



Mining

in 31 jurisdictions worldwide

2013

Contributing editors: Michael Bourassa and John Turner



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Papua New Guinea

Kym Livesley and Daniel Murnane

Gadens

Mining Industry

- 1 What is the nature and importance of the mining industry in your country?

The country is located to the immediate north of Australia in the Pacific Ring of Fire. It is highly prospective for copper, gold and zinc. Papua New Guinea is host to some world-class gold and copper mines, including the Porgera gold mine, the Ok Tedi copper mine and the Lihir Island gold mine. Papua New Guinea is currently host to eight major operational mines (Lihir Island, Hidden Valley, Ok Tedi, Porgera, Ramu Nickel, Simberi, Sinivit and Tolukuma) with an additional mine, Solwara 1, currently in construction. Of these, the Porgera gold mine, the Ok Tedi copper mine and the Lihir Island gold mine exported a total of 163.8 tonnes of gold between 2004 and 2006. In the same period Ok Tedi Mining Ltd exported over 510,000 tonnes of copper.

- 2 What are the target minerals?

Papua New Guinea's principal mineral exports are gold, silver and copper, although more recently a wider range of minerals have been targeted including chromite, nickel, iron, platinum-group metals and industrial minerals.

- 3 Which regions are most active?

There are operating and developing mines spread fairly evenly across Papua New Guinea. There is even a proposed deep-sea mining project in development offshore of Papua New Guinea, in the Bismarck Sea.

Legal and regulatory structure

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

Papua New Guinea has a common law legal system. Laws affecting mining are made by the National Parliament, a single-chamber, democratically elected legislature of 111 members elected from single-member constituencies with some regional seats. The decisions of the courts (the National Court and the Supreme Court) interpret the law. The judiciary is independent and adheres to the rule of law and due process. There are 22 provincial governments (including the National Capital District) with limited legislative powers. Provincial governments, other than the Autonomous Bougainville Government, do not have power to enact laws in relation to mining.

- 5 How is the mining industry regulated?

Mining is regulated at the national level. The principal Act is the Mining Act 1992 and regulations made under that Act. Under the Mining Act, the state may enter into a mining development contract (MDC), consistent with the Act, to regulate a mining development.

The minister may, in the case of a major project, require that an MDC be entered into. All major mining projects have been the subject of an MDC.

Previously these were enacted as Acts of the National Parliament (for example, the Mining (Ok Tedi Agreement) Act) but this practice has been discontinued. The national government recently entered into an MDC in respect of the Ramu Nickel project. This agreement contained special tax incentives and dealt with other issues relevant to the development.

The Mining Act 1992 is currently under review, and substantial changes to the licensing regime are being considered. The review, which is being funded by the World Bank, is to commence a wide consultative process in May 2009. Although the consultation process has concluded, no steps have yet been taken to introduce the new act.

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

The principal law is the Mining Act. Also relevant is the Environment Act 2000. The Companies Act 1997 regulates the incorporation and operation of companies.

The Mineral Resources Authority was established in 2006 as a statutory authority to promote, manage and regulate the mining industry. It replaced the Department of Mining, which is now responsible solely for policy development. The Mining Advisory Council makes recommendations to the minister in relation to grants and renewal of licences and related issues.

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

The Australasian Joint Ore Reserves Committee (JORC) Code is used in Papua New Guinea for public reporting purposes.

Mining rights and title

- 8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The state owns all minerals on or below the surface of the land in Papua New Guinea, including all minerals contained in any water lying on any land in Papua New Guinea. As the owner of all minerals, the state has absolute control of the mining rights and exercises these rights through the Mining Act. Third parties can be granted rights to explore and produce minerals through the system of tenements established under the Mining Act. All minerals lawfully mined under a mining lease or a special mining lease (tenements that grant rights to produce minerals) are owned by the holder of the mining lease or special mining lease.

Papua New Guinea's citizens may also obtain alluvial mining leases for surface rights on their traditional land. Applications are dealt with in order of receipt.

- 9 What information and data is publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

A database of geoscientific information concerning Papua New Guinea's mineral and geological resources is available to the public.

- 10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Mining rights are basically rights to explore (exploration licences) and to develop resources once discovered (special mining lease for major projects, mining lease for smaller projects). Papua New Guinea's citizens may also obtain alluvial mining leases for surface rights on their traditional land. Applications are dealt with in order of receipt.

The holder of an exploration licence is required to spend a prescribed minimum amount on exploration in the licence area. Applications are considered by the Mining Advisory Council, which is required to consider whether the proposed work programme is adequate and whether the applicant has the financial and technical resources to carry out the proposed programme.

The Mining Act gives preference to holders of exploration licences applying for mining licences in respect of the land the subject of an exploration licence. However, any person may apply for a mining licence in respect of land that is not already the subject of a mining tenement.

Generally, applicants for a mining lease will have an identified mineral resource. Applications for a mining licence are in a prescribed form and include details of the proposed tenement boundaries and the applicants proposals in respect of the mining operations to be undertaken in connection with the tenement.

- 11 What is the regime for the renewal and transfer of mineral licences?

In respect of a renewal of a mineral licence, the licence holder is required to apply to the department in accordance with a prescribed form. An application fee will also be payable. The minister, subject to the advice from the Mining Advisory Council, has discretion as to whether to renew the application or refuse the application. For exploration licences, compulsory relinquishment of part of the tenement may apply to a licence renewal.

Generally speaking, the holder of a mineral licence may apply for a transfer of a mineral licence, or an interest in it, to a third party. The minister has discretion as to whether to approve or refuse the transfer. In approving a transfer, the minister has the power to vary the applicable licence conditions. Once a transfer has been approved, it must then be registered to be effective.

There is a general restriction, with some exceptions, prohibiting dealings with an exploration licence during its first two years.

- 12 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Only citizens or citizen-controlled companies may acquire rights to alluvial mining. Otherwise there is no distinction between domestic or foreign applicants, either in law or in practice.

- 13 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

There is an independent judicial system that adheres to the rule of law and due process. This system is established under and protected by the Constitution. As noted in question 5, projects will typically have the benefit of a mining development contract (MDC) with the state. An MDC generally sets out the agreed development of the project and may include infrastructure, financial or economic considerations relevant to the project.

Papua New Guinea is not a party to the New York Convention, however, there is an Arbitration Act that regulates arbitration in Papua New Guinea. Papua New Guinea is a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States under which the International Centre for Settlement of International Disputes (ICSID) was established. In agreements with foreign developers, the government generally adopts the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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

The holder of an exploration licence has the right to enter and occupy the land subject to the licence for the purposes of conducting exploration for minerals on that land, to remove rock and overburden, and divert or use water resources for exploration purposes.

The holder of a mining lease or a special mining lease has the sole right to enter and occupy the land which is the subject of the licence for the purposes of mining, and treating all minerals mined from that land and related activities including tailings disposal, erection of accommodation, support services, etc.

The holder of a mining lease or a special mining lease owns all minerals lawfully mined on the land the subject of the licence.

- 15 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The state has a right, but not an obligation, to acquire, directly or through a nominee, up to a 30 per cent participating interest in any mineral discovery made during the exploration phase. There is no local listing requirement for mining projects.

- 16 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The Constitution of Papua New Guinea provides that no property may be compulsorily acquired by the state unless it is in accordance with a law, for a public purpose or is reasonably required in a democratic society and just compensation is subsequently paid.

In addition, where the proponent of the mining project is a foreign investor, section 37 of the Investment Promotion Act prohibits expropriation, unless it is in accordance with the law, for a public purpose and compensation is paid.

- 17 Are any areas designated as protected areas within your jurisdiction and which (in general terms) are off-limits or specially regulated?

No. The minister for mining may, however, by notice in the National Gazette, reserve land from exploration, mining or non-mechanised mining where the minister considers such a reservation to be in the best interests of the state.

Duties, royalties and taxes

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

A royalty of 2 per cent is payable on gross revenue from resource sales. Tax is imposed on a project basis (ie, ring-fenced). The basic tax rate is 30 per cent for income from mining for residents and 40 per cent for non-residents. Resident companies are liable to dividend withholding tax of 17 per cent on dividends, reduced to 10 per cent for dividends out of mining income. Special provisions apply to certain types of deductions. Interest paid to non-resident lenders by mining companies is not subject to interest withholding tax. Additional profits tax does not apply to mining projects but can apply to designated gas projects.

- 19** What tax advantages and incentives are available to private parties carrying on mining activities?

These may be negotiated on a project-by-project basis. Recent projects have received tax holidays, exemptions from import duties and other tax concessions. The mining sector enjoys the benefit of special provisions granting allowable deductions for exploration and capex.

- 20** Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Yes. The Resource Contracts Fiscal Stabilization Act 2000 provides for the state and project developer to enter into an agreement for the fiscal stability of all applicable taxes, duties, fees and other fiscal imposts. Fiscal stabilisation is available in respect of a mining project for which a mining development contact has been executed.

Under the Income Tax, Dividend (Withholding) Tax and Interest (Withholding) Tax Rates Act (chapter 111), if a taxpayer is subject to fiscal stabilisation under the Stabilization Act, an additional 2 per cent of income tax will be payable in addition to the rate of income tax otherwise payable by the taxpayer.

- 21** Is the government entitled to a carried interest, or a free carried interest in mining projects?

The state is effectively carried until such time as the state elects to participate or not in a mining project. Where the state elects to participate, the consideration payable by the state is a percentage of the un-recouped sunk costs attributable to the licence holder's interest in the mining project equal to the percentage participating interest in the project being acquired by the state. See also question 15.

- 22** Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Stamp duty is imposed at a rate of 2 per cent in respect of the transfer of a mining lease, while the transfer of a mineral exploration licence or the transfer of exploration information is generally subject to transfer duty of 10,000 kina. There is no capital gains tax in Papua New Guinea.

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

See above. A basic tax rate of 40 per cent applies to non-residents' income from mining sources as against 30 per cent and 10 per cent dividend withholding tax (DWT) for residents. A resident is broadly a company incorporated in or managed and controlled in Papua New Guinea.

Business structures

- 24** What are the principal business structures used by private parties carrying on mining activities?

All business structures are available. Because projects are ring-fenced for tax purposes, preference is often given to a locally incorporated subsidiary to undertake development of a resource project. If developed by more than one party the usual vehicle is an unincorporated joint venture.

- 25** Is there a requirement that a local entity be a party to the transaction?

There is no obligation to partner with a local entity. However, the state is entitled to enter into an agreement with a mining company in relation to the development of a mine and may under that agreement acquire a participating interest in that mining development. See also question 15.

- 26** Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

The Papua New Guinea government has concluded nine bilateral tax treaties, called double tax agreements or DTAs. Papua New Guinea has concluded a DTA with each of the following countries: Canada, Australia, Singapore, the United Kingdom, Malaysia, China, Germany, Korea and Fiji.

The DTAs apply to income taxes and other like taxes, such as salary and wage taxes, but do not apply to GST. The DTAs also contain a range of rules as to how income or payments derived by residents of the respective treaty partner countries are to be treated. In the business context, they generally provide that income derived by a resident entity of one country, from sources in the other country, will not be taxable in that other country unless the entity is considered to be operating through a permanent establishment (or branch) in that other country. The general rule is then subject to a number of important conditions and exceptions.

Financing

- 27** 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?

Mining projects are by nature capital-intensive. Most major resource projects in Papua New Guinea involve substantial capital investment and in most cases even the most basic infrastructure has to be built or provided by the developer. Construction costs in remote Papua New Guinea are significant. Offshore project finance is available but usually linked to a sponsor's credit rating. A premium for political risk insurance will usually apply. The Australian public capital markets are used to raise limited amounts of funding for exploration in Papua New Guinea. While there is a Port Moresby Stock Exchange, it is relatively undeveloped at this stage as a source of risk capital. Special provisions apply to the insurance sector. Waivers are required in certain cases when risk is to be placed offshore and not offered to the local market first. Thin capitalisation rules (a 70:30 debt to equity ratio) apply to restrict taxation deductions for interest payments.

- 28** Please describe the regime for taking security over mining interests.

The Mining Act provides that, subject to compliance with the terms of the Act, which are principally approval and registration, a legal or equitable interest in a tenement may be sold, transferred, mortgaged, charged or otherwise encumbered.

In addition, a new security regime, the Personal Property Security Act 2011 (PPSA) has been legislated for, but has not yet commenced.

Update and trends

A series of major new mines are in various stages of development and feasibility, including Frieda River (copper-gold), Yandera (copper), Wafi/Golpu (gold) and Woodlark Island (gold). Exploration activities are also at an all-time high.

In addition, momentum is building in terms of recommencement of exploration and, potentially, mining activities on the island of Bougainville.

The Province of Bougainville is currently a semi-autonomous region of Papua New Guinea, with a high level of devolved powers. One

area of devolved law-making power is in respect of mining. Subject to the passage of a mining act, two regimes would operate in Papua New Guinea.

As at July 2012, the Bougainville House of Representatives has approved a mining policy recommending exploration on the island. The Bougainville government commenced discussions regarding the terms of a draft mining act in early 2013.

All mining activities have been suspended on Bougainville since the early 1990s.

The PPSA will (when it commences) change Papua New Guinea's established common law principles regarding ownership of personal property. While most mining tenements will fall outside the scope of the PPSA, interests arising under joint-venture agreements, joint operating agreements, shareholders agreements, farm-in arrangements and royalty streams (to name a few) will require registration on the Personal Property Securities register.

Restrictions

- 29** What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no such restrictions.

- 30** What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no general restrictions or limitations on processing or export of minerals. When negotiating an MDC, some discussion may be had about some processing being done in-country, although this has never been made a requirement of the grant of any licence.

- 31** What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The Bank of Papua New Guinea (the central bank) administers limited exchange controls. Approval is still required by resident mining companies to open and maintain offshore bank accounts and to give guarantees in certain circumstances. There are reporting requirements in respect of movement of funds. Remission of funds offshore in excess of 200,000 kina requires a taxation clearance certificate. There are a number of scheduled tax haven countries where any remission of funds needs clearance.

Environment

- 32** What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Applications for development approval to undertake mining operations that might have an adverse impact on the environment are required to prepare and lodge an environmental impact statement with the Department of Environment and Conservation under the Environment Act 2000.

The director of environment must assess and either accept that statement or refer it to the Environment Council. There is a period of public consultation on the proposals. If the Environment Council is satisfied as to certain matters it can recommend to the minister that he or she approve the activities described in the development proposal.

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

See question 32. Applications can take up to six months, although for a non-controversial application a more likely time frame is three to four months.

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

This matter is not dealt with under the current Mining Act. Detailed proposals are to be introduced into the new mining act, which is currently being developed. Mine-closure obligations have in the past been dealt with on an ad hoc basis. The new proposals will require the lodgement of funds into a mine-closure fund (or the provision of a bond or guarantee to fund), which will cover 100 per cent of mine-closure costs at least six years prior to mine closure. All projects will need to develop, and continually update, a mine-closure plan. A conceptual mine-closure plan will need to be lodged with the initial application for development approval. Developers will also be required to establish and fund a socio-economic development plan, a future generations trust and a public infrastructure services trust.

Health & safety, and labour issues

- 35** What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining (Safety) Act and the regulations made under it regulate health and safety in the mining industry in Papua New Guinea. The Mining (Safety) Act and its regulations are administered by the Mineral Resources Authority.

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

Non-citizens require a work permit and a visa. Preference must be given to employees recruited in the area of the development, and secondly to citizens.

Social and community issues

- 37** What are the principal community engagement or CSR (corporate social responsibility) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

See question 38.

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

Landowner issues are an important consideration in any proposal to undertake resource development in Papua New Guinea. Very little

land is alienated or the subject of registered title and most of this is urban leasehold. The bulk of land is traditionally owned, and often disputed between tribes. Potential developers must be careful to ensure that proposed developments have the support of traditional landowners, and that appropriate compensation and benefit packages are negotiated. Business development opportunities for local landowners should also be a key objective.

A development forum process, whereby all relevant stakeholders (including landowners, provincial government and the national government) discuss and agree on key issues for the development of a resource project has been developed in conjunction with the negotiation of an MDC, which is required to obtain a special mining lease. The purpose of the development forum is to negotiate a memorandum of agreement, which includes important clauses on benefit sharing.

39 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

None.

Foreign investment

40 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Although there are no foreign ownership restrictions, there are entitlements in respect of state participation in mining projects (see questions 15 and 21). In addition, alluvial mining activities are restricted to citizens.

Foreign investors are required to be certified by the Investment Promotion Authority in accordance with the Investment Promotion Act 1992 before carrying on business in Papua New Guinea.

International treaties

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

Papua New Guinea is a party to a number of investment protection agreements with various states, and a number of double tax agreements. It is also a party to international conventions on the sale of goods and settlement of international disputes. There are no particular international treaties applicable to the mining industry.



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