

GETTING THE DEAL THROUGH

Mining

The regulation of exploration and extraction in 35 jurisdictions worldwide

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Mining industry

1 What is the nature and importance of the mining industry?

The Democratic Republic of the Congo (DRC) holds the world's largest deposits of copper and cobalt, as well as significant reserves of gold, diamonds and other minerals (zinc, iron, uranium, etc). The extractive sector historically accounted for about 75 per cent of total export earnings, 25 per cent of the country's GDP and 25 per cent of fiscal revenue. However, major civil conflicts and political instability has disrupted the country's resource development. By 2001, the mining sector's recorded contribution to GDP had declined to 7 per cent but by 2004 it recovered to an estimated 9 per cent (source: EITI; www.eitransparency.org). The World Bank believes that the gross value of mining production will range between US\$2 billion and US\$3.8 billion per annum in less than 10 years' time. This should represent between 20 and 25 per cent of GDP, and between US\$186 million and US\$689 million in taxes, compared with the scarce US\$27 million in 2005.

Legal and regulatory structure

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

The legal system of the DRC is civil law-based.

3 How is the mining industry regulated?

The mining industry is regulated through national legislation and regulations issued by the DRC parliament and the DRC executive branch and mainly by the new Mining Code adopted in 2002 and its ancillary Mining Regulation, adopted in 2003. These norms are of general application throughout the entire country.

Mining agreements were suppressed by the new Mining Code. Those validly existing under the former mining legislation could, subject to certain formalities, be maintained until their contractual expiry.

4 What are the principal laws that regulate the mining industry?
What are the principal regulatory bodies that administer those laws?

The main legislation governing mining activities is the Mining Code enacted by the Law No. 007/2002 of 11 July 2002 (the Mining Code). The application types of the Mining Code are provided by the Mining Regulation enacted by Decree No. 038/2003 of 26 March 2003 (the Mining Regulation). This core legislation includes environmental norms applicable to mining activities. It

also includes quarry rights and activities not dealt with here.

The main administrative entities in charge of regulating mining activities in the DRC as provided by the Mining Code are:

- the president of the Republic, who can enact mining regulations to implement the Mining Code and exercises his powers by Decree made on his own initiative or on the proposal of the minister of mines, after having obtained the opinion of the Geological Department or the Mining Registry;
- the minister of mines, who has, among other powers, jurisdiction over the granting, refusal and cancellation of mining rights, and exercises his powers by way of Decree;
- the Mining Registry (Cadastre Minier), which is a public entity, under the supervision of the minister of mines and the minister of finance, whose assignment is to carry out administrative proceedings concerning the application for, and registration of, mining rights, as well as the withdrawal, cancellation and expiry of those rights;
- the Directorate of Mines, which is responsible for inspecting and supervising mining activities with regard to safety, health, work practices, production, transport, sale and social matters; and
- the department in charge of the protection of the mining environment, which has powers regarding the definition and implementation of the mining regulations concerning environmental protection and the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan (see question 23).

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

The DRC mining legislation does not impose a specific classification system for reporting mineral resources and reserves. Thus, private investors should select the system or the convention that is most appropriate for purposes of their bankable feasibility study or of their financial reporting.

Mining rights and title

6 Who has title to metallic minerals in the ground?

According to the Constitution and the Mining Code, the state is the owner of all mineral resources in the soil or subsoil. In no way may a holder of surface rights avail himself of his title to claim any right of ownership whatsoever over the deposits of mineral substances.

However, the state may grant to private parties (local or foreign) the rights to explore and exploit mineral resources by awarding mining titles.

- 7** What information and data is publicly available to private parties that wish to engage in mining activities?

The following main sources of public information relating to the DRC mineral sector are available:

- the Mining Registry (Cadastre Minier): see www.cami.cd;
- the network of information on geology and prospecting in the DRC: see www.drcmining.com;
- the Technical Cell of Coordination and Mining Planning (CTCPM): see www.miningcongo.cd;
- the Centre for Geological and Mining Research (CRGM);
- the University of Lubumbashi; and
- the Ministry of Mines.

- 8** What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have?

Any private party can engage in non-artisanal research or exploitation of mineral substances in the DRC provided he or she is the holder of a valid mining right (research or exploitation) upon completing the corresponding administrative procedure.

The granting of mining titles is based on a 'first-come, first-served' principle: the applications for mining rights for a given 'perimeter' (demarcated surface area with indefinite depth) composed of quadrangles or 'squares' are registered in the chronological order of their filing.

In exceptional cases, the minister of mines may submit to tender, open or by invitation, mining rights relating to a specific deposit.

To maintain the validity of his or her mining rights, the holder must: commence exploration within six months (research permit) or commence development and construction works within three years (exploitation permit) as of the date the title evidencing his right is issued; and pay the surface duty per square relating to his title at the counter of the Mining Registry. If he fails to fulfil any of these obligations, the holder may be deprived of his right.

A title holder must also comply with specific rules relating to, among others, protection of the environment, cultural heritage, health and safety or construction and planning of infrastructure.

- 9** Is there any distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There are no distinctions between mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties, except for artisanal diggers and traders (small-scale mining), who can only be individual DRC nationals, and except for foreign companies that are requested to incorporate a local company before they apply for an exploitation permit. Foreign parties must elect domicile with an authorised domestic mining and quarry agent and act through his intermediary.

A foreign party need not have a domestic partner, but a company willing to obtain an exploitation permit must transfer 5 per cent (non-dilutable) of its share capital to the state.

- 10** How are mining rights protected?

The DRC judicial system adheres to the rule of law enforced pursuant to established procedures by courts that are independent from the executive and legislative branches of the state.

Moreover, the Mining Code provides for a specific recourse system for mining right holders and organises three ways to resolve mining disputes or threats over mining rights: administrative recourse, judicial recourse and national or international arbitral recourse, depending on the nature of such threat or dispute.

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

The mining rights must be exercised so as to affect, as little as possible, the interests of the lawful occupants of the land, including their customary rights.

- 12** What surface rights may private parties acquire? How are these rights acquired?

According to the Land Law No. 73-021 of 20 July 1973, the state has the exclusive, inalienable and imprescriptible property of the land.

The state can grant surface rights to private or public parties that have to be distinguished from mining rights since surface rights do not entail the right to exploit the mineral substances of the soil or subsoil and, inversely, a mining right does not entail any surface occupation right over the surface.

However, subject to any rights of third parties over the surface concerned, the holder of an exploitation mining right has, with the authorisation of the governor of the province concerned, and on the advice of the Administration of Mines, the right to occupy within his mining perimeter the land necessary for his activities and associated industrial activities, including the construction of industrial plants and dwellings, to use the water, dig canals and channels, and establish means of communication and transport of any type.

Nevertheless, any occupation of land depriving the rightful surface right holders from using the surface, or any modification rendering the land unfit for cultivation, will entail the obligation for the holder of the mining rights to pay fair compensation.

The mining right holder is also liable for the damage caused to the occupants of the land in connection with his mining activities, even if they are authorised.

The Mining Code provides for judicial and arbitral recourses in case of disputes.

Duties, royalties and taxes

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

First, the tax and customs regime that applies to mining activities is exhaustive: the Mining Code provides for all the taxes, charges, royalties and other fees owed to the Treasury by a mining title holder in respect of his mining activities, to the exclusion of any other form of taxation. When applicable, the tax provisions of the Mining Code refer to the general tax legislation.

Second, the Mining Code provides a certain guarantee of stability: the existing tax, customs, exchange and other benefits applicable to mining activities remain in effect for 10 years in favour of each concerned mining title holder in the event that the Mining Code is amended.

Mining royalty

A mining royalty is owed as from the date of commencement of effective exploitation. The mining royalty is calculated on the value of sales realised, less transport costs and less assay, insurance and marketing costs. The rate of the mining royalty is 0.5 per cent for iron or ferrous metals, 2 per cent for non-ferrous metals and 2.5 per cent for precious metals.

Profit-based tax

Professional tax on benefits: a professional tax on benefits at the preferential Mining Code rate of 30 per cent (instead of the 40 per cent corporate tax rate) is levied on the net profits from exploitation determined in accordance with the accounting and tax legislation in force.

Revenue-based taxes**Domestic turnover tax**

The holder is liable for the domestic turnover tax on sales and services. Except for sales of products to a transformation entity in the DRC, which are exempted, other sales of products are taxable at the preferential Mining Code rate of 10 per cent (instead of 13 per cent, due to increase to 15 per cent when a law voted in January 2008 will be promulgated and published). The standard rate of 3 per cent for equipment or agricultural products remains unchanged. The services rendered by the holder are taxable at the standard rate of 18 per cent, but a preferential Mining Code rate of 5 per cent is applied when the holder is the beneficiary of the services rendered (instead of 18 per cent, or 30 per cent if the provider is based abroad). Purchases of locally manufactured products for mining activities are taxed at the preferential Mining Code rate of 3 per cent (instead of 13 per cent, due to increase to 15 per cent). Imports of goods related to mining activities are taxed at the preferential Mining Code rate of 3 per cent, while the standard rate is 13 per cent (due to increase to 15 per cent) or 3 per cent for equipment or agricultural products.

Taxes on rental income

Rental income is taxed at the standard rate of 22 per cent.

Withholding tax on interest and dividends

The 20 per cent standard rate of the withholding tax is not applied to interest paid on loans contracted abroad in foreign currency. In addition, loans from affiliates must be on interest rates and other conditions as favourable or better than loans that would be obtained from third parties to benefit from this exemption.

Dividends and other distributions are subject to the preferential Mining Code withholding tax at the rate of 10 per cent.

Withholding tax on salaries

The holder is liable to pay the standard withholding tax on salaries payable to the employees.

Exceptional tax on expatriates' salaries

The holder is liable to pay the exceptional tax on expatriates' salaries at the preferential Mining Code rate of 10 per cent, instead of the 25 per cent standard rate.

Asset-based taxes**Tax on real estate property**

The holder is liable to pay the real estate tax on real estate property as determined by general tax legislation, except for buildings situated inside the mining perimeter, which are subject to the tax on the surface area of mining concessions.

Tax on vehicles

Tax on vehicles as determined in accordance with the general tax legislation is due, but those vehicles used exclusively within the mining perimeter for transport of staff or materials, or for handling or traction are exempt from this tax.

Tax on the surface area of mining concessions

A research permit holder is liable for the tax on the surface area of mining concessions at the rates of US\$0.02 per hectare for the first year, US\$0.03 for the second year, US\$0.035 for the third year and US\$0.04 for each subsequent year.

An exploitation permit holder is liable for this tax at US\$0.04 per hectare for the first year, US\$0.06 for the second year, US\$0.07 for the third year and US\$0.08 for subsequent years.

Annual surface duty per square

A special surface duty, payable annually to the Mining Registry, is levied on the number of squares held by a title holder. One square is 84.955 hectares. The duty is meant to cover service and management costs of the Mining Registry and the Ministry of Mines.

For a research permit, the annual duty per square amounts to US\$2.55 for each of the first two years, US\$26.34 for each subsequent year, US\$43.33 for each year of the first renewal period and US\$124.03 for each year of the second renewal period.

For an exploitation permit, the annual duty per square is US\$424.78 for an ordinary exploitation permit, US\$679.64 for a tailings exploitation permit and US\$195.40 for a small-scale exploitation permit.

Other taxes

The holder is subject, when carrying out activities outside its mining project, to the general tax legislation.

Annual traffic tax

The holder of a mining right is liable to pay the annual traffic tax pursuant to the general tax legislation except for those vehicles used exclusively within the mining perimeter.

Consumption and excise duties

The title holder is liable for the consumption and excise duties as per the general law, except for fuels (0 instead of 15 per cent).

Duties charged by the Customs Administration**Import duties at preferential rates**

Before the effective commencement of exploitation work, all goods and products imported strictly for mining use are subject to import duties at the preferential rate of 2 per cent, provided these goods appear on a 'list of assets benefiting from the preferential regime' that must first have been approved by a joint decree issued by the ministers of mines and finance.

Imports by the title holder of equipments and goods that do not appear on the approved list are subject to the standard import duties at the rates of 5, 10 or 20 per cent.

As from the effective commencement of exploitation work, the import duty rate of 5 per cent applies under the same conditions. However, fuels, lubricants, reagents and consumables for the mining activities remain taxed at 3 per cent.

Export duties

The title holder is fully exempted from all customs duties and other taxes, regardless of their nature, for exports in relation to the mining project. The remuneration fee for official services on exports is limited to a maximum of 1 per cent.

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

As set out in question 13, some important reductions or exemptions of taxes and customs duties are granted:

- professional tax on benefits: 30 instead of 40 per cent;
- domestic turnover tax: 10 instead of 13 per cent (due to increase to 15 per cent) on sales of goods, with an exemption for sales to a local transformation entity, and 3 per cent on purchases of local goods for the mining activity instead of 13 (15) per cent (except for equipment or agricultural products, which remain taxed at their standard rate of 3 per cent; 5 per cent for purchases of services instead of 18 per cent (local) or 30 per cent (foreign); 3 instead of 13 (15) per cent (except for equipment or agricultural products, which remain taxed at their standard rate of 3 per cent) for the importation of goods related to mining activities;
- withholding tax on interest and dividends: 0 instead of 20 per cent on interest paid on loans contracted abroad in foreign currency; 10 instead of 20 per cent on dividends and other distributions;
- exceptional tax on salaries of expatriates: 10 per cent instead of 25 per cent;
- tax on real property and on vehicles (including the traffic tax): exempted only if within the mining perimeter;
- import customs duties: 2, 3 or 5 per cent instead of 5, 10 or 20 per cent;
- export customs duties: total exoneration instead of 1, 1.5, 3, 5, 6 or 10 per cent; and
- special facilities are granted for deductions for research and development, provisions for depletion allowances, depreciations, etc.

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

There are no distinctions based on nationality of the parties.

Business structures

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

The main business structures used by private parties to carry on mining activities are the two following types of locally incorporated companies:

- the private limited liability company (SPRL), with a minimum of two shareholders (but does not benefit from tax deductions for interest on shareholders' advances); and
- the company limited by shares (SARL), with a minimum of seven shareholders (but its incorporation needs an approval by presidential decree).

Financing

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

The principal sources of financing are equity, shareholders' advances and, subject to risk appreciation and coverage, loans from local and foreign banks.

The domestic public securities market is virtually non-existent.

Restrictions and limitations

18 What restrictions and limitations are imposed on the importation of machinery and equipment or services required in connection with mining activities?

There are no restrictions and limitations for the import of mining machinery and equipment. For import duties, see question 13. However, if goods imported under this preferential customs regime are resold, they will be subject to the payment of normal import taxes.

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

Mining operators are allowed to hire a maximum of 5 per cent of foreign employees for management staff and a maximum of 10 per cent for other positions. Certain jobs are reserved for DRC nationals, but derogations may be granted. Foreign employees are required to obtain a work permit, generally valid for two years and renewable.

20 What restrictions or limitations are imposed on the processing, export or sale of metallic minerals?

There are no restrictions or limitations on the marketing of mining products from exploitation perimeters. However, leave of the minister of mines is required for exporting unprocessed ore, and only provided the title holder establishes:

- that it is impossible to process the ore in the DRC at a cost that is economically viable for the mining project; and
- the advantages for the DRC if the export leave is granted.

21 What restrictions or limitations are imposed on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals?

There are no restrictions or limitations on the import of funds or on the use of proceeds from the export or sale of metallic minerals except for special reporting requirements and for the obligation to repatriate 40 per cent of the exports revenue to the main bank account in the DRC. This 40 per cent must not be converted into DRC currency, though, but can be used, inter alia, to buy or lease imported equipment, pay for goods and services from abroad if these cannot be procured locally at identical conditions, price, quality and quantity, reimburse shareholders short-term advances provided the debt-to-equity ratio does not exceed 3:1 (if this ratio is exceeded, the normal currency exchange rules will apply), pay dividends to foreign shareholders, etc.

Environment, health and safety

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

The Mining Code and the Mining Regulation provide for mainly self-contained environmental (however see also the law No. 011-2002 of 29 August 2002 on the Forestry Code), and health and safety rules.

The principal regulatory bodies that administer those laws are the Direction in charge of the Mining Environment Protection (for environmental matters) and the Direction of Mines (for health and safety matters).

Update and trends

The DRC still suffers from civil unrest and inter-ethnic fighting, mainly in the eastern provinces. Inflation is back (17.8 per cent in 2007), while the external debt exceeds US\$10 billion. However, GDP increased from US\$6.6 billion in 2004 to US\$9.8 billion in 2007, with a relatively steady economic growth of around 6.5 per cent per annum, except in 2006 (5.1 per cent). Mining investments in the metal-mining province of Katanga are said to be about US\$2 billion, while official copper and cobalt production reached 36,400 and 10,850 tons respectively in 2006 (an increase of 38 per cent and 32 per cent compared to 2005) (sources: Central Bank of Congo and Jeune Afrique; www.jeuneafrique.com).

The mining contracts review process initiated last year resulted, after leaks to the press, in the report being notified officially in February 2008 to the 61 concerned mining

companies. All are required to 'adjust' or renegotiate the terms of their investment or joint-venture agreements. The report does not distinguish between those agreements that were concluded in full transparency and on sound economic bases, and those that really are questionable, including some that were not under review.

In parallel, the government concluded a controversial mega-contract with Chinese state-owned companies, with promises for infrastructure investments valued at US\$6 billion increasable at US\$9 billion, in exchange for minerals and associated with specific favourable tax and other conditions. The implementation details of this mega-contract are still unknown and are much awaited by both the mining investors, in particular those whose mining contracts are under review, and the International Monetary Fund, which fears that this mega-contract might overburden the DRC with debt and lead to its insolvency.

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

Exploitation permits are subject to the prior approval of an environmental impact study (EIS) and an environmental management plan (EMP). Exploration operations are subject to the approval of a mitigation and rehabilitation plan (MRP) subsequent to the delivery of the research permit. However, prospection and small-scale exploitation permits are only subject to codes of conduct.

A research permit may be obtained in a maximum of 47 calendar days from the date of filing the request, while the approval of the MRP may be obtained in a maximum of 24 calendar days from its filing, and an exploitation permit may be obtained in a maximum of 252 calendar days.

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

As part of its environmental plan, the holder of a research or exploitation right must provide for the measures of remediation and environmental rehabilitation after closure, the costs of which need to be entirely backed by a financial guarantee. However, the funding of the guarantee depends on the type of operation

and its duration, and can take place over time. The amount is revised half-term.

International treaties

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

The DRC is a member of the World Trade Organisation (WTO), the Multilateral Investment Guarantee Agency (MIGA), the Convention for the Creation of the International Centre for Settlement of Investment Disputes (ICSID), the Extractive Industries Transparency Initiative (EITI) and declared that it intended to adhere to the OHADA Convention.

The DRC has also concluded numerous international environmental treaties such as the Vienna Convention for the Protection of the Ozone Layer, the Rio Convention on Biological Diversity, the Stockholm Convention on Persistent Organic Pollutant, various instruments concerning hazardous waste, etc, and the Kyoto Protocol to the UN Convention on Climate Change.

The DRC concluded bilateral international treaties with a few countries in order to promote foreign investment. However, there are no international tax treaties currently in force, except for two limited transport tax treaties (source: International Bureau of Fiscal Documentation, April 2008; see www.ibdf.org).

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