Mining in Kenya – the start of a new era?

Introduction

Kenya, famous for its natural beauty and wildlife, is a country which remains subject to limited commercial exploitation of its wealth in minerals. Two recent mining projects, Kwale mineral sands project and Kilimapesa gold mine, have put Kenyan mining on the global map. Both mines are of great national significance, and together with Kenya's proposed new mining law, may signal the start of the new era for mining in Kenya.

Located in East Africa, along the equator and bordering the Indian Ocean to its east, Kenya shares boundaries with Tanzania, Uganda, South Sudan, Ethiopia and Somalia. Kenya is a regional hub in terms of financial, transportation and communications infrastructure in East Africa. While Kenya has the largest economy in East Africa, compared to the rest of the world, it remains relatively a low income country.

This article aims to provide a brief overview of the legal and regulatory framework applicable to the mining industry in Kenya and sets out some practical considerations investors should bear in mind when mining in Kenya.

Minerals deposits

Historically Kenya had focused on developing farming, tourism, manufacturing and service industries. Until recent years, mining exports only amounted to around 1 per cent of the GDP. The mineral deposits were predominately titanium and non-metallic substances such as soda ash, kaolin, fluorspar and gemstones. This however is changing. Kenya’s first ever large-scale mine, the Kwale mineral sands project, will commence exports later this year. It is estimated to triple the country’s present mining exports and will be the country’s fourth largest foreign exchange earner.

January 2012 saw the first gold pour from the Kilimapesa Gold Mine – the first gold mine in Kenya.

Recently, further potential for gold mining has been discovered along with possible coal and iron ore deposits. The Government intends to carry out a nationwide aerial survey to map potential mineral deposits with a view to boosting the mining sector and attracting foreign investment.

Legislative framework on mining

The Mining Act 1940 (chapter 306 of the Laws of Kenya) (the “Mining Act”) regulates all mining activities in Kenya. The Commissioner of Mines and Geology (the “Commissioner”), heads the Department of Mines and Geology and is responsible for overseeing mining research and policy as well as implementing the Mining Act.

The ownership of all mineral deposits vests in the Government. In order to carry out mining activities, an investor must apply to the Commissioner to the necessary right, licence or lease as set out below in summary.

1. Mineral exploration
   (a) **Prospecting Right**: any person may apply for a prospecting right which will provide the holder the right to carry out exploration activities in any land.
   (b) **Exclusive Prospecting Licence (“EPL”)**: persons who hold a prospecting right may apply for an EPL which provides the holder with the exclusive right to prospect in a designated land. An EPL is initially issued for one year and may be renewed at the discretion of the Commissioner for further terms of one year each up to a maximum of five years. An EPL is not transferable without the consent of the Commissioner.

   EPLs normally relate to prospecting in a large area of land. Alternatively “Mining Locations Licences” may be obtained for mineral exploration in a smaller area of land (up to four square kilometers).
2. Mineral exploitation

(a) Mining lease: a mining lease is issued to a holder of any prospecting right and provides the lessee the right to extract deposits within the land area of the mining lease, including the right to remove and dispose of the minerals as specified in the lease. A mining lease may be granted for a term of five to twenty-one years, and will set out the applicable terms and conditions for such mining.

(b) Special Mining Lease (“SML”): where the Commissioner is satisfied that there are special costs or other reasons applicable to a particular deposit, the Commissioner may grant a SML to any person. A SML may be granted and be renewed for such a term, and upon such conditions as the Commissioner may think fit.

All mining leases must be registered with the Commissioner and can only be transferred with the Commissioner’s written consent.

Obtaining a mining lease

The following are some of the main steps to be carried out prior to the issue of a mining lease.

1) Carrying out a mining feasibility study and an approved cadastral survey of the deposit.

2) Preparation of an Environmental Impact Assessment Study (“EIA”) in accordance with the requirement of the Environmental Management and Co-ordination Act No. 8 of 1999. This must be approved by the National Environment Management Authority. The EIA is subject to public comments before such approval;

3) Submitting a formal application for a mining lease (which will include information included in (a) and (b) above, and any compensation agreements payable to landowners) must be published in the Kenyan Gazette and a local newspaper inviting any objections.

4) Registration of the mining lease under the Mining Act and the Registration of Documents Act, and the applicable stamp fees must be paid.

5) Constitution of Kenya states that the Parliament must ratify any right or concession for the exploitation of any natural resource.

The above process typically takes over a year to complete.

Mining law reforms and local equity participation

The Mining Act has been criticised for lacking in contemporary practices such as fair sharing of revenue and efficient waste management. In 2012 the Ministry of Environment and Mineral Resources published a draft Geology Minerals and Mining Bill, which now awaits cabinet approval. The Bill aims to “revitalise the mining sector by ensuring transparent and efficient management ... benefit sharing and disputes resolution”. Key features include; increased and variable rates for royalties (variable on the type of mineral and value addition), reclassification of certain mining rights, establishing a dedicated “Mining Disputes Resolution Tribunal” and the sharing of benefits by local communities.

On 12 October 2012 the Mining (Local Equity Participation) Regulations, was promulgated, aimed at increasing Kenyan participation in mining companies. The regulation states “It shall be a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty five per cent (35%) of the mineral right.” The Regulation has been interpreted to mean that at least 35% of shareholders in mining companies must be Kenyan nationals.

The requirement of local investor participation is not unusual in the natural resource extractive sector. Such laws are fast becoming commonplace in mining economies, with similar laws being adopted in Botswana, Zimbabwe, Tanzania, Guinea and Indonesia. However, for such laws to reach their intended aim there must be adequate finance and financial infrastructure available to local investors. This is a challenge Kenya will need to address, given the potential for large scale mining operations in the near future.

Taxes

Resident and non-resident corporations in Kenya are liable to pay corporation tax on all income generated within Kenya. Corporation tax rate is currently at 30% (a branch of a foreign company is taxed at 37.5%). A reduced rate of tax applies if a company has been recently listed on the Kenyan Stock Exchange. Capital gains are generally not taxable in Kenya. However, following the Finance Act 2012, the Government
introduced a withholding tax on transfer of shares or property in the mining sector. A sale of a mining company will now attract a withholding tax of up to 20% (locals involved in such a transaction will be required to pay a reduced rate of 10%).

Other points to note

Some of the other practical points for investors to note include the below:

- Kenya does not maintain foreign exchange controls however, all banks must report significant dealings in foreign exchange (over US$10,000) to the central bank.
- Kenya's new land laws commenced on 2 May 2012, and certain aspects of the law (including the application forms for registration of charges) are yet to be clarified. The law also stipulates that foreigners may not hold an interest in land in excess of a 99 year lease.
- Kenya's Stamp Duty Act applies to most transaction documents and requires stamping at the Kenyan Revenue Authority. Investors must ensure documents are submitted to stamping within the given time frame, usually within 30 days of execution. Failure to stamp does not affect the legal validity, but an unstamped document is inadmissible in, and cannot be enforced by, a Kenyan court.

In the coming months the Kenyan mining industry will carefully monitor any changes to the Geology, Minerals and Mining Bill. It is hoped that the passing of the draft bill would provide the clarity and certainty needed to develop the Kenyan mining industry. Kenya, as with its East African neighbours, is showing signs of a mining industry with enormous potential. The challenge for the Government is to ensure that the legal and regulatory regime strikes the correct balance between optimising its national interest whilst encouraging large scale foreign investments.

For more information please visit the below websites.


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