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2015 BURKINA FASO MINING CODE

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Introduction

Burkina Faso's National Transitional Council (*Conseil National de Transition*, CNT), acting as Parliament, has approved a new legislation to amend the Mining Code (Law no. 031-2003/AN dated 8 May 2003). The CNT, which has been in power since the popular uprising last October and is charged with guiding the nation to elections later this year, passed the new law on 26 June 2015.

A bill amending the 2003 Mining Code was first proposed in 2013. It was later withdrawn due to low commodities prices and strong opposition from mining operators.

With the new Mining Code, Burkina Faso joins the wave of mining law reforms throughout Africa that emphasize transparency and accountability by both mining companies and host governments. Along with the newly enacted anti-corruption law, the new code aims to bring greater clarity and transparency to the mining industry while increasing state revenues from mining. It also specifically enumerates the fundamental obligation and responsibility of mining companies to respect and protect human rights. In doing so, it introduces several reforms that will impact current and future mining operations in Burkina Faso.

State Participation

The new Mining Code maintains the 10% free equity State participation of the previous code but expressly allows the State to acquire additional equity if it reaches an agreement with the mining company in accordance with the provisions of the Uniform Act on Companies. The new language suggests an intention to increase State participation by acquiring a greater share capital in mining operations.

Moreover, it creates a "preferential" dividend status whereby the State has priority in the distribution of dividends and is paid before any other allocation of distributable profits.

In furtherance of its goal to encourage transparency, the new law prevents certain government officials, such as the head of state and ministers, from holding title to mining concessions.

Mining Conventions and Mining Titles

With the new Mining Code, the Burkinabe government seeks to improve regulation and supervision of the mining industry. A technical commission will be established to oversee the granting of exploration licenses and mining

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conventions. Mining conventions are no longer required during the exploration phase and exploration licenses remain valid for a period of 20 years. By contrast, the duration of mining conventions is reduced from 25 years to 20 years, but may be renewed for consecutive periods of 5 years (previously 10 years).

License holders are required to notify the Ministry of Mining of any significant changes in the feasibility study as regards production estimates. Failure to adequately amend the feasibility study could give rise to penalties ranging from 1% to 4% of the production value, depending on the magnitude of change.

The new Mining Code provides for additional grounds for revoking mining titles, which include on-site employment of children, undue delay (more than one year) or suspension of exploitation and non-renewal of licenses upon expiration.

Surprisingly, the mining code suggests that the exploitation license is a right in rem on immovable property which may only be subject to a pledge (and no longer a mortgage), which seems inconsistent with OHADA law.

Tax/ Customs Regime and Community Development

The new law introduces several tax regime changes at the exploration and exploitation phases, as well as a 20% capital gains tax on the transfer of mining titles. However, transfers of licenses to Burkinabe companies created for the sole purpose of holding an exploitation license are exempt from the foregoing transfer tax.

In addition, the revised code eliminates the statutory language that provided for a 10 point tax reduction on mining profits during the exploitation phase. Instead, license holders will now incur a fixed corporate income tax of 17.5% and a tax of 6.25% on income derived from investments. While these figures resemble those in the previous code, they differ in that the rates are now fixed. All other mining taxes and royalties will be determined by implementing regulations.

The code further provides for the creation of four new funds, including a local development fund and a rehabilitation and mine closure fund. Exploitation license holders will pay 1% of their monthly gross turnover (or the value of the extracted products) to the local development fund. The rehabilitation and closure fund will be financed through a mandatory annual contribution from mining companies that will be determined based on an environmental impact assessment.

The mining code specifies that 1% duty payable to the local development fund also applies to holders of an exploitation license granted pursuant to the former mining code.

The code also contains specific custom duties exemptions for mining materials and equipment, with the exception of passenger vehicles, at each stage of a mining operation.

Stabilization Provisions

Tax stabilization provisions are guaranteed through the validity of the license or up to 20 years, whichever occurs first. Unlike the previous mining code, the new Mining Code extends tax stabilization provisions to any new mining taxes, royalties or duties.

Local Preference

The code introduces several obligations in support of local business and employees. It requires, for example, that mining companies give preference to qualified local employees, businesses and contractors. Similarly, mining companies are required to provide professional training to local managers. Quotas for these obligations will be established in a forthcoming implementing decree.

Conclusion

While individual countries have adopted varied approaches, recent mining code reforms in Africa have generally focused on increasing state participation, royalties and local content obligation.

With the new Mining Code, Burkina Faso has introduced changes to the mining industry that are not only intended to benefit the local community, but increase state revenues from mining through increased state participation and new mining taxes.

The revised code also reduces regulatory uncertainty and increases transparency within the mining sector, in line with international standards (Kimberley Process and the Extractive Industries Transparency Initiative).

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