

Country mining law updates

The following article reviews the mining laws that have recently changed or that are in the process of being changed in India, Russia, South Africa, Ghana and Ecuador.

1. India

The Indian cabinet approved a new mining policy in March 2008 which aims at opening this resource-rich country to increased private investment in mineral exploration and production. However, this mining initiative still requires the consent of the Indian Parliament.

The new mining policy plans to introduce new measures to update obsolete Indian mining laws (some of which date back to 1950s) which have deterred foreign investment over concerns related to security of tenure and the high level of discretion the Government has maintained over the granting and revocation of licences.

The current mining regulations in India do not provide for automatic conversion of a reconnaissance permit to a prospecting licence to a mining lease. The new policy would allow this automatic conversion and would also distance the Government as a regulator, from the Government as a miner.

The new mining policy envisages that (a) the companies that discover commercially exploitable reserves may sell those concessions to other companies at a profit; and (b) the auction of rights to discoveries made by publicly funded entities may be permitted to other investors. In addition, the policy would introduce a sustainable development framework based on the International Council on Mining and Metals model. Mining companies would also be required to spend a percentage of profits on social infrastructure in keeping with corporate social responsibility.

2. Russia

On April 16, 2008, the Russian parliament passed a new Federal Law “On Procedures for Foreign Investments in Companies of Strategic Significance for National Defense and Security” imposing restrictions on foreign investors seeking to buy shares or acquire control over Russian companies that are deemed strategic. The new law came into effect in July of this year. This law amends the Law of the Russian Federation No. 2395-I “On Subsoil” dated February 21, 1992 (the “**Amendments to the Subsoil Law**”).

The adopted laws are aimed at imposing limitations on foreign investors and groups of persons that include foreign investors upon their acquisition of shares and participatory interests in the capital of and/or control over companies that are deemed strategic, including companies that have a right to use subsoil plots of federal significance. Furthermore, the laws establish a number of restrictions on the use of subsoil plots of federal significance.

RESTRICTIONS ON TRANSACTIONS

Pursuant to the amendments, subsoil plots containing *inter alia* deposits of uranium, diamonds, nickel, cobalt and the platinum group of metals are included in the list of subsoil plots of federal significance.

In accordance with this new law, if a foreign investor or a group of persons including foreign investors acquires the shares of a company having rights to use subsoil plots of federal significance such that it acquires the right to (a) own directly or indirectly ten percent (10%) of shares of such company; or (b) appoint a chief executive officer and/or ten or more percent (10%) of the directors of such company; or (c) perform the functions of a management company; then such transactions would require the preliminary consent of a governmental commission. The overall time for taking a decision by the governmental commission is three months. However, in exceptional cases this term may be extended to six months.

RESTRICTIONS ON SUBSOIL RIGHTS

If in the process of a geological survey a foreign investor (or a legal entity with the participation of foreign investors) discovers a mineral deposit that comes under one of the categories of subsoil plots of federal significance, the Government of the Russian Federation may refuse to grant the entity that discovered the deposit the right for exploration and production of mineral resources on that plot.

If the deposit was discovered in the course of a geological survey on the basis of a combined license (for geological survey, exploration and production) the Government of the Russian Federation may decide to terminate the right to use this subsoil plot.

In either of the above cases, the Amendments to the Subsoil Law provide for compensation of expenditures related to prospecting and appraisal, and repayment of a bonus for the grant of rights. Moreover, such entities may be entitled to a premium payable by the Russian State.

The users of subsoil plots of federal significance, with the exception of those located on the Russian continental shelf, should be legal entities registered in the Russian Federation. The Government may impose additional limitations on Russian legal entities having foreign participation regarding their participation in tenders and auctions for the right to use such plots.

The users of subsoil plots located on the Russian continental shelf should *inter alia* be legal entities (a) that were established in the Russian Federation; (b) that have at least five years' experience in developing subsoil plots located on the Russian continental shelf; and (c) in whose capital the Russian State has a share of more than 50 percent, and/or in relation to which entity the State holds the right to the direct or indirect disposal of more than 50 percent of the total number of votes at shareholder level.

As a general rule, it is forbidden to transfer the right to use subsoil plots of federal significance to a company which has foreign investors or a group of such persons, which have the right to (a) dispose directly or indirectly of more than ten percent of the total number of votes at shareholder level; (b) determine the decisions of the governing body of such a company, including the rights to control the business activities of the company; or (c) appoint the chief executive body and/or more than ten percent of the members of the collective executive body and/or has the unconditional ability to elect more than ten percent of the members of the board of directors (supervisory council) or other collective body of such a company.

Such a transfer is permitted in exceptional cases only upon a decision by the Government of the Russian Federation.

EXISTING LICENSES TO BE PARTIALLY GRANDFATHERED

This new law will apply to transactions executed after its effective date, i.e., after its publication. However, if transactions are entered into prior to the effective date, this law will apply to such transactions to the extent that the rights and obligations under such transactions arise after the effective date. Thus, the restrictions imposed by the new law are likely to apply to executed but not yet completed transactions.

The provisions of the Amendments to the Subsoil Law relating to the discovery of deposits will apply to discoveries made after the effective date. They will not apply to subsoil plots that have been granted under a combined license in respect of which the license holder has completed geological surveys and begun exploration and production prior to the effective date.

3. South Africa

The South African Government first proposed royalties on mining rights in 2003, so as to have a more equitable share in the nation's mineral wealth. The royalty rates were revised last year and a draft mining royalty bill was introduced. However, the mining industry reacted to this revision and stated that the royalties suggested last year would make the mining of a number of minerals (including iron ore) uncompetitive. Based on these views, the Government agreed to adjust the way it calculates new mining royalties/taxes.

In June this year South Africa proposed to revise its mining royalty bill to charge royalties based on profitability. It is proposed that the royalty rates will range from 0.5 percent to 7 percent of sales, after transport costs, and will depend on miners' profitability and what they produce.

It is further proposed that there would be a cap on the royalties. The new tax formula will allow depreciation and amortisation to be deducted. The final formula would be based on earnings before interest and tax (EBIT), instead of EBITDA (earnings before interest, tax, depreciation and amortisation) as was the case in the previous draft of the bill.

It is envisaged that the revised royalty regime is investor friendly, and will be relatively easy to comply with and administer. The Government admits that the new formula for calculating the royalties would mean mining companies would pay a fair amount more in royalties compared to the original fixed rates for a number of commodities – however, it would ensure that the Government gets a fair share of its tax revenue. The draft mining royalty bill requires the consent and approval of the South African parliament before it comes into effect.

4. Ghana

It is proposed that Ghana will amend its laws to reap more benefit from its mining sector and to take advantage of high commodity prices. The Ghanaian Government wants to make its mining laws less liberal as presently they are of the view that the mining sector is not contributing adequately to the growth of the local economy and they want to fully integrate the mining industry into the Ghanaian local economy.

It is contemplated that the Ghanaian Government would either give out mining concessions and take royalties, or would actually get involved in the mining industry. The Government is taking a decision in this regard.

The West African country also aims to diversify the sector away from its traditional reliance on gold (of which it is second largest producer) and to move into production of others minerals such as kaolin, limestone, salt and coltan.

5. Ecuador

Ecuador is revising its mining laws and analysts view the current draft as reasonable. The draft of the new law has been drawn up through an extensive consultation process with stakeholders including communities, local governments, non-governmental organisations and mining companies, including firms having assets in the country.

The Ecuadorian Ministry of Mines announced in June this year that it had completed work on the draft mining law and the same has been sent to the President for his and his advisors' review.

It is proposed that the new mining law would limit the maximum number of concessions a mining company may hold in Ecuador. While this limit has not been finalised, the Government has confirmed that there will definitely be a limit. It is reported that the new Ecuadorian mining law would be tougher on environmental controls nonetheless it will provide a stable environment for foreign mining companies in the country.

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