility study for one year. This period cannot be extended.
- *a maximum of seven years, for coal mining*; and
  The seven-year period covers a general survey for one year; exploration for two years that may be extended twice, each time for one year, a feasibility study for two years.

Production operation IUPs will be granted in accordance with the following terms:

- for metallic mineral mining, production and operation IUPs may be granted for a maximum of 20 years, which can be extended twice, each extension for 10 years;
- for non-metallic mineral mining, production and operation IUPs may be granted for a maximum of 10 years, which can be extended twice, each extension for five years;
- for specific types of non-metallic mineral mining (eg, limestone for the cement industry, diamonds and other precious stones), production and operation IUPs may be granted for a maximum of 20 years, which can be extended twice, each extension for 10 years;
- for rock mining, production and operation IUPs may be granted for a maximum of five years, which can be extended twice, each extension for five years; and
- for coal mining, production and operation IUPs may be granted for a maximum of 20 years, which can be extended twice, each extension for 10 years.

In contrast to the duration of an IUP, the duration of each stage of mining activities for a CoW and CCoW will be determined by the parties concerned (ie, a CoW or CCoW holder and the government) in the relevant CoW or CCoW, which will vary between different CoWs and CCoWs.

The Mining Law provides that an IUP or IUPK may be revoked by the minister or the governor, in accordance with their respective authorities, if:

- the IUP or the IUPK holder does not perform its obligations as stipulated in the IUP and the IUPK and the laws and regulations;
- the IUP or the IUPK holder commits a crime as stipulated under the Mining Law; or
- the IUP or the IUPK holder is declared bankrupt.

Grounds to terminate a CoW or CCoW are specified under the relevant provisions of the CoW or CCOW. Given that the nature of a CoW or CCoW is an agreement, unless agreed by both parties or specified in the provisions of the relevant CoW or CCoW, a CoW or CCoW may not be terminated unilaterally.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The Mining Law does not distinguish between domestic and foreign parties, that is, any party intending to engage in mining activities must obtain an IUP or IUPK. However, foreign parties wishing to engage in mining must establish a PMA company, which can initially be wholly owned by a foreign party or parties (given the requirement for Indonesian companies to have a minimum of two shareholders), or invest in a company that holds an IUP, CoW or CCoW. Any change in status from a non-PMA mining company to a PMA mining company (and vice versa) must be approved by, among others, MEMR.

In respect of foreign investment in a company that already holds an exploration IUP, the maximum foreign shareholding is 75 per cent, while for the company that already holds a production operation IUP, the maximum foreign shareholding is 49 per cent. After the introduction of GR 1 of 2017 (followed by MEMR Regulation 9 of 2017), mining companies that carry out their own refining or underground mining activities are no longer entitled to more relaxed divestment obligations. Under the current regulatory regime, a PMA company that holds a production operation IUP is required to gradually divest after five years of commercial production, regardless of whether it carries out its own underground mining or mining processing/refining activities, so that the maximum foreign ownership must eventually be reduced from 100 per cent to become:

- 80 per cent after six years of commercial production;
- 70 per cent after seven years of commercial production;
- 63 per cent after eight years of commercial production;
- 56 per cent after nine years of commercial production; and
- 49 per cent after 10 years of commercial production.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mining Law provides that any dispute that arises in the implementation of IUPs, IUPKs or IPRs, must be resolved by the relevant district court or through domestic arbitration.

In addition, any challenges to the validity of any issued mining licences (including IUPs or IUPKs) can be brought to the relevant state administration court.

Litigation in Indonesia can be a time-consuming and costly process and outcomes are often unpredictable. Even in the case of successful litigation, the enforcement of a court decision can be a challenge.

Existing CoWs and CCoWs provide that any dispute between the CoW or CCoW holder and the government will be resolved through international arbitration and specify the applicable arbitration rules. Again, even in the case of a successful international arbitration, enforcement can be difficult in Indonesia.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Legal entities established in accordance with Indonesian law and domiciled in Indonesia (which would include locally owned companies and PMA companies under limited circumstances) can hold the following land titles that must be registered with the National Land Agency: the right to build and the right to use.

In practice, these rights, particularly the right to build, are usually applied for by, and granted to, a mining entity for areas of land to be used for more permanent infrastructure, facilities and plants.

The land rights acquisition process for a given mining project depends on the status of the land titles held by parties in the required area. Compensation for the rights to the acquired land may take the form of monetary compensation, substitute land, resettlement or a combination of any of these or any other form of compensation that is agreed between the mining entity, the traditional community and the relevant owners. As the acquisition of land will usually involve negotiations between the mining entity and land title or surface rights holders or both, it is possible for the latter to resist the mining company's compensation offers, since they cannot be compelled to accept any offer by the mining company.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The Mining Law specifically provides that the government (through state-owned companies or regional-owned companies) may be granted IUPs or IUPKs. The government is also given priority to carry out mining in WUPKs.

Even though the government is entitled to participate in mining projects, there is no specific provision that requires the project company to be locally listed.

With the divestment regime under the Mining Law and regulations comes the requirement for foreign shareholders to gradually divest portions of their shareholdings, making initial offers to the national government, then regional or municipal governments.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Mining Law and regulations are silent on government expropriation of licences. However, Law 25 of 2007 on Capital Investment (Investment Law) stipulates that the government will not nationalise or take over investors' rights of ownership unless this is carried out by statutory law. If the government does so, it is obliged to compensate the relevant investor in accordance with an amount that is applicable to the market in which the assets are nationalised or taken over.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Forestry areas

Certain forestry areas are designated as off-limits and are subject to specific regulation.

Under Law 41 of 1999 on Forestry (as amended) and the relevant regulations, forestry areas are divided into three categories: production forest, protection forest and conservation forest. Mining companies must obtain the relevant 'borrow use permit' from the Minister for the Environment and Forestry before carrying out any mining-related activities within production forest areas (for open-pit and underground mining) or within protected forest areas (for underground mining only, except for the 13 mining companies that have been permitted to carry out open-pit mining activities under Presidential Decree 41 of 2004). No mining-related activities are permitted in conservation forest areas.

In addition, as part of the government's efforts to tackle climate change and reduce deforestation and forest degradation, in 2011 Indonesia agreed to implement a two-year moratorium on forest conversion in parts of the country (which has been extended several times, most recently for a further two years to 3 May 2017). The relevant presidential instructions suspended the issuance of new permits to carry out activities (including mining activities) in natural primary forest and peatlands located in conservation, protection and production forests and other utilisation areas.

Heritage sites

Mining companies that carry out activities within heritage sites must obtain relevant permits. Criminal sanctions will be imposed if such activities cause damage to heritage sites.

Traditional community sites

In certain areas, local or provincial legislation recognises traditional community sites and the requirement to comply with local traditional community rituals before accessing the sites and during operations in the area surrounding the sites.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Mining Law provides that IUP and IUPK holders must pay dead rent during the exploration or production operation phase as well as production royalties at rates that will vary based on the mining scale, production and commodities price.

The dead rent rates for IUP or IUPK holders for mineral and coal mining activities are set out in GR 9 of 2012 and range from US$1 to 44 per hectare per year. GR 9 of 2012 also sets out the royalty rates for IUP and IUPK holders, which range from 1 to 7 per cent of the sale price of the minerals or coal per annum, depending on the type of mineral or coal.

CoW or CCoW holders pay dead rent, royalties and corporate income tax at rates specified in their CoWs or CCoWs.

IUP or IUPK holders are subject to corporate income tax at the prevailing rate (currently 25 per cent).

Delivery of goods and services is also subject to a value added tax of 10 per cent, except for those goods and services that are exempt under prevailing regulations.

Mining entities must also withhold tax on payments of dividends, interest, royalties and most types of services.

Minister of Finance Regulation 13 of 2017, effective from 10 February 2017, imposes progressive export duties on certain limited processed mineral products that are permitted to be exported (subject to compliance with various stringent conditions).

20 What tax advantages and incentives are available to private parties carrying on mining activities?

There are no general tax advantages available to private parties carrying on mining activities. In certain circumstances, however, domestic investment companies and PMA companies may obtain exemptions on import duties for specified capital equipment and materials, including machinery, goods and raw materials; and a higher debt-to-equity ratio may be granted, upon application to BKPM.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is no legislation that provides for tax stabilisation that would prevent the government from introducing excessive increases in taxes or imposing new taxes on mining operations. It is not common practice for the government to enter into tax stabilisation agreements.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to any carried interest or free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The Mining Law does not set out any specific provisions regarding transfer taxes or capital gains regarding the transfer of licences. Generally, a licence is not transferable.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Under the Mining Law there is no distinction between duties, royalties and taxes payable by wholly Indonesian-owned companies and those payable by PMA mining companies. The duties, royalties and taxes may differ between companies that carry out mining under an IUP and those under a CoW or CCoW. Whereas the holders of an IUP are subject to duties, royalties and taxes that generally apply, the holders of a CoW or CCoW could be subject to duties, royalties and taxes specifically provided for in the relevant CoW or CCoW.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Mining activities are usually carried out by limited liability companies established under the Indonesian Company Law.

26 Is there a requirement that a local entity be a party to the transaction?

Foreign parties may initially own 100 per cent of the shares in a newly established exploration-mining PMA company. However, since no new IUPs are being issued, foreign parties can only invest in a company that holds an exploration IUP. A foreign party is limited to owning a maximum of 75 per cent of a mining company that holds an exploration licence. As explained in question 13, foreign parties must begin to gradually divest their interest in a mining PMA company in accordance with a statutory time frame.

Mining services companies (contract mining)

The Mining Law and regulations now require that priority be given to the use of local and national mining services companies.

The engagement of a mining service PMA company by a mining company to conduct mining services may only be in circumstances where, after making the required announcement or advertisement, there are no local or national companies that have met the required 'classification' and 'qualifications'. Even after a mining service PMA company has satisfied all these requirements, during its engagement by the mining company it is obliged to subcontract part of the work to local or national mining services companies. The extent of such subcontracted work is not currently regulated.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Indonesia is party to a number of bilateral investment treaties (BITs) and tax treaties with various countries, the conditions of which vary. Whether a particular BIT or tax treaty is favourable depends on the counterpart jurisdiction and the structure of the proposed investment in Indonesia.

Indonesia had 67 BITs with partner countries, eight of which have not been ratified. As of 2016, Indonesia has terminated 20 BITs and is gradually planning to terminate the remaining BITs. There is an indication that the government is also seeking an alternative that involves the negotiation of new BITs and free-trade agreements.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Both debt and equity financing of mining projects are common in Indonesia, although debt financing has become more difficult in recent times with the depressed commodity prices. The domestic securities market is one source of financing. However, for more substantial projects, foreign investors can seek to raise funds through offshore stock offerings in the shareholding entity or by the foreign party obtaining debt financing with the proceeds being advanced to the IUP or IUPK holder, which would in turn give the financing entity comprehensive security over the assets of the IUP or IUPK holder (other than the mined product to which the holder is not entitled until dead rent, royalties and taxes have been paid).

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

A number of state-owned mining enterprises hold significant mining concessions, including PT Timah (Persero), PT Aneka Tambang (Persero) and PT Tambang Batubara Bukit Asam (Persero).

30 Please describe the regime for taking security over mining interests.

Mortgage

Mortgages can be granted over certain types of rights over land, which in a mining project would most commonly include the right to build, the right to own land (for Indonesian citizens only) and the right to use land. Mortgages may also encumber fixtures on land. It is possible to have more than one debt secured by a single mortgage and a debtor may give multiple mortgages over the same land or fixtures.

Fiduciary security

In a fiduciary security, title to collateral subject to an instrument of fiduciary security is transferred on a fiduciary basis to the secured party (fiduciary grantee or creditor), while the debtor or fiduciary grantor is allowed to remain in possession of the collateral. Title will be automatically returned to the debtor by operation of law upon full repayment of the underlying debt.

Moveable and certain immoveable assets (excluding land, aircraft and vessels above 20 cubic metres), both tangible and intangible, can be secured under an instrument of fiduciary security. The types of assets that can be secured by a fiduciary security include:

- mining equipment, machinery, stock, inventory and other unencumbered mining goods that can be owned and transferred;
- receivables;
- buildings and fixtures on land, which cannot be encumbered by mortgage rights and remain controlled by the fiduciary grantor; and
- insurance proceeds.

Objects of a fiduciary security do not need to exist at the time of execution and can be acquired by the fiduciary grantor at a later date.

Pledge

The main regulations governing pledges are contained in the Indonesian Civil Code. A pledge is an interest granted by an owner over moveable property (tangible and intangible) to a creditor as security for a debt. Moveable property that can be pledged includes bank accounts in the form of time deposits and certain financial instruments (including shares and securities such as government bonds and Bank Indonesia certificates). A pledge is a possessory security in that the moveable property secured by the pledge must be under the physical or constructive possession of the pledgee or mutually agreed third party.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no material restrictions or limitations imposed on the importation of machinery and equipment to be used for mining activities. Machinery and equipment imported under import duty and import tax facilities must not be transferred or sold to other parties without the import duty or tax being paid.

Mining services companies (contract mining)

In addition to specific requirements for mining services companies, the current regulations also require that:

- production operation IUP or IUPK holders must carry out their own actual mining activities (ie, digging) and may only engage a mining services company to carry out stripping of overburden;
- production operation IUP or IUPK holders must carry out processing and refining activities in Indonesia;
- IUP or IUPK holders must discharge their mining operation liabilities in the relevant mining area and may not engage the services of a mining contractor to do so; and

- IUP or IUPK holders must ultimately remain responsible for meeting the obligations set out in their IUP or IUPK.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no generally accepted standard conditions and agreements used for equipment supplies in Indonesia, including for the mining industry. Specifically for the mining industry, equipment supplies will fall under the business sector of mining services, in which the service provider must have mining service business registration with MEMR. However, there are no specific requirements and conditions for a particular form of equipment service contract between the mining company and service provider.

For dispute resolution in equipment supply contracts, mining companies or their service companies will commonly choose arbitration through the Indonesian National Board of Arbitration (BANI) or the Singapore International Arbitration Centre (SIAC).

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Although now revoked, GR 1 of 2014 and MEMR Regulation 1 of 2014 (as amended) were issued with the purpose of regulating the export ban on unprocessed minerals and ores, which took effect from 12 January 2014. The regulatory package also included regulations from the Ministry of Trade regulating the export mechanism, and the Ministry of Finance, regulating export duties. GR 1 of 2014 and MEMR Regulation 1 of 2014 essentially set out that certain minerals such as copper, iron ore, ilmenite, lead, manganese and zinc concentrates may be exported without being fully refined until 10 January 2017, provided the mining company met minimum levels of processing and also secured a recommendation from DGMC and Minister of Trade (MoT) approval, and export of nickel, bauxite, tin, gold, silver and chromium ore or concentrates was prohibited, so that these minerals had to be fully refined before export.

On 11 January 2017, MEMR issued Regulation 5 of 2017 on Increasing the Added Value of Minerals through Domestic Processing and Refining Activities (which revoked MEMR Regulation 1 of 2014 (as amended)) and MEMR Regulation 6 of 2017 on the Procedures and Requirements for Granting Recommendations for the Export of Processed and Refined Minerals (which revokes MEMR Regulation 5 of 2016). Based on these new regulations, from 11 January 2017 until 10 January 2022, only holders of an IUP or IUPK may export certain exempted partially processed minerals, subject to satisfaction of a set of stringent conditions, including a minimum level of processing, obtaining a recommendation from DGMC, an export approval from the MoT, and payment of export duties. CoW holders may no longer export certain exempted partially processed minerals unless they have converted their CoW into an IUPK (and satisfied the conditions for an IUPK holder, including divesting 51 per cent of its shares to Indonesian shareholders by the 10th year of commercial production).

The new regulations also provide that until 10 January 2022, a holder of a production operation IUP or production operation IUPK (including conversion from a CoW) may export ore with:

- a nickel content of less than 1.7 per cent, and only if they have 'used' 30 per cent of their own smelting capacity input for domestic purposes; and
- a washed bauxite content of at least 42 per cent, subject again to stringent conditions, including the construction of a refining facility (either by itself or together with others), and obtaining a recommendation from DGMC and export approval from the MoT.

The new regulations also dictate that in order to obtain a recommendation from DGMC, the production operation IUP or IUPK holder, among other things, must sign an 'integrity pact' (or undertaking, which must evidence a willingness to submit to sanctions for any breach of the integrity pact) to complete the construction of a processing and refining facility (either itself or in cooperation with a smelter company) by no later than 12 January 2022. The production operation IUP or IUPK holder must also submit a verified processing and refining facility construction plan and an independent verifier's report on the processing and refining facility construction status and in order to maintain the recommendation, the production operation IUP or IUPK holder must also submit to biannual reviews, during which it must prove that, among other things, the construction rate of the smelter facility is at least 90 per cent of the agreed rate, failing which DGMC will issue a recommendation to the Director General of International Trade to revoke the relevant export approval.

Similar to the revoked MEMR Regulation 8 of 2015, MEMR Regulation 5 of 2017 also provides that the holder of an exploration IUP, production operation IUP or IUPK or production operation IUP specifically for processing and refining, may carry out research and development for an 'establishment and development plan' in relation to domestic processing and refining activities. Such holders may cooperate in relation to research and development with the following:

- a research and development institution under the auspices of the MEMR;
- other competent research and development institutions;
- universities; or
- foreign parties (for research and development that cannot yet be carried out domestically and for the purpose of assessing the suitability of certain technology for domestic usage).

Domestic market obligation (DMO)

The Mining Law and regulations contain DMO provisions, which control the levels of production and export of minerals and coal. CoWs or CCoWs contain similar provisions.

The Mining Law and MEMR Regulation 34 of 2009 regulate most aspects of the DMO including the minimum percentage of coal and the price at which coal mining companies must sell coal to the domestic market.

Letter of credit (LC) for export payment method

On 5 January 2015, the MoT issued Regulation 4 of 2015 as amended by Regulation 67 of 2015, which stipulates that payment for exported minerals and coal must use an LC to be settled in a bank that is licensed to operate in Indonesia and deal in currency exchange. The LC requirement became effective as of 1 April 2015.

However, companies that are not yet able to use an LC for the payment method may request an exemption from the Ministry of Trade, as regulated under MoT Regulation 26 of 2015.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions or limitations on the import of funds for mining activities. However, any offshore loan of a certain amount that is received by an Indonesian party must be reported to Bank Indonesia (the central bank), the Ministry of Finance and the Coordinating Team for Offshore Loans. Further, if the offshore loan is obtained by a PMA company, the loan should be included in the PMA company's investment plan registered with the BKPM.

Although there are no restrictions or limitations on the repatriation or use of proceeds from the permitted export or sale of certain mining products, such as coal and metals, domestically, Bank Indonesia Regulation 16/10/PBI/2014 on Export Proceeds and Offshore Loan Withdrawals (BI Regulation 16 of 2014) as amended by BI Regulation 17/23/PBI/2015 imposes requirements to use Indonesian bank accounts, including Indonesian branches of offshore banks (foreign exchange banks), to receive any export proceeds and certain types of offshore loans (including non-revolving loans).

The Investment Law specifically allows foreign investors to repatriate their funds overseas. There are no laws and regulations currently in force that require approval to obtain or hold foreign currency in Indonesia or transfer foreign currency out of Indonesia. However, there is a restriction on the transfer of rupiah overseas. All transfers of funds to and from abroad above US$10,000 or its equivalent in rupiah must be reported to Bank Indonesia.

Any purchase of at least US$100,000 (or the equivalent in other foreign currency) per month must be supported by an underlying transaction. Evidence of such underlying transaction must be submitted to the relevant bank upon the purchase of any foreign currency of US$100,000 or more.

Law 7 of 2011 on Currency requires the use of rupiah in payment transactions within Indonesia, with some exceptions. With the

issuance of Bank Indonesia Regulation 17/3/PBI/2015 on 31 March 2015 (Currency Regulation), there was a narrowing of the available exceptions, so that all cash and non-cash payment transactions within Indonesia must now be made in rupiah, with very limited exceptions. Another result of the Currency Regulation is that all businesses are required to use rupiah to quote prices for their goods and services.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws are:

- Law 32 of 2009 on Environmental Protection and Management, which came into effect on 3 October 2009 (Environmental Law);
- GR 27 of 2012 on Environmental Permits (GR 27 of 2012); and
- GR 101 of 2014 on the Management of Toxic and Hazardous Waste (GR 101 of 2014).

The principal regulatory bodies that administer the Environmental Law are the Ministry for the Environment and Forestry and the relevant regional governments.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Before commencing any mining-related activities, mining companies must prepare and submit environmental management–monitoring effort (UKL–UPL) or environmental impact analysis (AMDAL) documents, as applicable, to the relevant authority for recommendation or approval. The Environmental Law introduced the requirement to obtain an environmental permit in addition to an AMDAL or a UKL–UPL.

AMDAL

The Environmental Law provides that AMDAL documents consist of the following:

- terms of reference (ToR);
- environmental impact statement; and
- environmental management–monitoring plan.

For a mining project, a UKL–UPL will be required for the exploration phase, while an AMDAL will only be required when the project proceeds to production operation.

The approval of an AMDAL is a two-step process: first, the company must submit the ToR to the relevant AMDAL Commission for review. A decision as to whether to approve or to reject the ToR must be made within 30 business days after the ToR is received and declared complete by the AMDAL Commission. Second, based on the approved ToR, the company must then prepare and submit the AMDAL documents to the minister for the environment and forestry, the governor, the regent or mayor (as appropriate) through the relevant AMDAL Commission. The AMDAL Commission will review the AMDAL documents and notify the relevant company if any additional information or documents are required. A decision as to whether to approve the AMDAL documents must be made within 75 business days of the receipt of the completed AMDAL documents.

UKL–UPL

In obtaining a recommendation for a UKL–UPL, a company must submit a UKL–UPL application to the relevant authorities (ie, the minister for the environment and forestry, the governor, the regent or mayor (as appropriate), or other appointed relevant authorities). The relevant authorities will assess the UKL–UPL application and will issue the recommendation for the UKL–UPL within 14 business days after the UKL–UPL application is deemed complete.

Every business or activity that has already obtained a business or activity permit but has not yet obtained a UKL–UPL is required to prepare (and submit to the relevant authorities) environmental management documents.

Environmental permits

Once an AMDAL approval or UKL–UPL recommendation has been granted, the approval or recommendation will be used as the basis for an environmental permit. An environmental permit may be granted by the minister for the environment and forestry, the governor or the regent or mayor (as appropriate) and is a prerequisite to obtaining relevant business operation permits.

If an environmental permit is revoked, the relevant business or activities permits that allow the relevant business to operate will also be revoked.

The grandfathering provisions of GR 27 of 2012 provide that if a company obtained approved environmental documents (AMDAL or UKL–UPL) before 23 February 2012, the company will not be required to obtain an additional environmental permit (since the AMDAL or UKL–UPL will be treated as the environmental permit).

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

GR 78 of 2010 introduces an obligation on IUP or IUPK and existing CoW or CCoW holders to restore their relevant mining areas following a planned and sustainable programme upon completion of part of the entire mining operations.

Under GR 78 of 2010, IUP or IUPK and existing CoW or CCoW holders must submit a five-year reclamation plan (renewable for five years). This regulation also requires that the IUP or IUPK and CoW or CCoW holders provide a guarantee in accordance with the reclamation and mine-closure budget plan that has been approved by the relevant government authority.

MEMR Regulation 7 of 2014 provides further explanation about reclamation and post-mining activities.

38 What are the restrictions for building tailings or waste dams?

The construction and management of tailings or waste dams must comply with Minister of Public Works Regulation 27 of 2015 on Dams (Dam Regulation). Prior to the construction of tailings or waste dams, the company must obtain a water utilisation permit (for tailings or waste dams that require water utilisation) from the Director General of Water Management, in-principle approval from the relevant authorities along with required technical recommendations from DGMC and the Minister of the Environment and Forestry (MoEF), and a construction permit from the Minister of Public Works. The Dam Regulations also provide that construction of a dam must also utilise manpower that has expertise and skills in dam construction. The management plan for tailings or waste dams, the implementation of which is arranged based on the type and volume of the tailings, must seek MoEF approval after obtaining a recommendation from the Dam Safety Commission under the Directorate General of Water Management and from DGMC. Before operating the tailings or waste dams, the company must also obtain an operating licence issued by MoEF together with a technical recommendation from the Director General of Water Management and from DGMC.

The construction, management and operation of tailings or waste dam facilities should also be reported regularly to the dam inspection unit established by the relevant authorities. Prior to constructing and implementing the management plan for the tailings or waste dam, a mining company will also be required to carry out public consultation and provide an emergency action plan for the local community and environment. There is no clear provision in the Dam Regulations regarding the liability of a company in case of a dam failure. However, in practice liability would be in the form of compensation to the local community or administrative sanctions on the mining company, if the dam failure was caused by not complying with the requirements for the construction/management/tailing placement or operations of tailings or waste dams, and other statutory consequences as provided for in the Environmental Law.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety, and labour laws that apply to the mining industry are:

- Law 13 of 2003 on Manpower;
- Law 1 of 1970 on Work Safety;
- GR 19 of 1973 on Regulation and Supervision of Work Health and Safety in Mining;
- Minister of Mines and Energy Decree 555.K/26/M.PE/1995 on Work Safety and Health of General Mining;
- Minister of Mines and Energy Decree 2555.K/201/MPE/1993 on Implementation of Mines Inspection in General Mining; and
- Minister of Manpower and Transmigration Decree KEP-61/MEN/1983 on Implementation of Restrictions on the Employment of Expatriates in the Mining Sector and the Energy Sub-sectors of General Mining.

The principal regulatory bodies that administer health and safety for mining are the Ministry of Manpower and Transmigration and the MEMR.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

GR 101 of 2014 provides that toxic and hazardous waste must be managed by the company by which it was produced. An attachment to GR 101 of 2014 provides that such waste includes mining waste products. Mining companies that produce mining waste products must therefore conduct mining waste reduction, storage, collection, transportation, utilisation, management, piling and disposal, each in line with GR 101 of 2014.

GR 101 of 2014 also provides for countermeasures that must be taken by the relevant company if there is environmental pollution or damage, and includes, among other things, publicising, isolating and stopping the source of such environmental pollution or damage.

The commercial exploitation of toxic and hazardous materials, including waste products in tailings ponds and waste piles, has not yet been regulated.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Companies engaged in mining activities may use domestic and foreign employees.

There are no restrictions or limitations imposed on the use of domestic employees for mining activities.

With respect to foreign employees, there is a list of positions in the mining sector that foreign personnel may or may not hold. This list is issued by the Ministry of Manpower in coordination with MEMR. To employ foreign personnel, companies must obtain approval of a Foreign Manpower Work Plan. Expatriates must obtain the relevant visas, residence and work permits.

Expatriates are only allowed to be employed by one Indonesian company at a time.

Expatriates may not fill certain positions (such as human resources director or manager) and some expatriate positions in the mining sector have time limitations.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Company Law and GR 47 of 2012 on Corporate Social Responsibility provide that every mining company must meet CSR obligations that must be included in the company's annual work plan.

For IUP holders, the relevant IUP will contain provisions on community development.

Update and trends

Change to the divestment obligation
With the introduction of GR 1 of 2017 and MEMR Regulation 9 of 2017, PMA mining companies are no longer entitled to the more relaxed divestment requirements if they carry out their own underground mining or mineral refining activities. All production operation IUP and production operation IUPK holders must now gradually divest their shares in accordance with the amounts and periods as set out in question 13 so that at the end of 10 years of commercial operations, they hold no more than 49 per cent of the PMA mining company.

Export limitation for CoW holders
With the introduction of MEMR Regulation 5 of 2017 and MEMR Regulation 6 of 2017, only holders of an IUP or IUPK are allowed to export certain exempted partially processed minerals. CoW holders may no longer export any certain exempted partially processed minerals unless they have converted their CoW into an IUPK (and satisfied the conditions for an IUPK holder including divesting 51 per cent of its shares to Indonesian shareholders by the 10th year of commercial production). The conversion process from a CoW into an IUPK is now regulated under MEMR Regulation 15 of 2017.

The Mining Law to be replaced in the near future
In 2016, discussion drafts of a new mining bill to replace the Mining Law were circulated by MEMR. We understand that the draft mining bill is not yet near final form and is likely to change in the future, so it is not at this stage worth speculating about the proposed changes contained in the last version. The spate of new mining regulations passed in early 2017 may have delayed finalisation of the mining bill. Only time will tell.

For CoW or CCoW holders, the relevant CoWs or CCoWs will usually also contain provisions on community development.

Currently there do not appear to be any specialised regulatory bodies that administer CSR obligations.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Community groups, including traditional (Adat) communities, are recognised under the Mining Law as having the right to apply for IPRs provided they obtain a recommendation from the relevant village head, community head or Adat chief. Local regulations may require a mining company to comply with traditional rituals, directions, restrictions or prohibitions before carrying out mining activities in the relevant area.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Indonesia is not a party to any international treaties, conventions or protocols on CSR issues.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The main Indonesian laws and regulations on anti-bribery and corrupt practices are as follows:

- Law 11 of 1980 on Bribery;
- Law 28 of 1999 on State Management that is Clean and Free from Corruption, Collusion and Nepotism;
- Law 31 of 1999 on Corruption Eradication (last amended by Law 20 of 2001);
- Law 30 of 2002 on the Corruption Eradication Commission;
- Law 46 of 2009 on the Corruption Court;
- Law 8 of 2010 on the Prevention and Eradication of Money Laundering; and
- other regulations and codes of conduct applicable to state agencies, government officials and civil servants, which prohibit the receiving or requesting of gifts or payment for personal benefit.

The President has also issued a regulation to establish a special task force to eradicate illegal payments or bribery within governmental

bodies through Presidential Regulation 87 of 2016. The main duties of the special task force include carrying out on-the-spot arrest, providing recommendations to the relevant ministries or governmental agencies on how to impose sanctions on the perpetrators in accordance with the laws and regulations and giving recommendations on the establishment of a special task force unit in each governmental agency.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Indonesia does not pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices, as Indonesia already has a fairly comprehensive anti-bribery regime. Foreign companies operating in Indonesia that have extraterritorial anti-bribery and foreign corrupt practices legislation (such as Australia, the UK and the US) are themselves bound to comply with such foreign legislation.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Presidential Regulation 26 of 2010 on Transparency of State and Regional Income Obtained from Extractive Industries signalled the adoption of the EITI Standard. Indonesia thereby became the first member of the Association of Southeast Asian Nations to have adopted the EITI Standard.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Foreign investment in mining companies is governed under the Investment Law and can only be made through the establishment of, or investment in, a PMA company, which must be registered with the BKPM. For mining businesses, an MEMR recommendation must be obtained before BKPM registration will be granted.

Foreign investors must comply with the regulation that specifies which business lines are open to foreign investment with conditions (commonly, imposing a maximum foreign investment percentage) and those business lines closed to investment (Negative List). Theoretically, any business lines not on the Negative List may be 100 per cent foreign-owned.

Neither the Mining Law nor the latest Negative List (effective from 18 May 2016) restricts a PMA company engaged in mining activities from being initially 100 per cent foreign-owned.

MEMR Regulation 9 of 2017 imposes new limitations on foreign ownership in a local Indonesian company or a PMA company that holds an IUP or IUPK for exploration or production operation (see question 13).

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Indonesia is not a party to any specific international mining treaties, but is a contracting state to the International Centre for Settlement of Investment Disputes and is a party to a number of bilateral and multilateral treaties on foreign investment.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Kazakhstan possesses substantial and diverse mineral resources. The mining and metals industries in Kazakhstan play an important role in the country's economy and national plans for development.

The industry features a number of large mineral enterprises with significant direct and indirect domestic and state investment, in addition to foreign participation. The national atomic company, Kazatomprom, plays a central role in the uranium sector. For other sectors, the government has established the national mining company, Tau-Ken Samruk. Exploration works are within the scope of activities of the national exploration company Kazgeology.

2 What are the target minerals?

In addition to being one of the world's largest uranium producers, Kazakhstan is a substantial producer of coal, iron ore, chromium, manganese, lead, zinc, copper, gold, nickel, cobalt, bauxite and rare earth, among others. Kazakhstan's geographical location and relative isolation make transportation logistics a key consideration in project development.

3 Which regions are most active?

Almost all regions are involved in mining production. For example, southern and central regions are the centre of uranium production. Central Kazakhstan is famous for its coal production. Complex ores are primarily mined in central and eastern regions of the country and iron ore is produced in northern regions.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Kazakhstan's legal system is civil law-based, built on the traditions of the continental, Roman-Germanic family of laws. As in other Commonwealth of Independent States (CIS) countries, the legal system and administrative apparatus carry certain legacies from the Soviet era.

5 How is the mining industry regulated?

Kazakhstan is a unitary state. The mining industry is regulated by national laws and regulations adopted by various executive authorities depending on their powers. Mining rights are granted by the national government, represented by the Ministry of Energy (for uranium and coal) and Ministry of Investments and Development (for other minerals) on the basis of subsoil use contracts awarded generally through tenders (with limited exceptions where a subsoil use contract can be granted on the basis of direct negotiations).

Unlike many countries, Kazakhstan has a single system of law and regulation for both the oil and gas, and mining industries. Although there are specific provisions applicable only to the mining industry, the general legal and regulatory framework for the oil and gas and mining industries is the same. Accordingly, mining law in Kazakhstan includes features that are common in oil and gas regimes internationally but uncommon in mining regimes (eg, subscription and commercial discovery bonuses and a tender procedure for acquisition of mining rights from the state). Mining law and regulation in Kazakhstan is characterised by a high level of state control over the activity of mining companies.

At the same time, the government tries to reflect the main trends in international practice in national legislation. For example, at the end of 2014, the Subsoil Law was amended in order to increase the investment attraction of the mining sector. Among other things, the amendments introduced a simplified procedure for granting exploration rights with respect to certain unexplored areas on the basis of the first-come, first-served principle.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The primary law regulating the mining industry is the Law on Subsoil and Subsoil Use dated 24 June 2010 (the Subsoil Law). The industry is also regulated by other laws, such as the Tax Code, the Land Code, the Labour Code, the Environmental Code, and others, as well as by multiple subordinate legal acts adopted by various executive authorities.

The principal state authorities regulating the mining sector are the Ministry of Energy (ME) for uranium and coal and the Ministry of Investments and Development (MID) for other minerals.

The ME and MID are vested with the functions of the regulatory body in the mining industry. The regulatory body, in conjunction with other state agencies, establishes the terms of and conducts tenders for the granting of subsoil use rights and represents the state in negotiations, execution, monitoring of implementation and compliance of and termination of subsoil use contracts.

Other ministries authorised to administer laws regulating some aspects of the mining industry include the Ministry of Justice, the Ministry of Healthcare and Social Development, the Ministry of Finance and the Ministry of Internal Affairs.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Kazakhstan's mineral resource and reserve reporting system is notably different, both in principle and in practice, from generally recognised 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 categorises 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 categorised 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).

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Under Kazakhstan's Constitution, all subsoil resources in situ, including metallic minerals, are owned by the state. Private parties can obtain a 'subsoil use right' (ie, the right to explore and extract minerals). Title to minerals passes from the state to the subsoil user on extraction from the ground, pursuant to the terms of the subsoil use (mining) contract.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Kazakhstan's government makes three types or levels of information relevant to possible exploration and mining activity available to private parties, as follows:

- general: information on areas free from subsoil use rights;
- basic geological and other information regarding a deposit or area (this is made available by the MID and ME in the course of conducting tenders or direct negotiations for the right to develop a particular deposit or exploration area. This information may be purchased by private parties for purposes of preparation of tender bids or in the course of direct negotiations. The geological information regarding the relevant deposit or area is prepared by the ME and MID and contains the information deemed necessary for applicants to prepare their bids. This information is provided on the basis that the prospective applicant may not transfer this information to third parties); and
- a more complete package of geological information regarding a certain deposit or subsoil area, which is made available and sold to a subsoil user after execution of a subsoil use contract.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Private parties may acquire subsoil use rights, comprising rights to conduct exploration or mining or, in certain limited cases, both exploration and mining.

Kazakhstan no longer operates an exploration or mining licence system. Subsoil use rights are currently granted on the basis of a subsoil use contract, entered into by the subsoil user and the MID or ME representing the state. Such contracts are, with certain exceptions, granted following competitive tenders, pursuant to negotiations with the tender winners. Unlike many countries, subsoil laws in Kazakhstan envisage that mineral deposits to be put out to tender are determined by the government. Accordingly, a potential investor cannot choose a particular deposit that he or she wishes to explore since tenders are announced with respect to deposits from the list approved by the government.

That being said, there are certain exceptions to this general rule. In particular, subsoil use contracts are granted without conducting a competitive tender in the following cases:

(i) contracts for production (mining) with an entity that has an exclusive entitlement to obtain the rights to subsoil use in connection with a commercial discovery on the basis of an exploration contract;
(ii) contracts for operation or construction of underground facilities not related to exploration or production of minerals;
(iii) contracts for exploration or mining with a national company;
(iv) contracts for exploration and or production with entities involved in industrial and innovation activity (as defined in the Entrepreneurship Code) a manufacturing process of which is connected with subsoil use;
(v) contracts for exploration or production in cases where a repeated competitive tender on award of a contract has been failed in view of participation of only one qualified participant in such tender;
(vi) contracts for extraction of underground waters in volumes of more than 2,000 cubic metres per day for drinking or commercial needs with the owner or user of a land plot, provided that such owner has a special water use right;
(vii) contracts for exploration within areas granted on the basis of simplified procedures; and
(viii) contracts for production of state-owned anthropogenic minerals.

It is worth noting that the ground for the direct award mentioned in (vii) was adopted recently (at the end of 2014). This provision envisages that exploration rights with regard to certain unexplored areas (the list of which is approved by the MID and ME) are provided by the state on a first come, first served basis. Any interested party is entitled to apply with an application for grant of exploration right with regard to such area. If, within five business days after publication of the application, there are no applications from other entities for the same area, the exploration rights should be granted on the basis of direct negotiations.

The primary obligations of the mineral rights holder include the following:

- use of contract area only for the purposes stipulated in the contract;
- ensuring the safety of human life, health and natural environment;
- selecting the most effective methods and technologies to conduct subsoil use operations;
- conducting subsoil use operations in compliance with applicable legislation;
- complying with approved project and technological documents for the exploration and development of deposits;
- not impeding other persons from freely moving within the area, using common facilities and carrying out any types of work including the exploration and mining of other natural resources (unless special safety considerations require otherwise);
- unreservedly providing necessary documents and information, and giving access to work sites to monitoring agencies fulfilling their official functions, and promptly remedying any breaches that they identify; and
- restoring land plots and other natural features that have been disturbed as a result of subsoil use operations to a condition suitable for further use, in accordance with legislation.

A subsoil user's obligations may be further detailed in a subsoil use contract. Compliance with contractual obligations is important because a breach may ultimately result in unilateral termination of a subsoil use contract by the state.

A holder of exploration rights who has made a commercial discovery has the exclusive right to proceed to the production stage. For these purposes, the subsoil user and the MID and ME should negotiate terms of the production contract, including the percentage of local content in purchased works and services and the volume of expenses for the social and economic development of the region and its infrastructure. If the contract is not executed for 24 months at the fault of a subsoil user, such subsoil user will lose its exclusive right to proceed to the production stage. The MID and ME should award the relevant territory to another entity with a condition that such new subsoil user will compensate to the previous subsoil user its expenses for exploration.

11 What is the regime for the renewal and transfer of mineral licences?

Exploration rights are granted for six years. In the event of a commercial discovery, this term can be further extended for a period necessary for assessment of the commercial discovery. Extension is formalised by amendments to a subsoil use contract.

Production rights are granted for 25 years and, for deposits with unique or large reserves, 45 years. The production term can be extended provided that there are no breaches of contractual terms by a subsoil user.

Transfer of subsoil use rights requires consent of the competent authority (ie, the MID and ME). In addition, with respect to deposits included in a special list of strategic deposits approved by the government, a transfer of subsoil use rights requires waiver of the state's preemptive purchase right. These consent and waiver requirements apply

to both direct transfer of subsoil use rights and indirect transfer (ie, by way of transfer of shares in a subsoil user or its ultimate parent company). The Subsoil Law provides for certain limited exceptions to these consent and waiver requirements (eg, transactions at organised stock exchanges). Failure to obtain a consent and waiver where required may result in invalidation of the transfer or termination of subsoil use rights, or both.

12 What is the typical duration of mining rights?

As noted above, exploration rights are granted for a period of six years. In the event of commercial discovery, this period can be extended for the period necessary for the assessment of the discovered minerals. Production rights are granted for 25 years and, for deposits with unique or large reserves, 45 years. The production term can be extended provided that there are no breaches of contractual terms by a subsoil user.

Subsoil use rights can be revoked or terminated by the state in a number of cases envisaged by the Subsoil Law. In particular, a subsoil use contract can be unilaterally terminated by the state:

- if a subsoil user has not cured more than two breaches of the subsoil use contract within the deadline indicated by the regulator;
- if subsoil use rights (or shares in a subsoil user or its parent company) are transferred with breach of applicable consent requirements; or
- if subsoil user's performance of its financial obligations is less than 30 per cent within two subsequent years.

In addition, with respect to strategic deposit, the competent body has the right to terminate the contract or demand that a subsoil use contract be amended in cases where the subsoil user's actions result in changes to the balance of economic interests of the parties and such changes may affect the national safety.

In the event that the competent body requested the subsoil user to amend the contract, the competent body may terminate the contract if:

- within two months after receiving the notification, the subsoil user does not confirm its consent to amend the contract or refuses to do it;
- within four months of receiving the subsoil user's consent to negotiate the amendments, the parties do not agree on the contents of the amendments; or
- within six months of agreeing on the contents of the amendments, the parties do not execute the amendments.

Also, the Subsoil Law provides for additional termination grounds for contracts executed under simplified award proceedings. Such contracts can be terminated:

- if the subsoil user does not timely pay expenses for social and economic development of the region and its infrastructure;
- if the subsoil user breaches requirements on the minimum amount of expenses and types of works prescribed by the contract; or
- if the subsoil user uses the contractual territory with a breach of its designation as prescribed by the contract.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Currently, there is no distinction between the mining rights that may be acquired by domestic as distinct from foreign parties. Kazakhstan's laws allow foreign individuals or legal entities to directly own mining rights in Kazakhstan.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Kazakhstan's legal system provides a framework and mechanisms for the protection of a subsoil user's contractual and other legal rights. Article 30 of the Subsoil Use Law provides that a subsoil user shall be guaranteed protection of its rights in accordance with legislation.

It should be noted, however, that Kazakhstan is a country still in transition from the Soviet era to a modern market economy with a rule of law, independent judiciary and full protection for rights of private property and contract. Although these concepts are all recognised, in practice, there can be some unpredictability and inconsistency in court processes and decision making.

Under the Subsoil Law, disputes arising out of or in connection with the performance or termination of mining rights shall be settled by negotiation or by Kazakhstan's courts in accordance with the laws and regulations of the state, or by international arbitration in accordance with treaties ratified by Kazakhstan.

Kazakhstan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Accordingly, foreign arbitration awards should be enforceable in Kazakhstan.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The Subsoil Law provides that on execution of a subsoil use contract (ie, acquisition of mining rights) the contract holder should apply to the local executive authority (Akimat) for provision of a land plot for the purposes of mining operations. The local executive authority must make the land plot available to the subsoil user for the duration of the subsoil use contract. If the land plot is state owned, the Akimat will lease the same to the subsoil user. If the land is privately owned, the Akimat may requisition the same for leasing to the subsoil user. If the owner of the land plot does not agree to the buyout, such buyout will be conducted by the court. The owner of the land plot is entitled to obtain a compensation of the land plot's value.

The right to use of the land plot is linked to the mining rights such that any changes in the title of the mining rights (transfer or termination) will lead to corresponding changes in the rights to use the land plot.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

While the government itself or state bodies do not directly participate in mining projects as subsoil users, indirect participation of the state in such projects is not unusual. Such indirect participation is typically conducted through participation in the projects of state-owned companies and their joint ventures. Also, there is a special list of deposits in development of which participation of a state-owned national company is mandatory.

There is no mandatory local listing requirement for a project company. However, if a project company wishes to make placement at a foreign stock exchange, in certain circumstances, it may be subject to the requirement to make placement at a local exchange as well (eg, if its main assets are in Kazakhstan). Such placement will be subject to consents by the state.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Generally, in the event of expropriation, an investor is entitled to obtain compensation of the mining rights. Such compensation should be made at the market terms value.

That being said, it is also worth noting that, under the Subsoil Law, in certain cases (eg, breach of contractual terms by a subsoil user), the state is entitled to unilaterally terminate a subsoil use contract. Generally, it is understood that, in such cases, an investor is not entitled to receive the compensation. However, if the investor is able to prove that its rights and other guarantees have been breached by the termination, it should be eligible for compensation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Generally, there are no specific areas where mining operations are prohibited. However, the government may, by a special resolution, prohibit or limit mining operations in certain areas, if it is necessary owing to national safety, the safety of the population and environment protection considerations. Also, mining operations may be limited or be subject to stricter regulation in specially protected environment areas (eg, the Caspian Sea).

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Kazakhstan's Tax Code specifies several special taxes that apply to mining companies in addition to general taxes such as corporate income tax, VAT, excise and customs duty, payroll tax, tax on transport, environmental pollution fees, etc. These special taxes include the following.

Signature bonus
A signature bonus is a one-time payment to the state for the right to use the subsoil. The amount of this tax is determined for each separate subsoil use contract on the basis of a formula established by the Tax Code, which takes into account the market value of aggregate approved reserves, the preliminarily assessed reserves and the category of mineral resources. The market value of the mineral resources is generally determined using the average exchange price at the London Metal Exchange or the London Precious Metal Exchange as quoted by specified publications. The final amount of the signature bonus (which may not be less than the minimum amount prescribed in the Tax Code) must be determined by the tender committee (in case of a tender) or the competent authority (in case of direct negotiations) and must be set out in the subsoil use contract.

Commercial discovery bonus
A commercial discovery bonus is a fixed payment that is payable by subsoil users when a commercial discovery is made in the contract territory, including discovery made in the course of additional exploration that increases the previously approved reserves. The rate of the commercial discovery bonus is 0.1 per cent of the market value of proven extractable reserves. The market value of the mineral resources is generally determined using the average exchange price at the London Metal Exchange or the London Precious Metal Exchange as quoted by specified publications.

Mineral extraction tax
A mineral extraction tax is payable on the value of the mineral resources produced (minus normative losses) and is payable on a quarterly basis. The value of the mineral resources for purposes of mineral extraction tax is generally determined using the average exchange price of extracted minerals at the London Metal Exchange or the London Precious Metal Exchange as quoted by specified publications. If there is no official exchange price for a mineral, it will be determined as the actual average sales price. There are fixed approved percentage rates of mineral extraction tax that range from zero to 18.5 per cent depending on the type of minerals. The mineral extraction tax replaced the royalty that applied to subsoil users under the old Tax Code.

Excess profits tax
Excess profits tax is payable annually in relation to the portion of net income under the relevant subsoil use contract, which exceeds 25 per cent of specified deductions (which are primarily deductions for corporate income tax purposes). The tax rates range according to a sliding scale from zero to 60 per cent of the net income of a subsoil user under each specific subsoil contract, in excess of 25 per cent of tax deductions.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

No special tax advantages or incentives are available to companies carrying on mining activities in Kazakhstan.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

In the past, it was possible to include a stabilisation provision into a subsoil use contract. However, the current Tax Code (dated 10 December 2008) eliminated tax stability of most subsoil use contracts. The previous Code provided that subsoil contracts entered into prior to 1 January 2004 and that have undergone mandatory tax expert evaluation are stabilised for tax purposes through to the end of their duration. This stabilisation was eliminated by the current Tax Code. As an exception, the following contracts are stabilised for tax purposes: production sharing agreements entered into prior to 1 January 2009; and contracts that received presidential approval in the past or will receive it in the future. There are, however, very few production-sharing agreements or subsoil contracts that have been approved by the president (and they mostly relate to the oil and gas industry). This means that most subsoil use contracts have lost their tax stability as of 1 January 2009. More specifically, it means that they will need to calculate their tax liabilities under the new Tax Code and will be subject to any future changes to the tax law.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

A carried interest is only available in production-sharing agreements. The Subsoil Law no longer provides for the possibility to execute production sharing agreements (production sharing agreements as a type of subsoil use contracts were excluded from the Subsoil Law in one of the rounds of amendments). Existing production sharing agreements relate to the oil and gas industry.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The sale of mining licences is generally subject to corporate income tax (20 per cent) on the difference between the sale price and the expenses incurred after commercial discovery but prior to production (including expenses related to geological exploration, preparatory works, fixed and intangible assets).

In addition, sale of mineral licences is generally subject to VAT (12 per cent).

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

As a general matter, there are no distinctions in the application of taxes relating to mining activities between domestic and foreign companies conducting their activities through a permanent establishment (eg, a branch).

However, a non-resident company acting through a permanent establishment must additionally pay a tax on net income from its activity in Kazakhstan at the rate of 15 per cent (the rate of this tax may be reduced under relevant double tax treaties). Domestic parties are not subject to this tax, although they must generally withhold 15 per cent tax from dividends distributed to their foreign shareholders (the rate of dividends withholding tax may also be reduced under relevant double tax treaties).

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The Subsoil Law contains no stipulations or restrictions with respect to the business structures that may be used for the purpose of conducting mining activities in Kazakhstan. The Law allows any form of legal entity (whether local or foreign) to acquire mining rights in Kazakhstan.

The two most commonly used business forms in Kazakhstan mining activity are limited liability partnerships (LLPs) and joint-stock companies (JSCs). JSCs are favoured by those who prefer detailed corporate governance rules and the possibility of having shares, registered with specialised independent registrars. LLPs are favoured by those who prefer less statutory prescription with respect to corporate governance matters. JSCs and LLPs can each be used for either joint ventures or 100 per cent foreign-owned subsidiaries.

26 Is there a requirement that a local entity be a party to the transaction?

There is no mandatory requirement that a local entity be a party to the transaction.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Kazakhstan has bilateral investment treaties and double tax treaties with more than 40 countries. The most popular jurisdiction for

structuring direct mining operations in Kazakhstan (ie, without setting up a local subsidiary) is the Netherlands.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Generally, mining companies are free to choose their funding sources.

In practice, Kazakhstan-based mining companies commonly use the following financing techniques:

- loans from shareholders;
- loans from Kazakhstan and foreign banks (including loans from the European Bank for Reconstruction and Development and the International Finance Corporation);
- issuance of domestic and foreign securities; and
- public offering of equity securities.

More substantial companies may have access to the domestic debt securities market by issuing domestic bonds. Smaller producers may also tap the debt market by issuance of promissory notes. A few subsoil users have issued Eurobonds on the international capital markets.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

While government and state-owned companies are generally able to directly finance mining projects, in practice, the government tries to attract as much private investment to the mining sector as possible.

30 Please describe the regime for taking security over mining interests.

Kazakhstan has fairly flexible foreign exchange and currency control rules and Kazakh legislation provides for various options to secure mining companies' borrowings (including by way of pledging the underlying subsoil use rights). At the same time, from a practical perspective, security over mining rights may be very difficult to enforce. The reason for this is that pledging mining rights and shares in a mining company requires a number of statutory clearances (consent for execution of a pledge agreement, consent for participation in a tender on enforcement of a pledge and, for strategic deposits, waiver of the state's pre-emptive purchase right for the transfer to the winner of the tender). Therefore, it is typical to obtain other types of security (eg, guarantee) in addition to a pledge of mining assets.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no direct limitations or restrictions imposed on the import of machinery and equipment or services in connection with mining activities, although certain types of machinery and equipment may fall under limited restrictions (eg, equipment with integrated radio frequency devices and dual-use equipment). In certain cases, import operations may also be subject to Kazakhstan exchange control requirements. Certain equipment is subject to mandatory certification requirements to confirm compliance with Kazakhstan's technical standards (limitations).

However, certain indirect limitations are imposed on the import of machinery, equipment or services under local content requirements stipulated in several laws, including the Subsoil Law.

Under the current rules on the purchase of goods, works and services for subsoil operations, the price proposed by a local manufacturer at tender shall be reduced by 20 per cent if the relevant goods, works and services satisfy conditions of the tender and legal requirements. This has been amended in view of Kazakhstan's accession to the World Trade Organization. In particular, this notional discount will be applicable to purchases of goods until expiry of the relevant subsoil use contracts under which mining companies operate or until 1 January 2021, whichever occurs earlier. For works and services, the notional discount will be kept, but the percentage of local content in services and works with which mining companies must comply should not exceed 50 per cent.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There is no unified approach in using standard conditions and agreements. Various buyers may use their own standard forms of agreements. FIDIC forms are sometimes used, especially in major projects where foreign investors are involved. Use of Orgalime standard agreements is less usual.

Generally, mining companies in their procurement of goods, works and services are subject to special procurement rules. Under such procurement rules, in most cases, a subsoil user should purchase goods, works and services by conducting an open tender. Other procurement methods can be used in cases stipulated by the procurement rules.

In major projects, the parties choose international arbitration as dispute resolution forum. In smaller projects, local courts are also chosen as a dispute resolution forum.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no general requirements that some or all minerals produced must be processed or sold domestically. However, a specific subsoil use contract may provide for a mining company's obligation to process certain amount of minerals in Kazakhstan. Also, the Subsoil Use Law provides for the pre-emptive right of Kazakhstan to buy mineral resources produced by the subsoil user on a priority basis at prices not higher than prices on international markets. Details of such purchase entitlement are to be set out in the subsoil use contract.

Further, the export of certain minerals requires export licences.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no requirements to repatriate or use the proceeds of mineral sales domestically. However, there are some restrictions under foreign currency regulation according to whether the subject is resident or non-resident. Branches and representative offices of foreign entities established in Kazakhstan do not fall within the definition of residents for foreign currency control purposes.

In general, resident legal entities are required to do the following:

- notify the National Bank of Kazakhstan in the event of opening an account abroad;
- pay other residents in Kazakh currency; and
- deposit their foreign currency received as the result of export operations at authorised banks and other financial institutions in Kazakhstan.

The foreign exchange regulations for non-residents are considerably less restrictive. They may open offshore bank accounts without restriction and deposit their funds offshore. Non-resident legal entities may purchase foreign currency on the domestic foreign currency market for routine currency operations and in other cases stipulated by legislative acts.

Kazakhstan does not have a system of mandatory conversion into local currency.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The most important law in the environmental area is the Environmental Code dated 9 January 2007. The Code establishes the authority of state agencies, sets out licensing procedures and requirements, procedures for obtaining ecological permits, conducting ecological monitoring, state expert examination, etc. In addition, it provides requirements for the use of radioactive materials, atomic energy and dangerous chemical and other substances, such as genetically modified products and organisms.

Update and trends

Kazakhstan is currently considering adopting the Code On Subsoil and Subsoil Use, which will replace the Law On Subsoil and Subsoil Use. The government has presented the first draft of the new code to the public.

Some of the main points of the code can be summarised as follows:

- re-introduction of subsoil use licences (which were abolished in 1999) for some types of subsoil use operations. It is planned that subsoil use licences will be issued for the following types of subsoil use operations: (i) exploration of solid minerals (as opposed to hydrocarbons); (ii) production of solid minerals; (iii) geological survey of subsoil; (iv) prospecting; and (v) use of subsoil's space (for purposes not connected to exploration and production of minerals);
- introduction of a new type of subsoil use operation – prospecting;
- subsoil use contracts will be used only for exploration and production of hydrocarbons;
- amendments to consent requirements in connection with transfer of subsoil use rights, shares in subsoil users or parent companies of subsoil users (eg, consent for transfer of shares in a subsoil user's parent company is required if such parent company has more than 50 per cent shares in a subsoil user – whereas, currently, the size of shareholding is not a factor affecting the applicability of the consent requirement; waiver requirement will be applicable only to strategic deposits of hydrocarbons - whereas currently strategic deposits subject to the waiver requirement include both hydrocarbon and solid mineral deposits);
- expansion of the scope of publicly available information regarding subsoil users and their activity;
- introduction of new concept of 'retention' of subsoil use rights in certain circumstances (eg, extraction is not economically feasible owing to to market conditions) where a subsoil user is released from the fulfillment of certain obligations; and
- introduction of state preferences for entities that executed a contract on processing of minerals.

The major regulatory body in this area is the Ministry of Energy, which has in its structure the Committee for Ecological Regulation, Control and State Inspection in the Oil and Gas Industry.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Mining companies are subject to various requirements in the environment protection area. Among other things, such requirements include preparing and approving with the authorities a report on impact on the environment, obtaining permits for emissions, discharges and wastes and obtaining insurance for ecologically dangerous types of activity, etc. In practice, obtaining all required environmental permits and licences can take several months.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The Subsoil Law provides that a subsoil user must, after terminating subsoil use operations, liquidate its operations and re-cultivate the relevant land. Liquidation works should be conducted in accordance with a special liquidation programme developed by an entity having a licence for such types of works. Under the Subsoil Law, a mining company has to make annual payments to a special liquidation fund, which will subsequently be used for financing liquidation works.

38 What are the restrictions for building tailings or waste dams?

A subsoil user is generally entitled to build tailing or waste dams. However, such dams should be included into project documents that are subject to approval by the authorities. Among other things, project documents are subject to state ecological expert examination, industrial safety examination, sanitary-hygienic examination and examination in the area of rational and complex use of the subsoil.

A special licence is necessary to construct a dam. However, a subsoil user does not have to have such licence on its own. If a subsoil user does not have a construction licence, it can subcontract the construction of dams to a licensed subcontractor.

Tailing and waste dams are considered dangerous industrial facilities. In view of this, construction and operation of dams are subject to enhanced safety requirements (eg, permit for use of equipment, devices and technologies, development of a special industrial safety declaration).

The subsoil user is obliged to ensure safety of all facilities it operates. Safety requirements, include employees who operate the relevant facilities must undergo special training, employees involved in operation of the facilities must have individual protection equipment and clothing, equipment used in the operations must comply with safety and sanitary-hygienic requirements).

In the event of danger to health and life of population, subsoil users must immediately suspend all operations and ensure that people are evacuated to a safe place.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Law on Civil Protection, dated 11 April 2014, establishes requirements for industrial safety, lists types of hazardous facilities (eg, exploration and production works in the mining industry) and sets out the authority of state agencies responsible for the regulation of industrial safety in the area.

The Labour Code dated 23 November 2015 provides for the general regulation of employment relations, rights and obligations of employers and employees and procedures for executing and terminating employment agreements, etc.

The major regulatory bodies in these areas are the Ministry of Investments and Development and Ministry of Healthcare and Social Development.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Generally, a mining company that generates wastes is considered an owner of such wastes. Thus, it is obliged to take all measures in connection with the safe storage and recovery of the wastes.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Under the Subsoil Law's local content provisions, subsoil users must give preference to Kazakh personnel and finance their training and education in accordance with the terms of a contract or a tender.

Subsoil contracts typically contain specific thresholds of local personnel that must be hired by the relevant subsoil user with a breakdown of different categories of employees (eg, top management, mid-level management, specialists). Further, subsoil users must provide equal conditions to Kazakhstan and foreign personnel.

Generally, hiring foreign employees for mining activities is undertaken on the basis of work permits issued by the relevant state agencies. In some cases, for example, if a foreign national is a head of the foreign company branch, a work permit is not required.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Subsoil Law provides that subsoil users must finance activity aimed at social and economic development of the relevant region and its infrastructure. The amount and terms of such financing should be detailed in subsoil use contracts. Compliance with this obligation is monitored by the MID and ME depending on the type of minerals extracted.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Kazakhstan's laws do not provide recognition and special rights for aboriginal or indigenous people as distinct from others.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

There is no detailed legislation with regard to corporate social responsibility. As stated, mining companies are obliged to provide financing for the purposes of social and economic development of the region and its infrastructure. In practice, major mining companies enter into memoranda of understanding with local governments where they agree in detail on specific measures that will be taken in the area of social and economic development.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The main law that provides for general regulation aimed at the prevention of corrupt practices is the Law on Counteraction against Corruption dated 18 November 2015. This law provides for general principles in anti-bribery practices, lists officials who are subject to anti-corruption legislation and sets forth the types of activities that cannot be combined with state functions, etc. The Administrative Code of 5 July 2014 and the Criminal Code dated 3 July 2014 establish administrative and criminal liability for corruption offences. Among other things, the laws provide that both parties that offer and those that obtain bribes are subject to liability.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Currently, companies in Kazakhstan tend to pay more attention to anti-bribery regulation. Foreign companies also follow anti-corruption laws that are applicable to them in their home jurisdictions (such as the US Foreign Corrupt Practices Act and the UK Bribery Act). At the same time, corruption remains an issue that makes the Kazakhstan government take more effort in combating its anti-corruption activity.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Kazakhstan has adopted a memorandum of understanding with respect to the implementation of the EITI in Kazakhstan. Under the Subsoil Law, all mining companies are obliged to follow the requirements of this memorandum. In 2013, Kazakhstan was assigned the status of EITI Follower Country.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Foreign companies are entitled to engage in the mining industry with the same conditions as local companies.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Kazakhstan is a party to several international treaties relevant to the mining industry, including the Treaty on Cooperation in Study, Exploration and Use of Mineral Resources of 27 March 1997 and the Treaty on Cooperation of Kazakhstan and European Communities and their Member States of 23 January 1995. Kazakhstan has also concluded bilateral investment treaties with more than 40 countries and is a party to a number of multilateral treaties concerning foreign investment.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

In accordance with the information reported by the Mexican National Institute of Statistics and Geography, during 2014 the mining industry represented 4 per cent of the GDP of Mexico. Furthermore, it is one of the main economic driving forces in Mexico. Its importance lies in the set of benefits arising from this activity, such as employment generation in areas where few industries operate, foreign investment, growth of its value chain and in the contribution to the cultural development of the country.

In addition to its contribution to GDP, the social benefits of mining spread to 24 out of the 32 states of the Mexican Republic, which makes Mexico the main destination for foreign investment in exploration of minerals in Latin America and the fourth worldwide.

2 What are the target minerals?

The 2015 report of the Mexican Mining Chamber of Mexico states the target minerals in Mexico as gold (34.1 per cent), silver (18.5 per cent), lead (2.8 per cent), copper (19.7 per cent), coal (1.6 per cent), zinc (6.5 per cent) AND iron (4.6 per cent).

At a global level, Mexico is in the first 10 places in the top producers of 19 major minerals, such as silver, gold, copper, zinc, lead and coal, it stands as the largest producer of silver and the eighth-largest producer of gold.

3 Which regions are most active?

In accordance to the 2015 report of the Mexican Mining Chamber, the most active regions in the mining industry regarding target minerals are as follows:

- Gold: Sonora (31.6 per cent), Zacatecas (27.6 per cent), Chihuahua (11.3 per cent), Durango (9.5 per cent), Guerrero (6.7 per cent), and others (12.3 per cent);
- Silver: Zacatecas (42 per cent), Chihuahua (13 per cent), Durango (16.6 per cent), Sonora (6.1 per cent), Oaxaca (3.9 per cent) and others (174 per cent);
- Lead: Zacatecas (62.7 per cent), Chihuahua (14.2 per cent), Durango (11.8 per cent) and others (11.3 per cent);
- Copper: Sonora (81.3 per cent), Zacatecas (7.1 per cent), San Luis Potosí (5.1 per cent), Chihuahua (3.1 per cent) and others (3.4 per cent); and
- Zinc: Zacatecas (43 per cent), Chihuahua (13.3 per cent), Durango (25.9 per cent), State of Mexico (5.9 per cent), Aguascalientes (3.9 per cent) and others (8.0 per cent).

Legal and regulatory structure

4 Is the legal system civil or common law-based?

In Mexico, the legal system is civil law-based.

5 How is the mining industry regulated?

The federal government regulates the mining industry through the Ministry of Economy, particularly, through the General Bureau of Mining Regulation (GBMR).

Other governmental bodies that administer the regulatory regime relating to mining activities are the Environmental Ministry, the Waters Commission, the Army Ministry, the Labour Ministry, the local public registries of real estate properties and the Agrarian Registry.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The laws regulating the mining industry are the Mexican Political Constitution, Mexican Mining Law, its Mining Regulation and the Mining Handbook Services (jointly, the Mining Law).

Additionally, other laws govern ancillary activities to the mining activities: Federal Environmental Law, the Federal Waters Law, Federal Agrarian Law (communities and social organisations lands' tenure), Federal Explosives and Weapons Law (for the storage, transportation and use of explosives), Federal Labour Law (this law governs labour relationships and safety at the mines facilities), local Civil Codes (applicable to private lands' tenure), federal and local tax laws, Federal Commercial Code, municipal regulations for zoning the use of the lands and Federal Environmental Norms.

The principal regulatory body in Mexico that administers the Mining Law is the GBMR, however, as mentioned in question 5, other governmental bodies administer the regulatory regimes relating to mining activities.

No, there were no major amendments in the past year to the aforementioned laws.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Mexico follows international standards in this regard. Currently, the classification system used by Mexico is similar to that contained in the National Instrument 43–101 of Canada.

In order to report mineral resources, the following classification is applied:

- inferred mineral resource;
- indicated mineral resource; and
- measured mineral resource.

Furthermore, reports on mineral reserves are classified as follows:

- probable mineral reserve; and
- proved mineral reserve.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mexico, as a nation, is the direct owner of all mineral deposits within the national territory as provided in the Constitution. The exploration and exploitation of such mineral resources are concessional to private parties pursuant to concessions granted by the federal government.

The GBMR is the agency of the federal government in charge of granting mining concessions and supervising the mining concessionaries to comply with Mining Law while holding mining concessions, while conducting mining activities and while granting rights to third parties over the mining concessions for them to conduct mining activities, which are also subjected to the Mining Law.

Mining concessions grant to their holders the right to explore and exploit all minerals and substances specified in the Mining Law, except for those reserved to be exploited by the Mexican government, such as gas derived from the exploitation of mineral coal, oil and solid, liquid or gaseous hydrocarbons.

Mining concessions do not grant the ownership or possession rights over the surface where they are located. When the concession holder does not have surface rights to access the lands where the mining concession is located, it can directly negotiate the use of land for mining activities with the owners of the surface rights. In the case that no agreements are reached for the use of the surface, mining concessionaries are entitled to start a procedure contemplated in the Mining Law to obtain the following:

- the expropriation;
- a temporary occupation; or
- an easement.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Legal information about ownership, agreements, liens and encumbrances of mining concessions is available at the Public Registry of Mining (PRM).

General mining information, including maps, mining cartography, geological and geophysical reports, information of ore deposits, technical data, tectonic and volcanic information, satellite images, hydrographic information, natural protected areas, general statistics on production, etc, for the mining districts (areas in which the Mexican territory is divided by the GBMR) for mining purposes is available at the Mexican Geological Service (MGS) through the 'Geoinfomex System'. Official Mexican mining cartography is also publicly available at the subdirectories of the GBMR in the corresponding states.

As part of their obligations before the GBMR, mining concessions' title-holders shall annually submit work assessment reports containing economical information on investments incurred in their mining concessions, as well as statistics reports. Information submitted is used to create statistics on mining activities in the Mexican territory, and is used to generate public and private databases.

The MGS also conducts exploration activities in areas allotted to them by the GBMR. Its results are also publicly available.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The most common way for private parties to acquire mining concessions is staking them.

Private parties may also acquire mining concessions from the MGS. The MGS offers mining concessions to private parties through public auctions, with data derived from its own surveys and exploration activities.

Once the GBMR issues the mining concessions to private parties, after complying with certain technical and legal requirements, the rights granted to their holders are freely assignable. All Mexican private individuals and Mexican entities registered before the PRM are legally capable to hold mining concessions or rights deriving therefrom. Mexican entities are those incorporated in accordance with Mexican laws. Foreign investment may participate in up to 100 per cent of the capital of a Mexican entity.

In accordance with the Mining Law, mining concessions allow their title holders to conduct exploration and exploitation works.

Process to acquire mining concessions through staking

Mining concessions are granted over free areas to the first petitioner in time of a mining claim. The location of a mining concession is determined by a fixed base point of the land that is named the 'starting point', which is linked to the claim's perimeter.

The first step to acquire a mining concession through a staking is to submit an application for a mining concession.

The applications for mining concessions must be submitted before the corresponding GBMR's agency depending on the location of the claim to be staked.

A mining expert shall conduct due diligence, considering the following:

- a review of the official Mexican mining cartography in the subdirectories of the GBMR in the states (see question 9);
- a recognition of the field;
- a definition of the perimeter;
- the field works; and
- a satellite GPS positioning in order to obtain the coordinates of the starting point of the claim.

If the due diligence report complies with all applicable requirements, the GBMR must issue the relevant title document within the following 15 days.

Energy sector

Due to the Mexican energy reform, enacted in August 2014, the GBMR, before issuing a mining concession, is required to consult with the Ministry of Energy (SENER), in order to verify that the area requested for mining concession is not considered an area of interest for SENER to conduct oil, gas or power generation activities.

Since oil, gas and power generation activities are now considered as priority activities in Mexico, the SENER may oppose the issuance of the relevant mining concession or may recommend the granting of it, excluding the area where the priority activities may be conducted, to the GBMR.

The Mining Law imposes, among others, the following main obligations to title holders of mining concessions:

- exploration or exploitation activities must start within 90 days of the concession being granted and recorded before the PRM, with the obligation to conduct and evidence minimum investments in the area under the mining concession or the extraction of economically useful minerals in the amounts provided under the Mining Law and provide the relevant work assessment reports showing the foregoing on an annual basis;
- pay governmental mining concession's fees, for which the amount payable depends on the following:
  - the date on which the mining concession was registered before the PRM (the older the mining concession is, the higher the governmental fees are); and
  - the surface covered by the mining concession (number of hectares) (governmental mining fees);
- comply with applicable legislation regarding technical, safety and environmental standards;
- provide the Ministry of Economy with statistical, technical and accounting reports in terms of the Mining Law;
- allow inspection visits from the Ministry of Economy; and
- inform the Energy Ministry in the case of finding any hydrocarbons where the mining concession is located.

As mentioned, there are no reconnaissance or other kind of mineral licences, only mining concessions, as described here.

11 What is the regime for the renewal and transfer of mineral licences?

Mining concessions are granted for a term of 50 years from the date of their registration in the PRM, and are subject to renewal for an additional term of 50 years if:

- the holder does not incur in a cause of cancellation of the concession by any act or omission so penalised by the Mining Law; and
- the holder requests the extension within five years prior to the expiry date.

The transfer or assignment of concessions or rights thereunder may be freely made to any party having legal capacity. The transfer of mining concessions or rights thereunder shall produce legal effects against third parties, the Ministry of Economy and other governmental authorities upon their registration with the PRM. Owners of mining concessions shall be only recognised as so, if they are recorded as concessionaires with the PRM.

A transfer or assignment will be null and void when made to an unqualified person under the Mining Law. However, the Mining Law provides that a transfer to an unqualified person will not be null and void when it occurs pursuant to a court resolution ordering the debtor (mining concessionaire) payment of the debt, and provided further that the rights are then transferred to a capable party within 365 calendar days after the date of the issuance of the court resolution.

A government consent is not required in order to transfer a mining concession, or in the event of change of control of its holder or its parent.

12 What is the typical duration of mining rights?

As mentioned in question 11, mining concessions are granted for a term of 50 years from the date of their registration in the PRM, and are subject to renewal for an additional term of 50 years if: (i) the holder does not incur in a cause of cancellation of the concession by any act or omission so penalised by the Mining Law; and (ii) the holder requests the extension within five years prior to the expiry date.

Mining concessions can be cancelled before expiration in the following cases: (i) for not complying with payment of governmental Mining Fees as provided in the Mining Law and the Federal Duties Law as described in question 10; (ii) for not filing the work assessment reports evidencing minimum investments incurred in the mining concessions as described in question 10; (iii) by a court resolution (ie, execution of a guarantee involving a mining concession); (iv) for dropping the mining concession through the corresponding administrative proceeding; (iv) for exploiting or extracting minerals not permitted by the Mining Law; (v) if the mining concession was acquired from the MGS as mentioned in answer to question 16, for not paying the corresponding royalties to the MGS; (v) for conducting mining activities without the relevant authorisations and permits necessary to conduct them; (vi) in the case that the title-holders lose their capacity to own mining concessions (ie, if a company changes its Mexican nationality), among others.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Foreign investment is allowed up to 100 per cent in Mexican companies that can acquire and work mining concessions. In Mexico, mining concessions may only be granted to Mexican individuals, Mexican companies (companies incorporated under the laws of Mexico and with corporate domicile within the country), land granted by the government to a group of individuals for agricultural and ranching purposes, agrarian communities, townships and aboriginal communities. In the case of companies, they must be incorporated in accordance with Mexican laws, and their corporate purpose shall include the exploration or exploitation of minerals and substances subject to the Mining Law. Since a Mexican company is a company incorporated under the laws of Mexico as mentioned before, there are no distinctions on the rights to be acquired by a Mexican company with 100 per cent Mexican investment in its capital and a Mexican company with 100 per cent foreign investment in its capital.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected through the applicable legislation and the applicable administrative and judicial authorities; therefore, Mexican authorities are in charge of the resolution of controversies that may arise from mining operation.

In accordance with certain provisions of the Federal Code of Civil Proceedings (which provisions are applicable to mining matters), in the event of a dispute between the parties to an agreement involving mining concessions, an arbitration award cannot be homologated (executed) in Mexico since mining matters are from the exclusive competence of Federal Mexican courts.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The mining rights covered under a concession do not include direct ownership or possession rights over the surface where a mining concession is located.

The use of the lands may be obtained through direct ownership or possession of lands (eg, lease agreements, temporary occupation agreements, easements agreements or expropriation through an administrative proceeding).

The Mexican Constitution recognises the following surface rights:

(i) social land granted to aborigines;
(ii) social land granted to a group of individuals or communities;
(iii) national land;
(iv) federal areas, beaches and river beds; and
(v) private property.

The Agrarian Law governs the property rights mentioned in (i)–(iii). Said lands can be legally occupied or acquired by private parties as provided in the Agrarian Law.

A concession holder may acquire all property rights mentioned. Typically, the consideration payable for the lands is agreed between the parties. The Mining Law provides the rules under which a mining concession holder may require the expropriation or the temporary occupation of the land when it does not reach an agreement with the landowner. In the case of expropriation by the Mexican government, the consideration is payable based on an appraisal made by an agency of the Mexican government.

The Ministry may revoke the temporary occupation agreement or to revert the surface expropriated in the following cases:

- if the mining works to develop are not started within the 365 days following the issuance of the relevant resolution;
- if the mining works are suspended for a year or more;
- if the surface granted is destined to ause other than the mining activities;
- if the concessions holders do not pay the consideration determined in the relevant resolution of temporary occupation or expropriation;
- if the mining concession is nullified or cancelled; and
- by a court resolution.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Beside the exploration activities conducted by private parties, exploration of national territory for the purpose of identifying and quantifying the nation's potential mineral resources is carried out by the MGS, through mining allotments, which are issued to this entity by the Ministry of Economy, the registration whereof is published in the federal Official Gazette. No other state agencies conduct mining activities.

Once MGS explore the relevant allotments, they are sold to private parties by way of public auctions. Mining concessionaires must pay royalties to the MGS as part of the consideration payable for the exploration activities and discoveries made by the MGS.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

In the case of mining concessions, certain governmental authorities (ie, Environmental Ministry, Communications and Transport Ministry, Agrarian Ministry and others), because of an event of national security or public interest, may decide to revert the concessions granted to private parties (the Reversion Decision). The Reversion Decision decree shall include the general rules to determine the consideration to be paid to the concession holder and the investments made in the concession. The depreciation of the expropriated assets, equipment and facilities attached to the mining concession shall be considered in order to calculate such consideration, through the payment of a fair market value compensation.

If the affected party agrees with the amount of consideration payable, it shall be final. If not, it has the right to file a claim before a Mexican court, which will take the final decision.

In accordance with the North America Free Trade Agreement (NAFTA), Mexico may only expropriate property in case of public

interest and on a non-discriminatory basis. In such events, expropriations will require a fair market value compensation, including accrued interest. In the event of any violations of the NAFTA and international laws, investors have the right to international arbitration.

18 Are any areas designated as protected areas within your jurisdiction and that are off-limits or specially regulated?

The federal government has issued specific decrees for the incorporation of natural protected areas. The federal government has established 181 natural protected areas throughout the country. Each natural protected area has zones where mining activities are forbidden or highly regulated; these limitations are applicable to private and public property within those areas.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

In addition to governmental mining fees, all mining concessions are subject to the payment of certain fees to the Mexican government, which are based on production.

In accordance with the Federal Duties Law (Duties Law) holders of mining concessions shall pay the following:

- 7.5 per cent of the income from the sale of minerals extracted from a mining concession minus the authorised deductions, on an annual basis (the governmental royalty); and
- in the case of commercialisation of gold, silver or platinum, concessionaires shall pay an additional 0.5 per cent of the income for the sale of such minerals on an annual basis (the extraordinary governmental royalty).

Finally, holders of mining concessions that do not perform and verify exploration or exploitation works for two consecutive years, during the first 11 years of seniority counted from their issuance, shall pay on a biannual basis, an additional 50 per cent of the corresponding governmental mining fees in accordance with the quotas stated in the Duties Law or 100 per cent if the concession's seniority is over 11 years.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Mexican tax legislation does not grant specific tax incentives to mining companies. However, there are other general tax incentives that can be taken, such as immediate deduction of some fixed assets, tax credit of the special tax over services and production related to diesel consumption and credit of the fees paid over the use of the mining concession.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Unfortunately, Mexican tax legislation does not contemplate the tax stability agreement concept, which could support the mining industry in the early years of operation.

The only possibility under Mexican legislation is to negotiate, upfront, the values to be used in transactions between related parties. The period that could be negotiated is up to five years and it is commonly known as an advance price agreement. This negotiation is basically from a transfer pricing perspective.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

Except for the royalties mentioned in question 16, in accordance with applicable Mexican legislation, the government is not entitled to carried interests in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of mining concessions is subject to taxation in connection with income tax (considering the gain triggered in the sale, similar to a capital gain) and value added tax (similar to a transfer tax) at a rate of 16 per cent.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

As mentioned in question 10, since exploration and exploitation activities conducted by foreign investors in Mexico must be made through Mexican companies, and these companies are considered for all legal effects as Mexican residents, there are no distinctions for duties, royalties and taxes payable by Mexican companies with 100 per cent Mexican investment and Mexican companies with 100 per cent foreign investment.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The most common business structures used are corporations and limited liability corporations, regulated by the Mexican Corporations Law.

26 Is there a requirement that a local entity be a party to the transaction?

No, there is not.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Mexico has entered into several bilateral agreements with foreign countries, including, among others, the following free trade agreements: the NAFTA with the US and Canada, the G3 with Colombia and Venezuela, the Trans-Pacific Partnership with Japan, Canada, the US, Australia, New Zealand, Malaysia, Brunei, Singapore and Vietnam, and other commercial agreements with the EU, Israel, Chile, Costa Rica, etc.

Additionally, the Mexican government has subscribed several bilateral agreements, for the avoidance of double taxation, with the following countries, among others: Argentina, Australia, Austria, Bahrain, Barbados, Brazil, Canada, China, Colombia, United Arab Emirates, Germany, Greece, Hungary, Hong Kong, India, Indonesia, Iceland, Italy, Kuwait, Lithuania, Luxembourg, Malta, New Zealand, Panama, the Netherlands, Peru, Poland, Qatar, the US, the UK, the Czech Republic, Russia, South Africa, Switzerland, Turkey, Ukraine and Uruguay.

All international commercial treaties subscribed to by Mexico include a chapter concerning protecting investment from unlawful acts of authority (ie, Chapter 11 of NAFTA).

Mexico has followed the OECD rules in the negotiation of all tax treaties and even when there could be some minor differences between the tax treaties, in general terms, the conditions agreed are similar.

Notwithstanding the above, it is fairly common to have finance agreements or royalty agreements in place and usually the payments are made to countries in which the tax treatment for such payments is more favourable. Because of the terms of the Mexican legislation, these payments are usually made to residents of countries with tax treaties with Mexico.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing for mining activities carried out by Mexican companies, subsidiaries of foreign companies, are the stock exchange institutions of their countries, with the Toronto stock exchange and the New York stock exchange being the most active for the parent companies of Mexican subsidiaries. Once the money is raised from the applicable stock exchange, the resources are sent to the Mexican subsidiaries, either as capital contributions or as loans. Also, foreign private banks lend money to foreign parent companies or directly to the Mexican subsidiaries. During the past 10 years, successful streaming, royalties and off-take agreements have been structured to finance mining projects in Mexico.

Additionally, a Governmental Mining Trust Fund (FIFOMI) and the Mexican Government Mining Bank, have provided funds

to private parties for the development of mining activities. FIFOMI grants the same treatment to Mexican companies with 100 per cent Mexican investment as to Mexican companies with 100 per cent foreign investment.

The Mexican stock exchange hosts mining companies but only with production projects and a number of valuable assets. There are 40 Mexican and foreign mining companies whose securities are listed on the Mexican stock exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

As mentioned in question 28, the FIFOMI and the Mexican Government Mining Bank provide funds to private parties for the development of mining activities.

30 Please describe the regime for taking security over mining interests.

Lenders usually request the following guarantees:

- over 100 per cent of the shares of the Mexican companies that own the mining concessions, through pledge agreements over the shares;
- over mining concessions, usually through non-possessory pledges or mortgages;
- over owned lands and real estate, through mortgages; and
- over machinery, equipment and other moveable assets through non-possessory pledges.

To be effective before third parties, these guarantees must be granted before a Mexican public notary to be able to register them with the corresponding public registry: mining concessions mortgages or non-possessory pledges with the PRM; all moveable assets, including machinery and equipment, with the Moveable Assets Guarantees Registry (federal jurisdiction) and lands and real estate with the local public registry of real estate (local jurisdiction).

It is also possible to grant a pledge over the minerals extracted from the mining concessions.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no restrictions for the exportation or the importation of machinery and equipment required in connection with exploration or exploitation activities.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Mexico does not use standards conditions for agreements covering equipments supplies. Most common commercial agreements used are leasing andpurchase agreements; in the event of forward sales, it is common to enter into title reservation agreements or security agreements using the supplies as security.

In case of disputes beween the parties, it is common to include arbitration provisions in the agreements involving supplies; however, parties can also use relevant legal resources before Mexican courts.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

In general terms there are no restrictions. All import and export processes require a permit. However, in order to export iron, gold, silver and copper minerals, the producing-exporting company or individual must be registered in a mining sectoral registry for the exportation of such minerals.

For the exportation of iron, exporters are required to be the owners of the mining concession from where the minerals are extracted.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions on the importation of funds or investment for exploration, extraction, export or sale of minerals to any national or foreign private party.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws applicable in Mexico to the mining industry are the following:

- General Law of Environmental Equilibrium and Environmental Protection;
- General Law for the Prevention and Management of Waste;
- General Law on Climate Change;
- General Law of Sustainable Forestry Development;
- regulation of the General Law of Environmental Equilibrium and Environmental Protection regarding environmental impact assessments;
- Regulations of Natural Protected Areas; and
- Mexican Official Norms (NOMS) related to environmental matters: NOM 120, NOM 141, NOM 147, NOM 155, NOM 157 and NOM 159, among others.

The principal environmental regulatory bodies are as follows:

- the Ministry of Environment and Natural Resources (SEMARNAT); and
- the Federal Environmental Prosecutor.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Exploration, exploitation and processing of minerals require the filing of an environmental impact assessment, as well as the filing of a preventive report in some cases.

Applicants must notify the environmental authority of actions that seek to make it to determine whether the filing of an environmental impact assessment is required, or may be performed without authorisation.

The authorisation of the preventive report for the exploration phase should be granted within 20 business days, and for the land use change on forest land the authorisation should be granted within 60 business days.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Remediation works are performed in Mexico in cases of soil contamination. Otherwise, a refurbishing process must be performed. Those responsible for activities that involve the generation and management of hazardous materials and waste that cause contamination of sites are required to carry out remediation works.

If hazardous substances considered highly risky are used during the exploitation phase, it is necessary to have environmental risk insurance that will be required in the corresponding resolution of the environmental impact assessment as a condition to starting operating activities. Three insurance terms or guarantees may be required, which are as follows:

- if hazardous substances are used;
- if hazardous waste is generated; and
- for the fulfilment of obligations contained in the resolutions of the environmental impact authorisation.

38 What are the restrictions for building tailings or waste dams?

Regarding restrictions for building tailings or waste dams, there is an Official Mexican Rules (Norma Oficial Mexicana) NOM-141-SEMARNAT-2003, which establishes the procedure for characterising the tailings, as well as the specifications and criteria for the characterisation and preparation site, project, construction, operation and post-operation of tailings dams. There are no qualifications necessary for the person in charge of operation and management of dam waste.

These facilities are inspected by authorities quite often; there are no specific periods for such inspections.

There is an obligation to get a permit from the authority the Programme for the Prevention of Accidents (PPA); in certain cases, to submit a risk assessment, to register the Hazardous Waste Management Plan, to have environmental insurance and to provide notice to the authority in case of emergencies, accidents or loss of hazardous waste.

There are no specific requirements for emergency drills with the local community.

The Federal Law of Environmental Responsibility, provides that that the main responsible of rescuing people and the remediation, damages' costs, and penalties is the mining company involved in such events.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health, safety and labour laws pertaining to the mining industry are:

- Federal Labour Law;
- Federal Social Security Law;
- Federal Regulations on Safety, Health and Work Environment;
- Official Regulation NOM-023-STPS-2012, Underground and Open Pit Mines – Safety and Health Conditions at Work; and
- Official Regulation NOM-032-STPS-2008, Security for Underground Coal Mines.

The principal regulatory entity is the Ministry of Labour and Social Welfare.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The Mexican Official Standard NOM-141-SEMARNAT-2003 sets the procedure for preparation, design, construction, operation and post-operation of mine tailings dams.

For the exploration and exploitation of tailings, no mining concession is required.

There are no specific rules under the Mining Law for the ownership of tailings. If tailings result from the ore beneficiated by the mining concession holder, they belong to the mining concession holder; in the case of tailings derived from the beneficiation of ore in a third parties' beneficiation plant, it usually belongs to the owner of the beneficiation plant.

In Mexico there are ancient mining works that produced tailings. Those tailings have no relationship with today's mining concessions; these, in accordance with civil law, belong to the owner of the lands where tailings are sited.

Furthermore, dumps, in accordance with the Mexican Mining Law, belong to the mining concession holder.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no exclusive restrictions or limitations imposed in connection with mining activities; however, the following restrictions apply in general:

- at least 90 per cent of the workers must be Mexican;
- for technical activities, workers must be Mexican unless there is a very particular and specific expertise that may only be performed by a foreigner, but only temporarily. Foreign workers are required to train Mexicans in the area of speciality dominated by them. Usually when foreign geologists, mining engineers, metallurgical engineers, environmental engineers and technicians are hired for Mexican projects they are hired as decision makers and management officers; and
- doctors (physicians) working for companies must be Mexican individuals.

Furthermore, foreigners require special authorisation from the National Migration Institute to be hired in Mexico for lucrative activities.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal community engagement regulations are the Mexican Constitution (its spirit is social and its focus is in protecting vulnerable groups), some provisions of the Mining Law (see question 41), the Federal Labour Law and the Agrarian Law and regulations thereof.

Mexico has also subscribed to several international treaties (see question 44).

The main regulatory entities are the Ministry of Economy through the GBMR, the Labour Ministry and the Agrarian Ministry.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Mexico has subscribed to the Convention for Protection of Indigenous and Tribal People (ILO Convention No. 169). Concessionaires must consult indigenous communities located in areas where mining concessions are located.

However, there are no mechanisms implemented in the applicable Mexican legislation in this regard, nor sanctions or penalties imposed if the concessionaire does not consult the indigenous community.

Additionally, in the acquisition of mining concessions, if there are simultaneous applications made by indigenous groups or tribal people and private miners for the staking of a mining concession, the indigenous communities living where the relevant mining concession is located have preferred rights to obtain the mining concession.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The Mexican government has subscribed to several conventions, including the following:

- Indigenous and Tribal Peoples Convention (No. 169 – ILO);
- Fund for the Development of Tribal Peoples in Latin America and the Caribbean;
- Performance Standards on Social and Environmental Sustainability of the International Financing Corporation; and
- Equator Principles.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Mexican legal framework applicable is the following (the Anti-corruption Laws):

- Mexican Constitution (in particular the Decree published on 27 May 2015 modifying, adding to and removing several anti-corruption provisions set forth in the Mexican Constitution);
- Ethic Code published by the Ministry of Public Service on 20 August 2015;
- Federal Criminal Code;
- State Criminal Codes;
- Federal Anticorruption Law for Government Contracting;

Update and trends

According to the Mexican Mining Chamber, during 2016 investment in Mexico decreased 6 per cent, mainly due to the following factors: the decline in demand for metals from China, the weakness in economic growth, the application of mining rights and non-deductibility of 100 per cent of the exploration expenses performed in pre-operational periods.

The production of metals is also downward: gold is down 11 per cent, and silver 5 per cent. In contrast, copper rose 3 per cent, thanks to the expansion of the Buenavista mine of Grupo México.

Notwithstanding the foregoing, the Mexican Mining Chamber anticipates that this tendency reverses during the following years, so it will work on promoting investment, exploring new deposits and acquiring new technology; thus, from the 15 projects for the production of gold in the country planned for 2021, with an estimated investment of US$2,700 million, in 2016, four projects began their production stage, with a disbursement of more than US$1,350 million; among these projects are San Julián, from Fresnillo, subsidiary of Peñoles; San Jose, from Fortuna Silver; Independencia and Guadalupe, from Coeur Mining; and El Limón-Los Guajes, from Torex Gold.

- General Law of the National Anti-Corruption System (this law includes the provisions regulating the National Anti-Corruption System); and
- General Law for Administrative Responsibilities (Ley 3 de 3). This law will enter into force in July 2017.

Activities ruled under the Anti-corruption Laws

- Offering, payment or receipt of bribes by government officers in exchange for any action or omission resulting in a benefit or advantage to the offering corporation or individual.
- Regulation of the responsibilities and penalties to be imposed on individuals and corporations for violations incurred in connection with the federal procurement procedures as well as violations incurred in international commercial transactions.
- Regulation and public policies and procedures in order to coordinate governmental authorities in the prevention, detection and punishment of corruption.
- Adoption of anti-bribery compliance programmes by the corporations.
- Regulation of public bindings, permits, licences, authorisations and concessions.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Notwithstanding that the Anti-corruption Laws do not require companies to adopt a compliance programme, the General Law for Administrative Responsibilities provides for possible reductions in penalties for companies being prosecuted for 'serious administrative offenses' if the corporation incorporated an adequate compliance programme at the time the relevant offence occurred. Foreign mining companies generally have anti-corruption and anti-bribery policies implemented from abroad, to be fulfilled not only by the company itself, but for all those with whom the company enters into any type of agreement, either for goods or services. On the other hand, public Mexican mining companies generally implement anti-corruption and anti-bribery policies through a corporate governance system that is responsible for ensuring transparency in the administration, the experience of their organisational values and accountability to its stakeholders.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The accession of Mexico to the EITI Standard is in progress. However, to date, Mexico has not enacted legislation nor has it adopted international practices regarding the EITI Standard in connection with disclosure of payments.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

As mentioned, Mexican mining companies may be owned up to 100 per cent by foreign investors, either as individuals or entities. Mexican mining companies partially or fully owned by foreign investors are considered Mexican entities and have the same business rights as Mexicans.

The only obligation of Mexican companies with foreign investment is to be registered with the Foreign Investment Registry and report changes to their capital structure and periodically report their finance conditions to the Mexican foreign investment authority.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Mexico has several bilateral agreements with other countries that contemplate certain matters related to the mining industry.

NAFTA

The purpose of NAFTA and other commercial treaties was to eliminate most of the duties imposed on the exportation and importation of goods.

Mexico has a temporary importation scheme through which payment of duties is not triggered except where the equipment remains in the country after the term of its temporary importation elapses.

Furthermore, Chapter 3 of NAFTA includes certain benefits for the import of mining equipment against the countries without free trade agreements, which are usually subject to a tax that ranges from 10 to 20 per cent.

Mexico and Japan Free Trade Agreement

With this agreement, Mexican companies will have a zero tax rate for the exportation of up to 95 per cent of the goods exported to Japan, including, among others, minerals.

Mexico will reduce duties on goods imported from Japan (eg, goods with electronic and steel components), by up to 44 per cent in the coming years.

Mexico and Chile Free Trade Agreement

This agreement provides the opportunity to participate as a supplier of mining industry inputs with a tax rate of zero per cent between the parties for chemical products for the flotation of minerals, and other processes performed in the mining industry including leachates, depressants, foaming agents, flocculants, sodium cyanide and sodium pentasulfide, among others.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry arguably represents one of Mozambique's most important sectors and stands at the forefront of the country's development efforts. Mining is one of the principal drivers of the national economy and its contribution to the GDP continues to increase. Over the past few years, Mozambique has been developing a mineral export promotion programme, primarily aimed at augmenting its depleted foreign exchange reserves. Consequently, major industry players from South Africa, Russia, Australia, India and Brazil have acquired interests in various mining areas across the country, highlighting the significance of the mining sector.

A number of high-profile mining projects are currently under way, which are not only boosting the industry itself, but also the considerable development of infrastructure to facilitate the export of the mining output. The most visible expression of this anchor effect is the upgrade of the Nacala Corridor Railway – a project that has enhanced Mozambique's competitiveness in the region by connecting the country's inland area to the port of Nacala, East Africa's deepest natural port.

2 What are the target minerals?

Mozambique's geological make up is extremely varied. Being one of the largest producers of tantalite and beryllium, the country boasts strategic reserves of both these minerals. Mozambique also hosts one of the world's largest aluminium smelters, with an installed capacity to produce 560,000 tonnes of aluminium ingot a year.

Copper, iron ore and lead, as well as high-grade bauxite, are explored in the central part of the country. High-scale heavy mineral sands and titanium projects are being developed in that same region. The Mozambican province of Tete is known as one of the world's largest coal reserves, although its level of production has decreased in recent years.

3 Which regions are most active?

Mozambique's most important mineral reserves are located in its central provinces of Tete and Manica.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Mozambique's legal system is civil law-based.

5 How is the mining industry regulated?

Mozambique's mining industry is primarily regulated at the national level by nationwide laws (enacted by Parliament) and by implementing regulations (approved by the government). Mining agreements are often entered into by and between the government and holders of mining rights. There are no objective criteria defining when a mining contract should be executed, but they are used for large-scale mining projects. A mining contract can provide for amendments and variations to or exemptions from the existing legislative requirements, taxes, custom duties and employment quotas regulating the country's mining industry.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Mining activities in Mozambique are governed by the Mining Law (Law No. 20/2014, of 18 August 2014) and by Mining Regulations (Decree No. 31/2015, of 31 December 2015). The existing legal framework aims to regulate the mining titles awarded for the exploitation of the country's mineral resources, the formalities instructing their concession and respective time frames, as well as the rights granted to investors who wish to engage in mining activities.

Other key statutes include:

- Health and Safety Regulations for Mineral Activity;
- Regulations on Mining Work;
- Environmental Regulations for Mineral Activity;
- Basic Rules for the Environmental Management of Mining Activity; and
- the Law on Taxation of Mineral Operations and its Regulations.

The industry's main regulatory bodies are the Ministry of Mineral Resources and Energy, which is essentially responsible for awarding mining rights, and the National Institute of Mines, which oversees mining activities.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Mozambique's mining legislation does not stipulate a specific classification system for the reporting of mineral resources and reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mozambique's Constitution establishes the fundamental principle that all mineral resources found in the soil, subsoil or in water are the sole property of the state. This same principle is reproduced in the Mining Law. Holders of surface rights may, under no circumstances, be vested with title to minerals found in the subsoil, except if special mining rights are obtained from the state. Private prospecting, and the exploration and mining of mineral resources, is only permitted under mining licences awarded by the government (Ministry of Mineral Resources and Energy).

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Several sets of mining data, including geological and geochemical data, are available for consultation at the National Directorate for

Geology and Mines by private entities considering investments in the mining sector. A detailed registry of mining areas and existing mining licences is also available. Nevertheless, mining data derived from prospecting and exploration activities may only be disclosed 90 days after the termination date of the respective mining title.

Mozambique has a Mining Registry Site launched by the Ministry of Mineral Resources and Energy. This online tool was created to ensure compliance with the standards set by the Extractive Industries Transparency Initiative and is essentially aimed at improving transparency in the mining sector. In addition, it has proved useful in promoting and boosting investment given that it provides potential investors with immediate and clear information on the areas open to mineral activities. It also provides a reference list of the various prospecting and exploration licences and mining concessions awarded.

The Portal is regularly updated and can be viewed at: http:/portals.fiexicadastre.com/Mozambique/en/.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

There are seven types of mineral rights or licences available:
- prospecting and exploration licences;
- mining concessions;
- mining certificates;
- mining passes;
- mineral handling licences;
- mineral processing licences; and
- marketing licences.

Only one type of mineral right can exist over an area of land at any one time. The acquisition, modification, transfer and termination of mineral licences are subject to registration.

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

Prospecting and exploration licences

Prospecting and exploration licences are initially granted for two years in the case of construction minerals (renewable for an additional two-year period) and five years for all other minerals (renewable for an additional three-year period), for areas of up to 198 and 19,998 hectares respectively. These licences allow their holders to access the licensed area and to carry out all activities ancillary to prospecting and exploration, such as the construction of temporary structures and the removal or sale of samples and specimens.

Holders of prospecting and exploration licences must submit an annual report, until 28 February of each year, summarising the activities undertaken during the previous year, as well as a work programme and budget for the forthcoming year, until 30 March.

Mining concessions

Mining concessions are granted for up to 25 years, allowing the holder to extract minerals from the concession area and to carry out all activities ancillary to extraction, such as the construction of structures and the marketing of minerals. Applications for mining concessions must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines. Furthermore, these applications are always subject to prior opinion issued by the government of the relevant province.

Mining concessions are granted on an exclusive basis and may be extended once, for the same 25-year period. Before commencing extraction activities, the holder of the mining concession must obtain an environmental licence and a DUAT (a form of land concession), as well as prepare a resettlement and compensation plan for the communities affected by the mining activities. These activities must then be launched within two years, and production within four years, of the awarding of the mining concession.

The mining production plan must include, among other elements: details of the ore deposit, design of the mine site, the operations schedule, the necessary infrastructure, expected dates for the start of development and commercial production, as well as environmental, health and safety plans.

Mineral processing licences

In Mozambique's Mining Law, mineral processing is defined as the mineral operations carried out to obtain mining ore, spanning the entire extractive industry chain. Mineral processing licences are granted for a period of 25 years and may be extended once for an equivalent period. Applications for this licence must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines.

Mineral handling licences

The Mining Law defines mineral handling as mineral operations carried out to recover useful ore components in order to then transform these into useful or profitable minerals using physical processes, excluding industrial transformation. Mineral handling licences are granted for a period of 25 years and may be extended once for an equivalent period. Applications for this licence must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines.

Marketing licences

When the entity selling or exporting minerals is not the same as that which produced or mined these minerals, a marketing licence is required. See question 33.

11 What is the regime for the renewal and transfer of mineral licences?

Prospecting and exploration licences are valid for up to two years in the case of construction minerals (renewable for an additional two-year period) and five years for all other minerals (renewable for an additional three-year period). In order to be granted an extension, an extension fee must be paid and the following documents must be submitted to the Ministry of Mineral Resources and Energy, at least 60 days prior to the termination date of the licence:
- a tax clearance certificate confirming that all mining taxes have been paid;
- a report detailing the activities carried out during the initial phase (including the investments made); and
- a work programme covering the extension period (with mention of the respective projected investment).

Provided that the above requirements have been met and that the licence holder has complied with all its obligations under the existing prospecting and exploration licence, the Ministry of Mineral Resources and Energy may, subject to the opinion of the National Institute of Mines, approve extension of the licence for the time period requested (ie, the Minister is not legally granted discretion to refuse the awarding of extensions for other reasons).

In accordance with the Mining Law and the Mining Regulations, the transfer of prospecting and exploration licences from one company to another, as well as the direct or indirect transfer of the licence holder's shares, may be requested only two years after the start of the respective mineral activities and is subject to prior approval by the Ministry of Mineral Resources and Energy. The Ministry's approval is, in turn, conditional on compliance with certain requirements, such as the payment of a transfer fee and clear demonstration of the assignee's technical and financial capacity.

12 What is the typical duration of mining rights?

The duration of mining rights depends on the mining right in question (see questions 10 and 11).

Pursuant to Mozambique's Mining Law, a mining right can be revoked when its holder fails to remediate, within 60 days of the government's prior notification, the following situations:
- failure to pay specific taxes;
- failure to comply with any provision or regulation set out in the mining contract that foresees the revocation of the mining right;
- bankruptcy, agreement or composition with the creditors (except if a guarantee has been registered over the mining facilities);
- transformation or dissolution of the mining company without the government's prior approval; or
- indebtedness to the state.

The Mining Regulations also allow for the immediate revocation of mining rights in the following situations:

- failure to pay the surface or production tax, for more than 90 days past the due date;
- failure to carry out mining activities or to file the respective annual works report within 24 months following the issuance of the prospecting and exploration licence; or
- failure to start the mining production within 48 months following the granting of the mining concession, or 24 months following the issuance of the mining certificate, as applicable.

Additionally, the Mining Law establishes other grounds for the revocation of each specific mining right.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The mining rights that may be acquired by Mozambican nationals are distinct from those that may be acquired by foreign parties:

- mining passes (for more basic, artisanal mining activities) and marketing licences may only be granted to Mozambican nationals or to Mozambican companies wholly owned by Mozambican individuals;
- mining certificates (for small-scale mining operations) may only be granted to Mozambican nationals or to Mozambican companies majority-owned by Mozambican individuals; and
- mineral processing and handling licences, prospecting and exploration licences, and mining concessions may only be granted to companies incorporated under the laws of Mozambique – however, these companies can be foreign-held, subject to the mandatory participation of Mozambican nationals, as detailed ahead.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mozambique has an independent judicial system and observes the fundamental principles of rule of law and due process. The protection and enforcement of mining rights can be effected through the local courts, although these courts often lack the necessary expertise of technical mining issues. Litigation in Mozambican courts has the additional problem of being expensive and time-consuming.

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

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Under Mozambican law, all land belongs to the state. Investors in mining activities cannot, therefore, buy or own land being used for the implementation of a mining project. They may, however, be granted the right to use and exploit that land (through the means of a DUAT). A DUAT provides its holder with legal certainty that it will be authorised to use a certain area of land for the purposes for which the DUAT was granted, such as mining. DUAT holders may also be owners of any buildings, facilities or other immoveable assets built on the land covered by their DUAT.

When mining rights are granted in relation to an area of land subject to an existing DUAT, the holder of the granted rights must pay compensation to the respective DUAT holder. In cases where a DUAT is awarded over a populated area and the population must be resettled, a relocation plan must be drawn up and due compensation paid to those affected.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The state's right to participate in mining projects is not provided for in Mozambique's mining legislation, but rather in Law No. 15/2011, of 10 August 2011 (the Law on Public-Private Partnerships, Large-Scale Enterprises and Business Concessions, also commonly known as the Mega-Projects Law) and Decree No. 16/2012, of 4 July 2012 (the Regulations on Public-Private Partnerships, Large-Scale Enterprises and Business Concessions, also commonly known as the Mega-Projects Regulations).

Pursuant to the Mega-Projects Law, contracts must permit the participation of public or private Mozambican corporate persons in the share capital of the project in question or in the capital of the consortium, according to terms to be negotiated and agreed upon by the parties. The Mega-Projects Regulations goes a step further, setting out that as consideration for the granting of exploitation rights over natural resources, the state reserves the right to negotiate a gratuitous participation of no less than 5 per cent of the share capital, during any of the project's phases.

With regard to the listing of project companies, and in accordance with the Mega-Projects Law, contracts must provide for a participation in the project or consortium's share capital which is to be reserved, via the Stock Exchange and on commercial market terms, for the economic inclusion of Mozambican nationals, regardless of whether foreign investment is involved. The participation rate should range between 5 and 20 per cent of said capital. Participation may be guaranteed by the state or by another public entity designated by the state, meaning that at an initial stage the relevant participation is transferred to the state or to other such entity. Alternatively, participation may be guaranteed by the project vehicle, which unconditionally undertakes to then dispose of it at a later date.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Mozambique's Mining Law establishes, as a general principle, that expropriation can only take place for justified public interest reasons and that the expropriated party will always be entitled to receive fair compensation.

18 Are any areas designated as protected areas within your jurisdiction and which (in general terms) are off-limits or specially regulated?

Mozambique's Land Law (Law No. 19/97, of 1 October 1997) establishes the existence of fully protected areas and partially protected areas. Fully protected areas are reserved for nature conservation and state military activities, whereas partially protected areas include:

- sea and river beds;
- the continental platform;
- an area of 100 metres from the coastline or river banks, or both;
- an area of 250 metres bordering dams and man-made lakes, as well as railways and an area of 50 metres adjacent thereto;
- highways and an area of 50 metres adjacent thereto;
- A 2 kilometre band along the country's borders;
- airports and an area of 100 metres adjacent thereto; and
- military facilities and an area of 100 metres adjacent thereto.

No rights may be awarded over fully or partially protected areas, but special licences can be obtained for specific and limited activities.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Mozambique's Law on the Taxation of Mineral Operations (Law No. 28/2014, of 23 September 2014) and the relevant Regulations (approved by Decree No. 28/15, of 28 December 2015) introduced significant changes to the tax regime applicable to the mining industry. The special regimes governing production tax, corporate income tax and fiscal benefits for the mining sector, previously dispersed across several legal instruments, are now consolidated in this single instrument.

VAT and customs duties apply throughout the entire life cycle of mining projects, but duties, royalties and taxes vary in accordance with the operational phase of the project.

Surface tax
Holders of prospecting and exploration licences, mining concessions and mining certificates are required to pay surface tax calculated in accordance with the fixed amount per hectare of land contained in the mining title.

Amount annually payable in meticais per hectare

Mining Title	Rate
Prospecting and exploration licences	
Years 1 and 2	17,50 MT/ha
Year 3	43,75 MT/ha
Years 4 and 5	91 MT/ha
Year 6	105 MT/ha
Years 7 and 8	210 MT/ha
Mining concession	
Years 1 to 5	30 MT/ha
From year 6 onwards	60 MT/ha
Mining certificate	
Years 1 to 5	17,500,000 MT/ha
From year 6 onwards	25,000 MT/ha

Production tax (royalty)
Individuals or companies developing mining activities must pay a production tax (royalty) calculated based on the value of the mineral extracted, as follows:
- diamonds – 8 per cent;
- precious metals, precious and semi-precious stones and heavy sand – 6 per cent;
- sands and stone – 1.5 per cent;
- base minerals, coal, ornamental rocks and other mineral products – 3 per cent.

This value is informed by the sale price of the previous consignment of the respective mineral or, if the mineral has never been sold, its market value. Production tax is to be paid at the end of the month during which the mineral was extracted. A 50 per cent reduction is foreseen in the law for mining products used in the development of local industry.

Windfall profits tax
Mining concessions or mining certificates with a pre-corporate income tax net return in excess of 18 per cent are subject to a windfall profits tax levied on the accumulated net cash flow. The statutory rate of the windfall profits tax is set at 20 per cent.

Corporate income tax
Corporate income tax – a profit-based tax – is payable at a rate of 32 per cent.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Mining projects are exempt (for a period of five years after the start of mining activities) from:
- customs duties payable on imported equipment (for both the prospecting and exploration, and mining or production phases) classified under Class K in the Customs Schedule; and
- customs duties payable on imported equipment not expressly classified under Class K in the Customs Schedule, but which is considered equivalent thereto (a comprehensive list of which can be found annexed to the Law on the Taxation of Mineral Operations).

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

A fiscal stabilisation regime may be negotiated between the government and the holders of mineral rights, as established in article 58 of the Law on the Taxation of Mineral Operations. This stabilisation period has a maximum duration of 10 years, which may be extended until the term of the concession in return for a 2 per cent annual increase in the production tax rate.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The Mega-Projects Regulations establish that the Mozambican state is reserved the right to negotiate a free participation of no less than 5 per cent during any phase of a mining project, as consideration for its awarding of exploitation rights over natural resources.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of mineral rights or licences is subject to a 32 per cent capital gains tax.

According to the Law on the Taxation of Mineral Operations, capital gains are due whenever the underlying transaction concerns mining assets or rights located in Mozambican territory, regardless of where the transaction actually takes place (ie, even if it is concluded at the (offshore) parent company level).

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

In There is generally little difference between a branch and a subsidiary in Mozambique. The main differentiating factor is the tax efficiency associated to the repatriation of profits. Dividends distributed by a local company to its shareholders are subject to withholding tax, whereas the repatriation of profits by the local branch of a foreign company is not.

Other key differences include:
- a subsidiary is a separate legal entity, whereas a branch is not legally autonomous from the foreign company that set it up – namely, its head office;
- the liability of a company's shareholders is limited to the amount of its share capital, whereas a foreign company is fully responsible for any liabilities arising from its branch's activities;
- at least one other shareholder (or two more, depending on the type of company) is required to incorporate a Mozambican company; in the case of a foreign entity branch, the appointment of a local representative is the sole requirement;
- given that a branch and its head office represent the same legal entity, the respective company's corporate matters are governed by only one jurisdiction: typically the country where the company has its registered offices, which determines the company's personal law;
- conversely, corporate documents issued by the foreign company at the head office level (minutes of shareholders' meetings, board resolutions, powers of attorney, etc) will always be subject to a more cumbersome and expensive process, usually involving translation and several stages of legalisation; and
- branch registration costs are broadly similar to those of incorporating a local company, although the latter are slightly higher.

26 Is there a requirement that a local entity be a party to the transaction?

Yes. In accordance with the Mega-Projects Law, contracts must provide for a participation in the project or consortium's share capital, to be reserved, via the Stock Exchange and on commercial market terms, for the economic inclusion of Mozambican nationals, regardless of whether foreign investment is involved. The participation rate should range between 5 and 20 per cent of said capital.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Mozambique has entered into double taxation treaties with the following countries: Botswana, India, Italy, Portugal, the Special Administrative Region of Macao (China), Mauritius, South Africa, the United Arab Emirates and Vietnam.

Mozambique has established bilateral investment treaties with Algeria, Belgium, China, Cuba, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Italy, Luxembourg, Mauritius, the Netherlands, Portugal, South Africa, Spain, Sweden, Switzerland, the United Kingdom, the United States, Vietnam and Zimbabwe.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Mozambique's banking sector and capital markets remain underdeveloped and lack the necessary liquidity to finance medium or large-scale mining projects. As such, financing for mining activities is mainly secured through corporate loans provided by foreign banks or through shareholders' loans. A common alternative financing option involves listing the licence holder's parent company (typically in the London Alternative Investment Market), thus passing the flotation proceeds down to the Mozambican company actually implementing the mining activities.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Mining activities are typically financed by private parties, rather than by the government, its agencies and pension funds.

30 Please describe the regime for taking security over mining interests.

Physical assets used in mining activities may be mortgaged, pledged or otherwise used as collateral to secure loans for the financing of mining operations – always subject, however, to the prior approval of the Ministry of Mineral Resources and Energy. As regards immoveable assets, any security rights attached thereto – a mortgage – must be documented in the form of a notary deed and duly registered with the property registry.

The admissibility of a direct pledge or mortgage over mining interests is highly debatable. In practical terms, this type of direct and immediate security over interests is not typically implemented in Mozambique. From a legal standpoint, the creation and enforcement of security rights over mining interests is always subject to authorisation by the Ministry of Mineral Resources and Energy. This means that the beneficiary of a security does not have an immediate right to execute the collateral in case of default of the underlying loan or financing arrangement – the intervention of the Ministry of Mineral Resources and Energy will always be required, it having full discretionary powers to approve or refuse the enforcement of the collateral.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Mozambique's mining legislation does not establish specific restrictions on the importation of services and equipment. However, customs duties exemptions on the importation of equipment will only be granted if no equipment of comparable quality is produced in Mozambique.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No standard conditions and agreements are used, although nothing prevents the parties from instituting these should they wish to do so.

33 What restrictions are imposed on the processing, export or sale of minerals?

Entities extracting minerals under a mining licence may freely dispose of the output of their production. Nevertheless, a marketing licence is required when the entity selling or exporting the minerals is not the same entity that produced or mined them. This marketing licence is awarded by the National Institute of Mines.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Mozambique's Mining Law establishes that the state warrants mining licence holders' right to export and repatriate profits derived from mining activities – including the proceeds from the export or sale of minerals, but always subject to compliance with the applicable foreign exchange regulations and procedures. Both the import of funds and the repatriation of proceeds derived from the export or sale of minerals qualify as foreign exchange operations under the Foreign Exchange Law and the Foreign Exchange Regulations. Foreign exchange operations must undergo a licensing process, which consists of registration or approval by the Central Bank of Mozambique, by the country's foreign exchange authority, or by both.

Finally, there is an additional obligation to convert at least 50 per cent of the export proceeds into local currency.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Environmental mining issues are largely regulated by Mozambique's Environmental Law (Law No. 20/97, of 1 October 1997), its Environmental Regulations for Mining Activity, and the Basic Rules on Environmental Management for Mining Activity.

The Ministry for Land, Environment and Rural Development acts as the country's environmental regulator.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Holders of mining rights must observe several environment-related obligations. For the purposes of defining the environmental requirements applicable to each case, mining operations are classified into three levels according to the scope, scale and sophistication of the equipment to be used.

If the activities foreseen are deemed to fall under Level I activities, the mining project will merely be subject to the Basic Rules on Environmental Management for Mining Activity, which are aimed at mitigating any environmental damages or socio-economic impacts possibly arising from mining activities by ensuring that these respect simple methods intended to prevent air, soil and water pollution, as well as damage to flora and fauna, and to protect human health.

If the activities foreseen are deemed to fall under either Level II or Level III activities, the specific regime set out in the Environmental Regulations for Mining Activity will apply. Mining operations falling under Level II activities, including those carried out in quarries or which involve the extraction and mining of other mineral resources for construction, exploration and mining activities involving mechanised equipment, as well as pilot-projects, must mandatorily submit an environmental management plan (EM plan) and an emergency and risk situation control programme.

The EM plan should be comprised of a report on the initial conditions of the mining area, a monitoring programme, a rehabilitation programme or a mine decommissioning and closure programme, or all of the above. Once approved by the relevant authority, the EM plan is considered a statement of environmental liability with which the company is required to comply.

Mining operations falling under Level III activities – typically mining concessions – are subject to even stricter environmental requirements. More specifically, holders of a mining concession must obtain an environmental licence from the Ministry for Land, Environment and Rural Development before commencing operations. An environmental impact assessment (EIA) is mandatory to obtain this licence. The

Update and trends

According to recent news, the large-scale Nacala Corridor Railway project officially launched operations on 12 May 2017. Significant investments in terms of infrastructure have also been made over the past few years.

On a separate note, the recently approved Guide on the Implementation of the Corporate Social Responsibility Policy for the Extractive Mineral Resources Industry (Ministerial Order No. 8/2017, of 16 January 2017) demonstrates the Ministry of Mineral Resources and Energy's commitment to the promotion of Corporate Social Responsibility.

resulting EIA report, which details the assessment findings, shall also include an environmental management programme (EM programme), as well as an emergency and risk situation control programme. The EM programme, which should contain an environmental monitoring programme and a mine decommissioning and closure programme, is required to cover a five-year period.

The procedure to obtain an environmental licence involves a public consultation process with the local communities, during which the licence holder must ensure that these communities are given the opportunity to participate in the decision-making process. Before the environmental licence can be issued, the EIA report must be approved by the Ministry for Land, Environment and Rural Development following a technical review conducted by the same in cooperation with the Ministry of Mineral Resources and Energy. The environmental licence is valid for the term of the corresponding mining title, but is subject to review every five years and may be issued subject to recommendations and certain conditions. Moreover, the Environmental Regulations for Mining Activity encourage stakeholders to enter into a memorandum of understanding for a five-year period, in order to establish the parties' agreement on the methods and procedures to be applied in the management of environmental, biophysical, social, economic and cultural matters, both during the project and on decommissioning. Furthermore, an environmental management report outlining the results of the environmental monitoring, from a social, economic, cultural and biophysical standpoint, must be submitted each year to the Ministry for Land, Environment and Rural Development.

The Mining Law also contains a provision, although somewhat generic, on environmental matters. Mining activities are similarly classified into three different levels (called A, B and C), in accordance with criteria akin to that provided for in the Environmental Regulations for Mining Activity. The Law further states that Level A activities are subject to an EIA, Level B activities to a simplified EIA, and Level C activities to an EM programme.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The provision of a financial bond for Level II and III activities is required under the Environmental Regulations for Mining Activity. This financial bond may be provided annually, in the form of an insurance policy, bank guarantee or bank deposit. It is intended to cover any decommissioning costs of the operations in question.

38 What are the restrictions for building tailings or waste dams?

Pursuant to the Environmental Regulations for Mining Activity, both holders of mining rights and operators must take appropriate measures for the disposal and treatment of mining waste products in order to prevent contamination of the location where this waste is deposited. It is forbidden to deposit hazardous waste on the soil and subsoil.

In addition, mining areas, including facilities used for or related to mining activities carried out under mining rights, are subject to inspection by the Ministry of Mineral Resources and Energy, although the law does not establish a specific number of inspections. The Technical Safety and Health Regulations for Geological and Mining Activities (approved by Decree No. 61/2006, of 26 December 2006) also contain detailed health and safety provisions with respect to mining activities.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Health, safety and labour issues are principally regulated by the Regulations on Mining Work, approved by Decree No. 13/2015, of 3 July 2015, and by the Technical Safety and Health Regulations for Geological and Mining Activities, approved by Decree No. 61/2006, of 26 December 2006. The Labour Law (Law No. 23/2007, of 1 August) also applies, but on an ancillary basis.

The Ministry of Labour is the main regulator.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

As mentioned in question 38, pursuant to the Environmental Regulations for Mining Activity, holders of mining rights and operators must take appropriate measures for the disposal and treatment of mining waste products in order to ensure that the location where waste is deposited is not contaminated. The deposit of hazardous waste on the soil and subsoil is forbidden.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

No restrictions apply to the use of domestic employees in mining activities, except those related to minimum employment age, maximum work hours, mandatory rest days and similar matters.

Both labour and immigration issues must be taken into account when dealing with foreign nationals working in Mozambique. As a general rule, foreign employees are only entitled to work in Mozambique under an employment contract governed by Mozambican law and entered into with a Mozambican employer – either a Mozambican company, or the Mozambican branch of a foreign company. This employment contract is subject to the authorisation of the Ministry of Labour – usually quite a cumbersome process – or simply to a notification procedure.

An employer may have a specific number of expatriate employees, depending on the total number of employees at its service. Under this quota regime, a company with more than 100 employees may have 5 per cent of expatriate workers, a company with more than 10 and fewer than 100 employees may have 8 per cent expatriate workers, and companies with up to 10 employees can only employ one expatriate. Expatriates hired under this quota regime are only subject to a notification procedure before the authorities. Employers are required to notify the authorities when they hire an expatriate under the expatriate quota, within 15 days of his or her admission, through the submission of a model application approved for this purpose, together with additional documentation.

Expatriates may be hired in numbers exceeding the relevant expatriate quota, but this exception is subject to special authorisation issued by the Ministry of Labour. In such cases, employers must submit an application stating their denomination, head office and business sector, as well as identifying the expatriate in question, his or her job function and the grounds on which they are requesting this special authorisation.

Further important features of the labour regime can be summarised as follows: when a mining contract explicitly provides for the possibility of hiring expatriates in numbers exceeding the quotas established in the general regime, mining companies and their subcontractors are merely required to notify the labour authorities of the admittance of these additional expatriates.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Ministry of Mineral Resources and Energy recently approved the Guide on the Implementation of the Corporate Social Responsibility Policy for the Extractive Mineral Resources Industry (Ministerial

Order No. 8/2017, of 16 January 2017). This statute primarily aims to establish social responsibility initiatives to help promote the social, economic and environmental welfare of communities affected by mining projects.

Nationally, the main regulator is the Ministry of Mineral Resources and Energy, and locally, it is the provincial government and the District Administration.

42 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

No specific legislation regulates this matter in Mozambique. It should, however, be noted that if mining activities are to be carried out in a populated area, and the local population subsequently needs to be resettled, a relocation plan must be prepared and due compensation must be paid to those evicted.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Mozambique has not entered into any international treaties, conventions or protocols specifically related to CSR issues.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Mozambican Penal Code (approved by Law No. 35/2014, of 31 December), as amended by the Anti-Corruption Law (approved by Law No. 6/2004, of 17 June 2004), criminalises both passive and active bribery and corruption practices. The applicable periods of imprisonment and fine amounts will depend on the type of offence committed and on the agent.

Pursuant to the Anti-Corruption Law and the Regulations on Public Works Contracts and the Supply of Goods and Services to the State (approved by Decree No. 15/2010, of 15 May 2010, as amended), all contracts to which government bodies are a party (as is the case of mining concession contracts) must include an anti-corruption clause.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes, particularly companies owned by foreign individuals or companies. It is common practice for these companies or individuals to apply the anti-bribery and anti-corruption legal regime in force in their own country of origin at their companies operating under the laws of Mozambique.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Mozambique is a party to the Extractive Industries Transparency Initiative since 2012. The recommendations set forth in the EITI Reports on Mozambique concern, among others, the lack of a centralised government revenue collection monitoring system required to ensure the accuracy and transparency of records of payments made by mining companies to government entities. Within this context, the Mozambican EITI Coordinating Committee has set, as one of its main goals for 2016–2018, the improvement of government entities' and mining companies' accountability mechanisms in a bid to comply with the standards established by the EITI. However, no progress has been made thus far on the enactment of new regulations governing these issues.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

In the mining industry, foreign ownership is restricted by the Mega-Projects Law, according to which a percentage ranging from 5 to 20 per cent of a mining project's capital must be reserved for local participants.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Mozambique has entered into several double taxation treaties and bilateral investments treaties, which establish certain benefits also applicable to the mining industry. A complete list of these legal instruments can be found in question 27.

A more targeted bilateral cooperation treaty for the mining sector was entered into by and between Mozambique and Angola in 2007. A similar cooperation treaty was then entered into by and between Mozambique and Portugal in March 2014.

As already mentioned, Mozambique is also a party to the Extractive Industries Transparency Initiative.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

According to the Directorate of Investment and Company Administration (DICA) website, as of March 2017, US$2.897 billion had been invested in 71 projects within Myanmar's mining sector, accounting for 4.12 per cent of total foreign investment in the country.

The Ministry of Natural Resources and Environmental Conservation (MoNREC) (formerly the Ministry of Mines) has set up various mining enterprises to form joint venture companies to enter into bilateral partnerships for mineral exploring, developing and exploiting.

2 What are the target minerals?

Myanmar has the largest jade deposits in the world, and its ruby deposits account for 90 per cent of the world's supply. Other precious stones found include sapphire and diamonds. Copper is the largest mining export, but other mineral products are also widespread throughout the country, including gold, silver, lead, zinc, tin, tungsten, nickel and antimony. Certain mining activities may be prohibited based on the targeted mineral (see question 13).

3 Which regions are most active?

Mineral exploration and mining is active throughout the country, but is under-reported. Currently, joint ventures mine gold in the Benmauk, Kani, Kyaukpadaung, Yemathin, Tagon and Kyaukpons areas; copper in the Shangalon, Kani, Kyaukpadaung, Heho and Monywa areas; tin in the Dawei river area; tungsten in the Dawei river area; nickel in the MweTaung, Wuntho and Taguang areas; iron in the Marliphant area; limestone in the Indainggyi area and coal in the Ngaphe area. For a breakdown on active mines, see the May 2014 issue of *International Mining*.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Myanmar legal system is based upon a mixture of common and civil law.

5 How is the mining industry regulated?

The MoNREC regulates the mining industry. Under the former government, ruling until 30 March 2016, the Ministry of Mines comprised six enterprises and two departments. Since the Ministry of Mines and the Ministry of Environmental Conservation and Forestry was combined by the new government as MoNREC, there are three departments, namely Union Minister's Office, the Department of Mines (DoM), Department of Geological Survey and Mineral Explorer, No. 1 Mining Enterprise, No. 2 Mining Enterprise, Myanmar Gems Enterprise and Myanmar Pearl Enterprise.

The four enterprises, which each focus on a specific area of mining, are:

- No. 1 Mining Enterprise: lead, zinc, silver, copper, iron, nickel, chromite and antimony;
- No. 2 Mining Enterprise: gold, tin, tungsten, rare earth, titanium and platinum;
- Myanmar Gems Enterprise: gems, jade and jewellery; and
- Myanmar Pearl Enterprise: pearls.

The three departments are the Minister's Office, Department of Geological Survey and Mineral Exploration (DGSE) and the DoM. The DGSE is responsible for geological surveys and mineral exploration and the DoM is responsible for forming mineral policy, enforcing regulations and environmental standards and collecting royalties.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Laws governing mining in Myanmar include the following:

- the Myanmar Mining Law (1994) and the Law amending the Myanmar Mining Law (2015);
- the Myanmar Mining Rules (1996);
- the Myanmar Investment Law (2016) (MIL);
- the Myanmar Investment Rules (2017);
- MIC Notifications;
- Notification No. 10/2017(Designation of Development Zones);
- Notification No. 11/2017 (prescribed Investment Capital Amendments);
- Notification No. 13/2017 (Classification of Promoted Sectors);
- Notification No. 15/2017 (List of Restricted Investment Activities);
- the State-Owned Economic Enterprises Law (1989) (SEE Law);
- the Gemstone Law (1995) and the second amendment of the Gemstone Law (2016);
- the Myanmar Pearl Law (1995) and
- the Law amending the Myanmar Pearl Law (2014).

The MoNREC is principally responsible for administering mining and the Myanmar Investment Commission (MIC) oversees the MIL.

An amendment to the Mining Law was enacted in November 2015, which included a number of revised definitions and clarifications of the authority of the Ministry, Department and Mining Enterprises. The law amending the Myanmar Mining Law was published in December 2015 with more details on the small, medium and large-scale production of minerals. This amending law also conferred more power to the Ministry relating to granting approval for specified foreign investment.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no legal classification system for reporting mineral resources and reserves, except CDs are available to buy from the DGSE.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

According to the SEE Law, the government has the sole right to carry out the exploration and extraction of pearls, jade, precious stones and metals. The government also has the sole right to export these minerals. However, the government may by notification, under section 3 of

the SEE law, permit a private company to carry out mining activities. Pursuant to the MIC Notification No. 15/2017, feasibility study and production of radioactive metals such as uranium and thorium is allowed to be carried out only by the country (Union).

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The MoNREC is responsible for maintaining information and data, which are presented at workshops from time to time. The MoNREC has a website that is still in development (www.mining.gov.mm). The DGSE provides CDs for reporting mineral resources and reserves.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The Mining Rules 1996, and the law amending the Myanmar Mining Law 2015, provide for the issue of prospecting permits, exploration permits, small, medium and large-scale mineral production permits, subsistence mineral production permits and integrated permits for prospecting, exploration and production. The law amending the Myanmar Mining Law added a provision to issue a permit to conduct a feasibility study, value-added process and sale and purchase permit. In practice, mining is usually conducted under production sharing contracts (PSCs), which are not mentioned in the Mining Rules 1996. Under the current model of PSC, the MoNREC provides two years for prospecting. An exploration permit is granted for no more than three years with a one-year extension available upon submitting an application for extension. A production permit is generally granted for 25 years with four extensions of five years available. There are substantial delays in the issue of permits, complicated by land acquisition problems.

The MoNREC currently favours PSCs over joint venture agreements. A PSC is a straight split on total production. Alternatively, there can be a cost-recovery type of production sharing, where a certain percentage of total revenue is reserved for recovery of the production costs. A straight split of the total production is preferred in large-volume, low-price and low cost-of-production minerals, such as dimension stones, coal and other industrial minerals. For more valuable metallic minerals such as gold and copper, production sharing with cost recovery is preferred.

The MoNREC is flexible on negotiating the terms of each arrangement. The sharing of production costs may be fixed for the term of the agreement or on a sliding scale depending on the level of production. The government's share of production can be inclusive of royalty, valued upon a mutually agreed price, and sold back to the investor.

A profit-sharing arrangement is primarily used for current projects with active mines and plants. Parties may enter into a joint venture with a state-owned enterprise through competitive bidding or by entering into an agreement based on terms negotiated by both parties.

11 What is the regime for the renewal and transfer of mineral licences?

Renewal of permits

The MoNREC may renew a permit for prospecting, exploration or production. Applications for renewing a permit must be submitted to the MoNREC three months before the expiry of the permit.

Transfer of permits

Permits may be transferred with the consent of the MoNREC and the approval of the MIC. To transfer a permit, a permit holder must submit a transfer application with a copy of the draft transfer agreement.

12 What is the typical duration of mining rights?

Large-scale production permit is for the period from 15 years up to 50 years, medium-scale production is up to 15 years and small-scale production permit is up to 10 years. Extension and renewal of mining rights is subject to the Mining Rules (1996).

The Ministry may reject an application for extension of tenure if any of the following circumstances is found:

- failure to comply with any condition of the permit by the applicant;
- the applicant has not carried out the mineral production operations in the large-scale mineral production permit area at a reasonable rate of progress;
- no remaining ore deposits with reasonable quantities of mineral reserves to be produced; and
- the programme of mineral production operation proposed to be carried out is not satisfactory.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

MIC in exercise of the powers conferred under section 42 and 100(b) of the MIL, with the approval of the Union government, announced Notification No. 15/2017, provides that a feasibility study and production of radioactive metals such as uranium and thorium is allowed to be carried out only by the Union. Prospecting, surveying, performing feasibility studies and developing minerals for small and medium-scale business in accordance with the Mining Law and prospecting, exploration and production of jade or gemstones are not allowed to be carried out by foreign investors. Prospecting, exploration, feasibility study and production with foreign investment for large-scale production of mineral, prospecting, exploration, feasibility study and small, medium and large-scale production with citizens' investment for production of mineral, manufacturing and marketing of gems, jewellery and finished products with foreign investment and exploration, finishing and marketing of gems, jewellery and its products with citizen investment activities may be carried out with the approval of the MoNREC.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Myanmar was party to the Geneva Protocol on Arbitration Clauses of 1923, but was not party to the ICSID Convention or other international conventions relating to arbitration. On 17 July 2013, Myanmar became party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.

A new arbitration law was enacted in January 2016 and allows Myanmar courts to enforce foreign arbitration awards on certain conditions.

There is no public record of any international commercial arbitration cases having been conducted under the English law-based, repealed Myanmar Arbitration Act 1944 nor under the present Arbitration Law 2016. There have been very few international commercial arbitration cases conducted in Myanmar. This probably reflects Myanmar's pre-1988 policy of minimising economic relations with other countries. Since 1988, there have been a number of contracts between public and private sector Myanmar parties and foreign companies, in which a foreign governing law and foreign arbitration rules are prescribed.

Myanmar is party to the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement of 2009.

Myanmar became a member of ASEAN in 1997, and is obliged to ratify 14 key agreements prescribed by ASEAN. The Protocol on Enhanced Dispute Settlement Mechanism (2004) is one of these agreements.

The arbitration provision in the Myanmar Companies Act states that:

- a company may by written agreement refer to arbitration, in accordance with the Arbitration Act on existing or future differences between itself and any other company or person;
- companies party to the arbitration may delegate power to the arbitrator to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing bodies; and
- the provisions of the Arbitration Act shall apply to all arbitrations between companies and persons in pursuance of this Act.

The arbitration procedure must always be in accordance with the Arbitration Law of 2016.

As a matter of government policy, most contracts between state-owned enterprises and foreign companies specify Myanmar law as the governing law, and prescribe that disputes be settled by arbitration under the Arbitration Law. In general, the attorney general's office and the MIC do not allow foreign arbitration provisions when the Myanmar government is party to the contract.

In practice, most disputes between contracting parties in Myanmar are settled by the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) located in Yangon (when both disputing parties are members of the UMFCCI).

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

According to the 1987 Transfer of Immoveable Property Restriction Act, private land ownership by a foreign national or a foreign company is not legal in Myanmar. Foreign nationals could only acquire land by way of a lease, which could not exceed a one-year term.

Since the new FIL was enacted in 2012, foreign-owned companies investing under an MIC permit are entitled to lease land for an initial term of up to 50 years, which may be extended twice for another 10 years each, depending on the type of industry and the amount invested. The Myanmar Investment (2016) Law, which superseded the Foreign Investment Law (2012), has similar long-term lease provisions.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Yes, the state has the sole right to carry out mining projects under the SEE Law. However, the MoNREC may, by notification, allow private companies to carry out mining projects. Mining projects are usually either allowed via a permit- or production-sharing contract. Foreign investors should expect to carry out projects with local Myanmar companies.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Rule 80 of the Mining Rules 1996 states that the MoNREC may suspend or cancel a permit. The rules do not have compensation provisions. A permit may be suspended or cancelled for the following reasons:

- failure by the holder of a permit to make a required payment under the Mining Law or the Mining Rules;
- submission of false statements to the MoNREC;
- discovery upon investigation that the permit has been applied for and obtained in contravention of the Mining Rules;
- after the death of the permit holder where the heirs are not qualified to obtain the permit under the Mining Law or the Mining Rules; and
- where the permit holder is not able to pay in full the taxes and duties payable to the government, becomes insolvent or the company is liquidated.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

A company is only allowed to mine in blocks for which the company has received a permit. Mining is banned on the beds of the Irrawaddy, Thanlwin, Chindwin and Sittang rivers.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Royalty and dead rent

The holder of a mineral production permit must pay royalties to the government according to the Myanmar Mining Law. The rates are as follows.

Royalty rates

Royalty rates are the following:

- for gold, platinum, uranium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 5 per cent;
- for silver, copper, tin, tungsten, nickel, heavy-earth, molybdenum, iridium, osmium, palladium, ruthernium, rhodium, tantalum, columbium, niobium, thorium, cadmium, rare earth element, beryllium, titanium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 4 per cent;
- for iron, zinc, lead, antimony, aluminium, arsenic, bismuth, chromium, cobalt, manganese, magnesium and other precious metallic minerals the Ministry may, with the approval of the government, prescribe and publish by notification from time to time at the rate of 3 per cent; and
- for industrial mineral or stone, at the rate of 2 per cent.

Dead rent

The holder of the permit shall pay dead rent for the land related to the permit in accordance with the rate specified. The dead rent shall be paid yearly in two instalments, which shall be within the rates mentioned in the Mining Law. The rates are subject to the types of operation and minerals.

Income tax

Income tax rates depend on whether the joint venture company is a 'resident' (ie, formed under Myanmar law) or a non-resident formed under a law other than Myanmar law, such as a 'branch office'. For resident companies, the income tax rate is 25 per cent of profits. For non-resident companies, the income tax rate has been 25 per cent since April 2015. For enterprises or individuals permitted and operating under the MIL, and foreign organisations engaged by special permission in a state-sponsored project, enterprise or undertaking, the income tax is 25 per cent. Foreign individuals engaged by special permission in a state-sponsored project, enterprise or undertaking are subject to income tax at a 20 per cent rate.

Commercial tax

Notification No. 117/2012, last amended in April 2015, prescribes commercial taxes of between 5 and 100 per cent depending upon the different goods and services businesses concerned. The application for registration must be in the prescribed form and filed one month before the commencement of business. Irrespective of the level of its sales at any time, a registered enterprise is required to comply with all the provisions of the law including submitting returns, paying tax monthly and keeping records, until its name is removed from the register. Only registered enterprises are allowed to deduct input taxes incurred on their purchases.

The commercial tax on services (all types of services except 26 services) is 5 per cent.

Stamp duties

Stamp duties collected from the sale of judicial and non-judicial stamps represent fees payable under the Court Fees Act. Non-judicial stamp duty is levied on various types of instruments required to be stamped under the Myanmar Stamp Act.

Withholding tax

	Resident foreigner %	Non-resident foreigner %
Interest	0	15
Royalties for the use of licences, trademarks, patent rights, etc	10	15
Payment for work done by foreign contractors	2	2.5
Payment made to contractors for goods and services purchased or performed in Myanmar	2	2.5

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The MIL covers many activities with the exception of those reserved for the state under the SEE Law. However, if a foreign investor is interested in an activity not specified in a notification or defined in the SEE Law, the investor can apply to the MIC stating its interest and demonstrating that such an enterprise would be beneficial to the state. Once satisfied, the MIC may approve the application.

The MIC may scrutinise and grant the following exemptions and relief, as required, to the investor if applied:

- exemption or relief from income tax if the profit obtained from the investment business that has obtained a permit or an endorsement is reinvested in such investment business or in any similar type of investment business within one year;
- right to depreciation for the purpose of income tax assessment, after computing such depreciation from the year of commencement of commercial operation based on a depreciation rate which is less than the stipulated lifetime of the machinery, equipment, building or capital assets used in the investment; and
- right to deduct expenses which are incurred for the research and development relating to the investment businesses carried out within the Union and actually required for the economic development of the Union from the assessable income.

Additionally, the new MIL offers a large range of incentives and guarantees to foreign investors including the guarantee against nationalisation.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No tax stabilisation agreements are in force. However, the MIL allows the Myanmar Investment Commission to grant exemptions from income tax. See question 20.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to a carried interest or a free carried interest.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

A licence is not considered a capital asset and is thus not subject to capital gains tax in Myanmar. However, the sale of a permit could be considered an 'other source of income' and under Union Tax Law (2017), the net profit realised would be taxed at 25 per cent.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

See question 19. Liability for income tax and withholding tax can vary between domestic and foreign parties.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Mining is generally conducted through a limited company. A Myanmar investor wishing to carry on business in Myanmar through a limited company may register a company under the Myanmar Companies Act. However, a Myanmar citizen-owned company shall not have any foreign shareholders or directors.

A foreign investor wishing to carry on business in Myanmar through a locally incorporated limited company may register the company under the Myanmar Companies Act, unless the company is a state-owned enterprise or involves the government, in which case it must be incorporated under the Special Companies Act (1950) and be approved in accordance with the MIL.

Under the Myanmar Companies Act, a foreign company, whether 100 per cent foreign-owned, a joint venture or a branch, is required to obtain a DICA permit. DICA permits are generally renewable every five years (formerly, every three years). The DICA permit is applied for at the DICA and must be tabled at an MIC meeting. A joint venture company with a state entity, formed under the Special Company Act 1950, is not required to obtain a DICA permit.

Limited companies have memorandums and articles of association. The articles of association may include special voting rights and other minority shareholder protections. Care must be taken by foreign investors in prescribing the powers of the managing director, etc. There are no nationality or residence qualifications applicable to directors unless otherwise prescribed in the articles of association.

26 Is there a requirement that a local entity be a party to the transaction?

See question 13.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Myanmar has bilateral investment treaties with China, India, Laos, the Philippines, Thailand, Vietnam, Indonesia, Israel, Japan, Kuwait, Korea and the US.

Myanmar currently has double taxation treaties with India, Laos, Malaysia, Singapore, Korea, Thailand, the UK and Vietnam.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Most foreign investors will be required to import capital into Myanmar. The availability of local capital is limited.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No.

30 Please describe the regime for taking security over mining interests.

Given the restrictions on foreign ownership, security over land use rights and government permits are ongoing concerns. In the event of default, investors fear that they may risk losing any required government licences. Forms of security available under UK colonial law are provided in the Burma Code. However, practice has taken over in many respects. Most forms of security must be registered. MIC and Myanmar Central Bank approvals must be obtained for offshore security.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Machinery and equipment may be imported into Myanmar subject to customs duty. However, the MIC may exempt certain machinery from customs duty under the MIL for a certain period of time such as a construction period.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There is no standard conditions and agreement covering equipment supplies; however, all the contractual terms and conditions shall be in compliance with the provisions of Contract Act (1872). Regarding dispute resolutions, there is no restriction to choose the dispute resolution mechanism. However, if one of the parties is a government entity, it is advised to choose the Arbitration Law (2016).

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The SEE Law provides that the government has the sole right to export minerals. However, the Myanmar Mining Law of 1994 states that one

purpose of the law is to 'fulfil domestic requirements and to increase export by producing more mineral products'.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Funds imported into Myanmar must be registered with MIC. The government has licensed 14 of the country's 23 private banks to hold currency accounts.

Under the MIL, a person who has brought in foreign capital can transfer the following:

- their personal foreign currency entitlement;
- net profit after deducting all taxes and provisions;
- payments made under a contract, including a loan agreement;
- payments resulting from any settlement of investment disputes;
- other compensation or money as compensation under investment or expropriation;
- foreign currency permitted for withdrawal by the MIC, which may include the value of assets on the winding-up of the business; and
- a foreign employee may transfer his or her salary and lawful income after deducting taxes and other living expenses incurred domestically.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Until 2012, there was no specific law protecting the environment in Myanmar. The 2008 Constitution does contain provisions guaranteeing the conservation of natural resources and the prevention of environmental degradation. The principle environmental laws applicable in the mining industry are the Mining Law, the Mining Rules, the Environmental Conservation Law enacted in March 2012 and the Environmental Rules enacted on 5 June 2014. The Environmental Impact Assessment Procedure and National Environmental Quality Emission Guideline were introduced in December 2015.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

See questions 34 and 35. The Environmental Conservation Law and its rules also regulate for the permit requirement. No estimate of timing can be given.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The holder of a permit may surrender the permit to close a mining process. The MoNREC must be given at least one month's notice prior to the return of a permit. The MoNREC will then cancel the entire permit if the return is with respect to the entire area or otherwise amend the permit accordingly. The permit holder has the right to remove from the permit area within six months of cancellation any building, machineries installed or other moveable property and mineral products that have been extracted prior to the cancellation of the permit.

38 What are the restrictions for building tailings or waste dams?

There is no specific provisions relating to the building tailings or waste dams. However, the permit holder must prepare the plan for environmental conservation works that may have detrimental effects due to mining operation. In disposing of liquids, wastes, tailings and fumes that have resulted from mineral production the holder of a mineral production permit or a manager shall undertake any laboratory tests as may be necessary for the prevention of pollution of water, air and land in the environment and for the safety of living beings. The Chief Inspector (the Director General of the Department of Mines) will inspect the environmental and social impact of the prospecting, exploration, production, processing activity of mineral, industrial mineral and stone.

Health and safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Myanmar Mining Rules, chapters XVII–XXII, are the principal rules for health and safety, and labour laws applicable to the mining industry. Generally, a mine employee must be over 18 years of age and must work no more than five days in a week. Employees should work no more than eight hours per day and 40 hours per week. If an employee is required to work for a whole day because of the nature of his or her work, the employee may work no more than 48 hours per week. A permit holder must also provide on-the-job safety and health training and appoint a supervisor to ensure the safe operation of the mine.

Additionally, current labour laws in Myanmar include the following:

- the Employment and Skill Development Law (2013);
- the Employment Restriction Act (1959);
- the Employment Statistics Act (1948);
- the Factories Act (1951), and the amending Law (2016);
- the Labour Organisation Law (2011);
- the Labour Organisation Rules (2012);
- the Leave and Holidays Act (1951), and the amending Law (2014);
- the Minimum Wages Law (2013);
- the Minimum Wages Rules (2013);
- the Payment of Wages Law (2016);
- the Shops and Establishments Law (2016);
- the Workmen's Compensation Act (1923);
- the Labour Dispute Settlement Law (2012), and the amending Law (2014);
- the Settlement of Labour Dispute Rules (2014);
- the Social Security Law (2012); and
- the Social Security Rules (2014).

These laws govern labour relation problems and deal with such subjects as working hours, holidays, leaves of absence, female and child labour, wages and overtime, severance pay, workmen's compensation, social welfare, work rules and other matters. The Social Security Law established a fund with contributions by employers, employees and the government.

The Myanmar Special Economic Zone Law (2014) FIL prescribes special rules applicable to foreign employees, work permits and minimum percentages of employees who must be citizens. MIL does not provide these provisions.

Myanmar has been a member of the ILO since 1948. A Myanmar tripartite delegation consisting of representatives of the government, employers and workers attend the ILO conference held annually in Geneva.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Under the Mining Rules, in disposing of liquids, wastes, tailings and fumes that have resulted from mineral production, the holder of a mineral production permit or a manager shall undertake laboratory tests as may be necessary for the prevention of pollution of water, air and land in the environment and for the safety of living beings. If in the course of tests toxic materials, which are harmful to living beings, are found, degradation shall be made by chemical means and systematic disposal shall be made only when it is certain that there is no danger.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

A company registered under the FIL must recruit 25 per cent of its skilled workforce domestically during the first year of operation, 50 per cent during the second year and 75 per cent during the third year. Myanmar citizens must perform all the unskilled work. MIL does not provide such restrictions.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

On 24 February 2015, Myanmar enacted a Competition Law, which came into force on 24 February 2017. It provides for the creation of a new regulatory body. Currently, there is no specific law relating to CSR. In the MIC proposal to obtain an MIC permit, a CSR scheme and plan are required as mandatory documents.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Until rules are enacted, it is not possible to describe the process or time the process may take.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

None.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The law regulating anti-corruption in Myanmar is the Anti-Corruption Law No. 23/2013 (the Anti-Corruption Law) of 2013. The Anti-Corruption Law applies to all persons involved in the corruption of 'persons in authority', namely public servants, foreign public officers, political post holders and high ranking officials.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Myanmar is party to the UN Convention Against Corruption (Resolution No. 58/4 of 31 October 2013), pursuant to which it has agreed to cooperate with other countries in addressing anti-corruption issues.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Myanmar has not yet enacted the legislation in accordance with the EITI. However Myanmar was accepted as an EITI candidate at the International EITI board meeting on 2 July 2014 and an EITI report for the period of 2013–2014 (oil, gas and mining sector) was submitted in December 2015.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Under section 42(c) of the MIL, in a joint venture carried out with a citizen in restricted business areas, subject to any express exception in the relevant notification, the minimum direct shareholding or interest of a Myanmar Citizen Investor in the joint venture is 20 per cent. This ceiling may be amended by the MIC by notification, from time to time, with the permission of the government.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

An investment in a mining project may qualify for investment protection under a bilateral investment treaty. Myanmar is also party to the 2009 ASEAN Comprehensive Investment Agreement. Mining and quarrying, and services incidental thereto are listed as one of the designated sectors to which the 2009 Agreement applies. However, Myanmar has an exemption to this agreement regarding the gemstone sector.

During 2012, Australia, Canada, the EU, the UK and the US all relaxed various economic sanctions against Myanmar in light of recent reforms. However, attention must still be paid to the terms of the relaxations of the sanctions, in particular the US prohibitions on investments or the provision of financial services to persons on the Treasury Department's Specially Designated Nationals and Blocked Persons list, and the new requirements for periodic reporting. Executive Order dated 7 August 2013 bans the importation of jadeite and rubies into the US.

US citizens are required to report on a range of policies and procedures with respect to their investments in Myanmar, including the following:

- human, labour and land rights;
- community consultations and stakeholder engagement;
- environmental stewardship;
- anti-corruption arrangements with security service providers;
- risk and impact assessments and mitigation; and
- payments to the government.

US citizens are also under an obligation to notify the department of state of any investment with Myanma Oil and Gas Enterprise and any contact with the military or non-state armed groups. See www.treasury.gov/resource-center/sanctions/programs/pages/burma.aspx regarding sanctions.

In May 2016, US sanctions were further relaxed and included the removal of three banks and seven state-owned enterprises from the Department of Treasury's Specially Designated Nationals list.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The development of the mining industry through private investment has been identified by the federal government of Nigeria as a key ingredient in economic diversification away from oil resources. It offers excellent opportunities for growth and poverty reduction. In 2004, the government received a credit from the International Development Association to execute the Sustainable Management of Mineral Resources Project. This project is aimed at increasing the government's long-term institutional and technical capacity to manage Nigeria's mineral resources in a sustainable way. Key components of this project include legal, regulatory and fiscal reform coupled with capacity building and reinforcement of the government sector's supervisory institutions. Key initiatives include the enactment of a new mining law in 2007 and a geological data acquisition campaign, which has so far indicated the occurrence of several minerals around the country.

2 What are the target minerals?

A broad range of minerals are known to occur in Nigeria. The current focus of the federal government, however, is the development of gold, coal, iron ore, limestone, lead-zinc, tantalite, bitumen and barite extraction.

3 Which regions are most active?

The most active regions are the north-west, south-west, south-east and middle belt regions.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system is based on English common law.

5 How is the mining industry regulated?

Regulation of the mining industry is exclusively reserved by the Nigerian Constitution for the federal government.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal laws for the regulation of the mining industry are the Nigerian Minerals and Mining Act 2007, Chapter N162, Laws of the Federal Republic of Nigeria (LFN) 2004 (the Mining Act)) and the Minerals and Mining Regulations 2011 (the Regulations). They are administered by the Ministry of Mines and Steel Development (MMSD) comprising the Mines Inspectorate Department (MID), the Mines Environmental Compliance Department (MECD), the Mining Cadastre Office (MCO) and the Artisanal and small-scale Mining Department.

Other relevant laws include the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (No. 25 of 2007), the Environmental Impact Assessment Act, Chapter E12 LFN 2004, the Nuclear Safety and Radiation Protection Act, Chapter N142 LFN 2004, the Explosives Act, Chapter E18 LFN 2004 and the Land Use Act, Chapter L5 LFN 2004.

There have been no amendments to the principal laws regulating the mining industry in the past year.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no specific code governing the reporting of mineral resources and mineral reserves in the mining industry. An applicant for a mining lease is, however, required to prove that there exists a commercial quantity of mineral resources as a precondition to the granting of the mining lease. The Regulations also specify that all mineral title holders must submit a half-yearly technical report on every licence area held to the MID, the MECD and the MCO. The report should contain data on the topographical features and mineral deposits in the licence area.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The Constitution of the Federal Republic of Nigeria and the Mining Act vests title to all mineral resources beneath or upon any land in Nigeria, including its continental shelf, territorial waters and exclusive economic zone in the federal government. Mining titles are granted by the federal government to private parties to search for and exploit minerals (see question 10 for types of mining titles). The granting of a mining title does not confer title to the minerals in the ground upon a private party. Title to minerals is transferred from the federal government to a private party upon the lawful extraction of such minerals by the private party.

Mining rights do not belong to the owner of the surface rights.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The Nigerian Geological Survey Agency (NGSA) has the responsibility of providing geological data to potential investors. It maintains a database of geological data that includes geological and mineral resources maps, airborne magnetic and radiometric data and geochemical maps. The NGSA also conducts geoscience surveys that become part of the database. The database is completely digitised and the intention is to make it available online in the near future.

All title holders are required to provide the NGSA with all geoscientific data acquired in the course of exploration or mining, including maps, coring and samples for storage and archiving. Titleholders are also required to provide the MCO with records of every mineral found and ore reserves calculated within a mining title area. All such

data shall be kept confidential until the earlier of a period of five years after its submission, relinquishment of a part or the whole of the mineral title area, or the revocation of the mineral title.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Private parties may acquire the right to search for or exploit metallic minerals through one of the following mining titles:

- a reconnaissance permit, required for carrying out reconnaissance activities on a non-exclusive basis in any part of Nigeria;
- an exploration licence for carrying out exploration activities on an exclusive basis within an area not exceeding 200km^2;
- a mining lease for carrying out mining activities on an exclusive basis within an area not exceeding 50km^2;
- a small-scale mining lease, for carrying out small-scale mining within an area not exceeding 3km^2;
- a quarry lease for carrying out quarrying activities within an area not exceeding 3km^2; and
- a water use permit for the right to obtain and use water for exploration and mining operations.

Mining titles are granted on a first come, first served basis and, in some cases, may be granted further to a competitive bid. The holder of an exploration licence has the exclusive right to apply for one or more mining leases or small-scale mining leases in respect of any part of its exploration area. Reconnaissance permits do not confer a preferential right to acquire a mining lease.

Holders of mining titles are under an obligation to comply with all applicable legislation, regulations and conditions imposed on the title. In particular, they must:

- carry on exploration or mining operations in a safe and skilful manner and take all due precautions with regard to safety, environmental degradation and pollution;
- minimise and manage any environmental impact resulting from mining activities;
- rehabilitate and reclaim all disturbed land to its natural or predetermined state or to such state as the Mining Act or regulations may specify; and
- pay the rents and royalties that may become due.

The holder of a mining lease is also required to:

- submit and obtain approval to an environmental impact assessment (EIA) report and work programme in respect of proposed mining operations within three years of the date of issue of a mining lease, in the case of a mining lease for exploiting mineral resources, or within two years in the case of a mining lease for exploiting mineral water;
- commence mine development within 36 months of the date of obtaining approval to the EIA and the work programme in the case of a mining lease for exploiting mineral resources, or within 12 months in the case of a mining lease for exploiting mineral water;
- conclude a community development agreement with its host community before the commencement of mine development or extraction; and
- keep in continuous employment a person who possesses adequate professional qualifications and experience in mining to supervise the mining operations.

The Regulations also prescribe that applicants of mineral titles must:

- provide evidence of technical competence (an applicant for an exploration licence, mining lease, water use permit or reconnaissance permit must employ a person or persons who possess adequate qualifications and experience in mining and must be registered or registrable with the Council for Mining Engineers and Geoscientists and any other relevant professional body. An applicant for a quarry lease or small-scale mining lease must employ a person or persons who possess minimum qualifications in mining and quarrying-related fields); and
- provide evidence of financial capability.

A holder of an exploration licence seeking a conversion to a mining licence shall in his or her application demonstrate that a commercial quantity of mineral resources exists in the area for which the application is made. It must also be demonstrated that he or she has fulfilled all necessary conditions of the exploration licence. The applicant will complete the prescribed form and pay the conversion fees. The MCO will either grant or deny the application within 45 days from the date of the application.

11 What is the regime for the renewal and transfer of mineral licences?

Renewal

The holder of a mineral title licence may apply to the MCO for a renewal of the licence. Where an application for the renewal of a subsisting licence is made, the licence shall remain in force until a new date is issued or the application for renewal is refused.

Where an application for a renewal is to be denied, the Minister of Solid Minerals Development (the minister) must give the applicant notice of intention to deny the renewal, citing reasons and inviting the applicant to take appropriate remedial measures or to present a documented statement in defence of the default.

A lease renewal applicant who is dissatisfied with the denial may appeal to the minister in writing and if dissatisfied with the outcome of the appeal, approach the Federal High Court.

Transfer

An application to transfer or assign any mineral title (excluding a reconnaissance permit) is made to the MCO upon the payment of the processing fee. Where an application for a transfer is denied, the MCO shall, no later than 30 days from the date of application for transfer, notify the applicant of the denial in writing.

An applicant may appeal at the Federal High Court within 60 days of the receipt of the denial.

The law prohibits the transfer of reconnaissance permits.

The consent of the minister must be obtained to transfer a licence. This consent is obtained in the form of an approval being given to an application for a transfer. However, consent is not required where the transfer is being made to an affiliate company and the parent company or assignor guarantees the performance of obligations under the title by the affiliate.

An application for transfer including details of the assignment or transfer (instrument of transfer), terms and conditions of the transfer, acceptance of transfer or assignment attestation by transferee, payment of mineral title transfer fees and any other information requested for by the MCO must be submitted in triplicate to obtain approval.

12 What is the typical duration of mining rights?

Yes, mining rights can be renewed or extended but the terms of the renewal vary from title to tile:

- reconnaissance permits (RP) – Its duration is for one year and is renewable annually;
- exploration licence (EL) – This has a duration of three years, renewable for two further periods of two years each (ie, it shall not exceed seven years;
- small-scale mining sease (SSML) – see mining lease;
- mining lease (ML) – All mining leases are for 25 years, renewable for a maximum period of 20 years;
- quarry lease (QL) – see mining lease;
- water use permit (WUP) – The permit is usually granted to holders of EL, ML, QL and SSML. The WUP is for the duration of the original licence granted.

The circumstances under which mining titles or rights can be cancelled or revoked anticipatively by the government are not set in stone or exhaustive. The government may revoke or cancel a title or right anticipatively for any reason it deems fit. Some of such instances would be if the government anticipates:

- environmental degradation, overriding public interest or public policy, etc; or
- where the title holder will be unable to meet any of its obligations under the regulations or Mining Act.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Only Nigerian citizens, companies incorporated in Nigeria and mining cooperatives registered in Nigeria are eligible to hold mining titles. A foreign party that intends to acquire a title must incorporate a company in Nigeria for this purpose. Companies may be 100 per cent foreign-owned and there is no distinction in law or in practice between the mining titles that may be acquired by a 100 per cent foreign-owned company and the mining titles that may be acquired by a 100 per cent Nigerian-owned company.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mining Act provides clear rules and grounds for the suspension and revocation of mineral titles. Prior to suspension or revocation, the affected mineral title holder must be notified of the impending suspension or revocation together with the grounds thereof and given a period of 30 days to remedy the breach or remove the grounds for suspension or revocation.

The rights granted to a mineral title holder under the Mining Act are protected by the judicial system, which is independent of the executive and the legislature. The Federal High Court has jurisdiction in respect of all matters relating to mines and minerals, although investment disputes between a mineral title holder and the government may be referred to arbitration under the UNCITRAL Arbitration Rules. All other disputes may be referred to the Federal High Court. In addition, investment disputes between a mineral title holder and a lender may be referred to the State High Court where the subject matter of the dispute is limited to the contract between parties.

Nigeria is a signatory to the Multilateral Investment Guarantee Agency Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Treaty on the International Centre for the Settlement of Investment Disputes, which confer an obligation on domestic courts to recognise and enforce foreign arbitral awards.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The holder of a mining right may request and acquire all surface rights necessary for the carrying out of mining operations under the issued title. They are acquired either before the mining rights are acquired or embedded in the mining rights eventually acquired. For example, the holder of a mining lease automatically acquires a water use permit.

Surface right holders may oppose these requests if their consent has not been obtained or if the mining rights holders have not paid the agreed compensation to the surface rightholders.

Mining titles in Nigeria confer both mineral and surface rights on their holders.

The Land Use Act vests all land within the territory of a state in the state governor. Private parties may only acquire a right of occupancy (which is akin to a leasehold interest). A requirement of land for mining purposes is regarded as a priority land use and a matter of overriding public interest. A governor may therefore revoke an existing right of occupancy where any land within the state is required for mining purposes. This power is required to be exercised within 60 days after the granting of a mining lease.

The consent of the landowner must be obtained before a mining title can be granted over an area of land that is occupied under a right of occupancy. In the event that consent is not obtained, the mining title area will exclude the land in question.

Subject to the payment of compensation and surface rent, a mining lessee enjoys the following surface rights:

- to obtain access to and enter the mining lease area;
- to exclusively use, occupy and carry out mineral exploitation on the land;
- to use water and wood and other construction materials as may be necessary; and
- to grow plants or keep animals for use by its employees.

The holder of an exploration licence can enter the licence area to carry out exploration activities and erect such plants and machinery as may be necessary. However, where any land within the area is subject to a right of occupancy, he or she must give prior notice to the lawful occupier and the local government chairperson of the area where the land is located and pay compensation for damages caused.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The Mining Act and the Regulations do not exclude the government or state agencies from participation in mining projects.

The federal government engages in mining projects through the Nigerian Mining Corporation, a corporation established by law to engage in the mining and refining of minerals.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Licences would be expropriated where the licence holders have breached applicable regulatory provisions. In such instances, licence holders are not entitled to compensation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Exploration and mining is prohibited in the following areas:

- land set aside for military purposes;
- land within 50 metres of any oil pipeline licence area, railway, public road, reservoir, dam and government or public buildings;
- land occupied by a town, village, market or cemetery;
- ancestral, sacred or archaeological sites;
- land subject to the provisions of the National Commission for Museums and Monuments Act, Chapter N19, LFN 2004 and national parks;
- land upon which a mineral title has already been granted and is subsisting; and
- any area designated as closed to mining operations.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Companies engaged in mining activities are liable to pay a corporate tax of 30 per cent and an education tax of 2 per cent of their taxable profits. A value added tax (VAT) of 5 per cent is payable in respect of taxable goods and services. Certain goods and services including exports are, however, exempt from VAT.

Minerals obtained in the course of mining or exploration are subject to the payment of royalty at 3–5 per cent of the value of the minerals. The minister may waive payment of royalty for any mineral exported solely for the purpose of analysis or experiment or as a scientific specimen. Also, the minister may, upon the approval of the Federal Executive Council, defer payment of any royalty on any mineral for a specified period.

Stamp duties are payable on all dutiable transactions and documents. Stamp duties may also apply on registrable agreements.

Annual service fees are payable in respect of all mineral titles on the anniversary of the issuance of the mining title. In addition to this, the holder of a mining lease is required to pay surface rent at a yearly rate to be determined by the minister with respect to land used by it for mining operations.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The holder of a mineral title enjoys the following incentives:

- a tax holiday for the first three years of operation, which period may be extended for another two years by the minister;
- capital allowance of 95 per cent of qualifying capital expenditure incurred on exploration, development and processing in the year in which the investment was made;

- annual indexation of the unclaimed balance of capital expenditure by 5 per cent (only applicable to mines that commence production within five years of the enactment of the Mining Act);
- deduction of losses as far as is possible from the assessable profits of the first year of assessment after the year in which the loss was incurred;
- exemption from customs and import duties on approved plants and machinery, equipment and accessories imported specifically and exclusively for mining operations;
- expatriate quota and resident permit in respect of the approved expatriate personnel;
- tax free personal remittance quota for expatriate personnel for the transfer of external currency out of Nigeria;
- free transferability of dividends or profits payments in respect of servicing a foreign loan and remittance of foreign capital in the event of sale or liquidation of mining operations in any convertible currency;
- freedom from expropriation, nationalisation or acquisition by any government of the Federation unless the act is in the national interest or for a public purpose and under a law that makes provision for payment of fair and adequate compensation and a right of access to the courts for the determination of the investors' interest or right and the amount of compensation to which he or she is entitled; and
- the right to a dispute settlement procedure under UNCITRAL Rules.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

We are not aware of such regulatory provisions.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Stamp duties and capital gains tax.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The principal business structure used for mining activities is a limited liability company. Foreign companies are not permitted to operate through a branch. They must seek incorporation as a separate entity in Nigeria.

26 Is there a requirement that a local entity be a party to the transaction?

There is no requirement that a local entity must be a party to a mining transaction. See question 13.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Nigeria has entered into bilateral investment agreements with China, Egypt, India, Israel, Finland, France, Germany, Korea, the Netherlands, Spain, Switzerland, Taiwan, Turkey, Uganda and the UK. These agreements accord investors from these countries 'fair and equitable treatment' and 'full protection and security'.

Nigeria has also entered into double taxation treaties with Belgium, Canada, China, the Czech Republic, France, Italy, the Netherlands, Pakistan, the Philippines, Romania, Slovakia, South Africa and the UK.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing are equity and debt financing from local and international lenders. Mining companies are now listed on the Nigerian Stock Exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

We are not aware of any direct financing provided by the government, its agencies or major pension funds to mining projects in the years past, or currently.

30 Please describe the regime for taking security over mining interests.

Rights or interest in a mining title can be subleased, pledged, mortgaged, charged, hypothecated or subjected to any security interest, wholly or in part, subject to the consent of the minister. Such consent is discretionary.

However, the transferor shall remain liable for the obligations under the title. He or she shall also be liable for actions arising out of securities made in respect of the title.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Generally, machinery and equipment imported into Nigeria must undergo inspection at the port of entry.

As stated in question 20, machinery and equipment that are imported for mining operations are exempt from the payment of customs and import duties. A precondition to benefiting from this exemption is that the Mines Inspectorate Department must approve the machinery or equipment prior to its importation.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no specific standard conditions and agreements covering equipment supplies in Nigeria. FIDIC standards are, however, commonly used in Nigeria.

The dispute resolution of equipment supply agreement is usually dependent on the size and value of the transaction and its parties. High net worth suppliers or transacting parties may be more inclined to resolve disputes by alternative dispute resolution, usually arbitration, which is binding on parties and is less time consuming. In any event, the dispute resolution of equipment supply agreement is dependent on the dispute resolution clause agreed to by parties to the agreement.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The right of a holder of a mining lease to process, sell, export or otherwise dispose of mineral products resulting from mining operations is subject to the payment of royalties on the minerals extracted.

A mineral title holder who intends to export minerals must register with the Nigerian Export Promotion Council, obtain an export clearance from the MMSD and comply with other custom requirements. Requirements for obtaining an export clearance include evidence of payment of royalty and inspection of the minerals to be exported by an officer of the MID.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Investors are required to import funds through an authorised dealer (a bank or other corporate organisation appointed by the Central Bank of Nigeria) in the Autonomous Foreign Exchange Market established by

the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Chapter F34 LFN 2004.

Dividends, profits or interest attributable to imported funds may be unconditionally remitted through an authorised dealer only if the funds were imported through an authorised dealer and the investor satisfies the documentary requirements. An investor may also remit payments for servicing foreign loans, as well as proceeds and other obligations in the event of the sale or liquidation of the investment. Access to foreign exchange is not tied to export performance.

Exporters of goods are required to open an export proceeds domiciliary account with a Nigerian bank. All export proceeds must be repatriated and paid into this account within 90 days of the shipment of the exported goods.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal laws are the Mining Act, which is administered by the MMSD, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, which is administered by the National Environmental Standards and Regulations Enforcement Agency and the Environmental Impact Assessment Act, which is administered by the Federal Ministry of the Environment.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Every person embarking on a mining project must submit an EIA report to the Ministry of Environment for approval. The minimum content of the report and the factors to be considered are specified in the EIA Act, the Sectoral Guidelines for Mining of Solid Minerals and the Regulations. After the report has been submitted, the Ministry of Environment must invite comments from interested persons. Where it is found that the project is likely to have a significant adverse effect on the environment and this adverse effect cannot be mitigated, or where public concern about the environment warrants it, the project may be referred to mediation or a review panel. Thereafter a decision shall be taken as to whether or not the project will be permitted, either in part or in whole, or with or without conditions.

The approved EIA report and an environmental protection and rehabilitation programme (EPRP) must be submitted to the MECD prior to the commencement of operations or upon an application for extension of the term of a mineral title or upon its conversion.

The environmental review process may take up to one year.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The EPRP to be submitted to the MECD should provide for specific reclamation and rehabilitation actions and the estimated cost of, and a timetable for, rehabilitation. The EPRP must be approved by the MECD.

A title holder that intends to abandon or permanently cease production from a lease area must give three months' notice in writing of its intention to the MID, the MECD and the MCO. The notification shall be accompanied by a report outlining details of the intended abandonment and the reasons thereof together with a plan showing the workings of the mine up to the time of the notice.

Upon receipt of the notice, the relevant department shall make recommendations to the minister with regard to the abandonment plan and the minister shall, within 10 days of receiving the notice, cause the matter to be investigated. If the minister is satisfied with the findings of the investigation, the abandonment will be approved and the title holder shall be required to:

- securely seal, fence or cover every mine shaft and undertake a safety audit;
- make safe all tailings and water retention areas; and
- demolish, fence or lock potentially hazardous buildings, structures, plants and equipment.

The Mining Act requires the minister to establish an Environmental Protection and Rehabilitation Fund to guarantee the environmental obligations of mineral title holders including obligations in relation to mine closure and remediation. Every mineral title holder is required to contribute to this fund in accordance with the amounts specified in its EPRP.

38 What are the restrictions for building tailings or waste dams?

There are no specific restrictions for building tailings or waste dams. There are, however, restrictions for deposit or storage of tailings or waste.

The Mining Regulations 2010 provide that every title holder or mine operator shall:

- provide an effective management system for their tailings throughout the period of operation;
- make adequate arrangements to protect the general public, particularly the host community from the risks associated with tailing storage;
- ensure that tailings are properly treated before they are discharged into the watercourse;
- ensure proper treatment of mine waste before final disposal to prevent air and water pollution and contamination; and
- provide adequate measures to minimise the effect of air pollution.

In addition, a title holder or mine operator shall, at least 30 days before commencement of any dumping operations, notify and obtain the approval of the Ministry through Mines Inspectorate Department in writing. The notice shall:

- specify the material to be dumped;
- give a description of the site;
- state whether the dump shall be a classified dump or not;
- state the manner in which the dumping operations are to be carried out; and
- explain the safety precautions to be taken to avoid polluting the environment and how the pollution to the environment shall be monitored and minimised.

While the regulations are silent on the qualifications of the person in charge of operation and management of dam waste, the Mining Regulations provide that technical competence to carry on the proposed exploration or mining operation must be established before a mining title is granted. It is therefore expected that this includes the competence to operate and manage waste generated from mining operations.

The Mining Act provides that a title holder must take steps to prevent pollution of the environment resulting from mining operations. Section 1118 of the Mining Act also provides that a title holder must rehabilitate land covered with tailings arising from mining operations to its natural state in accordance with laws in force and established best practices.

Facilities can be inspected by the Inspector of Mines at any time and without prior notice.

Regulation 29(a)–(d) of the National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations, provides that all waste treatments facilities must be equipped with:

- internal communicator or alarm system;
- telephone hand held two-way radio;
- portable fire extinguishers, fire equipment, spill control equipment, decontamination equipment; and
- water at adequate volume and pressure.

The National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations also provide that all emergency waste feed cut-off controls and system alarms are to be tested at least weekly.

The regulations do not state the responsibilities of mining companies and authorities regarding the rescue of people in case of a dam failure. The National Emergency Management Agency (NEMA) is the federal agency responsible for rescuing people in the event of an emergency, disaster or threatened disaster.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Other than the laws stated in question 35, the principal laws that regulate health and safety and labour are the Labour Act, the Trade Disputes Act, Chapter T8 LFN 2004, the Trade Unions Act, Chapter T14 LFN 2004 and the National Minimum Wage Act, Chapter N61 LFN 2004, all administered by the Ministry of Labour and Productivity; the Employees' Compensation Act 2010, which is administered by the Nigerian Social Insurance Trust Fund; the Pension Reform Act 2014, which is administered by the National Pension Commission of Nigeria and the National Health Insurance Scheme Act, Chapter N42 LFN 2004, which is administered by the Governing Council of the National Health Insurance Scheme.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

There are no regulations or laws specifically for the management and recycling of mining waste products in Nigeria. There are however several laws and regulations governing the collection, disposal and treatment of all waste products that also apply to mining operations.

These laws and regulations aim to protect the environment from pollution and degradation and any person or company engaging in mining activities or managing mining waste products shall ensure that the waste products are managed and recycled without resulting in soil erosion, land degradation and uncontrolled damage to vegetation, wildlife and water resources. Some of the regulations and laws governing waste management and recycling are as follows:

- the Mining Act prohibits the pollution of water or any water body in the course of mining activities;
- the Harmful Waste (Special Criminal Provision, etc) Act, chapter H1 LFN 2004 was enacted with the specific object of prohibiting the carrying, depositing and dumping of hazardous wastes on any land or territorial waters;
- National Environmental (Sanitation and Wastes Control) Regulation SI No. 28 of 2009 provides the legal framework for the adoption of sustainable and environmentally friendly practices in environmental sanitation and waste management to minimise pollution;
- National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulation SI No. 31 of 2009, which seeks to minimise pollution from mining and processing of coal, ores and industrial minerals and encourage the application of up-to-date efficient cleaner production technologies;
- National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries) Regulation SI No.14 of 2011, to control all operations and ancillary activities of this sector in order to safeguard the Nigerian environment from their negative impact);
- National Environmental Protection (pollution abatement in industries and factories generating waste) Regulation SI No. 9 of 1991 regulates the release of hazardous substances into the ecosystem; and
- National Environmental (Permitting and Licensing System) Regulation SI No. 29 of 2009 enables consistent application of environmental laws, regulations and standards in all sectors of the economy and geographical region.

The National Environmental Standards and Regulations Enforcement Agency is the agency tasked with regulating the collection, disposal and treatment of waste produced by municipalities and industrial sources. This agency also ensures compliance with all waste management laws and regulations in Nigeria.

We are not aware of any law limiting the title or rights to explore and exploit mining waste products in tailing ponds and waste piles to any particular persons or bodies, or any law prohibiting any particular persons or companies from exploring and exploiting mining waste products in tailing ponds and waste piles.

Update and trends

On 14 April 2017, the World Bank approved a US$150 million loan to commence the Mineral Sector Support for Economic Diversification (Mindiver) Project.

The Federal Minister of Mines and Steel in December 2016, announced the implementation of 13 per cent derivation for States of the Federation that produce solid minerals. There is, however, no official confirmation that the federal government has begun payment of the said derivation to producing states.

Any individual or company that however engages in the exploration and exploitation of mining waste products in tailing ponds and waste piles either by virtue of approved mining activities or other activities must comply with all laws and regulations on the collection, management, disposal and recycling of waste.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Labour Act places some restrictions on the employment of women and persons under the age of 16 for underground work in a mine or in night work.

Any company that intends to employ foreign nationals must obtain an 'expatriate quota' from the Ministry of the Interior. An expatriate quota permits a Nigerian company to employ a specified number of non-Nigerians.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining Act requires holders of mining titles to conclude community development agreements (CDAs) with their host communities prior to the commencement of mine development and extraction. A CDA must contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of the community, such as educational scholarships, employment opportunities, contributions to infrastructural development, maintenance, monitoring and consultative frameworks. The Regulations also require title holders to submit to the Ministry on an annual basis, a progress report on the CDA with the host community, which should include a fair and honest assessment of the projects pursued in the community, the achievements recorded and the constraints.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The Mining Act recognises that it may be the custom of some communities to win salt, soda, potash or galena from certain areas. It preserves the right of such communities to continue to win these minerals where such custom existed prior to the commencement of the Mining Act. It further provides that where the right of such communities to win minerals is lost as a result of the granting of a mining lease to a third party, the holder of the mining lease must pay compensation to the members of the community for the loss of this right.

Lawful occupiers of any land subject to a mining title are entitled to compensation for any disturbance to their surface rights and for any damage done on the land, including damage to crops, economic trees and buildings. Failure to pay compensation may result in the suspension and eventual revocation of the mining title if the failure continues. Lawful occupiers are also entitled to payment of compensation where their land has been compulsorily acquired for mining purposes.

An applicant for a mining title may be required to provide security for the payment of compensation in the form of a deposit or to reimburse the federal government for any compensation paid to any state government or lawful occupier in respect of the acquisition of any land subject to a mining title.

The lawful occupier of any land within an area subject to a mining lease retains the right to graze livestock upon, and to cultivate the

surface of, the land insofar as the grazing or cultivation does not interfere with mining operations in the area.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Nigeria is not a signatory to any treaty, convention or protocol relating to CSR. It is, however, a signatory to several treaties, conventions and protocols relating to human rights and environmental damage or degradation from which CSR issues may be inferred.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Corrupt Practices and Other Related Offences Act (the ICPC Act), chapter C31 LFN 2004 prohibits and prescribes punishment for corrupt practices and other related offences. The ICPC Act defines corruption to include bribery, fraud and other related offences while persons are defined to include natural persons, juristic persons or any body of persons corporate or incorporate. The ICPC Act also makes false declaration or returns in respect of public revenue or property a punishable offence.

Worthy of note for foreign investors is that the ICPC Act makes the following, among other offences, punishable:

- the giving and receiving of bribes to influence public duty by a public official;
- fraudulent acquisition and receipt of properties;
- failure to report bribery transactions; and
- the concealment of information and frustration of investigation.

The Economic and Financial Crimes Commission Act, Chapter E1 LFN 2004 is the body designated with the primary responsibility of investigating and prosecuting all economic and financial crimes. It is also the body with the responsibility to enforce the following laws:

- the Money Laundering (Prohibition) Act;
- the Advanced Fee Fraud and Other Related Offences Act;
- the Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act;
- the Banks and other Financial Institutions Act;
- Miscellaneous Offences Act; and
- any other law or regulation relating to economic and financial crimes including the Criminal and Penal Codes.

The act defines economic crime as a nonviolent criminal activity committed with the objectives of earning wealth illegally and includes any form of fraud, bribery, embezzlement, corrupt malpractice, tax evasion and dumping of toxic waste, etc.

The Money Laundering (Prohibition) Act, Chapter M18 LFN 2004 is directed or aimed at tracing, finding, freezing and possibly forfeiting, among other things, money and properties that have been acquired through illegal or prohibited means. It aims to prevent the legitimisation of proceeds of crime.

Apart from making the actual act of money laundering an offence, the law goes a step further to make the aiding, concealing, collaborating, conspiring and abetting of money laundering a criminal offence.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Foreign companies doing business in Nigeria and subsidiaries or affiliates of foreign companies in Nigeria may be required to comply with the legislation of their country of origin governing anti-bribery and foreign corrupt practices.

For example, the Foreign Corrupt Practices Act (FCPA) Act of 1977 (as amended) of the US makes it unlawful for an American person (individual or company) to make a corrupt payment to a Nigerian government official for the purpose of obtaining or retaining business. The FCPA Act also makes it unlawful for Nigerian individuals or companies to take any act in furtherance of such corrupt payment while in the US or on behalf of an American person.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Nigeria enacted the Nigeria Extractive Industries Transparency Initiative Act (NEITI) 2007, which established the NEITI agency. The NEITI Agency is responsible for the development of a framework for transparency and accountability in the reporting and disclosure by all extractive industry companies of revenues due to or paid to the government of Nigeria.

The NEITI Agency has adopted the global standards set by the EITI through its annual audit report in compliance with requirements of the EITI Rules.

The report that covers the oil, gas and solid minerals sectors, includes disclosure on production figures, revenue sharing arrangement between tiers of governments, as well as the process of awards of contracts in the oil, gas and mining industry. The revised standards, which equally encourage contract transparency in companies and government, also focus on expenditures incurred by the oil and gas companies on the provision of social services, public infrastructure and fuel subsidy payments.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Foreign ownership is not restricted. However, such ownership must be through a company incorporated in Nigeria. See questions 13 and 26.

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International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Nigeria is a member of the Economic Community of West African States, which recently issued the Harmonisation of Guiding Principles and Policies for the Mining Sector Directive. The Directive was issued to precede the introduction of a common mining policy and mining code for the West African subregion by the end of 2012. Its purpose is to provide guiding principles and policies for the mining sector of member states to ensure that high standards are achieved in terms of sustainability, accountability, promotion of human rights, transparency, social equity and environmental protection. The Directive also seeks to strike a balance between the need to attract investors with fiscal incentives and to maintain the industry and its resources as a viable source of revenue for the government.

Nigeria is also a party to several treaties and international agreements that aim to protect foreign investment. These include the Multilateral Investment Guarantee Agency Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Treaty on the International Centre for the Settlement of Investment Disputes and bilateral investment agreements with China, Egypt, Finland, France, Germany, Korea, the Netherlands, Spain, Switzerland, Taiwan, Turkey, Uganda and the UK.

Peru

Fernando Pickmann
Gallo Barrios Pickmann Abogados

Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry is one of the most important economic activities in Peru. With a 1 per cent of the Peruvian territory exploited, mining represents almost 15 per cent of the gross domestic product (GDP) and 65 per cent of exportations of the country. During the past decade, mining had a fundamental role in poverty reduction and the development of the country, allowing the achievement of necessary and real social inclusion and promoting general welfare. The economic indicators clearly reflect the contribution of the mining industry, which has contributed to generating jobs, invigorating the country and regional economies.

The Peruvian government has always been committed to supporting mining activities and has adopted serious changes in legislation to avoid illegal mining. This year, the Mines Ministry approved a legislative package to regulate a new formalisation process for informal miners that did not start their formalisation process under the previous legislation.

Finally, the mining industry has focused its efforts on being appreciated as an activity that makes sustainable use of resources and the environment, including the preservation of water sources, the promotion of agriculture and good relations with stakeholders.

2 What are the target minerals?

Peru occupies a leading position in the global production of mineral commodities such as copper (second after Chile), gold (sixth after China, Australia, South Africa, the US and Russia), lead (fourth after China, Australia and the US), molybdenum (fourth after China, the US and Chile), silver (second after Mexico), tin (third after China and Indonesia) and zinc (third after China and Australia).

3 Which regions are most active?

The most active regions according to the minerals are as follows:

- copper: Ancash, Arequipa, Moquegua, Cusco and Junín;
- gold: La Libertad, Cajamarca, Arequipa, Madre de Dios and Ayacucho;
- lead: Pasco, Lima, Junín, Ica and Huánuco; and
- silver: Junín, Lima, Pasco, Ancash and Arequipa.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Peruvian legal system is civil-law based.

5 How is the mining industry regulated?

The mining industry is mainly regulated by central government through the Ministry of Energy and Mines (MINEM).

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Mining activities and industry are regulated by the Peruvian Political Constitution, unified text of the General Mining Law, Special Administrative Rules and Dispositions and complementary rules granted by MINEM and the Peruvian Civil Code. The main regulatory entities are MINEM, the Geological Mining and Metallurgical Institute (INGEMMET) and the National Environmental Certification (SENACE), authority in charge of the approval of category III detailed environmental impact assessments, which refers to mining projects whose execution could cause significant negative impacts on the environment.

SENACE's purpose is to gradually assume all the responsibilities of MINEM regarding the approval of environmental studies (including environmental impact statements and semi-detailed environmental impact studies.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Code of Standards for Reporting Mineral Resources and Reserves issued by the Lima Stock Exchange is based on the principles and content of the JORC Code (Australia), the SAMREC Code (South Africa) and the CIM Standards (Canada).

The classification adopted by the aforementioned Code in order to report mineral resources is the following: inferred mineral resource; indicated mineral resource; and measured mineral resource.

The classifications adopted by the aforementioned Code in order to report mineral reserves are probable mineral reserves and proved mineral reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The Peruvian state is the owner of natural resources, which include minerals, therefore the Peruvian state owns the mining rights. Exploration, use and exploitation of mining rights can be granted to private parties, through the regime of mining concessions. Mining concessions have the nature of immoveable goods.

Mining concessions constitute a different right from surface land over them. Owners of surface lands are not authorised to perform mining activities on them, unless they have a valid mining concession title granted by the INGEMMET.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

INGEMMET is the governmental entity that runs the mineral concessions cadastre providing complete public information regarding mining concessions. Information held by INGEMMET is public and available through its website.

Title-holders of mining concessions shall submit a consolidated annual declaration to MINEM providing information regarding the activities performed. Information submitted is used to create statistics on mining activities on Peruvian territory.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Persons or entities are entitled to request mining rights. The General Mining Law establishes four different types of mining rights as follows:

- a mining concession grants rights to execute mining activities of exploration and exploitation – it has the nature of an immoveable right;
- a beneficiation concession grants the right to perform physical, chemical and physical-chemical processes to concentrate minerals or to purify, smelt or refine metals;
- a general labour concession grants the right to perform auxiliary mining services or activities such as ventilation, drainage, lifting or extraction to mining activities; and
- a mineral transportation concession grants the right to provide massive and continuous transport of mineral products by unconventional methods.

Title-holders of mining concessions shall pay validity fees to INGEMMET. The amount of said fee depends on the condition of the title-holders (small, artisanal or general regime).

Small title-holders are entities or persons holding concessions in an area of less than 2,000 hectares with no more than 350 metric tonnes of production per day and must pay a validity fee of US$1 per hectare; artisanal title-holders are entities or persons holding concessions in an area of less than 1,000 hectares with no more than 25 metric tonnes of production per day and must pay a validity fee of US$0.50 per hectare; finally the general regime applicalble to title-holders for entities or persons who do not qualify as small or artisanal and the fees are US$3 per hectare. Validity fees must be paid annually to maintain mining concessions in force. The non-compliance of validity fee payment for two consecutive years results in the extinction of the mining concession.

The Mining Law obligates mining concessions holders to move into production. Currently, two regimes of minimum production obligation (MPO) coexist: (i) Regime approved by Legislative Decree No. 1054 in June 2008 established that mining concessions holders – qualifying under the general regime – need to reach a minimum annual production equivalent to one (01) tax unit (approximately US$1,160) per year/hectare. If the holder of mining concession cannot reach such minimum annual production on the first semester of the 11th year since the year in which the concessions was granted, the holder will be required to pay a penalty equivalent to 10 per cent of the applicable minimum production per year per hectare until the 50th year. After the period of 15 years mentioned above, the mining concessions may remain in force for an additional period of up to five additional years in the case of: (i) the holder paying the applicable penalty and securing investments in the mining concession of 10 times the applicable penalty that should be paid; or, (ii) events of force majeure. If the minimum production is not reached after this period has lapsed, the mining concession will inevitably expire.

The regime approved by Legislative Decree No. 1320 – approved this year – will come into force in 2019 and, according this disposition, mining concessions holders shall reach the minimum annual production on the first semester of the eleventh year since the year in which the concessions was granted. Under this new regime if the mining concession holder cannot reach such minimum annual production, it will be required to pay a penalty equivalent to 2 per cent of the applicable minimum production per year per hectare until the 50th year.

If the holder cannot reach the minimum annual production on the first semester of the 16th year since the year in which the concessions was granted, the holder will be required to pay a penalty equivalent to 5 per cent of the applicable minimum production per year per hectare until the 20th year.

If the holder cannot reach the minimum annual production on the first semester of the 20th year since the year in which the concessions was granted, the holder will be required to pay a penalty equivalent to 10 per cent of the applicable minimum production per year per hectare until the 30th year.

Finally, if the holder cannot reach the minimum annual production until during this period, the mining concession will be automatically expired

11 What is the regime for the renewal and transfer of mineral licences?

The mining concession must be maintained by paying validity fees and complying with the corresponding minimum production, when appropriate (see question 10).

Transfer of mining concessions can be done by private civil agreements regulated by terms freely agreed. The main principle that rules commercial transactions in Peru is 'contractual freedom'; therefore, there are no limitations to the transfer of mining concessions.

On the other hand, regarding the transfer of authorisation to the environmental permits and commencement of mining operations (exploration and exploitation), it is considered as an inherent right to the mining concession. Therefore, once the mining concession is transferred, the permits and authorisation are transferred to the new titleholder. The new holder must communicate the transfer to MINEM. Notwithstanding the aforementioned, in order to simplify the permits transfer, the Peruvian government approved a law that regulates that in cases of a simple merger, split or reorganisation, all records, certificates, permits, licences and authorisations obtained or in process, will be automatically transferred to the (new) company that receives the patrimonial block. This provision shall not apply to permits whose special regulations prohibit their transfer, such as water permits and the registration of chemical inputs and taxable goods.

12 What is the typical duration of mining rights?

According to the General Mining Law the mining concession is irrevocable as long as the titleholder fulfils the legal obligations required to maintain it in force. However, the titleholder shall comply with all the obligations in order to maintain the mining concession valid (see question 10). The General Mining Law provides that mining concessions can be extinguished only by expiration (as a consequence of a failure by a titleholder to pay the mining validity fee and/or penalties for two years (consecutive or not)), abandonment (as a consequence of the breach of the mining procedure rules applicable to a mining claim), nullity (in case a mining concession was claimed by an individual or entities that have restrictions according to the mining law), resignation (in case the titleholder requests the extinction of the mining right) and cancellation (in case mining concession overlaps with priority rights, or when the right is unassailable).

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

According to the Peruvian Constitution, foreigners have exactly the same rights as Peruvians. The only exception is in the case of foreigners intending to acquire mining rights or properties located within 50km of the Peruvian border; in such a case, they will not be able to acquire properties or mining rights unless they previously receive express authorisation through a Supreme Decree.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

According to the Constitution, Peru has an independent judicial system based on independence of powers. Notwithstanding, a party can freely elect to submit its controversies to local or international private arbitration.

The Peruvian state is party to the New York Convention, the Panama Convention and Montevideo Convention, all of which guarantee the recognition and enforcement of foreign arbitral awards in Peru.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Title-holders of mining concessions can freely acquire surface lands located over its mining concessions.

In the case of surface lands owned by native communities, it will be necessary to obtain approval from the community through an agreement approving the transaction by a qualified majority of the community.

For the purchase of surface lands owned by the government, it is necessary to follow an acquisition process with the Peruvian state through the Superintendency of National Properties.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

In accordance with the Constitution, the Peruvian state has a promotional role to develop private investments. In a subsidiary way, the Peruvian government, through a special law, can be entitled to perform business activities (including mining).

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

According to the Constitution, property rights are inalienable (accordingly Peruvian Civil Code mining rights have the same status as property). Private parties may be expropriated of their rights only in the case of an event of national security or public necessity duly declared by special law. In those specific cases, the Peruvian state must pay a fair appraised compensation for the expropriated property.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Investors interested in developing mining activities in Peru must respect protected areas appointed by the Peruvian government. The treatment of protected areas has special regulation according to their nature.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Income tax – IT

Corporate income tax

Companies incorporated in Peru are considered domiciled for IT purposes and, therefore, subject to a 29.5 per cent rate (as of 2017) on net worldwide income; while the branches of foreign companies are only subject to IT on their Peruvian source income. The income tax for a domiciled company is known as corporate income tax (CIT).

To calculate the taxable basis, domiciled companies are entitled to deduct expenses, to the extent that they are necessary to produce income or to maintain its source. Additionally, there are certain limits and/or caps for the deduction of certain expenses, such as finance costs (thin capitalisation rules apply), provisions for bad debts, salaries and travel expenses, among others.

Dividends and any other type of profit distribution are subject to a 5 per cent withholding tax as of 2017. The previous rates (4.1 per cent or 6.8 per cent) shall be applied on retained earnings, depending on the fiscal year the profits were generated.

Withholding income tax

Non-domiciled companies are subject to a withholding income tax (WIT) in Peru on Peruvian-source income, on a gross basis.

The tax rates for non-domiciled entities are the following:

Name	Withholding tax rate
Other incomes	30%
Interest	4.99% (as long as certain requirements are fulfilled) 30% (all others)
Dividends	5%: as of 2017
Royalties	30%
Services fees	30% (general and digital services) 15% (technical assistance, provided certain conditions are met)

Mining tax regime

As from October of 2011, the mining royalty was modified and two new mining taxes came into effect: the special mining tax (IEM) and the special mining contribution (GEM). The mining royalty, the IEM and the GEM are economic considerations paid to the Peruvian government for the exploitation of mineral resources. Note that the Mining Royalty includes metallic and non-metallic mineral resources, while the IEM and the GEM only include metallic mineral resources. The GEM is only applicable to the mining companies that have valid tax stability agreements. These companies will voluntarily sign contracts with the Peruvian government for the payment of said charge, which must be determined by each stability agreement that they maintain.

The payment obligation of the mining royalty, IEM and GEM falls due at the closing of each quarter (January-March, April-June, July-September and October-December), and the basis of calculation is the operating profit or the sales revenue of the quarter (in the case of the mining royalty).

The operating profit is obtained by deducting from the revenue generated from the sales of mineral resources of each quarter, the sales cost, the operating expenses (including selling expenses and administrative expenses) incurred in order to be able to generate said revenue. Said expenses and costs must be at market value.

Within the past 12 business days of the second month following the generation of the obligation, mining companies must present a quarterly declaration (January–March; April–June; July–September and October–December) and make payment of the corresponding Mining Royalty, IEM and GEM. Said declaration must determine the basis for calculating the mentioned contributions.

The amounts effectively paid for mining royalty, IEM and GEM will be considered as an expense for IT purposes in the period in which they were paid.

They are calculated as follows:

Name	Base	Tax rate (range)
Mining Royalty	Operating profit - (minimum, 1% of sales)	1% - 12%
Special mining tax	Operating profit	2–8.4%
Special Mining Contribution	Operating profit	4–13.12%

Temporary tax on net assets (ITAN)

Companies that are subject to corporate IT are obligated to pay the temporary tax on net assets. This taxed is levied on the net asset value contained in the balance sheet as of 31 December of the previous period to which the payment corresponds, deducting the depreciations and amortisations permitted by law. A company is subject to the ITAN as of the year after it starts its activities.

Rate	Net assets
0%	Up to S/ 1,000,000
0.4%	More than S/ 1,000,000

The amount paid for the ITAN is a credit that will be offset against the advanced IT payment or the annual IT regularisation payment. Any remaining balance can be reimbursed by the Tax Administration.

Financial transactional tax (ITF)

The obligations paid through cash payments of amounts greater than 3,500 soles or US$1,000 must be made through bank accounts or deposits, bank transfers, payment orders, credit cards, non-negotiable checks, among other means of payment provided by the entities of the Peruvian financial system.

Any obligation that is not carried out using these methods prevents the deduction of the expense or the recognition of the cost for tax purposes, and prevents the recognition of tax credits (ie, VAT). Additionally, the ITF is applied, among other transactions, to all debits or credits in bank accounts maintained by the taxpayers. The applicable tax rate is 0.005 per cent. Certain operations are exempt from the ITF, such as the operations between accounts of the same accountholder, credits or debits in bank accounts opened at the request of the employer exclusively to be able to deposit the salaries of its employees, credits or debits in bank accounts of severance payments.

The ITF is deductible as an expense for IT purposes.

Valued added tax (VAT)
VAT is levied on the following operations at a rate of 18 per cent:
- sale of real property within Peru;
- services provided within Peru;
- import of services (services economically used within Peru);
- import of goods;
- construction contracts; and
- the first sale of a real property made by the constructor.

The VAT Law follows a debit or credit system by which the VAT paid in the purchase of goods and services can be used as a credit against the VAT originated by the future taxed operations. Any VAT credit that is not used within a determined month can be carried forward (at historical values) to be used against the VAT of future operations. It must be taken into account that the return of VAT in cash is only available for exporters and some entities in the pre-operating stage, as long as certain conditions are met.

It is important to mention that VAT will be reduced from 18 per cent to 17 per cent on 2017, provided that the fiscal revenues increase during the first semester.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

For the largest mining revenues, Peru has the following incentives.

Early recovery of VAT
To promote investment in the mining industry, a VAT recovery regime has been established for the holders of mining concessions that have not begun operations and are in the exploration stage. In addition to this regime, exclusively applicable to the mining industry, there is a regime of early recovery of the VAT applicable to any industry (including the mining industry) for companies in the pre-operating stage (for example, in the construction stage).

The following regimes are applicable to mining companies in the exploration and pre-operating stage:
- VAT recovery regime for mining companies in the exploration stage; and
- VAT early recovery regime for companies in the pre-operating stage.

Tax depreciation
There is a special depreciation annual rate for mining companies with a stability agreement of up to 5 per cent for buildings and up to 20 per cent for other fixed assets.

Also, for mining companies with or without a stability agreement, the tax depreciation for machinery and equipment for mining activities is up to 20 per cent.

Works for taxes
In 2008, the Works for Taxes regime came into effect. Companies have the option to pay part of their taxes through the execution of regional infrastructure works in some of the poorest regions of the country. For these purposes, companies must comply with certain conditions, such as signing agreements with the regional and local governments, and obtaining an authorisation from the Private Investment Promotion Agency (ProInversion) for listed or new projects. The amount invested by the company can be used as tax credit of up to 50 per cent of its IT from the previous fiscal year. This regime will generate benefits for private companies and for the government.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Stability agreement
Investors can sign stability agreements with the Peruvian government, whether under the special regime or under sectorial regimes (ie, mining and oil).

Legal stability agreements
Under the general regime, investors can sign legal stability agreements that guarantee the following rights for a 10-year period: (i) stability of the current IT regime at the time of the signing of the agreement, with regard to dividends and profit sharing; (ii) stability of the monetary policy of the Peruvian government, according to which there is an absence of exchange controls, foreign currency can be acquired or sold freely at any type of exchange rate offered by the market, and funds (remittances) can be sent abroad without requiring prior authorisation; and (iii) the right of non-discrimination between foreign and local investors.

Tax stability agreements for mining companies
Under the mining regime, local mining companies can sign stability contracts and guarantees, and investment promotion measures that guarantee the following during 10, 12 or 15 years:

Term stability	Minimum investment	Other requirements	Possibility to advance stability	Incentives
10 years	US$20 million	An initial capacity of concession no less than 350 tonnes per day or than 5,000 tonnes per day in extensions	Investment period of no more than three consecutive years	• tax stabilisation; • free availability of foreign currency and non-discrimination; • free commercialisation of mineral products; • stability of the special regimes, when they are granted, for tax rebates, temporary admission, and similar regimes; and • the non-unilateral amendment of the guarantees included in the contract by the state
12 years	US$100 million US$250 million in current mining entities (as an exception)	An initial capacity of concession no less than 5,000 tonnes per day or than 5,000 tonnes per day in extensions	Investment period of no more than eight consecutive years	This agreement includes the incentives aforementioned for a 10-year term of stability and the accounting books can be expressed in US dollars or in the currency in which the investment was made
15 years	US$500 million (as an exception)	An initial capacity of concession no less than 15,000 tonnes per day or than 20,000 tonnes per day in extensions	Investment period of no more than eight consecutive years	This agreement includes the incentives aforementioned for a 12-year term of stability and the mining investor is entitled to apply a global depreciation rate of 20 per cent for its personal property (moveable assets) and 5 per cent for real estate (buildings and constructions)

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

According to Peruvian regulations, the government is not entitled to carry interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

As a mining concession qualifies as immoveable property, separate and distinct from the premises where it is based, the income derived from

the transfer of a mining licence generates a capital gain that is subject to income tax, as follows:

- individuals: effective rate of 5 per cent income tax; and
- companies or any other entities subject to CIT: 29.5 per cent CIT.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

According to the Peruvian Constitution, there is no differential treatment between Peruvian and foreign investors.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The most used business structures are the *sociedades anónimas* (SA) corporation and limited liability company (SRL) regulated by Peruvian corporate law.

There are three types of corporation in which stock capital is divided into shares, as follows:

- typical corporation (SA) where a board of directors is mandatory;
- closed corporation (SAC), under which legal form the board of directors is merely optional; and
- open corporation (SAA), which shall list its shares in the stock exchange public registry. A board of directors is mandatory.

SRLs and joint venture agreements are commonly used business structures by mining companies, and are described as follows:

- a limited liability company whose stock capital is not represented in shares but in quotas; and
- a joint venture agreement, which is intended to create a common business platform for its parties for a determinate or indeterminate period without generating an independent entity from its parties.

26 Is there a requirement that a local entity be a party to the transaction?

No.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

The Peruvian government has subscribed to free trade agreements with the following countries: Andean Community, MERCOSUR, USA, Chile, Canada, China, Singapore South Korea, Mexico, Japan, Panama, EU, Costa Rica, Cuba and Honduras and it is currently negotiating others with El Salvador and Turkey.

Peru has signed double taxation relief agreements with Canada, Chile, Brazil, Mexico, Switzerland, Portugal, Mexico and South Korea. In addition, Peru belongs to the Andean Community of Nations (CAN), which also includes Bolivia, Colombia and Ecuador. These countries also have a valid double taxation relief agreement (Decision 578), which follows the United Nations model.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing for mining activities are the private banking system and the public stock market (Lima Stock Exchange, BVL).

During the past few years, the BVL has been very active and attractive, listing junior mining companies, whereby several Peruvian investors had participated in the negotiation and creation of the price of shares and have actively been participating in different private or public placements made by such companies.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The Peruvian government has an increasing interest in financing mining projects with proven mineral reserves. During the last year, through its development financial entity COFIDE, it has structured and financed up to US$240 million in one of the most promising mining projects.

On the other hand, private pension funds are allowed by law to acquire equity and debt instruments from mining companies as long as these companies are in an operation stage and have proper risk classifications.

30 Please describe the regime for taking security over mining interests.

Mining concessions are considered as immoveable goods in Peru. In this regard, a security interest can be granted in favour of any third party through a mining mortgage. Such mining mortgage must be registered on the Mining Public Registry to be valid. Pledges are not applicable to mining concessions given that this kind of security only applies over moveable goods. However, it is possible to grant pledges over the minerals extracted by the mining concessions.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no trade restrictions (neither importation nor exportation) of machinery and equipment required for mining activities. However, the Peruvian government – in order to limit illegal mining – regulates certain prohibitions to operators of small and artisanal mining. As a consequence of this, operators that develop small and artisanal mining are completely forbidden to acquire and use certain machinery and equipment such as dredges, front-loaders, dumper trucks and, in general, assets used to execute illegal mining activities.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Peruvian law has not required any standards conditions for the equipment supply. Notwithstanding this, any equipment supply shall be included in the company Mining Plan. Our jurisdiction is friendly towards buyers, as the Peruvian government safeguards and promotes investment. In the event of any dispute resolution in equipment supply agreements, as is established in question 14, parties can appeal to the judicial system; or in the case that the parties have agreed, submit the disputes to local or international private arbitration.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Mineral commercialisation is free and does not require any authorisation. Only entities dedicated to processing and trading gold are obliged to be registered in the Registry of Traders and Processors of Gold administrated by MINEM.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions on the importation of funds or investment for exploration, extraction, export or sale of minerals to any national or foreign private party. The Peruvian state encourages national and foreign investment and establishes that production of goods and services and foreign trade are exempt from restrictions.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental laws are the following:

- Law No. 28611 (the General Environmental Law);
- Law No. 27446 (the Law of the National System of Environmental Impact Assessment);
- Supreme Decree No. 020-2008-EM (Environmental Regulation for Mining Exploration Activities);

- Supreme Decree No. 040-2014-EM (Regulation of Protection and Environmental Management for the Activities of Exploitation, Benefit, General Labour, Transport and Mining Storage).

The principle regulatory bodies that administer these laws are the MINEM, the Assessment and Environmental Control Agency (OEFA), the SENACE and regional governments as an environmental controlling entity.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

To initiate mining activity, the title-holder must have in force the corresponding environmental certification, as well as the licences, authorisations and permits established under the current legislation.

The environmental certification is classified into the following categories:

- an environmental impact statement includes the projects where execution will not generate significant negative impact in the environment. This environmental certification is obtained automatically;
- a semi-detailed environmental impact study includes the projects where execution can cause a moderate environment impact for which negative effects can be eliminated or minimised through the adoption of simple applicable measures. To obtain this environmental certification could take between six to eight months; and
- a detailed environmental impact study, which includes the projects where characteristics, scope and location could produce significant environment impact requiring a deep analysis of said impacts. To obtain this environmental certification could take almost a year.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Peruvian regulation establishes the mining closure plan as an environmental management tool formed by the technical and legal actions that the title-holder must perform to establish all the measures to remediate the area used for mining activity to restore the necessary characteristics to establish a healthy environment.

The title-holder of the mining activity will submit the mining closure plan to the MINEM for its approval. This mining closure plan will establish the studies, actions and site management to reduce and eliminate, where possible, all the contaminant effects that would harm the population and the ecosystem. This plan is to be executed in a progressive way during the lifespan of the mining operation.

The title-holder of the mining activity must establish securities in favour of the competent authority to cover the costs of rehabilitation measurements for the periods of final closure and post-closure of the mining activity.

38 What are the restrictions for building tailings or waste dams?

The restrictions for building tailings are established in Supreme Decree No. 040-2014 (Regulation for Protection and Environmental Management for Exploitation, Benefit, Overall Work, Transport and Mining Storage Activities). The restrictions are: control and management of emissions of particulate material in all the stages of the process, control and management of reagents, prioritise the circulation of water to optimise the final disposition, among others. After the construction of the building tailing, the environmental authority in charge of the inspection (OEFA) can undertake checks at any time, which may be previously advised or without advice.

In our legislation, an alarm system mandatory and emergency drills with the local community have not yet been implemented.

The mining companies and authorities responsibility regarding the rescue of people in case of a dam failure could be civil, criminal and/or administrative, as applicable.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health, safety and labour laws on mining activities are:

- The unified text of the General Mining Law;
- Supreme Decree No. 003-97-TR (the Law of Productivity and Competitiveness);
- Supreme Decree No. 001-96-TR (Regulation of the Law of Productivity and Competitiveness);
- Supreme Decree No. 055-2010-EM (the Safety and Health Regulation in Mining Activities);
- Law No. 29783 (the Safety and Health in Labour Law);
- Supreme Decree No. 005-2012-TR (Regulation of the Safety and Health in Labour Law);
- Supreme Decree No. 010-2003-TR (the Collective Bargaining Law); and
- Supreme Decree No. 024-2016-EM (Regulation of Occupational Health and Safety in Mining Activities).

The principal regulatory bodies are the Supervisory Agency for Investment in Energy and Mining (OSINERGMIN), the MEM, the Labour Ministry and the National Superintendency of Labour Inspection (SUNAFIL).

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The principal rules related to the management and recycling of mining waste are as follows:

- Law No. 28,271 that regulates the mining environmental liabilities; and
- Supreme Decree No. 059-2005-EM (Law Regulation of the Mining Environmental Liabilities).

According to these regulations, generators of environmental liabilities as well as third parties may re-use tailings or waste piles. For such purposes, it is necessary to obtain an Environmental Impact Study approved by the Mining Ministry. Also, it is necessary to have title over the mining concession.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

From 1 January 2015, companies with 50 or more employees should comply with the quota of disabled employees (3 per cent of total personnel of the company) and will be subject to audit in each following year. (Law 29973, The General Law of Persons with Disabilities, article 41 in point 1).

For domestic employees, Peruvian labour law presumes that every labour relationship is permanent, unless the contrary is proven. Despite this presumption, employees can be hired by means of fixed-term contracts in the cases established by law. In some cases they can be extended for a maximum of five years. Legal benefits and labour conditions are basically the same for all employees, regardless of their type of employment contract.

Foreign employees have basically the same rights as Peruvian workers, but their hiring is subject to special rules. Foreign employees cannot exceed 20 per cent of the total personnel of the company and their salaries cannot exceed 30 per cent of the total payroll of the company, unless they are included in one of the legal exemptions (eg, technical or specialised personnel).

In addition, some foreign citizens shall not be considered 'foreigners' for labour purposes (eg, if they are married to Peruvians, are nationals of countries that have signed a treaty on labour reciprocity with Peru or have dual nationality).

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The main community engagement laws are rural community law, civil participation law and prior consultation law (based on the ILO Convention 169).

The principal regulatory entities are the MINEM and the Ministry of Culture.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The protection of rights of indigenous and tribal people do not affect the acquisition or exercise of mining rights. However, the Peruvian government has adopted the Indigenous and Tribal Peoples Convention (ILO Convention 169) by which title-holders shall consult indigenous communities domiciled in areas located in projects on previous matters. The government controls the process of prior consultation.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The Peruvian government has approved the International Technical Law ISO 2,600, which is the first guide regarding social responsibility applicable to all organisations, companies and states.

Also, the Peruvian government has ratified several conventions, such as the Indigenous and Tribal Peoples Convention (ILO Convention 169), the Convention of Technical Cooperation with the Inter-American Development Bank for the regularisation of indigenous reserves insulation project and the International Covenant on Economic, Social and Cultural Rights.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Peruvian legislation establishes that any person who in any form, offers, gives or promises a public official or public servant a donation, advantage or benefit to perform or omit acts in violation of their obligations, will be punished with between four and six years' imprisonment. In addition, this year, in order to avoid corrupt practices in the public sector, the Peruvian government has approved the figure of 'civil death' for public officials or public servants who are accused and convicted of corrupt practices. Likewise, for the private sector, entities will assume a major administrative responsibility.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Peruvian companies are not obliged to comply with foreign legislation that governs anti-bribery and foreign corrupt practices. However, if the parent company is incorporated and governed by such foreign legislation, it is very common that they apply these rules into their Peruvian subsidiary by internal policies or guidelines (eg, the Foreign Corrupt Practices Act of 1977 is applied to Peruvian subsidiaries as internal guidelines by mandate of the parent companies that are listed on New York Stock Exchange).

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Yes, Supreme Decree No. 028-2011-EM set up the special commission in charge of gathering information, supervision and monitoring the transparency and use of resources and tax revenues obtained from extractive industries. Said decree also regulated the actions needed for the implementation and development of the EITI in Peru.

In February 2012, the EITI board designated Peru as a compliant country.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign restrictions regarding ownership and investment in the mining industry. The Peruvian state promotes and encourages mining activity in all national territory, establishing the same restrictions and regulations to any private, national or foreign party. The only limitation that foreigners have are those related to the acquisition of properties or concessions located within 50km of the Peruvian border, detailed in question 13.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

In order to consolidate an appropriate legal framework for the promotion of foreign investment, Peru is a member of the Multilateral Investment Guarantee Agency, a member of the International Centre for Settlement of Investment Disputes, a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has more than 32 bilateral agreements with countries in Asia, Europe and Latin America.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The Philippines has been ranked as the fifth most mineralised country in the world, with an estimated US$1 trillion in untapped reserves of copper, gold, nickel, zinc and silver. Despite the foregoing, statistics from the Philippine Mines and Geosciences Bureau (MGB) indicate that, as of 2016, there are only 41 operating mines. For the same year, the Philippine Department of Environment and Natural Resources (DENR) has placed the preliminary gross production value for large-scale metallic mining at 99.6 billion pesos.

2 What are the target minerals?

The Philippines' top mineral exports are copper, gold and nickel. Other target minerals include quartz, mica, iron, gypsum, feldspar, chromite, calcite and sulphur. Some target non-metallic minerals are sand and gravel, limestone, marble, clay and other quarry materials.

3 Which regions are most active?

The following regions have high metallic and gold mining activities: Benguet, Masbate, Cebu, Leyte, Compostela Valley, Davao, Palawan and Surigao.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Philippine legal system is a hybrid of both civil law and common law. The civil law elements are primarily derived from the civil law system of Spain and which are evident in the law on family relations, property, succession, and obligations and contracts. The common law elements are primarily derived from the Anglo-American system of the US. Examples of Philippine legal concepts derived from common law include, among others, the doctrines of equity, estoppel, laches, and stare decisis. The authority of Philippine courts is limited to the interpretation of law. Nevertheless, the Philippine Supreme Court may reverse rulings of lower courts, and even abandon principles laid down in previous rulings.

5 How is the mining industry regulated?

It is regulated by the Philippine Constitution, and through laws, regulations and ordinances issued by the national government and local government units. Mining companies must also comply with the regulatory requirements for corporations in the Philippines.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal laws that regulate the mining industry are Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the Mining Act), and its implementing rules and regulations, DENR Administrative Order No. 2010-21 (Mining Act IRR), both of which have not been amended in the past year. In 2012, Executive Order No. 79 (Institutionalising and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilisation of Mineral Resources) (EO 79) was issued as the policy of the Aquino administration. EO 79 instituted reforms such as a review of the performance of existing mining operations and cleansing of non-moving mining rights holders, imposed a moratorium against the issuance of mineral agreements (MAs) (until the enactment of legislation rationalising existing revenue sharing schemes and mechanisms), and constituted the Mining Industry Coordinating Council, among others. The new Duterte administration has not issued any order that has repealed, amended or replaced EO 79.

The DENR is the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, including mines. The MGB, a line bureau under the DENR, is responsible for the proper management and disposition of mineral lands and mineral resources. It promotes sustainable mineral resources development. The MGB director recommends to the DENR secretary the granting of MAs and monitors compliance with the terms and conditions of the MAs.

The MGB and the Environmental Management Bureau (EMB), another line bureau of the DENR, advise the secretary on matters relating to environmental management, formulate plans and policies on environmental quality standards, exercise supervision over regional offices in the implementation of plans and programmes and issue permits and clearances.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The mining industry uses the Philippine Mining Reporting Code (PMRC) for reporting of all solid minerals, including industrial minerals and coal where public reporting is required by the Philippine Stock Exchange (PSE). The PMRC sets out minimum standards for mining companies in accordance with the principles of transparency, materiality and competence.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Under the Philippine Constitution, the state owns all natural resources, including minerals. Thus, the exploration, development and utilisation of mineral resources are under the full control and supervision of the state, which may directly undertake the same, or enter into co-production, joint venture or production-sharing agreements with Filipino citizens, or corporations or associations at least 60 per cent of whose capital is owned by such citizens. The president also may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilisation of minerals, petroleum, and other mineral oils. Because of the state's full control and supervision over mining rights, owners of surface rights do not automatically have rights over mineral resources found within their properties.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The MGB regularly publishes information on the mining industry through its official website (www.mgb.gov.ph). The information published includes details on existing exploration permits (EPs), mineral production sharing agreements (MPSAs), financial and technical assistance agreements (FTAAs), mineral processing permits (MPPs), pending mining applications, and pending cases with the Mining Adjudication Board and Panel of Arbitrators. The MGB also releases current and historical statistics on the mining industry such as the production level and prices of each type of mineral. There is also a list of currently producing mines and a map of where these operate.

Under the Mining Act IRR, holders of EPs and MAs are required to submit mineral assessment reports. The submission of an assessment of the mineral potential in a prospected area is a prerequisite to converting an EP into an MA.

The MGB through its Land Geological Survey Division and Marine Geological Survey Division conducts geoscience surveys such as geological mapping, mineral exploration, geo-hazard assessment, vulnerability assessment, and other geological and geo-environmental studies. Mineral Land Surveys may also be conducted by geodetic engineers of the MGB and regional offices, deputised geodetic engineers in private practice and company-employed deputised geodetic engineers. These surveys and studies, however, are not readily available online.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Under the Philippine Constitution, exploration, development and utilisation of mineral resources shall be under full control and supervision of the state. Nevertheless, mining rights may be acquired by private parties through an FTAA, an EP or an MA.

The holder of an EP is granted the right to conduct exploration for all minerals in specified areas. The MGB director's approval of a declaration of a mining project feasibility study grants the holder of an EP the exclusive right to an MA or FTAA. An MA grants to the holder thereof the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area, while an FTAA grants the right to provide financial or technical assistance directly to the government to undertake large-scale exploration, development and utilisation of mineral resources.

EO 79 suspended the issuance of MAs pending enactment of new legislation rationalising existing revenue sharing schemes and mechanisms. As of the end of February 2017, Senate Bill No. 927 (An Act Establishing the Fiscal Regime and Revenue Sharing Arrangement for Large-Scale Metallic Mining, and for Other Purposes) remains pending with the Senate Committee on Ways and Means. As of the same date, no similar bill had been filed or was pending in the House of Representatives.

11 What is the regime for the renewal and transfer of mineral licences?

The term of an EP is two years from the date of its issuance. It may be renewed for another two years, but the total term of the permit shall not exceed four years for non-metallic mineral exploration or six years for metallic mineral exploration. In cases, however, where the permittee failed to file the declaration of mining project feasibility during the total term of the EP and further exploration is warranted, the EP may be further renewed by the DENR secretary for another term of two years for the very purpose of preparing or completing the feasibility studies and the filing of the declaration of mining project feasibility and the pertinent MA or FTAA application. In case the permit expires before the declaration of mining project feasibility is approved and the MA or FTAA is filed, the permit is automatically extended until such time that the MA or FTAA application is approved.

The renewal of an EP may be granted by the DENR secretary, through the MGB director, only if the permittee has complied with all its terms and conditions, and has not been found guilty of violating any provision of the Mining Act and its IRR.

The term of an MA shall not exceed 25 years from its date of execution, renewable for another 25 years under the same terms and conditions, without prejudice to changes mutually agreed upon by the government and the contractor. After its renewal, the mining operations may be undertaken by the government or through a contractor. The contract to operate the mine shall be awarded to the highest bidder in a public bidding, with the contractor having the right to match the highest bid upon reimbursement of all reasonable expenses of the highest bidder.

The term of an FTAA shall not exceed 25 years from its date of execution, renewable for another term not exceeding 25 years under such terms and conditions as may be provided for by law and mutually agreed upon by the parties.

EPs may be transferred or assigned subject to the approval of the MGB director. MAs may be transferred subject to the approval of the MGB Regional Director. FTAAs may be transferred subject to the approval of the MGB Regional Director, taking into account the national interest and public welfare.

12 What is the typical duration of mining rights?

Mining rights involve EPs, MAs, FTAAs, quarry, sand and gravel, guano, gemstone gathering permits and small-scale mining permits.

The term of an EP shall be for a period of two years from the date of its issuance, renewable for another two years, but not to exceed a total of four years for non-metallic mineral exploration or six years for metallic exploration. The DENR secretary, MGB director or MGB regional director concerned may cancel the EP for violations by the permittee of the terms and conditions thereof, including the failure to secure the required proof of consultation with or project presentation to the Sanggunian concerned.

The term of an MP shall not exceed 25 years from the date of its execution, renewable for another term not exceeding 25 years. The MA shall be cancelled, revoked, or terminated for the failure of the contractor to comply with the terms and conditions thereof.

The term of a FTAA shall not exceed 25 years from the date of its execution, renewable for another term not exceeding 25 years. The FTAA may be cancelled, revoked or terminated, after due process, under any of the grounds for the cancellation of a mining permit, MA or FTAA.

The respective terms of a quarry permit and a sand and gravel permit shall be five years from the date of its issuance, renewable for a term of five years but not to exceed a total term of 25 years. The term of a guano permit shall be one year or upon the extraction of the quantity as specified in the permit. The term of a gemstone-gathering permit shall not exceed one year from the date of its issuance, renewable for periods of one year.

The grounds for the cancellation, revocation, and termination of an MP, MA or FTAA are falsehood or omission of facts in the application for the above permits which may alter, change or affect substantially the facts set forth in said statements; non-payment of taxes and fees due to the government for two consecutive years; failure to perform all other obligations, including abandonment, under the permits or agreements; violation of any of the terms and conditions of the permits or agreements; and violation of existing laws, policies and rules and regulations.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Yes. Under the Philippine Constitution, only Philippine citizens or corporations at least 60 per cent of whose capital is owned by such citizens may enter into MAs. Non-Filipino nationals or corporations that are 100 per cent foreign-owned may enter into EPs and FTAAs only.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by the Philippine Constitution, particularly the non-impairment clause under section 10, article III, which states that no law impairing the obligation of contracts shall be passed. The

non-impairment clause is limited in application to laws that derogate from prior acts or contracts by enlarging, abridging or in any manner changing the intention of the parties. There is impairment if a subsequent law changes the terms of a contract between the parties, imposes new conditions, dispenses with those agreed upon or withdraws remedies for the enforcement of the rights of the parties.

There is a system of arbitration for mining disputes provided under the Mining Act. The Panel of Arbitrators has exclusive and original jurisdiction to hear and decide mining disputes involving the following:

- rights to mining areas;
- mineral agreements, FTAAs or permits; and
- surface owners, occupants and claim holders or concessionaires.

The jurisdiction of the panel is limited only to those mining disputes that raise questions of fact or matters requiring the application of technical knowledge and experience.

Foreign arbitral awards in respect of domestic mining disputes are recognised and enforceable in this jurisdiction. Under section 42 of Republic Act No. 9285 (the Alternative Dispute Resolution Act of 2004), the recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court (RTC). When confirmed by the RTC, they are enforced as a foreign arbitral award, and enforced in the same manner as final and executory decisions of Philippine courts of law. Thus, foreign arbitral awards are not immediately executory in the sense that they may still be judicially reviewed and need to be confirmed by the RTC.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Permit holders and contractors, upon written notice and payment of just compensation, are entitled to enter and occupy said mining areas or lands when mining areas are so situated that, for purposes of more convenient operations, it is necessary to build, construct or install on the mining areas or lands owned, occupied or leased by other persons, such infrastructures as roads, railroads, mills, waste dump sites, tailings ponds, warehouses, staging or storage areas and port facilities, tramways, runways, airports, electric transmission, telephone or telegraph lines, dams and their normal flood and catchment areas, sites for water wells, ditches, canals, new river beds, pipelines, flumes, cuts, shafts, tunnels or mills. Further, holders of mining rights cannot be prevented from entering their contract areas, provided that written notices are sent to the surface owners, occupants and concessionaires, and that a bond is posted. In case of disagreement, the matter shall be brought before the Panel of Arbitrators.

Permit holders, however, may execute agreements with the surface owners, occupants or concessionaires regarding entry and use of their land for mining purposes.

Where the surface owners of the lands, occupants or concessionaires refuse to allow the permit holder or contractor entry into the lands, the permit holder or contractor shall bring the matter before the panel of arbitrators for proper disposition.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Yes, the Philippine Constitution allows the government and state agencies to participate in mining projects. The state may directly undertake exploration, development and utilisation of mineral resources. It may also enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60 per cent of whose capital is owned by such citizens. Finally, the state may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilisation.

Neither the Philippine Constitution nor the Mining Act requires mining project companies to be listed with the PSE.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Mining Act provides that contractors' properties are generally free from expropriation. By way of exception, however, the government may expropriate when the purpose is public use or in the interest of national welfare or defence. The law does not provide for the specific manner of determining compensation but requires that just compensation be paid.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

The Mining Act IRR specifically enumerates the areas that are closed to mining applications, as follows:

(i) areas covered by valid and existing mining rights and mining applications subject to item (iii);
(ii) old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks, provincial and municipal forests, tree parks, greenbelts, game refuges, bird sanctuaries and areas proclaimed as marine reserves and marine parks and tourist zones as defined by law and identified initial components of the National Integrated Protected Areas System (NIPAS) pursuant to Republic Act No. 7586 and such areas expressly prohibited thereunder, as well as under Department Administrative Order No. 25, series of 1992, and other laws;
(iii) areas that the DENR secretary may exclude based, among others, on proper assessment of their environmental impacts and implications on sustainable land uses, such as built-up areas and critical watersheds with appropriate barangay, municipal, city or provincial council ordinance specifying therein the location and specific boundary of the concerned area;
(iv) offshore areas within 500 metres of the mean low tide level and onshore areas within 200 metres of the mean low tide level along the coast;
(v) in the case of seabed or marine aggregate quarrying, offshore areas of less than 1,500 metres from the mean low tide level of land or island and where the seabed depth is less than 30 metres, measured at mean sea level; and
(vi) areas expressly prohibited by law.

The following areas may be opened for mining applications, subject to the pertinent conditions:

- military and other government reservations, upon prior written clearance by the government agency having jurisdiction over such reservations;
- areas near or under public or private buildings, cemeteries, archaeological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams or other infrastructure projects, public or private works, including plantations or valuable crops, upon written consent of the concerned government agency or private entity subject to technical evaluation and validation by the bureau;
- areas covered by FTAA applications that shall be opened for quarry resources;
- areas covered by mining applications upon the written consent of the FTAA applicants (provided that sand and gravel permit applications shall not require consent from the FTAA), EP or MA applicant, except for MA or EP applications covering sand, gravel or alluvial gold (provided, further, that the MGB director shall formulate the necessary guidelines to govern the foregoing);
- areas covered by small-scale mining under Republic Act No. 7076 and Presidential Decree No. 1899 upon prior consent of small-scale miners, in which case a royalty payment, upon the utilisation of minerals, shall be agreed upon by the concerned parties and shall form a trust fund for the socioeconomic development of the concerned community; and
- DENR project areas upon prior consent from the concerned agency.

The above enumeration notwithstanding, it appears that the list of protected areas was expanded by EO 79 to include the following:

- prime agricultural lands, in addition to lands covered by Republic Act No. 6657, or the Comprehensive Agrarian Reform Law of 1988, as amended, including plantations and areas devoted to valuable crops, and strategic agriculture and fisheries development zones and fish refuge and sanctuaries declared as such by the secretary of the Department of Agriculture;
- tourism development areas, as identified in the National Tourism Development Plan; and

- other critical areas, island ecosystems and impact areas of mining as determined by current and existing mapping technologies, that the DENR may hereafter identify pursuant to existing laws, rules and regulations such as, but not limited to, the NIPAS Act.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Government share

The total government share in an MPSA shall be the excise tax on mineral products.

The share of the government in co-production and joint venture agreements shall be negotiated by the government and the contractor taking into consideration the following:

- capital investment in the project;
- risks involved;
- contribution of the project to the economy; and
- other factors that will provide for a fair and equitable sharing between the parties.

The government shall also be entitled to compensation for its other contributions, which shall be agreed upon by the parties and shall consist, among other things, of the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for in existing laws.

The government share in an FTAA shall consist of, among other things, basic government share, consisting of contractor's income tax, customs duties and fees on imported capital equipment, value-added tax on imported tax and services, withholding tax on interest payments on foreign loans, withholding tax on dividends to foreign stockholders, capital gains tax, royalties for mineral reservations and to indigenous peoples, local business tax, real property tax, community tax, occupation fees, registration and permit fees and all other national and local government taxes, royalties and fees. It shall be negotiated by the government and the contractor taking into consideration, among others, the capital investment of the project, risks involved, contribution of the project to the economy and the technical complexity of the project. However, the government share in the FTAA shall only commence after the contractor has fully recovered pre-operating expenses and exploration and development expenditures.

After a certain period, FTAA contractors pay an additional government share consisting of the difference between the basic government share and 50 per cent of the net mining revenue, if the basic government share is less than 50 per cent of the net mining revenue.

Taxes

After the lapse of income tax holiday that is available under existing laws, the contractor shall pay income tax provided for in the National Internal Revenue Code of the Philippines (NIRC). The contractor is also liable for excise tax on mineral products and value added tax under the NIRC and customs duties under the Tariff and Customs Code of the Philippines. Lastly, the contractor is also liable for local business taxes and real property tax under the Local Government Code.

The contractor is also liable for an annual occupation fee and mine waste and tailing fees. The amount of the occupation fee to be paid will depend on the size of the area occupied by the contractor.

Royalties

For MAs, FTAAs, or mining permits covering ancestral lands, the contractor shall pay royalties to the concerned Indigenous Cultural Community or Communities (ICC) based on gross output. Such payment shall depend on the agreement between the ICC and the contractor.

For MAs and FTAAs over areas covered by small-scale miners, the contractor shall pay royalties to the concerned small-scale miners upon utilisation of the minerals. Such payment shall depend on the agreement between the small-scale miners and the contractor.

Mining operations within the mineral reservations are subject to a royalty, paid to the MGB, that shall not be less than 5 per cent of the market value of the gross output of the minerals or mineral products extracted or produced from the mineral reservations exclusive of all other taxes.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The Mining Act provides that contractors in mineral agreements and FTAAs shall be entitled to fiscal and non-fiscal incentives as provided in the Omnibus Investments Code. It mandates that mining activities be always included in the Investment Priorities Plan that is prepared annually by the Board of Investments. Under the 2017–2019 Investment Priorities Plan, approved on 28 February 2017, mining projects are limited to capital equipment incentives. However, as of this writing, the Board of Investments is still formulating guidelines with respect to such incentives for mining projects.

The Mining Act provides the following incentives:

- pollution control devices acquired, constructed or installed by contractors will not be considered as improvements on the land or building where they are placed, and will not be subject to property tax and other taxes or assessments;
- a net operating loss without the benefit of incentives incurred in any of the first 10 years of operations may be carried over as a deduction from taxable income for the next five years immediately following the year of such loss. The entire amount of the loss will be carried over to the first of the five taxable years following the loss, and any portion of such loss that exceeds the taxable income of such first year will be deducted in a like manner from the taxable income of the next remaining four years;
- fixed assets may be depreciated as follows:
  - to the extent of not more than twice as fast as the normal rate of depreciation or depreciated at normal rate of depreciation if the expected life is 10 years or less; or
  - depreciated over any number of years between five years and the expected life if the latter is more than 10 years, and the depreciation thereon allowed as a deduction from taxable income; and
- the contractor may opt to deduct exploration and development expenditures accumulated at cost as of the date of the prospecting or exploration and development expenditures paid or incurred during the taxable year, up to 25 per cent of the net income from mining operations. The actual exploration and development expenditures minus the 25 per cent net income from mining shall be carried forward to the succeeding years until fully deducted.

The Mining Act also provides that the contractor will be entitled to the basic rights and guarantees provided in the Philippine Constitution and such other rights recognised by the government, which include the following:

- repatriation of investments, or the right to repatriate the entire proceeds of the liquidation of the foreign investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation;
- remittance of earnings, or the right to remit earnings from the investment in the currency in which the foreign investment was originally made and at the exchange rate prevailing at the time of remittance;
- foreign loans and contracts, or the right to remit at the exchange rate prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from financial or technical assistance contracts;
- freedom from expropriation, or the right to be free from expropriation by the government of the property represented by investments or loans, or of the property of the enterprise except for public use or in the interest of national welfare or defence and upon payment of just compensation. In such cases, foreign investors or enterprises will have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance;
- requisition of investment, or the right to be free from requisition of the property represented by the investment or of the property of the enterprises except in cases of war or national emergency

and only for the duration thereof. Just compensation will be determined and paid either at the time or immediately after cessation of the state of war or national emergency. Payments received as compensation for the requisitioned property may be remitted in the currency in which the investments were originally made and at the exchange rate prevailing at the time of remittance; and

- confidentiality, where any confidential information supplied by the contractor pursuant to the Mining Act and its IRR will be treated as such by the DENR and the government, and during the term of the project to which it relates.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

At present, there are no tax stabilisation agreements in force.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The Mining Act does not provide that the government is entitled to a carried interest or a free carried interest in mining projects. Nevertheless, the law appears to limit the supposed government share to the usual taxes, royalties and fees.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Gains realised on a transfer of licence are generally subject to income tax.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

The law generally makes no distinction between the duties, royalties and taxes payable by domestic and foreign parties whether to the government or the indigenous communities in the area.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Considering the capital requirement, private parties make use of corporations or enter into joint ventures to carry on mining activities. Applicants for EPs, MAs, and FTAAs must have authorised capital in the amount of 100 million Philippine pesos with 6.25 million pesos paid-up. Applicants for FTAAs are required to have a minimum authorised capital of 500 million pesos upon the grant of the FTAA.

26 Is there a requirement that a local entity be a party to the transaction?

Applicants for MAs must be Filipino citizens, or a corporation, partnership, association, or cooperative at least 60 per cent of the capital of which is owned by Filipino citizens. The participation of a local entity is not required for EPs, FTAAs or MPPs, which may be held by a 100 per cent foreign-owned entity.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

To date, the Philippines has signed bilateral investment agreements with Argentina, Australia, Austria, Bangladesh, Belgium, Cambodia, Canada, China, Czech Republic, Denmark, Finland, France, Germany, India, Iran, Italy, Korea, Laos, Mongolia, Myanmar, Netherlands, Pakistan, Portugal, Romania, Saudi Arabia, Spain, Switzerland, Taiwan, Thailand, Turkey, the UK, the US and Vietnam.

The Philippines has also entered into tax treaties with Australia, Austria, Bahrain, Bangladesh, Belgium, Brazil, Canada, China, the Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Korea, Kuwait, Malaysia, the Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Spain, Sweden, Switzerland, Thailand, United Arab Emirates, the US and Vietnam.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing available to private parties carrying on mining activities are debt and equity financing, as well as foreign investments. The domestic public securities market finances the mining industry through bond issuances, initial public offering and sale of preferred shares.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

In general, the government, its agencies or major pension funds do not provide direct financing to mining projects. Nevertheless, government financial institutions, such as the Social Security System and the Government Service Insurance System, have investments in certain mining corporations.

30 Please describe the regime for taking security over mining interests.

There is currently no Philippine legal framework for taking security over mining interests. However, the Mining Act IRR requires that MAs and FTAAs include a stipulation that the financial institutions that have granted loans to contractors shall have the authority to designate their assignees in case of default by the contractors.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The Mining Act and its IRR impose the policy of preferential use of local goods, services and technologies over its imported counterparts to the extent compatible with efficient mining operations. In relation to labour, the Mining Act IRR specifically requires that the majority of a contractor's personnel in its mining operations should be qualified Filipino citizens originating from the host and neighbouring communities in the municipality and province where the mine is located. Further, the Mining Act IRR provides strict limitations in the hiring of foreign personnel.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

The standard conditions covering equipment supplies that must be observed by the contracting parties are in DENR Administrative Order No. 2000-98 or the Mine Safety and Health Standards, issued by the DENR in order to comply with the Philippine's international obligations relating to safety and health.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There is no requirement that metallic minerals be processed or sold in the Philippines. However, the Philippine government examines all sales and exportation of minerals or mineral products including the terms and conditions of all sales commitments. The government must be informed when any marketing agreement or sales contract is entered into with foreign and local buyers.

Furthermore, certain permits must be obtained for certain types of activities. For mineral trading either domestically or internationally, the party must be registered with the Department of Trade and Industry and accredited by the DENR. Marketing contracts and sales agreements involving commercial disposition of minerals and by-products shall be subject to approval by the Secretary of the DENR upon recommendation of the Director of the MGB. The approved marketing contracts and sales agreements shall be registered with the MGB and is confidential between the Philippine government and the contractor. In addition, the sale must be made at the highest commercially achievable market price and lowest commercially achievable commissions and related fees under circumstances then prevailing. Parties must

likewise negotiate sales terms and conditions compatible with world market conditions.

For the transport of ores, a permit must first be secured from the regional director for mines under the DENR, having jurisdiction over the area where the ores were extracted. For exportation of ores, a permit must be secured from the MGB.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The Philippine government encourages inward foreign investments in mining. As a rule, foreign investments need not be registered with the Philippine Central Bank (BSP). However, if a foreign investment is classified as a direct investment or an inward foreign portfolio investment in a peso-denominated debt instrument issued onshore by private resident firms, it must be registered with the BSP.

Moreover, there are no restrictions on the disposition of the proceeds from the export of minerals and mineral products. Under BSP regulations, foreign exchange receipts or earnings of residents from exports may be used freely for any purpose. Such proceeds may be sold for pesos, retained, or deposited in foreign currency accounts, whether in the Philippines or abroad at the option of the exporter.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining Act and its IRR contain provisions on environmental protection. Other environmental laws that may apply to mining operations include the Toxic Substance and Hazardous and Nuclear Wastes Control Act of 1990, the Clean Air Act of 1999 and the Clean Water Act of 2004. The DENR, and the agencies under it, MGB and EMB, ensure compliance with environmental laws.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

An environmental compliance certificate (ECC) is required for mining projects. To secure an ECC, a proponent must prepare and submit an environmental impact statement (EIS). The EIS should include, among others, the following:

- baseline environmental conditions focusing on the sectors (and resources) most significantly affected by the proposed action;
- impact assessment focused on significant environmental impacts (in relation to project construction and commissioning, operation and decommissioning), taking into account cumulative impacts;
- supporting documents, including technical and socio-economic data used and generated, certificate of zoning viability and municipal land use plan;
- proof of consultation with stakeholders; and
- proposals for environmental monitoring and guarantee funds, including a justification of the amount, if any.

The environmental impact assessment (EIA) process involves four steps: scoping, conduct of EIA study and report preparation, review and evaluation of the EIA report, and decision making. The EMB takes at least 40 days to process an ECC application.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The Mining Act IRR requires that a Final Mine Rehabilitation and Decommissioning Plan (FMRDP) or Mine Closure Plan be integrated in the Environmental Protection and Enhancement Programme (EPEP) to be submitted by contractors. Contractors and permit holders must rehabilitate the excavated, mined-out, tailings covered and disturbed areas to the condition of environmental safety pursuant to the FMRDP or Mine Closure Plan.

The government has established an environmental guarantee fund mechanism known collectively as the Contingent Liability and Rehabilitation Fund (CLRF). The CLRF is comprised of the Mine Rehabilitation Fund (MRF), Mine Waste and Tailings (MWT) fees and the Final Mine Rehabilitation and Decommissioning Fund (FMRDF). The MRF must be established and maintained by each operating contractor and permit holder as a reasonable environmental deposit to ensure availability of funds for the satisfactory compliance with the commitments and performance of the activities stipulated in the EPEP. MWT fees are collected biannually from each operating contractor and permit holder based on the amounts of mine waste and mill tailings it generated for the said period to be used for payment of compensation for damages caused by any mining operations. The FMRDF must be established by each operating contractor or permit holder to ensure that the full cost of the approved FMRDP is accrued before the end of the operating life of the mine.

38 What are the restrictions for building tailings or waste dams?

DENR Memorandum Order No. 32-99 (MO 32-99), issued in 1999, provides for 'policy guidelines and standards for mine wastes and mill tailings management'. Mining permittees must first secure a clearance from the MGB, without prejudice to other required permits from other agencies of the DENR, before constructing and operating building tailings or waste dams. An annual audit is conducted to assess compliance with the guidelines in MO 32-99. Permittees are required to establish contingency and emergency preparedness plans to deal with significant events, which are assessed by the MGB prior to issuing the said clearance.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining Act is the principal health and safety law for the mining industry. The DENR, through the MGB, is the principal regulatory body that administers the Mining Act. The Mining Act IRR contains provisions on mining health and safety measures.

The principal labour law applicable to the mining industry is the Philippine Labour Code. The Department of Labour and Employment is the principal regulatory body that administers the Labour Code.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Contractors have rights over its mine production including the mining waste products but are required to use the best available appropriate anti-pollution technology and facilities to protect the environment and rehabilitate areas affected by mine waste and mill tailings and other pollution. Moreover, MWT fees are collected in order to cover damages caused by pollution.

Under EO 79, all valuable metals in abandoned ores and mine wastes and mill tailings generated by previous and now defunct mining operations belong to the state and shall be developed and utilised through competitive public bidding in accordance with the pertinent provisions of law. Further, in the case of existing mining operations, all valuable metals in mine wastes and mill tailings shall automatically belong to the state upon the expiry of the pertinent mining contracts and shall be similarly developed and utilised through public bidding.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Mining Act mandates that a party to a mining agreement or a financial or technical assistance agreement shall give preference to Filipinos who are qualified to perform the corresponding work with reasonable efficiency and without hazard to the safety of the mining operations within the Philippines. However, as an exception, a party may hire foreign employees, subject to the provisions of the Commonwealth Act No. 613, as amended (Philippine Immigration Act), for technical and specialised work that, in his or her judgment and with the approval of the MGB director, requires highly specialised training or lengthy experience in the exploration, development or utilisation of mineral resources.

Further, under Republic Act No. 7610, as amended, children under the age of 18 shall not be allowed to work under circumstances that are hazardous or likely to be harmful to their health and safety.

In addition, foreign nationals seeking admission to the Philippines for employment must secure a permit from the Department of Labour and Employment after determination that there is no available Filipino employee who is competent, able and willing to do the job intended for the foreign national.

Moreover, employment in connection with mining activities shall likewise be subject to the provisions of Commonwealth Act No. 108 (Anti-Dummy Law), as amended, which prohibits any person not possessing the necessary requisites under the law and constitution to intervene in the management, operation, administration or control thereof. Technical personnel, however, may be exempted after having been specifically authorised by the secretary of the Department of Justice. Further, the election of foreigners as members of the boards of directors or governing bodies of corporations or associations engaged in partially nationalised activities are allowed in proportion to their allowable participation or share in the capital of such entities.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are currently no principal community engagement or CSR laws that are applicable to the mining industry. However, community engagement or social development provisions are found in various laws and regulations, including the Mining Act IRR. Under the Mining Act IRR, a contractor is mandated to annually allot a minimum of 1.5 per cent of operating costs to do the following:

- promote the general welfare of the inhabitants within the host and neighbouring communities;
- develop a programme for advancement of mining technology and geosciences; and
- develop and institutionalise an information, education, and communication programme for greater public awareness and understanding of responsible mining and geosciences.

Further, public participation is one of the three general criteria in the EIS system. It helps the community reach an informed decision on the social acceptability of a mining project. In this regard, the local government units and the MGB facilitate the dialogue process. In the case of ICCs or indigenous peoples (IPs), free and prior consent of the concerned ICCs and IPs must be secured prior to the conduct of mining operations.

Under mining regulations, the contractor is mandated to coordinate with proper authorities in providing development plans for host and neighbouring communities, promote community service and volunteerism in the community, and help create self-sustaining income-generating activities such as reforestation and production of goods and services needed by the mine and the community. The DENR, the MGB, and the concerned local government units administer this requirement.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

ICCs and IPs are given priority rights in the harvesting, extraction, development or exploitation of natural resources within their ancestral domains. No ancestral land shall be opened for mining operations without free and prior consent of the ICCs and IPs concerned. The parties must enter into an agreement with ICCs and IPs indicating the royalty payment, which may not be less than 1 per cent of the gross output. The said royalty shall form part of a trust fund for the socioeconomic well-being of the ICCs and IPs.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The Philippines is not a signatory to treaties, conventions or protocols that specifically relate to CSR issues.

Update and trends

In August 2016, the DENR, under former Secretary-Designate Regina P Lopez, a known anti-mining advocate, began an audit of the entire mining industry. In February 2017, Ms Lopez conducted two press conferences where she announced the suspension and closure of five and 23 mining projects, respectively, for supposed violations of environmental laws and the cancellation of 75 MPSAs for allegedly covering watersheds, among others. These orders have been questioned by the affected mining companies before the Office of the President, which resulted in their suspended implementation, essentially on violations of due process.

In May 2017, Ms Lopez' appointment was rejected by the Commission on Appointments after considerable public opposition especially from the mining companies and the members of Congress whose constituents rely on the cancelled or suspended projects. President Rodrigo R Duterte, who earlier publicly expressed his support for Ms Lopez' official acts, has since appointed Mr Roy Cimatu, a retired general, to replace Ms Lopez. While Mr Cimatu's appointment was cautiously welcomed by the Philippine mining industry, it is unclear whether he will reverse the acts of Ms Lopez, which subsist as valid until otherwise repealed or amended by Mr Cimatu, as DENR Secretary, or the Office of the President, or nullified by the courts. Mr Cimatu's appointment is likewise subject to confirmation by the Commission on Appointments.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Republic Act No. 3019, as amended, also known as the Anti-Graft and Corrupt Practices Act, enumerates all corrupt practices of any public officer, declares them unlawful and provides the corresponding penalties of imprisonment, perpetual disqualification from public office, and confiscation or forfeiture of unexplained wealth in favour of the government. Among the corrupt practices, the following are acts usually cited:

- directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for him or herself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any government permit or licence, in consideration for the help given or to be given; and
- causing any undue injury to any party, including the government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his or her official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence.

The law also penalises private individuals who participate in the corrupt practices listed under the statute.

Republic Act No. 6713, also known as the Code of Conduct and Ethical Standards for Public Officials and Employees, requires all government personnel to make an accurate statement of assets and liabilities, disclose net worth and financial connections. It also requires new public officials to divest ownership in any private enterprise within 30 days from assumption of office to avoid conflict of interest.

Republic Act No. 7080, also known as the Act Defining and Penalising the Crime of Plunder, penalises any public officer who by him or herself or in connivance with members of his or her family, relatives by affinity or consanguinity, business associates, accumulates or acquires ill-gotten wealth, through a combination of series of event criminal acts, an aggregate amount to the total value of at least 50 million pesos.

Act No. 3815, also known as the Revised Penal Code, penalises public officers for direct bribery, indirect bribery and qualified bribery. It also penalises private individuals who offer, promise or give gifts to a public officer under circumstances that will make the public officer liable for direct or indirect bribery.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

No. Although the Philippines has been a signatory to the United Nations Convention Against Corruption (UNCAC) since 2003, the Philippine Congress has not yet enacted a law specifically implementing all the provisions of the UNCAC. However, there has been partial and full implementation of some of the provisions in the UNCAC as reflected in various legislations such as Republic Act No. 9160, as amended or the Anti-Money Laundering Act; Republic Act No. 9485 or the Anti-Red Tape Act; and Republic Act No. 3019, as amended, or the Anti-Graft and Corrupt Practices Act, among others. Companies registered in the US and the UK must also comply with the US Foreign Corrupt Practices Act and the UK Bribery Act of 2010, respectively.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The president, through EO 79, mandated the establishment of mechanisms to operationalise the EITI in the mining sector. Following EO 79, the president issued Executive Order No. 147, series of 2013, creating the Philippine EITI Multi-Stakeholder Group. Philippine EITI developments may be found at www.ph-eiti.org.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Yes. Mining is considered a nationalised industry, the conduct of which is limited by the Philippine Constitution to Philippine citizens or corporations at least 60 per cent of whose capital is owned by such citizens. Hence, only Philippine citizens or such corporations may enter into MAs. Nevertheless, non-Philippine nationals, or corporations that are 100 per cent foreign-owned, may still enter into EPs and FTAAs.

Philippine courts and administrative agencies apply two tests to determine whether a corporation meets the 60 per cent requirement: the 'control test' and the 'grandfather rule'. The 'control test' computes the total percentage of foreign ownership based on the shares directly held by foreigners in a corporation. The 'grandfather rule' computes the total percentage of foreign ownership by tracing both the direct and indirect shareholdings of foreigners based on the company's corporate structure. In *Narra Nickel Mining and Development Corporation v Redmont Consolidated Mines*, 722 SCRA 382 (2014), 748 SCRA 455 (2015), the Philippine Supreme Court held that the 'control test' remains the primary test and must be complied with in all cases. However, notwithstanding compliance with the 'control test', the 'grandfather rule' may additionally apply when doubt exists as to the extent of control and beneficial ownership in a corporation, such as when a foreign-owned corporation practically provided all the funds in an ostensibly Filipino-owned corporation.

In *Roy v Herbosa*, G.R. No. 207246 (22 November 2016), the Supreme Court clarified that compliance with nationality restrictions was validly limited by the Securities and Exchange Commission on the voting shares and the total outstanding capital stock of the corporation. This clarifies the earlier ruling of the same court in *Heirs of Gamboa v Teves*, 682 SCRA 397 (2011), which ostensibly required the nationality restrictions to be applied to each class of shares.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

There is currently no multilateral international treaty or convention to which the Philippines is a party that specially applies to the mining industry or an investment in the mining industry. However, the Philippines has bilateral investment treaties, 32 of which are in force with other states and economic unions, specifically: Argentina, Australia, Austria, Bangladesh, Belgium-Luxembourg Economic Union, Canada, Chile, China, Czech Republic, Denmark, Finland, France, Germany, India, Italy, Korea, Kuwait, Mongolia, Myanmar, Netherlands, Portugal, Romania, Russia, Saudi Arabia, Spain, Switzerland, Syria, Taiwan, Thailand, Turkey, United Kingdom and Vietnam. These bilateral investment treaties typically include provisions generally prohibiting the expropriation of investments in the Philippines of nationals or permanent residents of a contracting state (except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation), as well as clauses allowing the nationals or permanent residents of a contracting state to submit a dispute involving the Philippine government to international commercial arbitration.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry has historically been a key driver of the South African economy. Economic activity in modern-day South Africa has been centred on mining activities, their ancillary services and supplies. The country's stock exchange in Johannesburg was established in 1887, a decade after the first diamonds were discovered on the banks of the Orange River, and almost simultaneously with the gold rush on the world-famous Witwatersrand. Today, the South African mining sector employs approximately 490,000 workers (5 per cent of the South African work force) and contributes to roughly 8 per cent of the country's gross domestic product.

Unsurprisingly, the country's mineral wealth is a valuable source of foreign direct investment. In spite of prevailing regulatory uncertainty the mining industry remains a key focus point of the government and the private sector, and continued efforts are being made to engage foreign investors to stimulate further growth.

2 What are the target minerals?

South Africa has the world's largest resources of platinum group metals, manganese, chromium, gold and alumino-silicates. The country accounts for over 40 per cent of the global production of ferrochromium, platinum group metals, vanadium and alumino-silicates exports, and is one of the world's largest exporters of platinum group metals, gold and vanadium. In addition, South Africa has large deposits of copper, zinc, iron, coal and diamonds.

3 Which regions are most active?

Various underground geological formations are found in South Africa. These formations span across the country and as a consequence mining activities occur in most of its provinces.

Some significant examples of these geological formations include:

- the Witwatersrand Basin (gold, uranium, silver, pyrite and osmiridium deposits);
- the Bushveld Complex (platinum group metals and associated copper, nickel, cobalt, chromium and vanadium-bearing titanium-iron ore deposits);
- the Transvaal Supergroup (manganese and iron ore deposits);
- the Karoo Basin (bituminous coal and anthracite deposits); and
- the Phalaborwa Igneous Complex (copper, phosphate, titanium, vermiculite, feldspar and zirconium deposits).

Legal and regulatory structure

4 Is the legal system civil or common law-based?

South Africa has a mixed legal system. Its doctrines and concepts are influenced both by the civilian tradition (in an uncodified Romano-Dutch form brought by early Dutch settlers) and by the common law tradition (introduced during the British colonial period).

The mineral resources sector is primarily regulated by statute and in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). The common law will apply to the extent that the MPRDA does not regulate a specific issue but the provisions of the MPRDA will prevail to the extent of any inconsistency.

5 How is the mining industry regulated?

The mining industry is regulated at national level by the Department of Mineral Resources (DMR) which, through its regional offices, implements and administers the MPRDA.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The mining industry is primarily regulated under the MPRDA. Black economic empowerment in the mining industry is currently regulated under the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010 (Mining Charter, 2010). There are currently amendments proposed to both the MPRDA, in terms of the MPRDA Amendment Bill,2013, and the Mining Charter, 2010, in terms of the draft Reviewed Mining Charter published for public comment on 15 April 2016. As at the date of publication, these amendments had not yet been passed into law.

The DMR, through its national and regional offices, is the executive body primarily tasked with regulating the mining industry. Other statutes relevant to the mining industry include:

- the National Environmental Management Act 1998 (NEMA);
- the Specific Environmental Management Acts, which were promulgated to operate in conjunction with NEMA and regulate matters such as waste, biodiversity, protected areas and air quality;
- the National Water Act 1998;
- the Labour Relations Act 1995; and
- the Mine Health and Safety Act 1996.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC) is used by the South African mining industry for reporting mineral resources and mineral reserves. The first revision of SAMREC was published in 2000 and was incorporated into the Listings Requirements of the Johannesburg Securities Exchange (JSE). A second edition of SAMREC was published in 2007 and amended in 2009. These previous editions have now been superseded by the current version of SAMREC, SAMREC 2016, which became mandatory with effect from 1 January 2017.

SAMREC stipulates minimum standards for the reporting of exploration results, mineral resources and mineral reserves. However, it does not specify the technical details relating to exploration results, mineral resource and mineral reserves. The interpretation of technical and geological data can be open to interpretation and may have an impact on project design and financial modelling. SAMREC provides guidelines on the interpretation and reporting of technical and geological data in order to ensure consistency.

SAMREC requires that mineral resources are classified, and must be reported, in order of increasing confidence in respect of geoscientific evidence, into inferred, indicated or measured categories. Any mineralisation that does not have demonstrated reasonable prospects for eventual economic extraction may not be included in a mineral resource.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The state is the custodian of South Africa's mineral and petroleum resources and has a duty to administer these resources for the benefit of all South Africans. As a consequence, an owner of the surface rights has no claim to the minerals found in, on or under the surface of his or her land.

Any person (including the owner of the surface rights) who wishes to exploit mineral resources in South Africa is required to first apply for and obtain the appropriate right under the MPRDA. The Minister of Mineral Resources is authorised to grant or refuse applications for rights under the MPRDA. Provided that an applicant meets all the requirements relating to the right for which the applicant has applied, the Minister is obliged to grant the right.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

All rights granted in terms of the MPRDA are required to be registered in the Mineral and Petroleum Titles Registration Office (MPTRO). Members of the public do not have an automatic right of access to these records, but can, subject to the permission of the Director-General of Mineral Resources, gain access to these records. The application process is regulated under the Promotion of Access to Information Act 2000.

Applications for prospecting and mining rights are generally lodged through the DMR's online application portal (SAMRAD). Although only limited information is available via SAMRAD, it will inform prospective applicants whether there are existing rights over the areas concerned.

The holders of prospecting rights are required to submit progress reports and data relating to their prospecting operations to the DMR and the South African Council for Geoscience (CGS). No person may dispose of or destroy any record, borehole core data or core-log data except in accordance with the written direction of the DMR in consultation with the CGS. These records are not generally accessible to the public.

The CGS is a public entity and was established under the Geoscience Act 1993. It was created to 'develop and publish world-class geoscience knowledge products and to render geoscience-related services to the South African public and industry'. If a prospective applicant for a prospecting or mining right requires information on South Africa's mineral resources, such information is available from the CGS. This information includes data received from mining companies, universities and research institutions worldwide. It maintains several mineral databases, some of which are accessible at its library, such as the COREDATA and COAL databases.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Under the MPRDA, any person (natural or juristic, foreign or local) may apply for and be granted a prospecting right, a mining right, a retention permit or a mining permit.

A prospecting right entitles the holder to the exclusive right to prospect for prescribed minerals over a prescribed area of land. The holder of a prospecting right also has the exclusive right to apply for and be granted a mining right in relation to the minerals and land to which the prospecting right relates. The holder of a prospecting right must:

- lodge such right for registration at the MPTRO within 60 days after the right has become effective;
- commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective;
- continuously and actively conduct prospecting operations in accordance with the prospecting work programme;
- comply with the terms and conditions of the prospecting right, relevant provisions of the MPRDA and any other relevant law;
- comply with the conditions of the environmental authorisation;
- pay the prescribed prospecting fees to the state;
- pay royalties to the state in respect of any minerals removed and disposed of; and
- submit progress reports and data of prospecting operations to the DMR and CGS.

A mining right entitles the holder to the exclusive right to mine for prescribed minerals over a prescribed area of land. The holder of a mining right must:

- lodge such right for registration at the MPTRO within 60 days after the right has become effective;
- commence with mining operations within one year from the date on which the mining right becomes effective;
- actively conduct mining operations in accordance with the mining work programme;
- comply with the terms and conditions of the mining right, relevant provisions of the MPRDA and any other relevant law;
- comply with the conditions of the environmental authorisation;
- comply with the requirements of the prescribed social and labour plan;
- pay royalties to the state; and
- submit the prescribed annual report, detailed the extent of the holders compliance with the Mining Charter, 2010 and the social and labour plan.

A mining permit entitles the holder to the exclusive right to mine for prescribed minerals over a prescribed area of land. A mining permit relates to small scale mining operations and will only be granted if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed five hectares in extent. The requirements and obligations imposed on a holder of a mining permit are less onerous than those imposed on the holder of a mining right. A retention permit may be granted under certain limited circumstances, the effect of which is to suspend the term of the prospecting right for the duration of the retention permit.

Currently, applications for these rights are considered on a 'first come, first served' basis. However, if the MPRDA Amendment Bill 2013 is passed in its current form the application process may be changed to a dual process where applications will be considered both in terms of a 'first come, first served' basis as well as a competitive bidding process.

11 What is the regime for the renewal and transfer of mineral licences?

The holder of a prospecting right, mining right, retention permit or mining permit has, subject to complying with certain requirements set out in the MPRDA, the exclusive right to apply for and be granted the renewal of such right in relation to the same mineral and same area of land:

- once for a period not exceeding three years, for a prospecting right;
- for further periods each of which may not exceed 30 years, for a mining right;
- for three periods, each of which many not exceed one year, for a mining permit; and
- once for a period not exceeding two years, for a retention permit.

The Minister has no discretion in relation to applications for renewals if the applicants have complied with the requirements set out in the MPRDA.

The Minister's prior written consent is required for a transfer of a prospecting or mining right by holder to a third party and the transfer of a controlling interest (both a direct and indirect interest) in a company that holds a mining or prospecting right. The transfer of any interest in a company listed on a recognised stock exchange is exempt from having to obtain the Minister's consent. The Minister's consent must

be granted if the cessionary, transferee, lessee, sub-lessee or assignee is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and satisfies the requirements for the initial granting of such right.

A mining permit and a retention permit are not capable of being transferred to a third party.

12 What is the typical duration of mining rights?

A prospecting right may be granted for an initial period of up to five years and a mining right may be granted for an initial period of up to 30 years. These rights may be renewed on terms and in accordance with the procedures discussed above.

The Minister may, subject to affording the holder of a right an opportunity to remedy any contravention, cancel or suspend a right, permission or permit if the holder:

- is conducting prospecting or mining operations in contravention of the MPRDA;
- breaches any term or condition of such right, permit or permission;
- is contravening any condition in the environmental authorisation; or
- has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the MPRDA.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The MPRDA does not draw a distinction between local and foreign applicants. Irrespective of the nationality of the applicant, all applicants for mining rights are required to comply with the requirements of the MPRDA, which include compliance with the Mining Charter 2010.

In terms of the Mining Charter 2010, all mining companies (ie, companies that hold mining rights granted in terms of the MPRDA) were required to reach a minimum historically disadvantaged South African (HDSA) ownership of 26 per cent by 31 December 2014. Once promulgated, the Reviewed Mining Charter will set new requirements for HDSA participation going forward.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Prospecting and mining rights vest a limited real right in the holder of the right in respect of the minerals to which the rights pertain and the land to which such right relates. In accordance with the Constitution of South Africa, holders of ownership rights may not be arbitrarily deprived of their rights and no person may unlawfully interfere with any entitlement that the right holders may have in terms of the rights. There have been a number of recent judgments in the mining sector in which the courts have found against the state and which evidence the independence of the judiciary and its ability to uphold the rule of law.

South Africa is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) and, as a consequence, foreign arbitral awards are capable of being enforced through the South African courts.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

In terms of the MPRDA, the holder of a mining or prospecting right obtains a statutory right of access to land. The holder of a prospecting or mining right may enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery, or equipment and build, construct or lay down any surface, underground, or under sea infrastructure, that may be required for the purpose of mining.

Both the holder of the prospecting or mining right and the owner of the surface rights must exercise their rights with due regard for the rights and entitlements of the other party. The owner of the surface rights may not unlawfully refuse the holder of the prospecting or mining right access to the property or interfere with the holder's ability to carry on the prospecting or mining activity on the land.

Despite the mining or prospecting right holder's statutory right of access to the property, it is common (although not a legal requirement) for mining companies to enter into access and compensation agreements with land owners. The reason for this is to mitigate the potential for disputes and disruptions to mining operations, particularly in circumstances where the land is owned or occupied by rural communities.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

There is no legal requirement for the state to participate in any mining projects nor are there any local listing requirements for mining companies. The African Exploration Mining and Finance Corporation is a state-owned mining company that has acquired its own portfolio of rights in terms of the MPRDA and is currently seeking to play a more active role in the industry.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Section 25 of the Constitution expressly provides that no one may be deprived of their property (including the expropriation of a limited real right) except in terms of a law of general application, for a public purpose or in the public interest. If the rightholder is deprived of its property the Constitution further provides that such a right holder is entitled to compensation. The amount of compensation to be paid and the time and manner of payment is subject to what the rightholder and state agree to or what is determined by court. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Under the MPRDA, no prospecting right, mining right may be granted or mining permit be issued in respect of:

- 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 because of national interest, the strategic nature of the mineral in question and the need to promote the sustainable development of the nation's mineral resources.

In addition, section 48 of the National Environmental Management: Protected Areas Act 2003 (NEMWA) specifically prohibits prospecting, mining, exploration, production or related activities in:

- special nature reserves, national parks or nature reserves;
- areas declared as 'protected environments';
- lake areas;
- world heritage sites;
- marine protected areas; and
- specially protected forest areas, forest nature reserves and forest wilderness areas declared in terms of the National Forests Act 1998.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act) sets out the revenue-based royalties payable on mineral resources that are extracted within South Africa and 'transferred'. The Royalty Act differentiates between refined and unrefined mineral resources. The mining royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources. The Royalty Act uses two variables to calculate the royalty liability: the value of the minerals and the royalty percentage rate, which is applied to the base. In addition to the payment of royalties, mining companies may also be subject to income tax capital gains tax, withholding tax, transaction taxes such as VAT, transfer duty and securities transfer tax.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Gold mining companies are taxed in terms of a formula that, by and large, takes into account the profitability of the company and provides relief in cases where margins are below 5 per cent (often referred to as the tax tunnel). The gold mining formula was introduced to encourage gold mining investment and the mining of marginal ore deposits. Mining companies mining for minerals other than gold are taxed at the standard corporate tax rates.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Royalty Act provides that the Minister of Finance may enter into binding fiscal stability agreements relating to mineral resource rights or in anticipation of such rights, guaranteeing the terms and conditions in respect of these rights apply for as long as the extractor holds the rights.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The MPRDA makes no provision that entitles the government to a carried interest or free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

In terms of capital gains, the Income Tax Act provides for capital gains tax (CGT) on any taxable capital gains in the taxable income of any person. In calculating the taxable income, a mine is entitled to claim expenditure against its mining income. Previously, the disposal of certain assets was exempt (for income tax purposes) as it was regarded 'capital' in nature. The position has now shifted and the disposal of specific mining-related assets (eg, land, surface rights, assets that qualify for wear and tear, mineral rights, prospecting rights and intellectual property rights, etc) will now be taxable in terms of the new CGT legislation.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Resident companies in South Africa are taxed based on their worldwide income and non-residents are taxed on South African sourced income subject to any applicable double taxation agreements that may be in force. Non-residents are, in addition, subject to the CGT legislation as detailed above. Foreign companies that conduct business in South Africa through a branch must also be registered as taxpayers and they are taxed at the standard corporate tax rate of 28 per cent.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Mining activities in South Africa are principally conducted using public or private limited liability companies. A private company may be incorporated by one person and generally needs only have one director. A public company may also be incorporated by one person but generally requires at least three directors. The essential difference between a public and private company is that the shares of a public company are freely transferable while the constitutional document of a private company must limit the transferability of the company's shares. There is no requirement that the shareholder or directors of South African companies must be South African citizens or residents.

A foreign company may conduct business in South Africa through a branch office but is required to register an 'external company' with the Companies and Intellectual Property Commission (CIPC) within 20 business days of commencing business activities in South Africa. External companies are exempted from the majority of the provisions of the South African Companies Act 2008. External companies are, however, required to continually maintain at least one office in South Africa and to register their address or principal office with the CIPC and update this information in the event of a change of address.

Mining operations may also be conducted through a joint venture which may take the form of an incorporated or unincorporated joint venture.

26 Is there a requirement that a local entity be a party to the transaction?

Mining companies which hold mining rights granted in terms of the MPRDA, were required in terms of the Mining Charter 2010, to achieve a minimum target of 26 per cent ownership by HDSAs by 31 December 2014. The participation by HDSAs, whether in the form of an incorporated entity, trust or individual capacity, is usually structured such that the HDSAs hold shares directly in a South African operating entity that in turn holds the mining rights.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

South Africa concluded a host of bilateral investment treaties (BITs) following its readmission to the international stage in 1994. However, since 2012 South Africa has terminated its BITs with a number of European countries including Denmark, Italy, Spain, Germany, Belgium, Luxembourg, Switzerland, the Netherlands and the United Kingdom. South Africa's BITs with Russia and China are, however, still in effect. The rationale behind the decision to terminate these BITs is that the protection offered to investors by the BITs will be replaced through domestic legislation in South Africa, under the Protection of Investment Act 22 of 2015 (Protection of Investment Act).

The Protection of Investment Act was assented to by the President in 2015 but is not yet in force. Government policy is seemingly to eventually terminate all of the remaining BITs in favour of the Protection of Investment Act. The Protection of Investment Act does not, however, offer investors the same level of protection as a BIT. Under the Act, foreign investors will no longer be afforded greater legal protection than their domestic counterparts and are excluded from recourse to binding investor-state international arbitration (which has been criticised as lacking legitimacy, consistency and transparency). Instead of binding arbitration, foreign investors have the option to refer any investment dispute with the South African government to a mediation facilitated by the Department of Trade and Industry (in addition to their ordinary right of recourse to domestic courts and statutory bodies.) The Act offers similar levels of compensation, in the event of recovery on expropriation, to the South African Constitution but not any protection against unfair or equitable treatment.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

South Africa has a sophisticated financial sector and a well-developed capital market, in the form of the JSE. Companies wishing to raise financing for mining activities are able to look to both domestic banks as well as various international financial institutions which have a presence in South Africa. The JSE plays an important role in financing the mining industry, and is a popular destination for foreign mining companies to raise capital through a secondary listing. The JSE Listings Requirements make provision for a fast-track secondary listings process to enable companies which are already listed on an accredited foreign exchange, to establish a secondary listing on the main board or alternative exchange of the JSE. In order to qualify for the fast-track listings process, an international company must have been listed on an accredited foreign exchange for at least 18 months. Accredited foreign exchanges include the London Stock Exchange, the Australian Stock Exchange, the New York Stock Exchange and the Toronto Stock Exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The Public Investment Corporation (PIC), which is wholly owned by the South African government, invests funds on behalf of public sector entities (including the pension funds of government employees).

The PIC is one of the largest investment managers in Africa and holds a stake in a many of the top JSE-listed companies, including mining companies. The PIC aims to contribute towards the realisation of key developmental priorities of South African government and invests in projects that promote the broader social and economic development of South Africa. The PIC frequently invests in mining projects that fall within its social and economic development mandate.

The Industrial Development Corporation of South Africa (IDC) is a financial institution mandated to promote economic growth and industrial development in South Africa and is wholly owned by the South African government. The IDC aims to develop South Africa's industrial capacity and job creation through the funding it provides. Most of the IDC's funding is in the private sector, with a focus on broad-based and expanded black economic empowerment. The IDC is involved in funding operations across the mining industry and offers a wide range of financing options including debt, equity and quasi-equity, guarantees trade, finance and venture capital.

30 Please describe the regime for taking security over mining interests.

It is common for lenders to take security over mining assets in South Africa. This security generally takes the form of share pledges, mortgages over the mining rights, and general and special notarial bonds over mining equipment. However, lenders should carefully consider the provisions of section 11 of the MPRDA before taking security over any mining assets. As mentioned above, the Minister's consent is required for a transfer of a prospecting or mining right by holder to a third party and the transfer of a controlling interest (both a direct and indirect interest) in a company that holds a mining or prospecting right. Accordingly, the Minister's consent will generally be required for lenders to perfect their security. Foreign lenders (ie, other than a bank as defined in the Banks Act 1990) may require the Minister's consent to both enter into the security arrangements and again before perfecting the security.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The importation of goods is not heavily regulated in South Africa. Duties and surcharges are levied under the Customs and Excise Act No. 91 of 164 (and regulations published under the Act). Normally, the duties and taxes payable are calculated by exclusively considering the value of the imported good (free on board method), and only in a limited number of instances will the quantity of the goods also be taken into consideration. In exceptional circumstances, luxury or non-essential items may be subject to additional ad valorem duties, and some commodities may be subject to anti-dumping or countervailing duties.

One important exception to this regime is South Africa's free trade agreement with the European Union. Historically the relationship was governed under the Trade, Development and Cooperation Agreement, however South Africa concluded a new trade deal, the Economic Partnership Agreement (EPA), with the European Union (EU) under the SADC-EU EPA framework to replace the trade provisions of the TDCA. The EPA came into force on 10 October 2016. As with the TDCA, 86 per cent of South Africa's imports from the EU enter the country duty free.

South Africa does not impose any duties or tariffs on the importation of services, although these are not liberalised under the EPA. Subject to foreign workers securing the necessary work permits from the Department of Home Affairs, they are free to work in South Africa.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no general agreements or standard conditions for the supply of equipment. Any agreement reached will be subject to the terms and conditions agreed to by the parties. During the negotiation process it is important that the parties ensure that the equipment to be supplied is accredited by an accreditation association or by the South African Bureau of Standards (SABS). The certification and assessment of the equipment is required to ensure that the regulatory, safety and reliability requirements of the South African labour laws and SABS standards are met.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

South Africa's trade with most parts of the world is characterised by the export of raw materials and the import of manufactured goods. In order to address the deficit created by the absence of a well-developed secondary sector, section 26 of the MPRDA provides that the Minister of Mineral Resources is entitled to initiate or promote the benefits of minerals in the country.

Historically, only the precious metal and diamond industries have been the subject of local beneficiation requirements in accordance with the obligations imposed by the Precious Metals Act 2005 and the Diamond Act 1986. Under both Acts, the South African government is required to consider the extent to which the activities proposed by an applicant for a mining right will promote equitable access to and local beneficiation of the minerals. If the proposed mining activities do not promote local beneficiation, the Minister may refuse to grant the mining right.

If the amendments proposed by the MPRDA Amendment Bill 2013 are passed into law, the Minister will be obliged to designate minerals or mineral products for local beneficiation. In terms of the Bill, every producer of designated minerals must offer local beneficiators a prescribed percentage of its product, in the prescribed quantities, qualities and time frames at the mine gate price or agreed price. In addition, any person who intends to export any designated minerals mined in the Republic may only do so with the Minister's written consent, subject to such conditions as the Minister may determine. The President previously refused to sign the Bill into law owing to reservations that these provisions of the Bill may constitute a contravention of South Africa's obligations under the General Agreement on Tariffs and Trade and the EPA with the European Union. The Bill is currently before Parliament.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The flow of capital in and out of South Africa is primarily regulated by the Exchange Control Regulations 1961 (Excon Regulations). The consent of an authorised dealer is required for a non-resident to acquire and hold shares in a resident company. This consent is fairly easy to obtain and the non-resident generally only needs to show it is such and that it purchased the shares in a resident company. For private companies, the authorised dealer will endorse the share certificate as 'non-resident'. For listed companies, the fact that the holder is non-resident will be flagged on the STRATE (electronic trading) system. In terms of the Excon Regulations, for a non-resident shareholder to receive dividends from a resident company, it must show that its share certificate has been endorsed or flagged 'non-resident' (in accordance with the procedure set out above).

In terms of the Excon Regulations, approval is required for any loans by a non-resident to a resident. Similarly, approval is required for a loan by a resident to a non-resident. The approval for inward loans is usually obtained by the South African borrower's local bank. If the loan terms exceed the thresholds set by the South African Reserve Bank (SARB), an application will need to be submitted to the SARB for approval – which is generally a longer process.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

NEMA is the framework legislation regulating the environment. The DMR is the competent authority responsible for enforcing the NEMA in so far as it relates directly to prospecting and mining activities. The Minister of Environmental Affairs, however, is the authority responsible for creating regulations under NEMA (including regulations that the DMR must apply and enforce). The Minister of Environmental Affairs is also the ultimate authority in respect of appeals against environmental authorisations, compliance notices or directives issued by the DMR.

Other important environmental laws include the National Water Act 36 of 1998, the National Environmental Management: Waste Act 59

Update and trends

As at the date of this publication, the MPRDA Amendment Bill and the Reviewed Mining Charter have yet to be passed into law.

Following the enactment of the One Environmental System, the DMR became responsible for enforcing the provisions of the NEMA in so far as it relates directly to prospecting or exploration of a mineral or petroleum resource; or extraction and primary processing of a mineral or petroleum resource. All other activities are regulated and enforced by the Department of Environmental Affairs. Jurisdictional issues between these two government entities have recently been the subject of dispute in case law and practice.

The Regulations Financial Provision for Prospecting, Exploration, Mining or Production Operations were gazetted in November 2015. It required that all holders and applicants of rights were required to align their operations with the requirements of the regulations by 1 February 2017. As the regulations are more stringent than the previous methods of calculating financial provision, the mining industry called for the regulations to be revised. There are discussions regarding proposed changes, but the only significant amendment to the regulations is to extend the date by which compliance must be achieved to 1 February 2019.

of 2008, the National Heritage Resources Act 25 of 1999, the National Environmental Management: Biodiversity Act 10 of 2004 and the National Environmental Management Air Quality Act 39 of 2004.

The DMR is the competent authority for approving environmental authorisations for prospecting and mining activities and activities directly associated therewith. The DMR is also responsible for enforcing the provisions of the NEMA or the environmental authorisation.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Applicants for a prospecting or mining right must apply for and obtain an environmental authorisation before the right is granted. Depending on the activities that the applicant will undertake, the applicant must conduct either a basic assessment or a scoping assessment and environmental impact assessment to investigate and assess the impacts of the activities on the environment. These processes must include a public participation process. The outcomes of the assessment, investigations and public participation process are included in a report and submitted to the DMR for consideration. If the DMR is satisfied with the report and the mitigation measures contained therein, an environmental authorisation may be issued. In terms of the One Environmental System, this process should take 300 days.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

An applicant or holder of a right or permit must determine and make financial provision to guarantee the availability of funds to undertake rehabilitation and remediation of the impacts arising from the prospecting or mining activities. The financial provision can be by way of financial bank guarantee, deposit into an account administered by the Minister of Mineral Resources, or a contribution to a trust fund.

The holder of a right is responsible for all environmental impacts arising from its activities and may (notwithstanding the issuing of a closure certificate) remain responsible.

38 What are the restrictions for building tailings or waste dams?

A waste management licence under the NEMWA is now required for the creation of residue stockpiles. Applicants for waste management licences must complete an environmental impact assessment process in accordance with NEMA. Registered engineers must design stockpiles. The MPRDA Regulations require that stockpiles are to be designed by 'competent persons'. This includes civil or mining engineers registered under the Engineering Profession of South Africa Act 114 of 1990. Stockpiles must comply with landfill requirements Stockpiles must now also comply with the National Norms and Standards for the Assessment of Waste for Landfill Disposal 2013; and National Norms and Standards for Disposal of Waste to Landfill 2013.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mine Health and Safety Act 29 of 1996 (MHSA) regulates health and safety in the mining industry. Inspectors have wide discretionary powers to order the suspension of mining operations or issue fines in circumstances where they believe that mining companies have contravened the provisions of the MHSA or where the health and safety of employees is at risk. Mining companies (and their directors) may be subject to criminal prosecution under the MHSA.

Employment in South Africa is regulated by statute, common law and contract. Legislation, such as the Labour Relations Act of 1995, grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern. Other legislation relevant to employment includes the Employment Equity Act 1997 and the Unemployment Insurance Act 2011. These acts are regulated and enforced by the Department of Labour.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

A waste management licence (in accordance with the NEMWA and its regulations) must be obtained for the establishment or reclamation of a residue stockpile or deposits resulting from mining or prospecting activities. Residue stockpiles and residue deposits are not defined in the NEMWA but based on the definition contained in the MPRDA, the above requirement to obtain a waste management licence does not apply to historical residue stockpiles or residue deposits not governed by the MPRDA. These residue stockpiles and residue deposits will need to be assessed on a case-by-case basis to determine which entity has authority to explore and exploit them and what authorisations or licences may be required.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no restrictions or limitations imposed on the use of foreign employees provided that they hold the requisite work permits issued by the Department of Home Affairs, in accordance with the Immigration Act 2002.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The MPRDA and the Mining Charter 2010 are the principal laws regulating community engagement and involvement of communities in the mining industry. One of the objects of the MPRDA is to promote employment and advance the social and economic welfare of all South Africans, promote economic growth and mineral and petroleum resources development in the Republic and ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating. Similarly, the Mining Charter 2010 aims to facilitate sustainable transformation, growth and development of the mining industry by requiring ownership by historically disadvantaged South Africans. The MPRDA and the Mining Charter 2010 are regulated and enforced by the DMR.

The submission and approval of a social and labour plan (SLP) is a pre-requisite for the granting of mining rights under the MPRDA. The SLP requires applicants for mining rights to develop and implement comprehensive Human Resources Development Programmes, a Mines Community development Plan, a Housing and Living Conditions plan, an Employment Equity Plan, and processes to save jobs and manage downscaling or closure, or both. A failure to adhere to the SLP will put the holder of a mining right in contravention of the MPRDA.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Mining companies are required to comply with the requirements of the Mining Charter 2010 for the purposes of being granted a right and in order to ensure the ongoing validity of the right.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

South Africa is a signatory to a number of conventions; however, many of these have not be enacted as domestic law.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

There are a number of statutes which prohibit corruption and bribery in South Africa. The primary legislation is the Prevention and Combatting of Corrupt Activities Act 2004, which creates the general offence of corruption with a very wide ambit. Broadly, any person who, directly or indirectly accepts or agrees to accept any gratification from any other person; or gives or agrees or offers to give any gratification to any other person; in order to act, personally or by influencing another person to so act, in a manner designed to achieve an unjustified result, is guilty of the offence of corruption. A person convicted of committing any of the statutory corruption offences may be liable to a fine and imprisonment up to a period of life imprisonment.

Other anti-bribery and corruption legislation includes the Prevention of Organised Crimes Act of 1998, which is concerned with acts such as money laundering and racketeering, and the Financial Intelligence Centre Act of 2001, which is aimed at identifying unlawful activities and to combat money laundering and the financing of terrorists and related activities.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies operating in South Africa with listings on foreign stock exchanges will need to ensure compliance with the anti-bribery and foreign corrupt practices applicable to these exchanges. Examples include the UK Bribery Act for UK-listed companies and the Foreign Corrupt Practices Act for US-listed companies.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

South Africa is not a signatory of the EITI as the government is of the opinion that its domestic legislation is sufficient for the purposes of the prevention of corruption and creating transparency and accountability.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

While there are no direct restrictions on foreign ownership in the mining industry, the provisions of the Mining Charter 2010 should be noted in relation to the minimum ownership requirements by HDSAs.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

South Africa is a member of the World Trade Organization (WTO) and in accordance with the membership requirements of the WTO, is a signatory to its agreements. In addition, the country is also a party to various BITs and multilateral agreements.

Some of the more salient examples of agreements concluded on a global and regional level include:

- The Economic Partnership Agreement between the European Union and the Southern African Development Community EPA Group;
- Treaty of the Southern African Development Community and its Protocols (SADC Treaty & Protocols), including the Protocol on Mining in the Southern African Development Community and SADC Protocol on Finance and Investment;
- Southern African Customs Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (SACU);
- Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the People's Republic of China on promoting Bilateral Trade and Economic Co-operation (MOU with People's Republic of China);
- Treaty Establishing the African Economic Community/ African Union;
- Free Trade Agreement between the European Free Trade Association States and SACU;
- Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part; and
- SADC Protocol on Finance and Invesment 2016.

As mentioned above, South Africa concluded a host of BITs following its readmission to the international stage in 1994. However, since 2012 South Africa has terminated its BITs with a number of European countries including Denmark, Spain, Germany, Belgium, Luxembourg, Switzerland, the Netherlands and the United Kingdom on the basis that the protection offered to investors under the BITs will be revised through domestic legislation, under the Protection of Investment Act. South Africa's BITs with Russia and China are, however, still in effect.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining has been of great importance in Sweden throughout modern history, and ore production has been rising significantly in recent years. There are currently almost 100 companies with exploration permits active in the search for minerals, and the mining sector in Sweden employs approximately 6,000 people (indirect jobs not included).

Sweden is one of the EU's leading producers of ores and metals. The mining industry is crucial to employment in some areas of Sweden and serves as an important basis for exports.

Mines currently in operation produce iron ore, sulphide ore and gold, but other minerals can also be found in sufficiently large quantities for profitable mining. There is an ongoing permit process for an open-cast mine for rare earth minerals (the deposit is considered to be the fourth largest in the world).

In 2011 a proposal for a national strategy for mineral exploitation was put forward by the Geological Survey of Sweden (SGU) to the Swedish government, and a national strategy was published by the government in 2013. This has, so far, resulted in additional funding for mapping and mineral information as well as the formation of a new group within the SGU with the sole task of assisting the mining industry.

Political stability, good infrastructure throughout the whole country, a solid legal system, widespread expertise among the workforce and a well-developed mining equipment industry mean that Sweden offers favourable conditions for mining operations.

Parties interested in starting mining operations in Sweden can visit the SGU's website and through different databases on the site obtain basic information for the initial evaluation of suitable areas for exploration. See also question 9.

2 What are the target minerals?

Sweden is by far the biggest producer of iron ore in the EU and is also among the leading producers of copper, zinc, lead, gold and silver. In 2013, approximately 75 per cent of prospecting expenses spent in Sweden concerned prospecting for gold, copper, zinc, lead and nickel, while 20 per cent of the expenses concerned iron ore. Exploration for other minerals such as molybdenum, wolfram, vanadium, tellurium and lithium was of interest for some foreign prospectors. A comprehensive map of ore and mineral locations can be found online through the Mineral Resources Information Office (MINKO) (apps.sgu.se/kartvisare/kartvisare-index-en.html).

3 Which regions are most active?

The mining industry is active in most parts of Sweden apart from the southernmost regions and the islands of Öland and Gotland, where the prospect of finding valuable mineral deposits is more limited. In those regions industrial mineral and construction material extraction is common instead. Northern Sweden is generally rich in minerals and has the highest concentration of mining operations in the country. Specific areas of interest are the Skellefteå field in the county of Västerbotten, an area of significant mineral density, and the county of Norrbotten, where the majority of iron ore production is located.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Sweden's legal system is civil law-based.

5 How is the mining industry regulated?

All acts governing the mining industry are national, but decisions under these acts are taken by administrative bodies at both regional and national level. See question 6. Sweden is a member of the EU and consequently any EU legislation concerning the mining industry is applicable as well.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The Swedish Minerals Act (No. 45 of 1991) is the principal law regulating the mining industry and it governs the procedure for acquiring exploration permits and exploitation commissions on land, irrespective of who owns the land to be explored or exploited. Detailed provisions of the application process and fees can be found in the Minerals Ordinance (No. 285 of 1992).

The Swedish Environmental Code (No. 808 of 1998) is relevant in many aspects. The Environmental Code is applicable in matters concerning the granting of a concession, which means that an environmental impact assessment (EIA) must be appended to an application for a concession. A permit for exploitation must always be granted under both the Minerals Act and the Environmental Code. For more information about EIAs, see question 36.

The Planning and Building Act (No. 900 of 2010) contains provisions that regulate building and construction.

Exploration work can be affected by the Off-road Driving Act (No. 1,313 of 1975) and the Heritage Conservation Act (No. 950 of 1988).

Applications for exploration permits and exploitation concessions under the Minerals Act are administered by the Mineral Inspectorate. The County Administrative Board takes part in the environmental evaluation of applications for exploration permits and exploitation concessions. The Swedish government makes decisions in matters of particular public interest. The local municipality is responsible for permissions in accordance with the Planning and Building Act. Permissions required by the Environmental Code are handled by the Land and Environmental Court. Supervision of compliance with the environmental conditions is usually carried out by the County Administrative Board and by the municipality's Environment and Health Board.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

A stand-alone framework called the Fennoscandian Review Board Standard (FRB standard) is recommended for use by the Swedish Miners Association and has also been adopted by the corresponding organisations in Norway and Finland. The classification system is based on the international template for the public reporting of exploration results, mineral resources and mineral reserves that is created by the Committee for Mineral Reserves International Reporting Standards with the purpose of creating mutual international standards.

The FRB standard is subsidiary to national legislation. The FRB standard is similar to the CIM Standards, the JORC Code and the SAMREC Code since all the standards are based on the international template for the public reporting of exploration results, mineral resources and mineral reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

All minerals that are covered by the Minerals Act are listed in said Act and those not listed belong to the landowner. Minerals of interest for mining are among those listed. The reason for this policy is that landowners in general are considered not to have the required capacity for exploiting mineral resources on their land. The same rules apply to all types of landowners, whether it is the state, private entities or individuals. Exploration permits can be granted for exploration on land (real property) belonging to any type of landowner, both private and public.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The SGU collects basic geological data concerning Sweden's bedrock geology and properties of rock. Information related to prospecting obtained through government surveys and private exploration, is accessible through MINKO. Most information is accessible online where maps can be produced on request for specific purposes and received in digital form or as hard copies. The National Drill Core Archive is located at MINKO and contains over 4,000km of drill cores that can be used for analysis. The results from such analysis have to be submitted to MINKO and will be made public after a period.

When an exploration permit is terminated without the granting of an exploitation concession within the exploration area, the permit holder (if they are carrying on exploration work professionally) must submit a summary report within three months.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Both exploration and exploitation permits are granted under the Minerals Act to qualified applicants entirely irrespective of who owns the land to be explored or exploited.

An exploration permit is granted for a specific area of land where there is some likelihood of a successful discovery being made. The area covered by the permit must be of a suitable shape and size and no larger than can be explored by the permit holder in an appropriate manner. An exploration permit gives access to land for exploration work that does not harm the environment or prejudice the use of the land and entails a preferential right to an exploitation concession. The rule is such that the party that applies first is given priority and therefore it is required that the first application is complete and will not need to be supplemented at a later time, as this can result in complications for the assessment of which party applied first.

If there is a possibility of the exploration work having a significant impact on the environment, a notice of consultation in accordance with the Environmental Code must be sent to the supervisory authority (the County Administrative Board). Before exploration work begins, the permit holder must prepare a work plan. The plan must contain a description of the work planned, a timetable and an assessment of any impact on private rights and public interests. The plan must be communicated with all landowners and any other affected parties. A work plan enters into force if there are no objections. It will also enter into force if the applicant and the objecting party agree to the contents of a revised plan. If they cannot agree, the matter may be adjudicated by the Mining Inspectorate, who in some cases can also establish conditions for the exploration work.

Before any work may be commenced, the exploring party is obliged to provide security for the compensation of any damage and encroachment of rights that the exploration work might inflict. An applicant for an exploration permit is required to pay an application fee as well as an exploration fee. The amount is decided according to the extent of the area subjected to exploration.

To commence mining activities an exploitation concession has to be acquired. As a cardinal rule, concessions are valid for 25 years, but can be extended. Further, a concession is valid for a specific area, which is determined on the basis of the shape and extent of the deposit, the purpose of the concession and other circumstances. Concession is granted if the discovered mineral deposit shows a probability of profitable exploitation and if the location and nature of the deposit does not render it inappropriate to grant the requested concession. The Environmental Code is applicable in matters concerning the granting of a concession. The holder of an exploration permit is not entitled to an automatic but rather a preferential right to acquire an exploitation concession.

In order for the holder of an exploration permit to acquire an environmental permit the operation must be subject to a trial in the Land and Environmental Court. This is a process that is separate from the previously explained procedure concerning exploration permit and exploitation concession. The process to acquire an environmental permit is governed by the Environmental Code. The environmental impact of the operation is thereby tried by the court. The court also sets the conditions for the operation in its decision.

11 What is the regime for the renewal and transfer of mineral licences?

A transfer of an exploration right or a concession can be permitted under the Minerals Act after an application to the permitting authority (the Mining Inspector). The permission can be granted if the future licence holder meets the conditions set forth in the Minerals Act.

Transfer of an environmental permit is possible, provided that the new holder is taking over the permitted operation. According to the Ordinance of Environmentally Harmful Operations and Protection of Health (No. 899 of 1998), the new holder must notify the supervisory authority (the County Administrative Board) about the transfer.

Conditions regarding the renewal of mineral licences are described in question 12.

12 What is the typical duration of mining rights?

An exploration right is valid for a period of three years, and can be prolonged for a maximum of 15 years under special conditions. The conditions for extension gradually become more severe. The conditions for extension concern the likelihood of finding minable minerals and the amount of exploration already conducted. When an exploration permit expires, a new application can be filed for the same exploration area. The new application can be filed no earlier than a year after the previous exploration right has expired, but exceptions can be made from the one-year rule if special conditions apply.

Once a concession is granted it is valid for 25 years. It can be prolonged for 10 years at a time if work is performed on a regular basis in the said area. If work is not performed on a regular basis in the said area, the concession can still be prolonged for an additional period of 10 years if mining is still ongoing, the work performed meets specific criteria set up under the Minerals Act or if it is otherwise motivated by the common interest that the mineral findings should be exploited in an effective manner. The application to prolong a concession should be filed no later than six months before the valid concession expires.

Environmental permits may be time limited or valid for an unlimited time. As the Minerals Act runs in parallel to the environmental Code, the environmental permit is linked to the restrictions of the exploitation concession even though the environmental permit itself is not explicitly time limited. In practice the permit may be time limited as the operator normally needs to apply for a new environmental permit after a certain time frame has passed in order to meet the requirements of Chapter 2 of the Environmental Code (for example, meeting the standards of using the best available technology). A renewal of the environmental permit in this sense is treated as a new application.

The Minerals Act states that an exploration permit or an exploitation concession can be revoked if the holder does not fulfil their obligations in accordance with the provisions of the Minerals Act, the terms laid out in the exploration permit or exploitation concession or if there are other specific reasons. The revocation of an exploration permit or an exploitation concession can only occur if considerable public interests are at stake. Revocation may also proceed owing to foreign and defence policy if it is necessary to secure Swedish influence over a deposit. An exploration permit may also be revoked if the holder is in breach of any term regarding consent to exploration work.

The terms of an exploitation concession can be changed if an operation according to the concession gives rise to inconveniences of considerable size that were not anticipated when the concession was granted. Under other circumstances, the terms laid out in exploration permits or exploitation concessions may be changed only in accordance with the holder's request or consent.

The Environmental Code also provides the possibility to change the conditions and terms of an environmental permit or to revoke the environmental permits, in whole or in part. A revocation or change of conditions and terms may only be made owing to specific circumstances such as the operations giving rise to inconveniences of considerable size that were not anticipated when the environmental permit was granted or a considerable breach of the environmental permit terms and conditions. Several governmental authorities have the possibility to initiate the processes described above.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There are no restrictions on foreign nationals obtaining exploration permits and exploitation concessions.

An exploration permit or exploitation concession may be transferred after consent by the issuing authority.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mining Inspector handles any disputes between the permit or concession holder and the landowner concerning rights and obligations connected to exploration or exploitation. Disputes regarding compensation to the landowner are handled by the Mining Inspector or the Land and Environmental Court.

Decisions made under the Minerals Act can be appealed, but the proper second instance depends on the type of decision being appealed.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), has been ratified by Sweden.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

A legal proceeding for the designation of land is held at the request and expense of the concession holder. This procedure establishes the concession area, which is the area the concession holder may use for exploitation of the mineral deposits. In addition, any land within or outside the concession area, which the concession holder plans to use for activities related to the exploitation, may be covered by the decision. When an exploitation concession is terminated, the concession holder forfeits any rights to the land assigned to him or her at that time.

Prior to the designation of land, the holder of the mining rights may enter into agreements with surface rights holders to acquire land rights. If all parties are in agreement, land will be designated according to what has been agreed. Where no agreements have been reached, the acquisition of land rights is handled in the land designation process. A surface rights holder may oppose the request by the mining rights holder to acquire land rights. If so, the conflicting interest is tried according to provisions in the Minerals Act, and land is designated according to what is required for the mining operations and connected activities. Land designations can be appealed to the Land- and Environmental court and subsequently to the Land- and Environmental Court of Appeal.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Neither the government nor the state agencies have a right to participate in mining projects. The project company is not required to be listed locally at any stage of the permit and concession processes.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

It is not possible to expropriate permits or concessions related to mining, hence there are no compensation provisions regarding expropriation. On the other hand, the state is able to expropriate land and other areas under certain premises stated in the Expropriation Act (No. 719 of 1972). Reasons for expropriation are specified in said Act. The decision to expropriate land is made by the government as a main rule, but the power of authority can be transferred to the County Administrative Board under certain circumstances. The compensation provisions for expropriated land are also stated in the Expropriation Act.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

No exploration or exploitation is allowed in national parks and there are several other areas or proximity limitations that might affect the outlook of conducting mining operations. Mining operations are rarely permitted:

- in areas included in local plans or regional provisions under the Planning and Building Act;
- closer than 30 metres to publicly owned transportation infrastructure;
- within 200 metres of inhabited buildings;
- in areas of military interest;
- in areas with electric power stations and industrial plants;
- within 200 metres of public buildings, hotels, churches and comparable establishments;
- in churchyards and burial grounds; and
- in certain specified undisturbed areas in the Swedish mountain range.

According to the Environmental Code, if an activity is located near or within a Natura 2000 area, the operator must demonstrate that the activity will not affect the environment in a significant way (Natura 2000 is an ecological network of protected areas within the territory of the EU). The Environmental Court tends to adjudicate matters affecting Natura 2000 areas quite strictly.

Exploration work that can have significant impact on the natural environment requires that a notice of consultation is sent to the County Administrative Board. If exploration work can damage land use where it is being carried out, security for compensation has to be given if the landowner has not given their consent.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Private parties conducting mining activities are required to pay an annual fee of 2 per mille of the average value of the minerals mined. The revenue is split between the landowners and the state, with landowners receiving 1.5 per mille and the state 0.5 per mille.

Normal corporate income tax, currently set at 22 per cent, applies to mining companies but there are no additional taxes for mining in particular.

For an exploration permit, certain fees have to be paid to the Mining Inspectorate by the applicant. An application fee of 500 Swedish kroner shall be paid to the Mining Inspector when handing in the application for every new area consisting of 2,000 hectares. If permission is granted, another 20 Swedish kroner for each hectare has to be paid for the first three-year period of the permit. If an extension of the exploration permit is permitted, an additional fee of 21 Swedish kroner per hectare per year is required. Further extension of the permit is possible, but will result in even higher annual fees. All fees are required to be paid in advance for each period of time.

When applying for an exploitation concession, a fee of 80,000 Swedish kroner must be paid for each area the application concerns. There is also a fee for the designation of land proceedings.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The tax advantages and incentives for private parties engaged in mining activities are regulated by the Energy Tax Act (No. 1,776 of 1994). For example, tax relief can be obtained regarding carbon dioxide tax and energy tax for certain vehicles used in the mining activity process.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is no legislation in force regarding tax stabilisation and there are no tax stabilisation agreements. There are special rules regarding the state-owned company LKAB. These rules apply to, for instance, customs regulations.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

During the course of the exploitation the holder of the concession must pay an annual mineral reimbursement according to the Minerals Act (see question 19). The holder of the concession is obliged to provide the information necessary to determine the scope of the reimbursement.

Apart from this mineral reimbursement, the government is not entitled to any type of carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

There are no special tax regulations for mining. General corporate tax law applies.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Foreign parties pay the same duties and royalties as domestic parties. As a main rule, they also pay the same taxes.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The principal business vehicle used is the limited liability company. Joint venture agreements are common but a joint venture is not a legal person and so the actual vehicle used to operate the joint venture is still the limited liability company. Partnerships are rarely used in any larger scale or capital intensive business since they do not provide the same structure and ease in transferring shares in the case of options and earn-in clauses. In addition, the minimum capital requirement for limited liability companies was recently lowered to 50,000 Swedish kroner, making this form of company even more accessible to both Swedish and international investors. It is also possible to open a local branch that is registered in Sweden and that is not a legal person in its own right but considered part of a foreign legal entity. Trusts, however, are not recognised in the Swedish legal system.

26 Is there a requirement that a local entity be a party to the transaction?

There is no such requirement.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Sweden is party to a number of international tax treaties, which may have an effect on the way foreign entities choose to operate but, in general, such treaties are neutral in character and do not single out particular jurisdictions for favourable treatment.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The largest Swedish mining operators are listed on the Stockholm Stock Exchange, now named Nasdaq OMX Nordic Stockholm. Others are financed by private equity firms or banks or both. In general, all means of financing open to any industrial business are also open to the mining industry.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

There is no direct financing provided by the government, its agencies or pension funds. However, the government owns 100 per cent of the shares in major mining operator LKAB and pension funds may from time to time own shares in listed mining companies.

30 Please describe the regime for taking security over mining interests.

It is not possible to take out a mortgage or to pledge a mining permit or concession. It is, however, possible in respect of the real estate that the licence concerns.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no specific restrictions concerning the importation of machinery and equipment for the mining industry. All services that are operated in Sweden, including mining, must be performed according to the law and provisions on health and safety (see questions 39 and 40).

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

The most commonly used standard terms used for equipment supplies are NL 09, General Conditions for the Supply of Machinery and other Mechanical, Electrical and Electronic Equipment in Denmark, Finland, Norway and Sweden. NL 09 is issued by the engineering industries organisations in the Nordic countries and is widely recognised. For construction of buildings, roads or other structures, parties will use either AB 04, General Conditions of Contract for Building and Civil Engineering Works and Building Services, or ABT 06, General Conditions of Contract for Design and Construct Contracts for Building, Civil Engineering and Installation works. These standard form agreements are issued by the Swedish Construction Contracts Committee (BKK), a body formed by the main private employers' associations and contractor's associations as well as state infrastructure agencies such as the Swedish Transport Administration. They provide a tried and tested structure, and they can be combined with add-on standard terms from BKK (eg, sub-contractor T&Cs or index provisions). For erection of plants, Orgalime's general conditions are sometimes used, for example, the Turnkey Contract of 2003.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no restrictions on the processing, export or sale of minerals.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no foreign exchange controls or other restrictions on the import of funds for exploration and extraction or the use of the proceeds from the business.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Environmental Code is the principal environmental law in Sweden. The Environmental Code is closely tied to the Minerals Act, which, with few exceptions, is applicable to all exploration and exploitation on land. Two types of rights are granted under the Minerals Act: exploration permits and exploitation concessions. The Mining Inspectorate grants these rights. In order to conduct mining operations both an exploitation concession and a permit under the Environmental Code must be acquired. With respect to mining operations, permits under the Environmental Code are granted by the Land and Environmental Court.

If exploration work could have significant impact on the environment, it entails certain investigations of the environmental aspects according to the Environmental Code. The Mining Inspectorate also hears applications for exploration permits and exploitation concessions, in consultation with the County Administrative Board, which examines whether the site is acceptable from an environmental point of view. The Environmental Code is also applicable in matters concerning the granting of an exploitation concession, which means that an EIA must be appended to an application for a concession.

Supervision of compliance with the environmental conditions is usually carried out by the County Administrative Board and by the municipality's Environment Health Board.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The granting of a permit for mining operations under the Environmental Code is governed by the same rules as other business operations with an environmental impact. The details for the permit under the Environmental Code, such as noise levels, storage sites and damming up water deposits, are decided during the permit process carried out by the Land and Environmental Court. Supervision of compliance with the environmental conditions imposed is usually carried out by the County Administrative Board and by the municipality's Environment Health Board.

The first step to acquiring a permit is the consultation process. It takes place between the company wishing to engage in activities with an environmental impact and parties environmentally affected by the operations, as well as agencies and organisations concerned with environmental issues. The purpose is to hear all concerned parties so that their interests can be considered when preparing the EIA.

After the consultation, the EIA has to be finalised. The purpose of the EIA is to describe the environmental impact that the proposed mining project will have. The description is made so that the reviewing bodies (the County Administrative Board or the Environmental Court) can assess whether the project should be allowed from an environmental point of view or not. The applicant must provide information in the EIA regarding any alternative sites for the proposed operation, together with a justification of why the proposed site was selected. The applicant must also provide a description of a zero option, which details the consequences of not starting the proposed operations.

After the hearing and EIA have been carried out, the application for a permit under the Environmental Code can be submitted to the Land and Environmental Court. The Land and Environmental Court determines whether the information gathered and presented in the consultation and environmental assessment phases is detailed enough to proceed with a ruling. During the initial phase of the proceedings, any affected parties may submit supplements to the application. The complete information will then be sent for review and comments to any affected party. Before the main hearing begins, the applicant will have the opportunity to address any comments made during the consultation process.

The complete process for obtaining a permit under the Environmental Code takes approximately three to five years depending on the size of the operation and where it is to be carried out.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The closure and remediation process is handled in the Environmental Code permit process through the details for the permit. If deemed necessary, a security will have to be provided to cover for potential damages to the environment and closure of the mining operations. All types of security are approved as long as they are satisfactory for their purpose. The applying party must show that the suggested security is satisfactory and if a security cannot be provided a permit will not be granted.

38 What are the restrictions for building tailings or waste dams?

Certain requirements for the operator in charge of dam maintenance are listed in the Ordinance on Dam Safety (No.214 of 2014). A tailings or waste dam typically needs a water operations permit according to the Environmental Code and the main principle being that the owner of the tailings or waste dam is responsible for its maintenance. The Ordinance on Dam Safety requires the operator in charge of maintenance to produce an impact assessment and propose a classification based on the impact that may potentially be caused by a dam failure. Furthermore, the operator in charge of maintenance must have a safety management system concerning the methods, routines and instructions needed for:

- organisation, areas of responsibility and qualifications for personnel working with dam safety;
- identification and assessment of risks for major accidents;
- operations, permit supervision and maintenance;
- routines for changes in the operations;
- planning for emergency situations; and
- audits and reviews.

High-risk installations are subject to provisions with more severe requirements in the Ordinance on Mining Waste (No. 319 of 2013). High risk installations are defined as installations wherein a deficiency or mistake in the installation or operational organisation may cause a major accident or an installation that has a certain amount of dangerous substances or chemicals. The Ordinance on Mining Waste also includes provisions on localisation and general design of tailings and waste dams.

The operator in charge of maintenance must make a complete assessment of the dam's safety and the operational organisation every 10 years. The operator is also obligated to produce yearly safety reports to the supervising authority.

More specific requirements than those listed above may be prescribed in the water operations permit needed for the tailings or waste dam.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety law is the Work Environment Act (No. 1,160 of 1977), which is applicable in all situations where an employee performs work for an employer. The Work Environment Act is a framework act and detailed regulations are found in the provisions issued by the Swedish Work Environment Authority, which is the principal regulatory body concerning health and safety in the workplace in Sweden. The Work Environment Act states the obligations of the employer: prevention of ill health and accidents, for example. The provisions of the Swedish Work Environment Authority on rock and mining work and general recommendations on implementation of the provisions (AFS 2010:1) are the main provisions concerning mining. They regulate, among other things, the kind of investigation and risk assessments that need to be done before the work in the mine can begin, the kind of working methods and equipment should be chosen, the kind of knowledge the workers in the mine need to possess, the personal protective equipment the workers shall use and required inspections.

Other provisions that may be applicable to mining are:

- the Swedish Work Environment Authority's provisions on chemical hazards in the working environment, together with general recommendations on the implementation of the provision (AFS

2014:43), which regulate the employer's obligations concerning hazardous chemical substances;
- the Swedish Work Environment Authority's provisions and general recommendations on occupational exposure limit values (AFS 2011:18), which regulate the assessment and measurement of air contaminants and the employer's obligation to take action to lower exposure and reduce risk;
- the Swedish Work Environment Authority's regulations governing blasting work and general advice on the application of the regulations (AFS 2007:1), which regulate how blasting work should be planned and executed;
- provisions issued by the Swedish Work Environment Authority concerning the use of work equipment (AFS 2006:4), which regulate what kind of work equipment the employer shall provide to employees;
- provisions issued by the Swedish Work Environment Authority concerning noise together with general recommendations on the implementation of the provisions (AFS 2005:16), which regulate the permitted level of noise in a workplace and how noise shall be prevented, etc;
- provisions issued by the Swedish Work Environment Authority concerning vibrations (AFS 2005:15), which regulate the employer's obligation to perform risk assessments and investigations regarding vibrations and the employer's responsibility to educate and inform their employees about vibrations;
- the Swedish Work Environment Authority's provisions on occupational medical supervision and general recommendations for applying the provisions (AFS 2005:6), which regulate when medical examinations need to be carried out with employees that are or will be exposed to, for instance, quartz and vibrations;
- provisions of the Swedish Work Environment Authority on the use of personal protective equipment, together with general recommendations on the implementation of the provisions (AFS 2001:3), which mainly regulate the employer's obligation to provide sufficient personal protective equipment to the employee; and
- provisions issued by the Swedish Work Environment Authority concerning quartz (AFS 2015:2), which regulate the measurement and cleaning of quartz.

If the different sections in the provisions are in conflict with each other, the rules in the provisions of the Swedish Work Environment Authority on rock and mining work and general recommendations on implementation of the provisions (AFS 2010:1) will prevail. Note that only the most common provisions that can be applicable to mining are mentioned. There are additional provisions that regulate all work environments.

The general labour laws in Sweden are applicable to the mining industry such as the Working Hours Act (No. 673 of 1982), the Co-determination Act (No. 580 of 1976), the Discrimination Act (No. 567 of 2008), the Parental Leave Act (No. 584 of 1995) and the Annual Leave Act (No. 480 of 1977). However, labour provisions in Sweden also exist in collective agreements and private employment agreements.

The Swedish Work Environment Authority is responsible for the supervision of the Working Hours Act. Non-compliance of the Discrimination Act is handled by the Equality Ombudsman. Violations against the remaining laws are settled through negotiations or in court.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Management and recycling of mining waste products is regulated by the Environmental Code, the Regulation on Waste from Extractive Industries (No. 319 of 2013) and to a lesser extent the Waste Regulation (No. 927 of 2011). The relevant rules are based on the EU Mining Waste Directive (2006/21/EG). For ongoing mining operations, the mining operators are responsible for mining waste and the possibility of extracting minerals from this. The normal approach is to handle extraction of minerals from waste as part of the environmental permit, which may require an amended permit if the extraction from waste is not included in the original permit.

Although there are no specific regulations regarding exploration and extraction from waste piles and tailings ponds that are not part of any ongoing mining operations, these should be handled in general accordance with the Regulation on Waste from Extractive Industries (No. 319 of 2013) and require an environmental permit. The Swedish government is currently reviewing possibilities to simplify regulations for this type of operation. However, it may take several years before new rules can be implemented.

The right to exploration and extraction of mining waste from closed mining waste facilities varies depending on the circumstances and when the waste management was considered closed, but is typically held by the previous mining operator or landowner.

Update and trends

In a new development , the Ministry of Environment and Energy has suggested in a memorandum that certain provisions regarding consultation in the Environmental Code should be applied in full when applying for an exploitation concession under the Minerals Act.

Current regulations allow for a concession to be granted without a prior consultation procedure. This is mainly because mining operations are also subject to an environmental permit review at a later stage. Since the Environmental Code is applied in full to the environmental permit review and consultations are a requirement in order for an environmental permit to be granted, the consultation provisions in the Environmental Code are considered at this point and it would seem unnecessary to require consultation on two occasions. In practice, the proposal may lead to additional costs and a more time-consuming concession procedure for the individual operator. On the other hand, it could improve the decision making process regarding concessions. The proposal has been published in the Ministry Publication Series (Sw: Departementsserien, DS) and must be passed as a government bill before it can be implemented. The proposal will now be scrutinised in several steps by affected parties, authorities and the Swedish parliament. It may be amended along the way and there is no certainty that the consultation requirement for exploitation concessions will be implemented in its current form. The proposal will be implemented during 2018 at the earliest.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The same laws and provisions concerning health and safety apply for domestic and foreign national employees. An employer with domestic employees in Sweden has to follow the Swedish labour legislation. The same applies when foreign personnel are employed in Sweden. But if an employee is merely posted to Sweden, the employer is only obliged to follow some of the Swedish labour legislation, according to the Act on Posting of Workers (No. 678 of 1999), which was adopted to fulfil Sweden's obligations according to the corresponding EU Directive (96/71/EC).

Foreign employees sometimes need a work permit in order to work in Sweden. Citizens of EU or EEA countries are exempt but they need to inform the Swedish Migration Board if their residency lasts longer than three months. Any employee from a country outside the EU or EES area who works in Sweden for more than three months needs both a work permit and a residence permit. They may also need a visa.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The consultation process is part of the permit process within the Environmental Code. According to the Environmental Code, known affected parties shall have the opportunity to express their opinions on a mining application. The principal regulatory bodies are mentioned in question 35.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Under the Minerals Act, rights holders to the affected land need to be involved during some stages of the granting of exploration permits and exploitation concessions. The indigenous Sami people's right to herd reindeer is such a right. Reindeer herding is exercised in vast areas

of northern Sweden and if the mining operations affect the prerequisites for this right, compensation will have to be paid to the Sami. The Sami will also take part in the application for a permit under the Environmental Code if the mining operation is planned to be carried out within their area.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

International treaties, conventions and protocols (and declarations) of interest are, for example:

- the Law of the Sea Treaty, 1982, which regulates deep sea mining;
- the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, concerning the right to get information and appeal Environmental Matters;
- the ILO 176 Safety and Health in Mines Convention, 1995, which regulates the working conditions in a mine (there exist additional ILO Conventions that can be applicable on mining);
- the Convention on Biological Diversity, 1992, which regulates the protection of biological diversity, sustainable use of it and fair and equal sharing;
- the Kyoto Protocol, 1998, concerning the decrease of emission of greenhouse gases;
- the Rio Declaration on Environment and Development, 1992, and Stockholm Declaration on the Human Environment concerning sustainable development and environmental protection, 1972;
- the ILO Declaration on Social Justice for a Fair Globalisation, 2008, concerning social protection and human rights in the workplace; and
- the Johannesburg Declaration concerning sustainable development, 2002.

The treaties, conventions and protocols only apply to signatory countries.

Sweden has not ratified the ILO 169 Indigenous and Tribal Peoples Convention of 1989, concerning special rights for indigenous and tribal people.

Besides the treaties, conventions and protocols there are different international codes relating to the mining industry (see question 7).

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Swedish legislation against bribery and corruption is found in the Penal Code. The Code covers not only corruption in the public sector but also in the private sector and between the public and private sector. The relevant provisions are found in chapter 10, sections 5a–5e. An employee or person performing an assignment who, for him or herself or another person, receives, accepts a promise of, or demands an improper benefit for the performance of the employment or assignment, may be deemed as taking a bribe. A person who gives, promises or offers an improper benefit in cases referred to above may, on the other hand, be guilty of giving a bribe. There is no distinction between bribery of public officials and private bribery. Moreover, there is no distinction between bribery of foreign or domestic public officials. However, the involvement of a public official will act as an aggravating circumstance and make it more likely that a benefit will be deemed a bribe.

Additional offences are trading in influence and negligent financing of bribery. Trading in influence involves the act of taking or giving an improper benefit in order to influence a person's action or decision in the exercise of public authority or in public procurement. An individual acting on behalf of a company that provides money or assets used by a third party for the giving of a bribe may be found guilty of negligent financing of bribery.

Consequences of bribery may range from a fine (proportional to the income of the individual, limited to a maximum of 150,000 Swedish kroner) or up to two years' imprisonment, or in grave cases, imprisonment of between six months and six years. A company may be fined between 5,000 and 10 million Swedish kroner.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Particular attention is paid to the UK Bribery Act and the US Foreign Corrupt Practices Act in view of the extra-territorial reach of these acts and in the former case, its strict liability provisions.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

No.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no restrictions concerning foreign ownership in the mining industry.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

There are no particular treaties regarding the mining industry that concern Sweden.

FOYEN

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining is a leading sector in terms of export value, as the rate of growth is overtaking agriculture, fishing, forestry and hunting. Over the past 10 years Tanzania has witnessed massive and unprecedented growth following the enactment of the Mining Act of 1998, now replaced by the Mining Act of 2010. Official statistics as in 2016 show that the mining industry grew by 7.1 per cent at 10.8 per cent GDP as compared to the same period in 2015 at 3.7 per cent, owing to an increase in production of natural gas and minerals, exceeding manufacturing and agriculture. World-class mining companies including Acacia Mining and Ashanti Anglo-Gold (Geita Gold) are operating large-scale mines in Tanzania. The economic impact of the fast-growing mineral sector in Tanzania in terms of job creation, increased tax revenue, skills development, improved welfare and, above all, its contribution to poverty alleviation cannot be overemphasised.

2 What are the target minerals?

The target minerals are gemstones, gold, silver, copper, iron, nickel, coal, building materials and, more recently, uranium.

3 Which regions are most active?

The most active region is the Lake Zone in the north-west. The southern region is also becoming more active.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Tanzania's legal system is sourced from English common law, statutes, case law, shariah law and customary law. English common law applies only in the absence of statutory law, and where commercial law has largely being enacted, common law does not apply. Shariah law is applied only in matters of marriage and succession to Tanzanians of Islamic faith, while customary law applies generally to matters of ancestral land ownership and inheritance.

5 How is the mining industry regulated?

The mining industry is regulated at the national level. The Ministry of Energy and Minerals (the Ministry) is the overall supervisor of the minerals and energy sector. There is a minister of energy and minerals (the minister) and a commissioner for minerals (the commissioner) within the Ministry appointed by the president whose responsibilities are to supervise and regulate the proper and effectual carrying out of the provisions of the Mining Act. There is also a Mining Advisory Board constituted pursuant to the Mining Act, which has the responsibility of advising the minister on matters concerning the mining sector generally. In addition to the Mining Act, large-scale mining companies, which are holders of special mining licences, may enter into development agreements with the government that guarantee the fiscal stability of a long-term mining project with respect to the range and applicable rates of royalties, taxes, duties, fees and other fiscal taxes and the manner in which liability thereof is calculated (development agreements). The development agreements acquire legislative effect upon execution and any tax concessions contained therein will take effect as the law itself without any further requirement.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal legislation governing the mining sector is the Mining Act. There are regulations issued pursuant to the Mining Act including Mining (Mineral Rights), Mining (Environmental Management and Protection), Mining (Safe Working and Occupational Health) and Mining (Dispute Resolutions). The Tanzania Extractive Industries (Transparency and Accountability) Act No. 23 of 2015 and the Environmental Management Act of 2004 are also relevant. Other relevant laws include the Atomic Energy Act of 2003, which controls the use of ionising and non-ionising radiation sources as associated with uranium mining, the Income Tax Act of 2006, which sets out a special regime for the mining sector, the Tanzania Investment Act of 1997, which contains provisions that guarantee profit and capital repatriation as well as access to international arbitral process and the Explosives Act, Chapter 45.

The principal regulatory body for the mining sector is the Ministry. Both the minister and the commissioner are the recognised licensing authorities acting individually or collectively under the Mining Act. There is a chief inspector of mines and other departments, which oversees the sector according to the requirements of the Mining Act and the National Environmental Management Council, which oversees environmental issues while the Tanzania Atomic Energy Commission oversees enforcement of the Atomic Energy Act. The Tanzania Investment Act is overseen by the Tanzania Investment Centre.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Classification of mineral resources and mineral reserves is contained in the relevant legislation. For example, under the Mining Act, building materials are distinguished from other minerals of higher value like gold, copper, nickel and zinc. Gemstones include diamonds, tanzanite and sapphire. Petroleum is of its own class pursuant to the petroleum legislation.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Control over minerals is vested in the state. However, mineral rights can be granted to individuals provided that they meet the criteria set out in the Mining Act, which stipulates, inter alia, that one must be above the age of 18 and is not bankrupt or to a body corporate, which is not in liquidation or being wound up and is not in default with respect to another mineral right. Primary mining licences and gemstone mining licences can only be held by individuals, partnerships or bodies

corporate, which are composed exclusively of Tanzanian citizens. A mineral right grants the holder the exclusive right to explore or mine minerals and does not confer on the holder surface rights. Likewise, a surface right holder does not have the right to explore for or mine minerals within his or her surface right area without applying for and being granted a licence by the Ministry.

In addition to this, under the Mining Act a licence holder who already owns 20 prospecting licences is restricted from owning any more prospecting licences, unless the cumulative area of all the 20 licences granted does not exceed 2,000km^2. This particular restriction applies to all entitled licence holders; that is, all individuals, partnerships, companies, or any of the partners, shareholders and directors of the partnership or company.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Information pertaining to mineral rights and geology is available from the Ministry, which has a database system in place showing all rights allocated within the country. In addition, the Geological Survey of Tanzania (GST) provides a wide range of geological services to the public. All reporting requirements for mineral rights' holders, including submission of quarterly reports must be submitted to the Ministry periodically in both hard and soft copies. There are no databases available online, however, requests for geoscience information may be directed to either the Ministry or the GST directly and may be provided at a fee.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Licences are granted on a first come, first served basis, except in a situation where licences are lodged simultaneously and therefore become subject to a competitive bidding process. The types of licences that may be granted under the Mining Act include a prospecting licence, a gemstone prospecting licence, a retention licence, a special mining licence, a mining licence, a gemstone mining licence and a primary mining licence. Primary mining licences are restricted to Tanzanian citizens or corporate entities whose membership is composed exclusively of Tanzanian citizens. Reconnaissance licences were discontinued following the enactment of the Mining Act. Under the terms of a prospecting licence and if the holder is not in default of those terms, he or she may apply for, and will be granted, a mining licence, upon satisfaction of the conditions for grant.

The holder of a prospecting licence must:

- commence prospecting operations within three months, or such further period as the licensing authority may allow, from the date of the granting of the licence or such other date as is stated in the licence;
- commence mining activities within 18 months or such further period as the licensing authority may allow;
- give notice to the licensing authority of discovery of any mineral deposit with potential commercial value; and
- expend on prospecting operations not less than the amount prescribed.

The holder of a mining licence or a special mining licence must:

- develop the mining area and carry on mining operations in substantial compliance with the programme of mining operations and their environmental management plan, and commence production in accordance with the programme of mining operations;
- employ and train citizens of Tanzania in accordance with the proposals as appended to the licence; and
- demarcate the mining area and keep it demarcated in the prescribed manner.

Whenever required by the minister, after consultation with the Mining Advisory Board, licence holders must provide for the posting of a rehabilitation bond, as provided for in the regulations, to finance the costs of rehabilitating and making safe the mining area on termination of mining operations where the holders of the special mining licence have failed to meet their obligations in this respect.

11 What is the regime for the renewal and transfer of mineral licences?

A licence holder or, where the holder is more than one person, every person who constitutes the holder of the mineral right, is entitled to assign the mineral right or an undivided proportionate part thereof to another person. However, the transfer of mining licences requires the prior written consent of the licensing authority unless it is to an affiliate whose obligations are guaranteed by the assignor or parent company approved by the licensing authority, a bank or other financial institution by way of a mortgage or charge given as security for a loan or guarantee, or another person who constitutes the holder of the mining licence.

All mineral rights must be renewed by the licensing authority unless the holder is in default in which case a 'default notice' would be issued first to give the licence holder time to remedy the default, failure of which would result in the suspension and eventual cancellation of the licence.

12 What is the typical duration of mining rights?

Prospecting licences are granted for a period of nine years and cannot be renewed. Special mining licences are granted for the estimated life of the ore body indicated in the feasibility study report or as the applicant may requested, whichever is shorter, and can be renewed at any time not later than one year before expiry for a period not exceeding the estimated life of the remaining ore body. A mining licence is granted for ten years and may be renewed no later than six months prior to expiry for a period not exceeding 10 years. The Minister shall not reject a renewal application on grounds that the applicant is in default without first serving a default notice specifying particulars of the default and requiring the holder to remedy the default within a specified time. Other grounds for refusal to renew a mining right include:

- development in the mining area has not proceeded with reasonable diligence;
- minerals in workable quantities do not remain to be produced;
- the applicant failed to conduct mining operations in strict compliance with applicant regulations relating to safety and environmental management; and
- the applicant has not included in his or her application for renewal the relevant environment certificate in respect of operations to be conducted during the period of renewal.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Except for primary mining licences, which are restricted to citizens of Tanzania, or corporate entities whose membership is composed exclusively of Tanzanian citizens, there are no restrictions or distinctions between foreign nationals and citizens in the acquisition of mineral rights. However, a gemstone mining licence is granted only to Tanzanian applicants, unless where the minister, after consultation with the Mining Advisory Board, determines that the development of the gemstone resource in an area of land subject to the gemstone mining licence is most likely to require specialised skills, technology or a high level of investment, he or she may grant the said licence, where he or she is satisfied that the licence will be held by that person together with a non-citizen whose undivided participating shares amount to not more than 50 per cent either alone, in the case of one person, or in aggregate in the case of more than one person.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mining Act prescribes a clear and transparent manner in dealing with the allocation and administration of mineral rights, which ensures adequate security of tenure. Mineral rights are allocated on a first

come, first served basis and there is no political interference in the process of allocation. Suspension or cancellation of a mineral right may be only for reasons of default and the licence holder is entitled to receive notice of intention to suspend or terminate a licence and termination is subject to due process of law. Further guarantee is contained in the Constitution under section 24, which guarantees private ownership of property and protection of that property by the state. In addition, the Tanzanian judicial system adheres to the rule of law and due process. The commissioner may, pursuant to the Mining Act, enquire into and decide all disputes between persons engaged in prospecting or mining operations, other than the government. The law further provides that any person aggrieved by the decision or order of the commissioner may appeal to the high court within 30 days from the date on which the decision or order of the commissioner was given or made.

Section 22(2) of the Tanzania Investment Act No. 26 of 1997, which regulates businesses, including mining businesses in respect of the transfer of profits and guarantees against expropriation, prohibits the state from acquiring a business enterprise, wholly or partially, unless the acquisition is under due process of law. It also provides for payment of fair, adequate and prompt compensation and a right of access to the court, or a right to arbitration for the determination of the investor's interest or right and the amount of compensation to which they are entitled. Any compensation payable must be paid promptly and authorisation required for its repatriation in convertible currency must be issued.

In addition to this, Tanzania is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) of 1958, which makes it easy to enforce foreign arbitral awards in respect of domestic mining disputes.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Private parties may acquire surface rights as prescribed in the Land Act 1999. All land in Tanzania is public land vested in the president who grants (via the commissioner for lands) rights of occupancy for specified periods of 33, 66 or 99 years, subject to renewal. There is a Central Land Registry in which all title deeds for granted rights of occupancies are registered. One copy of the title deed is kept at the registry and the other remains in the possession of the owner. Any mortgages or charges or similar third-party rights against the property, or transfers of the right of occupancy, are endorsed on the two copies of the title deeds and provide ready proof of the position. There are zonal land registries, which are administratively answerable to the Central Land Registry. The commissioner for lands is the principal administrative officer and adviser to the government with respect to land matters and he or she is a presidential appointee. There is also land owned under customary rights, but it remains held for purposes of surface use and not otherwise. Foreigners may hold land only for the purpose of investment through a derivative right. This process is administered through the Tanzania Investment Centre in accordance with the Tanzania Investment Act.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The government participates in mining projects by way of entering into a development agreement with a special mining licence holder. Other state agencies that own licences, such as the State Mining Corporation and the National Development Corporation, are also entitled to enter into mining projects. Holders of special mining licences are required to list on the Dar es Salaam Stock Exchange. The minimum local shareholding requirement of a holder of a special mining licence is 30 per cent of the total issued and paid up shares whereby the public offer must be within one year after granting of the special mining licence.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

See question 14.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

The minister may, by order published in the Gazette, designate any vacant area or declare any area relinquished from a prospecting licence to be an area exclusively reserved for mining operations by persons holding primary mining licences or designate any gemstone to be a specified gemstone for special conditions on mining, trading and disposal. According to section 95 of the Mining Act a licence holder is restricted from exercising their rights under a mineral rights in respect of the following areas:

- any land dedicated or set apart for any public purpose other than mining;
- any land dedicated as a place of burial;
- any land that is the site of or is within 200 metres of any building, reservoir or dam owned by the government;
- any land forming part of a licensed or government aerodrome or of any government landing ground, or which is within 1,000 metres of the boundaries thereof;
- any land of which there is a military installation, or on land that is within 100 metres of the boundaries thereof; or
- any reserved area, or any protected monument declared under the Antiquities Act.

In addition, holders of mineral rights cannot exercise their rights without written consent from the relevant local government authority, including the village council, and lawful occupiers in respect of any land, which is the site of or within 200 metres of any inhabited, occupied or temporarily unoccupied house or building, any land within 200 metres of land that has been declared or ploughed or otherwise prepared in good faith for the growing of agricultural crops or where crops have been reaped. With respect to land declared national parks, forest reserves, game reserves, range development areas or the Ngorongoro Conservation area, municipalities, townships, villages, or areas licensed for petroleum development prior consent must be obtained from the minister or authority having responsibility, respectively.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

There is a special fiscal regime for mining companies as detailed.

US dollar accounting

Other than the Tanzanian shilling, mining companies may opt to maintain their accounts in US dollars and their tax liability will be assessed and calculated in US dollars.

Corporate income tax

Corporate tax is payable under the Income Tax Act of 2006 (the Income Tax Act) at a rate not exceeding 30 per cent. Income is computed in the manner set out in the Income Tax Act, as may be amended from time to time.

Depreciation allowance for capital expenditure

Depreciation shall be deducted at the rate of 100 per cent on capital expenditure for exploration and development.

Loss carry-forwards

Losses may be carried forward indefinitely until recovered against income.

Expenditure on another licence area

Expenditure on prospecting and mining operations in respect of another licence area may, for the purpose of ascertaining taxable income, be treated as though it were expenditure incurred in respect of mining licences.

Withholding tax on dividends

Withholding tax on dividends is at the rate of 10 per cent. Other sectors pay withholding tax on dividends at the rate of 20 per cent, except for companies holding certificates of incentives issued by the Tanzania Investment Centre, which pay the same rate as mining companies.

Withholding tax on interest
Withholding tax on the interest on foreign loans is at the rate of 15 per cent and accrued interest is deemed a payment; therefore, withholding tax thereon is payable.

Withholding tax on payments for technical services and on management fees
Withholding tax on the above is capped at the rates of 3 per cent, where the technical service fee, or the management fee, does not exceed 2 per cent of the amount claimed as a deduction from income in respect of operating expenses incurred in mining operations, and 20 per cent for any excess amount.

Customs duty on imports of mining equipment and supplies
Import duties under the terms of the Customs Tariff Act by a mining company or its subcontractors are at a zero per cent rate during exploration and in the first year of operation, and thereafter will not exceed 5 per cent.

Value added tax (VAT)
VAT special relief has been limited to cover only exploration and prospecting activities, while excise duty exemptions have been abolished.

Royalties
Royalties are chargeable on the gross back value of minerals produced under a licence at the rate of 5 per cent for uranium, gemstones and diamonds, and 4 and 3 per cent for metallic minerals and any other minerals, respectively. Gross value is defined under the Mining Act to mean the market value of minerals at the point of refining or sale, or in the case of consumption within Tanzania, at the point of delivery within Tanzania.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The single major tax incentive available to mining companies is the possibility of large-scale mining projects to enter into a development agreement with the government, which freezes the tax regime as it was on the signature date of the development agreement. This creates a stable and predictable tax regime for the company. Should any changes in the tax regime occur such that the benefits guaranteed under the development agreement are eroded, the government will consult with the mining company and take action to ensure that the mining company is not in a worse-off situation than it was on the signature date of the development agreement.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

See question 20.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The development agreements entered into between a special mining licence holder and the government provide the government with a free carried interest at a rate to be negotiated and agreed upon between the parties.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Transfer taxes, including stamp duty and capital gains, are due to the revenue authorities prior to a transfer of a licence in addition to the transfer fee payable to the licensing authority. In addition, where there is a change in control involving transfer of shares in a corporate licence holder or the transfer of a mineral right, the transaction is subject to stamp duty and capital gains tax on the shares transferred or on the consideration of the agreement, also payable to the revenue authorities. Where the value of the assets of the transferor and transferee exceeds 800 million Tanzanian shillings, further approval must be obtained from the fair competition commission, as such a transaction involves an acquisition as defined under the Fair Competition Act No. 8 of 2003 and its Regulations made thereunder.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no difference between duties or royalties payable by domestic and foreign parties.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The principal business structures are limited liability companies, public corporations (being largely privatised), partnerships, branches of foreign-incorporated companies and sole traders. A large majority of foreign private parties carrying on mining activities use the limited liability company form. Very few operators use branches of foreign companies. Joint ventures are also common, but these are between corporate entities, as Tanzania does not recognise unincorporated joint ventures.

26 Is there a requirement that a local entity be a party to the transaction?

No. See question 10.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

There are mining development agreements between investors and the government that negotiate favourable tax adjustments, exemptions or deferments for the duration of the agreement.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Large-scale mining companies have hitherto sourced their funding from foreign banks and foreign listings. Smaller and local mining companies source their funds locally. The Dar es Salaam Stock Exchange is relatively new and has yet to play any role in the financing of mining activities, although the Mining Act now imposes a listing obligation to holders of special mining licences. Currently, only one mining company is listed. However, it is a cross-listing.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No.

30 Please describe the regime for taking security over mining interests.

The Mining Act entitles a licence holder to mortgage or create a charge over the mineral rights in favour of a third party. Such charge, where created by a body corporate, must be filed with the registrar of companies and notified to the licensing authority for purposes of recording in the Central Register of Mineral Rights. See question 11.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There is no restriction on the importation of machinery and equipment required for mining activities.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no standard conditions or agreements covering equipment supplies in Tanzania. These are usually private contracts entered between the supplier and the buyer. Any dispute arising from such contracts would be resolved through arbitration, depending on whether

the contract makes such a provision, or a court of competent jurisdiction in Tanzanian.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The Mining Act prohibits any person from buying or otherwise acquiring, selling, or otherwise disposing or exporting any minerals specified in a licence, unless that person is a licence holder or an authorised dealer. The dealer licence would specify the type of mineral or minerals it is for. However, the authorised dealer or licence holder must obtain a permit which evidences payment of royalty from the commissioner before he or she can export, sell or otherwise dispose of any minerals within or outside Tanzania. As of 2nd March, 2017 the government imposed a ban on export of metallic mineral concentrates and it is not known when this ban will be uplifted.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There is no restriction on the importation of funds to finance mining activities or the use of the export proceeds of mining produce. Tanzania enjoys a highly liberalised foreign exchange regime. There is complete market freedom, availability of foreign exchange at market prices and opening of domestic foreign currency accounts and no restriction on current account transactions. However, the Bank of Tanzania still regulates the establishment of offshore bank accounts by residents. Locally incorporated companies wishing to establish offshore bank accounts for purposes of depositing export proceeds or foreign loan proceeds must apply to the Bank of Tanzania for approval.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental law is the Environmental Management Act No. 20 of 2004 and its subsidiary legislation administered by the National Environmental Management Council. The Regulations made thereunder include the following:

- the Environmental (Registration of Environmental Experts) Regulations, 2005;
- the Environmental Impact Assessment and Audit Regulations, 2005;
- the Environmental Management (Air Quality Standards) Regulations, 2007;
- the Environmental Management (Soil Quality Standards) Regulations, 2007;
- the Environmental Management (Water Quality Standards) Regulations, 2007;
- the Environmental (Solid Waste Management) Regulations, 2009; and
- the Environmental (Hazardous Waste Control and Management) Regulations, 2009.

There are also other environmental laws contained in the Mining Regulations issued under the Mining Act. These are the Mining (Safety, Occupational Health and Environmental Protection) Regulations of 2010 and the Mining (Radioactive Minerals) Regulations of 2010. The chief inspector of mines, appointed pursuant to the Mining Act and working under the commissioner, administers the environmental, health and safety laws while the National Environmental Management Council administers the Environmental Management Act. Schedule 3 of the Environmental Management Act lists mining as an investment sector, which is subject to an environmental impact assessment prior to commencement of work. Further, section 232 of the same elevates the Environmental Management Act above the provisions of the regulations issued pursuant to the Mining Act. It stipulates that where the provisions of the Environmental Management Act are in conflict or are otherwise inconsistent with the provisions of any other law relating to environmental management, the provisions of the Environmental Management Act shall prevail to the extent of such inconsistency.

Update and trends

In October 2016, the Mining (Minimum Shareholding and Public Offering) Regulation was enacted requiring special mining licenceholder to offer 30 per cent to local shareholders in an initial public offer. The Regulations required special mining licenceholders who held licences prior to the commencement of the Regulations to list on the Dar Es Salaam Stock Exchange within two years, and those who were issued with licences after the commencement of the Regulations to list within one year. However, in February 2017, this position was altered and shortened by new Regulations which stipulate that special mining licenceholders must list within six months from the date of the new regulations (ie, by August 2017) and those who are granted licences after the commencement of the new Regulations to list within one year.

2016 also saw the final decision on Tax Appeal No. 128 of 2013 and No. 16 of 2015 whereby the Tanzania Revenue Authority was the plaintiff/complainant, while Acacia plc was the defendant/accused. The Tax Tribunal ruled in favour of the Tanzania Revenue Authority and Acacia was ordered to pay in excess of US$541 million in corporate and withholding taxes. Acacia is appealing this decision.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

All applications for special mining licences, mining licences or gemstone mining licences must be accompanied by an environmental certificate issued by the National Environmental Council pursuant to the Environmental Management Act. Such certificate is issued upon undertaking an environmental impact assessment by qualified experts. The minister would reject an application if the application for a licence is submitted without an environmental certificate. The licensing authority shall not issue a licence until at least 60 days from the date of the application. The licence holder is obliged to submit a report reviewing the progress and status of the environmental management plan or amendment within two years of grant or renewals and not exceeding five-year intervals thereafter.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

In terms of the Mining (Safety, Occupational Health and Environment Protection) Regulations of 2010, prior to a mine closure, the following must occur:

- the licence holder shall submit a report to the commissioner and the Ministry responsible for the environment outlining the post-operational state of dams, dykes, related seepage control, spillway works, mine water pumps and post-operational monitoring;
- a permanent spillway shall be designed to a standard required by the chief inspector, and installed prior to final abandonment of the tailing dam;
- all tailings ponds shall be reclaimed in accordance with land-use objectives unless permanent access is required to be maintained;
- chemicals or reagents that cannot be returned to the manufacturer are to be disposed of as directed by the chief inspector; and
- all potential acid-generating material shall be stored in a manner that minimises the production and release of acid levels that assures protection of environmental quality.

The minister may require a licence holder to provide for the posting of rehabilitation bonds, either in the form of escrow accounts, capital bonds, insurance or bank guarantee bonds, pledging and assets or any other form of bond. See also question 10.

38 What are the restrictions for building tailings or waste dams?

Approval from the chief inspector is required prior to the construction of a major impoundment, dam or waste dump and work shall not commence without written acceptance of the design by the chief inspector and possession of all other applicable permits. The waste emplacement and major impoundment or dams must be designed by a qualified professional engineer registered according to the Engineers Registration Act and comply with the specifications established by the

chief inspector. The company is required to provide the chief inspector with an annual report on the operation and maintenance of the tailings disposal system. Any impoundment not operated for a period of 12 or more month may be declared as closed.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety, and labour laws are the Occupational Health and Safety Act No. 5 of 2003, administered by the Occupational Health and Safety Authority, the Mining (Safety, Occupational Health and Environmental Protection) Regulations of 2010 and the Employment and Labour Relations Act No. 4 of 2006. All principal laws have subsidiary regulations that are also applicable. There is no regulatory body that administers the labour law.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

A mining company must obtain approval from the chief inspector of mines and the relevant regulatory authorities in order to construct a major impoundment, dam or waste dump. Such major waste emplacements or impoundments must be designed by a qualified professional and comply with specifications issued by the chief inspector. In addition, during the life of the mine, the licence holder must institute a programme of environmental protection and reclamation in accordance with the prescribed standards unless specifically excluded from complying with a particular standard.

Tailings belong to the licence holder who has an obligation under the Mining (Safety, Occupational Health and Environment Protection) Regulations to provide the chief inspector with an annual report on the operation and maintenance of the tailings disposal system.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The investor, depending on the nature of its operations, shall determine the immigration quota in respect of mining and petroleum operations. However, the labour commissioner will intervene if, in his or her opinion, a position filled by a foreign employee could be filled by a local employee in terms of skills available. In addition, all mining and special mining licence holders are required to employ and train the citizens of Tanzania and implement a succession plan for expatriate employees in accordance with the proposals appended to the mining or special mining licence.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are no community or CSR laws. Such terms are usually embroidered in a miner's individual mining programme.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Village land is protected by restricting entry of the holder of a mineral right without written consent from the occupiers thereof and the village council. See also question 18.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Pursuant to the Tanzania Extractive Industries (Transparency and Accountability) Act No. 23 of 2015, an extractive industry company is required to submit annual reports containing information on local content and corporate social responsibility to the Tanzania Extractive Industry (Transparency and Accountability) Committee. Failure to do so constitutes an offence.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

In Tanzania anti-corruption and anti-bribery is primarily enforced under the Prevention of Corruption Act Cap. 329. However there are other relevant legislations such as the Anti-Money Laundering Act Cap. 423, the Criminal Procedure Act Cap. 20 and the Penal Code Cap.16. The Prevention of Corruption Act established the Prevention and Combating of Corruption Bureau whose prime function is to take any necessary measures for the prevention and combating of corruption in public, parastatal and private sectors through its wide mandate.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Local companies must ensure to comply with the laws mentioned in question 45. However, companies dealing with foreign companies that observe foreign government legislation for anti-bribery and corrupt practices, may be required to enter into agreements that include such foreign legislative clauses that are enforceable in the jurisdiction of the subject of such agreement, including Tanzania. An example is the UK anti-bribery law, the provision for which may be found in various contracts with local companies.

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www.ensafrica.com

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The Extractive Industries (Transparency and Accountability) Committee, which is established under the Tanzania Extractive Industries (Transparency and Accountability) Act No. 23 of 2015, is responsible for ensuring that benefits of the extractive industry are verified, duly accounted for and prudently utilised for the benefit of the citizens of Tanzania. As such the committee is mandated under the Act, inter alia, to develop a framework for transparency and accountability in the reporting and disclosure by all extractive industry companies on revenues due to or paid to the government. They would require any extractive industry company, or from the statutory recipients, an accurate account of money paid by and received from the company at any period as revenue accruing to the government from such company for that period, and make reconciliations on payments from extractive industry companies and government receipts. Moreover, the committee may engage an independent reconciler to reconcile and verify payments made by extractive industry companies and revenues received by the government.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Other than primary mining licences or gemstone mining licences (see questions 8 and 13), there are none.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Tanzania is a signatory to various international treaties and conventions. Of particular relevance to the mining industry and in respect of all foreign investors, is the New York Convention and the adaptation of the UNCITRAL rules, which are now embodied under the arbitration clause within the model development agreement as provided in the Third Schedule to the Regulations with respect to development agreements between the government and special mining licence holders.

Thailand

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Chandler MHM Limited

1 What is the nature and importance of the mining industry in your country?

Thailand was formerly a major tin producer, but now produces mainly gold, silver, iron, zinc, limestone, gypsum and basalt. Thailand is currently a net importer of mineral commodities.

See the *United States Geological Survey Minerals Yearbook (Thailand)* for mining details from recent years in English. See also the website of the Mining Industry Council of Thailand at www.miningthai.org and the website of the Department of Primary Industries and Mines, Ministry of Industry (DPIM) at www.dpim.go.th for current information and statistics. An investment guide for the mining business in Thailand is available in both Thai and English but is dated September 2009 and does not cover the new Minerals Act.

2 What are the target minerals?

In Thailand, more than 40 minerals are produced. Based on the information provided on the DPIM website, the most-produced target minerals in 2016 were industrial minerals and industrial rocks, silver ore and gold ore. Between 2015 and 2016, mining production for almost all minerals reduced with a few exceptions.

The government announced a policy in May 2016 to close existing gold mines by the end of 2016, including those operated by Akara, and not to issue new, or renew mining licences for gold.

3 Which regions are most active?

There is exploration and mining activity in all regions. For example, gold is produced in central and northern regions, limestone is produced in central, western, southern and northern regions and zinc is produced in western regions.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Thailand's legal system is civil law-based.

5 How is the mining industry regulated?

The mining industry was regulated by the Ministry of Industry (MOI) and the DPIM at the central level, and by the local mineral industry officials (LMIOs) at the provincial level. However, a number of government agencies had regulatory powers over various elements of mining projects.

See question 6.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Until 30 August 2017, the principal law regulating the mining industry was the Minerals Act (1967), last amended in 2002 by the Minerals Act No. 5. The Act governs onshore and offshore exploration, mining, processing, mineral production, mineral trading, possession of minerals, ore dressing, transport and export of minerals other than petroleum.

The Mineral Royalty Rates Act (1966), prescribes the rates of royalties to be assessed for different kinds of minerals.

The principal environmental law is the National Environment Protection and Promotion Act (1992) (the Environmental Act) and is administered by the Office of Natural Resources and Environmental Policy and Planning (ONEP) in the Ministry of Natural Resources and Environment (MNRE). See questions 35 and 36.

The Minister of Natural Resources and Environment (MNRE) and Minister of Industry (MOI) are both charged with administration of the new Act, and will issue ministerial regulations, notifications and other orders. A National Mineral Administrative Policy board (NMAP or the Board) is to be established. The Department of Mineral Resources (DMR) shall function as secretarial office for the Board.

The Board is charged to prepare a mineral administrative master plan, which will include resource surveys, restrictions on certain minerals and areas, and guidelines for mineral administration that results in appropriate benefits to the economic, social, environmental and health balance. A master plan is to be prepared every five years, and be submitted to the Cabinet for approval.

A Mineral Committee and Provincial Mineral Committees are to be established. The Mineral Committee is charged with advising Ministers on bidding, issuance of ministerial regulations and notifications, approval of licences, renewals, transfers, revocation of conditions of mining of categories 2 and 3, consider complaints and provide assessments of impact on people's health and the environment. Provincial Mineral Committees have similar powers in respect of mining of category 1.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no legal classification system for reporting mineral resources and mineral reserves. In practice, the DPIM will classify the ore reserves based on reserves in mining lease areas and in areas of mineral potential. Information regarding Thailand's ore reserves is publicly available, in Thai, at www.dpim.go.th/dpimdoc/ores.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mining rights are granted by the Minister of Industry. Section 52 of the new Minerals Act states that no person shall mine in any area, regardless of any person's right over the surface area to be mined unless a mining lease has been obtained. In Thailand, minerals belong to the state. Mining rights do not grant title to minerals in the ground. The mining leaseholder can sell minerals specified in the mining lease only. Other minerals acquired incidentally may be sold by the leaseholder only after he or she has received a licence from the Director-General of the DPIM. Under section 53 of the new Minerals Act, the Minister will issue a notification to classify mining into three categories:

- Category 1 mining, ie, mining in the area of no more than one hundred rai, the prathanabat of which shall be issued by the local

mineral industries official on approval of the Provincial Mineral Committee in the province where the mining is operated;
- Category 2 mining, ie, mining in the area of no more than 625 rai, the prathanabat of which shall be issued by the Director-General on approval of the Mineral Committee;
- Category 3 mining, ie, mining other than the category 1 mining or category 2 mining, offshore mining and underground mining, the prathanabat of which shall be issued by the Director-General on approval of the Mineral Committee.

However, there is no limit on the number of mining leases that may be acquired by one person. Therefore, in practice it is possible to mine over a larger area than the prescribed rai limits. The application process for a mining lease for the landowner of the land to be mined is the same as for those who do not own the property.

Prospecting
The Act provides for issue of:
- prospecting licences, valid for one year;
- exclusive prospecting licence, valid for not more than two years, with area of not more than 2,500 rai; and
- special prospecting licences, valid for not more than five years, with area of 10,000 rai for onshore, and not more than 500,000 rai for offshore area.

Mining
The Act requires applicants to submit plans for restoration, development, utilisation and monitoring impacts from mining activities on the environment and health of people in and around the mining area, and requires applicants to bear the cost of organising referendums. The Minister may issue notifications to classify mining activities into three categories:
- Category 1 mining. Area of not more than 100 rai.
- Category 2 mining. Area of no more than 625 rai; and
- Category 3 mining. Mining other than category 1 or 2 mining, offshore mining and underground mining.

Maximum duration is 30 years (compared to 25 in the past).

Applications for underground mining require a restoration plan, and security for restoration of the mining area and compensation for persons affected by the mining.

Mineral dressing and metallurgical processing
Licenses may be issued, valid for no more than five years.

Cancellation, amendment and revocation of licences
There are provisions for dismissing applications, amendment of licenses, penalties and revocation of licences.

Mineral royalty, fees and special contributions
Royalty rates will be established under ministerial regulations. Rates are capped at 30 per cent.

The Act includes a schedule of fees.

Holders of mining leases will pay a special contribution of no more than ten percent of the rate of royalty on minerals produced.

The Minister may reduce fees.

The Act includes provisions for civil liabilities, seizure and attachment, penalties and transitory provisions. Current holders of mineral rights should study the transitory provisions carefully, because in many cases they will be subject to rules provided under the new Act.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Mining laws and regulations, information regarding the number of mines by kinds of minerals, number of licence holders and applicants for licences and mineral assessment statistics are publicly available in Thai via the DPIM website (www.dpim.go.th). The DPIM prepares mineral assessments by collecting mineral assessment reports submitted by licence holders.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

See question 8.

Major mining rights include exploration rights and mining leases. Mining rights are granted with certain conditions and validity as prescribed by the Minerals Act. The Minister of Industry has the power to revoke the rights if the holder fails to comply with the conditions attached to the granted right. The approval of mining rights is not specified in the law itself and can vary. To apply for any mining rights, the applicant must submit an application together with supporting documents and information required with the LMIO and pay the fees at the specified rate.

Exploration rights
For exploration activities, a prospecting licence must be acquired. In the case of overlapping applications for the same area, the first application to be submitted will be processed first. There are three kinds of prospecting licences that investors may apply for, namely, the general prospecting licence (GPL), the exclusive prospecting licence (EPL) and the special prospecting licence (SPL).

A GPL is a non-exclusive, non-renewable and non-transferable licence and is valid for one year. A GPL grants rights for mineral prospecting and exploration within a designated area of an administrative district or a province. The LMIO has the authority to issue a GPL. Mineral prospecting under this licence can be conducted only by geological, geochemical or geophysical surveys. Prospecting methods that directly collect mineral samplings, such as pitting, trenching and drilling are not allowed.

An EPL grants sole mineral prospecting and exploration rights within a designated area, and is valid for no more than two years. An EPL is issued by the Director-General and is non-transferable. An EPL is limited to an area not exceeding 2,500 rai (under the current policy, the granted area will not exceed 1,250 rai); The MOI has a policy of not issuing EPLs for industrial rocks, dimensional stones, marble, and dolomite. There are a number of conditions the holder of an EPL has to comply with, including:
- the commencement of exploration within 60 days after the EPL is issued;
- the filing of a report 180 days after the receipt of the EPL describing the first operations and works undertaken within 30 days from the end of that 180-day period; and
- filing a final exploration report within 30 days of the expiry date of the EPL.

An SPL is issued by the Director-General with approval of the board, and is valid for a duration of five years and is non-renewable. The exploration area that may be granted under an SPL may not exceed 10,000 rai, except applications to explore offshore may be made for 500,000 rai each. An application for an SPL must include a work plan and an estimate of expenses for each year for the whole project, as well as an offer of 'special benefits' to the government. The special benefits will further bind the holder of the SPL upon receiving a mining lease for mining in the area for which the SPL has been granted. The prospector must commence exploration within 90 days of the issuance of the SPL. A progress report must be submitted to the DPIM every 120-day period commencing from receipt of a licence. An SPL is suitable for large projects entailing high-value minerals or substantial investment capital, and also in the event an applicant requires more time or a larger area for exploration. The prospector may relinquish areas he or she no longer wishes to prospect.

Each SPL applicant must propose a 'special benefit' to the Thai government in the application. The SPL holder will generally get preferential rights to acquire a mining licence for the area the SPL covers. In the case that there are multiple applicants, owners or possessors of such land, under the Land Code, get priority above all other applicants.

The MOI issued a Gold Exploration and Development Policy dated 4 July 1987 to promote the exploration and mining of gold. The policy prescribes rules governing the application for gold exploration and mining rights in areas other than special areas declared to be 'gold mining development areas', which are subject to award by public auction. The MOI also issued another policy called the Gold Exploration and Mining Policy dated 6 May 2011 to prescribe the rules governing applications for gold exploration and mining requirement for environmental quality protection with the aim of achieving sustainable development of the gold ore mining industry.

Mining rights

Upon discovery of a commercial mineral deposit, a prospector must apply for a mining lease (ML) in order to conduct mining activities. Generally, applications will be treated on a first come, first served basis. The prospector holding an EPL or SPL has first priority of being granted an ML. In the event that there are multiple applicants, those who have ownership or possession of the surface land for which an ML is sought, have priority. The MOI issued the Gold Exploration and Mining Policy, which requires that the applicant for an ML for gold extraction must have received an SPL for that particular land for gold exploration prior to applying for an ML for the same land.

An ML may cover an area not exceeding 625 rai (or 2,500 rai if under a SPL) onshore, 10,000 rai underground and 50,000 rai offshore per applicant. There is no limit on the number of MLs that may be applied for by one person. An ML is valid for a maximum of 30 years and may not be transferred without the approval of the minister of industry. Pending approval of the ML, a prospector may apply for a non-transferable temporary ML, which is valid for one year.

An applicant for an ML must provide a map showing the area to be mined, reliable evidence of the discovery or existence of the mineral to be mined, evidence of financial capital, a work plan, evidence showing acquisition of surface land rights, evidence of technological ability (tools, equipment and machinery) and an environmental impact assessment report (EIA).

The DPIM has published guidelines for determining the minimum amount of capital required. Evidence of financial capital may be shown by a letter of confirmation issued by a bank. An applicant that has its own machinery and the equipment necessary for use in mining may produce evidence of ownership of such machinery and equipment and the value thereof may be deducted from the amount of capital required, provided the deduction does not exceed 50 per cent of the amount designated.

Special rules apply to underground mining. See sections 76–93.

Special rules for offshore mining

In August 1978, the cabinet passed two resolutions regarding offshore mining of minerals at depths not exceeding 200 feet. The resolutions can be summarised as follows.

Known deposits

After the expiry of the maximum mining lease period of 25 years, a foreign mining leaseholder may apply for a new ML to work an old deposit, provided that it realigns its equity interests so that Thai nationals hold at least 60 per cent of the total equity interest in the venture.

Unknown deposits

A company with foreign shareholders may apply for an ML to exploit a new deposit offshore, provided that Thai nationals hold at least 51 per cent of the equity interest initially, to be increased to 60 per cent within two years.

The above resolutions constitute administrative guidelines to be followed by the DPIM in its consideration of whether or not to grant or renew an offshore ML.

Other approvals required

Purchase of minerals

Any person who wishes to purchase minerals in the course of business must obtain a licence from DPIM. A purchasing licence is valid until 31 December of the year the licence was issued. The holder of a purchasing licence may not purchase minerals at any place other than the place specified in the purchasing licence. Purchasing minerals outside the specified place of purchase requires an external purchasing licence, which will be valid for the same period as the purchasing licence. A holder of a purchasing licence must keep accounts of minerals bought and sold and minerals still on hand.

Transportation and storage of minerals

The transportation of minerals requires that a mineral royalty is paid or guaranteed. For most minerals, an ore transport licence must accompany the transporting vehicle to the destination stated in the licence. Any person who wishes to store minerals outside a mining area or outside a designated place of purchase must also obtain a storage licence.

Ore dressing

Except for the holder of an ML who undertakes mineral dressing within the mining lease area, no one can undertake ore dressing operations without a licence. The licence is valid for a maximum of five years and is renewable for five years.

Metallurgical processing

Except for the holder of an ML who undertakes metallurgical processing within the mining lease area, no one can undertake metallurgical processing operations without a licence. A metallurgical license is valid for a maximum of five years and is renewable for five years.

11 What is the regime for the renewal and transfer of mineral licences?

Exploration licence

All types of prospecting licences are non-transferable and non-renewable.

Mining licences

An ML is transferable in accordance with rules, procedures and conditions prescribed in a notification by the Minister. The application and required supporting documents requested for approval of transfer or renewal shall be submitted with the LMIO. Where the ML provides for a term of less than 25 years and the ML holder applies for renewal in accordance with the rules and regulations at least 180 days before the expiry of the ML, the Minister of Industry may extend the terms of such ML provided that the aggregate term does not exceed 25 years.

In the case of a change in shareholding structure or change of control in the licence holder or its parent company, the Minerals Act does not require the licence holder to submit any notice of such a change. However, in the event of a structural change that results in shares becoming majority-foreign owned, a foreign business licence would be required under the Foreign Business Operation Act (1999), the company would be prohibited from owning land under the Land Code and from obtaining licensing to use a forested area.

12 What is the typical duration of mining rights?

See question 8.

Prospecting

- Prospecting licence: one year;
- Exclusive prospecting licences: two years; and
- Special prospecting licences: five years.

Mining

- Category 1 mining: 30 years;
- Category 2 mining: 30 years; and
- Category 3 mining: 30 years.

Grounds for revocation are prescribed in a number of sections of the new Minerals Act.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The government policy is not to grant mineral rights to foreign nationals (including companies in which ownership by foreign nationals exceeds 49 per cent). However, it is possible to grant mineral rights to a foreign company under a special agreement. Majority foreign-owned companies wishing to operate a mining business must obtain a licence

granted by the Minister of Commerce with the approval of the Thai cabinet as required under the Foreign Business Operation Act. The majority foreign-owned company can operate a mining business only if at least 40 per cent, or (with approval of the cabinet) 25 per cent of the capital is held by Thai nationals or Thai entities and at least two-fifths of the directors are Thai nationals.

The Land Code prescribes a ceiling on foreign ownership of 49 per cent; there is no restriction on foreign nationals leasing land. In the case the land to be applied for mining business is forest land, the company must have more than two-thirds of the shareholders or partners being Thai nationals holding more than half of the total number of shares.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

There is an independent court system in Thailand, including an administrative court to hear cases involving government agencies (such as the DPIM). Current government policy is that contracts with a government agency cannot include arbitration provisions, with exceptions approved by the cabinet. Under Thai law, judgments entered by a foreign court are not enforceable in Thailand. The foreign judgments can be introduced as evidence in an enforcement proceeding in a Thai court. A Thai court is free to examine new issues arising in the case. Foreign arbitration awards are enforceable under Thai law.

One factor that is often cited as an impediment to the mining industry's development is the lack of 'security of tenure'. The existing legal system does not expressly guarantee that the holder of an exploration licence will be granted an ML if it makes a commercial discovery. The government bureaucracy and the limited scope of the mining laws are not the sole causes of the inability to assure the right to mine prospected land; conflicts and restrictions from other authorities as well as subsequent land use conflicts complicate the issuance of rights.

One characteristic of the Thai bureaucracy that causes it to stand out is the divided nature of Thai administration. Government agencies in Thailand are divided into ministries, departments and bureaux, each of which are separate juristic entities, having independent contracting powers. Thus, the MOI is a separate legal entity from the DPIM, but the DPIM answers to the MOI administratively. Even though the DPIM is only one among many departments within the MOI, it can enter into contracts with a private party, independent of the Ministry. The director-general, as the head of the department, is the signatory to contracts. The question of whether the department or the director-general has the power to conclude contracts and the parameters within which this power can be exercised is governed by the law on public administration.

Each government agency is only concerned with administering its own law, even though that law may contradict other laws or may be inconsistent with national policy. This fact poses a major problem for the mineral industry in that the DPIM is not the agency that has the final say on whether or not an exploration or mining venture can be conducted. The ultimate decision may rest with the ONEP or with the Forestry Department, depending on where the land is situated.

Foreign investors often believe that once they have signed a contract with the DPIM and have paid the bonus, they may then proceed with the exploration and development work. In reality, the contract is only a grant of mineral rights, subject to negotiation with the other agencies concerned, and there is no guarantee that investors will be given all necessary approvals in the end. All acts of Parliament have the same standing under the law. The Forestry Act, the Minerals Act and the Environmental Act all have equal standing. Therefore, the DPIM, the Forestry Department and the ONEP are of equal legal status in the sense that none has authority to dictate terms to the other. There is no 'super-agency' to reconcile differences among departments, or hand down binding judgments in the case of conflicts.

Policies issued by the heads of various ministries and departments are the real modus operandi for government officials, and the failure of the officials to comply with policies may result in disciplinary action. These policies are internal directives and are not known to the public. In Thai legislation there are many provisions giving wide discretionary powers to permanent officials responsible for administering the law.

The new Minerals Act includes much more comprehensive provisions re regulations by two ministries (MOI and MNRE), a new National Mineral Administrative Policy Board and roles for both DPIM and DMR. A Mineral Committee and Provincial Mineral Committees will be established.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mining rights under the Minerals Act do not include any rights to the surface land. Surface rights over the mine vary depending on the type of land. Before applying for a mining lease, an applicant must acquire the right to use the surface land from the public or private owner, as the case may be. Negotiation with a private landowner is concluded by purchase or lease. If the land is owned by the government, a permit issued by the concerned government agency is required to be submitted along with the application for an ML before an ML is granted.

Ownership of private land is governed by the Land Code of 1954, the Civil and Commercial Code and regulations as set forth by the Land Department of the Ministry of the Interior. Under Thai law, foreign nationals may own land only if a treaty has been entered into between Thailand and their country or if permission is granted by the Ministry of the Interior. Presently, there are no such treaties between Thailand and any other country. A majority foreign-owned company is prohibited from owning land under the Land Code unless it obtains a Board of Investment (BOI) promotion certificate and an exemption to own land is granted. If the operator cannot own the land, it may consider a lease as another option. A lease agreement can be valid for a maximum of 30 years and must be registered with the Land Department of the Ministry of the Interior.

Non-private land can be categorised as forest areas, which are supervised by the Forestry Department under the Forestry Act of 1941 and National Reserved Forest Act of 1964, or agricultural land reform areas under the Land Reform for Agriculture Act of 1975, which is under the supervision of the Agricultural Land Reform Office. Licences from the concerned authority must be obtained. There are some categories of reserved areas that have been declared closed to exploration and mining activities. These include wildlife reserves, national parks, forests (conservation forests and economic forests) and areas reserved for security purposes. Development activities, including mining, are strictly prohibited in category 1A watershed areas, and restrictions apply to mining activities in economic forest areas. Other areas in the country are classified as urban areas, water bodies and areas for settlement programmes.

A government resolution for watershed classification in May 1985 prescribed that without exception, all development activities would be prohibited in forest areas classified as category 1A. Development in watershed category 1B is subject to government approval on a case-by-case basis and mining operations are permitted in watershed categories 2–5. It is more complicated to obtain permission to operate a mine in any category of reserved forest because of the revocation of forest concessions countrywide in January 1989. The revocation of forest concessions resulted in a reclassification of the country's forests, which are now classified as national parks, wildlife reserves, economic forests and land reform zones.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Although there is no prohibition on the government participating in mining projects, there is no precedent for such engagement by the government.

The new Minerals Act provides that its requirements do not apply to DPIM, DMR or DMF for the propose of survey, testing, study and research. Currently no state enterprise is involved in mining operations. There is no local listing requirement for a mining company.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Ministry of Industry has the power to revoke a licence when the holder fails to comply with the regulations provided under the Minerals Act or the conditions and obligations attached to the licence.

The Ministry of Industry is empowered to revoke an ML upon the occurrence of the following:

- it appears later that an ML was issued as a result of a prominent mistake or misunderstanding of material facts;
- the holder departs from the place of domicile or address and the LMIO is unable to communicate with him or her;
- the holder does not discharge all debts obligated under the Minerals Act within 90 days after receiving a written notice of payment from the LMIO; or
- the holder violates or commits an offence according to provisions under the Minerals Act, or fails to comply with the order of the LMIO or the conditions prescribed in the ML or related licence.

See Chapter 10 of the Minerals Act re dismissed, cancellation, amending and revocation of mining leases.

There will not be compensation for revocation. The Minerals Act itself has no provision regarding the government expropriation of mining businesses or MLs.

There are guarantees against expropriation in the Investment Promotion Law (Board of Investment), ASEAN Comprehensive Investment Agreement and several bilateral Investment Treaties.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are a number of types of land that are prohibited for mining, as outlined in question 15.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

A company earning revenues from mining is liable to pay corporate income tax under the Revenue Code. The current rate is 20 per cent. Dividend payments to overseas shareholders are generally subject to a withholding tax of 10 per cent. Expenses incurred for the sole purpose of carrying on the business may be deducted.

Depreciation of assets may be deducted as a business expense but must be done on an annual basis. Official prescribed rates of depreciation are 5 per cent for permanent buildings, 100 per cent for temporary buildings, 5 per cent for depletable natural resources, 10 per cent for lease rights with no fixed termination date and 20 per cent for other property.

Losses may be carried forward for five consecutive years.

Mineral royalties

The Thai government collects mineral royalties from mining and mineral production. The Minerals Act provides that the persons under the Minerals Act, including the mining lease holder and metallurgical operator, must pay mineral royalty, fees and special contribution in Chapter 11. The mineral royalty rate for each type of mineral will be determined by a ministerial regulation issued under the Mineral Act, and shall not exceed 30 per cent of market price.

Royalties will be paid based on the value of the particular mineral. Under the old Mineral Royalty Rates Act, some minerals were subject to the progressive rate with varying levels according to the price range and the maximum mineral royalty rate, while other types of minerals were subject to flat rates according to the kind, type and importance of the mineral.

Value added tax

Mining companies are subject to VAT at a flat rate of 10 per cent (temporarily reduced to 7 per cent until 30 September 2017). However, a zero VAT rate applies to exports of minerals by mineral traders. VAT payable is calculated from the difference between input tax (VAT paid by the mining trader to suppliers of goods or services) and output tax (VAT collected by the mining trader from persons who purchase goods or services).

Stamp duty is payable in respect of a number of transactions, at rates prescribed in the Revenue Code.

Double tax treaties with other nations

At present, Thailand has double tax treaties with 60 countries, including China, Japan and the US.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

BOI promotional incentives

Currently, under the Investment Promotion Act, only prospecting of minerals and (since 1 January 2015) only potash mining and dressing projects are eligible for promotion. As a precondition to applying for BOI incentives, a GPL, SPL or EPL must be obtained prior to submission of an investment promotion application for prospecting projects, and an ML must be obtained for potash mining and dressing projects prior to submission of an investment promotion application. Other types of mining activities are not eligible for promotion. The website of the BOI at www.boi.go.th includes a guide to the BOI and a summary of business law.

A mining project promoted by the BOI may be granted benefits including exemptions of customs duties for one year (which may be extended as deemed appropriate by the Board) on imported equipment and raw or essential materials used in manufacturing export products, and other non-tax incentives.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is currently no legislation in force that provides for either tax stabilisation or tax stabilisation agreements.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

Although there is no prohibition on the government holding an interest in mining projects, there is no precedent for such engagement by the government.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Consideration for transfer of licence is categorised as a taxable income that is subject to income tax at the rate prescribed by the Revenue Code. Capital gains are treated as normal income. VAT is applicable to transfers of rights.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

A Thai limited company is the usual choice of entity to hold MLs. In order to qualify for BOI promotion, the entity must be a limited company. Mining rights will not be granted to branches, non-registered partnerships, joint ventures or trusts.

26 Is there a requirement that a local entity be a party to the transaction?

Under the current law, an entity doing business in mining (excluding exploration activity) must be Thai majority-owned; otherwise, a foreign business operation licence granted by the minister of commerce with the approval of cabinet must be obtained.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Thailand has signed bilateral investment treaties (BITs) with 39 countries, of which 36 are in force, and double tax treaties with 60 countries. Among these BITs, those with Australia (TAF), Japan (JTEPA) and the US (Treaty of Amity) are considered more favourable. Under the TAF, a company with majority shareholders holding Australian nationality (up to 60 per cent) can engage in mining activities, but must be approved by the MOI and at least two-fifths of the directors must be of Thai nationality. This treaty does not exempt restrictions on foreign land ownership. The Treaty of Amity specifically includes the right to

prohibit or limit US companies from engaging in activities that include the exploitation of land or resources. The JTEPA has no language specific to mining activities. US and Japanese majority-owned companies must, therefore, adhere to restrictions and requirements for licensing found in the Foreign Business Operation Act (see question 13).

The ASEAN Comprehensive Investment Agreement includes provisions re mining activities.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Domestic and foreign financial institutions are the principal source of financing for mining projects, by way of loans on standard commercial terms.

Public limited companies and private limited companies (with the consent of the Stock Exchange of Thailand (SET)) may issue debentures.

Public limited companies may apply to be listed on the SET in accordance with rules prescribed by the SET.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Generally, no. The government pension fund may invest in securities issued by the mining companies, having credit ratings that meet investment grades.

30 Please describe the regime for taking security over mining interests.

A licence for mining activities, granted by the governmental agency, cannot be mortgaged, pledged or assigned as security under Thai law. Rights under a mining lease are not subject to judgement execution (section 65).

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The import of foreign machinery and equipment is subject to customs duty at rates prescribed in the customs tariff, and VAT (currently at the rate of 7 per cent). Exemptions may be granted by the BOI for promoted projects. In the case of a non-promoted company, the ratio of foreign staff to Thai staff shall not be greater than 1:4. The exemption to this limitation can be granted to the promoted company with the requirement that training and instruction must be expedited and support must be given to the Thai personnel in order that they can perform work in the promoted project in place of the foreign staff within the period of time prescribed by the BOI.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Standard international forms are not commonly used in Thailand. It is the practice to split international EPC contracts into an offshore supply agreement ('sales of goods agreement' not subject to W/H tax or stamp duty), and an onshore hire of work contract (subject to W/H tax and stamp duty).

It is common to find provisions for settlement of disputes to prescribe arbitration. SIAC in Singapore is a popular arbitration administrator.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The person who can operate mineral processing must be the holder of a provisional mining lease or mining lease who undertakes mineral processing operations within its mining concession area, unless a mineral processing licence is obtained from the LMIO, which will issue and designate the mineral processing area. Mineral processing must be operated in accordance with the approved flow sheet and mineral processing procedure under supervision and responsibility of the licensed engineer.

The import of minerals and metals of any kind, with the exception of tin in excess of two kilograms, does not come under the provisions of the Minerals Act, regardless of quantity.

The Minerals Act, however, governs export of the following minerals:

- tin ore in excess of 50 grams;
- gold ore (in any amount);
- copper ore, zinc ore and iron ore in excess of 2kg each;
- minerals with columbium (also known as niobium), tantalum and thorium, or other radioactive content, in any amount; and
- certain industrial minerals (dolomite, barite, pyrophyllite, feldspar, gypsum and kaolin) in excess of 1 tonne.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are exchange control regulations administered by the Bank of Thailand on behalf of the Ministry of Finance, under the Exchange Control Act (1942).

In the past, Thailand had comprehensive exchange control regulations, which were administered by the Bank of Thailand. Although approvals to repatriate capital and profits were discretionary, in practice approvals were granted as a matter of routine provided one complied with applicable procedures. A number of relaxations of exchange controls have been announced by the Bank of Thailand since June 1990, and ceilings on outward remittances have been substantially increased. Presently, commercial banks are authorised to process most applications to purchase foreign currency. Foreign currency accounts may be established abroad and in Thailand.

There are no rules requiring proceeds from the sale of minerals to be used domestically.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are many laws relating to the management of environmental problems. Each of these laws contains certain environmental requirements that relate to principal activities of the competent authorities. For example, the Factories Law contains provisions designating the MOI as the body responsible for dealing with environmental problems arising from a factory business operation. The public health law designates the Ministry of Public Health and local authorities as the bodies responsible for certain environmental problems, such as public nuisance or excretion management, among others. With respect to natural resources management and conservation, there are laws that apply to each type of natural resource, such as water, soil and minerals.

The Environmental Act is the principal law for managing environmental problems in all respects, including water pollution, air pollution, noise pollution, other pollution, as well as hazardous waste and conservation of natural resources. In addition, the Environmental Act requires both private and public sectors to prepare an EIA report for the prescribed operations or activities, and provides for the establishment of an environmental fund to support activities related to environmental quality promotion and protection.

The Environmental Act established three principal agencies: the ONEP, the Department of Pollution Control and the Department of Environmental Quality Promotion. These three agencies are attached to the MNRE. Their main powers and duties are as follows.

ONEP

The ONEP has the primary responsibility for the coordination and preparation of natural resources and environmental management plans to comply with the enhancement and conservation of national environmental quality law and other relevant laws, including proceedings relating to the assessment of environmental impacts that may arise from projects or activities of public and private sector companies.

Department of Pollution Control
The Department of Pollution Control is primarily responsible for making recommendations regarding environmental quality standards and standards for controlling pollution from its source. Its duties include preparing measures for controlling, preventing and solving environmental problems arising from pollution, taking steps regarding pollution complaints and taking action under the national environmental quality promotion and protection law, the pollution law, as well as other relevant laws.

Department of Environmental Quality Promotion
The Department of Environmental Quality Promotion is primarily responsible for the promotion and dissemination of information relating to the environment. In addition, it has a duty to compile, develop and provide services in relation to environmental data as the national environmental information and data centre, to promote public participation in environmental conservation, protection and utilisation of natural resources, to act as an environmental dispute prevention and mediation centre, to coordinate and propose plans and measures to promote and disseminate information relating to national resources and environmental protection, and to study, research, develop, support and transfer technology and environmental management.

The National Health Act provides a framework and guidelines for formulating national policies, strategies and activities in regard to national health, and provides mechanisms for securing continuous participation from all sectors in promoting health, and improving national health effectively and thoroughly. Health impact assessments (HIAs), as required under the Constitution, are formulated and supervised by this Act.

The new Minerals Act contains numerous provisions on environment and communities.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Important rules concerning environmental quality promotion and protection, which apply to exploration and mining under the Environmental Act are as follows.

Section 58 of the 2017 Thai Constitution provides that any project or activity that may cause severe impacts on the environment may not be done unless the impacts on environmental quality and health of people in the surrounding community has been studied and evaluated first. The rights of a community to have their input into any such evaluation, and take action against a government agency or organisation for not fulfilling these rights, are protected in the same provision.

The new Minerals Act includes numerous provisions for environmental review, by both existing and new government agencies. Ministerial Regulations and notifications will be issued. See section 5 of the new Minerals Act for powers of MNRE and MOI.

The National Environment Board
The National Environment Board has the power to prescribe the Environmental Act in the following areas: quality of water in public water sources, underground water quality, air quality, noise level and vibration and others. In prescribing such standards, technical principles, scientific evidence, economic and social feasibility, as well as relevant technology, must be taken into consideration. If the National Environment Board deems it appropriate, it may prescribe higher environmental quality standards than the general standards in areas that have been declared conservation areas, environmental protection areas, areas that have been approved by the cabinet for the use of measures to solve environmental problems or a pollution control zone.

General projects and activities
Under the Environmental Act, the Minister of Natural Resources and Environment, with the approval of the National Environment Board, has the power to require those undertaking certain projects or activities that may cause an impact to the environment to prepare and submit an EIA report. The projects or activities so required must be specified by notification in the Government Gazette.

Projects may be required to undertake either an EIA or an Environmental and Health Impact Assessment (EHIA). These two different levels of assessment depend on the type and size of the project. A project that is required to prepare an EHIA report as a project that may cause severe impact to the community in terms of environmental quality, natural resources and health of a community must do so in strict compliance with the notifications of the Ministry of Natural Resources and Environment regarding the criteria, procedure, regulations and guidelines for preparing such a report (found in a notification published on 29 December 2009).

Mining assessments
All mining projects require an EIA report. EIA reports must be submitted in the application for the mining lease under the Ministry of Natural Resources and Environment Notification dated 24 April 2012, which came into effect on 21 June 2012.

The following mining activities require the preparation and submission of an EHIA (notification of 31 August 2010):

- underground mines whose structure is designed to collapse after mining without any support, and no substitute form of support is inserted to prevent the collapse (all sizes);
- mines for lead, zinc or other metallic mineral mines using cyanide or mercury or lead nitrate in the production process, or other metallic mineral mines with arsenopyrite as an associated mineral (all sizes);
- coal mines only in the case the coals are conveyed out of the project site by car (200,000 tonnes or more per month or 2.4 million tonnes or more per year); and
- seabed mines (all sizes).

The Minister of Natural Resources and Environment, with the recommendation of the Pollution Control Committee and the approval of the National Environment Board, has the power to prescribe standards for controlling pollution from its source, in order to control the release of waste water, emission of air pollution, dumping of waste or other pollution into the environment. However, other standards may be prescribed by other laws, such as the Factories Act. If the standards prescribed by other laws are not lower than those prescribed by the Environmental Act, such standards may be applied. In the event that standards prescribed by other laws are lower than those prescribed by the Environmental Act, the government agency in charge must amend those laws to make them consistent with the rules issued under the Environmental Act.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The old Minerals Act required that land used for mining be restored to its original state when it is no longer used for mining (section 72). There were no provision of laws addressing the closure of mines under the old Minerals Act.

The new Minerals Act include comprehensive provisions including:

- section 19: general criteria of deposit areas for mining, including possible mining buffer boundaries, etc;
- section 32: power of Minister to issue notification re mining buffer boundaries, etc, applicable to all licences;
- section 52: mining is subject to terms prescribed in section 19;
- section 56: right of people in community to hold a referendum on issue of ML;
- section 67: power of Minister to issue notification re establishment of a control and monitoring committee;
- section 68: obligations of holder of MLs including eight restoration of mining areas and placing of security for restoration;
- section 70: revocation of MLs for failure to place security or take out insurance; and
- Chapter 6 (sections 76–93): special provisions applicable to underground mining.

38 What are the restrictions for building tailings or waste dams?

The new Minerals Act includes numerous new provisions, which prescribe rights and powers of regulators to address the above subjects. See question 37.

The Engineer Act, B.E 2542, governs the licensing of persons in charge of operation and management of projects.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety law is the Environmental Act administered by the ONEP and National Health Act administered by the National Health Commission Office (NHCO). Labour laws applicable to the mining industry include the Labour Protection Act (1998), the Civil and Commercial Code on the hire of services, the Labour Relations Act (1975), the Act Establishing the Labour Courts and Procedure in the Labour Courts (1979), the Provident Fund Act (1987), the Social Security Act (1990) and the Compensation Fund Act (1994). The Ministry of Labour administers these laws.

The new Minerals Act provides more comprehensive oversight of health and safety applicable to the mining industry. New ministerial regulations and notifications will prescribe procedures for implementation.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Under the Environment Act, section 78, the municipality where a mine is located is given the responsibility of managing solid waste disposal generated by mining activities, or alternatively, contracting out such services to the private sector. The rights to explore and exploit other mining waste products in tailings and waste piles belong to the mining licensee, or a sub-lessor that has the requisite licence to perform such activities under the Mining Act, or supporting regulations.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

All mining activities are subject to labour laws of general application (see question 39).

The employment of foreign employees is subject to laws and practices regarding visas and work permits.

The Working of Aliens Act (1978) requires that every foreign national working in Thailand obtains a work permit with certain exceptions. Presently, 39 occupations are closed to foreign nationals, including architecture, civil engineering, accounting and law. Generally, foreign nationals may start working only after a work permit is issued. In practice, little difficulty is experienced in obtaining work permits for qualified foreign nationals in positions for which qualified Thai nationals are not available.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Thailand does not have CSR laws. However, section 58 of the 2017 Constitution provides that the operation of any activity that might affect the community cannot be engaged in unless a study and assessment of the effect on the environment (EIA) and health (HIA) of the affected community is completed and a hearing involving the public and interested persons is conducted and the opinions of environmental NGOs and higher education institutions providing studies in the field of the environment are obtained. Failure to comply with this law permits the affected party to bring a claim to the administrative court and the operation shall be suspended during the case procedure.

The NHCO conducts administration of HIAs under the notification of NHCO published on 8 November 2009, which prescribed criteria and procedures to assess the health impact of public policy while the ONEP supervises administration of EIA reports and public hearings under the Environmental Act. Additionally, there are community engagements or CSR requirements specified in the government gold policy, dated 6 May 2011.

Update and trends

Mining in Thailand has been governed by the Minerals Act (1967) and Mineral Royalty Rates Act (1966). During this period there has been exploration and development of mines throughout the Kingdom. In early years, Thailand was a major tin mining jurisdiction. More recently, Akara developed the largest gold mine in SE Asia. There is ongoing interest in potash, lead/zinc, gold and other minerals. The Minerals Act has been administered by DPIM (Department of Primary Industry and Mining) in the Ministry of Industry.

However, Thailand has presented issues for some developers. In December 2014 the Investment Promotion Act was amended to make investment in many sectors in Thailand more attractive, but incentives for mining were reduced to potash only. In 2016, the Thai government decided to allow Akara's metallurgical licence to expire in December 2016, which caused the mine to close down; community concerns with contamination were a factor in this decision. Australian-based Kingsgate Consolidated is seeking compensation under the Thailand-Australian Free Trade Agreement.

The new Minerals Act (2017) was published on 2 March 2017 and comes into effect after 180 days (ie, 30 August 2017). It repeals the Minerals Act (1967) and Mineral Royalty Rates Act (1966) and associated legislation. The new Act includes 189 Sections. Royalty rates will be announced under a ministerial regulation.

Existing exploration licences, mining leases and licences in effect before 30 August 2017 continue in force according to their terms, subject to compliance with rules under the new Act, except for the new requirements concerning (i) preparation of mining buffer boundaries and establishment of basic data of environment and people's health, and (ii) rehabilitation of the mining area conditions, placing of security and taking insurance against loss.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

This is not applicable in this jurisdiction.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The ASEAN Minerals Cooperation Action Plan 2016–2025 (AMC AP–111) promotes environmentally and socially sustainable mineral development. See AMC AP–111 in www.asean.org/storage/2015/12/AMEM/AMCAP-III-(2016-2025)-Phase-1-(Final)2.pdf.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

Thailand's primary legislation covering anti-bribery and corrupt practices is the Organic Act on Counter Corruption 2011, as amended in 2015. Thailand has continued to amend other laws, such as the Anti-Money Laundering Act 1999 to encourage transparency and fulfil obligations under the United Nations Convention against Corruption, which Thailand ratified in 2011. The National Anti-Corruption Commission, the Public Sector on Anti-Corruption, and the attorney general's office are all empowered to investigate and prosecute possible corrupt practices.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies that fall under the jurisdiction of foreign anti-corruption legislation can be held liable for their activities in Thailand under those laws mentioned in question 45. Examples of legislation that could give rise to liability are the Foreign Corruption Practices Act (US), the Bribery Act (UK) and the OECD Convention against Bribery of Foreign Government Officials.

Additionally, a recent amendment to the Organic Act on Counter-Corruption (No. 3) BE 2558 (2015) introduced a provision in section 123/5 that imposes a higher penalty on an offender who gives, offers or agrees to give any benefit to state officials, foreign state officials or officials from international organisations.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Thailand has initiated steps to become a candidate and come into compliance with the EITI, but has not yet acceded to the EITI.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

See question 13.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

An investment in a mining project may qualify for investment protection under a bilateral investment treaty. Thailand is currently a party to 36 bilateral investment treaties. Thailand is also party to 2009 ASEAN Comprehensive Investment Agreement. Mining and quarrying, and services incidental thereto are listed as one of the designated sectors to which the 2009 Agreement applies.

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry in the UK is made up of approximately 13,000 companies, accounting for roughly 0.5 per cent of all businesses. The UK's extractive resources industry is dominated by energy minerals, such as oil, natural gas, and coal, which accounted for over 92 per cent of revenues from all resources extracted in 2013, followed by industrial minerals such as potash, silica and china clay. Metallic minerals extracted from the UK also include metals such as copper, gold, silver and iron ore, etc, and industrial aggregates used for concrete and gravel in construction and road building.

Despite rich metal deposits, low global commodity prices make importing many of these minerals more cost effective. The UK mining sector is largely focused on mining activities outside the UK, although there has been something of a resurgence over the past few years in domestic development.

While coal mining has historically been a significant industry in the UK, this is no longer the case, with the last deep coal mine closing in 2015. The majority of mining within the UK is now concentrated on construction minerals, such as clay and shale, gypsum and slate.

2 What are the target minerals?

The UK produces many different types of minerals, although few meaningful quantities. According to the British Geological Survey, the UK produced the following minerals, broken down by category:

Mineral	Thousand tonnes (2015 estimated)
Coal (deep-mined)	2,784
Coal (opencast)	5,742
Methane	39,600
Crude oil	42,826
Condensates and other	2,462
Gold (kg)	0
Silver (kg)	0
Chalk	3,500
Clay and Shale	7,200
Igneous rock	46,200
Limestone	74,100
Sandstone	13,200
Slate	900
Ball clay (sales)	740
Barytes	40
China clay (sales)	1,014
Fireclay	130
Gypsum (natural)	1,200
Peat	800
Potash	1,000
Salt	5,000
Silica sand	4,000
Talc	5

3 Which regions are most active?

The East Midlands is the region with the greatest mining output in the UK, where coal is the most abundant resource. Following the East Midlands are South West England, and then South East England in terms of mining activity and output.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The UK is made up of three jurisdictions: England and Wales; Northern Ireland (both of which are common law based) and Scotland (which is a hybrid of civil and common law).

5 How is the mining industry regulated?

The Crown oversees all mining areas containing fuel-related minerals in the UK, whereas metallic minerals are privately owned (albeit that all gold and silver is owned by the Crown Estate). Planning permission is required for mining developments generally. Mineral Planning Authorities (MPA) are responsible for granting planning applications. English county councils regulate mineral planning issues, with some areas in England split into separate districts and counties. Unitary authorities undertake mineral planning within their own jurisdictions in Scotland, Wales and Northern Ireland.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The main legislation regulating mining in the UK is contained within the Mines and Quarries Act 1954. The principal legislation that covers health and safety within UK mining is covered by The Mining Regulations 2014 (MR14), which become legally enforceable on 6 April 2015.

The Health and Safety Executive administers health and safety regulations in the UK. The European Agency for Safety and Health at Work states that 'broadly, HSE enforces health and safety law in industrial workplaces and over 400 local authorities enforce in commercial workplaces'. The Mines and Quarries Act 1954 covers a broad range of aspects including management issues, health and safety, and how to deal with abandoned and disused mines, among other issues. Minerals owned by the state are overseen by the Crown Estate and the Marine Management Organisation. While the UK is still a member of the EU (until circa March 2019), EU legislation regarding the regulation of mines will also apply. Coal mining is regulated by the Coal Authority.

MR14 covers such things as 'the use of electricity in mines', 'escape and rescue from mines', and the 'management and administration of safety and health in mines', among other factors. MR14 also operates in correlation with the following piece of related legislation:

- the Health and Safety at Work etc. Act 1974;
- Explosives Regulations 2014;
- Control of Substances Hazardous to Health Regulations 2002;

- Dangerous Substances and Explosives Atmospheres Regulations 2002;
- Management of Health and Safety at Work Regulations 1999; and
- Provision and Use of Work Equipment Regulations 1998.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

As is the case across the 27 EU member states, for securities listed in the UK any of the seven codes below provide an acceptable standard:

- JORC: 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves' – Australian and New Zealand code.
- CIM Standards: 'CIM Definition Standards on Mineral Resources and Reserves' – Canadian code.
- PERC: 'Pan-European & Reserves Reporting Committee' – European code.
- SAMREC: 'The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves' – South African code.
- Chile: 'Certification Code for Exploration Prospects, Mineral Resources and Ore Reserves' – Chilean code.
- NAEN: 'The Russian National Association for Mineral Resources' – Russian code.
- SME Guidelines: 'Society for Mining, Metallurgy and Exploration' – US code.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

In the UK, the ownership of oil, gas, coal, gold and silver is held by the Crown Estate. Exploitation of these resources is overseen and run by the Crown Estate. All other minerals are within private ownership.

The rights to gold and silver are owned by the Crown Estate, which license mining rights to private parties via the 'Crown Estate Mineral Agent', Wardell Armstrong. The landowner must, in addition, grant rights of access and exploration to any private parties that wish to mine state-owned resources.

Apart from fuel minerals, silver and gold, all other mineral resources within the UK are privately owned. There is no national licensing system relating to these resources, although a local mineral planning authority must still grant planning permission. A different process applies in Northern Ireland.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Information can be found on the British Geological Survey's Mining website.

The British Geological Survey 2014 produces the 'Industrial Minerals Assessment Unit', which records the mineral distribution and composition across the UK. The Mineral Reconnaissance Programme reports provide 'geological, geochemical, geophysical, mineralogical and metallogenic information on prospective areas in Britain. Work was carried out at various scales, from regional reconnaissance surveys or appraisal, to the drilling of a geochemical or geophysical anomaly.' The British Geological Survey website also contains information about potential further exploration and extraction of gemstones, gold deposits, etc, based on previous investigations and collated mineral deposit models. There is no general obligation on private parties to file mineral assessment reports.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

All minerals are owned privately, apart from fuel-minerals, silver and gold which are owned by the Crown (for more information see question 8). There is no country-wide extraction and exploration licensing procedure within privately owned areas of resources. In order to extract, planning permission is necessary from a mineral planning authority.

The Crown Estate owns all gold and silver in the UK in mines termed 'Mines Royal'. In the jurisdiction of Scotland today, a private mining party would have to consult the Crown Agent, Wardell Armstrong, who is legally entitled to grant licences to prospective private parties wishing to mine the aforementioned precious metals. Such applicants must satisfy CEMA of their financial and technical standing and their ability to manage exploration through to completion and will be required to obtain all other necessary permissions for their activities. In the case of England and Wales, Wardell Armstrong should be consulted, although the Crown Estate may sometimes grant a lease of Mines Royal within a specific area directly. In either case, rights of access to the relevant land will also be required from the landowner.

In Northern Ireland, precious metals such as gold and silver belong to the Crown Estate Commissioners (CEC). An application is made to both CEC and the Department for the Economy Northern Ireland (DfENI) to explore these. Once DfENI has issued a licence, CEC will normally issue a licence. A separate licence is required for prospecting from DfENI.

All licensees must obtain local planning permission in addition to the licence.

11 What is the regime for the renewal and transfer of mineral licences?

In relation to gold and silver the Crown Estate will grant an option-to-lease. When options are granted for long periods, the exploration company can progress automatically from one option stage to the next provided a progress report is submitted at least eight weeks before the end of each stage. The Crown Estate must be satisfied that the applicant meets the application and renewal criteria and that there is no competing application. A formal statutory process will generally be required to transfer the licence to a new entity.

Other non-fuel mineral rights go with the land, so when the owner of the surface land sells the freehold estate, the purchaser will inherit full title including any non-fuel minerals (except gold and silver). Such rights can also be transferred by way of deed or lease. Planning consents authorising such mining activities will run with the land. The transfer and renewal of leases and access rights granted by the owner of the surface land will generally be governed by private agreement between the parties.

12 What is the typical duration of mining rights?

The option-to-lease granted by the Crown Estate may be granted for up to six years depending on the proposals in the application, funding and the experience of the company making the application. Options for longer periods are generally structured in three two yearly stages. There is no clear guidance from the Crown Estate regarding cancellation. As is the case with planning permission, any lease granted by the Crown Estate will involve conditions, any material breach of these could lead to the lease being cancelled or revoked.

There is no typical duration of planning permission granted in connection with the mining of other mineral rights. As noted planning permission will be required and this will always include conditions, these conditions will determine the life of the planning permission by imposing a time limit. Any breaches of these conditions may result in the permission being cancelled or revoked. Duration will also be affected by the length of the mining lease (or licence) the surface owner is willing to grant.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties ?

There are no rules particular to the mining sector governing foreign ownership of UK mining assets.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected via the Land Registry, an administrative body responsible for maintaining records of land ownership and proprietary interests in land such as mortgages and licences. Disputes arising out of ownership are dealt with by the Land Registration division of the Property Chamber, an administrative tribunal. The Property Chamber is totally independent of the Land Registry. Appeals from the Property Chamber are dealt with in the independent judicial system by the Upper Tribunal (Land Chambers).

As a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, courts in England and Wales will recognise and enforce foreign arbitration decisions within the meaning of Part III of the Arbitration Act 1996.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mining rights for exploration and extraction of gold and silver are held by the Crown Estate. The mining company can apply for a licence to mine these metals from Wardell Armstrong. While there is no standard form to apply, the application must contain a programme of proposed works and financial and technical details related to the applicant. The licence does not confer any rights of access to land, instead, this will be a separate access agreement with the owner of the surface land.

For all other non-fuel minerals, two main rights are required to use the surface land for mining activities. The first is planning permission. In England and Wales this is granted by the Mineral Planning Authority (being the planning authority with responsibility for the control of minerals development, typically the county council). In Scotland, mineral planning permissions are granted by the local planning authority and in Northern Ireland it is dealt with centrally by the strategic planning unit. The UK operates a plan-led system, therefore permission is granted in relation to the minerals development plan for that area. This will involve a public consultation process under which an environmental impact assessment will be conducted. Secondly, the mining company will need to negotiate appropriate land access rights.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

No government or state agency has an automatic right to participate in mining projects and there is no local listing requirement for the project company.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

While uncommon, authorities may acquire mines and minerals by compulsory acquisition if empowered to do so under a relevant statute, for example the Application of Land Act 1981. Where the mines and minerals belong to the same vendor as the surface, the purchase of mines and minerals is merely part of the purchase of the whole of the land. Compulsory acquisition of land for the purpose of mining and extraction is also available if expedient in the national interest. Compensation is generally available for those who have suffered as a result of the compulsory acquisition and is generally dealt with in accordance with the relevant provisions of the Act granting the authority the power.

Planning permission is required for any mining activity. The Town and Country Planning Act 1990 (TCPA) contains revocation provisions if it appears to the local planning authority to be expedient to do so. Compensation is available, a claim can be made through the TCPA to the local planning authority to recover incurred expenditure and loss or damage directly attributable to the revocation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Land searches can be conducted in advance of applying for planning permission to conduct mining activities. This will reveal general information about the area and whether the relevant local authority or county council has made any declarations as to whether the land is subject to any conservation status. For example, if it is a national heritage site, a site of special scientific interest, national park, conservation area or subject to a tree preservation order. Although planning permission will be harder to obtain in this event, it is still achievable as evidenced by recent consents to construct a potash mine on (or more accurately under) the North Yorkshire moors.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The profits arising out of land used for mining activities are generally subject to the usual corporate income tax regime. No royalties (unless specified in the agreement with the landowner) are generally payable in the conduct of mining activities.

Stamp Duty Land Tax (SDLT) is payable on leases of mining rights. In the absence of exclusive possession the lease may be deemed a licence (which is outside the scope of SDLT).

On the basis that a trade has commenced, the lessor of the mineral right may receive rent which should be taxed accordingly as part of that party's income. Conversely, the lessee paying rent will usually treat this as a normal business expense.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

There is no special tax regime in place for private parties carrying on metallic mining activities in the UK.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is generally no concept of tax stabilisation in the UK in relation to the mining industry.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

There is no state carried interest entitlement in the UK.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

There are generally no transfer taxes payable (save where a right in land is being transferred as opposed a right to extract from land), but there could be capital gains charges, based on the acquisition value of the licence and the transfer value, to the extent that the licence is owned by a UK company. If the transfer is to a connected party, the market value rule would apply.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction. Duties, royalties and licences in the extractive industry are generally taxed according to the location of the resource, not the location or nationality of the parties involved.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The UK allows private parties significant flexibility in choosing business structures to carry on mining activities. The most common business form for mining is a company, typically one with liability limited by shares.

26 Is there a requirement that a local entity be a party to the transaction?

There are no requirements that UK persons be party to a mining transaction in the UK.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

There are a number of bilateral and multilateral investment treaties with other states which the UK has ratified. These treaties provide protections to foreign investors that may be operating in the UK. As such, they are governed by public international law and provide companies with protections that are independent from any protections afforded by domestic laws and contractual relationships. Currently, in the UK, there are a total of 150 treaties in force. For further information, a list of the relevant treaties can be found via the United Nations Conference on Trade and Development website.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The main sources of financing available to private parties carrying on mining activities are equity (either via a public offering or from a private or state-owned investor), debt (including convertible bonds, corporate bonds, senior loan facilities, project finance and asset finance) and alternative funding via royalty or streaming financing.

Private investors in mining companies range from state-backed entities (such as sovereign wealth funds) to corporates looking to guarantee their supply of certain commodities. Despite uncertainties in the world's financial markets over the past decade, equity and debt financing retain the lion's share of the mining finance market, but royalty and streaming financing are becoming increasingly common alternatives as equity values remain depressed. Royalty financing involves investors receiving a percentage of the mining company's revenue, while streaming financing typically involves an investor making an upfront payment in exchange for the right to purchase a fixed percentage of the mining company's future production, with ongoing payments made by the investor for each unit subsequently delivered pursuant to the streaming agreement.

The UK public securities market plays a significant role in financing the mining industry. The London Stock Exchange (LSE) is one of the largest international markets in the world and provides cost efficient access to a large pool of international equity. The Main Market is the LSE's flagship market for larger, more established companies and is home to some of the world's best known companies. The LSE's other market, AIM, is known for its balanced approach to regulation and is well suited to smaller, growing companies. Approximately 175 mining companies are listed in London, with a market value of approximately £210 billion.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Government funding is not generally available for mining projects.

30 Please describe the regime for taking security over mining interests.

The regime for taking security over mining interests depends on the specific land interest held. For example, if the mining interest arises by virtue of being proprietor to the land, and the required planning consents are possessed, the interest in the land can be mortgaged in the usual manner.

If the mining interest arises by virtue of a licence, lease or permit they will be mortgageable provided the licence, lease or permit consists of a mortgageable interest. To determine if there are any restrictions in this regard, terms of specific instruments should be consulted.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

As a general rule, no restrictions apply to the import of mining equipment or machinery on a domestic level. As a member of the EU Single Market (at the date of drafting), the UK is unable to introduce import controls on a national level, subject to limited exceptions that include the grounds of security and public health considerations. The UK's open general import licence (OGIL) as a general principal allows the import of all goods into the UK. However, this is subject to certain restrictions imposed on particular classes of industrial goods (including military, technology and chemicals), as well as goods from particular geographical regions or areas, such as those subject to sanctions. Of these restricted goods, some are restricted outright, some are subject to quotas and some are subject to 'surveillance' with the importer required to hold a licence. Certain exceptions to OGIL that impose restrictions dictated by national or supra-national (including EU) policy should be reviewed prior to importing goods, in particular chemicals or goods from countries subject to sanctions or trade embargoes, including Russia, Belarus, Iran, Libya, Syria and North Korea. Attention should also be paid to any munitions or technology imported which may have a military application, even if that is not the reasons for it being imported.

In addition to the restrictions to OGIL imposed and managed by the Department of Business, Innovation & Skills, a number of other governmental agencies impose restrictions relating to individual classes of goods. Particularly relevant to the mining industry will be restrictions imposed on the following:

- Chemicals – The 'CLP Regulation' (European Regulation (EC) No. 1272/2008 on classification, labelling and packaging of substances and mixtures) imposes requirements on suppliers and importers in relation to classification, labelling and packaging of chemicals.
- Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) legislation requires registration of certain chemicals, or finished products containing certain chemicals.
- Vehicles – While a licence is not required, an importer must ensure a vehicle is registered and have a valid vehicle licence (tax disc) before if driven on public roads.
- Wood and wood packaging – Certain requirements and restrictions are imposed by the Forestry Commission.
- Radioactive substances – A permit from the Environment Agency may be required.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

All major supply companies are likely to have their own bespoke standard terms that they will aim to operate on. The potential to negotiate away from these templates is likely to vary according to the bargaining powers of the parties. Note that in a number of cases, the level of specialisation that a supply company may have means very limited or no competition with other supply companies; in these situations, there will be limited scope to negotiate.

For heavy machinery, the Institution of Mechanical Engineers also has certain model form contracts that may be used. In particular, MF/2 is the model form contract for supply of electrical, electronic or mechanical plant.

On major construction projects FIDIC-based contracts are not uncommon.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Generally, the only restrictions imposed on the processing, export or sale of minerals derive from the relevant mineral being listed on a UK Strategic Export Control List, which are consolidated into the Consolidated List. This means that a licence is required from the Export Control Organisation. Broadly, this restricts the export of military items, or dual-use items that can be used for military purposes as well as their primary civil purpose, in addition to certain technologies, radioactive substances and other chemicals, and materials that may be

Update and trends

Although the UK is not a major mining destination from the perspective of physical production (although it has been in the past), London remains one of the pre-eminent centres for mining activity more broadly. This manifests itself both for the mining companies and those seeking to bring claims against them. On a more positive note, three of the key financial considerations for mining are the ability to provide access to equity, debt and trading capacity. London is probably ahead of any other location in its overall position across all three. The London Stock Exchange is one of the main exchanges for the listing of large mining companies (including Rio Tinto, BHP and Glencore, among others), and its AIM capability for junior and mid-cap miners (although less active recently than it has been historically) is showing signs of a positive resurgence as metals pricing becomes less challenged. For debt, most of the financial institutions active in the mining industry lend from and have teams based here. The LME and several precious metal trading associations provide critical trading capacity. Given these factors, London remains one of the world's leading mining and metals centres – albeit that the vast majority of this capacity is employed in servicing miners who have no – or limited – physical mining activity in the UK.

In this context, mining companies should be aware that collective actions are being used increasingly across the EU and particularly in the UK, often focused on alleged causes of action which emanate from third-party jurisdictions, frequently within Africa. There has long been scope to group individual claims together in order to manage litigation in the High Court more efficiently. It is not unusual for multiple claims raising common issues to be heard together, which is particularly pertinent to mining given that problems such as environmental damage or subsidence arising out of a mining operation can affect a large class of people, for instance, those living within the mine's locality. However, it is less common to see formal group litigation orders being made in the High Court – these effectively allow for larger defined opt-in class actions but are difficult to establish from a procedural perspective. We expect the focus for growth in collective claims against miners to continue in the UK.

used for torture. Whether or not a restriction will be imposed will be dictated by the nature, destination and intended use of the goods, or whether the exporter is engaged in a licensable trade activity.

An exporter should review the relevant guidelines for the specific product to be exported, as well as the current trade sanctions and arms embargoes imposed on a national and a supranational level.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions on importing or exporting funds, and there is no UK foreign exchange control. Note, however, that any tax implications, and relevant money laundering regulations, should also be considered.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The mining industry is regulated by independent government regulators, in particular the Environment Agency. Key legislation includes:

- the Environmental Permitting (England and Wales) Regulations 2010, which implements Directive 2006/21/EC1 of the European Parliament and the Council on the management of waste from extractive industries (the 'Mining Waste Directive');
- the Environmental Protection Act 1990;
- the Wildlife and Countryside Act 1981; and
- the Natural Environment and Rural Communities Act 2006 (in England and Wales).

Regulation can also be devolved further, to local authorities or Natural England. Additionally, specific localised policies may also apply to a particular area, including from the Conservation of Habitats and Species Regulations 2010, the Wildlife & Countryside Act 1981 and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003. A number of these implement EU or national policies, applying in certain environments or contexts.

It is important to also consider common law obligations, including general principles of nuisance, which may impact, for example, how much noise, vibration or pollution mining operations (and ancillary) activities can make.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Planning policy in England is set by the Department for Communities and Local Government; this is then implemented and applied by local authorities responsible for making planning decisions. The main policies that these local authorities will follow is the National Planning Policy Framework. Specifically, the local authority responsible will be the Mineral Planning Authority.

As part of the general planning process, environmental requirements will likely be imposed under the terms of any planning permission granted by the Mineral Planning Authority. A Minerals and Waste Development Framework is required, and this will incorporate various environmental considerations. In particular, it is likely an environmental impact assessment – as required by EU policy – will be conducted as part of this. A strategic environmental assessment may also be required.

Given that the environmental planning process is integrated with the rest of the planning requirements, likely timings are interdependent on timings for the overall process. Generally, depending on the scale and scope of the project, this can be a long and complex process, requiring extensive public consultation and consultation with various entities. As such, the likely timetable can vary.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

There is no comprehensive and generally applicable framework. Rather this is addressed through a combination of planning consents, and the relevant lease or licence terms. The Environment Agency monitors abandoned mines, and records those which are likely to cause environmental damage.

For mines closed after 1990, obligations to clean up contaminated land are imposed in certain circumstances through the Water Framework and the Environmental Protection Act 1990.

38 What are the restrictions for building tailings or waste dams?

Previous requirements imposed by the Mines and Quarries (Tips) Act 1969, the Mines and Quarries Act 1954, the Mines and Quarries (Tips) Regulations 1971 and the Quarries Regulations 1999 have largely been consolidated by the Mines Regulations 2014. Under this, there is an obligations to build tips (which is broadly defined) in such a way as to avoid instability or movement that could risk the health and safety of any person. This requires the mine operator to ensure that a competent person carries out an appraisal at appropriate intervals. If, following this, there is deemed to be a risk, a geotechnical specialist is required to carry out an assessment.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Health and Safety Executive is responsible for enforcing health and safety law, alongside local authorities. The primary health and safety legislation relating to mining is the Mines Regulations 2014.

Other more general health and safety legislation will also apply, including the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999. Additionally, employers have a common law duty of care to employees, which also impose health and safety requirements. General employment legislation including

the Employment Rights Act 1996, the Working Time Regulations 1998 and the Equality Act 2010 will also apply.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The Mining Waste Directive requires a waste management plan that addresses means of minimising waste generated, and the treatment, recovery and disposal of mine waste. An objective of this is the minimisation of environmental impact, which is likely to require the recycling, or at least infilling of any mined area, as far as is possible. Requirements will be determined on an individual basis.

A permit is required to operate a mining waste facility – such application will require a waste management plan, and, possibly, an environmental impact assessment. The rights will attach to whoever holds that permit, according to its terms. Note that a mining licence obtained for initial exploration and extraction may not automatically cover this – this must be reviewed on a case-by-case basis.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

UK law does not impose specific restrictions or limitations on the use of domestic or foreign employees in connection with mining activities. However, general UK immigration laws may be applicable to foreign employees where they may qualify for a Tier 2 (General) work visa to work at mining operations in the UK if the employment is for a skilled job. The visa will only be valid for a maximum of six years.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

CSR initiatives are covered by general provisions applicable to companies as found within the Companies Act 2006. While companies must adhere to these general provisions they have also adopted their own CSR policy as they view complying with CSR guidelines as a 'commercial necessity'. Both the government and independent associations publish such guidelines to urge companies to observe best practices (eg, the Association of British Insurers publishes guidance on CSR-related issues for companies and investors and the government sponsors a CSP website).

Specifically, the mining industry is subject to transparency and disclosure requirements under the UK Reports on Payments to Governments Regulations 2014 and the EU Directive 2014/95/EU. The Directive, implemented by the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, requires certain listed companies listed to disclose relevant environmental and social information in the management report, with the first reports to be published in 2018. The UK will also have to implement new EU Regulation on conflict minerals which is for importers of tungsten, tantalum, tin and gold to ensure that their business does not contribute to armed conflict.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

There is no concept of native title in English law and thus no applicable rights of aboriginal or indigenous people. However, certain requirements designed to protect the Crown or government authorities may affect mining rights (see question 6 and 10).

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The UN Global Compact is one of the CSR initiatives that the UK has adopted and encourages companies to sign up to. There is also international guidance that the UK encourages companies to adhere to, for example, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration.

A number of other international treaties which cover CSR initiatives have been ratified by the UK, such as:

- the 2014 Protocol to the Forced Labour Convention;
- the International Covenant on Economic Social and Cultural Rights 1966; and
- the International Covenant on Civil and Political Rights 1966.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The primary legislation governing anti-bribery is the Bribery Act 2010. This criminalises offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery). It also covers offences related to commercial bribery. The only defence available to a company is that it had adequate bribery prevention procedures in place that were deliberately breached by a rogue individual or individuals.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Multinational companies will often also seek to comply with the US FCPA, as well as local anti-bribery and corruption laws in other jurisdictions in which they operate.

The UK is a signatory to the UN Convention against Corruption and so companies are strongly advised to implement the convention procedures.

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47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The UK joined the EITI in 2014. As part of its commitment it has prepared a publicly available annual UK EITI Report that discloses information on company taxes and payments. The UK is also developing a publicly available register with information on who owns and controls companies, which is not an EITI requirement until 2020.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign ownership restrictions in the UK that are particular to the mining industry.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

The UK has entered into 110 Bilateral Investment Treaties with various countries. There are also 75 treaties to which the UK is a party with investment provisions (eg, Canada-EU CETA and ASEAN-EU Cooperation Agreement) and 30 investment-related instruments (eg, New York Convention and TRIPS).

These treaties apply to investments in general rather than specifically to the mining industry.

United States

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining remains an important industry in the US, particularly for many individual states. Having started the year with relatively low metal and mineral prices, prices for particular metals, especially various of the precious metals, trended higher throughout 2016. Overall production remained strong as the estimated value of mineral raw materials produced at mines in the US in 2016 was US$74.6 billion, a modest increase from the revised total of US$73.4 billion in 2015. The estimated value of US metal mine production in 2016 was US$23.0 billion, approximately 5 per cent less than that of 2015. Domestic raw materials and domestically recycled materials were used to process mineral materials worth US$675 billion. Downstream industries consumed these mineral materials producing an estimated value of US$2.78 trillion in 2016.

2 What are the target minerals?

In 2016, US production of the following mineral commodities (listed in decreasing order of value) was valued at more than US$1 billion each: crushed stone, cement, construction sand and gravel, gold, copper, industrial sand and gravel, iron ore (shipped), lime, phosphate rock, salt, soda ash, zinc and clays (all types). The principal contributors to the total value of US metal mine production in 2016 include: gold (37 per cent), copper (29 per cent), iron ore (15 per cent) and zinc (7 per cent).

3 Which regions are most active?

The West is the most active producing region in the US. Eleven states each produced more than US$2 billion worth of non-fuel mineral commodities in 2016, led by Nevada, Arizona and Texas. Once again, Nevada outpaced the other states, producing US$7.65 billion predominantly in gold, copper, silver, and sand and gravel.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The US has a common law-based legal system both federally and throughout the states (with the exception of the state of Louisiana which has a civil law system). Today, however, mining in the US is governed primarily by a system of federal, state and local laws and regulations codified over a period of decades. Many such laws and regulations have undergone further development in the courts, and all of them remain subject to further judicial interpretation. Additionally, there are quasi-judicial bodies within many regulatory agencies that are empowered to make decisions about the meaning and effect of regulations. Therefore, one must always look not only to the applicable statute or regulation, but also to any judicial decisions (case law) or quasi-judicial administrative determinations affecting the statute or regulation.

5 How is the mining industry regulated?

The US mining industry is regulated at both federal and state levels. At each level, regulation is achieved primarily through laws (and the regulations underlying them), including laws concerning mineral tenure (under which mineral exploration and exploitation rights are acquired, held and exercised) and laws concerning mining operations (governing the manner in which mining is conducted, including land use, environmental and health and safety regulations). Determining which laws apply in a given situation (federal, state or a combination) depends on ownership of the property.

Real property in the US may be owned by the federal government, a state or a private entity or individual. For any given property, the mineral rights (or mineral estate) and the surface rights (or surface estate) are distinct and separable property rights, and may or may not be owned by the same entity or individual (public or private).

Where mineral rights are federally owned, mineral tenure is regulated at the federal level. Likewise, tenure in respect of state-owned mineral rights is regulated at the state level. If a property's mineral rights are owned by a private entity or individual, acquiring those rights is a contractual matter between the private entity or individual and the mining company. If a private entity or individual owns the surface estate, accessing and using the surface is also a contractual matter (notwithstanding a common legal tenet that the mineral estate is 'dominant' over the surface estate). Mining operations on federal, state and private lands are all subject to regulation at both federal and state levels.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The General Mining Law of 1872 (General Mining Law) governs the process for acquiring and maintaining a right to develop and extract locatable minerals from mineral deposits discovered on federal lands. The Federal Land Policy and Management Act of 1976 (FLPMA) provides the legal framework within which mining rights acquired under the General Mining Law must be exercised in order to prevent undue and unnecessary degradation of federal lands. A key element of this legal framework is compliance with applicable environmental laws, beginning with the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impacts of major federal actions, including the permitting of mining activities on federal lands. Other key federal environmental statutes include the Federal Water Pollution Control Act (Clean Water Act), the Clean Air Act, the Endangered Species Act and the Comprehensive Environmental Response, Compensation and Liability Act (all as amended to date). Similar or corresponding legal regimes exist at the state level for mining on state and private lands.

The principal regulatory bodies responsible for administering the laws governing mining on federal lands are the US Bureau of Land Management (BLM) (an agency within the federal Department of Interior) and the US Forest Service (an agency within the federal Department of Agriculture). Other key federal agencies with potential regulatory authority over mining include the Environmental Protection Agency (EPA) and the US Army Corps of Engineers. To implement and enforce the laws under their purview, these agencies promulgate regulations containing detailed procedures, requirements and standards for compliance.

In a short-lived effort to amend its regulations governing the process for developing resource management plans to guide future uses of public lands pursuant to FLPMA, including uses such as mining, the BLM promulgated the Resource Management Planning Rule on 12

December 2016. Issued in the final weeks of the Obama administration, the rule was repealed in the early weeks of the Trump administration pursuant to a statute called the Congressional Review Act of 1996 (CRA), which gives the US Congress a limited period of time after a rule has been issued to nullify it.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Industry Guide 7, adopted and administered by the US Securities and Exchange Commission (SEC), governs the classification system for reporting reserves in the mining sector. Industry Guide 7 limits disclosure in SEC filings to proven or probable reserves. To be 'proven' or 'probable' reserves, the SEC requires that a detailed feasibility study demonstrate that a mineral deposit can be mined profitably at a commercial rate.

On 16 June 2016, the SEC proposed rules to completely replace its disclosure requirements for mining properties, including Industry Guide 7, with the goal of modernising and aligning the disclosure requirements with current international standards. The proposed rules would rescind Industry Guide 7 in favour of mining property disclosure requirements in a new Regulation S-K, Subpart 1300. The period for accepting public comments by the SEC has closed; a final rule has not been published. Although the mandate to comply more nearly with international standards is an important one, the mining industry would like to see certain revisions made to the proposed rules, which the Trump administration may eventually accommodate.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Government control of mining rights varies depending on ownership of the minerals underlying a property. Virtually all minerals (or mineral rights) in the US were originally owned by the federal government. Over the course of the past 150 years, mineral rights in many locations (particularly in the eastern half of the US) have been transferred through myriad federal land grants and other mechanisms to both the states and private parties. With respect to federally-owned mineral rights (other than mineral rights pertaining to leasable minerals (such as coal and oil shale) or salable minerals (such as sand and gravel)), the General Mining Law provides a system by which private US citizens (including US companies) can 'locate' mining claims. The process does not transfer ownership of the minerals themselves (such ownership passes only after the minerals have been severed from the land), but rather gives the claim holder a right to develop and extract the minerals. Other systems exist at the state level enabling private parties to acquire mining rights for state-owned minerals. These systems vary from state to state, but often involve some form of leasing. For privately owned minerals, mining rights (or even the mineral rights themselves) may be acquired like any other private property right, leased, bought and sold according to contract and property law.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency that collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Some limited information and data are publicly available to private parties that wish to engage in mining activities. For example, the BLM keeps federal land conveyance records in its offices around the country, and it maintains several online records systems (LR2000 and GeoCommunicator) that contain information on topics such as land and mineral title, federal mining claims and federal land parcel mapping (including Public Land Survey System data). However, there is little if any technical data in any of these records.

No single regulatory agency is responsible for collecting mineral assessment reports or other technical data from private parties. The BLM, the US Forest Service and various state agencies do collect such information from time to time as required by the mining regulations they are charged to enforce. As a general rule, however, any such information that contains or constitutes trade secrets or proprietary and confidential business information, including geological and geophysical information, is not made available to the public. Such information usually must be purchased from the party that owns it.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The General Mining Law allows private parties free access to open public lands to prospect for minerals. Upon making a discovery of a valuable mineral deposit, the prospector may 'locate' (or stake) a mining claim on the deposit according to a specific location procedure; provided, a mining claim may be located only by US citizens or those who have declared their intent to become US citizens. The holder of a valid mining claim (sometimes referred to as an 'unpatented mining claim') is entitled to develop and extract the mineral deposit associated with the claim, and is protected against challenges by the US and other private parties to the claim holder's rights.

The General Mining Law also provides a process to 'patent' mining claims, through which the federal government grants the claim holder fee title (full private ownership) to the mineral property. In 1994, however, the US Congress imposed a moratorium on any new mineral patent applications. This leaves unpatented mining claims as the primary method by which new mining rights may be acquired on federal lands.

A valid mining claim cannot be established in the absence of a discovery of a valuable mineral deposit. The General Mining Law does not specify the meaning of 'valuable mineral deposit,' but two definitional rules have evolved through administrative agency (US Department of Interior) and judicial decisions, as follows:

- the 'prudent man rule,' which determines value based on whether, 'a person of ordinary prudence would be justified in the further expenditure of his labour and means, with a reasonable prospect of success in developing a valuable mine'; and
- the 'marketability rule,' which requires a claimant to demonstrate a reasonable prospect of making a profit from the sale of minerals from the claim or group of contiguous claims.

The marketability rule was developed and nearly always applied by the Department of Interior within the context of disputes between a mining claimant and the US (as opposed to a dispute between a mining claimant and a competing claimant), but US courts have not strictly adhered to this distinction and have applied both tests in deciding controversies between rival claimants.

After a mining claim has been located, the claimant must record a notice or certificate of location with the proper BLM office within 90 days of the date of location. A similar filing must also be made at the local county recorder's office within a time frame specified under state law (usually 90 days from the date of location, although shorter periods may apply in some states).

In certain circumstances annual assessment work may be performed to maintain an unpatented mining claim. In most cases, however, mining claims are maintained by payment of annual maintenance fees to the BLM.

The process of acquiring mining rights to state-owned minerals varies from state to state, but mineral leasing systems are commonly used. The acquisition of privately owned mining rights (whether acquiring the minerals themselves or the right to exploit them) is a matter of contract with the mineral owner.

11 What is the regime for the renewal and transfer of mineral licences?

Mining claims on federal lands are maintained on an annual basis by payment of maintenance fees to the BLM (or, in some cases, performing a certain amount of assessment work each year). Such claims are freely transferable without the requirement of government approval,

although transfer documents must be filed with the proper county and BLM offices within 90 days.

The regime for renewal and transfer of mining rights to state-owned minerals varies from state to state, but notice and approval requirements often apply. Mining rights in respect of privately owned minerals may be transferred according to applicable state contract and property laws.

12 What is the typical duration of mining rights?

A mining claim on federal lands may continue indefinitely if it is supported by a discovery of a valuable mineral deposit and is properly maintained through required annual maintenance fees or assessment work. A claim is subject to forfeiture to the US for failure to follow claim location requirements, failure to prove a valid discovery or failure to pay annual maintenance fees or perform annual assessment work.

The duration of mining rights to state-owned minerals varies from state to state. Mining rights are commonly granted by lease for a finite term (eg, five years), subject to renewal for additional terms or to continuation for the duration of mineral production. State mining rights may be subject to termination for a variety of reasons, such as failure to make rental payments, violation of state regulations or lease requirements or failure to commence or to continue diligent exploration or mining operations.

Mining rights in respect of privately owned minerals, including those acquired by patent from the federal government, continue indefinitely as the property of their owner, and may be freely leased, traded or sold.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a business entity organised under the laws of any state is considered a US citizen. Otherwise, there is generally no distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected under US law, including the requirements of due process. Mining rights holders may seek protection of their interests in the independent judicial system of the US, either in federal or state courts (and sometimes after required administrative proceedings at the regulatory agency level) depending on the identity of the parties and the nature of the dispute. Foreign arbitration awards are freely enforceable in the US by virtue of the New York Convention, incorporated into US law under Chapter 2 of the Federal Arbitration Act.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The holder of a valid mining claim has the 'exclusive right of possession and enjoyment' of the surface area within the boundaries of the claim, subject to a number of important qualifications. First, the claimholder's uses of the surface are limited to exploration, mining and processing and uses reasonably incident thereto. In addition, the claimholder's surface rights are subject to the federal government's right to manage and dispose of vegetative resources and other surface resources not reasonably required for mining and to other uses by the United States and persons authorised by the United States that do not materially interfere with the claimholder's mineral operations. Finally, the claimholder's use of the surface is subject to compliance with federal surface management regulations that emphasise advance planning for surface resource protection and surface reclamation.

The nature and extent of surface rights on state lands varies from state to state, but requirements for multiple use accommodation, surface resource protection and surface reclamation akin to those on federal lands may be expected in most jurisdictions. Privately owned surface rights are a matter of private contract (surface use agreement), but typically involve surface damage payments, environmental indemnities and reclamation guarantees in favour of the surface owner.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

No government or state agency in the US has a right to participate in mining projects. There is no specific local listing requirement, though mining claims on federal lands may be located and held only by US citizens (including business entities organised under the laws of any state) or those who have declared their intent to become US citizens.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There is no provision in US law dealing specifically with government expropriation of mineral rights. Federal, state and local governments in general may take private property for a public purpose through their power of eminent domain, but the property owner must be afforded due process of law and paid just compensation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are several categories of protected state and federal lands where mining may be heavily regulated if not entirely prohibited. On federal lands, mining claims may not be located in areas closed to mineral entry by a special act of Congress, regulation or public land order. These areas, 'withdrawn' from mineral entry, include without limitation national parks, national monuments, tribal reservations, military reservations, scientific testing areas, most reclamation project areas of the Bureau of Reclamation and most wildlife protection areas managed by the US Fish and Wildlife Service. Mining claims are also prohibited on land designated by Congress as part of the National Wilderness Preservation System or designated as a wild portion of a Wild and Scenic River. Federal land withdrawn for power development may be subject to mining claim location only under certain conditions. Categories of protected state lands must be determined on a state-by-state basis, but may include, for example, wildlife management areas, state parks, scientific and natural areas and recreation areas.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The US mining industry is not exempted from taxes and does not enjoy any type of tax holiday when new projects are commenced whether by domestic or foreign parties. Taxes may be imposed at the federal, state and local levels, although there is no federal tax specific to minerals extraction. Nothing at the federal level of government requires a private party mining on federal lands to pay duties, taxes or royalties as such, although federal mining claims are subject to payment of annual maintenance fees. In general, however, private parties conducting mining in the US must address the full panoply of taxes, including, without limitation, federal and state income taxes, state severance taxes (where applicable), ad valorem property taxes, sales taxes, use taxes, payroll taxes and the like. State income taxes and respective rates vary among the 50 states, with certain states not imposing any income tax at all.

The federal and state income taxes tend to be profit-based since numerous deductions and credits can often be applied to reduce tax liability. Note, however, that the US imposes an alternative minimum tax designed to extract a minimal amount of income tax, even if tax liability might otherwise be reduced due to certain deductions. What, if any, efforts may be made by the Trump administration and Congress to modify the system of federal taxes remains to be determined.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

No specific tax advantages or initiatives exist for private parties carrying on mining in the US. Private parties carrying on mining activities have the same opportunity as other taxpayers to utilise applicable deductions and credits to reduce taxes in association with mining activities.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Tax stabilisation and related agreements are oftentimes offered in developing nations. In the US, however, no legislation exists at the state or federal level to provide for tax stabilisation for mining activities. Similarly, no tax stabilisation agreements are authorised by US law regardless of whether the mining party is domestic or foreign.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No entitlement exists under US law for the government at any level to obtain a carried interest or a free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of a mining licence is not subject to any transfer tax or capital gains tax as such at the federal level. States may apply a transfer tax or fee for such a transfer, and accordingly the individual state where the mining rights are located or the transaction is structured should be evaluated on a case-by-case basis.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

The US does not distinguish between domestic and foreign parties in regard to the payment of taxes pertaining to mining activities. Generally, tax rates, deductions for business expenses, available credits and the like apply equally to domestic and foreign parties. Note, however, that the Federal Foreign Investment in Real Property Tax Act of 1980 (Internal Revenue Code, section 1445) was enacted to ensure that foreign sellers pay taxes on the sale of real property in the US, which has been defined to include mining properties. In any such transaction, tax withholding is determined on the basis of whether participating parties are domestic or foreign. Generally, a foreign party that sells or distributes a US real property interest must withhold tax equal to 35 per cent of the gain it recognises on the sale. A domestic corporation must deduct and withhold a tax equal to 10 per cent of the total amount realised by a foreign person on disposition of their property before 17 February 2016 (15 per cent thereafter).

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Private parties have significant flexibility in choosing business structures to carry on mining activities in the US. Principal business structures include corporations, limited liability companies, limited partnerships and certain forms of joint venture.

26 Is there a requirement that a local entity be a party to the transaction?

There is no requirement for a local entity to be a party to a mining transaction in the US. However, mining claims on federal lands may be located and held only by US citizens (including US business entities) or those who have declared their intent to become US citizens.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Foreign entities are generally comfortable relying on the laws and court systems within the US to protect their contract and property rights and do not commonly structure their US mining operations through bilateral investment treaties. In certain circumstances, a foreign entity might take advantage of a multilateral investment treaty (such as the North American Free Trade Agreement (NAFTA) among the US, Canada and Mexico), but mining projects are not typically structured around such treaties. Note that NAFTA may be subject to renegotiation as announced by the Trump administration.

The US has entered into tax treaties with numerous foreign countries. Under these treaties, residents of foreign countries may be taxed at a reduced rate, or be exempt from US taxes, on certain items of income they receive from sources within the US. These reduced rates and exemptions vary among countries and among specific items of income and therefore must be evaluated on a country-by-country basis. Examples of tax treaties on which foreign entities often rely for tax relief in connection with their US mining operations include treaties that the US has made with the UK, Canada and Mexico.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Specific financing requirements or investment directives do not exist as such pursuant to mining laws in the US, which operates as a free market economy. Mining endeavours are funded through a multitude of conventional and alternative financing mechanisms with no specific roadmap for success. From a conventional standpoint, equity and debt alternatives are typically used, whether through private or public sources, but these alternatives have been more difficult to achieve in a depressed mining market. Financings of mining deals through equity sources (domestic or foreign exchanges, private placements and initial public offerings) and debt financings (investor or bank loans and bonds), are still occurring though at a less frequent rate over the past few years. The fact is that less capital funding is being raised through the domestic securities market exchanges in the US. More recently, creative alternative structures of financing are being increasingly utilised, including convertible bond debt, royalty financings, off-take arrangements and streaming mechanisms, which offer less dilution than equity at depressed prices.

Careful consideration of US securities laws in regard to mine financings is essential along with the regulatory requirements imposed by the SEC, which has mandated certain disclosure obligations related to the mining industry. For instance, Industry Guide 7, published by the SEC, requires publicly traded companies to disclose information regarding proven and probable reserves. However, the SEC has not mandated the use of National Instrument 43-101, the standard utilised in Canada. Note, however, that the SEC proposed rules in 2016 to replace Industry Guide 7, but those proposed rules have not yet been promulgated.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No government or regulatory agency in the US provides direct financing to mining projects. No US law or regulation allows or authorises such financing. Pension funds are neither expressly authorised nor prohibited from investing in mining projects. In the US, in contrast to Canada, pension fund financing of mining projects is not a common occurrence.

30 Please describe the regime for taking security over mining interests.

Typically, mining interests may be used as security or collateral and can be mortgaged and pledged. Often, the approval of the grantor or lessor may be required, whether that party is the federal government or a private party.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Currently there are no particular restrictions as such in regard to the importation of machinery and equipment or services required in connection with mining exploration and extraction activities, but in the future import tariffs may be affected by the Trump administration on some or all imports, which is a matter to be determined in 2017. According to the Department of Commerce, which would otherwise have authority and control over any import restrictions, the US itself is still the world's largest producer of mining and construction equipment and machinery. Note, however, that a merchandise processing fee may be assessed in particular states and accordingly the state in which exploration and extraction occur should be separately researched and considered.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No particular set of standard conditions or agreements is predominant in the US in regard to equipment supplies. FIDIC contracts are often referred to as the international standard, though both FIDIC and Orgalime forms may be used. Whether conditions or agreements are more friendly to the supplier or buyer is typically a negotiated contract matter in the US, given the country's emphasis on free market principles. No basis currently exists on which to predict any US trend regarding dispute resolution of equipment supply agreements, given that the matter ultimately depends on the nature of and terms and conditions in applicable agreements.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

As a general rule, currently no restrictions exist in regard to the export or sale of metallic minerals. Certain restrictions may be placed on and apply in regard to the export or sale of critical and strategic minerals by certain US federal executive departments as the matter is continually being evaluated in Congress. The US Department of Homeland Security and the State Department clearly possess authority to characterise export or import of minerals or metals to be a national security risk, but such sweeping authority has not yet been exercised.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Currently, no restrictions exist in regard to the import of funds for exploration and extraction activities or the use of proceeds from the export or sale of minerals. However, the export of funds from the US is subject to laws of general application that are administered by, among others, the Department of the Treasury and the Department of Homeland Security. It is also conceivable that certain financings from imported funds may be subject to review by the Committee on Foreign Investment in the US (CFIUS), which is the federal body responsible for reviewing and investigating foreign direct investment and any related potential impact on national security. The Department of Homeland Security is a member of CFIUS.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Numerous federal environmental statutory requirements and programmes apply to mining in the US along with state counterpart requirements and programmes. Among the primary federal programmes that regulate environmental matters pertaining to the mining industry are the following:

- the NEPA (comprehensive interdisciplinary approach for major federal actions);
- Federal Land Policy and Management Act (degradation of federal lands);
- Surface Mining Control and Reclamation Act (coal operations);
- Clean Air Act as amended (air quality standards);
- Federal Water Pollution Control Act and Clean Water Act (protection of surface water);
- Safe Drinking Water Act (drinking water quality and underground injection);
- Resource Conservation and Recovery Act as amended (solid and hazardous waste control);
- Endangered Species Act (protection of animals and plants);
- Migratory Bird Treaty Act (protection of species of birds);
- Comprehensive Environmental Response, Compensation and Liability Act as amended (hazardous substance release and site clean-up);
- Toxic Substances Control Act (regulation of risky chemicals);
- Rivers and Harbors Act (impact to rivers);
- the Indian Mineral Development Act of 1982 (mining on Native American land);
- National Historic Preservation Act (historic sites and landmarks); and
- Federal Mine Safety Health Act of 1977 (promote mine health & safety).

Some of the federal agencies with authority over mining include, without limitation, the following:

- the EPA;
- the BLM;
- the US Forest Service;
- the US Army Corps of Engineers;
- the Bureau of Indian Affairs (BIA);
- the Bureau of Reclamation; and
- the Mine Safety Health Administration (MSHA).

As always, environmental requirements in states and local jurisdictions in which mining activity is undertaken should be evaluated. Often, states have counterpart programmes to those that exist at the federal level.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The environmental review and permitting process for a mining project in the US is somewhat dependent on the state in which it occurs and also whether the project is located on private, state or federal land. Typically, however, the process is highly complex, time consuming and expensive. The process for a mining project may also be made more difficult and time consuming if NEPA is triggered by significant federal action requiring a detailed environmental analysis regarding whether the project will individually or cumulatively have a significant effect on the human environment. If so, any mining project will be substantially delayed while environmental impacts and reasonable alternatives are considered in the context of either an environmental assessment or an environmental impact statement. A lead agency with primary authority over the NEPA process will coordinate with numerous other federal and state agencies to oversee the process, coordinate comments and ensure public review and input. The process is measured in years and not months and can lead to various legal challenges during the course of the effort that can substantially delay or even kill mining projects.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

For the most part, the closure and remediation process for a mining project is guided and determined as a matter of state law during the permitting process, with potentially stringent reclamation and financial assurance requirements that must be met in some form during and at the end of the mining project. The exception, of course, relates to mining projects on federal lands that must meet requirements imposed by the BLM and the US Forest Service, which in most respects are similar to state-mandated requirements. Most states require reclamation of mined areas to facilitate closure, re-vegetation and restoration of areas that have been adversely impacted and to ensure control of water runoff and rehabilitation of impacted land areas and natural habitats. Federal and state laws also typically allow several different alternatives to be met in providing financial assurance designed to ensure the availability of funds for ongoing work or future work to be undertaken either by the mining party itself or by the government, including performance bonds, insurance arrangements, letters of credit, trust funds and cash collateral. Some flexibility is provided through such alternatives to ensure adequate funds are available for reclamation of impacted areas and natural resources. Mining projects may also be required to undertake more than reclamation and may have to meet more rigid and expensive requirements to fully remediate sites in appropriate circumstances pursuant to the Comprehensive Environmental Response and Compensation Act as amended. Such remediation cannot only be quite costly but can also take years to accomplish with the expectation for ultimate sign off by a regulatory agency at the state and federal level.

38 What are the restrictions for building tailings or waste dams?

The construction and care of tailings or waste dams are a relatively new phenomenon in the overall history of US mining activity. Unlike

Update and trends

Throughout 2016, opposition to the Dakota Access Pipeline by Indian tribes gained significant public exposure. Given the momentous attention, future energy and mining projects likely will be subject to greater scrutiny by US indigenous groups where those projects are developed on land considered to have significant religious and cultural value to Indian tribes.

On 30 January 2017, the President of the United States, soon after his inauguration, issued an Executive Order directing agencies, among other things, (i) to identify at least two existing regulations to repeal for every new regulation proposed or issued, and (ii) to promulgate regulations during fiscal year 2017 that, together with repealed regulations, have combined incremental costs of $0 or less, regardless of benefits. The present effect of this Executive Order on the mining industry is unclear at this time, though it could have significant future impacts.

Already, however, the Trump administration's impact on the mining industry has manifested itself in other ways. In particular, the administration was instrumental in quickly dismantling three 2016 initiatives of the Department of Interior, including one secretarial order and two newly promulgated rules, that were of particular interest to the industry.

First, by order dated 15 January 2016, the former Secretary of the Interior had initiated a comprehensive review of the federal coal leasing programme to identify and evaluate potential programmatic reforms. The order placed a moratorium on the issuance of new coal leases during the review. On 29 March 2017, the new Secretary of the Interior appointed by President Trump halted the programmatic review and overturned the coal lease moratorium.

The two Department of Interior rules were the Resource Management Planning Rule, issued by the BLM on 12 December 2016 (effective 11 January 2017), and the Stream Protection Rule, issued by the Department's Office of Surface Mining Reclamation and Enforcement on 20 December 2016 (effective 19 January 2017). The Resource Management Planning Rule amended regulations concerning the process for developing plans to guide the future uses of federal lands under FLPMA, including uses such as mining. The Stream Protection Rule amended regulations governing surface coal mining operations.

Both rules, promulgated in the final weeks of the Obama administration, were repealed in the early weeks of the Trump administration (Resource Management Planning on 27 March 2017, and Stream Protection on 16 February 2017) pursuant to the CRA. The act gives the US Congress a limited period of time after a rule has been issued to disapprove the rule by joint resolution (ie, a resolution approved by both House and Senate). If signed by the President (or not otherwise stopped by presidential veto), the disapproval resolution becomes law, rendering the rule nullified and prohibiting the issuance of any 'substantially similar' rule without subsequent legislative authority.

Finally, as previously reported, the mining industry has for years requested the issuance of rules governing mine property disclosures to parallel or follow international standards. In June 2016, the SEC issued a proposed rule to address the matter that was designed to dismantle and replace Industry Guide 7. Whether or not the proposed rule will be promulgated and issued will depend on its further evaluation by the Trump administration.

dams utilised for impounding water, which may ultimately be drained depending on structural integrity, a tailings dam must be designed to impound material safely in perpetuity, which requires careful consideration of seismic and hydrologic events. MSHA conducts periodic inspections of tailings dams, authorising its enforcement personnel to conduct inspections to evaluate and address relative hazards and to penalise poor operational controls.

In the US, despite MSHA's authority and presence, state regulators have the primary responsibility and authority to oversee construction and management of tailings or waste dams. Any applicable requirements or standards for such dams would be at the state level, for the most part, including professional qualifications for anyone in charge of operation and management of dam waste, inspection requirements, installation of alarms and emergency drills and evacuation procedures. Many states have promulgated regulations that classify dams by their hazard potential in terms of serious hazard to public health or serious damage to property. Typically, dams may not be constructed, operated, enlarged, repaired, altered, removed from service or abandoned without express approval of the pertinent state agency. Those dams with the highest hazard are most strictly regulated, with professional design criteria, specific construction standards and strict maintenance procedures, including monitoring. States have authority to inspect, adopt regulations and issue orders, invoke injunctive or judicial action to enforce against unsafe dams or dams that present an imminent hazard or threat to life or property and to take supervisory control of the dam's operation. For high-hazard dams, emergency action plans within certain states may be invoked in the event of dam failure. Additional, detailed state standards may be imposed on facilities that treat, store and dispose of hazardous waste pursuant to Resource Conservation and Recovery Act (RCRA) and its state counterpart statutes and regulations.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal source of authorities addressing health, safety and labour issues in regard to the mining industry in the US is the federal Mine Safety and Health Act. Pursuant to the Act, the Mine Health and Safety Administration regulates the health and safety of mining operations and activities, with broad-based authority over miner health and safety, mine working conditions, training programmes, complaints of discrimination and prevention of accidents, injuries and illnesses, among other things. The Administration also possesses significant enforcement, inspection and corrective action authorities, which can result in substantial fines and even mine suspension or closure. Additionally, the states in which mining occurs have their own counterpart legal and regulatory authorities over mine health and safety.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The management and recycling of mining waste products may very well be regulated as solid or hazardous waste pursuant to restrictive requirements imposed by the federal RCRA as amended. The Act imposes certain statutory and regulatory restrictions on recycling of wastes, even if beneficial. The RCRA programme may be managed either by EPA or by a state with delegated authority to manage the solid and hazardous waste programme. In such instances, a requirement may exist to obtain a federal or state permit to conduct waste recycling, including the exploration and exploitation of mining waste products.

Those seeking to explore and exploit mining waste products in tailings ponds or waste piles should first familiarise themselves with the legacy liabilities that may be associated with such units, before seeking to obtain any form of management or ownership control over them. Unless the ponds and piles have been abandoned, they may be otherwise owned and controlled by the same owners of the mine and related properties that were associated with them during periods of active mine operations. Consequently, title may be held in private parties or possibly even the federal or state government, requiring approval from such owners for access to and control over the waste products in the form of a lease, licence or direct acquisition. Assumption of legacy liabilities should always be carefully considered and evaluated.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

US law does not impose specific restrictions or limitations on the use of domestic or foreign employees in connection with mining activities. Generally applicable US immigration law may apply to foreign employees working in mining activities in the US. Subject to certain limitations and requirements, which should always be evaluated in advance, highly skilled and specialised foreign citizens may qualify for temporary visas to work at mining operations in the US.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Although the US does not have laws mandating corporate social responsibility, certain aspects of the mining industry are subject to public engagement and disclosure requirements, particularly when developing federal minerals. Many mining projects in the US are subject to environmental review under the NEPA, which mandates that federal agencies study the environmental impact of certain mining projects. Further, corporations engaged in mineral development in the US are openly seeking to improve relationships with local communities, the wider society, and various constituent groups to align stakeholder and company values.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Generally, aboriginal or indigenous rights impact the acquisition or exercise of mining rights when those rights are located on Indian lands. Indian reservations are federal lands set aside by treaty or administrative action for the occupancy and use of specified Indian tribes. The US holds legal title to Indian lands for the benefit and use of the Indian owners, and the federal government has undertaken to protect tribal treaty rights, lands, assets and resources. The BIA administers the federal trust responsibility and any agreement to develop minerals held in trust for Indian beneficiaries must be approved by the Secretary of the Interior. Unlike the federal supervision applicable in the lower 48 states, Alaskan Natives have title to the surface and subsurface estates and directly control their mineral assets.

Laws designed to protect cultural resources, cultural items, sacred sites or historic properties may also affect mining rights. When permitting certain mineral development projects, federal agencies will also consider environmental justice issues, a policy that seeks to prevent placing an unequal share of the burdens of hazardous waste and other potentially harmful impacts on disadvantaged populations.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The US is a party to many international treaties, conventions or protocols of general application that in some way relate to and impact CSR globally. The breadth and impact of any general international agreement on the mining industry and related CSR issues varies significantly. For example, the North American Free Trade Agreement between the US, Canada and Mexico requires equal treatment between citizens of the party nations and provides investors with various protections including fair and equitable treatment.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The primary statute that expressly criminalises corruption of US federal public officials, which prohibits both making and receiving either bribes or gratuities, is title 18 of the United States Code (USC), section 201. Additionally, title 18 USC, section 666 applies when governmental or other entities receive federal programme benefits of over US$10,000. The Hobbs Act targets public corruption by criminalising extortion. Although no federal statute specifically prohibits private commercial bribery, federal prosecutors may use existing laws such as the mail and wire fraud statute to prosecute such acts. As interpreted and enforced by US authorities, the anti-bribery provisions of the Foreign Corrupt Practices Act can extend to foreign companies and individuals for acts in the US.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

The US has signed and ratified a number of significant treaties related to the fight against corruption. However, given the strength and reach of US anti-corruption laws, companies operating in the US do not pay particular attention to any specific foreign anti-bribery or corruption legislation.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The US joined the EITI in 2011 and has created a public data portal to document natural resource revenues from federal lands. The portal includes detailed information on taxes collected from oil, gas, coal, wind and geothermal operations on federal lands and how such revenues are distributed. Owing to the widely varied nature of ownership interests in natural resources in the US (eg, private, federal, state, tribal), forcing universal participation across the US is considered too unwieldy to administer. Participation of the US is limited to federal lands.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a business entity organised under the laws of any state is considered a US citizen. Generally, there is no prohibition in regard to foreign ownership of stock in corporations that own or control mining claims, and US mining laws generally allow for foreign

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investment through a business entity organised pursuant to endemic state laws. No foreign ownership restrictions as such apply in respect of state- or privately owned mineral interests.

More generally, certain tax withholding requirements may apply in transactions involving transfers of real property interests in the US (including mineral interests) by a foreign person.

Additionally, a transaction of any sort (including a mining transaction) that could result in control of a US business by a foreign person is subject to scrutiny by the federal inter-agency CFIUS in order to identify and address any national security concerns that arise as a result of the transaction. If a covered transaction presents national security risks and other provisions of law do not provide adequate authority to address the risks, CFIUS may impose conditions on the transaction to mitigate the risks. In certain circumstances CFIUS also may refer the case to the president for action, including possibly suspending or prohibiting the transaction. In September 2012, for example, a CFIUS determination led President Obama to block a Chinese-owned company from building four small wind farm projects near a US Navy installation.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

The US is a party to numerous international treaties of general application that address or relate to foreign investment in the US, but no such treaties address investment in the mining industry per se. It is important to keep in mind, however, that foreign investment, particularly in this day and age, is subject to US national security laws and related government scrutiny. For example, the CFIUS reviews foreign direct investment and any related potential impact on national security. 'Covered transactions' are reviewed and evaluated to determine if any resultant control of a US business by a foreign entity could have or pose a national security risk, whereupon the committee has authority to require changes to mitigate risk and, ultimately, recommend the suspension or prohibition of the transaction to the President of the US.

Because of its proximity to both Canada and Mexico, two treaties that have traditionally been a particular focus of the US are the NAFTA and the Trans-Pacific Partnership Agreement (TPPA). The Trump administration has withdrawn the US from the TPPA, and recently also announced the intention to renegotiate NAFTA. Significantly, both agreements prohibited expropriation or nationalisation of projects across international borders and provided a methodology for compensation (see *Glamis Gold v United States* as an example of a major mining arbitration pertaining to NAFTA). In any event, new developments in regard to the future cross-border relationships with both Canada and Mexico are expected and should be further evaluated.

Uzbekistan

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Uzbekistan's mining industry is one of the country's most important and strategic industries. Uzbekistan is one of the world's largest producers of gold and uranium (ranked seventh for both). Uzbekistan also produces copper, silver, coal, phosphate, molybdenum, potassium, tungsten, lead, zinc and other minerals.

2 What are the target minerals?

Uzbekistan possesses most types of minerals. Different regions focus on different minerals. For example, Navoi province is famous for its large deposits of gold and uranium and Tashkent province for copper, coal and gold deposits.

3 Which regions are most active?

The most active regions are Navoi, Samarkand and Tashkent provinces.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Uzbekistan's legal system is based on civil law, which is similar to the Romano–Germanic system of law.

5 How is the mining industry regulated?

Exploration and development of minerals is regulated under a number of national laws and regulations. Exploration and mining rights are granted on the basis of a subsoil-use licence awarded to the subsoil user, through tenders or direct negotiations, by the State Committee of the Republic of Uzbekistan on Geology and Mineral Resources.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The main act regulating the mining industry is the Law on Subsoil No. 444-II, new edition, dated 13 December 2002 (the Subsoil Law). The Subsoil Law provides the fundamental legal framework governing exploration and development of all subsoil resources, including minerals and oil and gas. The Subsoil Law provides for state licensing and control, rights and obligations, basic rules regarding efficient use of resources, types of subsoil use, duration of subsoil use and other matters.

The industry is also regulated under a number of other laws and regulations, including the Resolution of the President of Uzbekistan on Terms and Conditions on Granting of Subsoil Use Rights No. PP-649 dated 7 June 2007 (Regulation PP-649), the Tax Code, the Land Code, the Labour Code and the Environment Protection Law. It shall be noted that Regulation PP-649 established a procedure for granting a licence on subsoil-use rights for all subsoil minerals excluding construction materials. Granting subsoil-use rights for exploration and development of deposits of construction materials is regulated by the Resolution of the President of the Republic of Uzbekistan on Terms and Conditions on Granting of Subsoil Use Rights for Deposits of Construction Materials No. PP-1524 dated 2 May 2011. In addition to the above, the Law on Concessions dated 30 August 1995 provides a legal basis for this form of right to develop mineral resources. However, this law has not yet been widely applied in practice. To date, there have not been any examples of concessions being negotiated and entered for mining projects in Uzbekistan. The difference between the regulatory framework in Uzbekistan and that of other countries is in the absence of any separation between mining and petroleum law and a common approach towards regulation of the mining industry and the oil and gas industry. The confusion is exacerbated by the Law on Production Sharing Agreements dated 7 January 2001 (the PSA Law). The PSA Law applies, in addition to the Subsoil Law, in the case of affairs related to the conclusion, execution and termination of Production Sharing Agreements (PSAs) in the exploration and mining of mineral resources in Uzbekistan.

The principal regulatory bodies that administer the laws and regulations related to mining are the State Committee of the Republic of Uzbekistan on Geology and Mineral Resources (Geology Committee), the State Inspectorate of the Republic of Uzbekistan on Control over Industrial Safety of works in Industry, Mining, Geology and Public Utilities Sectors (Industrial Safety Inspectorate) and the State Committee of the Republic of Uzbekistan on Protection of the Environment (Environment Protection Committee).

There have been no major amendments to laws in the mining industry in the past year.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Uzbekistan's mineral resource and reserve reporting system is quite different from generally recognised international systems, such as Canada's CIM Standards, Australia's JORC Code or South Africa's SAMREC Code. Uzbekistan, along with many other Commonwealth of Independent States countries, still uses the former Soviet system for classification of mineral resources and reserves. This categorises mineral concentrations according to the extent to which they have been explored and substantiated, specifically: categories A, B, C1 and C2 and three categories of potential resources P1, P2, P3 and, also, on an economic-value basis, with two categories: balance reserves (commercial reserves) and off-balance reserves (reserves lacking commercial potential).

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Under the Subsoil Law all subsoil resources are owned by the state. Title to minerals passes from the state to the subsoil user on extraction from the ground, pursuant to the terms of the subsoil-use licence. Any transfer of subsoil ownership rights (including the right of use) to a non-state party is subject to approval by the cabinet of ministers of Uzbekistan (government or cabinet of ministers).

Uzbekistan differs from many other countries, where there is private ownership of minerals in the ground and where landlords have title to all mineral resources located under their land plots. All subsoil resources in the ground, until extracted, are owned by the state. Surface rights do not grant rights to natural resources in the ground and, in this way, are clearly distinct from mineral rights.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Usually, geological data held by the Geology Committee is treated as state secret and the Geology Committee makes very high-level information publicly available, such as the names of given deposits, their location and respective mineral reserves, as recognised by the state. Usually this information is publicly available through the websites of government agencies such as the Geology Committee, the Agency on Information Support and Foreign Investments Promotion and the annual geological conference, Uzgeoinvest.

Sufficient basic geological data to prepare an aggregated feasibility study (for exploration activities) or a preliminary feasibility study (for mining activities) is provided by the Geology Committee in the course of conducting tenders or direct negotiations for the right to develop a particular deposit or exploration area. This information may be disclosed to investors subject to their signing a confidentiality agreement. A more detailed package of geological information regarding a certain deposit or subsoil area is made available to the licensee after the relevant licence for subsoil-use rights has been granted.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Uzbekistan uses a licensing system for the granting of exploration and mining rights. Therefore, subsoil-use rights are granted on the basis of a subsoil-use licence awarded to the subsoil user on behalf of the cabinet of ministers by the Geology Committee. Such licences are usually awarded either through tenders or direct negotiations.

The primary obligations of the mineral rights holder include obligations to:

- use the allotment only for the purposes stipulated in the licence;
- comply with standards and rules on technology of conducting subsoil-use operations;
- comply with the work programmes on development of operations;
- draw up geological, survey and other documents in the process of the development of mineral deposits, the use of subsoil for other purposes not connected with the mining of minerals and to protect their safety;
- keep records of the volume and quality of extracted and reserved principal and other jointly deposited mineral resources;
- preserve extracted but temporarily unused associated subsoil resources;
- ensure compliance with standards of loss when mining minerals and processing mineral raw materials;
- not exercise selective extraction of rich blocks within the licensed area;
- update the Geology Committee on the status of, and changes in reserves of, the principal and other jointly deposited subsoil resources;
- provide information on the volume of extracted subsoil resources to the Geology Committee;
- ensure the safety of human life, health and the natural environment;
- ensure safe execution of work connected with the use of subsoil and taking of measures for the prevention of extraordinary situations, and elaboration of plans to eliminate accidents;
- observe the established procedure for closure and conservation of enterprises for mining of minerals and underground structures not associated with mining of minerals;
- ensure execution of works connected with planning or terracing of dump slopes and pit edges, as well as erosion preventive measures; and
- restore land plots and other natural features that have been disturbed as a result of subsoil-use operations to a condition suitable for further use.

Depending on the type of the subsoil use, the licence may include other obligations.

The Subsoil Law and Regulation PP-649 grant the exploration licence holder a right to progress from exploration to mining activity and states that a party or parties that financed the exploration activities on a given deposit shall have an exclusive right to obtain a licence for mining activities on the same deposit. The exploration licence holder is usually treated as the financier of exploration activities and has the exclusive right to progress to mining activities. There is no automatic transfer from exploration to mining licence. The Subsoil Law and Regulation PP-649 provide that the mining licence must be granted upon the application of the party that financed the exploration activities. The application must be supported by:

- documents proving that exploration activities on a given deposit were financed by an applicant and disclosing the source of financing;
- notarised copies of a certificate of incorporation and constitutive documents of the applicant;
- information on the executive management and shareholders of the applicant; and
- information on technical and technological capacities of the applicant demonstrating that the applicant is capable of performing the intended activity on development of the deposit and ensuring production, and also information on contractors to be involved in performance of the intended activity.

In addition, the Geology Committee may request submission of copies of an applicant's or its contractors' licences and permits for carrying out certain types of activities connected with the subsoil use.

11 What is the regime for the renewal and transfer of mineral licences?

The term of a licence may be extended provided that a subsoil user applies to the Geology Committee not less than six months before expiry of the validity period of a licence. Pursuant to the Subsoil Law, the Geology Committee must take a decision on whether to grant the extension within 30 days of the submission of the extension application. Usually, this decision is closely coordinated with the government. The extension is subject to the subsoil user's compliance with the terms and conditions of the licence and the subsoil user demonstrating that it requires an extension to complete exploration or mining activities on a given deposit.

The Subsoil Law and Regulation PP-649 are silent on the transfer of licences with respect to exploration activities and only provide such rights with respect to licences for mining mineral resources and licences for use of technogenic mineral generations. The said licences can be transferred (partially or in full) to another party provided that this party undertakes all obligations under the licence. Transfer of licences is carried out by a licence holder submitting an application to the Geology Committee with an indication of the reasons for the transfer. The application shall be supported by the documents confirming that the party to whom the rights under the licence are being transferred meets the licence requirements. The Geology Committee prepares the information related to the licence transfer and coordinates it with the relevant ministries and state agencies. Recommendations of the ministries and state agencies are further submitted to the government regarding the decision whether to approve or reject the transfer of the licence.

12 What is the typical duration of mining rights?

Generally, mining rights are granted for the term of five years with possibility of renewal for the new term. Mining rights under PSAs are granted for the period of duration of a particular PSA. Renewal of mining rights is carried out through filing a licence application with the licensing authority and requesting to issue a licence for the new term.

Mining rights may be suspended, restricted or prematurely terminated in the circumstances specified by the Subsoil Law, such as failure to commence use of subsoil plot within one year from the date of subsoil plot allotment, repetitive failure to make subsoil use payments, breach of main terms and conditions of a licence, etc.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Generally, there is no distinction, and foreign individuals and legal entities can directly hold mining rights in Uzbekistan. Uzbekistan has managed to build a powerful mining industry over the past 40 years, thanks to rich uranium and gold deposits. Most of the subsoil deposits are being developed by two major state-owned mining companies or by joint ventures with these companies (Navoi Mining Metallurgical Combine (NMMC) and Almalyk Mining Metallurgical Combine (AMMC)). Thus, in practice, priority in providing mining rights with respect to large deposits of strategic minerals, such as gold, silver, copper and uranium are given to these companies. At the same time, the government continues to seek and attract foreign investors employing innovative technologies and best practices, and there are examples of successful cooperation with large Western and Asian companies.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights may be suspended, restricted or prematurely terminated in the circumstances specified by the Subsoil Law. Subsoil users are free to choose a judicial body for protection of the rights and they may refer their disputes either to the Uzbek economic courts or foreign arbitrations. Unlike foreign court judgments, foreign arbitral awards shall be recognised in Uzbekistan without retrial on the merits, as Uzbekistan is party to the 1958 New York Convention On the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Accordingly, a foreign arbitral award obtained in a state that is party to the New York Convention should be recognised and enforced by an Uzbek economic court, subject to the qualifications in the New York Convention and compliance with Uzbek civil procedure and the procedures established by the Uzbek law on commercial arbitration for the enforcement of arbitration decisions.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests? ?

For mining purposes and in order to secure mining rights, private parties must acquire the surface rights to relevant land plots. Surface rights as such are usually acquired after the mineral licence has been granted, and at the stage of construction or development of the project to the extent that such surface rights are required. Although the Land Code provides for other types of land rights such as the right of permanent or temporary use, in practice, foreign companies or joint ventures engaged in mining activities are granted a lease-right to land. All land rights must be registered with the local state cadastre authority. In addition, Regulation PP-649 provides that subsoil-use rights become effective upon registration of such rights by the Geology Committee in the state register of the subsoil-use rights. Further, the terms of a licence for mineral extracting activities will provide that the mine allotment must be granted by the Industrial Safety Inspectorate. The right to the use of a land plot is linked to the subsoil-use rights, such that any changes in the title of the subsoil-use rights (transfer or termination) will lead to corresponding changes in the rights to use the land plot.

Yes, theoretically surface rights holders can oppose requests for the surface rights. However, since the land belongs to the state and is provided to surface rights holders for temporary or permanent use only, the government is entitled to transfer the land from one to another holder for higher priority needs.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Yes, through its state agencies, committees or wholly owned state companies the government participates in mining projects. In fact, currently, most of the subsoil deposits are being developed by the two major state-owned mining companies, NMMC and AMMC. Also, the Geology Committee has set up a number of joint ventures with foreign investors for prospecting and exploring potential fields in Uzbekistan.

There is no local listing requirement for the mining project companies in Uzbekistan.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Subsoil Law is silent on expropriations of licences by the government. However, the Law on Guarantees and Measures for Protection of Foreign Investors' Rights dated 30 April 1998 (Law on Protection of Foreign Investors' Rights) provides that foreign investments and any other assets of foreign investors located in Uzbekistan cannot be nationalised or confiscated, except in the instance of natural disasters, accidents, epidemics and epizootics. In the event of nationalisation in the said circumstances, the government is obliged to provide the affected foreign investor with compensation of an amount equal to the damage caused as a result of such nationalisation. The law further provides that the state shall be a guarantor of timely payment of such compensation to the foreign investor.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Yes, there are certain areas that have special status and where mining works may be either prohibited (for example, in natural parks) or restricted (for example, in frontier zones and certain types of agricultural land).

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Uzbekistan's Tax Code specifies several special taxes payable by subsoil users, including mining companies, in addition to general taxes such as corporate income tax (7.5 per cent), VAT (20 per cent), social tax (25 per cent), excise and customs duty, tax on petrol and other mandatory duties, as follows:

- subsoil-use tax (gold: 5 per cent; copper: 8.1 per cent; uranium: 10 per cent and coal: 4 per cent) is calculated on the value of the mineral resources produced and is payable on a quarterly basis for small entities and on a monthly basis for other types of entities. The value of the mineral resources for purposes of subsoil-use tax is generally determined using the average weighted sales price for the reporting period;
- subscription bonus (gold: 10,000 times the minimum monthly wage (MMW); copper: 1,000 times MMW and uranium 500 times MMW) is a one-time fixed payment to the state for the right to explore and extract minerals in accordance with a subsoil-use licence;
- commercial discovery bonus (0.1 per cent) is a fixed payment that is payable by subsurface users when a commercial discovery is made in the licensed territory. The rate of the commercial discovery bonus is determined on the basis of the value of proven extractable reserves (the value of the mineral resources is generally determined using the market price established at international exchanges);
- excess profits tax (50 per cent) is payable in respect of certain types of minerals, which are determined in accordance with legislation (in 2017, only natural gas, copper, cement, clinker and polyethylene pellets were subject to excess profits tax); and
- PSAs (the Uzbek Tax Code specifies the special tax regime for foreign companies conducting activities under PSAs. Thus, a foreign investor, its contractors and subcontractors under a PSA are exempt from payment of all types of taxes and mandatory duties with regard to exploration activities. Further, during the period of the PSA a foreign investor is required to pay corporate profit tax, land tax, water use tax, excise tax, social tax and special taxes for subsoil users (subscription bonus and commercial discovery bonus), excluding excess profits tax. Incentives granted to a foreign investor under the PSA are exemption from payment of VAT

and property tax and exemption from customs duties that would otherwise be levied upon imported goods and works purported for activities under the PSA and upon export of products belonging to a foreign investor in accordance with the PSA).

A non-resident company operating or acting through a permanent establishment must, in addition, pay a net profit tax from its activity in Uzbekistan at the rate of 10 per cent. Domestic parties are not subject to this tax, although they must withhold 10 per cent withholding tax from dividends distributed to their foreign shareholders (the rate of dividends withholding tax may also be reduced under relevant double tax treaties).

No special tax incentives, excluding the incentives under PSAs referred to above, are generally available to companies conducting mining activities in Uzbekistan. However, it may be possible to negotiate tax incentives directly with the state. These are granted by special government resolutions.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Generally, no special tax incentives are provided to companies conducting mining activities in Uzbekistan.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There are no direct tax stabilisation provisions under the Uzbek Tax Code, except for general provisions on stability of laws provided by a number of legislative documents. Pursuant to the Law on Protection of Foreign Investors' Rights foreign investments are protected from any subsequent changes in the Uzbek laws, which may worsen investment conditions, for a period of 10 years from the date of the investment. In contrast to the Law on Protection of Foreign Investors' Rights, the PSA Law provides similar stability provisions but for the entire period of validity of the PSA, without 10 years' limitation. Pursuant to the PSA Law, if after the signing of the PSA, Uzbekistan adopts any laws or other legal acts that lead to deterioration of commercial results of the foreign investor's operations under the PSA, then the provisions prescribed under the PSA continue to be applicable to the foreign investor. This rule does not apply to the changes made in the laws with respect to standards for safety of works, preservation of mineral resources, environmental protection and health of the population.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

Currently, the concept of carried interest or a free carried interest is not used in Uzbekistan with respect to mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Currently, the Uzbek Tax Code does not provide for a clear procedure of determining of capital gains with respect to transferred rights, especially if the entity receiver of the capital gain is located outside of Uzbekistan. However, the most recent trends show that such entities located outside of Uzbekistan are viewed by local tax authorities as receivers of the capital gain and are thus subject to the tax on capital gains in Uzbekistan.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Generally, the same tax regime applies to domestic companies and foreign companies whose activities in Uzbekistan create a permanent establishment for Uzbekistan tax purposes. Otherwise, foreign companies are subject to Uzbekistan withholding tax with respect to certain Uzbekistan-sourced income such as dividends, interest, royalties and other similar income, subject to reduction or elimination under any applicable double tax treaty. Further, income received from the provision of goods, work and services that creates no permanent establishment in Uzbekistan is not subject to any Uzbek withholding tax.

As mentioned above, the Uzbek Tax Code specifies the special tax regime for foreign companies conducting activities under a PSA.

See question 19.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The Subsoil Law contains no restrictions with respect to the business structures that may be used for the purpose of conducting mining activities in Uzbekistan. The Subsoil Law allows any form of legal entity (whether local or foreign) to acquire mining rights in Uzbekistan. The two most commonly used business forms in Uzbek mining activity are the limited liability company (LLC) and joint-stock company (JSC). The Law allows for a JSC and an LLC to each be used for either joint ventures or 100 per cent foreign-owned subsidiaries.

26 Is there a requirement that a local entity be a party to the transaction?

As a general rule, there is no requirement that subsoil users enter into the transactions with only local entities. However, in practice, the state, through the Geology Committee or its mining companies, is usually involved in mining activities of strategic or high-revenue projects by participation in joint ventures with foreign investors.

Also, there is a general expectation on the subsoil users to use locally manufactured equipment, materials and finished products wherever possible as well as to engage local organisations for works and services in the course of subsoil-use operations.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Yes, operations in Uzbekistan are often structured through holding companies located in other jurisdictions and in most cases through Dutch, Swiss and Singaporean holding companies owing to favourable tax treaties with these countries.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The Subsoil Law does not regulate the financing of mining activities and mining companies are free to choose their funding sources. In practice, the principal sources of financing are a user's own funds and funds borrowed from foreign private financing institutions, such as the European Bank for Reconstruction and Development, the Asian Development Bank, the International Finance Corporation, etc. Debt financing is subject to registration with the Central Bank of Uzbekistan (CBU) unless borrowings are made for a period of no more than 360 days. In addition, registration with the CBU is subject to regular reporting to the CBU, which monitors the relevant debt-financing agreement.

It should be noted that there is currently no well-established legal framework in Uzbekistan for the domestic securities market that could enable mining companies to issue domestic bonds or commercial papers.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Usually, direct financing is provided by the government to state-owned mining companies. Pension funds are not involved in the financing of mining projects.

30 Please describe the regime for taking security over mining interests.

Imposing security interests over any type of subsoil-use licence is not enforceable under Uzbek law.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no direct limitations or restrictions imposed on the import of machinery and equipment or services in connection with mining

activities, although certain types of machinery and equipment may fall under limited restrictions (for example, equipment with integrated radio frequency devices). It should be noted that import operations are subject to Uzbek exchange control requirements, such as registration of import contracts with a local servicing bank and customs authorities. Imported items should conform to Uzbekistan's technical standards.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

FIDIC standard conditions are quite popular in Uzbekistan. Yes, the market is friendly to the suppliers and buyers, though the government's policy for the past decade in this respect have been focused on bringing innovative technologies and solutions in Uzbekistan and encouraging local manufacturing of innovative technologies in partnership with leading global companies and subsequent exports and domestic use of these technologies.

See question 14 for dispute resolution practices.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no general requirements in the Subsoil or PSA Laws that some or all minerals produced must be processed or sold domestically. However, the PSA Law provides for a pre-emptive right of Uzbekistan, in case of emergency, to buy mineral resources produced by the subsoil user on a priority basis. Prices and other details of such purchase entitlement have to be set out in the PSA. The PSA Law does not expressly provide otherwise, and in practice the Ministry of Finance is entitled to this pre-emptive right.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

In 2003, Uzbekistan followed article VIII of the IMF Treaty to ensure free and unrestricted conversion of local currency into foreign currency for current operations. In accordance with the law, the conversion of national currency into hard currency must be carried out within five business days. However, in practice, companies engaged in business activities in non-strategic sectors (retail, trade, etc) of the economy may experience delays.

Export proceeds are generally subject to a 50 per cent mandatory sale to local servicing banks. The mandatory sale must be carried out within five days following the receipt of export proceeds. The income to be converted may be reduced by specific foreign currency expenses including transportation, insurance, customs duties, commissions, interest on bank loans, and goods and services related to the production of exports. An exemption is also provided for reinvested revenues resulting from an increase in export or the export of scientific and technological equipment.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The main act in the area of environmental protection is the Law on Environmental Protection No. 754-XII, dated 9 December 1992, as amended, which sets out the rights and duties of individuals and legal entities, provides for the regulation of, and control over, environmental protection and provides a general framework for environmental impact assessment and environmental monitoring. In addition, it provides requirements for the use of radioactive materials, atomic energy and dangerous chemical substances. Other key acts regulating environmental protection are as follows:

- the Land Code;
- the Law on Radiation Safety No. 120-II, dated 31 August 2000, as amended;
- the Law on Waste No. 362-II, dated 5 April 2002, as amended;
- the Law on Environmental Assessment No. 73-II, dated 25 May 2000;
- the Law on Atmospheric Air Protection No. 353-I, dated 27 December 1996;
- the Law on Water and Water Use No. 837-XII, dated 6 May 1993, as amended; and
- the Law on Subsoil No. 444-II, dated 13 December 2002.

The principal regulatory bodies in these areas are the Environmental Protection Committee and the Industrial Safety Inspectorate.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

There are several types of environmental licences and permits subsoil users must obtain before carrying out their activities. The Law on Environmental Assessment No. 73-II requires subsoil users, prior to financing works on construction of mining projects, to obtain a conclusion on environmental assessment from the specialised department of the Environment Protection Committee as to compliance of the intended activity with ecological requirements and that measures undertaken by the subsoil user on environmental safety ensure the sufficiency and feasibility of efficient use of mineral resources. The subsoil users must also obtain permits for the following:

- discharging pollutants into the environment;
- in respect of water consumption;
- setting limits for air pollution; and
- for waste disposal.

Obtaining a conclusion on environmental assessment and all other required environmental permits and licences may take up to one month, and on sophisticated projects up to three months.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The Subsoil Law and Regulation PP-649 require that subsoil users conduct closure and remediation. The closure and remediation terms and conditions are usually different, and depend on certain environmental, operational and other external circumstances of each mining project. Therefore the Subsoil Law and Regulation PP-649 only set out general rules on closure and remediation and require that such specific provisions be included in the mining licences.

No performance bonds, guarantees or other financial assurances are required of a subsoil user upon closure of a mining project. Pursuant to the general rules established by the Subsoil Law, subsoil users must conduct closure and remediation at their own expense, except, for instance, where mining rights are prematurely terminated by the government owing to an emergency situation. In the past, mining companies were required to establish special reserve funds for mine reclamation purposes.

38 What are the restrictions for building tailings or waste dams?

Construction and exploitation of tailings or waste dams for the purposes of storing and burying of mining wastes is carried out based on a licence issued by the Environment Protection Committee by way of direct negotiations of licence applicant with this agency. The person in charge of operation and management of waste dams shall have relevant technical qualification and be certified by the Industrial Safety Inspectorate to operate and manage waste dams.

The Environmental Protection Committee and the Industrial Safety Inspectorate, as principal controlling bodies of safe exploitation of waste dams, are entitled to carry out ad hoc and scheduled inspections of the facilities mining companies exploiting waste dams. Inspections usually carried out once in a month.

Mining companies are responsible for safe exploitation of waste dams and are obliged to implement emergency response procedures to prevent damage to people, animals and environment in the events of dam failure.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Uzbekistan has a broad range of laws regulating labour relations, the main element of which is the Uzbek Labour Code (the Labour Code).

However, there are no special requirements, standards or labour rules applicable to labour relations in the mining industry.

As for work safety, the general issues related to health and safety at work are governed by the Labour Code, as well as by the Law on Industrial Safety on Hazardous Manufacturing Objects, dated 26 September 2006 and the Law on Labour Protection, dated 6 May 1993. These statutes impose on employers a considerable number of obligations related to ensuring safe working conditions and work safety, including obligations to ensure that working conditions at each workplace meet work safety requirements, that the employees use individual and collective protective gear, that the employees observe the work and rest regime provided for by Uzbek laws, and that a work safety service is established, etc. Finally, each employer is required to develop an extensive set of various labour safety rules and regulations, as well as numerous other documents relating to work safety.

The principal regulatory body administering health and safety, and labour laws is the Ministry of Labour and Social Protection of the Population and Industrial Safety Inspectorate.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The Law on Wastes No. 362-II, dated 5 April 2002, as amended (Law on Wastes) establishes fundamental rules on management, storing and recycling of waste products, including hazardous waste products. In particular, the Law on Wastes provides for definitions of ownership and title for waste products, maintenance of the state cadastre of the disposal or landfill of waste products, order of developing and approval of standards of waste disposal, order on import and export of wastes, categorising and certification of waste products, mandatory ecological certification of waste products that are intended for sale or purchase, and the export or import of hazardous waste products before their transportation.

The Law on Wastes also sets the following major requirements to owners of wastes:

- to comply with sanitary standards and rules, and ecological limits on waste management;
- to maintain records of wastes and appropriate reporting;
- to define the level of hazard of the waste for humans, animals and the environment;
- to ensure collection, appropriate storage and protection of wastes that retain their value and are subject to recycling;
- to develop standards for waste generation and their disposal limits;
- to undertake measures on developing and implementing technologies on wastes recycling;
- to undertake measures on maximum recycling of wastes, their sale or transfer to legal entities and individuals engaged in collection, storage and disposal of wastes and also ensure environmentally harmless burial of wastes that cannot be recycled; and
- to pay compensatory payments for storing of waste, etc.

The Law on Wastes establishes that owners of waste are responsible for the management and recycling of waste products, including hazardous waste. It shall be noted that activity on exploring and exploiting mining waste products in tailing ponds and waste piles is subject to licensing.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no restrictions or limitations specifically imposed on the employment of domestic or foreign employees in connection with mining, besides the limitation set by the PSA Law. Pursuant to the PSA Law, one of the main conditions of carrying out works under PSAs is that the number of Uzbek citizens in these works shall not be less than 80 per cent of the average annual number of employees and the use of foreign personnel above this quota is only allowed in the case of the absence of Uzbek citizens with the appropriate qualifications for a particular position.

Hiring of foreign employees for any business activities in Uzbekistan is undertaken on the basis of work permits issued by the relevant state agencies. Legal entities with foreign employees in Uzbekistan must obtain a foreign labour licence from the Agency of Foreign Labour Migration Issues (Labour Agency). The Labour Agency functions under the Ministry of Labour and Social Protection of the Population. A licensed company must also obtain a work permit (confirmation) from the Labour Agency for each foreign employee. The Labour Agency should issue a foreign labour licence within 30 days from the date of submission of all required documents.

Update and trends

The government is currently in the process of implementing several regulations intending to simplify licensing procedures and boosting foreign investments in the mining industry.

State companies continued to be the major investors and operators of mining deposits. Several leading multinational companies continued exploration activities for uranium in greenfield areas. A number of foreign investors have continued the development of silicon, tungsten and molybdenum deposits.

In 2016, the US Geological Survey ranked Uzbekistan as the world's ninth-largest gold producer.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

To date, Uzbekistan has not introduced such laws.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Not applicable.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

No specific international treaties, conventions or protocols relating to CSR issues (including indigenous peoples) are applicable in Uzbekistan.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The main act regulating anti-bribery and corrupt practices is the Criminal Code. In particular, the Criminal Code provides criminal liability for the following types of offences:

- bribe-taking by a state official (article 210);
- giving a bribe to a state official (article 211);
- intermediation in bribery (article 212);
- giving a bribe to a public servant (article 213);
- bribe-taking by a public servant (article 214);
- commercial bribery (article 1929); and
- bribing a servant of a non-government entity (commercial or otherwise) (article 19,210).

Recently the government has also enacted Standard Rules of Ethics of the Government Employees approved by the Resolution of the Cabinet of Ministers No. 62, dated 2 March 2016 (Rules of Ethics). The Rules of Ethics prohibit government officials and public servants from receiving anything of material value or any other benefits in connection with performance of their duties, from individuals or legal entities. The Rules of Ethics also provide major principles and rules of behaviour for government officials and public servants, as well as definitions of conflict of interest and liability for a breach of said Rules.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Usually, Western companies operating in Uzbekistan are well aware of the Foreign Corrupt Practices Act, the UK Bribery Act and other relevant laws and establish their business practices in compliance with these acts. In contrast, local companies in most instances will not be aware of the existence of these acts.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

To date, Uzbekistan has not enacted any laws enforcing provisions of EITI.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign ownership restrictions relevant to the mining industry in Uzbekistan. In practice, however, the mining industry is viewed as a strategic sector of the economy and as a result most large-scale mining projects are implemented by state-owned mining companies.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Uzbekistan is a party to several international treaties relevant to the mining industry, including the Treaty on Cooperation in Study, Exploration and Use of Mineral Resources of 27 March 1997. Uzbekistan has also concluded about 50 bilateral investment treaties with other countries and is a party to a number of multilateral treaties concerning foreign investment. Thus, on 6 May 1994, Uzbekistan ratified the 1965 Washington Convention on the Procedure of Settlements of Investment Disputes between States and Nationals of Other States.

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Zambia

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Zambia has a long history of mining, predominantly in copper and cobalt. Mine development has been concentrated in an area known as Copperbelt Province. The Copperbelt mines are renowned for their high-grade deposits.

Exploration activity in recent years has raised the potential for opening up new centres for copper mining in the north-west and east of the country. Zambia's flagship copper project, Lumwana Mine, was commissioned in December 2008 and has been a successful project producing 125,000 metric tonnes in 2015 alone.

Zambia also hosts small-scale gold, coal, manganese and zinc deposits. In recent years, exploration has significantly expanded throughout Zambia to include prospecting for non-traditional minerals such as nickel and uranium, with some exploration for diamonds. The country's first nickel mine became operational in 2008. Zambia is also renowned for its gemstones and ranks as one of the world's leading producers of high-quality stones. Recent exploration work has also revealed the presence of significant deposits of coal-bed methane.

Having undergone a severe decline in the late 1980s and early 1990s, the mining sector had begun to perform well when productivity was severely affected by the global economic downturn in 2008, which had a negative impact on the global mining industry in general.

Since independence in 1964, the mining industry has provided the traditional base for the country's foreign exchange earnings and continues to be the major contributor to export receipts, accounting for more than 70 per cent of Zambia's export earnings as at 2016. The mining sector and its support industries provide major employment and the infrastructure backbone to areas that would otherwise lack the impetus for sustained development.

2 What are the target minerals?

The target minerals are mainly base metals, platinum group metals, uranium and gold.

3 Which regions are most active?

Concentration of mining activity in Zambia has recently diversified out of the Copperbelt Province into virtually all the other nine provinces but mainly the North-Western Province (largely viewed as 'the new Copperbelt'), Southern Province, Luapula Province, Central Province and Eastern Province.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The Zambian legal system is based on the common law tradition. Most of its private and public law has followed the English legal system or has been heavily influenced by it. Zambian civil procedure is influenced by English law and is reliant upon many of the English civil procedures and practices.

5 How is the mining industry regulated?

Zambia's mining industry is principally regulated by the government through the Mines and Minerals Development Act No. 11 of 2015 (the Mines Act), which repealed and replaced the Mines and Minerals Development Act No. 7 of 2008.

The Mines Act provides for the administration of the mining sector and includes the establishment of the offices of the director of mines, who is the chief administrator and is responsible for supervising and regulating the proper and effectual development of mines and conduct of mining operations in accordance with the provisions of the Mines Act; the office of the director of geological survey, who is responsible for undertaking the geological mapping of Zambia and the exploration operations on behalf of the Republic, advising the Minister on geological matters and providing data concerning the geology and mineral resources of Zambia, assisting members of the public on information concerning geological matters and maintaining such laboratory and library and record facilities as may be necessary for the performance of the functions under the Mines Act; the director of mines safety who supervises matters relating to the environment, public health and safety in exploration, mineral processing and mining operations; and the director of mining cadastre who is responsible for the administration of mining rights and mineral processing licences.

The Mines Act also establishes a Mining Licensing Committee, which considers applications for mining and non-mining rights and all matters related to the administration of mining and non-mining rights (eg, suspension, termination or amendment of the licences). The committee also advises the minister on all matters related to its functions under the Mines Act.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The principal law regulating the mining industry apart from the Mines Act is the Environmental Management Act No. 12 of 2011 (the Environmental Act).

The primary regulatory body for the mining sector is the Ministry of Mines and Minerals Development (the Ministry). The Ministry has several departments that supervise activities within the sector. The Environmental Act is administered by the Zambia Environmental Management Agency (ZEMA).

The Mines and Minerals Development (General) Regulations, Statutory Instrument No. 7 of 2016 (Regulations), which regulate licence fees, application fees, maintenance and application forms, have been revised. The Regulations have also introduced time frames within which applications for renewal of licences can be made. An amendment to the Mines Act, introducing a new mining tax regime based on a sliding mineral royalty tax was made in 2016. A discussion of the new regime is further below.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Zambia does not have a national classification system for reporting mineral resources and mineral reserves. Ideally, the department of Mineral Development should have in place a system for reporting mineral resources and mineral reserves. Such a national system is yet to be developed. Zambia has also not adopted any other classification systems used in other jurisdictions. However, Zambia has developed a Mineral Production Monitoring Support Project, with funding from the European Union. The objective of this project is to help improve and

strengthen the Ministry's capacity to monitor mining and mineral activity in Zambia. Zambia is also developing a database called the Mineral Output Statistical Evaluation System aimed at improving efficiency and transparency in the reporting of mineral production output by mines in Zambia. This is expected to be finalised in 2019.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Following the completion of the privatisation of the mining sector in Zambia in 2000, mining in Zambia is predominantly private sector-driven. The state transformed the parastatal agency that owned virtually all the productive mines and tenements before 2000 into an investment company known as Zambia Consolidated Copper Mines Investment Holdings, which retains minority interests in most large-scale mining projects.

However, all the large-scale mines in Zambia, as well as most prospective tenements, are in private hands with constitutionally protected title to minerals discovered or won. The state deliberately promotes a policy of a private sector-driven mining industry.

There is a clear distinction between mining rights and surface rights under Zambian law with the former largely dominating the latter as a superior right, although a fairly robust compensation mechanism exists for addressing surface rights that predate the mining right.

There is generally one regime for administering all mining rights (the Mines Act) and another regime for administering all surface rights in Zambia (the Lands Act, chapter 184 of the Laws of Zambia).

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The intention under the Mines Act is to render all information in the sector publicly available to private parties although this is not the case in reality. The Ministry is both the repository and depository of information and data for the mining sector. All mining and exploration activities are required to be collected and lodged by mining right holders with the Ministry. Both the government and the private sector may conduct geosciences surveys although the latter is precluded from undertaking such surveys without the consent of the Ministry or over areas where there are existing mining rights. Basic information and data on mining activities and mineralisation are available on http://portals.flexicadastre.com/zambia. This interface provides information such as details of mining licences that are active in Zambia.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

All mining rights are acquired in accordance with the provisions of the Mines Act. Mining rights under the Mines Act consist of a mining licence or an exploration licence. A person may therefore only prospect for minerals or carry on mining operations under the authority of a mining right granted under the Mines Act.

All mining rights are acquired by application to the director of mines cadastre by submitting a prescribed form and paying the prescribed fee by either an individual or a company. Mining rights are granted on a first-come, first-served basis by either the director of mines or the director of geological survey, where the application meets the requirements of the Mines Act.

The following mining rights may be acquired: an exploration licence and a mining licence. The Mines Act also provides for non-mining rights which are a mineral processing licence, mineral trading permit, mineral import permit, mineral export permit and a gold panning certificate.

The Mines Act confers obligations on specific licence holders, as follows.

Exploration licence

Under the Mines Act, what was referred to as prospecting licences under the repealed Mines and Minerals Development Act of 2008 are now referred to as exploration licences. The area of land over which an application for an exploration licence is made should be represented by complete and specific cadastre units. The minimum size of a small-scale exploration area is three cadastre units (approximately 0.1km2) and this cannot exceed 300 cadastre units. For large-scale exploration the minimum area of exploration is 300 cadastre units, while the maximum area must not exceed 59,880 cadastre units.

A holder of an exploration licence (ie, a company and its subsidiaries) may not hold a number of licences whose accumulated total area is more than 299,400 cadastre units. A company that accumulates an exploration area in excess of 149,700 cadastre units must pay prescribed additional fees.

Exploration licences are valid for a period of four years and can be renewed for two further periods of three years each. The maximum period of an initial exploration licence is 10 years.

The holder of an exploration licence has the following obligations:

- commence exploration operations, only once a decision letter (written approval) in respect of the environmental project brief approved by the ZEMA has been submitted to the mining cadastre office;
- register a pegging certificate within 180 days of acquiring or being granted the exploration licence;
- expend on exploration operations not less than the amount prescribed or required by the terms of the licence to be so expended;
- carry on exploration operations in accordance with the programme of exploration operations;
- notify the director of mining cadastre of the discovery of the mineral to which the exploration licence relates within a period of 30 days of such discovery;
- backfill or otherwise make safe any excavation made during the course of the exploration operations, as the director of mining cadastre may specify;
- permanently preserve and safeguard any borehole in a manner directed by the director, and to surrender to government without compensation, the drill cores, mineral samples, the boreholes and any water rights in respect therefore, on termination;
- unless the director stipulates otherwise, to remove within 60 days of the expiry of the exploration licence, any camp, temporary buildings or machinery installed or erected, or make good any damage occasioned to the ground on account of such removal; and
- maintain full and accurate records of the exploration operations and submit them quarterly to the Ministry, indicating:
  - the boreholes drilled;
  - the strata penetrated;
  - the minerals discovered;
  - the results of any seismic survey or geochemical, geophysical and remote sensing data analysis;
  - the result of any analysis or identification of minerals removed from the exploration area;
  - the geological interpretations of records maintained on the above matters;
  - the number of persons employed;
  - any other exploration work;
  - the costs incurred;
  - such other matters as may be prescribed by the minister in a statutory instrument; and
  - furnish the directors, at least every quarter, with digital and hard copies of the records.

Mining licence

A mining licence applies to anyone intending to carry on any artisanal, small or large-scale mining. An application for a mining licence is made to the director of mining cadastre in a prescribed manner and form and upon payment of a prescribed fee. The period for which a mining licence is granted depends on the category or class of mining to be undertaken.

These are as follows:

- two years for artisanal mining;
- 10 years for small-scale mining; and
- 25 years for large-scale mining.

Artisanal mining may only be undertaken by Zambian citizens or cooperatives wholly composed of Zambian citizens. Small-scale mining may only be undertaken by citizen-owned, citizen influenced or citizen empowered companies. A citizen-owned company (COC) is one where 50.1 per cent of its equity is owned by citizens and in which the citizens have control of the management of the company. A citizen-influenced company (CIC) is one where 5–25 per cent of its equity is owned by citizens who also have significant control of the management of the company and a citizen-empowered company (CEC) is one where 25–50 per cent of its equity is owned by citizens.

The Mines Act confers the following obligations on holders of mining licences:

- register a pegging certificate within 180 days of being granted the mining licence;
- develop the mining area and carry on mining operations with due diligence and in compliance with the programme of mining operations and the environmental impact assessment (EIA);
- take all measures on or under the surface to mine the mineral to which the licence refers;
- with respect to large-scale mining, implement the local business undertaking attached to the mining licence as well as employ and train Zambian citizens in accordance with the proposal attached to the licence;
- comply with the proposed forecast of capital investment;
- permit inspection of the books and records maintained by an authorised officer;
- submit to the director of mining cadastre reports, records and other information that may be required;
- maintain accurate technical records of the mining area, copies of all geological reports, accurate and systemic financial records and books of accounts of the mining operations under the licence and operations not related to the mining licence;
- submit financial year end reports and in the case of large-scale mining returns showing compliance with the obligations specified;
- maintain security of the licensee's tenements;
- submit annual mine plans, sections, primary and secondary developments, ore recovery and treatment and production costs to the demarcate of the mining area in the prescribed manner; and
- maintain complete and accurate technical records of the operations in the mining area with copies of all maps and geological reports.

The holder of an exploration licence has a preferential but not an automatic right to acquire a subsequent mining right. The Mines Act gives the holder of an exploration licence the opportunity to apply for a mining licence within the exploration area. Such application should be made to the director of mines in the prescribed form and upon payment of a prescribed fee. It appears that the conversion of an exploration licence to a mining licence would be achieved through making an application for such a mining licence within six months before the expiry of the exploration licence.

An application for a mining licence must include the following to be accepted:

- a statement of the period for which the licence is sought;
- a statement of the minerals to be mined under the licence;
- a comprehensive statement of the mineral deposits in the area over which the licence is sought, including details of all known minerals proved, estimated or inferred, ore reserves and mining conditions;
- the proposed programme for mining operations, including a forecast of capital investment, the estimated recovery rate of ore and mineral products, and the proposed treatment and disposal of ore and minerals recovered;
- an environmental management plan, including proposals for the prevention of pollution, the treatment of waste, the protection and reclamation of land and water resources, and for eliminating or minimising the adverse effects on the environment of mining operations;
- details of expected infrastructure requirements;
- the applicant's proposal with respect to the employment and training of citizens of Zambia;
- the applicant's proposals for the promotion of local business development outlining how the applicant intends to promote;
- the participation of Zambian entrepreneurs in procurement and supply business opportunities with the applicant;
- the setting up by Zambian entrepreneurs of import substitution, and repair and maintenance businesses locally;
- partnership between the Zambian entrepreneurs and foreign suppliers and contractors;
- skills development to enable the Zambian entrepreneurs to attain quality standards in contract works and supply;
- a full description, with geographical coordinates, of the area of land for which the mining licence is sought (not exceeding 7,470 cadastre units), represented by complete and not partial cadastre units;
- a tax clearance certificate issued under the Income Tax Act;
- a plan of the proposed mining area prepared in such manner and showing such particulars as the director of mines may require; and
- such further information as the director of geological survey may require for the disposal of the application.

In addition to the above, the Mines Act also requires an applicant to commission and produce for the director of mines an environmental impact study on the proposed mining operations approved by the ZEMA. Further, the holder of a small-scale prospecting permit may at any time during the currency of the permit apply to the director for a small-scale mining licence over any part of the prospecting area in the prescribed manner and upon payment of the prescribed fee.

An application for such licence would include the following:

- an identification of the relevant prospecting permit;
- a description and sketch of the area of land, not exceeding 180 cadastre units over which the small-scale mining licence is sought, sufficient to enable identification of the area;
- a description of the proposed programme of mining operations, which shall include a forecast of investment, the estimated recovery rate of ore and the applicant's proposal for its treatment and disposal;
- a description to the best of the applicant's knowledge and belief of the mineral deposits in the area over which the licence is sought;
- a statement of the duration, not exceeding 10 years, for which the small-scale mining licence is sought;
- a tax clearance certificate under the Income Tax Act; and
- such other information as the director may require for the disposal of the application.

Non-mining rights

Mineral processing licence

The holder of a mineral processing licence is granted exclusive rights to carry on mineral processing in the mineral processing area specified in the licence. The following obligations are attached to a mineral processing licence:

- to commence mineral processing operations once approval has been granted by the Zambia Environmental Agency in respect of the EIA;
- to carry on mineral processing operations in accordance with the approved programme of mineral processing operations;
- to submit reports to the directors on sources of ore, concentrates, tailings, slimes, quantities and grade feed;
- to provide the directors with reports on compliance with safety and environmental standards, as well as labour and production returns; and
- to submit any other records, reports and other information that the directors may require concerning the operations of mineral processing.

Gold panning certificate

The holder of a gold panning certificate is granted exclusive rights to pan for gold over specified areas along water courses and bodies, but is prohibited from excavating. Gold panning certificates are valid for a period of two years and confer the following obligations on a holder:

- maintaining accurate and separate production and sales registers;
- keeping daily records of production and sales, indicating names of buyers, permit numbers, amount and value of gold sold;

- submitting to the director of mines, by the 15th day of each month, true copies of all entries made in the production and sales in the preceding month;
- making the records and minerals available within normal working hours, for inspection by an authorised officer;
- paying mineral royalties in accordance with the Mines Act; and
- maintaining the panning area in accordance with the provisions of the Environmental Management Act of 2011.

Mineral trading permit

A mineral trading permit confers on the holder exclusive rights to trade in minerals. A citizen, citizen-influenced company, citizen-empowered company or citizen-owned company may apply for a mineral trading permit. The permit is valid for a period of three years and is renewable. A holder of a mineral trading permit has the following obligations:

- maintaining accurate and separate mineral trading registers for the transactions for each mineral;
- keeping daily records of buying, selling or processing – indicating the names of buyers and sellers, their licence numbers and the amount and value of the minerals bought, sold, processed, exported or imported;
- submitting to the director of mines, by the 15th of each month, a true copy of all the entries made in the mineral trading register in the preceding month; and
- making records and minerals available within normal working hours for inspection by an authorised officer.

Mineral import and mineral export permits

Any person intending to import or export any mineral, ore or mineral product is required to obtain a permit from the director of mines.

A holder of an import or export permit is required to submit to import or export returns in the prescribed form. The permits are valid for a period of one year and are limited to the quantities specified on the permit.

11 What is the regime for the renewal and transfer of mineral licences?

The renewal and transfer of rights relating to exploration, and mining licences is governed by the provisions of the Mines Act and the Mines Regulations The Mines Regulations provide guidelines for the renewal of a mining right and mineral processing licence, which is a non-mining right under the Mines Act.

An application for renewal of a mining right or mineral processing licence is made as follows:

- in the case of an exploration licence, six months before expiry of the existing licence;
- in the case of a mining licence, three months for an artisanal licence, six months before expiry for a small-scale mining licence and one year before expiry in the case of a large-scale mining licence; and
- renewal of a mineral processing licence must be made one year before the expiry of the licence.

Applications for a renewal of a mining right or mineral processing licence must be made in the prescribed form and submitted to the mining cadastre office. The process for transferring or assigning a mining right or mineral processing licence is provided for in the Mines Regulations. The statute considers three means of transfer or assignment. Firstly, the transfer or assignment of a share or shares in a company that holds a mining right or mineral processing licence. Secondly, the transfer of control of a company that holds a mining right or mineral processing licence and thirdly the transfer of a mining right or mineral processing licence.

An application for consent to transfer control in a company that holds a mining right or the transfer of the mining right (ie, the exploration or mining licence as the case may be) is made in the prescribed form and submitted to the minister for consideration. Transfer of a mining right without first obtaining the consent of the Minister as required by the Mines Act renders such transfer void.

An assignment or transfer can be made at any time during the tenure of the right, but not less than 120 days before the expiry of the licence, and must be accompanied by an application for a mining right (or mineral processing licence) for the prospective assignee or transferee.

12 What is the typical duration of mining rights?

Mining licences

The period for which a mining licence is granted depends on the category or class of mining to be undertaken The Mines Act prescribes a period not exceeding 25 years for large-scale mining, a period not exceeding 10 years for small-scale mining and a period not exceeding two years for artisanal mining. These mining rights are all subject to renewal. Application for renewal must be made three months before expiry in the case of artisanal mining; six months in the case of small-scale mining and one year before expiry in the case of large-scale mining.

Exploration licences

The Mines Act provides that an exploration licence shall be valid for an initial period of four years and can be renewed an additional two times for a period not exceeding three years each. Further, the holder of an exploration licence must relinquish 50 per cent of the exploration area at each renewal. The maximum duration of an exploration licence from initial grant is 10 years. However, an exploration licence for small-scale exploration and gemstones, other than diamonds is non-renewable. Mining rights can be extended or renewed if following consideration of the extension or renewal application by the Licensing Committee, the mining right holder has complied with the conditions attached to the licence and to the provisions of the Mines Act in general.

The Mines Act gives authority to the Director of Mines Safety or Director of Mines to suspend production or close a mine, and similarly to the Licencing Committee to suspend or revoke a mining licence.

The Director of Mines Safety or Director of Mines may direct a mining licence older to suspend or curtail production or close the mine or a section of the mine for any of the following reasons:

- contravention of a condition of the mining right that presents danger or imminent harm to persons within the exploration, or mining area;
- an unsafe working environment;
- uncontrollable pollution of the area resulting from the mining operations;
- force majeure;
- a labour dispute that disrupts the mining operations;
- if a licence holder obtained the mining right by fraud or submission of false information or statements;
- if a licence holder contravenes a provision in the Mines Act, any other written law relating to the mining right, or any terms and conditions of the mining right;
- if a licence holder fails to carry out mining in accordance with the approved plan of mining operations and the gross proceeds of sale of minerals from the mining area in any three successive years is less than half of the deemed turnover applicable to the mining licence in each of those years;
- or fails to pay annual area charges or mineral royalty;
- if false information is given on the recovery of ores and mineral products, production costs or sale;
- if a licence holder fails to execute the approved exploration programme in the case of a holder of an exploration licence;
- if a licence holder has ceased to fulfil the eligibility requirements under the Mines Act; or
- suspension of revocation is in the public interest.

The Licencing Committee may suspend or revoke a mining right if the holder does any of the following:

- obtained the right by fraud or submission of false information or statements;
- contravenes this Act, any other written law relating to the right or any terms and conditions of the right;
- fails to carry out mining operations in accordance with the approved plan of mining operations and the gross proceeds of sale of minerals from the mining area in any three successive years is less than half of the deemed turnover applicable to the mining licence in each of those years;
- give false information on the recovery of ores and mineral products, production costs or sale;
- fail to pay annual area charges;
- fails to excuse the approved exploration programme, in the case of a holder of an exploration licence;

- has ceased to fulfil the eligibility requirements under the Mines Act; or
- the suspension or revocation is in the public interest.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Artisanal mining is only permitted to be undertaken by a Zambian citizen or a cooperative wholly composed of Zambian citizens. Small-scale mining may only be undertaken by a citizen-owned, citizen-influenced or citizen-empowered company. A citizen-owned company is one where 50.1 per cent of its equity is owned by citizens and in which the citizens have control of the management of the company. A citizen-empowered company is one where 25–50 per cent of its equity is owned by citizens and a citizen-influenced company is one where 5–25 per cent of its equity is owned by citizens who also have significant control of the management of the company. Gold panning certificates, which are non-mining rights, are issued to citizens or cooperatives consisting only of Zambian citizens.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mines Act protects mining rights by conferring on the holder exclusive rights to carry on exploration or mining (or both). A licence can only be cancelled or suspended by reasons of default or contravention of a condition of the mining right. Prior to cancellation or suspension, the licence holder must have failed to remedy the default within the time allowed or where the default was not capable of remedy, have failed to offer reasonable compensation.

Further protection is provided by the Zambian Constitution, which stipulates that property of any description can only be compulsorily acquired, under the authority of an Act of Parliament that provides for payment of adequate compensation.

In addition, foreign arbitration awards with respect to domestic disputes are freely enforceable in Zambia subject only to a standard or universal list of public policy restrictions. The Arbitration Act, No. 19 of 2000 provides that a foreign arbitration award is enforceable in Zambia. Zambian courts will generally enforce an arbitral award rendered by a recognised arbitral institution as a legal, valid and binding submission to the arbitration in accordance with the rules of such recognised arbitral institution.

Arbitral awards will be enforced by the Zambian courts if rendered by all arbitral institutions rendering an award under the auspices of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention) including the London Court of International Arbitration, the International Chamber of Commerce, the Arbitration Association (Southern Africa) and the Arbitration Foundation of Southern Africa.

Although Zambian courts are able to enforce arbitral awards as stated above, the said awards can be challenged on the basis of the following grounds:

- if the party to the arbitration award was under some incapacity or the arbitration agreement is not valid;
- if the party challenging the arbitration was not given proper notice of the appointment of the arbitrator;
- if the arbitration deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration;
- if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- if the award has not yet become binding on the parties;
- if the subject matter of the dispute is not capable of settlement by arbitration under the law of Zambia;
- if the award is in conflict with public policy; and
- if the making of the award was induced or effected by fraud, corruption or misrepresentation.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Surface rights are governed by the Lands Act, chapter 184 of the Laws of Zambia (the Lands Act). There are two types of land tenure systems in Zambia: customary tenure and state tenure. Customary tenure comprises over 90 per cent of the total land mass. The customary land is administered by traditional rulers in various parts of the country. Mining right holders can obtain the exclusive or other use of the whole or any portion of an exploration or mining area.

The process for acquisition of customary land begins with its conversion to leasehold tenure. To obtain a conversion of customary area the following process is normally followed:

- the preparation of a plan showing the exact extent of the land to be converted;
- an application to the chief of the area for conversion of such area into a leasehold tenure and the approval of the chief;
- upon the consent of the chief, the chief shall refer the application to the local council where the land is situated;
- the local council is required to consider if there is any conflict between the customary law of the area and the Lands Act, and in the event that there is no conflict make a recommendation to the commissioner of lands; and
- the commissioner of lands may accept or refuse to accept the recommendation and the applicant has a right of appeal in the event of a refusal to the Lands Tribunal.

Title to land is allocated for a period of 99 years, renewable if the covenants subject to which it was granted have not been breached. The Republican President may grant land title for a longer duration if this is considered to be in the interest of the nation. Any person who desires to sell, transfer or assign land is required to obtain the president's consent before such land can be disposed of. Consent must be granted within 45 days and is deemed granted thereafter if not refused. Reasons for refusal must be given. An aggrieved party has the right to appeal against the decision to refuse to grant consent to the Lands Tribunal established under the Lands Act.

In instances where private leasehold interests exist in an area covered by a mining right, the holder of any licence or permit who requires the exclusive or other use of any portion of the exploration or mining area may acquire a lease over such area or the right of use thereof on terms to be agreed between the licence holder and the owner of such land. There is an arbitration process to determine the matter (largely in respect of compensation), but the owner or occupier cannot prevent the mine from operating on such land. If any portion of the land over which the tenement exists is under customary land, there may be a requirement to obtain permission from the local chief in order to obtain surface rights that would require the chief to give his or her written consent to the local council for the conversion of that particular portion of customary tenure to statutory (leasehold) tenure.

If a mining right predates any surface right over the same location, it is not technically possible for surface rights independent of the mining rights to be acquired subsequently.

The Mines Act provides that the surface rights holder has to give written consent to a holder of a mining right to exercise any rights over their land. In instances when written consent is required, it should not be unreasonably withheld. A surface rights holder may opt not to give consent with good reason or request the director of mining cadastre to determine any dispute arising with the holder of the mining right in relation to the use of the land. Alternatively the director of mining cadastre may require the parties to submit to arbitration.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The mining industry is private sector driven since the privatisation of the mining sector and liberalisation of the Zambian economy and therefore the government does not necessarily have a right to participate in a mining project. However, the law permits the government to identify an area that is not subject to existing mining rights in relation to which the director of geological survey may carry out exploration activities on behalf of the government.

The Mines Act provides that the government may acquire mining rights for government over identified areas. The identified areas will not be subject to an application for a mining right by any person and furthermore the mining rights subject to identified areas shall be granted to a government investment company in accordance with the provisions of the Mines Act.

In addition, the Public-Private Partnership Act No. 14 of 2009 (the PPP Act) provides for the implementation of public-private partnership agreements between contracting authorities and concessionaires although these are mainly related to infrastructure projects. The PPP Act enables the government and government agencies to partner with the private sector on projects that develop public infrastructure and contribute to effective delivery of social services. This may be more visible particularly when it relates to projects dealing with sustainability.

There are no mandatory listing requirements with respect to the project company.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are no specific legal provisions relating to expropriation of mining licences. Article 16(1) of the Constitution of Zambia and Chapter 1 of the Laws of Zambia provides for the protection of fundamental rights, which include the ownership and protection of property rights. Mining rights as defined under the Mines Act would qualify as rights to property protected by the Constitution. Expropriation of property can only be by an Act of Parliament, which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired. The Constitution further provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the protection of the fundamental rights, to the ownership and protection of property rights to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereof where the property consists of or includes any licence or permit.

Any relevant Act must provide that in default of agreement, the amount of compensation shall be determined by a court of competent jurisdiction. The only other provision that deals with acquisition of property in general terms is section 3 of the Land Acquisitions Act, chapter 189, which gives the President of Zambia power to acquire property of any description where they consider it desirable or expedient in the interests of the Republic to do so compulsorily. Section 10 of the same Act further provides for the monetary compensation where any property is acquired by the President under the Act. There has, however, been much debate as to what would constitute property and whether the Act ought to be applied strictly to land acquisition or property of any form.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

The Mines Act provides that the holder of a mining right or mineral processing licence requires written consent of the appropriate authority to commence activity upon any land dedicated as a place for burial, a place being an ancient or national monument, any land within 90 metres of any building or dam owned by the republic or any land forming part of the government aerodrome.

There are generally no protected areas in Zambia specified as being off-limits for mining purposes apart from those areas declared as heritage sites under the law.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The following duties, royalties and taxes are payable by private parties carrying on mining activities, each of which (with the exception of royalties and value added tax) are profit-based.

Corporate income tax

As detailed in the Income Tax Act, Zambia has a source based system for the taxation of income. Income from a source deemed to be a Zambian source is subject to income tax. Corporate income tax (CIT) on mining companies is charged as follows:

- income from mineral processing carried out under a Mineral Processing Licence is taxed at the rate of 35 per cent;
- income from mining operations, at the rate of 30 per cent per annum.

Exploration operations are not included under the definition of mining operations and, therefore, the above-mentioned CIT will not apply to a holder of a large-scale exploration licence, provided that they do not undertake any mining operations. Notwithstanding this, however, a holder of an exploration licence will be required to submit annual CIT returns.

To date, the rates of CIT indicated are correct as a result of negotiations between mining companies and the government.

Variable profit tax

Variable profit tax is payable on income earned from mining operations at 15 per cent when taxable income exceeds 8 per cent on the gross sales.

Royalties

Mineral	Royalty payable
Copper	4 per cent when the norm price is less than US$4,500 per tonne 5 per cent when the norm price is US$4,500 per tonne or more but less than US$6,000 per tonne; and 6 per cent when the norm price is US$6,000 per tonne or more
Base metals (other than copper)	5 per cent of the norm value
Precious metals	6 per cent of the norm value
Gemstones	6 per cent of the gross value
Energy minerals	5 per cent of the gross value
Industrial minerals	5 per cent of the gross value

Norm value is defined by the Mines Act as:

- the monthly average London Metal Exchange cash price per tonne of the metal or recoverable metal sold;
- the monthly average Metal Bulletin cash price per tonne of metal or recoverable metal sold to the extent that it is not quoted on the London Metal exchange; or
- the monthly average cash price per tonne at any exchange market approved by the Commissioner-General (the Commissioner General) of the Zambia Revenue Authority (ZRA) of metal sold or recoverable metal sold to the extent that it is not sold on the London Metal Exchange or Metal Bulletin.

The gross value is defined as the realised price for a sale (free on board) at the point of export from Zambia or point of delivery within Zambia.

Duties and value added tax

During the construction and production phase, mines usually purchase machinery that is imported. Import duties (at a rate of up to 25 per cent) and VAT (at 16 per cent) are levied on these goods. ZRA has the discretion to grant tax relief to the mines in the form of various allowances, deductions and write-offs, such that mining entities defer the taxation to a later year when they are in a better financial position to pay. Export of goods from Zambia is considered to be a zero-rated supply if requisite evidence of exportation is produced.

Withholding tax

Tax required to be deducted from any dividend shall be deducted at the rate of zero per cent per annum for any dividend paid by a company carrying on mining operations. Withholding tax applies at the following rates in respect of other payments:

- dividend payouts and profits distribution by branches of foreign companies at 15 per cent;
- construction and haulage operations fees paid out to non-residents at 20 per cent;
- interest at 15 per cent;
- commission and entertainment fees paid out to non-residents and management and consultancy fees paid out to non-residents at 20 per cent; and
- management and consultancy services paid out to resident consultants at 15 per cent.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Whereas the normal CIT rate is 35 per cent, mining companies are taxed for CIT purposes at 30 per cent. In addition, withholding tax on

dividends paid by mining companies is zero per cent whereas it is generally 15 per cent for other companies.

US dollar accounting
Mining companies may be allowed to maintain account books in US dollars in accordance with generally accepted accounting principles if the Commissioner-General is satisfied that not less than 75 per cent of the gross income is earned in the form of foreign exchange from outside Zambia.

Prospecting expenditure deductions
All prospecting expenditure incurred in a charge year is allowed as a deduction.

Mining expenditure deductions
A deduction is allowed in respect of the capital expenditure incurred on a mine that is in regular production in the charge year.

Deductions for mining expenditure on non-producing and non-contiguous mines
For a person carrying on mining operations in a mine that is in regular production and who is also the owner of, or has the right to work a mine that is not contiguous with the producing mine and from which the person has made a loss in the charge year, the amount of such loss shall not be deducted in ascertaining the gains or profits from his or her mining operations provided that such loss may be allowed as a deduction in ascertaining the gains or profits arising from the same mine when it commences regular production.

Capital allowance
Capital allowances are deducted in ascertaining the gains or profits of a business for each charge year at the rate of 25 per cent.

Carry-forward loss
Losses may be carried forward for a period not exceeding 10 years. The tax losses carried forward for one charge year is limited to 50 per cent of taxable profits.

Customs duty on imports of mining equipment
The holder of a mining right is entitled to exemption from customs and excise duties, and from any other duty or impost levied under the Customs and Excise Act, in respect of all machinery and equipment (including specialised motor vehicles) required for any of the activities carried on or to be carried on in pursuance of the right or otherwise for the purposes of his or her investment in mining or prospecting or exploration.

Royalty deferment
This option is available under the Mines Act, in that the Commissioner-General may, on application by the holder of the mining right, defer payment of royalty due from the holder if, during any period for which a payment of royalty is due the cash operating margin of the holder in respect of mining operations in the mining area falls below zero.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is currently no legislation providing for tax stabilisation agreements or clauses. However, the Zambian government has been known to enter into concession agreements with individual mining companies in which stabilisation clauses have been included. In the event that there is a tax dispute between mining entities and the government, the mining entities can lobby the government, who will then consider their concerns.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The government is not entitled to a carried interest or a free carried interest in mining projects. The government plays more of a regulatory role, but has no direct participation in terms of the direction of mining operations or shareholding in mining right holders.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Property transfer tax (PTT) is payable on the transfer of any type of mining right from one party to another. Any mining right under the Mines Act is considered to be property and the Property Transfer Tax (Amendment) Act No. 16 of 2015 provides that PTT of 10 per cent of the realised value, which is the value of a good sold on the open market, in respect of a mining right or an interest in the mining right, shall be payable on the transfer, assignment, encumbrance or other dealing involving a mining right or mining interest.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between duties or royalties for domestic and foreign parties.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

The main business structures used by private parties are private limited companies incorporated under the Companies Act. Foreign entities may also utilise joint ventures, subsidiaries or branches to conduct mining activities in Zambia. Where joint ventures are used, however, the most appropriate structure is an incorporated rather than an unincorporated structure. This is because an unincorporated entity cannot hold a mining right under Zambian law.

26 Is there a requirement that a local entity be a party to the transaction?

The law in Zambia does not prescribe business structures requiring a local entity to be a party.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Zambia has tax treaties with the following countries, although Ireland and Switzerland are the most commonly used tax havens for tax-structuring purposes in relation to projects based in Zambia:

Country	Effective date of convention
Netherlands	15 October 1948
France	14 December 1950
South Africa	1 April 1957
Sweden	28 May 1958
Switzerland	30 May 1961
Tanzania	2 March 1968
Uganda	24 August 1968
Kenya	27 August 1968
Japan	19 February 1970
Italy	27 October 1972
United Kingdom	29 March 1973
Germany	13 May 1973
Ireland	22 July 1973
Norway	22 July 1973
Denmark	13 September 1973
Finland	3 November 1978
India	5 June 1981
Mauritius	14 April 2012

Bilateral investment treaties
Zambia has currently entered into a total of 13 bilateral investment treaties (BITs). The most notable of these include Germany (1996), China (1996) France (2002) United Kingdom (2009), the Netherlands (2003)

and the Belgium-Luxembourg Economic Union (2001). These treaties contain favourable investor protection provisions such as provisions against the expropriation. However, not all the BITs are currently in force.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of funding available to small-scale mining parties are local banks, macro-finance agencies and the government. Large-scale mining parties may principally source their funds from local and international commercial and development banks. The public securities market plays a limited role in financing the Zambian mining industry with only two mining companies currently listed on the stock exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The government does not currently provide any direct financing to mining projects.

30 Please describe the regime for taking security over mining interests.

Under Zambian law, there is no fixed regime for taking security over mining rights. Security may be taken over any mining right by mortgage, pledge or by any other means used to obtain security over property, however, there is a requirement that the approval of any encumbrance, assignment or transfer of a mining right under the Mines Act is obtained from the Minister.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no restrictions pertaining to the importation of machinery and equipment to be used in connection with mining activities.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction ?

There are no specific standard conditions and agreements prescribed under the law in Zambia. It is upon the parties entering into equipment supplies contract to decide whether the agreement covering the equipment supply will be subject to any standard conditions. The market therefore is equally friendly to both buyer and seller as their contract will determine their rights and obligations as agreed.

Generally, the parties to these agreements prescribe arbitration as a means of resolving their disputes, although a notable number prefer court proceedings. Court actions are preferred for actions to recover the equipment supplied whilst arbitration is preferred for actions for the price.

In terms of standards for the actual equipment supplied, the Zambia Bureau of Standards (ZABS), the statutory national standards body for Zambia established under the Standards Act, Cap 416 for the preparation and promulgation of Zambian Standards, implements compulsory standards through import and export inspections. ZABS serves the country in the field of standardisation, standards formulation, quality control, quality assurance, import and export quality inspections, certification and removal of technical barriers to trade. Therefore, any equipment supplied must conform to the standards set by ZABS, regardless of whether they are locally sourced or from outside the country.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

A person who is not a holder of a large scale mining licence or a small-scale mining licence cannot process minerals without a mineral processing licence that is issued by the director of geological survey.

It is prohibited for a person who doesn't have a mining licence to trade in minerals without a mineral trading permit issued upon application to the director of mines.

A person or company cannot import or export through the Republic any mineral ore or mineral product without a mineral import and mineral export permit issued by the director of mines.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no restrictions on the importation of funds to finance mining activities or use of the proceeds from the export or sale of minerals.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental health and safety laws applicable to the mining industry are the Environmental Act, the Occupational Health and Safety Act No. 36 of 2010, the Mines and Minerals (Environmental) Regulations No. 29 of 1997 and the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations SI No. 28 of 1997 (EIA Regulations).

The principal regulatory bodies responsible for administration of the environmental, health and safety protection regulatory framework are ZEMA, the Ministry (Mines Safety Department) and the Occupational Health and Safety Institute.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The EIA Regulations specify that any person who, or entity that, proposes to undertake a new project which under the EIA Regulations requires an environmental impact assessment (EIA) to be undertaken must have an EIA conducted before the commencement of the project. The EIA Regulations provide that mining operations require an EIA to be undertaken. The nature of the project will determine whether the developer should prepare an environmental project brief (EPB) or an environmental impact statement. The EPB should set out the objectives and nature of the project, the main activities to be undertaken before, during and after the commencement of the project, the socio-economic impact of the project on the people that will be affected, and also the perceived socio-impact of the particular project on the environment, following the procedures set out in the EIA Regulations.

Where an EPB is submitted, it is considered by the ZEMA, which determines whether the project is likely to have a significant impact on the environment, and shall, within 40 days of receiving the EPB, approve it if satisfied that there will be no significant impact on the environment or that the EPB discloses sufficient mitigation measures to ensure the acceptability of the anticipated impact. If ZEMA determines that the project is likely to have a significant impact on the environment, it will require the developer to prepare an EIS. ZEMA shall assess the EIS in accordance with the procedures in the EIA Regulations and eventually issue a decision stating that the project is approved, rejected or approved subject to the developer meeting certain conditions.

The process of obtaining the approval of the mining project can take between six weeks and several months owing to the time required for public hearings and the relevant notifications and waiting periods related thereto.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The closure procedure of a mining project is fully set out in the Mines and Minerals (Environmental) Regulations (the Regulations). Under the Regulations, closure of a mine can only occur where the applicant has applied to the director of mines safety for a partial or complete closure of a mine. The application must include an audit report on the environment surrounding the mine site prepared by an independent person.

A mine site should stand closed within 60 days of an application. Once all the conditions of closure under the Regulations have been met, the director of mines safety is required to issue a closure certificate for

Update and trends

According to the latest Extractive Industries Transparency Initiative (EITI) report for Zambia, all EITI member countries (of which Zambia is a member), will be required, by 2020, to publish the identity of companies that bid for, operate or invest in extractive projects in their country to curb tax evasion.

As mentioned above in question 7, Zambia has developed a Mineral Production Monitoring Support Project, with funding from the European Union. The objective of this project is to help improve and strengthen the capacity of the Ministry of Mines and Minerals Development to monitor mining and mineral activity in Zambia. Zambia is also developing a database called the Mineral Output Statistical Evaluation System aimed to improve efficiency and transparency in the reporting of mineral production output by mines in Zambia. This is expected to be finalised in 2019.

In September 2016, the World Bank projected that copper prices will start rising in 2017, reaching US$4,866, US$5,092 in 2018 and US$5,329 in 2019. In 2016, Zambia's export earnings from copper were US$3.2 billion as compared to US$4 billion in 2015. This projected increase in prices will result in an increase in export earnings from copper.

Canada-based company Redhawk Resources (TSX:RDK), a resource exploration and development company, is reported to have entered into an agreement with Copperzone Resources, another Canadian company, for USD1.5m exploration expenditures over one year in four copper and cobalt projects in north-west Zambia. This project may increase the possibility of discovering more mineral deposit reserves in the country.

The current trend is for companies interested in exploring minerals in Zambia to enter into joint ventures with companies that already have been awarded exploration licences without themselves having to go through the process of applying for exploration licences. As a matter of practice, the Ministry of Mines and Minerals Development expects mining companies to notify the Minister of the existence of such agreements.

any mine closed and the mining right or permit or part thereof is to be cancelled by the minister.

The Mines and Minerals (Environmental Protection Fund) Regulations provide for refunds to holders of licences, on application, when a mine site is closed. In accordance with the Act, this amount would be less any monies owing. The director of mines safety may use any part of the contribution to the fund of a licence holder for the purposes of rehabilitating the site.

38 What are the restrictions for building tailings or waste dams?

One requires a licence from ZEMA as provided under the Environmental Management (Licensing Regulations) 2013 before building tailings or waste dams. The site upon which a dam is constructed should be solid ground. In the case of tailings the Department of Mines Safety under the Ministry of Mines would not approve construction near wetlands to avoid contamination of surface and underground water bodies in an area. There are no specific professional qualifications required for the professionals in charge and management of the dam waste. The facilities are routinely inspected by the Department of Mine Safety. The installation of an alarm is mandatory to prevent unauthorised entry to the dam site. Dams are supposed to be constructed away from human settlement. In case of an emergency, there are drills; however, these are mainly for staff members. There are also mandatory reporting obligations in the case of an accident. However, there are no expressly stated responsibilities to rescue people in case of a dam failure.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The main health and safety and labour laws applicable to the mining industry include:

Health and safety laws	Administering authority
Mines and Minerals Development Act	Ministry of Mines, Energy and Water Development
Factories Act	Inspector of Factories
Environmental Management Act	Zambia Environmental Management Agency
Public Health Act	Inspector
Food and Drugs Act	Health Inspector
Ionising Radiation Protection Act	Radiation Protection Authority
Workers' Compensation Act	Workers' Compensation Commission
Energy Regulation Act	Energy Regulation Board
Industrial and Labour Relations Act	Labour Commissioner
Employment Act	Labour Commissioner
Occupational Health and Safety Act	Occupational Health and Safety Institute

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Rules and regulations related to the management of waste are provided for by the Environmental Management Act No. 12 of 2011. The Act imposes the following obligations in relation to waste management:

- a person shall not collect, transport, sort, recover, treat, store, dispose of, or otherwise manage waste in a manner that results in an adverse effect, or creates a significant risk of an adverse effect occurring;
- a person who produces, collects, recovers, transports, keeps, treats or disposes of waste shall take all reasonable measures to prevent any other person from using waste in a manner that causes an adverse effect on the environment; and
- a person shall not dispose of waste in such a manner that it causes litter.

ZEMA may, upon application, issue a waste management licence that permits the holder to conduct the following activities:

- reclaim, re-use, recover or recycle waste;
- collect and dispose of waste from industrial, commercial, domestic or community activities;
- transport waste to a disposal site;
- own, construct or operate a waste disposal site or other facility for the permanent disposal or storage of waste; and
- transit, trade in or export waste.

The holder of such a licence therefore has the right to explore and exploit waste products.

The Mines and Minerals Development Act further provides that a holder of a mining licence is required to undertake the management of the environment in the mining area for which a licence has been granted, which includes waste management. The holder of a mining licence therefore has the right to explore and exploit mining waste that is produced as a result of the mining activities carried out pursuant to the licence granted.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Companies carrying out mining operations are legally obliged under the Mines Act to give preference to the employment of citizens with relevant qualifications or skills and train citizens of Zambia for the transfer of technical managerial skills. Immigration rules require a party seeking to recruit foreign employees to justify such recruitment prior to the grant of immigration permits.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are no CSR laws applicable. However, some of the conditions attached to mining rights are that holders must employ and train Zambians and promote local business development.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Not applicable.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Not applicable.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The Anti-Corruption Act No. 3 of 2012 (the ACC Act)
The ACC Act provides for the prevention, detection, investigation, prosecution and punishment of corrupt practices and related offences in public offices. The act further defines offences based on the rule of law for the promotion of transparency, accountability and management of public affairs and property.

The Public Procurement Act No. 12 of 2008
The Public Procurement Act revises the law relating to procurement so as to ensure transparency and accountability in public procurement, as well as regulating and controlling practices related thereto.

The Financial Intelligence Centre Act No. 46 of 2010
This Act creates the Financial Intelligence Centre which is tasked with inter alia receiving, requesting, analysing and disseminating the disclosure of suspicious transaction reports. Suspicious transaction reports are defined as reports submitted on suspected or attempted money laundering, financing of terrorism or other serious offences.

The Prohibition and Prevention of Money Laundering Act 2001, as amended by the Prohibition and Prevention of Money Laundering (Amendment Act No. 44 of 2010)
This Act provides for the constitution of the Anti-Money Laundering Authority and the Anti-Money Laundering Investigations Unit. The Act also provides for the forfeiture of property of persons convicted of money laundering and the cooperation of international organisations in the investigations, prosecution and other legal processes related to money laundering.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Generally, Zambian law firms would not advise clients on foreign legislation, however companies with a connection to the US or the UK (eg, incorporated company or parent company, share listings, employees and employers in either or both jurisdiction) are advised to take cognizance of the UK Bribery Act of 2010 and the US Foreign Corrupt Practices Act (FCPA).

The UK Bribery Act prohibits paying bribes to any foreign public official with the intention of influencing the official, or to obtain or retain a business advantage, if the official is not permitted or required by law to be so influenced.

A foreign public official includes:

- anyone who holds a foreign legislative, administrative or judicial position;
- anyone who exercises a public function for a foreign country, territory, public agency or enterprise; and
- any official or agent of a public organisation (eg, UN or the World Bank).

The UK Bribery Act provides broad authority to prosecute individuals and commercial organisations for conduct outside the UK.

Offences that occur in the UK are covered, in which case the nationality or place of incorporation is irrelevant. Even if no act occurs in the UK, there will still be liability if the person has a close connection with the UK (ie, UK citizen or resident or UK-incorporated company, among others).

This captures the activities of UK-incorporated entities abroad (eg, in Zambia). It also captures foreign nationals who commit bribery abroad, if they are also residents of the UK. Corporate offences include failure to prevent bribery and are extended to commercial organisations incorporated in the UK, or any other body corporate that carries on all or part of its business in the UK and any partnerships that carry on all or part of their business in the UK.

The FCPA's anti-bribery provisions prohibit US persons and companies from paying bribes or providing anything else of value to 'foreign officials' in order to obtain or retain business, or to secure an improper business advantage. The FCPA only covers public bribery (ie, government officials), although commercial bribery may be covered by other laws. Officers, directors, employees, agents, distributors and shareholders acting on behalf of a corporate entity may subject it to liability. The anti-bribery provisions apply to the following:

- US persons and companies;
- non-US companies that have listed US securities or are Security and Exchange Commission-reporting companies; and
- anyone acting in the territory of the US.

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47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Since becoming fully compliant with the EITI in 2012, Zambia has recorded increases in revenue, according to the Ministry of Mines. This is attributed to the increase in the number of tax haven-based management firms.

There is, however, no legislation requiring disclosure of payments by resource companies to government entities.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Under the Mines Act, foreign ownership of mining rights is not strictly prohibited. However, there is a requirement that a foreign national or foreign entity would be required to incorporate a company under the Companies Act. Foreign entities usually use joint ventures, and subsidiaries to conduct mining activities in Zambia. Further, there is a restriction on persons who are not Zambian citizens or companies that are not owned by Zambian citizens with regard to prospecting permits, small-scale mining licences, small-scale gemstone licences and an artisanal mining right as previously discussed above.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

Zambia is a signatory to several international treaties and conventions; most of these treaties, however, are not directly related to the mining industry.

Zambia is a signatory to the International Convention on the Settlement of Investment Disputes. Zambia is also a member of the International Monetary Fund and World Bank and follows the investment guidelines and conditions issued by these organisations.

The Zambian government has signed several investor protection agreements with other governments. The signing of these agreements gives rise to the protection of nationals of these countries and can facilitate the implementation of rights under the Investment Dispute Convention Act, which incorporates the International Convention on the Settlement of Investment Disputes.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
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Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
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Mining
ISSN 1748-3085

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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