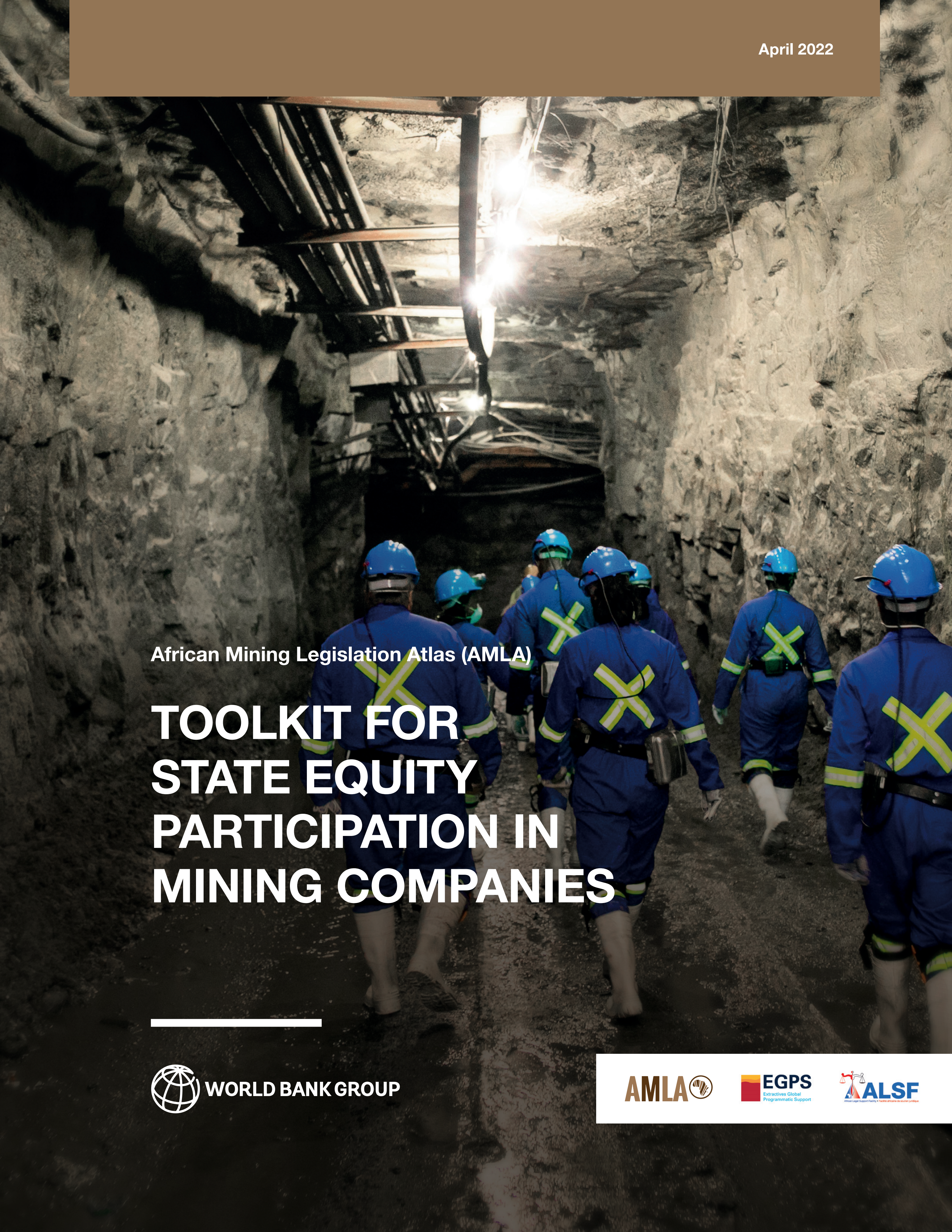

April 2022

African Mining Legislation Atlas (AMLA)

TOOLKIT FOR STATE EQUITY PARTICIPATION IN MINING COMPANIES

WORLD BANK GROUP

AMLA

EGPS
Extractives Global Programmatic Support

ALSF

April 2022

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African Mining Legislation Atlas (AMLA)

Foreword

Nearly a decade ago, the World Bank together with the African Legal Support Facility and the Africa Union launched the African Mining Legislation Atlas (AMLA). The core mission of the project was to curate critical legislative knowledge that will contribute to strengthening the ability of African countries to maximize the benefits of mineral development. This mission continues to be vital. Africa cannot attract quality investments for the mining sector without the right legal framework and adequate, stable governance, with a shared value ethos that is transparent and climate responsive.

AMLA has developed useful knowledge instruments designed to bridge information gaps and build the capacity of African governments and mining professionals on critical legislative and policy issues. This includes the flagship **AMLA Platform** and the **AMLA Guiding Template**. The AMLA Platform is a free online one-stop interactive database with mining legislation of all the African countries. The Guiding Template is a mining legislation drafting and reference tool, which provides a good practical foundation on mining legislation supported by sample drafting language.

The Guiding Template covers several topics including the various elements of fiscal regimes. It provides examples of how fiscal terms can be incorporated into mining legislation to enable governments to implement and administer a standardized and balanced fiscal regime across the mining sector. Amongst the various fiscal terms covered, the Guiding Template provides options for enacting legislative provisions to implement state equity participation requirements as part of a fiscal regime. State equity participation in mining companies is one way through which States can boost fiscal revenue from mining operations (through receipt of dividends and capital gains). State equity participation also has non-fiscal benefits which include skills and technology transfer, improved oversight over companies and enhanced decision-making role over strategic resources. While state equity participation may yield these benefits for African countries, if the relevant policies and corporate structures are not well designed, these benefits may not be realized. Where state equity participation is not properly balanced with other fiscal tools, it may have the reverse effect and make countries unattractive for investment.

Building on the Guiding Template, this toolkit addresses some of the challenges faced by African countries in designing and implementing policy and legislation to implement state equity participation. It is intended to provide practical tools and contractual approaches that may be used to ensure that countries derive sustainable benefits from mining operations in which the state is involved as shareholders.

Consistent with the partnership approach that runs through the AMLA project, the Toolkit has been developed in collaboration with the Extractives Global Programmatic Support (EGPS) Multi-Donor Trust Fund, the African Legal Support Facility (ALSF), the International Senior Lawyers Project (ISLP) and ENS Africa under the joint management oversight of the World Bank Group's Legal Vice Presidency Unit and the Extractives Global Practice.

We would like to sincerely thank the authors and peer reviewers (who contributed valuable time and expertise, on a pro bono basis) for their commitment to the development of this Toolkit. The process of creating this toolkit benefited enormously from their experience, dedication, tenacity, and healthy debate.

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Toolkit for State Equity Participation

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Words and Expressions
Glossary

In this Toolkit, the following words and expressions shall have the following meanings:

ALSF: the African Legal Support Facility, an international organization dedicated to providing legal advice and technical assistance to African countries and developing innovative tools for capacity building and knowledge management.

AMLA: the African Mining Legislative Atlas, a legislation-gathering organization; a dissemination and capacity-building initiative of the WBG and the ALSF.

AMV: the Africa Mining Vision, a policy framework created by the African Union in 2009 to ensure that Africa uses its mineral resources strategically for broad-based, inclusive development.

Bilateral Investment Treaty (BIT): An agreement made between two countries that contains reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territory.

Board of Directors" (or "Board"): The governing body of an incorporated company. Its members (the directors) are normally elected by the shareholders of the company (generally at an annual general meeting). Subject to certain matters reserved by law for shareholders, the Board has the ultimate decision-making authority

Carried Interest: an equity interest granted to the State in the mining project company, where such ownership interest is paid for from the future dividends or profit distributions that would have been distributed to that ownership interest. The amount due accrues interest. In effect (but not in form), this type of equity is akin to a loan extended by the project company to pay the State's equity purchase and ongoing participation costs.

Double Taxation Treaty: an agreement (usually bilateral) between countries which is intended to prevent taxpayers from being taxed on the same amount of profit or gains in each country. A Double Taxation Treaty often includes reducing the rate of Withholding Taxes that would otherwise be due in respect of payments made by a person in one of the countries to a person resident in the other country, so long as the requirements of the Double Taxation Treaty are met.

Drag-Along: allows a majority shareholder to require that a minority shareholder participate in a sale to a third party. The idea is that a majority shareholder may not be able to recognize the full value of its holdings unless it can sell the entire company to a third party by dragging along minority shareholders. Drag-Along rights generally provide that the minority shareholder receive the same deal terms as the majority shareholder.

Equity: Shares in a mining company.

ESG: Environmental, social, and governance (ESG) considerations that are non-financial in nature and guide company decision-making.

Fiscal Regime: The set of policy tools that determine how the revenues from mining projects are shared between the State and other mining project participants.

Free Carried Interest (FCI)/Free Equity: the State receives an equity interest in the mining project company at no cost to itself. Such interest does not oblige the State to participate in the paying of any costs associated with the mining project, but it does entitle the state to a share of distributed dividends.

Fully paid: Paid for at value, with no further money due from the State.

GST: A goods and services tax, a consumption tax applies to the sale of goods or services, and often treated as synonymous with a value added tax.

Guiding Template: The Guiding Template is AMLA's flagship knowledge product which outlines a menu of legislative solutions to assist countries prepare or revise their mining laws. It can be found on the AMLA website at https://a-mla.org/en/guidingtemplate

Hybrid Interest: A State's equity interest in a company that is made up of a compulsory percentage by law, and an optional additional percentage.

Mine: When used as a noun, refers to a mine located in the mining area; when used as a verb, means any operation or activity with the purpose of developing and producing any mineral from the earth, from the sea, and/or mine tailings. "Mining" shall have a corresponding meaning.

Net Profit Interest: A share of the "net profits" of the production from a mining lease.

Nonrenewable Mineral Resource: Mineral resources that cannot be readily replaced by natural means at a pace quickly enough to keep up with consumption.

OECD: the Organization for Economic Co-operation and Development.

Officer: A person authorized by the Board of Directors to manage the business and operations of a mining company.

Preemption Rights or Pre-emptive Rights: The right of the State to acquire assets or equity before the mining company tries to sell it to a third party unless such rights are specifically not applied.

Resource Rent Tax: The tax designed to capture part of the extra profits generated by a mining project company.

Right of First Option (ROFO): The right of the State to bid on or make an offer to purchase assets before the owner tries to sell it to a third party; when a party that owns an item of property or a right agrees with the state or another counterparty that it will not sell the property or right without first giving the counterparty an opportunity to submit the first offer to purchase the property or right. Right of First Offer is generally a moderate form of counterparty right and is distinguished from the stronger Right of First Refusal.

Right of First Refusal (ROFR): The contractual right of the State to enter into a transaction for the purchase of equity in the mining company in response to an offer to purchase or intent to issue additional equity to a third party or to existing shareholders of the company.

Royalties: A payment on the production or sale of mineral production, either in the form of a set unit-based rate, or as a percentage of sales revenues..

SOE: state-owned enterprises; a company that is wholly or partially owned by the State

State Equity Participation: The State's ownership of shares in a mining company or project.

Surface Rentals: Payment for surface use related to mining.

Tag-along: provisions are commonly used to protect minority shareholders, by giving them the right to require a shareholder selling its shares to a third party to also acquire the minority shareholders' shares—the minority shareholders are able to "tag along" with the selling shareholder.

Toolkit: Refers to this toolkit, which was developed by the WBG and the ALSF to assist African States with regard to the tools required to implement mining laws and achieve policy objectives pertaining to state equity participation.

VAT: A value-added tax imposed whenever value is added to a good or service, and often treated as synonymous with a goods and services tax.

WBG: The World Bank Group; WBG is made up of the following entities: the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for the Settlement of Investment Disputes.

Windfall Tax: A tax levied by States on mining companies when economic conditions allow the mining venture to experience above-average profits.

Introduction

"The principal philosophical question is whether African mineral-producing states should have a policy of compulsory state equity participation in all (or at least all significant) mining projects."

African Mining Legislation Atlas (AMLA)

1. Introduction

The African Mining Legislative Atlas (AMLA) provides free online access to the mining laws of 53 African countries. Developed by the World Bank in 2014, this legislative database can be accessed at www.a-mla.org. In addition to compiling mining laws and regulations, AMLA provides users with a Guiding Template to be used in the process of developing mining laws. The Guiding Template, developed in 2017, sets out the key elements of a mining law, and provides examples of representative provisions from various African mining laws.[1] The Guiding Template addresses the following: (i) General Topics; (ii) Mineral Rights; (iii) Fiscal Terms; (iv) Environment; and (v) Local Development, Labor, Health, and Safety.

One of the key elements in the discussion of fiscal terms is state equity participation. According to the Guiding Template, "State equity participation refers to provisions that mandate or allow the State to hold a percentage of equity or ownership in corporate entities engaged in mining activities."[2] The World Bank Group (WBG) and the African Legal Support Facility (ALSF) have developed this toolkit to provide additional guidance concerning the practical implementation of the Guiding Template's provisions on state equity participation. The toolkit takes Part C of the Guiding Template as its starting point, and expands and amplifies the framework in order to assist States in forming, managing, and operating state-owned enterprises in a pragmatic and beneficial manner.

1 See https://a-mla.org/en/guidingtemplate.

2 Section 36.1 of the Guiding Template (State Equity Participation).

More specifically this toolkit will, among other things, provide guidance to lawmakers on the questions concerning state equity participation that are posed in the Guiding Template. For example when investors secure the right to develop a mining project in a particular jurisdiction, those investors will typically form a project company under the laws of the relevant State, and the ***project company*** will hold the title to the concession, lease, or agreement. When the State takes an equity interest in a mining project, it usually does so by acquiring an equity interest in the project company. The State may have the right to take the equity interest under applicable legislation, or it may need to negotiate this as part of the granting of the mining title to the company. In some circumstances, the State will form a company that is entirely owned by the State, and will use this company to hold the equity interest in the subsidiary; this is known as a state-owned enterprise (SOE). The participation by the State as an equity holder in a mining company raises a variety of policy and governance questions which are explored in this Toolkit.

Historically, mineral-rich African countries have experienced exploitation of their natural resources by foreign entities, ending up with little or no benefit for the countries themselves. As part of the decolonization of Africa, newly-formed African states could exercise sovereignty over their mineral resources. State equity participation is one of the major issues for contemporary mineral regulation. In the African context, where the State's benefits from mining remain contested even today, there are important policy and legislative considerations that must be addressed.

In some African countries, it is the policy of the State to participate in the equity of all mining projects. In other countries the State does not participate in mining projects at all. Accordingly, the principal philosophical question is whether African mineral-producing states should have a policy of compulsory state equity participation in all (or at least all significant) mining projects. In order to address this question, and the various practical and commercial issues that flow from it, the following questions should be borne in mind when considering whether, and if so how, to implement a State's equity participation in a mining project:

i. Should a State participate, and if so, at what stage should it become a participant in the equity of the project company?

ii. How and when should the State acquire equity participation in the project company?

iii. Should the State's participation be "free equity," "carried equity," or "fully paid"? Should there be a prescribed minimum that the State acquires free of charge by law?

iv. Which entity will hold and manage the State's equity participation in the project company?

v. What kind of corporate governance structure(s) should be adopted for the State's participation?

vi. How should the State's equity be represented on the company's board of directors? Will the State's equity include any preferred distribution of dividends, or other economic or voting rights?

The Basis of a Mining Fiscal Regime

“Mineral resources are finite. When developing them, the State should look for a method that balances the current, and potentially urgent need for revenue generation against the needs of future generations.”

African Mining Legislation Atlas (AMLA)

2. The Basis of a Mining Fiscal Regime

2.1 The Economics of a Mining Investment

In most African countries, minerals are owned by the State, and the State has an obligation to manage their mineral resources to benefit its citizens. For countries with developing economies, there is a substantial advantage in developing these resources as a way to grow and diversify the country's economy.[3]

States should aim to balance the needs and expectations of the State and its citizens on the one hand, and investors and financiers on the other hand in order to: (i) attract investment in the minerals sector; and (ii) ensure a fair return to the State and its citizens (this is referred to as the "Fiscal Regime Balance"). If the State places too little value on its minerals, it will attract investors but will not secure a financial benefit for its citizens. Similarly, if it imposes too high a cost on mineral development it will render such development not economically attractive to investors. The fiscal regime balance is not uniform among all States. Each State should calibrate its own fiscal regime balance to reflect its policy priorities.

3 Gary McMahon and Susana Moreira. 2014. *"The Contribution of the Mining Sector to Socioeconomic and Human Development."* World Bank Extractive Industries for Development Series #30.

State Policy Considerations in a Fiscal Regime

A fiscal regime has several elements. These include, but are not limited to, royalties, bonus payments, annual rentals, income taxes, value-added or goods and services taxes, and import and export duties. The twin goals of the fiscal regime balance are at odds with each other. If the State's share of revenue is too high, it will drive away foreign investment. But if it is too low, it will reduce the economic return to the country and its citizens. Both extreme cases have played out in the past, as described in **Case Study #1**. However, there is in fact a large zone between these two extremes where the State and its citizens get a fair return, and investment remains attractive to outside capital. Every State should carefully calibrate each element of its fiscal regime so that it can pursue the fiscal regime balance that is optimal for its policy goals.

Case Study #1

Calibrating an Optimal Fiscal Regime Balance

In 2000, in examining all the elements of Burkina Faso's fiscal regime, it was seen that the effective tax rate was 106 percent. In other words, for every dollar earned from a gold mining company in the country, the company would pay $1.06 in taxes.[4] This very high level of taxation would be an obvious disincentive to mining. Burkina Faso has since modified its fiscal regime, and is now seen as a country with a favorable environment for mining.[5] On the other hand, in South Africa in 2000, the total tax burden on a gold mining project was only 32.6 percent. This rate did not secure enough of the fiscal benefit of mining projects for the benefit of the country and its citizens. South Africa has also modified its fiscal regime in the intervening years. For example, South Africa added a royalty on produced minerals in 2010.[6]

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4 James M. Otto. 2000. *Mining Taxation in Developing Countries* (2000)

5 See the EITI report on Burkina Faso for a detailed review of its current fiscal regime. Initiative pour la Transparence dans les Industries Extractives au Burkina Faso (RAPPORT ITIE 2019).

6 Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008, South African Government, available at https://www.gov.za/documents/mineral-and-petroleum-resources-royalty-act.

Mineral resources are finite. When developing them, ***the State should look for a method that balances the current, and potentially urgent need for revenue generation against the needs of future generations.*** As a result, when assessing a fiscal regime applicable to the development of mineral resources, including state equity participation in mining ventures, ***the State should ensure that the revenue generated is used in a manner that promotes sustainable economic development.*** In the context of state equity ownership, the State will want to manage its equity with both near-term and long-term considerations in mind. Those considerations are likely to include both economic and policy elements.

Toolbox Item 1

When considering the role of a state-owned enterprise (SOE) in a mining project, consider how the SOE may advance or impair the twin goals of: (i) attracting investment in the minerals sector; and (ii) ensuring a fair return to the State and its citizens.

2.2 Key Elements of a Fiscal Regime

2.2.1 Royalties

In the context of non renewable mineral resources, Royalties are a charge that is payable by a mining titleholder to the State in exchange for the exploitation of such mineral resources. The Guiding Template, in discussing the role of royalties in a fiscal regime, notes that "their purpose is to compensate the owner of the mineral resource for the loss of a non-renewable asset regardless of the profitability of the project. Therefore, it is critical to price royalties at the right level."[7] Royalties are sometimes set at a fixed rate (for example, cents per ton) for industrial or common minerals. More commonly, the royalty rate is an ad valorem rate, which is a percentage of the value of the minerals produced, usually tied to the sales or market price.[8] The royalty may be a gross royalty based on the total sales price or the market price; or it may be a net royalty, which allows the deduction of some of the costs and expenses of production. The Guiding Template provides a useful overview of the principles of developing and administering royalties.

7 Section 36.2 of the Guiding Template (Royalties).

8 Id.

2.2.2 Bonus Payments

Bonuses provide large upfront payments, whether or not the project proves profitable.[9] As stated in the Guiding Template, "Bonuses are lump sum payments made to the state at certain milestones in the project's life cycle; for example, at signing of the mining agreement (signature bonus) or at attaining certain production levels (production bonuses)." These bonuses may either be imposed by legislation, or negotiated between the State and investors. While imposing a substantial upfront bonus payment does assure some fiscal return to the State, it may impair the economics of a project if it is imposed inappropriately. States must consider the suitability of a bonus bid on a case-by-case basis.

Toolbox Item 2

State equity participation in the mining company, especially if it includes a carried or free interest, may affect the economic viability of a project. In deciding whether or not to introduce bonus bids, a State must carefully consider its fiscal regime balance in order to ensure both the economic viability of a project and the sustainability of the benefits a State stands to gain from mining projects.

2.2.3 Surface Rentals

Surface Rental payments usually represent a payment for surface use related to mining.[10] The annual rental payment can be either a fixed or indexed payment per year. More often, the granting of mining titles may include a rental payment per hectare or other land unit. Annual rentals are usually fairly limited, and are designed to reflect a market-based return on land use.

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9 Section 36.8 of the Guiding Template (Rents).

10 Section 36.7 of the Guiding Template (Bonuses).

2.2.4 Corporate Income Tax

Corporate income tax, or profit tax, is central to every mining fiscal regime, and is a critical element of the fiscal regime balance. It is the part of the overall tax charge that is not deferred, and largely relates to the profits of the year, although some of the charge(s) may arise from adjustments to previous years.

Corporate income tax is assessed as a percentage of a business's profits, with profits generally calculated as gross revenues minus allowable deductions for expenses, and minus any unrecovered losses from previous periods that may be carried forward.[11] The basic formula for determining corporate income or profit tax is:

$$\left(\text{Project Revenues} - \text{Allowable Deductions}\right) \times \left(\text{Applicable Corporate Income Tax Rate}\right) = \left(\text{Corporate Income} \,/\, \text{Profit Tax}\right)$$

Typically, sovereign states, and state-owned enterprises (SOEs) (if applicable), are not subject to taxation. By taking an equity interest in a mining enterprise, however, the SOE indirectly becomes a taxpayer, and the value of its equity interest and its rights to distributions will be affected by the taxes that are payable by the project company. Therefore, as an equity holder, the State will need to understand the tax regime applicable to the project company in order to assess whether its having an equity interest will yield the best results. However, in some joint venture structures, for example in Botswanan and Namibian diamond mining enterprises, the law may very well prescribe that only the privately held portion of the equity is taxable (that is, the portion of equity that is privately held).

i. Deductions

In calculating the income that is chargeable to tax in any given tax year, the project company may deduct certain costs and expenses allowed by the tax code of the applicable jurisdiction. These costs and expenses vary from jurisdiction to jurisdiction, based on the deductions allowed and how they are calculated and monitored. As noted in Section 36.3(f) of the Guiding Template, the legislation and rules addressing deductions should include provisions for: (i) determining the size of these deductions; (ii) determining the timing of the allowable deductions; and (iii) incentivizing desired behavior by companies.[12] Deductions can include costs and expenses like royalties, exploration costs, financing, and the costs of depreciation/amortization. Deduction regimes can also be used to incentivize or reward social programs. For example, the Ghanaian tax code permits deductions for charitable contributions made in Ghana and approved by the government for educational schemes, community development projects, social welfare, medical services, or for the provision of other social services. In South Africa, companies can deduct community investments, but these deductions are limited to five percent (5%) of the taxable income.

11 Section 36.3(a) of the Guiding Template (Taxes - Income).

12 Section 36.3(f) of the Guiding Template (Taxes - Deductions).

ii. Tax Losses

The income tax laws of most jurisdictions recognize that a typical project company venture will have more expenditures than income in its initial years of activity, particularly during the exploration and development phases. Accordingly, loss carry-forward rules allow unused losses from a previous year to be deducted from profits in later years to reduce taxable income. Most tax codes limit the carry- forward period for unused losses, after which they may not be used to offset gains. Some common periods are, for example, ten (10) years (Sierra Leone); seven (7) years (Liberia); and five (5) years (Ghana)—although some jurisdictions allow loss carry-forwards to last for longer periods, or even indefinitely. Some jurisdictions, such as Sierra Leone, prohibit loss carry-forwards from being used to fully eliminate the income taxes otherwise payable in a particular year.

iii. Ring-Fencing

Ring-fencing prevents the losses incurred with respect to one mine or contract area from being offset against profits generated from another mine or contract area belonging to the same mining enterprise. In other words, a mining enterprise with multiple projects should not deduct loss items that arise in the exploration and development phase of one project against income generated from a more profitable, or a different project where all of the loss carry-forwards have been used, and income tax is now due to be paid.[13] Ring-fencing therefore protects the net taxable base.

iv. Special Mining Tax

Although international best practices suggest that the rate of corporate income tax applied to a mining project should not differ from the rate applied to other commercial enterprises, some jurisdictions do impose special rules for mining projects on the theory that minerals are a finite resource and should be taxed to reflect the limited time available to recover value for the mineral estate; and/or that because mining is capital intensive, it requires special tax rules.

v. Windfall Profits Taxes / Resource Rent Taxes

Whereas income taxes are assessed as a percentage of the net profits of a project after deducting allowable expenses, Resource Rent Taxes or Windfall Profits Taxes are designed to capture “rents” (i.e. the net cash flow) on mining resources as profitability increases. Such taxes vary greatly from one country to another, and often pose significant practical difficulties in design and administration. A typical resource

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13 Section 36.3(a) of the Guiding Template (Taxes - Income).

rent tax has three basic components: (i) a threshold rate of return for the project company above which the tax applies; (ii) the specified tax rate above the threshold; and (iii) a tax base, which is typically the cash flow from a particular project.[14] For example, the Democratic Republic of Congo imposes a fifty percent (50%) tax on “super profits,” which is defined as the income realized when commodity prices rise twenty-five percent (25%) above those provided in a project’s feasibility study. And Sierra Leone on the other hand, introduced a mineral Resource Rent Tax calculated as (40 – income tax rate) / (100 – income tax rate), where “income tax rate” is the corporate income tax rate on mining companies.

vi. Withholding Taxes

Tax codes require the project company to withhold the taxes payable by the company to nonresident third parties; the company is required to withhold and remit to the host State the actual or projected tax liabilities for payments received.[15] Withholding taxes ensure that taxes are paid. The applicable rates of withholding are typically provided for in the tax code. As Section 36.3(b) of the Guiding Template notes, like income tax, withholding taxes should generally be provided for in the tax law and should be standard across all sectors. Withholding taxes are not only important for ensuring that a State captures some of the benefits that nonresident companies have generated from the country’s resources, but also for reducing the incentive for resident companies to shift profits out of the country through, for instance, excessively high interest payments, or service fees.

However, the implementation of the withholding of taxes is never straightforward as many foreign investors and service providers tend to be organized in jurisdictions that have a Double Taxation Treaty or a BIT with the host State and, therefore, benefit from a significantly reduced or zero (0) Withholding Tax rate.

vii. Capital Gains Taxes

An increasing number of African States have, in recent years, developed statutory and contractual approaches to taxing profits or gains realized on the direct or indirect sale or transfer of mining titles, or interests in mining titles. For mining companies, the capital gains from these projects can be substantial. Capital gains tax may be payable on a direct sale of the project company that holds the mining title, or on an indirect sale of upstream entities (that is, an indirect change of control). If the State is an equity holder, it may be affected by capital gains taxes, and may be required to pay this tax when it receives a capital gain on the sale of its equity. The payment of capital gains taxes could affect the ability of the company to pay dividends.

14 Natural Resources Governance Inst., et al. *“Mining Contracts: How to Read and Understand Them.”* Revenue Watch June 2014.

15 This typically applies to remitted dividends, remitted loan interest, and management and other service fees.

Toolbox Item 3

As an equity participant in a project company, a state-owned enterprise will be subject to indirect taxation. The State should aim for a tax regime that strikes a proper balance between the State's interests and taxpayer interests.

viii. Value-Added and Goods and Services Taxes

Many countries have a value-added tax (VAT), or a goods and services tax (GST) that is of general applicability to companies doing business in that country. Investors will look at the effect of the VAT or GST on mine economics when assessing whether to invest in a country. A reasonable VAT or GST is usually not an issue, but if these taxes are especially high, or if there are provisions that increase the costs for mining services or equipment, then they can have an effect on investment decisions.

ix. Import and Export Duties

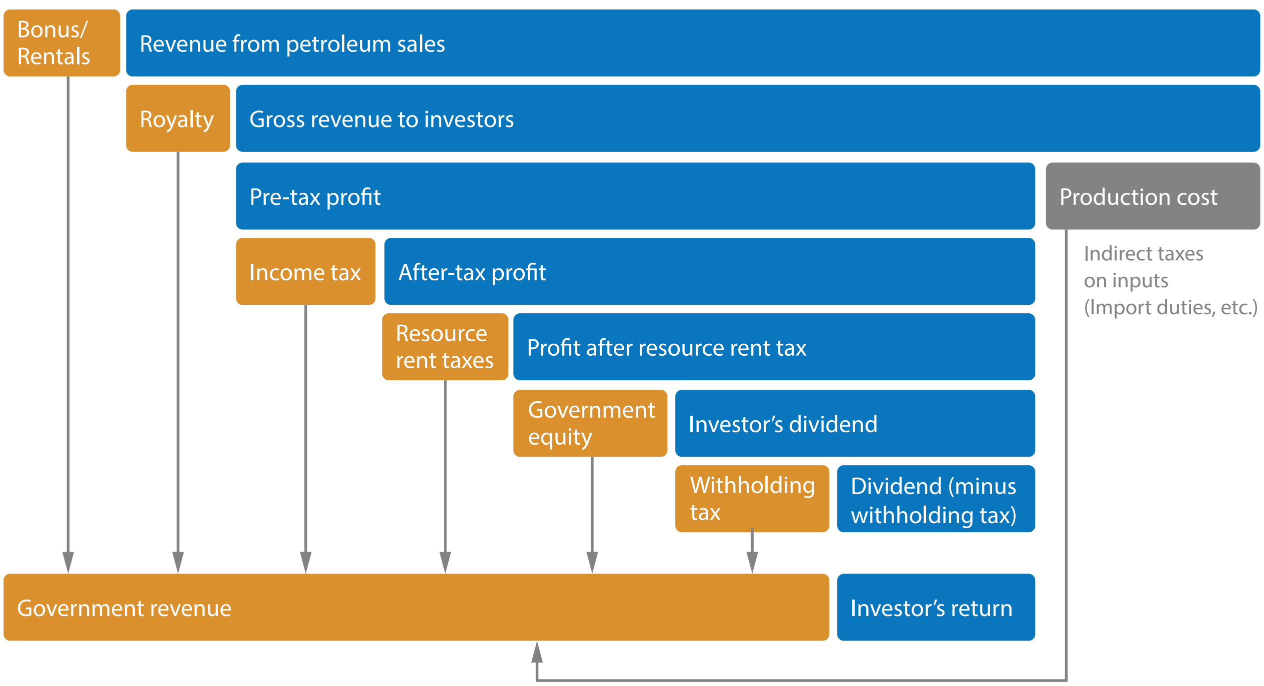
Since mining projects require machinery, import duties on equipment will affect mine economics. As with the corporate income tax, mining investors regularly seek some relief from import duties—for example, reduced rates for mining equipment, or a holiday period for import duties. Since most mining companies sell their products globally, excessive export duties can also threaten the viability of mining projects.

International best practice is for mining companies to be subject to a State's general taxation system, while incorporating a few mining-specific features--such as the resource rent element--that address some of the sector's special characteristics. Rather than rely on special arrangements and bilaterally negotiated agreements to secure investment, tax neutrality is often achieved by implementing tax laws that apply to all mining titleholders without relying on special arrangements, or BITs.

2.3 Balancing the Elements, and Administrating a Fiscal Regime

Figure 1 provides a useful representation of how the burdens and costs of a fiscal regime affect mine economics. In particular, although each of the orange rectangles accrue to the benefit of the State, the timing of such items will impact the investor. For example, a bonus bid payment is payable upfront, irrespective of the project's success, while dividends and the withholding of taxes are likely to apply only in the event of profitability, and later in the life of the mine.

Figure 1. Burdens and Costs of Mine Economics Over Time



Source: Natural Resource Governance Institute. "Fiscal Regime Design: What Revenues the Government Will be Entitled to Collect." (NRGI Reader, March 2015).[16]

16 Natural Resource Governance Institute. "Fiscal Regime Design: What Revenues the Government Will be Entitled to Collect." (NRGI Reader, March 2015) available at https://resourcegovernance.org/sites/default/files/documents/nrgi_primer_fiscal-regime-design.pdf

Case Study #2

Government of Tanzania vs. Acacia Mining

It is important for a fiscal regime to provide certainty regarding revenue collection. Both the State and investors benefit from certainty in this process. A lengthy dispute between the government of Tanzania and Acacia Mining is an example in which changes to the fundamentals of revenue collection impaired future development.[17] In 2017, as part of a series of reforms to the mining industry, the government of Tanzania served Acacia Mining with a bill for $40 billion in unpaid taxes, and an additional $150 billion in interest and penalties. While the government defended its decision, market analysts found the demand excessive. In 2019, Tanzania and Acacia settled the dispute for a $300 million payment. That payment was part of a broader settlement that included (i) the lifting of a concentrate export ban; (ii) the sharing of future economic benefits from mines on a 50-50 basis; and (iii) the acquisition by Tanzania of an interest in the Acacia mining project. Barrick Gold and the government of Tanzania formed an SOE, Twiga Minerals, to hold these interests. But the size of the claim affected the credibility of the government's claims, and adversely affected Tanzania's negotiating position: in 2020, the Fraser Institute listed Tanzania as one of the least attractive jurisdictions for mining, a substantial drop from its ranking in 2016.

2.4 Payments to Social Development Funds

A number of countries on the African continent (including Côte d'Ivoire, Mali, and Senegal) have adopted legislation mandating local social development funds.

17 Reuters, *Barrick Gold reaches deal with Tanzania over Acacia Mining* (October 20, 2019) available at https://www.reuters.com/article/us-barrick-gold-tanzania-idUSKBN1WZ0DL

As the contributions to social development funds have become increasingly codified, they can now be considered as forming part of the fiscal package. Mining companies recognize the importance of earning the trust and support of local communities. Paying taxes, however, is not always sufficient to ensure that local communities benefit from those taxes. Taxes paid to the State may not reach the communities that host the mining projects. Consequently, mining companies usually allocate a budget to carry out social development programs such as building roads, schools, hospitals, and the like at the project site in order to maintain good relations with the local communities. Even though contribution to these funds may very well be a legal requirement in some jurisdictions, it must not be used as a substitute for the State's own obligations to the relevant mine communities. In addition to the fiscal benefits of social development funds, if representatives of state-owned enterprises have a role as a director or officer of the mining titleholder, they can provide guidance to the company concerning effective ways to deploy the funds. (For more on this topic, refer to the AMLA Local Development and Community Engagement Toolkit.)

Toolbox Item 4

Requiring contributions to a social development fund is a way to increase the benefits to the communities that are connected to and impacted by mining projects, and the State as a whole.

State Equity as Part of the Fiscal Package

"States should be clear as to the objectives they intend to accomplish through their equity participation, and should be realistic regarding the potential revenue they can expect to receive."

African Mining Legislation Atlas (AMLA)

3. State Equity as Part of the Fiscal Package

State equity participation is an element of the overall fiscal regime that is applicable to mining projects. It provides an opportunity for States to receive revenues from mining projects through dividends, and more specifically, to participate in the potential upside of the project. The most likely opportunity for capturing this value is upon the sale of the assets of the project company (excluding the mining title), or the sale of the project company itself. These events allow for distribution of the proceeds of the sale to equity holders. The State should attempt to protect its interest in these proceeds by securing a right to participate in any disposition of the company, its equity, or the mining title. This protection often takes the form of a "tag-along" right, which ensures that the equity holders can participate in the proceeds of a divestiture. In other words, this protects the State from the majority of shares being sold without its ability to also sell its interest when that would be the most financially beneficial decision.

In most circumstances, the dividends paid to the State's equity interest during the life of mine operations are relatively minor. The revenues from the elements of a fiscal regime as described above are likely to be considerably more valuable than dividends from equity. As an equity owner, the State may receive (and be enticed by the possibility of) dividend payments. However, the amount and frequency of actual dividend payments often fail to meet expectations and may not be paid at all due to transfer pricing, tax treatment, and/or high operating costs, among other things. For example, Gécamines (the state-owned mining company of the Democratic Republic of Congo) stated that as of the end of 2017 only one mining company had paid dividends between 2001-2017 even though 3.5 million tons of copper and 320,000 tons of cobalt had been produced. According to Gécamines, the construction, operating, and financing costs always exceeded those that had been presented in feasibility studies. These additional costs, plus a tax exemption, meant that its mining projects were not profitable. Profits are a precondition to dividends and income tax; so, as a result neither income tax nor dividends were paid.

Table 3.1. Fiscal Contributions of the Mining and Quarrying Sector

Type of Fiscal Payment (GHC)	2018	2019	% Change
Employee Income Tax (Pay-As-You-Earn)	**457,156,177**	**736,256,367**	**61.05%**
Corporate Income Tax	**1,199,597,591**	**2,269,768,470**	**89.21%**
Royalty	**705,262,160**	**1,006,668,500**	**42.74%**
Other (Self-Employed)	**178,498**	**674,312**	**277.80%**
Dividend	**112,070,960**	**38,520,630**	**-65.63%**
Total	**2,474,265,386**	**4,051,888,279**	**63.76%**

Source: Ghana Revenue Authority (2021), Ministry of Finance (2021), and Non-Tax Policy Unit (2021).

State equity participation is not always seen as a key element of a country's fiscal regime. In many instances, it is an enhancement to the more fundamental elements of the regime. Table 1 sets out the revenues generated by the mining sector in Ghana, based on its 2019 EITI Report.[18] The dividends derived from state equity participation appear to be a very small part of the fiscal package (about 1 percent), but the payment of dividends is not the only benefit of state equity ownership. If a mining venture sells a substantial portion of its assets, the proceeds of that sale may be distributed to equity holders. The divestiture of mining assets can create a substantial economic benefit.

18 Extractive Industries Transparency Initiative Progress Report (2019) available at https://eiti.org/documents/eiti-progress-report-2019.

Toolbox Item 5

States should be clear as to the objectives they intend to accomplish through their equity participation, and should be realistic regarding the potential revenue they can expect to receive. There are various options for States: they should choose the one that is most compatible with their objectives. There are three options:

1. State Equity Mandated by Law

When the State mandates compulsory fixed equity participation in all mining projects through legislation, the equity may be nontransferable in any event. The fiscal receipts available to a State under this option are dividends and distributions in the event of liquidation. The State should review applicable legislation and guidance to determine whether its free equity interest can be transferred.

2. Commercial Participation

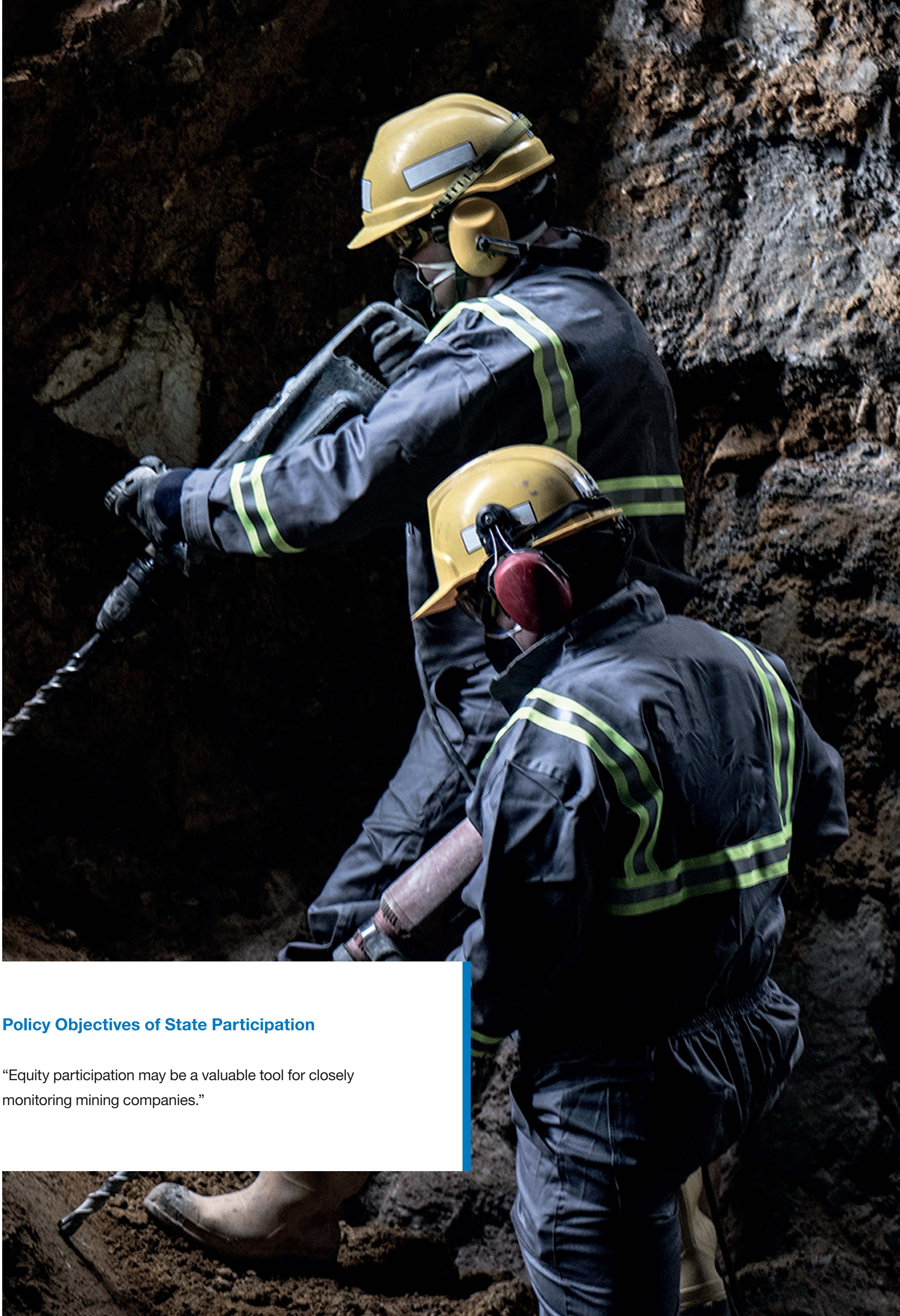
States may also choose to participate in mining projects on a strictly commercial basis, with no defined equity percentage in law. That is, through legislation, the State may reserve the option to participate in a mining project in a manner that is commercially and socioeconomically reasonable in the circumstances.

Under this option, the State may import contractual clauses to ensure that it has the most profitable investment possible. It may opt to transfer its equity in the project or mining titleholder at any time, and/or may choose to negotiate "tag-along" rights in the event of a majority sale of equity by the private majority shareholders in the project company or a public listing.

3. Hybrid State Equity Participation

Under this option, States may mandate a compulsory percentage of equity participation in mining projects, while also allowing them to negotiate for additional equity, depending on what is commercially acceptable for them. The mandated percentage shall remain nontransferable, and the only fiscal benefits shall be dividends.

However, negotiated extra equity may be treated similarly to the commercial participation option, and the State may import contractual clauses such as "tag-along" clauses, if there is a sale of majority shares, or a public listing.



Policy Objectives of State Participation

"Equity participation may be a valuable tool for closely monitoring mining companies."

African Mining Legislation Atlas (AMLA)

4. Policy Objectives of State Participation

4.1 Background

The previous section discusses various aspects of the fiscal regime, including state equity participation, which is typically applicable to the mining sectors of most African countries. As discussed in Section 3, the financial benefits of equity ownership may be relatively modest compared to other fiscal opportunities for the State. Nevertheless, state equity participation is different from the other elements of the fiscal package, because it is often employed by States to achieve several noneconomic objectives. This section of the toolkit explores these policy objectives.

It should be noted that while state equity participation tends to be the norm in Africa, none of the jurisdictions that are considered to be the most attractive mining jurisdictions include state equity participation as part of their fiscal regime or mining legislation[19]. Therefore the question arises as to why many African countries do provide for state equity participation.

Certain countries in Africa have not adopted mandatory state equity participation, but do require that mining companies, through indigenization, empowerment, or similar legislation, have a minimal level of equity ownership

19 Fraser Institute Annual Survey of Mining Companies (2021) available at https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2021.pdf

held by their nationals. (This is the norm in countries such as Namibia, South Africa, and Zimbabwe.) While an argument could be made that some of the policy objectives of the equity participation of nationals are similar to those typically associated with state equity participation, the equity participation of nationals (or historically disenfranchised groups) has a somewhat different policy, and is outside the scope of this toolkit.

Toolbox Item 6

In addition to equity ownership by the State, or as an alternative to it, consider legislation or policies that promote equity ownership by citizens or businesses within the country, especially for historically disenfranchised groups.

Case Study #3

Democratic Republic of Congo: Mining Code

The Democratic Republic of Congo (DRC) adopted a new mining code in 2018.[20] The DRC receives a free carried 10-percent share in the project company, with an additional 5 percent increase if the license is renewed.[21] In addition, 10 percent of the share capital of the company must be held by Congolese citizens. These changes are inspired in part by an attempt to promote ownership by the citizens of the country as a way to reduce ongoing tensions between mining companies and artisanal miners.[22]

20 See generally Aimery de Schoutheete et al. *The Mining Law Review: Democratic Republic of the Congo* (November 1, 2021). available at https://thelawreviews.co.uk/title/the-mining-law-review/democratic-republic-of-the-congo-mining-law

21 D.L.A. Piper. “Emerging Mining Trends in Resource Nationalization in Southern Africa” August 11, 2020. (https://www.dlapiper.com/sv/global/insights/publications/2020/08/africa-connected-issue-4/2emerging-mining-trends-in-resource-nationalization-in-southern-africa/)

22 International Crisis Group. *“Mineral Concessions: Avoiding Conflict in DR Congo’s Mining Heartland.”* (June 2020) available at https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/290-mineral-concessions-avoiding-conflict-dr-congos-mining-heartland

Toolbox Item 7

Although state equity participation is included in the legislation of most African countries, it is not essential in order for the country to be a successful mining jurisdiction. States should consider both fiscal and policy objectives when determining whether to require or promote state equity ownership.

4.2 Political Considerations & Sense of Ownership

It could be posited that, at its core, state equity participation in mining projects is a manifestation of a form of sovereignty over natural resources. All but two African states were once colonies of European states. Therefore, there may be a lingering mistrust vis-à-vis foreign mining companies, as well as a reluctance by policy makers to be perceived as "giving away" the national mineral resources to foreign companies. It may be important for the government to show that the country, as a sovereign state, maintains ownership over its resources. This has become more pertinent with the rise of social media, increased scrutiny from civil societies and nongovernmental organizations (NGOs), and an unrealistic expectation by the public regarding the revenues generated by the State from mining operations, and the payments made to the State from resource development.

4.3 Improved Oversight

From the perspective of the State, equity participation may be a valuable tool for closely monitoring mining companies. In this regard, it should be noted that the economies of several African jurisdictions are not as deep and diverse as the economies of more successful mining jurisdictions; and they tend to depend heavily on revenues generated from their extractive industries. Additionally, most of these African jurisdictions, which do mandate state equity participation, do not typically have a fiscal administration that is robust enough to enforce payment of taxes or monitor practices such as transfer pricing.

There may be an added incentive for these countries to keep a close eye on the mineral sector and the companies operating within them through both equity and board participation, and more particularly through information rights.

Toolbox Item 8

It is important to develop administrative expertise within the State in order to ensure effective oversight and management of the State's equity interest.

4.4 Information Rights

As a shareholder in the project company, the State will usually be granted board representation in the company. This typically enables the State to have access to information that it otherwise might not have had. In such a case, the board member(s) representing the State are in a better position to monitor the development and operations of the project(s). Again, if the State believes that in its role as regulator it will not necessarily have access to all of the relevant information pertaining to the mining project and the project company, it may want to rely on board representation to ensure that it keeps abreast of all pertinent developments relating to the mining companies.

4.5 Transfer of Knowledge

Another reason cited in favor of state equity participation is the transfer of knowledge. It is important to note that the transfer of knowledge is often symbiotic in nature. While knowledge may be transferred from board members appointed by the project company to board members appointed by the State, it is also possible for state-appointed representatives to transfer knowledge to the representatives appointed by the project company. In addition, technical personnel from the State may be able to participate in a technical advisory committee. For this transfer of knowledge to be effective, the State would have to designate appropriate persons to the boards of mining companies, including personnel with technical expertise; and mining companies should be willing to invest in such persons to ensure that they have the competencies that will enable them to participate knowledgeably in board discussions when necessary.

4.6 Other Noneconomic Objectives

The issues that are typically negotiated in shareholders' agreements are those that pertain to the management, financing, and dividend policies of the company. These may include the composition of the board; the holding of meetings and decision-making processes, including approval thresholds for certain key decisions (for example, indebtedness, sales contracts, contracts with affiliated companies, and investment decisions exceeding a designated limit); restrictions on share transfers (including preemption rights, tag-along and drag-along rights, rights of first refusal (ROFRs) and rights of first option (ROFOs)); and the process for the payment of dividends. The primary pathway to addressing noneconomic policy objectives is either through mining legislation, or mining agreements between the State and the project company. As with securing fiscal returns, state equity ownership may assist in the process of promoting the noneconomic objectives of the State.

Toolbox Item 9

While state participation may not necessarily be the means through which the State achieves its noneconomic objectives, it may be helpful in achieving those objectives. The State must be realistic about its rights and duties as a shareholder, and should review the protections for and duties of minority shareholders in the country of incorporation, and develop a strategy for both protecting its minority interest, and using its rights as a shareholder.

Forms of State Participation

"The State must clarify its objectives and expectations concerning its equity participation prior to entering into a shareholders' agreement, and must clearly identify the appropriate agency of the government that will represent its interest as a shareholder in the company."

African Mining Legislation Atlas (AMLA)

5. Forms of State Participation

This section of the toolkit looks at the form and manner of state equity participation.

5.1 Structuring State Participation

From a legislator's perspective, state equity participation should be considered in the context of the fiscal regime balance. Additionally, the level of equity participation may depend on the State's willingness to acquire equity interests at fair market value, to contribute to the development expenditures of mining projects, and to share in the risk of the project.

The level of state participation is usually established in mining legislation.[23] It is increasingly common for the legislation to require a minimum non dilutable "free" carried interest, as well as the ability to acquire additional equity, with a maximum percentage cap in the project company at fair market value, which, is seldom exercised. The flexibility afforded by the legislation of these countries (with both a mandatory and an optional component to equity participation) appears to be a reasonable approach. This approach provides the benefits of a "free" carried interest, while also allowing greater equity ownership based on the financial investment of the State. It might be difficult to justify a "free" carried interest at this higher level.

23 See Appendix C.

Nevertheless, there may be cases in which advanced-stage exploration or development-stage mineral projects are either held by the State or have reverted to the State, where the State will require a higher level of equity participation (if the project has been derisked at this point from a geological perspective). There may also be cases where the mining project is held by a state-owned enterprise (SOE) that is looking for a joint venture partner to advance a particular project. In such cases, the level of participation of the SOE is likely to be dictated by business imperatives on a negotiated basis with the project company.

Additionally, unless equity participation is through a free carried interest, States may have to pay the acquisition costs, and may also have to contribute to the development costs of the project. They may not have the financial resources allocated, or the will, to pay for additional or initial equity. Indeed the option to acquire additional participation in mining companies is seldom exercised, due to the State's limited financial resources, or its unwillingness to allocate scarce resources to the acquisition of additional equity.

Toolbox Item 10

When determining the level of state participation, a State must consider the goals of economic return and corporate governance. Many statutes that create a State's right to equity set the equity amount at a relatively low level – for example, at around 10 percent. This level, especially if it is carried or free, provides the State with economic participation in the mining venture. At that level, the State may have to negotiate for a role as a director or officer. A higher level of equity participation will justify greater control of company decision making by the SOE. It is difficult, however, to justify a higher equity interest when that interest is carried or free.

5.2 Types of State Equity Participation

5.2.1 Carried Interest

A shareholder's payment obligation for mine development and other expenses may be "carried" by other shareholders. A State's equity interest in a project company is often a "carried" interest. The "carried" shareholder is not required to contribute funds to the company: the other shareholders pay those costs on behalf of the carried shareholder. The paying shareholders then recover those costs from future revenues of the mining project, usually with some interest or premium added to represent the risk taken for initially funding the project. The paying shareholders do carry substantial risk: if the project is not successful, they may never recover their costs.

While the carried shareholder has the advantage of a low-risk investment in the mining project, being carried is not without its disadvantages. The shareholders' agreement or other corporate management agreements may give the carried shareholder less power in relation to management decisions or project development. Given that the carrying party is taking all the risk of mine development, that party may insist on the right to decide how investment in the mining project will proceed. Additionally, with the obligation to repay the carried costs, the flow of revenue to the carried party will be delayed even beyond the initial generation of revenue from the project.

5.2.2 Free Carried Interest

In some African countries, the host country is granted a "free carried interest" in a mining venture.[24] The use of the term "carried" is a bit of a misnomer, because in most instances the interest is not cost- bearing, and is not subject to recoupment of costs from future revenues. Sometimes this notion is not completely clear, which can be problematic over the longer term. Free carried interest is usually low, and there is usually the right to purchase additional equity. In some legislation, the initial free carried interest cannot be diluted. Governance issues are usually uncertain as well. The laws creating the right to a free carried interest may not grant the State a seat on the board of the project company; if not, achieving such representation would require negotiation between the State and the company.

5.2.3 Fully Paid Equity

When a State chooses to acquire its equity position through the use of its own financial resources, its interest is "paid up." This means that the value of its equity shares is purchased without the assistance of any other shareholder. The State enjoys the full benefits and risks of equity, which includes market ups and downs, as well as pro rata control.

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24 See generally Daye Kaba, 2017. *"Free Carried Interests in Francophone Africa Mining Legislation: Is There Such a Thing as a Free Lunch?"* available at www.lexology.com. In 2017, Tanzania also passed legislation creating a free carried interest in mining ventures. See http://kgpartners.co.tz/free-carried-interest-shares-in-tanzania-mining-legislation.

5.3 Determining the Level of State Participation

The level of state participation is often established in mining legislation. In some African countries, the legislation provides for nondilutable "free carried interest," as well as the ability to acquire additional "fully paid equity" (typically of up to 30 percent) in the project company at fair market value. The option to acquire this additional equity interest is seldom exercised.

Where a country's laws require state equity participation in every mining project, there are several factors to consider: (i) the stage in the project (i.e. production or exploration) at which equity participation is required; (ii) the mechanism by which the State will acquire its equity interest in the company that has the mining license; (iii) which of the three forms of equity ownership described in Section 5.2 the State will use and--if the State has an option for additional equity participation on a paid basis--the pricing formula or considerations for such additional shares; (iv) governance issues such as board representation, voting and/or veto rights, and antidilution rights; and (v) the State entity or agency that will be responsible for administering the State's equity participation in the company.[25]

Toolbox Item 11

In many cases, applicable legislation will specify the nature and percentage of the State's equity interest in the project company, and whether that interest is a free or carried interest. If the State has some flexibility, however, it should assess whether to pay for its interest, or whether it should request a free or carried interest. If the State pays for its interest, it may receive better returns. (Note that the notion of a "free" interest is legally untenable under most laws. The legislation should provide that the State will be granted equity participation in consideration of the wealth created and the impoverishment of the subsoil.)

State equity participation may present some disadvantages. For one thing, the state's "shareholders," its citizenry, are likely to have different expectations than the shareholders of international firms. There are also budgetary considerations. For example, if the State has fully paid for its equity interest, it incurs speculative exploration and development costs long before the project has proved viable and profitable. In this scenario,

25 Section 36.1 of Guiding Template (State Equity Participation).

the State, as an equity owner of a private firm, may be taking a concentrated risk in the subsidiary of an international firm whose holdings are limited to the mining project. The State may not be able to demonstrate or persuade stakeholders that this equity interest was the best use of State funds. Although this concern is mitigated somewhat if the State does not bear costs until the production phase, the justification of using any funds at all may still be difficult to justify. Also, even where equity ownership is "free," there could be capital costs to owners (including the State).[26] However, these financial considerations may be offset by technology or knowledge transfers, or other policy objectives.

Toolbox Item 12

Many mining laws include a requirement that the State or a state-owned enterprise (SOE) be granted a free interest, or a free carried interest, in the project company.

Advantages

The advantage of having a free interest is that the State is not required to fund the cost of mine development. The project company is the investor in the mining project and will pay those costs on behalf of the State. As a result, the State bears less risk if the venture fails.

Disadvantages

The disadvantage is that the State or SOE is required to repay those costs out of the profit or revenue of the mining venture, typically with some rate of return to the mining investors. As a result, the economic return from the mining venture to the State will be delayed. Given the long-term horizon for generating revenue for most mine ventures, this delay could be material. Similarly, as a carried interest, it will reduce the dividends payable to the state-owned company or state-owned interest. If the State pays for its equity in the mining venture, those payments are at risk if the venture fails. However, if it is successful, then the state-owned interest will receive a return on that investment sooner. In addition, by paying for its equity interest, the State can benefit from higher returns in other fiscal terms of the regime, including royalties. Also, as a paid equity holder the State will have more influence on the decisions of the company.

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26 Section 36.1 of Guiding Template (State Equity Participation).

5.4 Vehicle of State Participation

The law often specifies the vehicle to be used for state participation. The State may participate through a state-owned mining company, a mining ministry, or through other state institutions such as state parastatals, fully-owned public enterprises, or national development corporations whose role is to conduct business with the private sector.

5.4.1 Unincorporated Joint Venture

States may also decide to enter into contractual agreements with mining companies to form a joint venture for specific mining projects without forming a separate legal entity. The Foundation for Natural Resources and Energy Law, formerly known as Rocky Mountain Mineral Law Foundation has developed a model joint venture agreement called "Form 5" that sets out the key provisions of a mining joint venture.[27] While this form of ownership and operation is common in some parts of the world, many African countries do not allow mining titles to be held through unincorporated joint ventures. An unincorporated joint venture would often designate one party as the manager of the venture, and indicate how liability will be shared between the parties.

Toolbox Item 13

The tool that should be used to memorialize this type of arrangement is a joint venture agreement.

5.4.2 Incorporated Joint Venture

While the joint venture remains a viable approach to project development, most joint ventures are now conducted under a jointly owned company (an unincorporated joint venture or a company joint venture).[28] Indeed, the Foundation for Natural Resources and Energy Law has published a new version of "Form 5" for use in the creation of a limited liability company for mining ventures.[29] The primary concern with an unincorporated joint venture is that in most jurisdictions the two contracting parties have unlimited joint liability for the risks

27 https://www.fnrel.org/publications/forms-and-agreements/form-5a

28 See Jeff Faillers, *Common Deal Structures Used in the Mining Industry, Young Natural Resources Lawyers and Landmen Institute,* Foundation for Natural Resources and Energy Law(2020).

29 Supra Note 27.

associated with the mining venture.[30] They tend to be treated like a general partnership. Joint ventures can also be complicated to form and administer and may be tax-inefficient. These issues may be of less concern to an SOE than to a State. An SOE may be able to avoid or minimize tax liabilities and, as discussed in Section 6.10, may be able to invoke sovereign immunity as a defense against some legal liabilities. Nonetheless, the trend is toward forming an incorporated joint venture entity rather than using an unincorporated joint venture, either at the beginning of a joint relationship, or along the way as the project develops.

Incorporated joint venture governance is functionally equivalent whether the agreement is a shareholders' agreement or joint venture agreement. Each type of agreement addresses the relevant business and commercial issues, and provides the rights and obligations of the State and the other equity partners or venturers. Major terms include the formation of the joint venture; the scope of activities; the duration and terms of the agreement; the ownership interests; the management structure; and the manager/operator duties and responsibilities.

Toolbox Item 14

The tool that should be used to memorialize this type of joint venture is typically a shareholders' agreement.

When the State decides to participate in the equity of the project company, it will become a shareholder in the company, along with the promoters and other investors. To define the relationship and obligations of the shareholders, and to identify the key aspects of the operation of the company, the shareholders (including the State) may enter into a shareholders' agreement. A shareholders' agreement often covers matters on which the companies' articles are silent, and when signed by all the shareholders, has the force of a constitutional document of the company, with the effect that in the event of a conflict between the shareholders' agreement and the project company's articles of association, the shareholders' agreement will prevail. The shareholders' agreement typically provides that in the event of a transfer of shares, the new shareholder shall accede to the agreement.

The terms typically include the management and operation of the company, additional financing obligations, board representation and voting rights, profit sharing, transfer of shareholding, dispute resolution mechanisms, and the protection of minority shareholders. It is important to ensure that the terms of a shareholders' agreement are fair, and balanced in relation to all the shareholders;

30 Peter Machin, *Structuring the Investment for Mineral Development Designing the Investment Vehicle: Mining, Rocky Mountain Mineral Law Special Institute,* International Resources Law: a Blueprint for Mineral Development (1991)

otherwise a minority shareholder (which the State is, typically, in these companies) may be subject to onerous and exploitative terms.

The State must clarify its objectives and expectations concerning its equity participation prior to entering into a shareholders' agreement, and must clearly identify the appropriate agency of the government that will represent its interest as a shareholder in the company; since once the shareholders' agreement is signed, the parties are bound by its terms.

5.4.3 State-Owned Enterprise/Entity (SOE)

The mining legislation should contemplate establishing a corporate entity distinct from other state ministries, departments, or agencies as the entity through which the State holds its equity. The goal is for this entity to have a clear commercial objective, and to implement clear corporate governance principles and disciplines.[31] The law establishing the SOE may cross-reference the provisions of the State's corporate laws, and incorporate relevant protections such as minority shareholder protections, and the protections, roles, and obligations of directors. The law establishing Codelco in Chile provides an example of such cross-referencing.[32]

African countries that have established state-owned mining companies include: the Democratic Republic of Congo, Morocco, Tanzania, and Zimbabwe. Uganda's draft Mining and Minerals Bill 2021 also provides for a state-owned mining company. Botswana and Zambia are examples of countries in which partially state-owned mining companies have been successful. Afghanistan, Chile, Mongolia, and the Philippines are examples of other countries with state-owned mining companies.[33]

Ideally, the law establishing the State's right to equity participation should clearly identify and define the specific functions and mandates of the SOE. The law should describe the SOE's economic and noneconomic objectives, and distinguish between the responsibilities of the SOE and other State institutions like the ministry, regulators, tax authorities, or the geological data institution. A clear definition of responsibilities in the law prevents duplication, and promotes an effective and accountable SOE.[34] If the legislation does not include

31 Peter D. Cameron and Michael C. Stanley. 2017. *Oil, Gas, and Mining : A Sourcebook for Understanding the Extractive Industries.* Washington, DC: World Bank. p.125.

32 Article 2 of Law No. 19,137.

33 Natural Resource Governance Institute, State Owned Companies. available at https://resourcegovernance.org/report/state-owned-companies.

this information, the State should provide guidance on these issues to the SOE or to the vehicle managing the equity interest. The SOE should not have a regulatory role.

An SOE requires adequate finances in order to effectively execute its role. Either the law or the State should identify the sources of the funds for the SOE and create a funding mechanism. Options include retained earnings from public revenue collected by the SOE; budgetary allocation in the national budget; foreign equity partners and/or international mining companies; market capital by listing shares on public stock exchanges; the sale of bonds on international financial markets; or any combination of these.[35] There is no standard funding mechanism; thus each African nation should consider which method(s) is best for them to use.

Parliaments or other national lawmaking bodies should legislate the specific roles and reporting requirements of the SOE. Through their oversight role, lawmakers and regulators then enforce the rules necessary to ensure good corporate governance in the national mining company. This is an effective mechanism for ensuring that the state-owned company is held accountable.

A State may establish multiple SOEs, corresponding to different minerals or different sectors. For example, it may want one SOE to participate in mining ventures for specific strategic minerals, and a different SOE to participate in the downstream industry of refining. Tanzania has two SOEs that hold the State's interest in mining licenses, each established by different laws: the State Mining Corporation (STAMICO) under the Ministry of Minerals, which was reestablished in 2015,[36] and the National Development Corporation (NDC), a parastatal with the mandate to stimulate industrialization in partnership with the private sector.[37]

5.4.4 Direct State Participation

Under this vehicle of state participation, the State, through a government ministry or other agency, acquires equity in the mining titleholder. The consequence of this is that the name of the ministry or other government agency appears in the shareholders' register. This form of State equity participation is common in jurisdictions that do not have a national mining company, or other state-owned investment vehicle.

34 Natural Resource Governance Institute. 2015. *State Participation in Oil, Gas and Mining* available at https://resourcegovernance.org/analysis-tools/publications/state-participation-oil-gas-and-mining

35 David Manley and Rob Pitman. 2017. *Natural Resource Charter Benchmarking Framework.* p.74.

36 https://www.stamico.co.tz/pages/history

37 https://ndc.go.tz/establishment

Key Considerations in State Participation

"The State must clarify its objectives and expectations concerning its equity participation prior to entering into a shareholders' agreement, and must clearly identify the appropriate agency of the government that will represent its interest as a shareholder in the company."

African Mining Legislation Atlas (AMLA)

6. Key Considerations in State Participation

6.1 Political Considerations and Improved Oversight

Noneconomic policy objectives, including job creation, local beneficiation, and capacity building can justify state equity participation in mining companies. Two questions arise regarding these policy objectives: (i) To what degree should the State leverage its equity participation to seek noneconomic objectives from the project company? and (ii) As a minority shareholder, can the State actually impose noneconomic objectives on the mining companies?

Regarding the first question, which is normative in scope, the analysis to be conducted by the State considers the State both as a shareholder and as a member of the board of directors. The State could adopt an activist stance and request that certain noneconomic objectives be adopted or considered by the company through shareholder proposals, provided that such mechanisms exist under applicable law. It is, however, more likely to exert influence as an equity holder, in its role on the board. The State could use its board position to encourage the board to consider, if not adopt, certain noneconomic policy objectives such as local content, job creation, and so on. And it could raise these issues during shareholder and board meetings, particularly in the context of the growing importance of environmental and social governance (ESG).

ESG refers to criteria used to evaluate companies based on certain nonfinancial factors that investors, companies, and other stakeholders apply as part of their evaluation process to identify material risks and growth opportunities, and to assess the future financial performance of companies. ESG factors are now part of the investment decision-making process, along with traditional financial metrics. Although there may be some overlap between the State's policy objectives and ESG criteria, ESG standards are investor-driven and often emanate from multilateral institutions in concert with commercial firms; they are not per se compatible with the State's national interest. Whether or not the State pursues ESG objectives, it is reasonable for it to use its board seat to pursue its strategic policy objectives.

Toolbox Item 15

Mining companies must consider environmental and social governance (ESG) criteria and targets in their projects and corporate actions. These commitments affect the State as equity holder and board member. The State must incorporate ESG principles into its decision-making processes as well as its governing legislation.

Returning to the question of whether the State has, in fact, enough power as a minority shareholder to impose certain noneconomic objectives upon the project company, the answer is likely no. Mining companies are usually reluctant to cede any operational power to the State, particularly where the State has free carried-interest equity participation.

Typically, the shareholders' agreement addresses the management, financing, and dividend policies of the company. These agreements may include board composition; the holding of meetings and decision-making processes (including approval thresholds for certain key decisions, such as indebtedness, sales contracts, contracts with affiliated companies, and investment decisions exceeding a designated limit); restrictions on share transfers (including preemption rights, tag-along and drag-along rights, ROFRs, and ROFOs); and the process for the payment of dividends. Such agreements do not typically focus on noneconomic objectives, and are an unlikely avenue for pursuing such goals. Noneconomic policy objectives are better addressed either in the mining legislation, and/or in the mining agreement between the State and the company.

6.2 Economic Objectives

6.2.1 Participation in the Economic Rent of the Project

State equity participation has two primary economic components: (i) capital appreciation of shares; and (ii) dividend payments. Where state equity is compulsory, the utility to the State of capital appreciation is limited by the often non transferrable nature of equity ownership, as well as the difficulty of monetizing shares, as discussed in Section 6.2 above. Dividend payments are attractive, but they often fail to materialize as expected, as described in detail in Section 4. As an equity participant, the State also takes a downside risk. If the project does not produce revenues, either because of market conditions or the ineffective conduct of operations by management (or an inability to work with the State), there will likely be no profits from which dividends can be paid.

However, a state-owned enterprise may use its equity participation to pursue strategic objectives. The interaction between the State and an international project company may result in the transfer of knowledge. State equity participation may also improve information collection, including but not limited to, mapping the country's geological resources.

6.2.2 Payment of Dividends

As discussed in Section 3, the State's equity interest does not typically result in the robust payment of dividends. Since state equity participation is typically in the form of ordinary shares, the corporate laws of the relevant jurisdictions will dictate the process as well as the conditions that have to be met in order for dividends to be distributed. It should also be noted that it is not always possible to freely negotiate the distribution of dividends in the shareholders' agreement or mining agreement, considering that any payment of dividends will be subject to the corporate laws of the relevant country, any regulations promulgated thereunder, and the constitutional documents of the companies and the shareholders' agreement(s).

Accordingly, to facilitate ease in the payment of dividends, States must take great care in reviewing these instruments when taking up equity participation. It should be noted that by choosing to be an equity participant in a project company, the State could share in the upside of the project company's success; but it also shares some of the project risk if the company does not produce revenues, either as a result of market conditions or the ineffective conduct of operations by management. In such cases the State would not receive its dividends. Some States have tried to put into place mechanisms intended to result in a more expeditious payment of dividends, including preferred shares.

6.2.3 The Transferability of State Equity

The answer to the question of whether state equity participation is transferable may be contained in the relevant legislation. In some cases, the legislation will stipulate that it is nontransferable. (The law determines the nature of state equity in mining projects. Whether it may be transferred will usually be prescribed by the relevant legislation, together with the conditions for such transfer, if any).

In determining whether state equity should be transferable, policy objectives are a key factor. If there are restrictions on the marketability of the state equity interest, they may adversely affect the monetary/economic value of its equity interest.[38] However, if the objective is to ensure that the State maintains equity participation in all mining companies for political reasons, and to accomplish certain noneconomic objectives, then the State may want to restrict transferability. Where the State's primary interest in legislating state equity participation includes indigenization and the empowerment of locals or the State, States may decide to make the equity nontransferable to ensure that the status quo is maintained regardless of the project undertaken. However, if a State's primary interest in legislating for state equity participation is purely economic it will be preferable for its interest to be transferable, because the economic value of the equity interest is often dependent on its resale/transfer value.

Some countries have expressed an interest in monetizing state equity participation. To date it is not clear whether any of these countries have managed to do so successfully. To the extent that the State wants to sell its equity participation to third parties, it would not be unreasonable for such transfer to be subject to a right of first refusal in favor of the other shareholder.

Toolbox Item 16

If the State hopes to capitalize on its equity interest, it may want to have a robust right to transfer its interest to a third party in a sale. In most cases, the corporate governance agreements are likely to include a preferential right to acquire interest in the company. If the primary goal of a State's equity ownership is to assure participation in the economic success of the mining venture, then restrictions on transferability are not a concern.

38 See Toolbox Item 6.

6.3 Alternatives to State Equity Participation

In 2003 Ghana entered into an investment agreement with Newmont Ghana Gold and other project participants that entitled it to receive a share of the net cash flow from mining operations carried out under the agreement. As the agreement was ratified by Parliament, it amended the mining legislation regarding those operations by substituting a right for the State to receive ten percent (10%) of the net cash flow from the operations in lieu of the Minerals and Mining Act provisions for a ten percent (10%) free-carried interest. The agreement specifies the cost factors to be considered in determining the net cash flow, and the revenue stream is therefore relatively predictable. Under the agreement, the State waives its right to acquire any other interest in the project until 15 years after the commencement of production; but after that it may acquire up to twenty percent (20%) equity at fair market value.[39]

Toolbox Item 17

A net profit interest is one alternative to an equity interest. It does not provide the rights or impose the obligations associated with equity ownership, but it does provide a mechanism for participating in the economic upside of a mining project.

6.4 Conflict of Interest

The fact that the board of a project company includes a representative of the State raises the fundamental issue as to whose interest this representative represents. The State's nominee could have a dual, and sometimes conflicting role which not only may put the State's nominee in a legally challenging situation, but may also hinder the company's ability to have open and frank discussions during board meetings on issues that may affect the project. Does the State's representative represent the interest of all shareholders of the project company, as should be the case? Alternatively, would the State's nominee attend meetings and report back to the State, as regulator, as to what is transpiring with the project company? Company directors owe a fiduciary duty to the shareholders of the company. They are expected to act in the best interests of the company, which at times may not align with the best interest of the State. There should therefore be clarity and accountability as to the proper roles and responsibilities of the State's board representative.

39 Petro Guj, Boubacar Bocoum, James Limerick, Murray Meaton, and Bryan Maybee. 2013. *How to Improve Mining Tax Administration and Collection Frameworks: A Sourcebook.* (World Bank 2013)

Toolbox Item 18

The state-owned entity should develop a conflict-of-interest policy or guidance document describing how its representatives are to act when managing the State's equity interest, including a description of the duties of its representatives to the company and its other shareholders.

6.5 Appointment of Representatives

6.5.1 Expertise

Typically, but not advisedly, state officials or employees are often deployed as representatives on the board of the mining titleholder. In addition to the conflict-of-interest issues just mentioned, the appointment of state representatives should be based on their professional skills and expertise. States must remember that, from a corporate law perspective, directors owe duties of care and skill to the companies whose boards they sit on. States must take this issue into consideration when appointing the representatives who will represent the State's interests on the board.

6.6 Legal Framework for State Participation in Mining Project Companies

A primary consideration for States is whether the country's laws allow or mandate state participation in mining ventures. Africa has various legal systems, and they often coexist with customary law and/or religious law. There are three major systems: those that are based on civil law principles; on common law principles; or on dual systems.

The legal system will determine the structure of the legal framework. A legal framework is comprised of enacted laws, implementing regulations or rules, and contracts. It may also include common law, decrees, guidelines, practice directions, administrative orders, or similar authoritative documents, which may be legally binding, or which provide administrative guidance.

The legal framework for state participation in mining ventures should be provided in the country's primary mining law or code, regulations, and contracts. State participation is a fiscal tool specific to the mining sector and should be set out in the primary mining law.[40]

6.7 State Participation in Contract Negotiation

6.7.1 Joint Venture Agreements and Shareholders Agreements

From the State's perspective, agreements are an important part of the legal framework because they enable the State to ensure an active role, full access to information, and better monitoring even when the State is a minority shareholder. They also provide for the right of the State to receive dividends. When negotiating the State's participation in a joint venture or shareholders' agreement, it is important to consider that successful joint ventures are long-term relationships. Compatibility and flexibility are necessary for a successful venture; unreasonably one-sided agreements will lead to disputes and litigation. Considering that successful mining projects last for decades, it is advisable to approach the negotiation of agreements with a mutually beneficial long-term view.

Good lawyers and clear drafting are essential to the State's negotiation of agreements. Well-drafted provisions may prevent disputes from arising (or make them easier to resolve); help to maintain the relationship; and stand the test of time. A notable example of a successful joint venture is the Sociedad Contractual Minera El Abra, which was incorporated in 1994 between Chile's Codelco and Freeport-McMoRan, and which has averaged annual production in excess of 280,000 pounds of refined copper between 2012 and 2019. A major reason for its success is good lawyers who drafted the agreements that are still in place.

6.7.2 Model Contracts

States may want to consider the development of model contracts to guide their negotiations on state participation. A model contract is one in which the general structure of an agreement and general terms are laid out, but specific issues are left open for negotiation. The use of a model contract reduces the State's burden for conducting lengthy negotiations or exerting its limited resources. They save time, increase transparency, and supplement the primary legislation by providing additional details to the provisions of the law and the conditions in the mining title. Model contracts standardize the rules, increase certainty, and appeal to investors.

40 Section 36 of the Guiding Template (Fiscal Terms).

Mining development agreements provided in the mining law are commonly used to attract investment and develop mining projects. In Tanzania, the mining law provides for state participation of at least sixteen percent (16%) nondilutable free carried-interest shares in the capital of a project company.[41] It also provides for a development agreement made between the State and the holder of a mining title. Developing model agreements as part of the primary law, or in regulations, enables the State to implement the legal provisions for state participation in a standard way across different mining projects, but also have the flexibility to modify specific provisions for specific projects when necessary.

Toolbox Item 19

If the State intends to take an equity interest in mining projects on a regular basis, it is worthwhile to develop a model contract to use for equity investment. A model contract provides a useful framework for negotiation.

6.8 Special Circumstances

6.8.1 Strategic Minerals

Strategic minerals, or critical minerals, are identified as those that are vital for the social and economic development of a State, or are important for reasons of security and defense. The list of minerals considered to be strategic or critical may vary from one State to another depending on development priorities, the local context, and the State's aspirations. Strategic minerals may be listed in the mining law, regulations, or national development plans. State equity participation gives the State additional "skin in the game" in the development of strategic minerals.

41 The Mining Act Cap.123 Revised Edition 2019, Section 10., available at https://a-mla.org/en/country/law/1736

6.8.2 Value Addition

The current strategy is for African nations to use their resources to catalyze industrial development, which accords with the African Mining Vision (AMV). The success of this strategy depends on proactive and deliberate actions from States to promote local beneficiation and value addition of minerals. Subsequent to the AMV, studies continue to emphasize that reasonable value addition milestones need to be incorporated into mining regimes,[42] and that strengthening links requires the right strategy for mineral extraction and processing operations. (For example, state involvement in setting the terms that impose the linkage conditions, and investing in economic infrastructure, especially power and transport.)[43] Value addition and beneficiation is an important factor for States to consider when implementing state participation in mining ventures.

6.9 Governance

In most instances, the mining entity will be formed under and governed by the law of the relevant State. Even in that circumstance, the local mining company may be owned in part by a company that is subject to the laws of another country, and the rules applicable to that owner may influence the governance and management of the mining enterprise.

Nearly every corporate governance regime (whether in a civil or common law jurisdiction) creates some level of shareholder protection and some level of duty applicable to officers and directors. The State should review those duties and protections in order to accept the consequences of equity ownership with full awareness of those legal commitments.

The Organization for Economic Co-operation and Development (OECD) has developed a set of Principles of Corporate Governance, as set out in **Toolbox 21**. The State should consider how it wishes to address each of these factors in its role as the owner of equity in a mining company, and even more significantly in its potential role as an officer or director of a project company.

42 African Union. 2011. *Minerals and Africa's Development: An Overview of the Report of the International Study Group on Africa's Mineral Regimes.* p.10.

43 UNECA. 2011. *"Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes."* Addis Ababa, Ethiopia p.152.

Toolbox Item 20

Governance is a critical component of a State's equity participation in a project company. Among the key issues to be addressed are:

- The level of voting percentage for shareholder approval;
- The decisions that require corporate shareholder approval;
- Composition of the board of directors, and the State's role, if any, on the board of directors;
- Committees of the company, such as a technical advisory committee, and the State's role in those committees;
- Disclosure requirements, including transparency at the local and international levels;
- Reporting and accounting requirements;
- Budgeting and project approval, and the State's role in that process;
- Determining when to make distributions, and the effect of a free or carried interest on distributions;
- Restrictions on transfer and sale of equity, including rights of first refusal, tag-along and/or drag-along clauses, etc.

Toolbox Item 21

OECD Principles of Corporate Governance[44]

1. Basis for an effective corporate governance framework.

i. This first principle sets the important context for the other principles
ii. Transparent and efficient markets
iii. Rule of law
iv. Clear division of responsibilities among authorities

2. Rights of shareholders

i. Secure ownership
ii. Information
iii. Participation
iv. Voting
v. Share of profits

3. Equitable treatment of shareholders

i. Equal voting rights
ii. Protection of minority and foreign shareholders
iii. No insider trading or self-dealing

4. Role of stakeholders

i. Respect for legal rights and agreements
ii. Cooperation between corporations and stakeholders
iii. Access to information
iv. Communication and redress for violations

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44 OECD. 2015. *G20/OECD Principles of Corporate Governance.* Paris: OECD. https://doi.org/10.1787/9789264236882-en.

5. Disclosure and transparency

i. Timely and accurate disclosure of material information
ii. Disclosure of financial situation, performance, ownership, governance
iii. Accounting standards
iv. Audits of financial statements

6. Responsibilities of the Board

i. Strategic guidance
ii. Monitoring of management
iii. Accountability to the company and shareholders
iv. Duty of care
v. Duty of loyalty

6.10 Sovereign Immunity and State Participation

States typically have sovereign immunity against lawsuits. Where they hold equity in mining companies the question arises as to whether the State (whether through SOEs or through direct participation) can claim sovereign immunity in commercial disputes. In such instances, they may be required to waive sovereign immunity in order to give comfort to investors or other shareholders.

Sovereign immunity may be waived in various ways, including:

- A bilateral investment treaty (BIT) between two States for the promotion and protection of investments of foreign nationals or a multilateral investment treaty;
- Domestic law;
- By agreement.

Toolbox Item 22

The State should consider waiving sovereign immunity when it holds equity in mining companies.

6.11 Risks

Natural resource development anywhere in the world has its own particular set of risks, in the form of commodity prices, engineering puzzles, and geologic uncertainty. A state or state-owned enterprise (SOE) must consider these risks when assessing whether to take an equity interest in a mining venture, and if so how to manage that interest. Even where the interest is being carried, the State or SOE will want to make a clear-headed assessment of these risks before committing the administrative resources and support required to properly realize value from state equity.

These risks include:

6.11.1 Project Risk

Not every mining project will be successful. There are many factors that can prevent mine development: denial of permits, geological impediments, commercial missteps, and so forth. The State runs the risk of losing its investment or wasting its administrative resources if the project does not take off, or fails after the exploration stage.

6.11.2 Taxation Risk

While a State is typically not subject to tax, if it holds an equity interest in a company, that company, as a separate legal entity, will be subject to tax; this indirectly affects the State. A state-owned enterprise could also be subject to income tax and capital gains tax. **(See Section 3)**. Excessive or unanticipated tax burdens also diminish the availability of distributions to the equity holders.

6.11.3 Litigation Risk

A mining venture can be adversely affected by commercial litigation or other claims. Also, with state equity participation, a State opens itself up to the possibility of a dispute among the shareholders, or between shareholders and the management of the company, which could lead to liability. The scope of this risk, however, depends heavily on the State's corporate laws and the shareholders' agreement, as well as the availability of the defense of sovereign immunity.

6.11.4 Economic Risk

States realize most of their revenue from mining ventures through taxes and other related fiscal impositions. A return on state equity will rest either on dividends from future profit, or a distribution to equity from a sale of the company or its assets. Macroeconomic factors can affect the ability of a mining venture to make dividends or market its assets effectively. Also, the State must balance the role of its equity position against other elements of the fiscal regime that are applicable to the mining venture. A State may experience challenges in demanding more equity when there are high taxes imposed on mining titleholders; or it may be compelled to relax some of its economic gains in order to secure more equity.

6.11.5 Minority Risks

States are typically minority shareholders in an equity participation. As a result, the fate of the State's interest may depend upon good decision making by the majority shareholders; the State may not have the ability to determine, or even influence the direction of the mining venture.

6.11.6 Regulatory Risk

Every mining project is highly regulated, and a change or extension in the regulations applicable to the project can have an adverse effect on it. Also, the State will have a dual role, as both project owner and project regulator. The State will want to take steps to clearly define the roles of its representatives in both the commercial and regulatory spheres, and provide a process for avoiding potential conflicts of interest.

Conclusion

"The State must balance the various benefits and commitments of owning equity, with a clear view of its policy and fiscal rationale for taking equity, when determining whether it is in the interest of the State to own equity in a project company."

African Mining Legislation Atlas (AMLA)

6. Conclusion

As noted in the introduction to this Toolkit, there are key questions to be considered when deciding whether and how to implement a state equity interest in a mining venture. Based on the preceding discussion, it is possible to expand on those questions.

i. Should a State participate, and if so, at what stage should it become a participant in the equity of the project company?

This question has two parts. First, the State must determine whether it wants to take equity in mining ventures at all. In some circumstances, there is a legal requirement in the mining legislation or other law that the State must hold equity in mining ventures. Even where there is no express legal requirement to take an equity position, the State may have the option to negotiate for equity as part of the granting of a mining lease or concession, or under the terms of a mine development agreement.

In assessing whether to take equity in a project company, the State should be realistic about the fiscal benefits of that equity. As discussed in Section 3, the distribution of cash from dividends associated with equity are typically fairly limited, and not as robust as the other elements of the fiscal regime that are applicable to mine investments. Equity interest may provide a greater fiscal benefit upon the sale of the company, but that benefit is remote and uncertain. However, there are other benefits to holding equity ownership in a project company, such as participating in decision making and having access to information. Also, holding equity in a project company may be seen as an important reflection of the fundamental ownership of minerals by the State. However, properly managing equity interest will require a commitment of resources by the State. ***In short, the State must balance the various benefits and commitments of owning equity, with a clear view of its policy and fiscal rationale for taking equity, when determining whether it is in the interest of the State to own equity in a project company.***

Once the State determines that it will take an equity interest in the project company, it must also determine whether to take that interest immediately or wait for the project to develop. A mining project will proceed through an exploration phase that will determine the nature of the available resource through a feasibility study, which will in turn determine whether it can be developed in an economically viable manner; and only then will it move on to construction and production. The State may choose to take its equity immediately and participate as an equity holder through the exploration phase. Or it may choose to wait until exploration is completed, or even after the feasibility study is complete. If the State is paying for all or part of its equity position in the company, it may choose to wait until later in the mine development process. Doing so decreases the risk of the investment, because the exploration and feasibility phases reduce the uncertainties related to the mining venture.

ii. How and when should the State acquire equity participation in the project company?

The previous paragraph addresses **when** the State should take its equity in a project company. This question also asks **how** it should do so. First the State must determine the internal capital structure of the company. Most companies have a large tranche of ordinary shares or interests, often called “common stock.” These shares or interests are entitled to participate in the economic success of the company and will have some right to vote. In most jurisdictions, the officers and directors of the company will have some duty to protect the interests of the common shares. That said, a project company may also have a tranche of preferred shares or interests, with rights and protections more favorable than those granted to the common shares. The preferred shares may be entitled to capture the economic benefits of share ownership in preference to the common shares and may have voting rights greater than those granted to the common shares. So, the State will need to determine whether taking equity in common shares is acceptable, and the extent to which its rights may be affected by preferred shares (if any). Note that preferred shares are often used to secure investment in the company or financing of the company; the State may find the right for it to have preferred shares to be an acceptable method of providing the economic incentive needed to allow a project to be developed.

In most circumstances, the State’s equity will be in the form of common shares. Some mining legislation requires a specific percentage of interest to be held by the State, or the legislation may specify that the State’s equity cannot be diluted. Where the legislation is silent on this issue, the State should include an assessment of the risk of dilution as part of the negotiations related to its equity participation in the company.

iii. Should the State's participation be "free equity," "carried equity," or "fully paid"? Should there be a prescribed minimum that the State acquires free of charge by law?

As discussed in **Section 5**, there is very little practical difference between "free equity" and "carried equity." Mining legislation often specifies that the State's equity interest in the company be "free." For either a free interest or a carried interest, the State does not make a cash payment in exchange for its equity in the company; and once the State holds its equity, it is not required to fund the costs of the mining project. The other owners of the company pay those costs, and "carry" the State's interest. Alternatively, the State may pay for its equity interest at the threshold and participate as a fully-paid- up equity holder, along with the other owners of the company.

Paying for equity in the company creates some risk. That said, being carried is not without its disadvantages. The shareholders' agreement or other corporate management agreements may give the carried interest less power in relation to management decisions or project development. Given that the carrying party is taking all the risk of mine development, that party may insist on the right to decide how investment in the mining project will proceed. Additionally, since the carried costs must be repaid, the flow of revenue to the carried party will be delayed even beyond the point where the initial generation of revenue from the project begins.

iv. Which entity will hold and manage the State's equity participation in the project company?

Mining legislation in Africa sometimes specifies that State equity is to be held by a state-owned mining company; in other circumstances, the legislation simply says that the State is entitled to an equity interest. In most circumstances, the State's equity interest can be held by the central government, by an agency or ministry of the State, or by a state-owned mining company. As discussed in **Section 5.4**, there are advantages and disadvantages to each option. When choosing how to hold an equity interest, it is crucial to consider placing the interest in an entity or agency that will have the resources and expertise needed to properly manage and optimize the State's interest.

v. What kind of corporate governance structure(s) should be adopted for the State's participation?

Any equity interest in a project company will be governed by the company's corporate organizational documents. In most cases, the State's equity interest will be subject to a shareholders', stockholders', or corporate operating agreement, or a similar instrument that sets out the rights and obligations of equity holders and provides the rules applicable to the internal management of equity interests.

The checklist included in **Appendix B** sets out the various issues to be addressed in the organizational documents of the company. Note that the governance of the company will also be subject to the laws of the State in which the entity is organized.

vi. How should the State's equity be represented on the company's board of directors? Will the State's equity include any preferred distribution of dividends, or other economic or voting rights?

Holding an equity interest in a company does not necessarily entitle a shareholder to a seat on the board of directors of the company, or a role as an officer of the company. If the State wants a seat on the board of directors or the management committee of a company, that right will have to be negotiated in the definition of the terms concerning the State's equity participation. Serving as a director entail undertaking a duty to protect the interests of the company and all of its shareholders; the State should consider carefully whether it wants to designate someone to take on that role, and what benefits it hopes to accrue from taking a position in the management of the company. In many cases, the primary purpose of taking an equity interest in the project company is to capture economic benefits for the State; and if that is the purpose in mind, having a role as a director or officer is not necessary. Or the State may seek enhanced economic returns or a preferred voting right, such as a "golden share." These rights, while beneficial to the State in the abstract, can make the mining venture less or attractive or even feasible to investors, and should be weighed as part of the overall balance to be found among the various elements of the fiscal regime applicable to the project.

African Mining Legislation Atlas (AMLA)
Appendix A: The Toolkit

Toolkit Item 1: When considering the role of a state-owned enterprise (SOE) in a mining project, consider how the SOE may advance or impair the twin goals of: (i) attracting investment in the minerals sector; and (ii) ensuring a fair return to the State and its citizens.

Toolkit Item 2: State equity participation in the mining company, especially if it includes a carried or free interest, may affect the economic viability of a project. In deciding whether or not to introduce bonus bids, a State must carefully consider its fiscal regime balance in order to ensure both the economic viability of a project and the sustainability of the benefits a State stands to gain from mining projects.

Toolkit Item 3: As an equity participant in a project company, a state-owned enterprise will be subject to indirect taxation. The State should aim for a tax regime that strikes a proper balance between the State's interests and taxpayer interests.

Toolkit Item 4: Requiring contributions to a social development fund is a way to increase the benefits to the communities that are connected to and impacted by mining projects, and the State as a whole.

Toolkit Item 5: States should be clear as to the objectives they intend to accomplish through their equity participation, and should be realistic regarding the potential revenue they can expect to receive. There are various options for States: they should choose the one that is most compatible with their objectives. There are three options:

1. **State Equity Mandated by Law:**

   When the State mandates compulsory fixed equity participation in all mining projects through legislation, the equity may be nontransferable in any event. The fiscal receipts available to a State under this option are dividends and distributions in the event of liquidation. The State should review applicable legislation and guidance to determine whether its free equity interest can be transferred.

2. Commercial Participation

States may also choose to participate in mining projects on a strictly commercial basis, with no defined equity percentage in law. That is, through legislation, the State may reserve the option to participate in a mining project in a manner that is commercially and socioeconomically reasonable in the circumstances.

Under this option, the State may import contractual clauses to ensure that it has the most profitable investment possible. It may opt to transfer its equity in the project or mining titleholder at any time, and/or may choose to negotiate "tag-along" rights in the event of a majority sale of equity by the private majority shareholders in the project company or a public listing.

3. Hybrid State Equity Participation

Under this option, States may mandate a compulsory percentage of equity participation in mining projects, while also allowing them to negotiate for additional equity, depending on what is commercially acceptable for them. The mandated percentage shall remain nontransferable, and the only fiscal benefits shall be dividends.

However, negotiated extra equity may be treated similarly to the commercial participation option, and the State may import contractual clauses such as "tag-along" clauses, if there is a sale of majority shares, or a public listing.

Toolkit Item 6: In addition to, or as an alternative to equity ownership by the State, consider legislation or policies that promote equity ownership by citizens or businesses within the country, especially for historically disenfranchised groups.

Toolkit Item 7: Although State equity participation is included in the legislation of most African countries, it is not essential in order for the country to be a successful mining jurisdiction. States should consider both fiscal and policy objectives when determining whether to require or promote State equity ownership.

Toolkit Item 8: It is important to develop administrative expertise within the State in order to ensure effective oversight and management of the State's equity interest.

Toolkit Item 9: While state participation may not necessarily be the means through which the State achieves its noneconomic objectives, it may be helpful in achieving those objectives. The State must be realistic about its rights and duties as shareholders, and review protections for and duties of minority shareholders in the country of incorporation of the mining venture, and develop a strategy for both protecting its minority interest and using its rights as a shareholder.

Toolkit Item 10: When determining the level of state participation, the State must consider the goals of economic return and corporate governance. Many statutes creating a State's right to equity set the equity amount at a relatively low level – for example, at around 10 percent. This level, especially if carried or free, provides economic participation in the mining venture. But at that level, the State may have to negotiate for a role as a director or officer. A higher level of equity participation will justify greater control of company decision making by the state-owned enterprise. It is difficult, however, to justify a higher equity interest where that interest is carried or free.

Toolkit Item 11: In many cases, applicable legislation will specify the nature and percentage of the State's equity interest in the project company, and whether that interest is a free or carried interest. If the State has some flexibility, however, it should assess whether it is best to pay for its interest, or to request a free or carried interest. If the State pays for its interest, it may receive better returns. Note that the notion of a "free" interest is legally untenable under most laws. The legislation should provide that the State will be granted equity participation in consideration for the wealth created and the impoverishment of the subsoil.

Toolkit Item 12: Many mining laws include a requirement that the State or a state-owned enterprise (SOE) be granted a free interest, or a free carried interest, in the project company.

- **Advantages**

  The advantage of having a free interest is that the State is not required to fund the cost of mine development. The project company is the investor in the mining project and will pay those costs on behalf of the State. As a result, the State bears less risk if the venture fails.

- **Disadvantages**

  The disadvantage is that the State or SOE is required to repay those costs out of the profit or revenue of the mining venture, typically with some rate of return to the mining investors. As a result, the economic return from the mining venture to the State will be delayed. Given the long-term horizon for generating revenue for most mine ventures, this delay could be material. Similarly, as a carried interest, it will reduce the dividends payable to the state-owned company or state-owned interest. If the State pays for its equity in the mining venture, those payments are at risk if the venture fails. However, if it is successful, then the state-owned interest will receive a return on that investment sooner. In addition, by paying for its equity interest, the State can benefit from higher returns in other fiscal terms of the regime, including royalties. Also, as a paid equity holder the State will have more influence on the decisions of the company.

Toolkit Item 13: The tool that should be used to memorialize this type of arrangement? is a joint venture agreement.

Toolkit Item 14: The tool that should be used to memorialize this type of joint venture is typically a shareholders' agreement.

When the State decides to participate in the equity of the project company, it will become a shareholder in the company, along with the promoters and other investors. To define the relationship and obligations of the shareholders, and to identify the key aspects of the operation of the company, the shareholders (including the State) may enter into a shareholders' agreement. A shareholders' agreement often covers matters on which the companies' articles are silent, and when signed by all the shareholders, has the force of a constitutional document of the company, with the effect that in the event of a conflict between the shareholders' agreement and the project company's articles of association, the shareholders' agreement will prevail. The shareholders' agreement typically provides that in the event of a transfer of shares, the new shareholder shall accede to the agreement.

The terms typically include the management and operation of the company, additional financing obligations, board representation and voting rights, profit sharing, transfer of shareholding, dispute resolution mechanisms, and the protection of minority shareholders. It is important to ensure that the terms of a shareholders' agreement are fair, and balanced in relation to all the shareholders; otherwise a minority shareholder (which the State is, typically, in these companies) may be subject to onerous and exploitative terms.

The State must clarify its objectives and expectations concerning its equity participation prior to entering into a shareholders' agreement, and must clearly identify the appropriate agency of the government that will represent its interest as a shareholder in the company; since once the shareholders' agreement is signed, the parties are bound by its terms.

Toolkit Item 15: Mining companies must consider environmental and social governance (ESG) criteria and targets in their projects and corporate actions. These commitments affect the State as equity holder and board member. The State must incorporate ESG principles into its decision-making processes as well as its governing legislation.

Toolkit Item 16: If the State hopes to capitalize on its equity interest, it may want to have a robust right to transfer its interest to a third party in a sale. In most cases, the corporate governance agreements are likely to include a preferential right to acquire interest in the company. If the primary goal of a State's equity ownership is to assure participation in the economic success of the mining venture, then restrictions on transferability are not a concern.

Toolkit Item 17: A net profit interest is one alternative to an equity interest. It does not provide the rights or impose the obligations associated with equity ownership, but it does provide a mechanism for participating in the economic upside of a mining project.

Toolkit Item 18: The state-owned entity should develop a conflict-of-interest policy or guidance document describing how its representatives are to act when managing the State's equity interest, including a description of the duties of its representatives to the company and its other shareholders.

Toolkit Item 19: If the State intends to take an equity interest in mining projects on a regular basis, it is worthwhile to develop a model contract to use for equity investment. A model contract provides a useful framework for negotiation.

Toolkit Item 20: Governance is a critical component of a State's equity participation in a project company. Among the key issues to be addressed are:

- The level of voting percentage for shareholder approval;
- The decisions that require corporate shareholder approval;
- Composition of the board of directors, and the State's role, if any, on the board of directors;
- Committees of the company, such as a technical advisory committee, and the State's role in those committees;
- Disclosure requirements, including transparency at the local and international levels;
- Reporting and accounting requirements;
- Budgeting and project approval, and the State's role in that process;
- Determining when to make distributions, and the effect of a free or carried interest on distributions;
- Restrictions on transfer and sale of equity, including rights of first refusal, tag-along and/or drag-along clauses, etc.

Toolkit Item 21: OECD Principles of Corporate Governance[45]

1. Basis for an effective corporate governance framework.

i. This first principle sets the important context for the other principles
ii. Transparent and efficient markets
iii. Rule of law
iv. Clear division of responsibilities among authorities

2. Rights of shareholders

45 OECD. 2015. *G20/OECD Principles of Corporate Governance.* Paris: OECD. https://doi.org/10.1787/9789264236882-en.

i. Secure ownership
ii. Information
iii. Participation
iv. Voting
v. Share of profits

3. Equitable treatment of shareholders

i. Equal voting rights
ii. Protection of minority and foreign shareholders
iii. No insider trading or self-dealing

4. Role of stakeholders

i. Respect for legal rights and agreements
ii. Cooperation between corporations and stakeholders
iii. Access to information
iv. Communication and redress for violations

5. Disclosure and transparency

i. Timely and accurate disclosure of material information
ii. Disclosure of financial situation, performance, ownership, governance
iii. Accounting standards
iv. Audits of financial statements

6. Responsibilities of the Board

i. Strategic guidance
ii. Monitoring of management
iii. Accountability to the company and shareholders
iv. Duty of care
v. Duty of loyalty

Toolkit Item 22: The State should consider waiving sovereign immunity when it holds equity in mining companies.

African Mining Legislation Atlas (AMLA)

Appendix B: Checklist for State Equity Participation in Mining Projects

1. Basis for Equity Participation

a. Review applicable legislation

i. Determine whether there is legislation requiring? state equity participation in a mining project, and whether the legislation specifies the level of equity participation allowed.

ii. If there is not, determine whether the State wishes to negotiate for an equity interest in the project company.

2. Form of Equity Participation

a. Determine the preferred or applicable form of equity participation:

i. Review applicable legislation to determine whether the interest is to be a free carried interest, a carried interest, a purchased interest, or a hybrid (that is, a free or carried interest with the right to acquire additional equity).

ii. If the applicable legislation does not specify the form of equity interest, negotiate the form from the following options:

1. "Free" carried interest
2. Carried interest
3. Paid interest
4. Hybrid (partially carried, and partially paid for by the State)

b. Note: As a practical matter, there is little difference between a free carried interest and a carried interest, but both terms are used. In each case, the project company pays the costs associated with the State's equity, and recoups those costs, plus a rate of return from future revenues. This is the most common form of state equity participation. There is a trend toward a hybrid approach, where the State has a certain percentage of free carried interest, and the right to purchase additional equity.

3. Holding Equity Interest

a. Determine whether legislation requires that equity interest be held by the State directly, through a ministry or agency, or through a state-owned enterprise.

b. If the legislation does not specify the entity to hold the equity interest, then determine whether the interest should be held by the State directly, through a ministry or agency, or through a state-owned enterprise.

4. Enter into a shareholders' agreement to document the terms of the equity interest.

a. State the parties to the shareholders' agreement.

i. State Participant: SOE, Ministry, State
ii. Company
iii. Other Equity, if any

b. State the Equity Structure of the Company

i. Classes of Shares (if any)
ii. Initial equity ownership, including SOE shares

    1. Might be done on a schedule to the agreement

5. Describe the Management Structure of the Company

a. Board of Directors

A company is typically managed through a board of directors. The Board makes key decisions related to the operation and management of the company, with a few major decisions reserved for shareholder votes.

i. Number of directors
Determine the number of directors to be appointed to the Board of Directors. The shareholders' agreement will also describe the voting process for the Board, and the process for appointing Board members.

ii. Number of state board seats

Determine the number of directors that can be appointed by the State or the state-owned Enterprise (SOE). The percentage of the board seats held by the State will typically reflect the percentage of equity held in the company. State equity holders can sometimes negotiate for a higher proportion of board seats.

b. Officers

The company will appoint officers to run the day-to-day operations of the company – a chief operating office, a president, a chief financial officer, etc. The State should consider whether and to what extent it should have its representatives serve as officers of the company.

6. Shareholder Action

a. Matters reserved for shareholder approval

A shareholders' agreement will typically list items that are subject to shareholder approval. These are major issues, such as selling the assets of the company or dissolving the company. The list of items subject to shareholder approval is subject to negotiation among the shareholders.

b. Percentage of vote required for shareholder approval

The shareholders' agreement will describe the percentage of shareholders required to approve an action. The action might be subject to a simple majority vote, or it might require a supermajority, perhaps 75 or 80 percent of the shareholders.

c. Blocking Vote

The State should consider whether it should have a blocking vote – that is, if it should hold enough shares to prevent a vote from achieving the required super-majority level. This issue is a matter to be negotiated.

d. Golden Share

In some circumstances, the State may be able to secure a Golden Share – a share in the company that must have a vote in favor of certain corporate actions in order for that action to be approved. Golden shares have become less common over time.

7. Budgets & Financial Reporting

a. Budget Preparation

The shareholders' agreement will set forth a process for preparing and approving budgets.

b. Budget Review and Approval

Determine the role the State representative will play in reviewing and approving the budget.

8. Financing and Capital

a. Debt Financing

i. Is debt financing allowed?

ii. What role does the State interest have in reviewing and approving debt financing?

iii. What impact, if any, will the State interest have on the security and collateral package provided to the lenders?

b. Raising Capital

i. Will the company raise capital through the sale of shares?

ii. Are there limits or restrictions on raising capital?

iii. Is there antidilution protection for the State's equity interest?

When issuing new equity in the company to raise capital, the new shares can reduce the percentage of interest the State holds in the company. The shareholders' agreement can include provisions that protect the State from dilution in this circumstance.

iv. Are there limits or exceptions to any antidilution protection?

9. Nature of SOE financial interest

a. Is the interest of the State a free or carried interest, or is the interest paid for by the State?

b. If the State's interest is a carried interest, how is the amount of the interest determined (that is, how are costs allocated to that interest)?

c. **How is the carried interest recouped by the project company from future revenues?**

d. **Paying?**

10. Dividends

a. **How are dividends declared?**

b. **If the State has a carried or free interest, is it entitled to dividends, or to reduced dividends?**

11. Transfer of Shares

As a general rule, the shareholders in the company will want the right to transfer shares to a third party in order to be able to realize value from its interest.

a. Are there any restrictions on the transfer of shares by the company?

Note that the laws of the State may include restrictions on the transfer of interests in the project company; this is a separate issue.

b. Are there any restrictions on the transfer of shares by the State?

The project company may want to restrict the right of the State to transfer its interest, which would assure that the State would retain its interest in the company. But a restriction on the transfer of the State's shares can also reduce the value of those shares.

c. Are there preemptive rights to acquiring shares?

The shareholders' agreement may include a right of first refusal (ROFR) or some other preferential right of acquisition of (i) newly issued shares; or (ii) shares that are to be sold to a third party.

d. Tag-Along/Drag-Along Rights

A Tag-Along right gives minority shareholders the right to require a shareholder selling its shares to a third party to also acquire the minority shareholders' shares. A Drag-Along right allows a majority shareholder to require that a minority shareholder participate in a sale to a third party.

12. Confidentiality

Confirm that the confidentiality provisions of the shareholders' agreement are consistent with any disclosure or transparency requirements applicable to the State.

13. Representations and Covenants

Review representations and covenants to confirm that these provisions are consistent with the governmental obligations of the State.

14. Indemnification

a. Company Indemnification

i. The company typically indemnifies the directors and officers of the company;

ii. Indemnification is subject to local law.

15. Dispute Resolution

a. The shareholders' agreement will set forth a dispute resolution clause to address disputes between shareholders.

b. The project company may ask the State or SOE to waive any defense of sovereign immunity.

African Mining Legislation Atlas (AMLA)

Appendix C: State-Owned Enterprises (SOEs) for Mining in Africa

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
1. Algeria				Mining Law 2014, Article 143: With a view toward the reconstitution and development of national mineral reserves, the State may finance prospecting and mining exploration programs.	
2. The Republic of Angola	Mining Code of Angola 2011, Article 11: The state is entitled to participate in the mining project through either or both of: (i) a state-owned company having at least 10% equity ownership in the to-be-formed mining company; or (ii) a participation in kind (minerals produced) in a defined proportion that increases directly with the increase in the internal rate of return of the project.		Mining Code of Angola 2011, Article 23: 1. Mining rights to prospect and explore, treat and sell strategic minerals throughout the national territory, including the territorial sea, the continental shelf and the exclusive economic zone, may be exclusively assigned to a specific public entity, which assumes the role of national concessionaire of these rights. 2. National concessionaires of mining rights over strategic minerals are created by the executive branch. 3. National concessionaires have the nature of a public company, being governed by the respective legislation. 4. National concessionaires may not directly exercise mining rights for the exploration, treatment and marketing of minerals, but may, however, exercise these rights by setting up companies that they fully own.	Mining Code of Angola 2011, Article 10: The state can intervene economically in the mining sector, either through regulatory entities and national concessionaires, or through operating companies, all these entities being subject to the principles and rules established in the Mining Code and in the legislation on public investment and on public or publicly owned companies.	Mining Code of Angola 2011, Article 20: Permits the designation of minerals as "strategic." Diamonds, gold, and radioactive minerals are expressly so classified (see Article 21). Rare metals and rare earth elements were designated as "Strategic" per Presidential Decree 231/16 of 8 December 2016. See First-Step Analysis: Mining in Angola – Lexology. Mining Code of Angola 2011, Article 57: The concession area may be rescued for reasons of public utility, upon fair compensation to the concessionaire when strategic mineral resources or those subject to a special regime have been discovered, the exploration of which is of greater interest to the national economy; subject to fair compensation of the holder which will be calculated using factors enumerated in the Mining Code.

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
3. Benin	Republic of Benin Law on the Mining Code and Mining Taxation 2006, Section 8: The State may engage, for its own account, in any mining or quarrying activity, directly or through State companies acting alone or in association with third parties. The exploitation of a deposit by an exploitation company gives the right to the allocation to the State of contribution shares set at 10% of the capital of the exploitation company for the entire duration of the mine. No financial contribution should be requested from the State for these contribution shares, even in the event of a capital increase. In all cases, this State contribution remains equal to 10% of the capital of the operating company. Any additional participation of the State and private nationals in the share capital of the operating companies will be done by negotiation by agreement between the parties. When the State undertakes alone or causes to be undertaken for its own account one or more activities referred to in this law, it remains subject to it except with regard to exploration activities undertaken under the authority of the Minister responsible for mines for exclusively scientific or for the sole purpose of improving geological knowledge.				

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
4. Botswana		The Botswana Mines and Minerals Act 17 1999, Amended 2007, Article 40: The Government may acquire up to 15% working interest participation in the proposed mine (except for diamonds – see below) in the following manner— (a) upon its exercise of its option Government shall be issued a single P1.00 special share at par, which shall carry the right to appoint up to two directors, with alternates, and to receive all dividends or other distributions in respect of its working interest percentage; and (b) Government shall be obliged in the same manner as other shareholders to contribute its working interest percentage of— Government shall on issuing the license inform the applicant as to whether or not it is exercising its option and of the working interest percentage it wishes to take. The Botswana Mines and Minerals Act 17 1999, Amended 2007, Article 51: Any application for the issue, renewal, transfer or amendment of a license to mine diamonds shall initiate a negotiating process, in good faith, between Government and the applicant covering all technical, financial and commercial aspects of the proposed project including Government participation. Should the negotiations not lead to agreement within six (6) months or such extended period as the Minister may allow, the application shall fail. Upon successful conclusion of the negotiation as above, the Minister shall issue a license reflecting the terms and conditions agreed.	Botswana Mining Law Guidance 08/24/2015, Section 7.3: (1) Where the President considers that any land is required to secure the development or utilization of the mineral resources of Botswana, he may compulsorily acquire such land. (2) Acquisition of land under this section shall be deemed to be for a public purpose and undertaken in accordance with the Acquisition of Property Act.	Debswana Diamond Company (Pty) is an equal partnership between the Government of the Republic of Botswana and the De Beers Group of Companies.	Diamond mining is the primary mining industry in Botswana and as of Q3 2021 for approximately 1/3 of government revenue.

Country	Legislation for Equity Ownership in Mining Projects **by SOE**	Legislation for Equity Ownership in Mining Projects **by Government or Ministry**	Other Legislation requiring Participation in Mining Project **by Government**	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
5. The Republic of Burkina Faso		Mining Code 2015, Section 43: The granting of an industrial exploitation permit for a large or small mine entitles the State, free of charge, to a priority dividend participation of 10% in the share capital of the operating company for the entire duration of the mine. This participation is free of all charges and cannot experience any dilution in the event of an increase in the share capital. Any form of additional State participation in the share capital of the operating company shall be made in accordance with the provisions of the uniform act of the Organization for the Harmonization of Business Law in Africa relating to the law of commercial companies and economic interest group.			
6. The Republic of Burundi		Mining Code 2013, Section 14: The State may engage alone in any prospecting and research operation concerning mineral substances subject to the mining regime and mineral substances subject to the quarry regime. The conditions under which these operations are carried out when the State joins forces with national or foreign private capital are set by the Code of private companies or companies with public participation Mining Code 2013, Section 63: The granting of an industrial exploitation permit gives rise to the allocation to the State of at least ten percent (10%) of the shares or contribution shares of the operating company. The States' participation cannot be diluted in the event of a capital increase. Without prejudice to the provisions of the first paragraph, the State does not exercise the activity of mining operations. It acts as a regulator. Mining Code 2013, Section 65: The mining agreement accompanying an exploitation permit must at least contain provisions relating to: a) its duration, in accordance with the principles set out in Article 72; b) the rights and obligations of the parties; c) the creation of the joint mining company (SM); d) State participation of at least ten percent (10%) of the share capital of the mining company.			

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
7. The Republic of Cabo Verde (Cape Verde)					A 2014 mining law exists but we could not locate it.
8. Cameroon		Code Minier 2016, Section 59: (1) The granting of an operating permit shall give rise to the allocation to the State of ten percent (10%) of the shares or contributed shares of the operating company, free of charge, free of all charges. The State's participation cannot be diluted in the event of an increase in the share capital. (2) The State may, at its request and in addition to the ten percent (10%) mentioned above, directly or through the intermediary of a public sector company, increase its participation in the capital of the companies of mining according to the terms defined by mutual agreement. The aforementioned increase may not exceed twenty-five percent (25%). In this case, the State is subject to the same rights and obligations as the other shareholders. (3) When, during the evolution of the company referred to in paragraph 1 above, the transfer of the shares of another shareholder occurs, the State or the public body designated for this purpose exercises a right preferably on said shares. In this case, the State or the designated public body may retrocede the said shares to private operators or to a new strategic partner within a maximum period of five (05) years. The retrocession is approved by decree of the President of the Republic			

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
9. Central African Republic	It seems that SOE's are contemplated by Mining Code, Article 8 but there are very few details on their operation: The State, in association with third parties, can engage in an activity governed by the Mining Code. The entity resulting from this association remains however subject to the same rights and obligations as private individuals, holders of mining titles or beneficiaries of authorizations issued under the Mining Code.	Mining Code, Articles 36 and 52 require that all mining projects give at least 15% of the share capital of the operating company (need to check translation) to the State and 15% of gross production during the operating phase to the State. Mining Code, Article 8 also contemplates the State, with approval of the Council of Ministers, exploiting a deposit on its own. However it is not clear what regulations they are subject to. More accurate French translation is needed.		Mining Code, Articles 6 and 12: All natural mineral deposits are the property of the State, yet the State will only expropriate mining facilities and extracted substances as provided for by law, and for fair value as determined by an independent tribunal.	
10. Chad		Mining Code 2018, Section 3: From the date of entry into force of this code, any new allocation of a mining exploitation title or a permanent quarry exploitation authorization immediately entitles the State to a non-contributory participation in the share capital of the company holding the title or authorization concerned. The non-contributory participation of the State is twelve point five percent (12.5%) of the share capital. Mining Code 2018, Section 381: The non-contributory contribution referred to in article 380 cannot be diluted by any increases and/or reductions in capital. It is free of any charge and no contribution, financial or not, can be requested in return from the State. This participation is deemed to have been acquired as soon as the mining exploitation title or authorization to operate the permanent quarry is granted and also offers the State all the other rights attached to the ownership of the shares concerned at the end of the AUSCGIE. It cannot be assigned or be the subject of any security whatsoever. Mining Code 2018, Section 382: In addition to its non-contributory participation, the State may, by agreement of the parties, acquire or subscribe under the conditions of common law, an additional participation not exceeding 15% of the share capital. The terms of this operation are to be defined with the other shareholders of the holder of the mining exploitation title or the authorization for permanent quarry exploitation.		Mining Code 2018, Section 231: The State reserves the right to buy and market a quantity of the production of a company holding a mining exploitation title up to its participation in the share capital of the said company. The terms and conditions for exercising this right are set by regulation.	

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
		The additional State participation is transferable, including to Chadian nationals, and may be subject to security. For the purposes of exercising its rights under the additional interest: (i) The State has a right of first refusal on any participation session; (ii) Any capital increase is reserved as a priority for the State in addition to its preferential subscription right, under the conditions provided for by AUSCGIE. A shareholders' agreement specifies the terms and conditions for implementing the provisions of this article. 383: The State's holdings in companies holding mining exploitation titles are managed or held on its behalf, by virtue of an indefinite-term share consumption loan granted to it free of charge, by a national company. created for this purpose in accordance with the legislative provisions in force governing public enterprises. The capital of the national company referred to in the first paragraph of this article is entirely defined by the State. It may, however, be opened at any time and in particular by way of a public call for savings, to physical persons of Chadian nationality, including those having the status of public agent. 5% of mining revenues from the producing area are paid into a local development support fund intended to contribute to the socio-economic development of local authorities located in the areas where mining companies operate. The terms of supply, operation and functioning are fixed by decree on the proposal of the Minister in charge of Mines. See Mining Code 2018, Section 131 Mining Code 2016, Section 155: (vi) A commitment by the applicant to allocate free of charge to the State a stake, the terms of which are determined by this code, in the capital of the company required to hold the permanent quarry industrial operating permit.			
11. Comoros					Mining Act 1954, no provision for state participation.

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
12. Democratic Republic of Congo (DRC)		The Mining Code Act 2002, Title III, Chapter I, Article 71, as amended by Act No. 18-001, provides that, as a condition to obtaining an Exploitation License, the applicant must, without cost or charge to the Government, transfer to the Government 10% of the non-dilutable shares in the registered capital of the company applying for the license. The Mining Code Act 2002, Title I, Chapter II, Article 8, Amended by Act No. 18-001 provides that the State may, through public entities, or expert organizations set up for that purpose, either by itself or in association with third parties, carry out mining activity governed by the Mining Code.	The Mining Code Act 2002, Title I, Chapter II, Article 8, Amended by Act No. 18-001, provides that the State may, through expert organizations, carry out exploration activities of soil or sub-soil with the purpose of improving the geological knowledge of the National Territory or for scientific purposes, which activities do not require a mining or quarry right to be obtained.	The Mining Code Act 2002 Title III, Chapter I, Article 71, Amended by Act No. 18-001: In practice, operators that are engaged in joint ventures with state-owned permit holders, such as Gécamines, are not required to transfer 10% of their share capital to the state, as contemplated by the Act.	
13. Republic of Congo	Mining Law, Articles 66-9: "Public Enterprises" are described in the mining law as being able to discover and exploit mines but they are never defined.	Mining Law, Article 100. It seems that when creating a mining company in the Congo, the State must have at least 10% of the shares. However, the State's participation in kind cannot be less than 10%. In addition, the State can take additional shares.			
14. Republic of Côte d'Ivoire (Côte d'Ivoire/Ivory Coast)		Code Minier 2014, Article 7: The granting of an exploitation permit entails an obligation for the holder thereof to set up an Ivory Coast company whose exclusive object shall be the exploitation of the deposit for which the permit was issued. The exploitation permit is transferred to the company thus set up in accordance with the conditions defined by decree. The State's granting of exploitation permits grants the State, in consideration of the wealth distributed and the impoverishment of the subsoil, the right to the allocation of contribution shares set at ten per cent (10%) of the capital of the exploitation company during the entire lifespan of the mine. The State may not be required to make any financial contribution for said contribution shares even in the event of a capital increase. In any event, the State's share shall continue to be equal to at least ten per cent (10%) of the capital of the exploitation company. Any State paid participation in the capital of operating companies shall be determined by negotiation of party agreements at market conditions.			

Country	Legislation for Equity Ownership in Mining Projects by SOE	Legislation for Equity Ownership in Mining Projects by Government or Ministry	Other Legislation requiring Participation in Mining Project by Government	Other Participation by Government in Mining Projects (Policy or Practice)	Notes
		Said participation is contributive and does not exceed 15% of the capital of the exploration company on the date of its acquisition. The limit of the State's paid participation does not take account of shares held by State companies and majority public financial participation companies. Notwithstanding the foregoing, the State may hold an unlimited contributive participation in the capital of the exploitation company of a deposit in which the State has invested as from the deposit exploration and identification phase.			
15. Djibouti		Code Minier 2016, Section 8: The State reserves the right to undertake mining research and exploitation activities, in accordance with the provisions of this law, either directly through one of its public branches or indirectly through the intermediary of a private legal person of which he holds a share or all of the capital.			
16. Egypt	Mining Law 2014, Article 5: State mining agency (the "Authority") can establish a company specialized in operations and activities related to mines, quarries, and salines, buy stocks in, or join one, in accordance with the Implementing Regulations of this law.	Mining Law 2014, Article 4: State mining agency (the "Authority") can establish a company specialized in operations and activities related to mines, quarries, and salines, buy stocks in, or join one, in accordance with the Implementing Regulations of this law.			
17. The Republic of Equatorial Guinea	Mining Law 2006, Section 55: This law empowers the Government to create a National Mining Company, which will have the form of a joint-stock company, whose Corporate Capital will be totally subscribed by the State. Said company may participate as a stockholder in the Mining Exploitation Contracts. Said participation shall be determined in the respective Agreements between the Contractor and the State. The National Mining Company will operate under the guardianship of the Ministry of Mines, Industry and Energy on which it will depend at a hierarchical, functional and organic level.				

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18. Eritrea		Mining Law 1997, Section 41: Without prejudice to the provisions of Article 7 of this Proclamation, the Government may acquire without cost to it a participation interest of up to ten percent of any mining investment. Additional equity participation not exceeding a total of 30 per cent including the ten percent above may also be provided to Government by agreement which shall specify the percentage, timing, financing, resulting rights and obligations and other details of such participation.			
19. Eswatini (Swaziland)	Mining Law 2011, Section 33: (1) The iNgwenyama in trust for the Swazi Nation shall acquire 25% shareho1diflg without any monetary consideration in a large scale mining project for which a mining license is granted. (2)The share interest arrangement specified in sub-section (1) is without prejudice to the obligation that the Government shall acquire 25% shareholding without any monetary consideration in a large scale mining project for which a mining license is granted. (3) The share interest acquired by the Government under sub-section (2) shall be distributed as follows - (a) fifteen percent (15%) of the share interest shall be maintained in an appropriate fund or other financial mechanism established and administered by the Government for the purpose of providing investment opportunities to citizens; and (b) ten percent (10%) of the share interest shall be acquired by any person who is a citizen of Swaziland as defined in section 82(3) or registered in Swaziland at a fair market value to be determined by the Minister in a manner prescribed by regulation. (4) The Government may, from a fund under subsection (3), (a) acquire and supply minerals to local beneficiators or (b) acquire minerals from other mineral producing countries, in a prescribed manner.	Mining Law 2011, Section 78: (1) A mineral agreement entered into under this Act may contain terms relating to the rights and obligations of the holder of one or more reconnaissance licenses, prospecting licenses, retention licenses or mining licenses, or any combination of such mineral rights. (2) A mineral agreement may contain, in particular provisions concerning - (a) the payment of royalties, taxes, fees and other fiscal impositions and state participation; (b) arrangements concerning participation in any mining operations by the INgwenyama in trust for the Swazi nation; (c) the circumstances or the manner in which a discretion conferred under this Act may be exercised; (d) subject to any legislative requirements in respect of the environment, the environment~ obligations and liabilities of the holder of a prospecting or mining license; and (e) procedures for the settlement of disputes.			

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	(5) A mining license granted under this Act - (a) has no effect until the share interest arrangement provided for by sub-section (1) and (2) has been put into place; and (b) may be cancelled if the holder of the license or any other person enters into an arrangement, agreement or understanding the intent or effect of which is to defeat the intention of sub-section (1) and (2) unless an alternative arrangement or agreement is entered into that will achieve the same result.				
20. Ethiopia		Mining Operations Proclamation 2010, Amended 2013, Article 72: Government shall acquire, without cost, a 5% participation interest in any large scale mining investment. The Ethiopian Government and a licensee may agree to provide the government with an additional equity participation by separate agreement. For small scale mining investments, the percentage of mandatory minimum government equity is governed by the laws of the regional states.	Mining Operations Proclamation 2010, Amended 2013, Article 54: Mining activity in Ethiopia is only possible pursuant to a Government concession and license.	Mining Operations Proclamation 2010, Amended 2013, Article 72: The Government may undertake mining operations that are vital for overall economic growth either by itself or in partnership with private investors.	
21. The Gabonese Republic (Gabon)	Acts of the Gabonese Republic Law 2019, Article 9: The State can carry out any mining activity directly or through a state-owned company. The State can also carry out any activity mining through any form of partnership, with any legal person with the technical capacities and financial requirements for the conduct of such operations. The State can also carry out any activity mining through any form of partnership, with any legal person with the technical capacities and financial requirements for the conduct of such operations.	Acts of the Gabonese Republic Law 2019, Article 7: The State is entitled to a systematic participation right of 10%, free of any charge and not dilutable, in the capital of holders of operating permits under the mining regime, for the valuation of tax benefits applicable to mining activities, subject to its right to renounce this right in return for the advantages fixed in the mining convention; an optional participation right in the capital of holders of operating permits in mining regimes who can reach 25% negotiated for a consideration, in accordance with the provisions of common law; a power to approve all operations on authorization and mining title with third parties, as well as any acquisition of a shareholding in the capital of a security holder mimic.			

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22. Gambia				The Gambia, Mines and Quarries Act 2004, Section 28(2): For the purpose of guaranteeing the fiscal stability of a long term mining project a development agreement may make special provision for the payment of royalties, taxes, fees and other fiscal impositions.	
23. Ghana		Ghana Minerals and Mining Act 2006, Section 46: Where a mineral right is for mining or exploitation, the Government shall acquire a ten percent free carried interest in the rights and obligations of the mineral operations in respect of which financial contribution shall not be paid by Government.			Ghana Minerals and Mining Act 2006, Section 94: Where a license is granted in a designated area to a person other than the owner of the land, the licensee shall pay compensation for the use of the land and destruction of crops to the owner of the land that the Minister in consultation with the Commission and the Government agency with responsibility for valuation of public lands may prescribe.
24. Guinea	Mining Code of the Republic of Guinea 2011, Article 150-II: A Public Limited Company, with the State as the sole shareholder, is hereby established to direct the management of mineral resources. This company is mandated to diligently manage the State's ownership interests in companies holding a Mining Operation Permit. In so doing, this company acts in the name of and on behalf of its sole shareholder, the State. This Public Limited Company in charge of mineral resource management is obligated to pay out in the form of dividends to its sole shareholder, the State, the products and dividends received.	Mining Code of the Republic of Guinea 2011, Article 150-I: The grant by the State of a Mining Operation Permit immediately gives the State an ownership interest, at no cost, of up to a maximum of fifteen per cent (15%), in the capital of the company holding the Title. . . . This participation is also free from all charges and this interest is free carry. This interest is obtained upon the signature of the Mining Operation Permit.		Mining Code of the Republic of Guinea 2011, Article 16: The State may engage in any Mining or Quarry Activity on its own behalf, either directly or through the Public Limited Company responsible for management of the mining patrimony acting alone or in association with third parties in the mining sector.	Mining Code of the Republic of Guinea 2011, Article 16: The State may negotiate specific agreements with bilateral partners (States) with respect to the development of its mineral resources. The State reserves the right to negotiate production sharing contracts, the terms and conditions of which will be set out and appended to the Exploration Permit.
25. The Republic of Guinea-Bissau					Could not access law.

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26. Kenya		Mining Act 2016, Section 22-3: The National Mining Corporation is a body corporate investment arm of the national government in respect of minerals. Its purpose is to invest in mining on behalf of the national government. Where a mineral right is for a large-scale mining operation or related to strategic minerals (i.e., all radioactive minerals and any minerals otherwise designated as strategic, id. § 16), "the State shall acquire a ten percent free carried interest in the share capital of the right in respect of which financial contribution shall not be paid by the State." Id. § 48(1), (2). However, the State may further participate in mining and operations as agreed with the holder at arms' length. Id. § 48(3). Mining State Participation Regulations 2017, Section 9: Any agreement entered into or interest acquired requires the consent of the Cabinet Secretary responsible for mining matters. The State does not need to make or pay any financial contribution for its interest and its interest cannot be diluted unless the State transfers, assigns, or sells part or all of interest to the holder or any other party. Id. § 6(2), (3). Though the State may transfer or assign its interest, it must give the holder of the mining license the right of first refusal. Id. §§ 6(10), (11), 7(3). Additionally, the State's free carried interest does not entitle it to manage or participate in the day-to-day management of the operations of the holder of the mining license. Id. § 6(14). However, it has the right to vote and is entitled to receive notice of and attend and speak at a general meeting of the members of the holder of a mining license or company, appoint a director proportionate to its shareholding to the Board, and receive a percentage of any dividends equal to its equity share. Id. § 6(8), (12), (13).			Mining Act 2016, Section 6: Every mineral in its natural state in Kenya is the property of the Republic and is vested in the national government in trust for the people of Kenya.

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27. Lesotho		Mining Law 2005, Section 34: Government shares or investment (1) The Government may, through the Ministry of Natural Resources, acquire not less than 20 % shareholding in a proposed mine. (2) The Government shall, through the Ministry of Natural Resources, when a mineral lease is issued, inform the applicant whether it is taking the shareholding in a proposed mine. (3) This section shall not apply to a lease to mine diamonds where extent of and terms of participation are agreed under section 44 Mining Law 2005, Section 44: Mining lease for diamonds (1) Notwithstanding the provisions of this Act, the Board shall initiate negotiations with an applicant, in good faith, on an application for the issue, renewal, transfer or amendment of a mineral concession for diamonds, covering all technical, financial and commercial aspects of the proposed project, including the Government participation. (2) Upon successful conclusion of the negotiation under subsection (1), the Minister may issue a lease and agreement reflecting the terms and conditions			
28. Liberia		New Minerals and Mining Law 2000, Section 2.1: Minerals on the surface of the ground or in the soil or subsoil, rivers, streams, watercourses, territorial waters and continental shelf of Liberia are the property of the Republic (of Liberia) and anything pertaining to their Exploration, Development, Mining, and export shall be governed by this Law. New Minerals and Mining Law 2000, Section 9.22: Government shall receive free of charge an equity interest in all Class A Mining Operations as defined in Chapter 6 of this Law equal to but not less than ten percent (10%) or not more than fifteen percent (15%) of its authorized, issued and outstanding share capital existing at any time and from time to time without dilution.	The government shall issue mining licenses to eligible individuals that are in conformance with the Law.		

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29. Libya					Mining Law 1971, Section 15: Assignment of License The Licensee or the investor may request assignment to the Ministry or to others of the license or investment contract before the end of the period specified in the license or contract for the reasons expressed by the Ministry in this case, and that is only after written approval from the Ministry as well as the approval of both the assignee and third parties and stakeholders with specifying the date of entry into force by the Ministry, and settle the rights and obligations of the assignee.
30. Madagascar				National Mining and Strategic Resources (OMNIS), is governed by a unique "Convention d'Établissement" promulgated in February 1999. Extractive Industries Transparency Initiative, eiti.org.	As of [August 12, 2020], no mandatory provision entitles the state to a share in a mining company or requires the government to enter into a mining development agreement in addition to the permits. However, the state and any private company are free to negotiate state participation in the mining company or any other agreement relating to the development of a mine. Ricard Glass and Hoby Rakotoniary, Mondaq, Madagascar: Mining Comparative Guide. At the end of 2020, amendments to the mining code were still pending. U.S. Dep't of State, 2020 Investment Climate Statements: Madagascar.
31. Malawi					Mining Law 1981, no provision for state participation.

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32. The Republic of Mali		Code Minier 2019, Section 65: As soon as the Grande Mine Exploitation Permit has been granted, the holder begins the process for the creation of a company under Malian law. This company can only hold the operating license for which it was created. The State participates in the newly created company up to 10% free of all charges. This participation cannot be diluted even in the event of a capital increase; and the related actions are considered priority actions. The holder of the exploration permit is required to transfer the exploitation permit free of charge to the exploitation company as soon as it is created. When, for a year, a net accounting profit is recorded by the General Meeting of the operating company, the latter votes the payment of a priority dividend to the State, equal to 10% of the said profit minus only amounts allocated to legal reserves in accordance with applicable law, in respect of its free participation provided for in the preceding paragraph. The terms and conditions for payment of this priority dividend are set out in the implementing decree of this code. The State has an option right for an additional participation of a maximum of 10% in cash, which will not be taken into account for the determination of the rate of the priority dividend. The amount, the subscription price and the date of exercise of this option will be fixed by mutual agreement on the basis of an evaluation of the project. Notwithstanding the foregoing, the State may hold an unlimited contributory stake in the capital of the company operating a deposit for which the State has invested from the research and identification phase of the deposit. Code Minier 2019, Section 66: The State can contribute its holdings in the various mining companies to a State-controlled asset company. This company can take stakes in companies with a similar purpose to that of mining companies, raise funds to finance its participation in mining companies, and serve as means for investment by nationals in mining companies operating in Mali.			

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33. The Islamic Republic of Mauritania		Mining Code 2009 Amendment, Article 38, Section 2: The operating permit can only be granted to a legal person governed by Mauritanian law in which the State holds a 10% stake, free of all charges and this, in accordance with the conditions provided for by this law and its implementing texts. . The State reserves the right to exercise an option for additional participation in cash of a maximum of 10% in the capital of the operating company thus created Mining Code 2014, Article 38: Mines can only be operated under an exploitation permit or a small-scale mining permit. The exploitation permit can only be granted to a legal person governed by Mauritanian law in which the State holds a 10% stake supported by the Exploitation Company. The State reserves the right to participate in the capital of this company up to 10% paid by the State. The said permit can only cover the inner zone of the exploration permit and is granted by right if the holder of the exploration permit has fulfilled his obligations. The area for which the exploitation permit is granted according to the deposit whose exploitation is envisaged, including the satellite deposits, as defined in the feasibility study prepared by the holder of the exploration permit. The holder of the exploitation permit must have the perimeter delimited by an approved geologist in accordance with the mining regulations and practices in force.			
34. Mauritius		Mining Law 1966, Section 4: The Government shall have the exclusive right to prospect for minerals in or under any land.			
35. Morocco					Mining Code 2015, no provision for state participation.

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36. The Republic of Mozambique		Mining Law 2014, Article 8: The mining contract, among other clauses, should contain the following: a) State participation in the mining venture; b) Minimum local content; c) local employment and technical-professional training programmes; d) incentives for the increase of value of the minerals; e) social responsibility activities to be developed by the mining holder; f) memorandum of understanding between the Government, the company and the community(ies); g) dispute settlement mechanisms, including provisions related to the settlement of any such disputes through arbitration; h) the way communities of the mining area are engaged and benefitted by the venture. Mining Law 2014, Article 34: 1. The Government must create mechanisms in order to allow the engagement of national entrepreneurship in mining projects, including the definition of the terms and conditions for this purpose. 2. The State must intensify, progressively, its participation level in mining projects. 3. The Government shall promote the entry of mining companies into the Stock Exchange of Mozambique in the terms of the applicable legislation. The Mega-Projects Regulations establish that the Mozambican state reserves the right to negotiate a free participation of no less than 5 per cent during any phase of a mining project, as consideration for its awarding of exploitation rights over natural resources.			Mining Agreements in Mozambique have provided no cost equity to Mozambique Mining Exploration Company (EMEM).

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37. Namibia		Legislation does not appear to require state ownership of mining projects. However, in April 2011 a Cabinet decision announced that the following would be "strategic minerals:" uranium, gold, copper, coal, diamonds and rare earth metals. The state-owned Epangelo would be granted the right to own all new licenses for exploration and for the mining of strategic minerals. The announcement was not retroactive – see e.g., Notes column. KPMG Namibia Report, 14. Neither the strategic mineral designation nor the exclusive grant to Epangelo appear to be codified in any legislation available on the AMLA site, all of which were enacted prior to 2011.		Namdeb is a wholly owned subsidiary of Namdeb Holdings (Proprietary) Limited Holdings which is owned in equal shares (50:50) by the Government of the Republic of Namibia and De Beers Group. https://www.namdeb.com/. Epangelo is a private mining company incorporated into the Republic of Namibia under the Companies Act (Act 61 of 1972). The Government of the Republic of Namibia is the sole shareholder. The company was declared as a State owned Enterprises in 2013 under the PEGA (Act 2 of 2006). https://www.epangelomining.na/about.html.	largest producer of uranium oxide in the world, is majority owned by China National Uranium Corporation (CNUC). Namibia is also a leading producer of zinc. There are two operational mines: Skorpion Zinc (operated by Vedanta Resources) and Rosh Pinah (owned by various shareholders, with Exxaro Base Metals owning the largest interest at 46 percent). "Namibia is an up-and-coming source country for critical minerals, which are important for renewable energy technologies….[and] has the potential to develop new mining projects for cobalt and lithium." https://www.trade.gov/country-commercial-guides/namibia-mining-and-minerals.
38. The Republic of Niger		Mining Code, Article 8: Issuance by the State of a mining permit shall entitle the latter to free shares for property representing 10% of the capital, in compensation for wealth distributed, sub-soil impoverishment and prospecting expenses incurred as provided for in article 89 below. No financial contribution shall be requested from the State for these shares.			Mining Code on AMLA is incomplete. Used Ordinance No 93-16 of 2 March 1993 related to the Mining Law.
39. Nigeria				Mining Law 2007, Article 1(2): All land that has a commercial quantity of minerals is initially owned by the government. In general, due to high amount of petroleum and other factors, Nigeria's mining industry is underdeveloped. It used to be 100% controlled by SOE's, but the government has been attempting to privatize it since 1999. The Nigerian Mining Corporation (NMC) was established in 1972. It is a fully state-owned-entity with eight subsidiaries, four projects and has shares in over twenty-one associated/joint venture companies.	

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				The government seems to be attempting to slowly privatize most, if not all, of NMC's holdings. See https://bpe.gov.ng/nigerian-mining-corporation/.	
40. Rwanda		Law on Mining and Quarry Operations 2018, Article 4, 1: All rights of ownership and control of minerals or quarry products in, under or upon any land in Rwanda are vested in the State notwithstanding personal ownership of land and other properties thereof. Law on Mining and Quarry Operations 2018, Article 4, 4: The competent authority may designate certain quarries for exclusive exploitation by the Government for the purposes of carrying out projects in the public interest. Law on Mining and Quarry Operations 2018, Article 49: The Government may acquire on such terms as agreed upon between the holder of a license and the Government, shares in mining or quarry operations.		"According to the current Plan, in a bid to professionalize small-scale mining, there is a need for access to affordable locally made mining equipment. Rwanda Mines, Petroleum and Gas Board (RMB) has been tasked to establish a mechanism bringing together the mining companies and local equipment manufacturers." The New Times, How government plans to revive the mining sector (May 12, 2020).	
41. Senegal		Mining Code 2006, Article 31: The granting of a mining permit entitles the State to a free participation of ten percent (10%) in the share capital of the operating company throughout the life of the mine. This participation, free of all charges, must not be diluted in the event of an increase in the share capital. The State may, in addition to its free share of the capital, negotiate for itself and/or the national private sector, for consideration, an additional participation of up to twenty-five percent (25%) in the capital of the operating company, according to the usual procedures in force in this area			

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42. Democratic Republic of São Tomé and Príncipe					No provisions in the Legal Framework for Mining and Extraction of Aggregates, 2020 for State participation.
43. The Republic of Seychelles					Seychelles Mineral Act 2009, no provision for state participation.
44. Sierra Leone		Mines and Minerals Act 2009, Section 162: (1) The Government of Sierra Leone shall have the option to acquire on such terms as shall be agreed upon between the holder of a large-scale mining license and the Government, shareholding interest in any large-scale mining operations. (2) Any agreement concluded under subsection (1) shall be done with the advice of the Minerals Advisory Board and with the concurrence of the Minister of Finance.			
45. Somalia		Mining Law 1984, Section 55: The terms and conditions of any Agreement may, in the discretion of the Minister, provide for the Government's participation in some or all stages of the Hydrocarbons exploration or mining operations contemplated. Such participation may include the right to participate in the rights and obligations under this Code, the Regulations or any permit or lease. The Minister may issue Regulations governing the terms and conditions upon which the Government will participate in such operations.			Participation appears to be limited to hydrocarbons, but provision is ambiguous.

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46. South Africa					No legislation pertaining to SOEs specifically. In 2011 South Africa resurrected its mining state owned entity (AEMFC) which had been dormant pretty much since its inception in 1944. It mainly focuses on coal but does not seem to be a major producer.
47. The Republic of South Sudan					No provision for state participation.
48. Sudan					No provision for state participation.
49. Tanzania		The United Republic of Tanzania Mining Act 2019, Section 5: (1) The entire property in and control of all minerals in, and under or upon any land, rivers, streams, water courses throughout Tanzania, area covered by territorial sea, continental shelf or the exclusive economic zone is the property of the United Republic and shall be vested in the President in trust for the People of Tanzania. (2) The Government shall have lien over any material, substance, product or associated products extracted from the mining operations or mineral processing. The United Republic of Tanzania Mining Act 2019, Section 10-(1): The government may grant mining licenses to eligible individuals; (1) In any mining operations under a mining license or a special mining license the Government shall have not less than sixteen percent non-dilutable free carried interest shares in the capital of a mining company depending on the type of minerals and the level of investment. (2) In addition to the free carried interest shares, the Government shall be entitled to acquire, in total, up to fifty percent of the shares of the mining company commensurate with the total tax expenditures incurred by the Government in favor of the mining company.			

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		(3) Acquisition by the Government of shares in the Company shall be determined by the total value of the tax expenditures enjoyed by the mining company.			
50. The Togolese Republic (Togo)		Mining Code, Amended 2003, Article 55: In appropriate circumstances, 10% free equity interest to State, and 20% paid interest in Togo private citizens.			
51. The Republic of Tunisia					No state participate provided in mining law or regulations.
52. Uganda		Mining Law 2003, Section 3: Subject to any right granted to any person under this Act, the entire property in and control of all minerals in, on or under, any land or waters in Uganda are and shall be vested in the Government, notwithstanding any right of ownership of or by any person in relation to any land in, on or under which any such minerals are found. Mining Law 2003, Section 25: Minerals obtained in the course of prospecting under a prospecting license shall be the property of the Government and, except such reasonable quantity as may be prescribed for the purpose of sampling, assay, analysis or other examination, shall not be disposed of by the holder of the license or by any other person without the written consent of the Commissioner. Mining Law 2003, Section 55: A location license (i.e., for small-scale prospecting and mining operations) shall be granted, in the case of an individual, only to a citizen of Uganda, and in the case of a body corporate, only where citizens of Uganda hold at least fifty one percent of the beneficial ownership of such a body. Licenses may be revoked if less than 51% of the beneficial ownership interest in a body corporate is held by Ugandan citizens. Id. § 59.			A 2021 draft bill establishes a Uganda National Mining Company wholly owned by the State to manage Uganda's commercial holding and participating interests of the State, including by participating in joint ventures in which it holds an interest on behalf of the State. The Mining and Minerals Bill, 2021, Sections 22-3. The bill also allows for state equity participation (through the Uganda National Mining Company), by requiring the grant of a large scale or medium scale mining license to convey a maximum ownership interest of 15% to the State at no cost, with the ability of the State to acquire supplementary participation, in cash, with total State participation not to exceed 35%. Id. § 206. As at 24th January 2022, this Bill is not yet passed into law and is before the Parliament for consideration. https://parliamentwatch.ug/bills/the-mining-and-mineral-bills-2021/

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					https://www.independent.co.ug/energy-ministry-lobbies-lawmakers-to-expedite-mining-bill-2021/
53. Zambia				The Mines and Minerals Development Act 2015, Part III, Division 1, Section 17 provides that the government may acquire mining rights for Government investment over identified areas. Such identified areas shall be reserved for government investment and shall not be subject to an application for the acquisition of mining rights by any person.	Following the privatization of the Zambian mining sector in 2001, the Zambian mining industry has been primarily private-sector driven. The government transformed the agency that previously owned all mines to an investment company now known as Zambia Consolidated Copper Mines Investment Holdings, which continues to hold a minority interest in most large-scale mining projects in Zambia, although Government free carry ownership is not required by law.
54. The Republic of Zimbabwe	Zimbabwe Mining Development Corporation Act, Chapter 20: Subject to this Act and the Mines and Minerals Act [Chapter 21:05], the functions and duties of the Corporation shall be— (a) to invest in the mining industry in Zimbabwe on behalf of the State; (b) to plan, co-ordinate and implement mining development projects on behalf of the State; (c) to engage in prospecting, exploration, mining and mineral beneficiation programs; (d) to encourage and undertake the formation of mining co-operatives; (e) to render assistance to persons engaged in or about to engage in mining; (f) to review annually the general economic conditions and prospects of the mining industry and in particular investment schemes; (g) to advise the Minister on all matters connected with corporate investments in the mining industry and make recommendations for the proper co-ordination of all investment programs; (h) to carry out any other functions and duties which may be imposed upon the Corporation by any enactment.				

- Toolkit for state equity participation in mining companies for AMLA

African Mining Legislation Atlas (AMLA).

TOOLKIT FOR STATE EQUITY PARTICIPATION IN MINING COMPANIES

WORLD BANK GROUP

AMLA EGPS Extractives Global Programmatic Support ALSF African Legal Support Facility • Facilité africaine de soutien juridique

African Mining Legislation Atlas (AMLA).

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