Hogan Lovells

Mining Industry Newsletter

APRIL 2014

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Welcome

Hogan Lovells' Mining Industry Team is pleased to provide the Hogan Lovells Mining Industry Newsletter as a new service for its valued clients. This periodic newsletter will inform legal, regulatory, and compliance staff to the most recent mining laws and news and examine their potential impact on how companies conduct business.

Hogan Lovells will be attending and sponsoring the 116th National Western Mining Conference and Exhibition in Denver, Colorado, from 14-17 April 2014. We look forward to seeing you there!

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Mining is at the forefront of the news in France

Introduction
The topic of mining has been at the forefront of the news in France for several months, due in particular to the stands taken by the man who is now the former Minister of Industrial Recovery, Arnaud Montebourg. Mr. Montebourg has, on various occasions, pointed out the need to give fresh impetus to the mining industry in France to address difficulties associated with the procurement of metallic mineral resources and the increased challenges concerning rare metals. Four points deserve further discussion.

The reform of the French Mining Code
In December 2013, Philippe Tuot, a member of the Conseil d'État provided the Government with a draft Mining Code, intended to tidy up the current Mining Code, which had not been "revamped" since it was enacted in 1810.

Philippe Tuot's draft Mining Code, with over 700 Articles, is a continuation of the former Code. (Only ten percent of the Articles in the Tuot draft are new provisions.)

First, all the legislative provisions which apply to mining matters are grouped together in the draft Code – as in the current Mining Code – irrespective of the relevant materials, environments, and territories.

Second, the predominant role played by the State in mining matters is reaffirmed, the State having sole authority to issue mining rights for exploration for mining operations and also for works authorizations.

The draft Mining Code does, however, propose some important innovations. For example, in the interests of simplification and efficiency, the draft Code proposes

- to ensure that decisions on mining matters are taken solely at ministerial level (works authorizations are currently granted at county level);
- that authorizations no longer be submitted for purely academic explorations which are not intended to lead to an exploration (as is currently the case);
- to limit the time limits for examination procedures (which are currently very long) and to introduce a system of an implied license;
- to submit any litigation relating to administrative decisions on mining matters to a system with full jurisdiction (the judge would decide on the basis of the law in force on the date of his decision and would, above all, have powers to reverse decisions).

Further, in the interests of taking better account of the environment, the draft Code proposes

- to require an applicant to take account of the environmental impact of its project as early as the application phase for the exploration licence and mining operations licence (and not merely at the phase of the works authorization, as is currently the case);
- to create a national program for enhancing the subsoil, with which administrative decisions on mining matters must necessarily be compatible;
- to establish a principle of operator liability or "failing which, the beneficiary of the explorations or operations or the person which actually carried out the mining works" when mining works are terminated, such liability being effective for a period of 30 years, at the end of which the State will become liable (at present, the State is liable for the management of former mining areas).

We are not at present aware when the draft Mining Code will be debated before Parliament.

The announced formation of a state company devoted to underground prospection
In February 2014, Arnaud de Montebourg made a public announcement regarding the future formation of a new state company, the Companie Nationale des Mines (CNM) whose principal purpose will be (i) to explore the sub-soil in France (including the Overseas Areas), to assist with any mining thereof and (ii) to export French know-how on mining to any interested countries.

The stated objective is for France to ensure its independence by controlling its supply of strategic raw materials.

Although full details of the future company are still not clear, its financing will be based both on the Agence des participations de l'État (APE), an agency which manages the State's holdings in various firms, and on the Geological

and Mining Research Bureau (BRGM), a state institution for the application of Earth Sciences.

The ongoing update of the inventory of mining resources in France

In 2012, the State entrusted to BRGM – a state institution whose assignments include gathering all available information on the subsoil – the task of updating France's mining inventory.

This update of the mining inventory is still ongoing and should allow – in particular through a 3D application which was presented by the BRGM in June 2013 – for a better understanding of the condition of the subsoil and the identification of areas with strong potential.

Is there a renewed interest in France for mining companies?

In June 2013, Variscan Mines was granted an exploration licence for the County of Maine-et-Loire, France.

In November 2013, Cominor was also granted an exploration licence for the County of Creuse.

The grant of such permits received a good deal of press coverage, since it was the first time in 20 years that exploration licences were granted over land in Metropolitan France, leading some to say that France might in the near future become a country with a mining industry once again.

Due to the recent changes in government, which occurred at the start of April 2014, doubts remain as to whether the various reforms or works discussed above will be implemented and, if so, when.

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Mongolia adopts its state minerals policy until 2025

On 16 January 2014, the Parliament of Mongolia approved the State Policy of Mongolia in respect of the Minerals Sector for 2014 – 2025 (Minerals Policy). Further, on 24 January 2014, the Parliament amended the royalty regime applicable to the gold sector with a view to encourage sales of gold produced in Mongolia to the central bank and local commercial banks. The key features of the State Minerals Policy and royalty amendments are set out below.

Minerals Policy
The Minerals Policy embodies declarative and aspirational statements setting out the future direction and objectives for the development of the Mongolian minerals sector. The Minerals Policy comprises four parts: (i) general provisions; (ii) policy principles; (iii) policy directions; and (iv) implementation phases and methods, and expected results.

The Minerals Policy indicates that the State will support and encourage private investment in the minerals sector, limit its role to regulation and supervision, encourage transparent and responsible mining operations, and adopt policies to encourage environmentally friendly and value-added operations. Mongolia will maintain the concept of "strategic deposits" under the Minerals Law, over which the State is entitled to acquire an equity interest of up to 50 percent subject to the source of funding for exploration. Currently, there are 15 identified strategic deposits, including operating and exploration-stage projects. It is anticipated that the list of strategic deposits will be expanded.

Under the ambit of the Minerals Policy, separate policies applicable to specific mineral types, such as copper, coal, and iron ore, will be developed in the future.

While the Minerals Policy sets out the main principles and direction in general terms of Mongolian government policy, it is yet to be seen how such principles and policy directions will be reflected and implemented in subsequent legislation and practice. In that context, it is unlikely that the Minerals Policy of itself will allay the ongoing concerns of private investors over security of tenure issues.

Although the extent of its binding nature (if any) is unclear under Mongolian law, the adoption of the State Minerals Policy is significant as it paves the way for much-anticipated amendments to the Law of Mongolia on Minerals of 2006 (Minerals Law).

Potential amendments to the Minerals Law are expected to include a relaxation of the current moratorium on the issue of new mineral exploration licenses which has been in effect since June 2010. As a result of the moratorium, the number of issued minerals licenses has fallen from over 5,500 to approximately 2,900 as of February 2014. It is widely expected that amendments to the Minerals Law will be discussed during the upcoming spring session of the Parliament scheduled to commence on 5 April 2014.

Gold royalty incentives
Amendments to the Minerals Law approved by Parliament on 24 January 2014 introduced a preferential royalty rate for gold produced in Mongolia applicable until 1 January 2019, which aim to encourage the sale of gold to the Bank of Mongolia or Mongolian licensed commercial banks (who are authorized by the Bank of Mongolia). Prior to the amendments, the applicable royalty rate for gold comprised a basic royalty rate of 5 percent and an additional progressive royalty rate of up to 5 percent depending on the gold price. This resulted in an effective royalty rate of 10 percent if the gold price per ounce exceeded US$1,300. Following the changes, gold miners who opt to sell gold to the Bank of Mongolia or its authorized commercial banks (in practice at market price) will enjoy a preferential royalty rate of 2.5 percent.

The decrease in the royalty rate for the gold sector is a welcome development, particularly in light of recent difficulties in the sector exacerbated by significant changes to the regulatory and tax regime (for example, the 2006 windfall profit tax of 68 percent, and the law prohibiting exploration and mining activities in certain protected zones).

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Extractive industries reporting extended for UK-incorporated companies

The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (the "Regulations") amend the Companies Act 2006 and came into force 1 October 2013. These define reporting obligations for both quoted and unquoted companies.

The Regulations will take effect for financial years ending on or after 30 September 2013 and, therefore, companies with a calendar year-end will need to include the new disclosures when they publish their 2013 report in spring 2014. Failure to comply can lead to fines being imposed on the directors of the company.

Unquoted companies will have to continue to comply with the obligation to publish a business review, as previously required, with some exceptions for small companies. Quoted UK companies will also have to include, where this is necessary for an understanding of the development and performance of their business (i) information about the effectiveness of the company's policies in addressing human rights, social and community issues that it faces; (ii) information on the gender balance in senior management, including a breakdown showing, at the end of the financial year, that information as regards directors, senior managers, and employees of the quoted company and its consolidated undertakings; and (iii) a new requirement on the quoted company to describe its business model and strategy, in line with the existing "comply or explain" disclosures in the UK Corporate Governance Code but now mandatory.

On October 17, 2013, the Council of the EU adopted the proposal for a directive to amend the Transparency Directive (2004/109/EC) which, in conjunction with the recently adopted Accounting Directive (2013/34/EU), will require both large and quoted EU-incorporated companies in the extractive industries or in the logging of primary forests to disclose payments of €100,000 (£84,400) or more to governments (both national and local), on both a country and project basis.

The UK has decided to comply early with its obligations to transpose these directives and has released a consultation with a view to promulgating regulations during 2014. The obligation will therefore apply to UK companies for financial years commencing on or after 1 January 2015. Therefore, the non-EU-incorporated parent of any UK subsidiary must comply or face onerous penalties which, in the case of a failure to prepare or deliver a report, will constitute a criminal offence for directors of the relevant companies. In each case, the report will be required to be made public within six months after the end of each financial year and should remain publicly available for at least ten years.

Along with the UK's commencement of the process to obtain certification under the Extractive Industries Transparency Initiative, these new legislative changes will have a profound effect upon the way in which companies in the extractive resources sector comply with their reporting obligations.

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South Africa Mining and Petroleum Resources Development Act

In previous mining newsletters, we discussed the Cabinet approval of the Mineral and Petroleum Resources Development Bill 2012, at the end of May 2013, for tabling in Parliament, and some of the more important proposed amendments.

In this newsletter, we highlight the amendments in the Mineral and Petroleum Resources Development Bill (MPRDA Bill) that have been approved. This update is not meant to be exhaustive, in any manner, and readers are encouraged to seek advice in respect of the proposed amendments and the potential consequences.

The MPRDA Bill was approved by the National Portfolio Committee (NCOP) on Mineral Resources on 6 March 2014, and Parliament approved the MPRDA Bill on 12 March 2014.

The MPRDA Bill will now be sent to the State President to sign. After the State President has signed the MPRDA Bill, the date for the commencement of the amendments will be published in the Government Gazette.

Stated Purpose of the Bill
The stated purpose of the MPRDA Bill is to amend the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) as amended by the 2008 MPRDA Amendment Act; so as to remove ambiguities that exist within the Act; to provide for the regulation of associated minerals; partitioning of rights and enhance provisions relating to beneficiation of minerals; to promote national energy security; to streamline administrative processes; to align the MPRDA with the Geoscience Act, 1993; to provide for enhanced sanctions, to improve the regulatory system; and to provide for matters connected therewith.

Associated Minerals
The amendments aim to improve the situation regarding associated minerals. The definition of "associated mineral" includes any mineral that occurs in mineralogical association with and in the same core deposit as the primary mineral being mined in terms of the mining right, where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith.

However, the ability to lawfully mine associated minerals is subject to compliance with the requirements set out in the amendments to section 102 of the MPRDA. The amendments include the insertion of section 102(3), which provides that any right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with the first mentioned mineral provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.

The MPRDA Bill inserts section 102(4) of the MPRDA, which provides that the right holder contemplated in section 102(3) must within 60 days from the date of making the declaration of the associated mineral apply for an amendment of its right to include the mineral that has been declared, failing which a third party may apply in terms of section 16, 22, or 27 of the MPRDA as the case may be for such associated mineral.

Inclusion of Historical "Dumps," Residue Stockpiles, and Residue Deposits
The amendments are aimed at firmly including residue stockpiles and residue deposits, under the ambit of the MPRDA, together with historic "dumps."

The amendments include changes to the definition of "land," which will include residue deposits and residue stockpiles. The proposed amendments to the term "mine" also include specific reference to residue deposits and residue stockpiles.

The term "residue stockpiles" is also included in the definition of "mining operation."

In addition to specifically incorporating residue stockpiles and residue deposits in the various definitions, section 42A(1) provides that all historic residue stockpiles and residue deposits currently not regulated under the MPRDA belong to the owners thereof and continue in force for a period of two years from the date on which the MPRDA Bill is promulgated.

This means that current owners of residue stockpiles and residue deposits will remain the owners for two years, during which they are required, in the case where the residue deposit or residue stockpile is on a mining area, to apply for amendment of the mining right to include the

residue stockpile, and in the case where the residue deposit or residue stockpile falls outside of the mining area, to apply for a mining right or mining permit.

Beneficiation
The term "beneficiation" is to be amended to mean the transformation, value addition or downstream beneficiation of a mineral to a higher value product, over baselines to be determined by the Minister, which can either be consumed locally or exported.

Section 26 of the MPRDA is amended to require the Minister to designate mineral or mineral products for local beneficiation, and once a mineral or mineral product is designated, producers of the designated minerals must offer a prescribed percentage of its production of minerals or mineral products in the prescribed quantities, qualities, and timelines, at the mine gate price or the agreed price, to local beneficiators. Third-party exporters, persons who do not actually produce the minerals or mineral products, may not export designated minerals or mineral products, without ministerial consent.

The principle "First Come First Served" will no longer apply
The MPRDA Bill proposes the deletion of section 9 of the MPRDA, which provides for the "first come first served" principle in relation to applications for rights, and its substitution with a provision that the Minister may by notice invite applications for rights. The Minister will be granted the right to periodically invite applications by notice in the Gazette. The stated purpose is that the invitation process will ensure coordinated quality approvals by the department that meaningfully contribute toward the fulfilment of the objects of the MPRDA.

Partitioning of Rights and Ministerial Consent - Sections 11 and 102 of the MPRDA
The MPRDA Bill substitutes section 11(1) of the MPRDA with a new subsection, which provides that a right or a part of a right (prospecting right or mining right), may be ceded, transferred, encumbered, let, sublet, assigned or alienated with ministerial consent, and subject to such conditions as the Minister may determine. The current provisions of section 11(1) of the MPRDA do not make provision for partitioning of rights.

In addition to the partitioning of rights, section 11(1) of the MPRDA will require ministerial consent in the event of any cession, transfer, etc. of an interest in any prospecting or mining right or in an unlisted company or a controlling interest in a listed company, where such unlisted company or listed company holds the prospecting right or mining right, or an interest in any such right.

The MPRDA Bill amends section 102(1) of the MPRDA by the substitution of a new subsection that includes a requirement for ministerial consent for the amendment or variation of an approved Social and Labor Plan or an Environmental Authorization (which is substituted for Environmental Management Programs), and includes any application for amendment or variation for the extension of the area covered by the relevant right or by the addition of minerals, or a share or shares or seams, mineralized bodies or strata, which are not at the time the subject thereof.

Increased Sanctions
The MPRDA Bill amends section 99 of the MPRDA, and changes from specified fines, to fines based on a percentage of the right holder's annual turnover in the Republic and its exports from the Republic during the preceding financial year. The percentages are between five and ten percent, depending on the nature of the offence.

Where it is not possible to establish the recent annual turnover of any offender, maximum fines are specified.

Time Frames
Relevant time frames in the MPRDA will be amended, to reflect time frames as prescribed by the Minster, from time to time. The MPRDA Bill states that the time frames will be prescribed and fixed in the Regulations. It also states that the time frames will not detract from the standard practice of 30, 60, and 90 days, where applicable.

Consent for Change of Control
The MPRDA exempts listed mining companies from obtaining ministerial consent if the listed company undergoes a change in control. In terms of the MPRDA Bill, ministerial consent will be required in relation to listed mining companies, if there is a change in control. In addition, ministerial consent will be required if there is any change in shareholding for non-listed companies that hold mining rights or exercise control of such holders.

Community Involvement
The MPRDA Bill provides that if the mining right application relates to land occupied by a community, as defined, the Minister may impose conditions that the Minister believes are necessary to promote the rights and interests of the community.

Integrated Licensing Approach
The MPRDA Bill promotes an integrated licensing approach in respect of mining rights, environmental authorizations, and licenses for the use of water.

The MPRDA Bill confirms that the Minister (of Mineral Resources) is the competent authority to implement mine environmental management in terms of the National Environmental Management Act, while the Minister of Environmental Affairs is the competent authority to develop, review, and amend legislation, regulations, and policies relating to mine environmental management.

Objections and Appeals
The MPRDA Bill makes provision for objections to the granting of a prospecting right, mining right, or mining permit. If an objection is received, the objection must be referred to the Regional Mining Development and Environmental Committee (REMDEC) to consider the objections and to advise the Minister thereon. If an objection is received, the objection may also be referred to the applicant with an instruction to consult with the objecting person and if agreement is reached, the agreement must be recorded in writing.

Further, if a person appeals against the granting of a right or the approval of an environmental authorization, and provided that the appeal has been lodged within the prescribed period, the notarial deed of granting shall not be executed until such appeal has been finalized.

This effectively means that, even where a right or an environmental authorization has been granted, if an appeal is lodged, the holder of the right cannot commence the prospecting or mining operations.

Summary and Conclusion
The MPRDA Bill makes far-reaching changes, impacting on all aspects of mining operations and must be carefully considered by shareholders.

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Effects of Indonesian ore export Ban

As reported in our last newsletter, the Republic of Indonesia implemented a planned ban on the export of unprocessed mineral ore, with some exceptions. On 11 January 2014, the Minister of Energy and Mineral Resources (MEMR) provided exceptions from the ban for copper, manganese, iron ore, lead, and zinc concentrates. The exceptions are in place for only three years, however, and are conditioned on a commitment to construct smelters in Indonesia. No such exceptions exist for other minerals, like nickel, tin, gold, silver, or chromium.

The ban was intended to promote the development of smelting capacity in Indonesia. Indeed, Freeport-McMoran Copper & Gold and PT Aneka Tambang (Antam) have agreed to study construction of a copper smelter in Indonesia. That study will take at least three months. Even if companies agree to construct smelters, as opposed to exiting Indonesia or curtailing operations, the ban could have a significant adverse effect on the Indonesian economy.

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U.S. Securities and Exchange Commission staff answers additional frequently asked questions about the conflicts minerals rule

On 7 April 2014, the staff of the U.S. Securities and Exchange Commission's Division of Corporate Finance supplemented its 30 May 2013 publication of frequently asked questions relating to its rule requiring reporting companies under the Exchange Act to provide annual disclosures regarding conflict minerals. The disclosures are required if an issuer determines that conflict minerals are necessary to the functionality or production of products it manufactures or contracts to manufacture.

Issuers subject to the disclosure requirements must report on Form SD and the associated Conflict Minerals Report whether the conflict minerals utilized by them originated in the Democratic Republic of the Congo (DRC) or an adjoining country, and the due diligence they undertook on the source and chain of custody of the conflict minerals. Exchange Act Rule 13p-1 and Form SD set forth the disclosure requirements implementing Section 13(p) of the Exchange Act, which was added by Section 1502 of the Dodd-Frank Act. These requirements became effective on November 13, 2012 and first apply for the 2013 calendar year, with the report on Form SD for 2013 due by May 31, 2014.

The SEC's new guidance primarily addresses the independent private sector audit ("IPSA") of an issuer's Conflict Minerals Report. Among the responses issued by the SEC are:

- The auditor performing the IPSA must meet applicable requirements under the Government Accountability Office's Yellow Book, but does not have to be a certified public accountant.
- If, during the temporary transition period (four years for smaller reporting companies and two years for all other issuers) an issuer determines that any of its products are "DRC conflict undeterminable," then the issuer is not required to undergo an IPSA of its Conflict Minerals Report. However, if the issuer wants to label its product as "DRC conflict free," then the issuer must perform an IPSA.
- The IPSA does not need to include or opine on the country of origin inquiry.
- An issuer does not need to carry out due diligence measures constantly throughout the entire year covered by the report, and the due diligence measures may begin before or extend beyond the calendar year.
- If a product contains some conflict minerals from recycled or scrap sources and some that are not from recycled or scrap sources, the disclosure about the conflict minerals from recycled or scrap sources must be reported on the Form SD, which does not require an IPSA. The disclosure about the conflict minerals not from recycled or scrap sources must be reported in the Conflict Minerals Report.

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