GETTING THE DEAL THROUGH

Mining

in 28 jurisdictions worldwide

2014

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Mining 2014

Contributing editors: Michael Bourassa and John Turner Fasken Martineau

Getting the Deal Through is delighted to publish the fully revised and updated tenth edition of *Mining*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 28 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen on the basis of their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editors Michael Bourassa and John Turner of Fasken Martineau for their assistance with this volume.

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Mining industry

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

The Philippines is rich in mineral resources and the mining industry plays a significant role in the country's economy. According to the Philippine Department of Environment and Natural Resources (DENR):

- the large reserves of various kinds of minerals in the country puts the Philippines in the top five most mineral-rich countries in the world, third in gold reserves, fourth in copper, and fifth in nickel;
- around 9 million hectares, or 30 per cent of the country's total land area of 30 million hectares, are believed to contain important metallic mineral deposits and around 5 million hectares are also known to be potential sites for non-metallic mineral reserves; and
- the country's offshore areas, which cover around 2.2 million km^2, also contain placer minerals, including gold, magnetite and chromite-bearing sands as well as aggregate resources like sand and gravel, decorative stones, and polymetallic sulphide deposits (see www.denr.gov.ph/index.php/component/content/article/16.html).

In 2013, the total production value for metallic minerals was 99.33 billion Philippine pesos, a 0.30 per cent or 298 million Philippine pesos increase in relation to the 99.04 billion Philippine pesos total production value for metallic minerals in 2012 (see www.mgb.gov.ph/Files/ItemLinks/ThePhilippineMineralsIndustryAtAGlance.jpg).

2 What are the target minerals?

The Philippines has significant gold, copper and nickel deposits. Other target minerals include chromite, silver, lead, zinc iron, cobalt and platinum. Non-metallic resources found in the Philippines include sand and gravel, limestone, marble, clay and other quarry materials.

3 Which regions are most active?

Many areas in the Philippines are particularly mineral-rich. The provinces with significant mining activities include Benguet, Compostela Valley, Davao, Palawan and Surigao.

Legal and regulatory structure

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

The Philippine legal system is a civil law system. The Philippine Civil Code is based on the Spanish Civil Code. However, certain Philippine statutes are based on statutes of the United States. For example, the Philippine Corporation Code and the Philippine National Internal Revenue Code were based on the US models.

5 How is the mining industry regulated?

The mining industry is regulated through laws and regulations issued by the national government. Local government units also issue ordinances that may affect mining activities within their respective jurisdictions. Mining companies listed on the Philippine Stock Exchange must also comply with the rules of the exchange.

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

The principal laws and regulations that regulate the mining industry are Republic Act No. 7942 (the Mining Act) and DENR Administrative Order No. 21-10 (DENR Order No. 21-10). The Mining Act is a national law enacted by the Congress of the Philippines, while DENR Order No. 21-10 is the regulation issued by the DENR to implement the provisions of the Mining Act.

The DENR is the primary government agency responsible for the regulation of the mining industry. The Mines and Geosciences Bureau (MGB), a line bureau of the DENR, has direct charge of the administration and disposition of mineral lands and mineral resources. The MGB also recommends to the DENR Secretary the granting of exploration permits and/or mineral agreements to duly qualified persons. Local government units may also issue quarry permits to duly qualified persons.

The MGB and the Environmental Management Bureau (EMB), another line bureau of the DENR, monitor the compliance of mining companies with their respective obligations under applicable environmental laws.

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

The Philippine Mineral Reporting Code (PMRC) sets out minimum standards, recommendations and guidelines for public reporting in the Philippines of exploration results, mineral resources and ore reserves. The PMRC is modelled substantially on the JORC Code (2004) of Australasia and is compatible with the international codes from Australia, South Africa, the European Union, and Canada as well as the International Reporting Template (2006) by the Committee for Mineral Reserves International Reporting Standards.

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 controls the grant of mining rights in the Philippines. Under the 1987 Philippine Constitution, the state owns all

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natural resources in the Philippines. Article XII, section 2 of the 1987 Philippine Constitution provides that '[all] lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the state.' Furthermore, it provides that the state has full control and supervision of 'the exploration, development, and utilisation of natural resources'. Since the state is the owner of all natural resources, the owner of surface rights does not own the minerals below the ground. The state may grant mining rights over an area to parties other than the owner of the surface rights.

The state may grant private parties the right to explore, develop and utilise natural resources. In this regard, the state may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations at least 60 per cent of whose capital is owned by such citizens. The President of the Philippines is also authorised to 'enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilisation of minerals, petroleum, and other mineral oils'.

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?

The MGB regularly publishes the annual Directory of Philippine Producing Mines and Quarries, Generation of Mineral Statistics (a monthly report on metallic and non-metallic mineral production, sales, employment, exports and prices), the Mineral Statistics Series (an annual report on local and international mineral production and metal prices) and the Quarterly Review of the Minerals Industry. Geological maps and technical reports are also available at the MGB. Information is also available in other non-periodic publications of the MGB and its website (www.mgb.gov.ph).

Holders of exploration permits and mineral agreements are required to periodically submit reports to the MGB or the DENR. The government conducts geoscience surveys, which become part of the Mineral Resources Database System and National Geodetic Network Information System; however, these are not available online.

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?

Under the Mining Act, mining rights may be acquired through the following:

- an exploration permit, which grants the holder the right to explore (subject to valid, prior and existing rights of any party or parties within the subject area);
- a mineral agreement, which may be in the form of:
  - a mineral production-sharing agreement (MPSA), which is an agreement where the government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output. The contractor provides the financing, technology, management and personnel necessary for the implementation of the agreement;
  - a co-production agreement, which is an agreement between the government and the contractor wherein the government provides inputs to the mining operations other than the mineral resource; or
  - a joint venture agreement, which is an agreement where a joint-venture company is organised by the government and the contractor with both parties having equity shares. Aside from earnings in equity, the government is entitled to a share in the gross output; and
- a financial or technical assistance agreement (FTAA), which is an agreement for the large-scale exploration, development and utilisation of mineral resources (ie, mining projects requiring a minimum investment of US$50 million).

Subject to the fulfilment of certain conditions, mining rights are generally acquired on a first-come, first-considered basis. Under Executive Order No. 79, the grant of mining rights and mining tenements over areas with known and verified mineral resources and reserves, including those owned by the government and those under expired tenements, will be undertaken through competitive public bidding.

The holder of a mineral agreement or an FTAA is obliged to conduct mining operations in accordance with the terms of the agreement and applicable laws and regulation.

Holders of exploration permits enjoy preferential rights in acquiring a mineral agreement or an FTAA over areas covered by the exploration permit. The exploration permit holder may, at his or her choice, convert totally or partially the exploration permit to a mineral agreement or an FTAA for the purpose of undertaking detailed exploration, if the exploration activities indicate a resource discovery. For this purpose, the exploration permit holder must file a letter of intent with the relevant MGB regional office and provide a copy to the MGB central office. Upon compliance by the exploration permit holder with all the pertinent requirements, including a field verification report by the MGB regional office confirming the resource discovery and upon payment of the required conversion fee, the application for conversion will be evaluated and approved subject to applicable laws and regulations.

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

Exploration permit

An exploration permit is valid for a period of two years, subject to renewal for periods of two years, up to a total of four years for non-metallic mineral exploration and six years for metallic mineral exploration. The grantee of the permit may apply for further renewal of the exploration permit, which may be granted for another term of two years for the very purpose of preparing or completing the feasibility studies, and filing of the declaration of mining project feasibility and the pertinent mineral agreement or FTAA application.

The DENR Secretary, through the MGB Director, may grant the renewal after field verification by the MGB, and compliance with all pertinent requirements, including payment of all required fees and reporting requirements. Under the regulations, if all the requirements have been complied with and the exploration permit application for renewal is still awaiting approval one month after its date of filing, the said exploration permit application for renewal, upon submission of an affidavit by the applicant attesting to the full compliance with all the pertinent requirements, will be deemed approved and the MGB Director must issue the renewed exploration permit.

An exploration permit may be transferred or assigned to another qualified person or persons subject to the approval of the MGB director.

Mineral agreement

A mineral agreement has a term not exceeding 25 years from the date of its execution, renewable for another term not exceeding 25 years under the same terms and conditions, without prejudice to changes mutually agreed upon by the government and the contractor. After the renewal period, the operation of the mine may be

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undertaken by the government or through a contractor. The contract for the operation of a mine will be awarded to the highest bidder in a public bidding; however, the contractor will have the right to equal the highest bid upon reimbursement of all reasonable expenses of the highest bidder.

A contractor may file an application for the total or partial transfer or assignment of its mineral agreement to a qualified person upon payment of an application fee with the MGB regional office concerned for evaluation. The application should be accompanied by the pertinent deed of assignment that must contain, inter alia, a stipulation that the transferee or assignee assumes all obligations of the transferor or assignor under the agreement. Any transfer or assignment of rights and obligations under a mineral agreement is subject to the approval of the DENR secretary upon the recommendation of the MGB director. Any transfer or assignment will be deemed automatically approved if not acted upon by the DENR secretary within 30 calendar days from official receipt thereof, unless it is patently unconstitutional, illegal or where such transfer or assignment is in violation of pertinent rules and regulations.

Financial or technical assistance agreement

An FTAA has a term not exceeding 25 years from the date of execution thereof, renewable for another term not exceeding 25 years under such terms and conditions as may be provided for by law and mutually agreed upon by the parties.

A contractor may file an application for the total or partial transfer or assignment of its FTAA to a qualified person upon payment of an application fee with the MGB regional office concerned for evaluation. The application should be accompanied by the pertinent deed of assignment that must contain, inter alia, a stipulation that the transferee or assignee assumes all obligations of the transferor or assignor under the FTAA. Upon endorsement by the MGB director, the DENR secretary may recommend to the president the transfer or assignment of rights and obligations under the FTAA for approval. Any transfer or assignment will be deemed automatically approved if not acted upon by the president within 30 calendar days from official receipt thereof, unless it is patently unconstitutional, illegal or where such transfer or assignment is in violation of pertinent rules and regulations.

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?

The following agreements are available only to Philippine citizens or to corporations at least 60 per cent of whose capital is owned by such citizens:

- an MPSA;
- a co-production agreement; and
- a joint-venture agreement.

On the other hand, an exploration permit or an FTAA can be held by non-Philippine nationals or corporations that are 100 per cent foreign-owned. Corporations that are owned by non-Philippine citizens or do not meet the minimum Philippine ownership usually enter into joint ventures with Philippine citizens or enter into an FTAA with the government.

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

The Philippine Constitution establishes an independent judicial system and guarantees adherence to the rule of law and due process. It also guarantees that obligations of contracts will not be impaired by subsequent legislation. Thus, the state, which is the counterparty of the private entity in mineral agreements, may generally not pass legislation or regulations impairing its obligations under such mineral agreements.

The Mining Act established a system of arbitration for mining disputes. Thus, an arbitration panel would have exclusive and original jurisdiction to hear and decide disputes involving rights to mining areas; disputes involving mineral agreements or permits; and disputes involving surface owners, occupants and claim holders or concessionaires. A party not satisfied with the decision or order of the panel of arbitrators may appeal the decision, within 15 days of receipt, to the Mines Adjudication Board, which must resolve the appeal within 30 days of submission thereof. An aggrieved party may file a petition for review by certiorari with the Supreme Court within 30 days from receipt of the order or decision of the Mines Adjudication Board.

Generally, foreign arbitration awards may be recognised and enforced in the Philippines, which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

In general, the Mining Act grants private parties holding mining rights the following auxiliary rights in respect of the surface area:

- the right to cut trees or timber within the mining area as may be necessary for mining operations, subject to forestry laws, rules and regulations;
- water rights for mining operations, upon approval of an application with the appropriate government agency in accordance with existing water laws, rules and regulations promulgated thereunder;
- when mining areas are so situated that for purposes of more convenient mining operations it is necessary to build, construct or install infrastructure on the mining areas or lands owned, occupied or leased by other persons, the contractor, upon payment of just compensation, is entitled to enter and occupy said mining areas or lands; and
- subject to prior notification, holders of mining rights may enter private land and concession areas owned or held by surface owners, occupants, or concessionaires when conducting mining operations therein. However, the surface owner, occupant or concessionaire must be compensated for any damage done to his or her property by reason of such entry. If the surface owners of the land, occupants or concessionaires thereof refuse to allow the contractor or permit holder entry into the land despite receipt of the written notification or refuse to receive said written notification, the contractor or permit holder can bring the matter before the panel of arbitrators for proper disposition.

A mining contractor may also acquire other rights through the execution of agreements with the surface owner, occupant, or concessionaire.

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 participation of the government and state agencies in mining projects depends on the terms and form of the mineral agreement. Under the 1987 Philippine Constitution, the state may directly undertake the exploration, development, and utilisation of natural resources, or it may enter into co-production, joint venture, or production-sharing agreements with Philippine citizens, or corporations or associations at least 60 per cent of whose capital is owned by such citizens. The state may also enter into FTAAs with non-Philippine nationals.

There is no local listing requirement for project companies.

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

The Mining Act does not have provisions dealing with government expropriation of licences. In general, the government may revoke a mining licence or terminate the relevant agreement based on grounds provided by law or based on grounds provided in the permit or the relevant agreement. In addition, the 1987 Philippine Constitution provides that the state, in times of national emergency, when public interest so requires, may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any business affected with public interest. Moreover, under the 1987 Philippine Constitution, private property may not be taken for public use without fair compensation.

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

Under the Mining Act, the following areas are considered closed to mining applications:

- military and other government reservations, except with prior written clearance from the government agency concerned;
- areas near or under public or private buildings, cemeteries, archeological and historic sites, bridges, highways, waterways, railways, reservoirs, dams or other infrastructure projects, public or private works including plantations or valuable crops, except upon written consent of the government agency or private entity concerned;
- areas covered by valid and existing mining rights;
- areas expressly prohibited by law;
- areas covered by small-scale miners as defined by law unless with prior consent of the small-scale miners, in which case a royalty payment upon the utilisation of minerals must be agreed upon by the parties, said royalty forming a trust fund for the socioeconomic development of the community concerned; and
- old growth or virgin forests, designated watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks, provincial and municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the National Integrated Protected Areas System (NIPAS) under Republic Act No. 7586, DENR Administrative Order No. 25, s. of 1992 and other laws.

Under Executive Order No. 79, applications for mineral contracts, concessions, and agreements will not be allowed in the following:

- areas expressly enumerated under the Mining Act;
- protected areas categorised and established under the NIPAS under Republic Act No. 7586;
- prime agricultural lands, in addition to lands covered by Republic Act No. 6657 (Comprehensive Agrarian Reform Law of 1988, as amended), including plantations and areas devoted to valuable crops, and strategic agriculture and fisheries development zones and fish refuges and sanctuaries declared as such by the Secretary of the Department of Agriculture;
- tourism development areas, as identified in the National Tourism Development Plan; and
- other critical areas, island ecosystems, and impact areas of mining as determined by current and existing mapping technologies, that the DENR may hereafter identify pursuant to existing laws, rules, and regulations, such as, but not limited to, Republic Act No. 7586.

Ancestral lands of the indigenous cultural communities are also not open to mining operations unless the free prior and informed consent of the relevant indigenous cultural community concerned is obtained.

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?

Without prejudice to such fiscal incentives that may be available under existing laws, private parties carrying out mining activities are subject to taxes imposed under the National Internal Revenue Code and the Tariff and Customs Code, such as income tax, excise tax on minerals, value added tax and customs duties. They are also subject to taxes imposed under the Local Government Code, such as local business taxes and real property tax. Some of these taxes are revenue-based and some are based on other criteria (eg, volume, actual market value of the gross output).

Mining contractors must also pay occupation fees, computed based on the size of the mining area, to the local government unit concerned.

Mining contractors operating within ancestral lands must also pay royalties to the relevant indigenous cultural community based on the gross output, while mining contractors operating within government mineral reservations must also pay royalties to the national government based on the market value of the gross output of the minerals or mineral products extracted or produced.

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

Subject to the Investment Priorities Plan issued annually by the Board of Investments, the contractors in mineral agreements and FTAAs may be entitled to fiscal and non-fiscal incentives provided in the Omnibus Investments Code. These fiscal incentives may include an income tax holiday for a certain number of years, exemption from certain taxes and special deductions from gross income. Non-fiscal incentives may include simplified customs importation procedures and importation of consigned equipment for a period of 10 years and employment of foreign nationals in supervisory, technical or advisory positions. Under the 2013 Investment Priorities Plan, mining and mineral processing projects are not entitled to an income tax holiday. At present, the Investment Priorities Plan for 2014 is still in process.

In addition, the Mining Act provides the following incentives:

- Pollution control devices acquired, constructed or installed by contractors will not be considered as improvements on the land or building where they are placed, and will not be subject to property tax and other taxes or assessments.
- A net operating loss without the benefit of incentives incurred in any of the first 10 years of operations may be carried over as a deduction from taxable income for the next five years immediately following the year of such loss. The entire amount of the loss will be carried over to the first of the five taxable years following the loss, and any portion of such loss that exceeds the taxable income of such first year will be deducted in a like manner from the taxable income of the next remaining four years.
- Fixed assets may be depreciated as follows: to the extent of not more than twice as fast as the normal rate of depreciation or depreciated at normal rate of depreciation if the expected life is 10 years or less; or depreciated over any number of years between five years and the expected life if the latter is more than 10 years, and the depreciation thereon allowed as a deduction from taxable income.

The Mining Act also provides that the contractor will be entitled to the basic rights and guarantees provided in the 1987 Philippine Constitution and such other rights recognised by the government as enumerated hereunder:

- the right to repatriate the entire proceeds of the liquidation of the foreign investment in the currency in which the investment

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was originally made and at the exchange rate prevailing at the time of repatriation;
- the right to remit earnings from the investment in the currency in which the foreign investment was originally made and at the exchange rate prevailing at the time of remittance;
- the right to remit at the exchange rate prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from financial or technical assistance contracts;
- the right to be free from expropriation by the government of the property represented by investments or loans, or of the property of the enterprise except for public use or in the interest of national welfare or defence and upon payment of just compensation. In such cases, foreign investors or enterprises will have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance;
- the right to be free from requisition of the property represented by the investment or of the property of the enterprises except in cases of war or national emergency and only for the duration thereof. Just compensation will be determined and paid either at the time or immediately after cessation of the state of war or national emergency. Payments received as compensation for the requisitioned property may be remitted in the currency in which the investments were originally made and at the exchange rate prevailing at the time of remittance; and
- any confidential information supplied by the contractor pursuant to the Mining Act and its implementing rules and regulations will be treated as such by the DENR and the government, and during the term of the project to which it relates.

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

There is no legislation providing for tax stabilisation on mining operations.

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

Generally, the government does not have a carried interest (or free carried interest) in mining projects (unless expressly so provided in the relevant agreement).

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

Any gain received by an assignor is generally subject to income tax. However, the assignor of an exploration permit or mineral agreement do not generally receive monetary consideration for the transfer of such exploration permit or mineral agreement, and the assignment is generally made upon the condition that the assignee will assume and perform the obligations of the assignor under the exploration permit or mineral agreement assigned.

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

Generally, there are no distinctions between duties, royalties and taxes payable by domestic parties and those payable by foreign parties. However, with respect to dividend income, dividends received by a Philippine corporation (which may be wholly owned by non-Philippine citizens) or a Philippine branch of a non-Philippine corporation from a Philippine corporation are not subject to Philippine income tax. On the other hand, dividends paid to a non-resident, non-Philippine corporation by a Philippine corporation are subject to Philippine income tax, without prejudice to preferential rates provided in income tax treaties between the Philippines and the country where the non-resident recipient of the dividends is domiciled.

Business structures

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

Private parties usually use a corporation to carry on mining activities (except for small-scale mining which is usually conducted by individuals).

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

As discussed in item 12 above, a Philippine corporation wholly owned by non-Philippine nationals may hold an exploration permit or an FTAA. However, a mineral agreement (such as an MPSA) is available only to Philippine citizens or to corporations at least 60 per cent of whose capital is owned by such citizens. Thus, the participation of Philippine nationals will be necessary for transactions involving mineral agreements.

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?

To date, the Philippines has signed more than 30 investment treaties, which encourage investments between the parties thereto through the creation of favourable investment conditions. Among the countries with bilateral investment treaties with the Philippines are Argentina, Australia, Bahrain, Bangladesh, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Finland, France, Germany, India, Indonesia, Italy, Japan, Korea, Myanmar, the Netherlands, Pakistan, Portugal, Romania, Spain, Switzerland, Thailand, the United Kingdom and Vietnam.

The Philippines also entered into several tax treaties with other countries (such as the US, Canada, Australia and China), mostly for the avoidance of double taxation and prevention of fiscal evasion with respect to income taxes.

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?

In general, the principal sources of financing used by private parties carrying on mining activities are equity and shareholder financing; bank financing (including corporate financing or project financing); and public offering of shares. A number of domestic mining companies are listed on the Philippine Stock Exchange.

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

The issue of whether a security interest can be created over exploration permits, mineral agreements or FTAAs is not settled under Philippine law.

Restrictions

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

In general, there are no restrictions and limitations imposed on the importation of machinery and equipment or services required in connection with mining activities. However, to the maximum extent compatible with efficient mining operations, the contractor must

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give preference to products, services and technologies produced and offered in the Philippines of comparable quality. In particular, the contractor must give preference to Philippine-owned construction enterprises and use buildings that can be constructed through materials and skills available in the Philippines, employ Philippine sub-contractors for road construction and the transportation and purchase of Philippine household equipment, furniture and food.

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 is no requirement that metallic minerals be processed or sold in the Philippines. However, certain permits must be obtained for certain types of activities, such as for mineral processing, ore transport, and mineral trading.

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?

Generally, there are no restrictions or limitations imposed on the import of funds for mining activities. However, the Mining Act requires FTAAs to contain a stipulation that, except for payments for dispositions for its equity, foreign investments in local enterprises that are qualified for repatriation, and local suppliers' credits and such other generally accepted and permissible financial schemes for raising funds for valid business purposes, the contractor will not raise any form of financing from domestic sources of funds, whether in the Philippine or foreign currency, for conducting its mining operations for, and in, the contract area.

Proceeds from the export or sale of metallic minerals need not be repatriated back to or used in the Philippines. Access to foreign exchange is not tied to export performance. However, under section 72 of Republic Act No. 7,653, the Monetary Board of the Central Bank, with the approval of the president of the Philippines, in the imminence of, or during, a foreign exchange crisis or in times of national emergency, may require any person residing in or operating in the Philippines to deliver any foreign exchange obtained by such person to the Central Bank or to any bank or agent designated by the Central Bank, at the then effective exchange rate or rates.

Environment

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

The Mining Act and DENR Order No. 21-10 are the principal environmental law and regulations applicable to the mining industry (in addition to other local environmental laws of general application). DENR Order No. 21-10 contains detailed provisions on environmental protection. The DENR, the MGB and the EMB are the principal regulatory bodies that administer said laws.

The other local environmental laws that may apply to mining operations include the Toxic Substance and Hazardous and Nuclear Wastes Control Act of 1990, the Clean Air Act of 1999 and the Clean Water Act of 2004.

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

All applicants for exploration permits, mineral agreements and FTAAs must submit an Environmental Work Programme (EWP) detailing the environmental impact control and rehabilitation activities proposed during the exploration period (including the costs to enable sufficient financial resources to be allocated to meet environmental and rehabilitation commitments).

A mining contractor must secure an environmental compliance certificate (ECC) from the EMB prior to the conduct of development works, construction of production facilities, or mine production activities in the contract area. After the issuance of the ECC, the contractor must also submit an environmental protection and enhancement programme (EPEP). In addition, the contractor must submit, on a yearly basis, an annual environmental protection and enhancement programme (AEPEP) based on the approved EPEP.

It usually takes several months to obtain the necessary environmental permits and clearances.

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

Contractors must rehabilitate excavated, mined-out, tailings-covered and disturbed areas to the condition of environmental safety. The Mining Act requires each contractor to establish and maintain a mine rehabilitation fund (MRF) as a deposit to ensure availability of funds for the satisfactory compliance of commitments stipulated in the EPEP or AEPEP. The MRF is deposited as a trust fund in a government depository bank and is used for physical and social rehabilitation of areas and communities affected by mining activities and for research on the social, technical and preventive aspects of rehabilitation.

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 Act and the Labour Code (and their implementing regulations) are the principal health and safety and labour laws applicable to the mining industry (in addition to other local laws of general application). DENR Order No. 21-10 contains detailed provisions on mines safety and health protection. The DENR has also issued separately the Mine Safety and Health Standards.

The DENR, the MGB, the EMB and the Department of Labour and Employment are the principal regulatory bodies that administer these laws.

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

Pursuant to the Mining Act, a contractor must give preference to Philippine citizens in all types of mining employment within the country in so far as such citizens are qualified to perform the corresponding work with reasonable efficiency and without hazard to the safety of the operations. The contractor, however, is not to be hindered from hiring employees of his or her own selection, subject to the provisions of the Philippine Immigration Act (Commonwealth Act No. 613, as amended), for technical and specialised work that, in his or her judgement and with the approval of the MGB director, requires highly specialised training or lengthy experience in the exploration, development or utilisation of mineral resources.

Furthermore, section 2-A of the Anti-dummy Law (Commonwealth Act No. 108, as last amended by PD No. 715) contains a prohibition against the employment by any person, corporation or association of any alien who will intervene in the management, operation, administration or control thereof, whether as an officer, employee or labourer, where the exercise or enjoyment of the property of (or the franchise, privilege or business engaged in by) such person, corporation or association is expressly reserved by the 1987 Philippine Constitution or local laws to citizens of the Philippines or to corporations or associations at least 60 per cent of the capital of which is owned by such citizens. There are only two exceptions to this prohibition: first, where the Secretary of the

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Philippine Department of Justice (or his authorised representative) specifically authorises the employment of a non-Filipino as technical personnel; and secondly, the election of aliens as members of the boards of directors or governing bodies of corporations or associations engaged in partially nationalised activities in proportion to their allowable participation in the capital of such entities. Please note that the Anti-dummy Law does not apply to a corporation that holds an exploration permit or an FTAA (unless the corporation is engaged in other partly nationalised activities such as landholding).

Update and trends

On 21 February 2013, the DENR, through DENR Memorandum Order No. 2013-01, increased the capitalisation requirements for corporations applying for exploration permits, mineral agreements or FTAAs. Corporate mining applicants are now required to have an authorided capital stock of at least 100 million Philippine pesos and a paid-up capital of at least 6.25 million Philippine pesos.

On 7 March 2013, the DENR formally lifted the moratorium on the acceptance of mining applications. The moratorium or the suspension of acceptance by the MGB of all types of mining applications had been in effect since 18 January 2011. Please note, however, that the moratorium on the issuance or grant of new mineral agreements, pursuant to Executive Order No. 79, section 2012, will remain in effect until a legislation rationalising existing revenue sharing schemes and mechanisms has been enacted.

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?

The principal community engagement or CSR laws and regulations are the Mining Act and DENR Order No. 21-10. DENR Order No. 21-10 contains specific provisions for the development of host and neighbouring communities of a mining project to promote the general welfare of their inhabitants. The DENR and the MGB, with the participation of the local government units concerned, are the principal regulatory bodies that administer these laws and regulations.

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

The Indigenous People's Rights Act (Republic Act No. 8371) provides that indigenous cultural communities (ICCs) or indigenous peoples (IPs) have priority rights in the harvesting, extraction, development or exploitation of natural resources within their ancestral domains. A non-member of an ICC or a non-IP is allowed to take part in the development and utilisation of the natural resources for a period not exceeding 25 years, renewable for a period not more than 25 years, through a written agreement entered into with the ICCs or IPs concerned. The National Commission on Indigenous Peoples (NCIP) exercises visitorial powers and may take action to safeguard the rights of the ICCs or IPs under this agreement.

Governmental departments and agencies are strictly enjoined from issuing, renewing, or granting any concession, licence or lease, or entering into any production-sharing agreement, without prior certification (Certification Precondition) from the NCIP that either the area affected does not overlap with any ancestral domain or the mining contractor has obtained the free and prior informed consent (FPIC) of the ICCs or IPs concerned in accordance with applicable regulations. Unless otherwise specifically stated in the memorandum of agreement between the mining contractor and the ICCs or IPs, the mining contractor would have to obtain a separate FPIC from the ICCs or IPs concerned for each major phase of the proposed mining project (eg, exploration, development, commercial operation). In connection with the procurement of an FPIC for a proposed mining project, the parties will agree on the royalty payment to the concerned ICCs or IPs, which may not be less than 1 per cent of the gross output. The ICCs or IPs have the right to stop or suspend any mining project that did not satisfy the consultation process.

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

The Philippines is not a party to any treaty, convention or protocol that specifically relates to CSR issues.

Foreign investment

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

As mentioned in question 12 above, non-Philippine nationals may hold only exploration permits and FTAAs. However, non-Philippine nationals may not hold mineral agreements (eg, MPSAs, co-production agreements, joint venture agreements).

International treaties

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

The Philippines is not a party to any treaty that applies specifically to the mining industry or an investment in the mining industry.

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