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# Mining Law Committee News

**VOL 7 NO 1**

**IBA ANNUAL CONFERENCE, VIENNA, OCTOBER 2015**



# International Bar Association Conferences 2015–2016



**4 NOVEMBER 2015** JAKARTA, INDONESIA

Asia Pacific Arbitration Group Training Day – Best Practices in International Arbitration

**12 NOVEMBER 2015** MOSCOW, RUSSIA

7th Annual Mergers and Acquisitions in Russia and CIS Conference

**12 NOVEMBER 2015** LONDON, ENGLAND

Private Equity Transactions Symposium

**13 NOVEMBER 2015** SÃO PAULO, BRAZIL

Celebrating Magna Carta and the Rule of Law

**14–15 NOVEMBER 2015** LONDON, ENGLAND

IBA-ELSA Law Students' Conference 2015

**18–20 NOVEMBER 2015**

LIVINGSTONE, ZAMBIA

Building on the Foundations for a Successful Future: Economic Development and the Rule of Law in Africa

**18–20 NOVEMBER 2015** LONDON, ENGLAND

7th Biennial Global Immigration Conference

**19–20 NOVEMBER 2015**

SEOUL, SOUTH KOREA

Mergers & Acquisitions in the Technology Sector: Current Asian and International Trends

**3 DECEMBER 2015** LONDON, ENGLAND

Third Party Funding and International Arbitration: a 360 degree perspective

**3–4 DECEMBER 2015** MEXICO CITY, MEXICO

The New Era of Taxation: The keys to providing legal advice on tax law in a rapidly changing world

**4 DECEMBER 2015** MOSCOW, RUSSIA

9th Annual Law Firm Management Conference

**4 DECEMBER 2015** PARIS, FRANCE

The Rise of Ethics and Transparency in Mediation and ADR: Fighting Corruption and Abuses Through New Means

**5 DECEMBER 2015** NEW DELHI, INDIA

Magna Carta 800th Anniversary – Foundation of Democracy and the New Trends of Dispute Resolution in India

**27–29 JANUARY 2016** MEXICO CITY, MEXICO

Mexico's Energy Reform: The Bidding Has Begun

**30–31 JANUARY 2016**

THE PEACE PALACE, THE HAGUE

Legal Challenges of Modern Warfare

**3–5 FEBRUARY 2016** TOKYO, JAPAN

IBA/ABA International Cartel Workshop

**8–9 FEBRUARY 2016** LONDON, ENGLAND

5th Annual IBA Taxation Conference

**11–12 FEBRUARY 2016** PARIS, FRANCE

4th IBA European Corporate and Private M&A Conference

**17–19 FEBRUARY 2016**

ADELAIDE, AUSTRALIA

Innovation in Legal Practice

**29 FEBRUARY – 1 MARCH 2016**

LONDON, ENGLAND

21st Annual International Wealth Transfer Practice Law Conference

**4 MARCH 2016** SHANGHAI, CHINA

19th Annual International Arbitration Day

**6–8 MARCH 2016** LONDON, ENGLAND

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**9–11 MARCH 2016** RIO DE JANEIRO, BRAZIL

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**10–11 MARCH 2016** SINGAPORE

2nd Asia-based International Financial Law Conference

**7–8 APRIL 2016** BERLIN, GERMANY

7th World Women Lawyers' Conference

**14–15 APRIL 2016** COPENHAGEN, DENMARK

8th Annual Real Estate Investment Conference

**14–15 APRIL 2016** MEXICO CITY, MEXICO

IBA Annual Employment and Discrimination Law Conference

**17–20 APRIL 2016** NEW YORK, USA

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law

**27–29 APRIL 2016** SAN FRANCISCO, USA

IBA Annual Litigation Forum 2016

**11–13 MAY 2016** PANAMA CITY, PANAMA

19th Annual IBA Transnational Crime Conference

**16–17 MAY 2016** MEXICO CITY, MEXICO

12th IBA Competition Mid-Year Conference

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**Contributions** to this publication are always welcome and should be sent to the Chair, Florencia Heredia at [theredia@holtlegal.com.ar](mailto:theredia@holtlegal.com.ar).

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## International Bar Association

4th Floor, 10 St Bride Street  
London EC4A 4AD, United Kingdom  
Tel: +44 (0)20 7842 0090  
Fax: +44 (0)20 7842 0091  
[www.ibanet.org](http://www.ibanet.org)

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This newsletter is intended to provide general information regarding recent developments in mining law. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

# From the Chair

It is with great pleasure that we welcome you to enjoy the latest edition of the Mining Law Committee Newsletter on the occasion of the IBA Annual Conference in Vienna.

The incoming members of the Mining Law Committee aim to continue the excellent work of the outgoing members in promoting the research and study of all areas of mining law and related-industry issues from a geographically diverse approach.

Following the success of the IBA's June conference in New York on Investing in Africa: Opportunities for Businesses and the Lawyers Who Counsel Them, this newsletter features a number of articles related to mining in Africa, as well as a few updates about changes to mining legislation in other parts of the world and multi-stakeholder initiatives affecting the mining sector.

Jacqueline Musitwa shares her views on the domestic issues and international trends impacting the mining sector in sub-Saharan Africa, while Sophie Thomashausen and Glen Ireland examine the prospects for shared use mining-related infrastructure

and particularly rail and port infrastructure in sub-Saharan Africa in the context of the current commodity price slump and infrastructure bottlenecks hampering the development or expansion of mining projects. In turn, Dr Aboubacar Fall, Adriano Trindade and Robert Milbourne provide updates and share their views on recent changes to the mining legislation in Senegal, Brazil and Mongolia, respectively. And finally, Nneoma Nwogu, of the World Bank, and Jim Cress present two mining-related stakeholder initiatives. Nneoma discusses a new initiative to bring together a searchable platform of mining legislation and experts in Africa and Jim Cress provides an overview of the Rocky Mountain Mineral Law Foundation (RMMLF)'s newly revised Form 5 LLC Mining Joint Venture Agreement.

We look very much forward to seeing many of you at our upcoming conferences and to welcoming you to all Mining Law Committee activities. Feel free to contact us and get involved.

**Florencia Heredia**

HOLT Legal,  
Buenos Aires  
fheredia@holtlegal.  
com.ar

# Committee Officers

## Chair

Florencia Heredia  
HOLT Abogados, Buenos Aires  
fheredia@holtlegal.com.ar

## Senior Vice-Chair

Michael Bourassa  
Fasken Martineau Du Moulin, Toronto  
mbourassa@fasken.com

## Senior Vice-Chair

Hubert André-Dumont  
McGuireWoods, Brussels  
handredumont@mcguirewoods.com

## Senior Vice-Chair

Pedro Freitas  
Veirano Advogados, Rio de Janeiro  
pedro.freitas@veirano.com.br

## Vice-Chair

Carlos Vilhena  
Pinheiro Neto Advogados, Brasília  
cvilhena@pn.com.br

## Secretary

Daniel Altikes  
Antofagasta Minerals, Santiago  
daltikes@aminerals.cl

## Secretary

Barry Irwin  
Allen & Overy, Singapore  
barry.irwin@allenoverly.com

## Secretary

Carmen Diges  
Miller Thomson, Toronto  
plazaspin@hotmail.com

## Treasurer

Casper Herler  
Borenus, Helsinki  
casper.herler@borenus.com

## Newsletter Editor

Sophie Thomashausen  
Columbia Center on Sustainable Investment,  
New York  
sophie.thomashausen@gmail.com

## Newsletter Editor

Elizabeth Bastida  
Dundee University, Dundee  
ebastida371@gmail.com

## Newsletter Editor

Rahmat Soemadipradja  
Soemadipradja & Taher, Jakarta  
rahmat\_s@soemath.com

## Programme Officer

Carlos Perez-Cotapos  
Cariola Diez Perez-Cotapos & Cia, Santiago  
cperez-cotapos@cariola.cl

## Programme Officer

Emil Ruppert  
Rubio Leguia Normand, Lima  
eruppert@rubio.pe

## IBA Committees Liaison Officer

Pablo Mir  
Bofill Mir & Alvarez Jana Abogados, Santiago  
pmir@bmaj.cl

## Young Lawyers Liaison Officer

Robert Milbourne  
K & L Gates, Perth  
Robert.Milbourne@klgates.com

## Website Officer

Tabitha Maro  
Rex Attorneys, Dar es Salaam  
tabithamaro@gmail.com

## IBA Office

lpd@int-bar.org



# Vienna 4–9 October 2015

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



### Mining Law Committee sessions

#### Monday 1430 – 1545

##### **International trade, climate change, access to natural resources and human rights in the 21st century: can the gaps be bridged?**

*Presented by the International Trade and Customs Law Committee, the Environment, Health and Safety Law Committee and the Mining Law Committee*

*Session Co-Moderators*

**Christopher Kent** *Ottawa, Ontario, Canada; Vice Chair, International Trade and Customs Law Committee*

**Ignacio Randle** *Estudio Randle, Buenos Aires, Argentina; Council Member, Energy, Environment, Natural Resources and Infrastructure Law Section*

In July 2014, the IBA Task Force on Climate Change Justice and Human Rights issued its seminal report entitled 'Achieving Justice and Human Rights in the Era of Climate Change'. Among the many issues examined in the report is the compatibility of the frameworks of multilateral and bilateral trade and investment treaties with the policy imperatives associated with global climate change. This high-profile panel will include one of the Co-Chairs of the Task Force and leading authorities on international trade and environment policy. The panel will discuss and debate the trade and environment policy issues and conclusions contained in the report, including their achievability, the issues posed for both developed and developing countries, and the opportunities for addressing these issues in on going trade negotiations such as the Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership.

*Speakers*

**Vassilis Akritidis** *McGuirewoods, Brussels, Belgium*

**David Estrin** *CIGI International Law Research Program, Waterloo, Ontario, Canada; Council Member, Energy, Environment, Natural Resources and Infrastructure Law Section*

**Jennifer Hillman** *Cassidy Levy Kent, Washington, DC, USA*

**Professor Gabrielle Marceau** *World Trade Organization, Geneva, Switzerland*

HALL L7

#### Tuesday 0930 – 1230

##### **Governmental and institutional relations for natural resources projects**

*Presented by the Mining Law Committee, the Anti-Corruption Committee, the Corporate Social Responsibility Committee and the Public Law Committee*

*Session Co-Chairs*

**Ignacio Randle** *Estudio Randle, Buenos Aires, Argentina; Council Member, Energy, Environment, Natural Resources and Infrastructure Law Section*

**Carlos Vilhena** *Pinheiro Neto Advogados, Brasília, Brazil; Vice Chair, Mining Law Committee*

One of the biggest challenges these days for natural resources projects is the investors' relations with national, state and local governments, communities and institutions, among other stakeholders. The session will look into how the investor should prepare to deal with such relations, design a suitable government and institutional relations policy and strategy, decide when and how to be proactive in creating and maintaining strong links with all stakeholders, aiming at how best to deal with expectations arising from the best management of resource wealth.

The session will analyse accumulated experience on natural resources project development, successful and unsuccessful experiences and how to avoid the mistakes of the past. The session will address matters such as: how to secure the greatest benefit for all involved parties through an inclusive and comprehensive strategy; commit to the highest environmental, social and human rights standards and to sustainable development; avoid corrupt practices and provide clear information.

*Speakers*

**Steven Fox** *Veracity Worldwide, New York, USA*

**James Small** *Atlantic Strategy Group, Brussels, Belgium*

**France Tenaille** *Gowling Lafleur Henderson, Toronto, Ontario, Canada*

HALL L8

## Wednesday 1430 – 1730

### Extractive industries – what happens when environmental permit conditions fail: response and remediation

*Presented by the Mining Law Committee, the Employment and Industrial Relations Law Committee, the Environment, Health and Safety Law Committee and the Negligence and Damages Committee*

*Session Co-Chairs*

**Michael Bourassa** *Fasken Martineau DuMoulin, Toronto, Ontario, Canada; Senior Vice Chair, Mining Law Committee*

**Eugene Smary** *Warner Norcross & Judd, Grand Rapids, Michigan, USA; Vice Chair, Energy, Environment, Natural Resources and Infrastructure Law Section*

Our panellists will discuss the Deepwater Horizon situation (BP spill in the Gulf of Mexico) and the recent settlement with the US government, and also provide some background on the coal ash situation in the US. Some comparisons will be made to Australian permitting and remediation issues. In a broader context the panel will focus on human rights and community issues generally in connection with the topic. In its analysis the panellists will also address regulatory prevention, remedial action, criminal vs civil liability to the government, civil liability to third parties, the role of public relations, and correcting mistakes.

*Speakers*

**Hon Cheryl Edwardes** *Cheryl Edwardes Legal, Como, Western Australia, Australia; Vice Chair, Environment, Health and Safety Law Committee*

**Roger Martella** *Sidley Austin, Washington, DC, USA; Climate Change Justice and Human Rights Task Force Liaison Officer, Environment, Health and Safety Law Committee*

**Thomas Milch** *Arnold & Porter, Washington, DC, USA*

**Margaret Wachenfeld** *Institute for Human Rights and Business, London, England*

ROOMS -2.47 & -2.48

## Thursday 0930 – 1230

### Role of judges and arbitrators in natural resources activities

*Presented by the Mining Law Committee, the Arbitration Committee, the Judges' Forum, the Litigation Committee and the Power Law Committee*

*Session Co-Chairs*

**Florencia Heredia** *HOLT Abogados, Buenos Aires, Argentina; Chair, Mining Law Committee*

**Lucy Martinez** *Three Crowns, London, England*

Judicial review has become quite frequent in natural resources and energy projects around the world. Also investment protection arbitration, through BITs, has become a common feature when the state does not fulfil its obligations as receiver of FDI for these projects. Not only in the way the judiciary traditionally has been an instance of analysis and review for the protection of rights of interested parties, though also suspending projects due to review of environmental or other permits through actions by communities.

Concepts such as 'judicial activism' and 'judicial review' will be examined and discussed with examples of mining and energy-related projects in different jurisdictions and legal systems.

*Speakers*

**Yousuf Aflab** *Enodo Rights, New York, USA*

**Edward Fashole-Luke II** *Luke & Associates, Gaborone, Botswana*

**Jeremy Sharpe** *Shearman & Sterling, New York, USA*

**Stephen Tromans QC** *39 Essex Chambers, London, England*

**Claudio Undurraga** *Prieto y Cia, Santiago, Chile*

HALL N2

## Thursday 1430 – 1730

### Sustaining development and developing sustainability: the African experience, challenges and prospects

*Presented by the African Regional Forum and the Mining Law Committee*

*Session Co-Chairs*

**Olufunwi Oluyede** *TRLPLAW, Lagos, Nigeria; LPD Council Member*

**Barnabas Tumusingize** *Sebalu & Lule Advocates, Kampala, Uganda*

It is trite knowledge that Africa is bequeathed with vast natural resources. Such providential endowment inherently creates an unparalleled opportunity for the continent to fund its development with the exploitation of these resources – and with a strong focus on sustainability and community development.

How do we secure access to the benefits of resource development for Africans, while protecting the continent's uniquely rich environment and ecosystem? How do we best set the foundation for adequate participation of future African generations in significant development strategies and policies affecting their habitats?

Our panel of globally renowned specialists will address these gnawing issues with stirring audience participation.

*Speakers*

**Israel Aye** *Sterling Partnership Legal Practitioners, Lagos, Nigeria*

**Peter Leon** *Webber Wentzel, Illovo, South Africa; LPD Council Member*

**Sternford Moyo** *Scanlen & Holderness, Harare, Zimbabwe; Chair, African Regional Forum*

**Ignacio Randle** *Estudio Randle, Buenos Aires, Argentina; Council Member Energy, Environment, Natural Resources and Infrastructure Law Section*

**Pieter Steyn** *Werksmans Attorneys, Johannesburg, South Africa; Senior Vice Chair, Antitrust Committee*

**Laura van der Meer** *Kelley Drye & Warren, Brussels, Belgium*

HALL E2

To find out more about the conference venue, sessions and social programme, and to register, visit [www.ibanet.org/conferences/vienna2015.aspx](http://www.ibanet.org/conferences/vienna2015.aspx). Further information on accommodation, tours and excursions during the conference week can also be found at the above address.



# An innovative approach to transforming Africa's mining sector: the African Mining Legislation Atlas Project

**Nneoma Veronica Nwogu**

World Bank,  
Washington, DC  
nnwogu@worldbank.org

In October 2014, the World Bank Group (WBG), in partnership with the African Legal Support Facility and the University of Cape Town launched the African Mining Legislation Atlas (AMLA) Project. With the goal of addressing information asymmetry in Africa's mining sector, the Project provides comparative data on Africa's mining laws through creation of the AMLA platform; builds the capacity of Africa's next generation of lawyers; and will produce a guiding template, an annotated document designed to assist countries in the preparation or revision of their mining laws.

By the end of 2015, the Project will have trained more than 50 young African legal professionals from 17 countries, speaking French, English, Arabic and Portuguese in addition to numerous local languages. The AMLA platform was designed to enable users to compare legislative provisions across all available primary mining laws and already contains all 53 existing African mining codes in searchable format. It is also being populated with mining code amendments, mining regulations and related legislation and will be translated into French and Portuguese in due course.

In addition, the Project is producing a guiding template, an easy to read annotated document that outlines an array of non-prescriptive legislative options. Designed to support countries looking to develop comprehensive legal frameworks for their mining sector, the guiding template is based on a list of the most common topics appearing in all 53 African mining laws with the addition of relevant topics garnered from the legislation of other leading mineral producing nations outside of Africa. For

each of the topics identified, the document will outline context, sources, application, legislative language, and jurisprudence where available.

To develop the document through an inclusive, multi-stakeholder process, the WBG has partnered with a group of international legal experts to provide detailed content based on their expertise in different areas of the mining sector. The group includes representatives from a broad range of institutions including: the Africa Union Commission (AUC), the African Minerals Development Center (AMDC), the African Legal Support Facility (ALSF), the Columbia Center on Sustainable Investment (CCSI), the International Senior Lawyers Program (ISLP), the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Latham & Watkins, the National Resource Governance Institute (NRGI), and the Mining Law in Africa (MLiA) program at the University of Cape Town (MLiA).

In November 2015, a draft of the guiding template will be discussed at the Law, Justice and Development Week, a World Bank Group event hosted by the legal units of the World Bank, International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID).

*Editor's note: For further information regarding the AMLA Project please visit the Global Forum on Law, Justice and Development ([www.globalforumljd.org](http://www.globalforumljd.org)). To visit the AMLA platform please go to [www.a-mla.org](http://www.a-mla.org). The Project welcomes feedback on the usefulness and accuracy of the platform. Comments can be sent to [feedback@a-mla.org](mailto:feedback@a-mla.org).*

**Sophie Thomashausen**

Columbia Center on Sustainable Investment,  
New York

sthomashausen@law.columbia.edu

**Glen Ireland**

Infra Share Partners,  
London

glen.ireland@infra-share.org

# Shared-use mining infrastructure in sub-Saharan Africa: challenges and opportunities

**T**he IBA's recent Conference, Investing in Africa: Opportunities for Businesses and the Lawyers Who Counsel Them, held in New York on 24–26 June 2015, highlighted the growing challenges and opportunities related to infrastructure needed for major mining projects in sub-Saharan Africa. The mining sector, which remains critical to many economies in the region, is being hampered by the lack of adequate transport, power and other infrastructure, as was underscored by participants in the 'Trends in the Mining Sector' panel. In the current depressed commodity price environment, large investments in infrastructure required to develop major, 'world-class' deposits is difficult to justify, causing many important projects to be delayed or cancelled. At the same time, the World Bank has identified a funding gap of US\$31bn (or 5.1 per cent of GDP) annually to meet the wider-infrastructure needs of sub-Saharan Africa's growing population and economy. In this context, host governments, mining companies, and their legal advisors are actively considering opportunities and challenges associated with the shared-use of mining infrastructure.

## Shared-use infrastructure: what is it and why is it an opportunity?

Many types of infrastructure, including railways, ports, power generation plants, power transmission lines, water treatment facilities and ICT equipment, are amenable to shared use by multiple mining operations and, potentially, other sectors and local communities. Through sharing, the initial investment in infrastructure can be spread across multiple users, thereby lowering costs for each. In addition, where existing public infrastructure is inadequate to meet consumer/industrial demand, mining firms can provide the necessary offtake guarantees

to facilitate the financing of an expansion or upgrade of that infrastructure, or the mining firm can itself invest in the infrastructure to reliably service the mine. In both instances, the incremental cost of building new or expanding existing infrastructure to meet the needs of a new mine is typically much lower than constructing duplicate infrastructure. Indeed, the cost of duplicating some types of infrastructure (eg, railways and ports) can be prohibitive, which usually justifies their regulation as 'natural monopolies'.

While infrastructure sharing is common (and, indeed, the norm) in most OECD countries, this is not the case in sub-Saharan Africa (with the exception of South Africa) and other developing regions. Historically, mining firms have sought to mitigate political, operational and other risks in frontier countries by securing full control over, and exclusive rights to use, critical infrastructure, and have been willing to incur significant additional up-front costs in order to achieve this. The question of whether or not this approach has benefitted host countries (which has been hotly debated in recent years) has been rendered moot by current market conditions. Capital constraints within major mining firms mean they are much less willing or able to pursue this 'enclave' approach to mining. The challenge now facing host governments in sub-Saharan Africa is to develop appropriate legal and regulatory frameworks for infrastructure that address the legitimate concerns of major mining firms, while enabling broad-based economic development through efficient and effective shared-use arrangements.

From the perspective of host governments in sub-Saharan Africa, it is essential that investments in the exploitation of non-renewable minerals lead to diversified and sustainable economic growth. Sharing of essential infrastructure is one of the most viable ways that mining activity can

support the establishment of industries that will survive long after a country's mineral resources are fully exhausted. For example, a railway corridor and port facility can support large-scale and sustainable investments in agriculture and forestry by providing reliable access to foreign markets. A power plant constructed for a mine can be used to supply low-cost electricity to local communities or the nation's grid, improving living standards and supporting the development of SMEs. Similarly, a national or regional power or water utility that is upgraded and its transmission and distribution network extended, to service mining demand will benefit other users with more extensive and reliable supply. The traditional enclave approach to mine development has in the past meant that large investments in infrastructure were uncoordinated with national growth/development plans. Thus, host countries have often missed opportunities for mining-related infrastructure to address gaps in their nation's physical infrastructure. Governments should, therefore, carefully consider at an early stage whether and how mining infrastructure can play a central role in achieving their countries' development goals.

### Why has it not yet taken off?

Sub-Saharan Africa has seen some limited examples of shared-use arrangements in the context of power, water and ICT infrastructure. However, very little progress has been made in shared-use solutions for railway and port facilities, although limited contractual provision for this has been made in some countries including Liberia, Cameroon and Mozambique. Encouragingly, plans for the massive Simandou project in the Republic of Guinea (which remains on the drawing board, and has been repeatedly delayed) contemplate construction of a major new railway line and an associated port near the capital of Conakry for transporting the project's iron ore; these facilities will also be made available for use by other mining and non-mining users, including passengers and agri-businesses.

There are many reasons why shared-use mining infrastructure is yet to fully realised in sub-Saharan Africa. *Mining firms*, which have traditionally used their ownership and/or control of infrastructure to gain competitive advantage, have been slow to embrace the new reality. *Host governments*,

who must play a role in brokering shared infrastructure solutions, often lack the skills needed to integrate proposed mining investments into their infrastructure master plans, or to impose and enforce shared-use infrastructure solutions. *Project lenders*, who are active in sub-Saharan Africa have been slow to adapt their lending practices to accommodate infrastructure sharing, which requires innovative commercial and legal structures and carries a different risk profile than the enclave mining model. Finally, while numerous reports promoting the concept of shared use have been published by *development finance and supra-national institutions*, these institutions could do more to support host governments in implementing solutions on a project-by-project basis and to promote the evolution of accepted shared-use norms (as they have done, for example, in the area of environmental protection).

### What are the current prospects for shared-use infrastructure in sub-Saharan Africa?

As has been well documented, Chinese mining and other firms have been actively pursuing 'resource for infrastructure' (R4I) transactions on the African Continent. This represents a competitive threat to Western mining groups, who find that they are not able simply to 'sit-out' the current commodity price slump. In order to retain their mineral rights and future growth prospects, they must be creative in their approach to essential infrastructure. Mining groups are, therefore, increasingly open to participating in well-structured shared infrastructure solutions. At the same time, host governments in sub-Saharan Africa are under increasing pressure from communities and donors alike to achieve greater economic 'linkages' from mining projects that promote tangible and sustainable development gains. They are also more aware of the risks associated with the enclave model, in which a 'first mover' mining firm effectively acquires unregulated monopoly power over other mineral resources in the same region (leading to undeveloped, stranded deposits) and has little incentive to encourage the development of new industries or economic opportunities. In light of the foregoing, the prospects for shared-use infrastructure solutions in sub-Saharan Africa have never been better.

One possible shared-use model, which is attracting attention and debate, involves the development, financing, construction, and

operation and maintenance of infrastructure by an independent entity that benefits from long-term, 'take-or-pay' contracts conferring rights to use it. Thus, the infrastructure project is made economically viable through agreements with creditworthy, long-term users (eg, mining firms). By ensuring management of the infrastructure by an experienced, independent operator, the legitimate concerns of mining firms concerning the long-term reliability and efficiency of critical facilities can be addressed, and conflict of interest concerns arising in the context of enclave mining can be largely avoided.

### **Remaining challenges**

When implementing a shared-use infrastructure model, including one based on an 'independent' operator, a range of issues related to ownership, financing, construction, operation, maintenance and regulation arise. In the context of sub-Saharan Africa, a number of significant challenges remain to be addressed, including the following:

#### ***Government capacity***

How can the capacity of host governments to plan and prepare for, negotiate or broker, and regulate shared infrastructure solutions be improved, or their institutional weaknesses mitigated?

Can appropriate institutions be identified or created to ensure that access rules and tariffs are fair and equitable, and resolve disputes when they arise?

To the extent passengers and SMEs are permitted to use infrastructure, is the host government able to subsidise tariffs to ensure affordable access?

#### ***Concerns of the first-mover mining project(s)***

How will a first-mover mining project be fairly rewarded for its risk-taking, and can unfair free-riding by its competitors be prevented?

How can any efficiency losses or risks associated with permitting non-mining users access to critical infrastructure be addressed/mitigated?

#### ***Concerns of other users***

If infrastructure is to be operated/controlled by a first mover mining firm, how can conflict of interest concerns be addressed to the satisfaction of other potential users (particularly where local regulatory capacity is perceived to be weak)?

#### ***Timing issues***

As negotiating and implementing shared-use infrastructure arrangements for a mining project is a complex exercise, how can solutions be implemented without unreasonably delaying much-needed mining investment?

### **Conclusion**

Shared use infrastructure presents an opportunity to achieve 'win-win' solutions in which mining projects benefit from lower costs and a greater number of stakeholders are able to benefit from mining investment in the longer term. Share-use solutions are, however, complex and challenging, particularly in the context of sub-Saharan Africa. In the current environment, mining firms and host governments, working together with their legal advisors, have a strong incentive to find an appropriate path forward.

# Comments on the draft mining code of Senegal

Senegal is on the verge of adopting a new mining code to replace the 2003 mining code currently still in force. The draft mining code has been a work in progress since November 2012 following the election of Macky Sall as President of Senegal. The President, who is a geologist engineer by training and has served as Minister of Mining & Geology, had prioritised mining reform in his 2012 election campaign in recognising the importance the mining sector holds for Senegal.

The aim of the reform is to attract more foreign investment in order to drive economic growth in Senegal and increase the contribution of the mining sector to the country's gross domestic product. Mining has been selected as one of the main priority sectors of the Plan for an Emerging Senegal (PSE) designed and is strongly supported by the President.

## Background

Parallel to this decision to revise the 2003 mining code, a presidential decree established the Commission for the Revision of Mining Contracts and the Mining Code (*Commission de revision des contrats miniers et du code minier*) which is exclusively composed of representatives of public institutions (Government, Parliament, Economic and Social Council).

The mandate of the Commission is twofold: to revisit existing mining contracts; and to revise the 2003 mining code in order to bring about important changes including (1) the strengthening of local development-related provisions, (2) the shortening of deadlines on starting work plan implementation, and (3) the increase of transparency obligations on title holders as well as the Senegalese government whereby all payments have to be made public. Senegal is an Extractive Industries Transparency Initiative (EITI) Candidate country.

These changes to the draft mining code were based on recommendations formulated from different sources, including a World Bank funded study on the *Assessment of the*

*Legal and Fiscal Framework of the Senegal Mining Sector*, as well as input from the Commission for the Revision of Mining Contracts and the Mining Code and public consultations held across the country.

The overall objective of the draft mining code is to increase revenues to the government and the local communities from the mining sector, while still keeping the investor friendly incentives offered in the current 2003 legislation.

In terms of scope of application of the draft mining code, once enacted, it will only apply to mining titles issued on or after its date of enactment. Mining firms that acquired their mining titles in Senegal under the current 2003 mining code or earlier regimes will not be bound by its provisions retroactively.

## Main innovations contained in the draft mining code

While the draft mining code does not represent a complete overhaul of the 2003 mining code, it does include a number of important changes, as set out below:

### Future typology of mining titles

The distinction introduced by the 2003 mining code between a *mine permit* and a *mine concession* is considered to be confusing. The draft mining code will introduce distinctions between *small mine permits* and *mining permits*. In particular, a *small mine permit* will be limited to mining projects with a daily treatment capacity of 500 tonnes of minerals and a mining area of 500 hectares, whereas for *mining permits*, there will be no limitation on the scale of operations the title holder is able to conduct.

The new mining code will also allow investors to apply for a *semi-mechanised mining authorisation* for mining operations of a maximum size of 50 hectares that use artisanal methods.

Further, the notion of a mining concession (*concession minière*), has been replaced by that of an exploitation permit (*permit d'exploitation*), which the drafters considered

to be legally more explicit. It is important to emphasise that current mining concessions will continue to be governed by the 2003 mining code until their expiration dates. The term *exploitation permit* will include the detailed rights and obligations, as negotiated by the parties; they will be so used for mining agreements issued after entry into force of the draft mining code. The name change will not therefore result in legal consequences.

**Timeframe for the validity of mining titles**

The draft mining code provides for the granting of small mine permits for an initial term of five years instead of three years under the current legislation. These five years may be renewed for three years at a time without limit to the number of renewals. As to mining permits, the initial term will range between five and 15 years depending on the targeted mineral reserves and the investment required. Mining permits will be renewable as many times as necessary until the end of production. It is noteworthy that under the current legislation a mining concession can be granted for up to 25 years.

Once a mining permit is granted, the investor can negotiate a mining agreement under the condition that the agreement:

- is published on the Ministry of Mining and Trade website after execution;
- does not contradict the provisions of the draft mining law, although it may supplement them; and
- sets out the rights and obligations of the parties including the stability of the legal conditions under which the mining title was granted.

**Foreign ownership of mining titles**

The draft mining code removes the restriction on foreign ownership of mining interests. Foreign investors can now own 100 per cent of the shares of a company holding a mining title, although such a company must be registered in Senegal.

**New changes in fees, royalties and overall fiscal revenue**

These changes relate to fees, royalties and taxes. Under the draft mining code, the entry fees for research permits, semi-mechanised mining authorisations and quarry permits will be increased, but not substantially. The same applies to small mine permit and mine permits.

The draft mining code will introduce an annual surface royalty payable by all title holders, including holders of research permits and quarry permits. The annual surface royalty will be calculated per hectare or square kilometer at a rate of 2500 FCFA per hectare for small mine permits and 250,000 FCFA per hectare for mining permit.

Regarding the fiscal regime, under the draft mining code, mining firms will no longer have to resort to the mining code for information regarding fiscal and custom regimes applicable to their project. Indeed, all tax provisions included in the current legislation, except the *mining tax*, will be transferred to the General Tax Code (*Code Général des Impôts*).

While the *mining tax* has not been transferred to the General Tax Code, its application has, however, been revised to now subject all mining activities to a *trimestrial mining tax* levied on the market value of the commercialised product. The rate of the trimestrial mining tax will be increased based on the type of mineral being mined. Following are some examples:

Iron Ore	- concentrate	3.5%
	- processed	1.5%
Phosphate	- calcium-aluminate	5%
	- chalk phosphate	6.5%
Gold		5%
Other assigned substances		3%

**Tax relief**

Changes have also been made to the various tax benefits contained in the 2003 mining code. For example, mining title holders will now be exempt from all taxes and fees, including value added tax (VAT) and COSEC port charges during the period commencing on the date of entry into force of the mining permit (or small mine permit), and ending on the first date of commercial production (called the *Investment Period*). However, taxes such as (1) the statistical royalty, (2) the community solidarity levy, (3) and the community levy, among others have been retained. In addition, mining title holders will no longer be exempted from the payment of export taxes in relation to products mined within the area of their mining permit. It is worth noting that the above-mentioned provisions will be applicable jointly with any other applicable taxes and tax exemptions contained in the General Tax Code.

### *Introduction of Production Sharing Agreements (PSA)*

Under the draft mining code, the state will be entitled to enter into a PSA with a mining company. Under such agreement, the mining company will be granted the exclusive right to research, develop and exploit a mine in a particular area and recover the costs incurred from the proceeds of the sale of the product. The remaining part of the sale of the production will be split between the state and the mining company. Each PSA will be required to provide the details of the contractual arrangement between the parties. The mining production under the PSA will not be subject to the abovementioned trimestrial mining tax.

### *Contribution to local development*

In order to promote the social and economic development of local communities living in the mining areas, the draft mining code will make it mandatory for mining title holders to contribute to a local fund annually. The amount of the contribution will be specified in each title holder's mining agreement.

### *New compulsory obligations for mining title holders to meet*

Contrary to the 2003 mining code, the draft mining code will require research permit- and small mine permit holders to provide guarantees as security for the cost of rehabilitating the areas under investigation or the mining sites. A joint ministerial Order of the Ministry of Mines & Industry and the Ministry for Environment will provide the details of the guarantee to be posted.

The same obligation would apply to mining permit holders under the draft mining code with the particularity that a trust account with a local bank must be established into which the funds that would be used for the rehabilitation of the mine site are deposited.

In addition to rehabilitation obligations, all mining title holders will specifically be required to: respect, protect and implement human rights in areas affected by mining operations; respect the provisions of the Forestry Code where the mining title has

been granted over a 'classified forest zone'; and respect the principles and obligations under the EITI, such as declaring all payments to the state to the national EITI authorities, including *social development* payments.

### *New penalties for mining title holders*

The draft mining code provides for a great range of penalties and sanctions including, but not limited to: non-payment of taxes; not commencing work programs within the agreed timeframes; irregularities in documentation or failure to provide requested documentation; illegal mining activity and theft of mine substances; illegal storage, transport or sale of mineral substances; fraud; and health and safety violations.

### *New audit and transparency requirements*

In addition to being bound by their EITI commitments, the state and mining companies will be subject to more stringent audit and transparency obligations. For example, the state will have the right to appoint an independent firm to audit the accounts, facilities, infrastructure, systems and procedures of any mining company.

Further, there will no longer be confidentiality over the publication of all mining revenues owed to the state. The state will be compelled to make public all contracts and related financial statements.

### **Conclusion**

In revising its mining legislation, Senegal is following the trend currently observed in West Africa aimed at increasing state revenues to boost their GDP, introducing more stringent social and environmental safeguards and improving the social and economic conditions of local communities residing in the areas of the mining site.

At the same time, the draft mining code seeks to bring about more transparency in mining operations and better governance of the mining sector aimed at attracting more foreign investments in a sector considered as a priority for Senegal's socio-economic development.

Jacqueline  
Musiitwa

Hoja Law Group, New  
York

j.musiitwa@  
hojalawgroup.com

# Laws, labour and power: domestic issues affecting sub- Saharan Africa's mining sector

**T**he mining sector in resource-rich sub-Saharan African countries continues to be a key driver of economic growth and an important source of foreign direct investment. Weak or outdated legal and policy frameworks governing the mining sector, contentious labour matters and poor infrastructure – particularly in relation to power and transport - are some of the major local issues constraining the sector from a national perspective. These local obstacles are compounded by the decline in commodity prices, reduced demand from China and other emerging markets for natural resources and the strengthening of the US dollar that has weakened local currencies.

This article highlights some of the most prominent trends in the mining industry in sub-Saharan Africa.

## Legislative changes

Although resource rich African countries have experienced improved GDP growth in recent years – and especially during the commodity boom of the last decade, the much anticipated benefits from mining in terms of employment, economic linkages, and improved standards of living have not been as forthcoming. Some resource rich African countries have argued that their lack of a modernised legal system, coupled with a lack of government capacity to effectively negotiate contracts and monitor their implementation has led to such countries not fully realising the gains of their resources, or getting the optimal benefit from such non-renewable resources for their people. Others have alleged corruption in the procurement and contracting process has prevented countries from realising the full potential of the exploitation of their mineral resources – which is similarly linked to weak governance. Yet the actual drivers of sub-Saharan African governments to overhaul the laws and policies regulating mining has ultimately come from the increased trend and calls for greater transparency and accountability in the mining sector from local, regional and international

actors alike to ensure that the fiscal and non-fiscal benefits of mining are more effectively harnessed to improve the well-being of all Africans.

## *International and local pressure for greater transparency and accountability*

The need for accountability is at the core of many legislative changes. The demands for accountability come from several sources. One of the largest pressures for accountability is from investors who are demanding greater legal certainty, reasonable taxes and investor friendly benefits. Communities and civil society groups are also increasingly demanding better governance of the sector. This is as a result of expectations for tangible development gains, including job creation, skills transfer, and an overall improvement to the standard of living in affected communities.

Countries also update their laws to bring them in line with international transparency standards. For instance, many countries use the Extractives Industry Transparency Initiative (EITI) standard that is internationally renowned for promoting open and accountable management of natural resources. Additionally, because of pressure from multilateral agencies that play a significant role in the development process. For instance, Burkina Faso overhauled its mining code (and instituted an anti-corruption law) after pressure from the World Bank mandated the changes in exchange for access to debt. Similarly, a number of countries have been agreeing to publicly disclose the contracts of mining deals.

## *Development agendas*

With the turn of the millennium came increased long term government planning, and better yet, a concerted effort and urgency to execute such plans. One of the key buzzwords and guiding forces was the need to achieve 'sustainable and inclusive' development.

As such, countries are increasingly aligning mining policy to national development plans. For instance, 'the Africa Mining Vision (AMV) sets out how mining can be used to drive continental development'. Unlike other initiatives, it is lauded as being a truly African solution to an African problem and is now in the process of being implemented at a country level (the so-called Country Mining Visions). Most recently, in June 2015, Lesotho completed the development of an AMV compliant Minerals and Mining Policy. Now more than before, countries are liaising with one another to exchange best practices and avoid the pitfalls that have been made in the past. That said, only time will tell how effective adoption and execution of these policies will be.

Lastly, with intra-African trade at below 15 per cent and trade with the world at less than five per cent, there has been an increasing realisation on the Continent that greater regional integration is critical. As African countries continue to integrate, there is increasing talk of adopting a regional approach to mining-related issues. For instance, regional economic blocs like the Economic Commission for West Africa States are considering a unified mining code for the region.

### *Local content*

There is also an increasing trend of countries legislating local content laws and policies. These ensure a percentage of service contracts, employment, or goods are sourced locally. Local content laws have positively benefited some countries. For instance, Botswana is leading the way in mandating that the processing of diamonds take place in Botswana so it can realise the full value of the cost of polished diamonds rather than just the unpolished rocks. With increasing investment in local value chains, the industry has the potential to finally deliver more tangible benefits and wider economic benefits.

Indigenisation, on the other hand, has not been considered as favourably as other aspects of such laws. Indigenisation is the process by which foreign owned businesses have to divest a specified amount of their shareholding to local owners. Although many among the investment community have been quick to dub this trend as resource nationalisation, it is not foreseeable that countries would take that extreme of a route. The scope of these so-called indigenisation laws vary based on

the country, mineral resources available and political atmosphere. For instance, one of the more extreme cases is that of Zimbabwe, where the recently-imposed indigenisation law requires 51 per cent of foreign-owned mines operating in the country to be owned by Zimbabweans. The imposition of such a high local ownership requirement can be attributed to increasing frustration at the lack of trickle down effects from Zimbabwe's mining sector, coupled with populist rhetoric from politicians who seek to redress historical wrongs against marginalised groups, in part to detract from failing domestic policies.

Despite the seeming controversy, executed correctly – and in a way that ensures broad based local participation, such laws can ensure local workforces get access to service contracts, jobs and improved skills, local populations get equity in mines and the economic benefits of mining trickles down to all aspects of the economy.

### *Labour*

The mining industry continues to face many challenges with respect to labour. Some of the challenges are low wages that result in strikes, strong unionised labour that is in constant tension with employers, poor worker safety conditions and poor workers' compensation.

In South Africa, where the unions are strong, there have been ongoing tensions between mining companies and unionised workers about benefits. Mining activity has been impacted due to prolonged and sometimes violent strikes. Sadly, if labour disputes are not resolved amicably, the industry will see additional tragic events as was witnessed by the Marikana (Lonmin mine) shooting where 44 people lost their lives and others were injured. In addition to the negative effects of labour relations for the workers and mines, the perception of doing business in such countries is negatively affected.

Lastly, the ebola outbreak in Guinea, Sierra Leone and Liberia, demonstrated that weak health institutions nationally can also affect the mining sector. Although many mines claim to have taken precautions, the mining output during the peak of the disease was severely affected and, in some instances, halted altogether. However, as the disease is eradicated and trade with the affected countries increases, one expect the figures for the industry to return and progressively surpass the pre-ebola outbreak levels.

### Power

There are varying statistics on the availability of power in sub-Saharan Africa. Regardless of the statistics, with less than 40 per cent of the population with access to power, current electricity capacity is insufficient to support both domestic and industrial use. Furthermore, even with additional continent-wide public private partnership initiatives such as Power Africa, the Africa Energy Leaders Group and NEPAD's Africa Power Vision, alternative sources of energy are not being developed fast enough to meet current demand. In 2015 alone, South Africa, the world's largest producer of chrome, manganese and platinum and Zambia, one of the world's top copper producers, have experienced nationwide load shedding. Mining firms have also not been immune to government calls to conserve power. Continued power interruptions negatively affect production – and beneficiation plans can potentially destroy machines and also decrease worker morale. Although the respective governments have implemented both short- and long-term plans to rectify the power situation, there is no doubt that it takes time to remedy power shortages after many

years of underinvestment and planning in the power sectors of these countries. Time, unfortunately that countries might not have as they compete to continue to grow their economies.

### Conclusion

The foregoing issues confronting the mining industry are not new. What is different is that in the context of international pressures for greater transparency and better governance of the extractive sectors, coupled with local pressures to share in the gains from the sector and be less impacted by its negative externalities, African governments are learning from their mishaps and attempting to make positive changes in the industry. The question remains how fast they will be able to address them. Governments' realisation that mining resources, though advantageous to economies are finite, and the industry is volatile, has led to an increased push to diversify their economies by seeking to facilitate economic linkages with the mining sector and local value addition. Those coupled with the general focus on improving human resources, will inch African countries closer to their desired development goals.

**Adriano  
Drummond  
Cançado  
Trindade**

Pinheiro Neto  
Avogados, Brasília  
atrindade@pn.com.br

## Current developments in the reform of the Brazilian mining law

**I**n June 2013, the Federal Government sent a Bill to National Congress to reform the mining sector. The Bill is designed to change the institutional structure and the mining legislation that regulates exploration and mining activities, besides increasing mining royalties.

The Bill was the result of a lengthy drafting process by the Federal Executive – it took over four years to arrive at the final draft. The lack of significant consultation and involvement of mining companies and other stakeholders added criticism to the document once it was disclosed. Several mining companies considered the role of the state under the proposed framework as interventionist. It further raised a number of uncertainties to a business that is already risky.

One of the main issues of concern by the mining sector was the total replacement of the first-come, first-served access rule for a mixed system that would combine bid rounds and public offering, where the government would disclose every application so that interested parties could also claim the same area. In this case, a simplified competitive procedure would be carried out. Even though the first-come, first-served system is not perfect, it is the regime that best fits the dynamics of mineral exploration in areas with little or no geological information. The combined bid rounds and public offering would represent a barrier to obtain mineral rights and would severely affect exploration investment. Perhaps the only positive feature of the Bill was the replacement of the current

two-title system for exploration and mining for a single title for both stages.

From an institutional point of view, the Bill proposes the creation of the National Mineral Policy Council and the replacement of the current Department of Mines (DNPM) for a National Mining Agency. These proposals were welcome by the sector, as long as the Agency is not a change of name of the existing Department, ie, the Agency should have enough resources, regulatory powers, technical excellence and independence.

In addition, the Bill provided for an increase in fees and in the mining royalty (which would be set by the Federal Executive subject to a ceiling in the law), and created other levies. The Bill also described situations in which the government would have wide discretion to cancel mineral rights or impose more obligations on the titleholder.

All these characteristics were not well regarded by the sector and caused an impact on existing and new mining projects. Funding was already difficult to obtain given market conditions (both in Brazil and internationally), and became even more difficult in light of the uncertainties brought by the new mining Bill.

As soon as the mining Bill reached the National Congress, a Special Committee was formed in the House of Representatives for its review. The Committee organised a number of public hearings and meetings in various states of the country in order to involve the public and get a better feeling of the actual concerns of the mining sector, so as to better gauge reactions to the bill. As a result, the Reporting Representative submitted an amending Bill in November 2014.

The amending Bill is more market-friendly and provides a number of changes to

accommodate the concerns of the industry (including the application of the first-come, first-served system for greenfield areas).

It is much more detailed and deals with matters that failed to be addressed in the original draft, such as access to land, rights and obligations of titleholders, transition rules, mechanisms for the encumbrance of mineral rights as security (such as a pledge or fiduciary property), among other matters. On the other hand, the mining royalty is also increased (but rates will be determined by the law as opposed to the Federal Executive determining them) and new levies are created. The institutional reform is also addressed in more detail.

The amending Bill was not voted by the Special Committee in 2014. Given the general elections that took place in October 2014 and the new legislative assembly that took office in February 2015, a new Special Committee had to be set up. The same Reporting Representative was appointed, but now he has the chance to revise his amending Bill, which is still pending. Technically the Special Committee has to approve the amending Bill (or reject it and approve the Federal Executive's Bill, or amend it) before it is voted by the plenary session of the House of Representatives, and then is sent to the Senate. However, given the long term of the Special Committee and its pending final results, the Speaker of the House of Representatives may call the matter to be reviewed and decided directly at the plenary session of the House.

The matter is expected to unfold in the second semester of 2015. And so it should, as the uncertainty regarding the law to be applied in the near future is causing severe damage to the mining sector.

**Robert  
Milbourne**

K&L Gates, Brisbane

Robert.Milbourne@  
klgates.com

# Understanding Mongolia's emerging minerals policy

**M**ongolia's economy is largely dependent on its abundant natural resources that include crucial reserves of approximately 80 minerals. Mongolia's mining industry provides the vast majority of the country's revenue. Oyu Tolgoi, the largest copper and gold mining company in Mongolia, is a joint venture between Turquoise Hill Resources (a majority owned subsidiary of Rio Tinto) and the government of Mongolia and accounts for 95 per cent of the total investment in Mongolia's mining industry, and despite its importance, it has been subject to a series of ongoing disagreements with the government. Indeed, in spite of the importance of mining, Mongolia lacks a comprehensive legal policy and regulatory framework, and has created significant perceived risks to doing business in the country. Over the last several years, foreign investment has decreased and the exchange rate with the US dollar has weakened. Worryingly, since 2012 there has been significant instability with respect to the issuance of exploration licences under the Law on Prohibition of Granting Exploration Licences. By mid-2014, political and economic pressure resulted in a series of changes to the law and policy of mineral investments in the country, including a lifting on the ban of issuing exploration licences. Given the breadth of opportunities and the high priority ongoing reform of the sector, now is a strategic time for potential investors to understand the political and legal environment for mineral investment in the country.

## Policy and legal framework updates in the mining sector in 2014

In January 2014, Mongolia's parliament approved the State Policy with respect to its minerals sector for 2014–2025. That policy was designed to support and encourage private investment in the minerals sector, limit the state's role to regulation and supervision, promote transparent and responsible mining operations, and adopt policies to maintain environmentally friendly and value-added

operations. In 2014, Mongolia adopted Amendments to the Mineral Law 2014, which amended a number of pieces of legislation in order to attract foreign mining investment. Key amendments included reducing business registration to 30 days, launched a one-stop shop for all types of investors, and allowed regional and sector-specific incentives to support economic diversification. Under this new Act, private foreign investment no longer needs to seek approval to invest, because only foreign, state-owned enterprises investing more than 33 per cent of the entity in minerals, communication or financial sectors will be required to obtain approval from the State Agency. In July 2014, the Mongolian Parliament adopted the Law of Mongolia on Amending the Minerals Law. The amendments included expanding certain exploration licence periods from nine to 12 years, increasing the geographical area available for mining and exploration from eight per cent to 20 per cent, and reducing the royalty rate for gold from five per cent to 2.5 per cent until January 2019 and proposed a National Geological Survey and the formation of a Policy Council to oversee legal changes in the mining industry. Those changes were intended to deliver a positive message to the business community, showing that the government of Mongolia was taking progressive measures to revive a weakened economy by increasing its support for the mining industry.

## Challenges in the mining sector

### *Uncertainties in the legal framework*

Although the government of Mongolia is encouraging the development of the mining sector, there are still uncertainties regarding the amendments of 2014. Applications are still assessed on a first-come, first-served basis, despite discussions toward competitive bidding. Moreover, the amendments did not regulate the re-tendering process for the 106 licences that were revoked following a 2013 court decision that found the former head of the Mineral Resource Authority of Mongolia guilty of corruption and abuse of power.

Those 106 licences have begun to be reissued by a competitive tendering process requiring those participating in the tender to deposit 30 per cent of the threshold value.

#### *Lack of infrastructure access and skilled labour*

There is a lack of infrastructure access in Mongolia's mining industry, and therefore since 2011 the World Bank has been carrying out the four components of the Mining Infrastructure Investment Support Projects to facilitate investments to support mining as well as downstream processing activities. There is also a lack of skilled labour due to the failure to train a workforce for a mining-based economy, and that failure is arguably exacerbated by the many mining contracts and mining legislation (eg, the Minerals Law of 2006) that require a certain percentage of the mining workforce to be Mongolian, when local employees are not yet fully prepared for the roles required.

#### *Corruption*

Corruption appears to be a serious and growing problem in Mongolia, mainly due to a lack of sufficient anti-corruption legal and regulatory frameworks. The Mongolian government is attempting to enhance the

country's anti-corruption bodies. The Corruption Perception Index published by Transparency International shows that Mongolia ranked as the 83rd least corrupt among 177 countries. In addition, inefficiency in collecting and distributing mining revenues is one of the more challenging issues in Mongolia. To address these concerns Mongolia has begun the implementation process for the Extractive Industries Transparency Initiative (EITI). However, no EITI legislation has been passed.

#### **Conclusion**

Since the transformation to a market economy, the government of Mongolia has been reviewing its policies in the mining industry and adopting amendments as well as making other legal changes and reforms. These endeavours include the recently ratified State Policy on minerals and other fundamental legislation, which stepped in the right direction. However, to further encourage foreign investment and development in the mining sector, the Mongolian government must rectify uncertainties in administering and implementing the new acts, the lack of mining infrastructure and skilled labour, and aspects related to corruption and the implementation of EITI.

## Newly revised RMMLF Form 5 LLC Mining Joint Venture Agreement

**Jim Cress**

Bryan Cave, Denver  
jim.cress@bryancave.com

In 2009, the Rocky Mountain Mineral Law Foundation (RMMLF) created a committee to update the limited liability company version of its venerable 'Form 5' mining joint venture agreement. The RMMLF has recently published the resulting 'Form 5 LLC', a Delaware limited liability company-based exploration, development and mining venture agreement intended for mining projects located in the United States. Form 5 LLC incorporates provisions from the previous RMMLF venture forms, including 'Form 5' (1984), 'Form 5A' (1996), and 'Form 5A LLC' (1998), and new provisions that take advantage of amendments to the

Delaware Limited Liability Company Act (the 'DLLCA') and LLC case law developments since the last revision to the form in 1998.

The original RMMLF Form 5 was a model agreement for a common law, contractual mining joint venture that arose from a common 'earn in' transaction framework in the mining industry, in which the owner of a mineral property grants an undivided interest in the property to a second party in exchange for funding a specified amount of exploration, development and mining costs. Form 5A retained the basic deal structure of Form 5 (co-ownership of the mineral property under a contractual operating agreement

that did not create a separate entity), while expanding and revising provisions regarding environmental liabilities and compliance, pre-feasibility and feasibility studies, development programs and budgets, preemptive rights, dilution, and duties of the participants and the manager. Form 5A LLC converted Form 5A to a Delaware limited liability company to take advantage of the LLC's limited liability, partnership tax treatment, and other benefits.

### **Advantages of the LLC Entity Form for US mining ventures**

DLLCA § 18-1101(b) provides that the Act is intended to 'give maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements.' This flexibility permits the parties to a U.S. mining joint venture to customise their agreement with the expectation that courts will enforce their deal as written.

In an unincorporated joint venture such as Form 5 and Form 5A, the mining properties are held by the participants as 'tenants-in-common,' making each co-owner potentially jointly and severally liable for environmental, operating and liabilities arising out of the properties and operations conducted by the parties. In contrast, the debts, obligations and liabilities of a Delaware LLC are solely its obligations, and no member or manager is obligated personally for LLC liabilities.

Under the DLLCA, a party ceases to be a member of an LLC if the member files for bankruptcy or reorganisation or suffers a similar insolvency event. The bankrupt or insolvent member loses its management and voting rights, retaining only its economic rights to profits and losses and distributions of the LLC. In contrast to an unincorporated joint venture, creditors of the individual members of an LLC and of the LLC itself have no right to exercise legal or equitable remedies against the mining properties and other assets of the LLC and no right to enforce contribution obligations of the members to the LLC unless the LLC agreement expressly provides.

Previous versions of Form 5 included disclaimers of fiduciary duties between the participants and limited the duty of care of the joint venture's operator or manager to the contractual standard of gross negligence and willful misconduct. However, applicable law, including partnership law, could impose a fiduciary standard despite the agreement of the parties to a more flexible standard of

conduct. The DLLCA now permits the parties to restrict or eliminate all implied fiduciary duties except the implied contractual covenant of 'good faith and fair dealing,' and to eliminate liability for breach of duty other than bad faith violations of the duty of good faith.

### **The Form 5 LLC forms and changes from previous forms**

The new Form 5 LLC is actually a suite of four forms and a set of alternative provisions and commentary (despite an original aspiration to produce only a simpler, 'modest Form 5' limited liability company agreement). The suite includes two LLC agreements, one that contains earn-in provisions and one for transactions without (or occurring after) an earn-in. Form 5 LLC includes a new form of exploration and development agreement, to be used if the parties do not want to enter into a full blown LLC agreement prior to completion of earn-in or if the property-owning party is reluctant to transfer title to the mining properties prior to earn-in. The parties can attach the LLC form to the exploration and development agreement or agree to the material terms of an LLC agreement to be negotiated upon completion of earn-in. Form 5 LLC also contains a form of contribution agreement relating to the formation of the LLC and transfer of the mining properties, including representations, warranties and indemnities relating to the properties and any prior operations. Form 5 LLC includes a number of sample alternative provisions commonly found in mining joint ventures which can be added to the LLC agreement, including alternative earn-in provisions, transfer of interest provisions and provisions regarding financing and mine development. Some of the provisions added to Form 5A have been moved to the alternative provisions. The forms are accompanied by commentary explaining issues related to the forms and drafting choices made by the committee.

New provisions in Form 5 LLC include detailed indemnification provisions that take advantage of DLLCA indemnification protections for managers and members. The LLC agreement also contains a provision for 'major decisions' requiring approval of the holders of a specified percentage of the membership interests, in lieu of Form 5A's detailed procedures for pre-feasibility and feasibility study approval and decisions to



## NEWLY REVISED RMMLF FORM 5 LLC MINING JOINT VENTURE AGREEMENT

finance and construct a mine. The new forms also implement the DLLCA's insolvency and bankruptcy protections and limitation of fiduciary duties described above. The Form 5 LLC tax provisions (and related commentary) address issues such as taking production in kind, allocation of earn-in deductions to the earning party, tax distributions and other matters, in light of recent US tax rules that may impact the tax treatment of mining joint ventures.

Form 5 LLC, like the previous RMMLF forms, is intended only as a guide or checklist for practitioners to adapt to their particular transaction. RMMLF hopes that the new forms will provide a useful starting point for tailoring mining joint ventures. RMMLF will be offering a half-day workshop introduction to the new forms taught by the drafting committee, in Denver, Colorado on October 9, 2015, and in Toronto on March 5, 2016 (the day before the Prospectors and Developers Association of Canada Convention).