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# THE MINING LAW REVIEW

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EDITOR  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH

# THE MINING LAW REVIEW

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# THE MINING LAW REVIEW

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Editor  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

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## EDITOR'S PREFACE

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I am pleased to have participated in the preparation of the first edition of *The Mining Law Review*. The Review is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 22 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes eight country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

After the lost decades of the 1980s and 1990s came the mining boom of the past decade and the beginning of the 'Commodities Super-Cycle'. During this time, the price of industrial minerals and other commodities rose sharply. Needless to say, the mining boom has resulted in the resurgence of mining and has been a boon to many emerging economies, particularly in Africa and South America.

Will the super-cycle continue? If one accepts that the root cause of the super-cycle is China, then the answer is yes and mining has a bright future: China needs minerals to continue its industrialisation and the rollout of modern cities and infrastructure. While its stated objective is to build a modern service-oriented economy, China is at best 10 to 15 years away from transiting out of its current intensive mineral consumption phase. As a result, continued strong demand should sustain prices for the next decade – this

is particularly true for metals little found in China. Thereafter, demand should remain strong as the world adds an estimated 2 billion to its population by 2050, most of whom will reside in emerging markets and – if the past is indicative of the future – will want greatly improved living standards.

The Commodities Super-Cycle has fuelled increased mining activity across the globe. It has also given rise to the most important trend facing mining: economic nationalism. Governments, under pressure from their exchequers and populations, want increased and – perhaps more problematically – immediate economic benefits from mining. This phenomenon can be observed in post-industrial economies as well as in emerging ones and across all political lines. No country is immune from this trend.

The long period of sustained high prices for minerals and metals has greatly increased expectations and mining companies and governments are struggling to achieve the right balance between competing interests. The question of the day is how predictably and fairly to share income among various stakeholders: governments, mining communities, mining companies, their shareholders and employees. This is a very difficult question and there is no 'one-size-fits-all solution'.

Mining projects are endeavours of long gestation, which can take 10 years or more between discovery and commissioning. Mining projects are also very capital-intensive with a front-ended investment profile. In other words, mining companies invest large amount of money early but have multi-decade payback horizons and require stable legal and tax environments in order to attract project capital.

Governments, on the other hand, are subject to shorter-term pressures. Their budgets are yearly affairs, employees and local communities are impatient, and politicians are at the mercy of electoral cycles. The tax-receipt profile of mining projects, however, is predominantly back-ended; that is to say, governments receive the bulk of taxes and other charges many years after project commissioning and project debt repayment.

The long-term needs of projects for stable legal and tax environments and the short-term pressures placed on governments for more revenues has led to friction. While governments have considerable leverage thanks to supply constraints and high prices, they must nonetheless walk a fine line. They need to be careful not to 'kill the golden goose' while avoiding a 'race to the bottom'. After all, governments compete with each other to attract mining projects and mining companies can jurisdiction shop.

Economic nationalism is not limited to raising taxes: it can take other forms, including governmental or local ownership, benchmark export pricing, minimum in-country transformation, and export restrictions to ensure supply to local industry.

How can mining companies mitigate risks posed by economic nationalism? One of the best mitigation strategies is for mining companies to have a strong 'social licence'. A social licence may be defined as the acceptance or – better still – the approval of the community adjacent to a project. A strong social licence is not only effective against governmental overreach but can also serve as an effective anti-corruption mechanism.

A social licence has to be earned and maintained. This is best achieved through multi-stakeholder dialogues, local economic involvement, good environmental performance and social inclusion. Medical clinics, schools, roads, power plants, irrigation dams and water treatment plants are some of the types of projects carried out by mining companies as part of their social licence.

As you consult this book you will find more on economic nationalism and other topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

**Erik Richer La Flèche**

Stikeman Elliott LLP

Montreal

November 2012

## Chapter 5

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# DEMOCRATIC REPUBLIC OF THE CONGO

*Emery Mukendi Wafwana, Edmond Cibamba Diata, Nady Mayifuila,  
Jonathan van Kempen and Eric Mumwena Kasonga<sup>1</sup>*

### I OVERVIEW

The Democratic Republic of the Congo ('the DRC') is immensely rich in natural resources and holds some of the largest deposits anywhere in the world. The country holds one-third of the world's reserves of cobalt and one-tenth of its copper reserves and contains 80 per cent of world reserves of columbite-tantalite ('coltan'). The DRC holds the largest known reserves of diamonds and the largest undeveloped gold deposits in the world. The country also holds significant reserves of other minerals such as zinc, iron, tin and uranium. In 2008, the country's share of world production amounted to 45 per cent for cobalt, 30 per cent for industrial diamonds and 2 per cent for copper.<sup>2</sup>

Historically, and after years of armed conflict and political turmoil, foreign investors are increasingly attracted by natural resources projects in the DRC, particularly in the mining sector. In order to engage in mining activities, foreign investors can either apply for and obtain mining rights from the mining registry ('CAMI'), in which case they will need to explore to find mineral deposits, or they can enter into joint-venture agreements with mining title holders, generally state-owned companies such as Gecamines, which holds areas within which mineral substances have already been identified. Mining titles available in the DRC are research permits ('PRs'), exploitation permits ('PEs'), and exploitation permits for small-scale mines ('PEPMs'), and tailing exploitation permits ('PERS'). According to the general director of CAMI, there are exploration activities on 30 per cent of the surface area of the country, through a total

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1 Emery Mukendi Wafwana is founding partner, Edmond Cibamba Diata is a partner, and Nady Mayifuila, Jonathan van Kempen and Eric Mumwena Kasonga are associates at Emery Mukendi Wafwana & Associés.

2 Promines, 'Artisanal mining exploitation in the DRC', Pact Inc, June 2010, p. 21, [www.pactworld.org/galleries/resource-center/PROMINES%20Report%20English.pdf](http://www.pactworld.org/galleries/resource-center/PROMINES%20Report%20English.pdf).

of 3,479 research permits; exploitation activity covers 2 per cent, with 462 exploitation permits and 88 exploitation permits for small-scale mines. Artisanal exploitation covers only 0.06 per cent of the country, and 9 per cent is reserved for geological research undertaken by public entities.<sup>3</sup>

## **II LEGAL FRAMEWORK<sup>4</sup>**

The DRC is a civil law country, whose private law is based on the 1804 Napoleonic Civil Code. The general characteristics of the DRC legal system are very similar to legal systems in force in other French-speaking African countries.

At the apex of the legal system, the Congolese Constitution of 18 February 2006 is the first source of law, which sets fundamental pillars for the regulation of mining activities. It also provides that the management and regulation of the state's ownership is determined by law.

In accordance with the Constitution, the DRC legislator enacted the Law No. 007/2002 of 11 July 2002 on the Mining Code ('the Mining Code') and the implementation measures of the Mining Code provided in Decree No. 038/2003 of 26 March 2003 on Mining Regulations ('the Mining Regulations'). Both the Mining Code and Mining Regulations form the law governing mining activities (together, 'the mining legislation').

In accordance with Article 215 of the Constitution, international treaties and conventions duly concluded take precedence over national law, provided they are also applied by the other contracting party. For example, at the international level, the DRC is a member of numerous international organisations such as the World Trade Organization, the World Bank Group (including the International Financial Corporation), the Multilateral Investment Guarantee Agency ('MIGA') and the Convention establishing the International Centre for Settlement of Investment Disputes ('ICSID'). Furthermore, the DRC has concluded bilateral investment treaties ('BITs') with several countries,<sup>5</sup> including the only double-taxation treaty in force with Belgium.<sup>6</sup>

At the regional level, the DRC is currently a member of the African Union, the Southern African Development Community, the Economic Community of Central African States, and the Common Market for Eastern and Southern Africa, and the International Conference on the Great Lakes Region. In addition, the DRC is a member

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3 Jean Felix Mupanda, General Director of CAMI, 'Prospects for investment in the mining exploitation in the DRC', speech at Mining INDABA, Cape Town, 2011.

4 Emery Mukendi Wafwana, *Droit minier Vol. I, principes de gestion du domaine minier*, Bruylant, Kinshasa, 2003.

5 BITs concluded with the United States, Switzerland, France and Germany are currently in force (see UNCTAD, [www.unctadxi.org](http://www.unctadxi.org)).

6 The double-taxation treaty between the DRC and Belgium was signed on 23 May 2007 and ratified in Belgium on 13 February 2009. By Law No. 11/023 dated 24 December 2011, the DRC authorised the ratification of the double-taxation treaty, which entered into force on 24 December 2011, and is applicable to fiscal year 2013.

of the Organization for the Harmonization of Business Law in Africa ('OHADA').<sup>7</sup> It completed its accession process to OHADA by filing the instrument of accession with the Government of the Republic of Senegal on 13 July 2012. Consequently, in accordance with Article 53, Section 2 of the OHADA Treaty, all provisions thereof, regulations and uniform acts ('OHADA Law') came into force in the DRC 60 days after the effective filing of the instrument of accession (12 September 2012).

Mining activities in the DRC may also be affected by foreign legislations such as Section 1502 of the US Dodd-Frank Act imposing new disclosure requirements for US public companies that use conflict minerals from the DRC or adjoining countries;<sup>8</sup> the US Foreign Corrupt Practices Act of 1977;<sup>9</sup> or the UK Bribery Act of 2010.<sup>10</sup>

Finally, mining activities are subject to international voluntary principles that promote transparency, accountability and good practice. For example, the DRC has been granted the status of candidate country for the Extractive Industries Transparency Initiative ('EITI') until 1 March 2013, by which time the DRC will be required to have completed an EITI validation that demonstrates compliance with the 2011 edition of EITI Rules.<sup>11</sup>

In the DRC, mining activities are regulated and managed by several political and administrative entities, as well as technical services that assist such entities.<sup>12</sup> Political entities involved in the implementation of the mining legislation are the President of the Republic<sup>13</sup> and the Minister of Mines,<sup>14</sup> and administrative entities are provincial

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7 OHADA is an international organisation, created by a Treaty signed in Port-Louis, Mauritius, on 17 October 1993, in order to strengthen the African legal system, by enacting a secure legal framework for the conduct of business in Africa. The current member states of OHADA are Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, the Republic of the Congo, the Democratic Republic of the Congo, Chad, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

8 Section 1502 of the US Dodd-Frank Act was adopted on 22 August 2012 ([www.sec.gov/rules/final/2012/34-67717.pdf](http://www.sec.gov/rules/final/2012/34-67717.pdf)).

9 US Foreign Corrupt Practices Act of 1977 ([www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf](http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf)).

10 UK Anti-Bribery Act 2010, which came into force on July 2011 ([www.legislation.gov.uk](http://www.legislation.gov.uk)).

11 Extraction Industries Transparency Initiative (<http://eiti.org/DRCongo>).

12 Edmond Cibamba Diata, *Cours de droit minier*, Université Libre de Kinshasa, 2006–2007.

13 According to Article 9 of the Mining Code, the President of the Republic has the power to enact the Mining Regulations to implement the Mining Code, to classify, declassify or reclassify mineral substances as mines or quarry products, to declare, classify or declassify an area as a prohibited area for mining activities or quarry works or a mineral substance as a reserved substance and to confirm the reservation of a deposit which is subject to tender pursuant to a ministerial decree. The President may exercise his or her power under the Mining Code by decree after having obtained the opinion of the Geology Directorate or CAMI.

14 Article 10 of the Mining Code defines the powers of the minister of mines under the Mining Code. Its power includes granting or refusal and cancellation of mining; granting of authorisation to export raw mineral substances; and approval for constitution of mortgages.



governors and heads of the provincial authority of mines.<sup>15</sup> Technical services to the mining administration are provided by CAMI, which is a state institution endowed with legal personality and financial autonomy under the supervision of the Minister of Mines and minister of finance. CAMI is responsible for registering applications for mining rights, granting of mining rights, withdrawal, cancellation or expiration of mining rights and transformation or lease of mining rights.<sup>16</sup> In addition, other administrative entities intervene in the implementation of the Mining Code within well-defined limits, such as the Geology Directorate,<sup>17</sup> the Mines Directorate<sup>18</sup> and the Mining Environment Protection Directorate.<sup>19</sup>

### **III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS**

#### **i Title**

The DRC state exercises its permanent sovereignty over soil and subsoil. This principle is enacted by Article 9 of the Constitution, which provides that ‘the State exercises its permanent sovereignty over the soil, subsoil, water, forests, air spaces, river, lake and sea as well as over Congolese territorial seas and continental shelves’. This principle of state ownership is also recognised in Article 3, Section 1 of the Mining Code, which states that ‘the deposits of mineral substances, including artificial deposits, underground water and geothermal deposits on surface or in the subsoil or in water systems of the National territory are the exclusive, inalienable and imprescriptible property of the State’.

The ownership of the deposits of mineral substances constitutes a real property right that is separate and distinct from the rights resulting from the surface area. Therefore, holders of surface rights may not claim any right of ownership over the deposits of mineral substances contained below the surface area, whereas holders of mining exploitation rights acquire ownership over all extracted products.

#### **ii Mining rights**

The mining legislation envisages different mining rights: PR; PE; PER; and PEPM.<sup>20</sup> Mineral prospecting may take place throughout the entire country, except for in certain protected or restricted areas.<sup>21</sup> Any person that wishes to undertake mineral prospecting must make a preliminary declaration to CAMI. Mining rights are granted following a procedure set out in the Mining Code.<sup>22</sup>

All applications for mining rights must be made by eligible individuals or entities. In accordance with Article 23 of the Mining Code, the following are eligible for mining

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15 Article 11 of the Mining Code.

16 Article 12 of the Mining Code.

17 Article 13 of the Mining Code.

18 Article 14 of the Mining Code.

19 Article 15 of the Mining Code.

20 Article 1.14 of the Mining Code.

21 Article 17 of the Mining Code.

22 Article 32 of the Mining Code.

rights: any individual of age who is a Congolese national or of foreign nationality; any Congolese legal entity with a registered office in the DRC whose corporate purpose is mining activities; any foreign legal entity; or any entity carrying out scientific activities. Artisanal mining is, however reserved to Congolese nationals.<sup>23</sup>

All applications for mining rights must fulfil the following:

- a* information must be accurate, required by Article 35 of the Mining Code;
- b* payment of filing costs, proof of which must be supplied;
- c* compliance with Articles 28 and 29 of the Mining Code, as to the form and location of the perimeter;
- d* the entire perimeter applied for under a PE must be located within the perimeter of the PR; and
- e* proof of the applicant's registration with the new commercial registry, if the applicant is subject to this legal obligation.<sup>24</sup>

Once applications are filed and accepted, they are subject to three evaluations: cadastral evaluation undertaken by CAMI, technical evaluation undertaken by the Mines Directorate, and environmental evaluation undertaken by the services responsible for the protection of the mining environment. CAMI centralises the opinions issued from such evaluations and submits them to the competent authority. Subsequently, the competent authority renders its decision and submits it to CAMI. In case of a favourable decision, CAMI registers them, notifies the decision to the applicant, and displays it in the premises set out in the Mining Regulations. In the event the competent authority fails to submit its decision within the required time, the decision to grant the mining right will be deemed to have been granted.

When a decision grants a mining right, CAMI issues a mining title to the applicant evidencing the right, providing that the relevant annual surface rights have been paid. The annual surface fees per quadrangle<sup>25</sup> must be paid for the first year, at the latest 30 days after the rights have been granted. Failure to pay within this time frame will render the mining rights null and void.<sup>26</sup>

### *Research permits*

A PR is a real property and exclusive right, conveyable and transferable. The right is evidenced by a mining title called a 'research certificate'. It is valid for four years, renewable twice for periods of two years for precious stones, and for five years, renewable twice for periods of five years for other mineral substances. An entity and its affiliated companies cannot hold more than 50 PRs.

To apply for a PR, an applicant must follow the procedure set by Articles 35 to 42 of the Mining Code and needs to attach proof of minimum financial capacity to its

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23 Article 26 of the Mining Code.

24 Article 38 of the Mining Code.

25 A surface area of 84,655 hectares.

26 Article 47 of the Mining Code.

applications; this must be equal to 10 times the total amount of the annual surface rights fees payable for the last year of the first period of the PR applied for.

The holder of a PR is entitled to obtain renewal of its PR provided that it has not breached its obligations to maintain the validity of the permit; it submits an exploration work report for the prior term of validity of its title with the results obtained; and the renewal application is filed with CAMI at least three months before the PR expires. At each renewal, the holder of the PR automatically relinquishes 50 per cent of the perimeter covered by its permit.

### *Exploitation permits*

A PE is a real property and exclusive right, conveyable and transferable. The right is evidenced by a mining title called an 'exploitation certificate'. A PE grants its holder the right to extract the mineral substances for which it is specifically granted. Its term of validity is 30 years, which is renewable for several terms of 15 years.

To apply for a PE, an application must be filed with CAMI along with the following attachments:

- a* a copy of the valid research certificate;
- b* the report on the outcome of the research work with regard to the nature, the quality, the volume and the geographical situation of the mineral substances;
- c* the feasibility study for the exploitation of the deposit;
- d* the technical framework plan for the development, construction and development of the mine;
- e* the environmental impact study ('EIS') and the environmental management plan of the project ('EMPP'); and
- f* the report on consultations held with the authorities of the local administrative entities as well as representatives of the local communities.

An application for a PE will be granted provided that the following conditions are fulfilled: (1) proof of the existence of a deposit that can be economically exploited, (2) proof of the applicant's financial capacity in view of the contemplated exploitation, (3) prior approval of the draft EIS and EMPP and (4) transfer to the state of 5 per cent of the shares in the registered capital of the company applying for the PE.

### *Tailing exploitation permit*

A PER is also a real property and exclusive right, conveyable and transferable. The right is evidenced by a mining title called a 'tailing exploitation certificate'. It is valid for five years, and is renewable for several times. The applicant for an exploitation of tailings prepares the application in accordance with Articles 38 to 42, as complemented by Articles 74 to 75 of the Mining Code, and is filed with CAMI. The provisions relating to the filing, instruction, granting, refusal, expiration, renewal and revocation of the PE also apply to the PER.

### *Exploitation permit for small-scale mines*

A PEPM is a real property and exclusive right, conveyable and transferable and grants its holder the right to exploit a small mining deposit. The right is evidenced by a mining title called 'small-scale mining certificate' and its term of validity is variable, but may not

exceed 10 years, renewals included.<sup>27</sup> In addition to the conditions related to the granting of a PE, the granting of a PEPM is subject to the demonstration of the existence of a deposit that would not allow economically viable industrial exploitation. In addition, any foreign national wishing to apply for such a right must set up a Congolese corporation in association with one or more Congolese nationals, whose participation in the capital of the corporation must be at least than 25 per cent.<sup>28</sup> The provisions related to the filing, instruction, granting, refusal, expiration, renewal and revocation of the PE apply also to the PEPM.<sup>29</sup>

### **iii Additional permits and licences**

There are no additional permits and licences required for title holders to conduct mining activities.

### **iv Closure and remediation of mining projects**

The holder of mining rights must provide a financial security for the rehabilitation of the environment in order to guarantee compliance with the environmental obligations, in particular to cover the costs of the environmental rehabilitation measures detailed in the environmental plan. The details of the financial security are specified in the Mining Regulations.

## **IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS**

### **i Environmental, health and safety regulations**

The mining legislation contains provisions that regulate the environmental, health and safety aspects of mining activities. Environmental aspects are regulated by the Mining Code and the Mining Regulations. For safety, hygiene and protection measures, the Mining Code provides in Article 207 that such measures will be enacted by specific regulations.

International development initiatives such as the EITI (see above) and the Equator Principles also affect environmental, health and safety aspects of the mining activities in the DRC.

### **ii Environmental compliance**

The environments obligations of title holders depend on the type of mining title. Prior to commencing exploration works, holders of a PR must prepare a mitigation and rehabilitation plan that needs to be approved by the DPEM.<sup>30</sup> All applicants for exploitation permits (PE, PER and PEPM) need to submit an EIS and an EMPP, which need to be approved beforehand by the DPEM.<sup>31</sup> The details of the different

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27 Article 101 of the Mining Code.

28 Article 104 of the Mining Code.

29 Articles 105 to 108 of the Mining Code.

30 Article 203 of the Mining Code.

31 Article 204 of the Mining Code.

environmental plans that need to be prepared and approved beforehand are specified in the Mining Regulations.

The holder of a mining right will be liable for any environmental damages caused by its activities only to the extent that it did not comply with the terms of its approved environmental plan or violated any environmental obligations under the Mining Code or title XVIII of the Mining Regulations.

A title holder is also subject to other environmental obligations such as (1) filing an annual report in accordance with Article 458 of the Mining Regulations describing, *inter alia*, the executed mining works and its environmental effects, (2) performing an environmental audit in accordance with articles 459 and 460 of the Mining Regulations, and (3) conducting an environmental audit in the case of closure of the mining site in accordance with Article 473 of the Mining Regulations.

Furthermore, if mining rights are transferred, the transferor and the transferee must carry out an environmental audit of the mining site. In accordance with Article 182 of the Mining Code, the title holder who acquires its mining right by transfer will assume the environmental obligations with regard to the DRC on behalf of the transferor, unless the transferor has obtained a certificate of discharge of its environmental obligations.

### iii Third-party rights

The DRC mining legislation does contain not specific regulations for the protection of local communities in relation to the exercise of mining rights, but if a mining project requires the relocation of local communities, this would need to be analysed under the environmental plan.

## V OPERATIONS, PROCESSING AND SALE OF MINERALS

### i Processing and operations

As previously explained, deposits of mineral substances are the exclusive property of the state, which grants to exploitation right holders the ownership of the mineral substances, which are moveable assets, governed by civil and commercial law.<sup>32</sup> Furthermore, exploitation right holders have the exclusive right to dispose, transport and freely commercialise the marketable products originating from their perimeters.<sup>33</sup>

The exploitation right holders are entitled to undertake concentration, metallurgical or technical processing and transformation operations of mineral substances extracted from deposits located within their perimeters without the need for any additional authorisation.<sup>34</sup> Subject to Article 10(J) of the Mining Code, the processing or transformation of mineral substances may be conducted either by the exploitation right holder or by a processing or transformation entity.<sup>35</sup> Any person or entity that wishes solely to transform mineral substances must apply for and obtain a processing or

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32 Article 3 of the Mining Code.

33 Articles 64 line d and 88 of the Mining Code.

34 Articles 64 and 82 of the Mining Code.

35 Article 81 of the Mining Code.

transformation licence, which is governed by specific legislation.<sup>36</sup> Although the Mining Code refers to this specific legislation, this matter is in fact governed by Ministerial Decree No. 3163/CAB.MIN/MINES/01/2007 of 11 August 2007 regulating the activities of processing entities and entities for transformation of mineral substances.

**ii Sale, import and export of extracted or processed minerals**

Exploitation right holders are entitled to sell their products to customers of their choice at prices freely negotiated on the domestic or foreign markets.<sup>37</sup>

Furthermore, exploitation right holders are generally able to freely export all of their production on international markets of their choice, but they must sign a document governed by the regulations on change.<sup>38</sup> Exportation of raw mineral substances outside the DRC is, however, subject to an authorisation from the Minister of Mines. Such authorisation will be granted only if the holder demonstrates that it is not possible to process or treat the substances in the DRC at a cost that is economically viable for the mining project, and it also shows the advantages for the DRC if the authorisation is granted.<sup>39</sup>

**iii Foreign investment**

Foreign investments are, in principle, regulated by the Investment Code created by Law No. 004/2002 of 21 February 2002, which sets the conditions, advantages and general rules applicable to investments made in the DRC, but mining activities are excluded from its application and are instead regulated by the mining legislation, which does not subject foreign investment in the mining sector to any authorisation from the DRC government.

There are no restrictions on the import of capital or on the use of proceeds from the export or sale of mining products and their conversion into Congolese francs;<sup>40</sup> however, the Mining Code specifies that the holder who exports mining substances must repatriate into its main DRC national account a minimum of 40 per cent of the receipts from exportation. After having paid the corresponding taxes and charges, the holder may then transfer revenue and capital for the benefit of non-residents, subject to certain restrictions. First, the payment for any goods and services to foreign supplies are allowed only if the holder was unable to find the same goods or services in the same quantity, quality or price, and under the same conditions, on the Congolese market. Second, the repayment of advances on shareholders' accounts are authorised provided that the ratio of the borrowed funds against stock capital does not exceed 75:25.<sup>41</sup>

In relation to the financing of mining projects, Articles 543 and 544 of the Mining Regulations provide that holders are authorised to conclude one or more loan agreements with foreign lenders provided that the terms and conditions of the loan

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36 Article 82 of the Mining Code.

37 Article 85 of the Mining Code.

38 Article 266, Section 1 of the Mining Code.

39 Article 85, Section 2 of the Mining Code.

40 Article 263 of the Mining Code.

41 Article 264 of the Mining Code.

agreement are similar or more attractive than the ones provided under normal domestic market conditions. The holder must, however, file three copies of the loan agreement with the mines directorate within 18 business days of the date of the signature of the loan agreement for its review.

## **VI CHARGES**

The Mining Code creates a specific, preferential and exhaustive tax and customs regime applying to mining activities in the DRC. The tax regime is specific because it creates certain taxes that are specific to mining activities, such as mining royalties or annual surface area tax. It is preferential because it provides for reduced tax rates and exemptions with comparison to the standard tax regime. It is also exhaustive because it lists all taxes, royalties, duties or other fees applicable to mining activities to the exclusion of any other form of taxation, except more favourable tax or customs provisions entering into force after the Mining Code.<sup>42</sup>

The tax and custom regime of the Mining Code is applicable to holders of mining title, their affiliate companies<sup>43</sup> and subcontractors<sup>44</sup> that carry out mining activities in accordance with a contract concluded with the holder of the mining title.<sup>45</sup> Furthermore, the Mining Code provides for specific tax incentives to strengthen the competitiveness of the mining sector in the DRC.

The tax and customs regime applicable to mining activities is also protected by a stability clause. In this regard, Article 276 of the Mining Code provides that the state will guarantee that the provisions of the Mining Code can only be modified if – and only if – the Mining Code itself is the subject of a legislative amendment adopted by the parliament. Furthermore, any amendment to the Mining Code adopted by parliament will only come into force 10 years following its enactment, but more favourable tax and customs provisions enacted after the date of the Mining Code are immediately applicable to mining activities as of the date of their entry into force.<sup>46</sup>

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42 Articles 220 and 221 of the Mining Code.

43 By affiliate companies, the Mining Code means, under Article 1.47, a company that holds directly or indirectly more than 50 per cent of the voting rights in the company holding the mining title or in the company in which voting rights are held directly or indirectly by the holder.

44 By subcontractors, the Mining Code means, under Article 1.48, any person supplying equipment or carrying out works or providing relevant services to the mining title holder within the context of its mining activities pursuant to its mining title and, in particular, including the construction of industrial, administrative, sociocultural and other types of infrastructure necessary for the project, as well as all other services directly related to the mining project.

45 Article 219 of the Mining Code.

46 Article 222 of the Mining Code.

**i Royalties**

The exploitation right holder is subject to mining royalties on all commercial products as of the effective date of commencement of the activity.<sup>47</sup> Mining royalties serve two goals: (1) to provide the DRC state with income at the outset of the exploitation, even in the case that the exploitation makes no profits; and (2) to contribute to the development of local communities, as part of the royalties are redistributed to communities surrounding the mining site. Mining royalties are 0.5 per cent for iron or ferrous metal; 2 per cent for non-ferrous metals; 2.5 per cent for precious metals; 4 per cent for precious stones; 1 per cent for industrial minerals; and 0 per cent for standard construction materials. Solid hydrocarbons and other substances are not specifically mentioned.<sup>48</sup>

Mining royalties are due upon the sale of the products and are calculated on the value of sales made, less the costs of transport, quality control analysis of the commercial products, insurance and any costs related to the sale transaction.<sup>49</sup>

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

**ii Taxes**

In general, taxes are direct and indirect. Direct taxes are subdivided between (1) asset-based taxes, which include tax on real property and on vehicles and (2) income-based taxes, which include tax on rental income, tax on interest and dividends, and professional taxes, which comprise tax on profits and tax on salaries.

In the case of asset-based taxes, the holder of mining title is liable for tax on real property in accordance with the general tax law, except on buildings located inside the perimeter subject of a PR or PE, which are exempt from the tax on real property.<sup>50</sup> The holder of a mining title is liable for tax on vehicles in accordance with the general tax law, except on vehicles used exclusively for mining activities, which are also exempt.<sup>51</sup>

The holder of a mining title is liable for the tax on rental income in accordance with the general tax law, which sets the tax rate at 22 per cent. The holder of a mining title is obliged to withhold the tax on interests and dividends in accordance with the general tax law, which sets the tax rate at 20 per cent; however, providing that certain conditions are met, interest paid by the holder by virtue of loans contracted in foreign currency abroad are exempt, and, dividends and other distributions made by the holder of mining titles are taxed at the preferential rate of 10 per cent.<sup>52</sup>

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47 Article 240 of the Mining Code; Articles 523 et seq. of the Mining Regulations.

48 Article 241 of the Mining Code.

49 Article 255 of the Mining Code.

50 Article 236 of the Mining Code.

51 Article 237 of the Mining Code.

52 Article 246, Section 2 of the Mining Code.



In terms of professional taxes, the holder is liable for a tax on profits, which is payable on net profits made through its operational activity in the DRC. The Mining Code provides for a preferential rate of 30 per cent on net profits instead of the general tax law, which sets the rate at 40 per cent. Net profits consist of profits less all costs incurred in the production of income during the year, based on general law and the Mining Code. Specific provisions of the Mining Code provide for tax incentives that will reduce payable professional taxes such as depreciation up to 60 per cent of the purchase price of an asset during the first year,<sup>53</sup> the potential to carry forward tax loss up the fifth year following the year of the loss,<sup>54</sup> and research and development expenses may be capitalised during the exploration period and amortised for the first two years following the granting of the PE.<sup>55</sup>

Furthermore, the mining title holder is obliged to withhold the tax on salaries in accordance with general tax law. The mining title holder is also obliged to withhold the exceptional tax on salaries for expatriate employees at a preferential rate of 10 per cent instead of the standard rate of 25 per cent.

As an indirect tax, domestic turnover tax ('ICA') is payable on the gross amount of sales of products or services made locally. The seller or service provider is the tax debtor and adds the amount of ICA to its invoices and repays the collected ICA to the tax authority. Different rates apply. First, for sales and services rendered by the mining title holder, the following rates apply: products sold by the mining title holder to a transformation entity located in the DRC are exempt from ICA; any other sales of products by the mining title holder within the DRC are taxed at a preferential rate of 10 per cent; services rendered by the mining title holder are taxed at the standard rate of 18 per cent. Second, for sales and services rendered to the mining title holder, the following rates apply: a preferential rate of 5 per cent is payable by the holder for services rendered to it in connection with its corporate purpose; and purchases of goods manufactured in the DRC and linked to the mining activities of the holder are taxed at the rate of 3 per cent.

### **iii Duties**

The Mining Code sets a preferential regime for import duties. In order for the mining title holder to benefit from this preferential regime, a list, including the number and the value of the moveable property, equipment, vehicles, mineral substances and other inputs (which are governed by the preferential regime), needs to be approved by a joint decree issued by the ministers of mines and finance before commencing the work.<sup>56</sup> Prior to the effective commencement of the exploitation work, importation of goods and products that are strictly for mining use are subject to import duties at the preferential rate of 2 per cent, but from the effective commencement of exploitation work, importation of goods and products that are strictly for mining use are subject to import duties at the preferential rate of 5 per cent. Imports of fuels, lubricants, reagents and consumer goods

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53 Article 249 of the Mining Code.

54 Article 251 of the Mining Code.

55 Article 252 of the Mining Code.

56 Article 225 of the Mining Code.

destined for mining activities are subject to import duties of 3 per cent throughout the duration of the mining project.

Goods imported under the preferential regime may not be transferred to any other person without the prior consent of the customs authorities, otherwise the avoided import duties will need to be paid.<sup>57</sup>

There are no export duties for the exportation of commercial products in relation to mining projects;<sup>58</sup> however, some royalties and fees are due as remuneration for services rendered in connection with the export of commercial products or goods for temporary export for improvement, but may not exceed 1 per cent of their value.

#### iv Other fees

To cover the costs for the management of mining titles provided by CAMI, mining title holders are also required to pay fees on the surface area of the mining concession.<sup>59</sup> As provided in Article 196 of the Mining Code, non-payment of the annual surface area fees in a timely fashion may affect the validity of the mining title. For holders of PRs, the rates are in Congolese francs, equivalent to US\$0.02 per hectare for the first year, to US\$0.03 per hectare for the second year, US\$0.035 per hectare for the third year and US\$0.04 per hectare for subsequent years. For holders of PEs, the fees are in Congolese francs, equivalent to US\$0.04 per hectare for the first year, US\$0.06 per hectare for the second year, US\$0.07 per hectare for the third year and US\$0.08 per hectare for subsequent years.

## VII OUTLOOK AND TRENDS

The mining sector in the DRC is currently experiencing a period of growth. Following the adoption of the Mining Code in 2002, the mining authorities have been deliberating on ways to contribute to the development of the mining sector in order to achieve the best socio-economic outcomes.

The changes one should expect to see in a near future are related, *inter alia*, to:

- a* ways of increasing mining tax revenue in the short term;
- b* ways of achieving better implementation of the mining legislation;
- c* strict application of the principles and criteria of the EITI;
- d* strengthening capacity building for the administrative and specialised services of the Ministry of Mines to ensure more efficient management of mining rights;
- e* ensuring control of research activities and mining exploitations;
- f* provide efficient technical assistance and training to artisanal miners;
- g* increasing the mining sector's contribution to the country's economic development, through restructuring of state companies;
- h* improvement of social and environmental conditions in mining areas.

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57 Article 228 of the Mining Code.

58 Article 234 of the Mining Code.

59 Article 238 of the Mining Code.

After 10 years of existence, the mining legislation will be revised this year. The goal behind such revision is, according to the DRC mining authorities, to improve it and correct its shortcomings.

Areas affected by the review will include handling of mining titles and mining rights, social responsibilities of mining companies, and the percentage compensation to be paid to the DRC state (the idea being to increase the state participation in mining companies to compensate for all the fiscal and customs incentives given to mining companies). The DRC believes<sup>60</sup> that this is the only way for it to recover what it loses in terms of taxes and customs fees not collected because of fiscal exemptions.

The mining authorities also wish to correct a few issues such as difficulties of local communities in accessing mining properties; inadequate data on geological infrastructure; the absence of a policy for promoting investment in the absence of objective conditions of implementation or monitoring of exploration and exploitation projects; and inadequate tax collection systems.

The mining authorities would also like to see more reforms that address the proper application of legal principles to improve the governance of the sector and its contribution to socio-economic development at both national and local levels.

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<sup>60</sup> Jean Felix Mupanda, General Director of CAMI, speech held at IPAD Mining and Infrastructure, 2010, Kinshasa, DRC.

## Appendix 1

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