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Guinea's new mining code: Significant changes in a key mining jurisdiction

The Republic of Guinea in West Africa has some of the richest mineral deposits in the world. Alongside significant deposits of gold, diamonds and uranium, Guinea has one of the world's largest reserves of bauxite, the raw material for producing aluminium, and world class reserves of high grade iron ore.

President Alpha Conde, Guinea's first ever democratically elected president, pledged during his campaign in 2010 that mining-sector reforms would be the central plank of his reform agenda during his term of office. On 9 September 2011, during his first year in office, Guinea's National Transitional Council (Guinea's interim parliament) unanimously adopted a new mining code. This new mining code (the "New Code") which repeals and replaces the previous mining code of 1995 (the "Old Code") will have significant implications for companies with exploration and mining operations or who are looking to enter the mining sector in Guinea. In this note, we take a brief look at certain key provisions of the New Code and highlight some of the changes it has introduced.

Entry into force and status of existing mining titles and agreements

The New Code was adopted and came into effect on 9 September 2011 (it being understood that the publication of the New Code in the "Official Journal" is merely a formality that will occur at any later date). The New Code does not affect the ownership or the validity of mining titles or agreements that were obtained or concluded and ratified prior to its adoption. These continue to be recognised under article 217. However, the New Code's provisions relating to tax, customs duties, employment, training, transparency and anti-corruption will apply to all mining companies with existing operations in Guinea. These provisions will come into effect in respect of such companies sixty days after the effective date of the New Code. Holders of mining titles who have not yet concluded a mining agreement or who have signed a mining agreement that is yet to be ratified (or was ratified with reservations) prior to the adoption of the New Code, will come under the New Code in its entirety. So too will all mining agreements that are not linked to, or derived from, a mining title.

Increased State participation

A prominent feature of the New Code is its more assertive approach to state participation in mining operations. Under article 167 of the Old Code, the State was entitled to a free 15% stake in the capital of companies engaged in the mining of precious stones, but the State was not entitled to any free carried interest in companies mining substances of "special interest" (such as bauxite and iron ore). The New Code takes a radically different approach. Under article 150 of the New Code, upon the issuance of a mining title, the State is automatically granted <u>at no cost</u> a 15% (in the case of bauxite, iron ore, uranium, gold and diamonds, although less for certain other minerals) non-dilutable interest in the share capital of the title holder. The State further reserves the right to acquire additional interests on a fully paid basis up to a maximum shareholding of 35% (for all minerals). The precise timing of such additional buy-in is undefined in the New Code. Prior to the adoption of the New Code, Rio Tinto negotiated a set of staged buy-in options over 20 years up to the 35% threshold in respect of its Simandou iron ore project. Interestingly, the New Code permits a the trade off between the State's entitlement to further

If you would like to know more about the subjects covered in this publication or our services, please contact:

James Pay +44 (0)20 7006 2625

Titus Edjua +44 (0)20 7006 3052

David Lewis +44 (0)20 7006 1903

Kathy Honeywood +44 (0)20 7006 1524

Tony Giustini +33 1 4405 5926

Alhassane Barry +33 1 4405 5160

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

participation and the payment of a higher mining tax. In other words, it is possible for a mining company to agree to pay higher taxes in return for the

State's undertaking not to exercise its entitlement to some or all of the additional interests. However, the Mining Code does not provide any details on this process, which will presumably be negotiated on a case by case basis.

Stringent requirements for mining permits and the duration of permits and mining agreements

The New Code has introduced additional and more stringent requirements for obtaining mining permits. In particular, applicants must provide a completed feasibility study, incorporating (among other things) an environmental and social impact study, a detailed work schedule, and a community development plan covering training, medical facilities, social work, education, road works, water supply and electricity. Further, under the Old Code, mining agreements could derogate from the mining code and other legislation. Under article 18 of the New Code, mining agreements can only supplement but not derogate from the provisions of the mining code.

Article 32 of the New Code has increased the duration of operating permits to 15 years (up from to 10 years in the Old Code), with the possibility of several 5 year extensions, subject to the holder being in compliance with its obligations. However, article 34 imposes a new monthly fine of US$100,000 (for the first three months, with a monthly increase of the penalty amount thereafter) if work is not commenced within one year of the issuance of the operating permit for industrial operations.

Article 18 of the New Code prescribes a maximum duration of 25 years for mining agreements, which may subsequently be renewed through 10 year extensions. The Old Code did not include any restrictions on the duration of mining agreements.

Anti-Corruption Measures

The New Code echoes President Conde's earlier pronouncements that the New Code would be committed to the principles of the Extractive Industries Transparency Initiative (EITI) and anti-corruption. The Code introduces a variety of transparency and anti-corruption measures, including KYC-type disclosure requirements for companies seeking mining permits (and this applies to their contractors, sub-contractors and all stakeholders), an obligation on companies to submit an annual anti-corruption surveillance plan and an obligation on all individuals and companies engaged in the sector or applying for a permit to sign a code of good conduct with the minister in charge of the mining sector. Article 153 prohibits companies from paying bribes to government and elected officials. Members of government and government officials are also forbidden from having any direct or indirect financial interest in mining companies. The Code provides for civil and criminal penalties (including prison sentences) in the case of breach.

Corporate Social Responsibilities

The New Code also imposes on mining companies a number of additional corporate social obligations on mining companies towards local communities. Under article 130, all holders of mining titles must enter into a "development agreement" with the local community in their area of operation. This development agreement will deal with environmental protection, health of the local population and social development projects. Mining companies must establish a Local Development Fund (regulated by presidential decree) for this purpose and, depending on the mineral involved, shall contribute between 0.5% and 1.0% of their turnover to the Fund, commencing on the first year of operations.

Tax and royalties

The New Code introduces several changes to the tax and royalties regime for mining companies. Notable examples include: (a) articles 173 and 174 which provide for a new tax exemption (in respect of VAT or customs duties) for imported equipment during the construction period; (b) article 180 which increases the import tax rate for supplies/materials from 5.6% (under the Old Code) to 8%; (c) article 147 which reduces the tax on dividends from 15% (under the Old Code) to 10%. The New Code, unlike the Old Code, does not provide for certain income tax exemptions such as the 5 year or 8 year exemptions from the start of commercial operations for certain categories of operations. It is generally less generous on tax exemptions. Changes regarding the basis for calculating mining taxes have also been introduced. These will no longer be calculated on the basis of the F.O.B. value of the mineral, but on the LME 3 month seller value. Article 161 sets out a detailed table containing changes to the mining taxes. The New Code guarantees the stabilisation of the tax and customs regime for a period not exceeding ten years (both for operating permits and mining concessions), with the possibility of a one off extension for a period of 5 years in return for the payment of an annual premium by the investor. Under the Old Code, mining concessions could benefit from stabilization clauses for up to 25 years.

Conclusions

The New Mining Code is hot off the press and its implications have yet to be fully explored and understood. However, what is clear is that the migration of existing mining titles and mining agreements to the New Code, albeit only in respect of certain provisions, is likely to have significant implications for mining companies already working in Guinea. Reflecting the growing trend of resource nationalism in the natural resources sector, the New Code requires mining companies to accommodate a significantly increased direct state shareholding in their mining operations alongside more onerous tax provisions. The economic impact of the provisions on investment decisions will have to be calculated. Guinea's significant step towards greater transparency and tighter anti-corruption is to be applauded. However, whether Guinea's New Code will set a precedent for the region remains to be seen.