

International mineral regulatory best practice

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Overview

- This presentation considers the interests of various stakeholders which need to be balanced in a mineral regulatory regime, as well as the following models of international mineral regulatory best practice:
 - a specialised independent regulatory agency
 - eg the Ghanaian Minerals Commission
 - a central administrative system for mining information
 - eg the Namibian mining cadastre, and the new electronic system to be implemented in South Africa in March 2011
 - the International Bar Association's Model Mining Agreement ("**MMDA**") project as an alternative best practice model

Regulatory best practice: essential components

- A best practice mineral regulatory regime should include the following basic principles:
 - efficient macro-economic management
 - an effective legal and regulatory framework
 - security of tenure
 - objective criteria for the grant of exploration and mining licences
 - limited administrative discretion
 - a defined role for Government
 - efficient mining sector institutions and administrative capacity
 - effective infrastructure and services
 - competitive fiscal and taxation conditions



Regulatory best practice: essential components (II)

- A mineral regulatory regime should balance the interests of private investors, government and affected communities, as well as address environmental concerns
- Competition for private investment has compelled countries around the world to adopt investor friendly legislative reforms
- Countries aiming to benefit from foreign investment in the minerals sector must work towards greater efficiency, transparency and accountability in their respective regulatory regimes
- Investor-friendly mineral regulatory regimes should ideally include, in addition to the basic principles previously described:
 - specialised, independent regulatory agencies to administer the minerals sector
 - clear taxation and royalties regimes
 - efficient systems for the management of mining related information (ie mining cadastre)
 - effective investment protection mechanisms including international arbitration

Independent agency

- Several jurisdictions around the world, including Ghana and Brazil, are adopting regulatory models that incorporate independent agencies
- There are several inherent advantages offered by independent regulatory agencies:
 - they potentially limit undue influence on regulators
 - specialist agencies can provide greater sector specific knowledge with the inclusion of independent specialists
 - such agencies generally increase the efficiency of public administration
- Brazil has announced the imminent implementation of an independent National Mining Agency to replace the National Department of Mineral Production

Independent agency: Ghana example

- Mining is a significant economic activity in Ghana, accounting for 5% of its GDP and 38% of its exports
- Ghana has the second largest gold deposits in Africa after South Africa
- Apart from gold, Ghana also produces significant quantities of bauxite, manganese and diamonds
- In a bid to increase foreign investment in the mining sector, in 1993 the Ghanaian government introduced an independent agency responsible for the administration of the minerals sector:
 - to remove administrative uncertainty
 - to reduce bureaucracy, improve administrative efficiency and reduce corruption



Independent agency: Ghana example (II)

- The Ghanaian Parliament was empowered to establish a Minerals Commission under the Constitution of the Republic of Ghana, 1992
- The Minerals Commission of Ghana was established with the enactment of the Minerals Commission Act, 1993
- Under the Act, the Minerals Commission is responsible for the "**regulation and management**" as well as the "**utilisation of minerals**"



Independent agency: Ghana example (III)

- The Minerals Commission has the following features:
 - the board is appointed by the President of Ghana
 - the board consists of nine members including a chairman and a chief executive
 - its administrative functions are independent of the national government
- Section 2 of the Minerals Commission Act sets out the functions of the Commission, which include **"formulat[ing] recommendations for national policy... [on] mineral resources", "advis[ing] the Minister [of Lands and National Resources]"** as well as **"monitor[ing] the implementation of... policies of the Government"**



Independent agency: Ghana example (IV)

- An application for mineral rights is not submitted directly to the Minister of Lands and National Resources but rather to the Minerals Commission
- The Commission then submits a recommendation to the Minister within ninety days of receipt of the application
- Section 5(1) of the Minerals and Mining Act, 2006 provides that the Minister of Lands and National Resources "**may negotiate, grant, revoke, suspend or renew mineral rights**" subject to "**the recommendations of the Commission**"
- Although the Minister of Lands and National Resources is not strictly bound by the recommendations of the Minerals Commission, it is clear that the intention of the legislature was to restrict the discretion of the Minister in this regard

Mining cadastre

- Mining jurisdictions in the developing world are adopting centralised information systems, or mining cadastres. Examples are Sierra Leone, Mozambique and Namibia
- There are several inherent advantages to the adoption of a mining cadastre:
 - enhancement of the transparency of public activities in the mining sector and thus a limit on the scope for corruption
 - an increase in certainty, protection and security of tenure for investors
 - an increase in the efficiency of public administration

Mining cadastre: Namibia example

- Namibia shares a common history with South Africa as the economic development of both countries has been heavily influenced by the mining sector
- Namibia's predominant mineral resources include diamonds, uranium, gold, zinc, copper and lead
- The Minerals (Prospecting and Mining) Act, 1992 (“**the Namibian Minerals Act**”) is the primary piece of legislation regulating the minerals industry in Namibia
- In addition to the Namibian Minerals Act, the Namibian government published the Minerals Policy of Namibia in order to make public its goals and policies in this sector
- A key policy achievement has been the implementation of a “**Computerised Title Management System**” (“**CTMS**”) in 1996

Mining cadastre: Namibia example (II)

- The Namibian Department of Minerals and Energy operates the CTMS
- The CTMS administers all transactions throughout the lifetime of a mineral title
 - title information can be archived and updated, and all required documents are generated by the system
 - geographic information on the titles, as well as related topics such as geology and administrative boundaries, are fully integrated and can be visualized, queried and printed in the form of a map
- Under the Namibian Minerals Act mineral titles are public documents which can be accessed freely
- The CTMS has greatly improved the efficiency with which the licence applications are processed and monitored

Mining cadastre: Namibia example (III)

- Under the Namibian Minerals Act the Minister of Mines and Energy appoints a Mining Commissioner who is responsible for receiving licence applications and monitoring compliance with the Act
- The Namibian Minerals Act divides the day to day administration of the Act by the Mining Commissioner, on the one hand, and broader policy formulation and implementation, which are the responsibility of the Minister, on the other
- This role split seems sensible and may even promote administrative efficiency
- The Minerals Act also established a Minerals Board of Namibia
 - The Board advises the Minister generally, as well as in respect of particular issues, and makes recommendations in relation to –
 - the minerals policy of Namibia and its implementation
 - the amendment or application of the provisions of the Namibian Minerals Act
 - any matter referred to the Board by the Minister



South Africa's New Electronic Mineral Management System

- On 7 February 2011, the Minister of Mineral Resources ("**the Minister**"), Susan Shabangu, announced a series of measures which, when implemented, should result in a general improvement of administrative efficiency and transparency in the DMR:
 - the new electronic mineral management system ("**the new electronic system**"), to be implemented in March 2011, will add far greater detail to the process of applying for prospecting rights, mining rights and permits, though not, according to the Minister, at the cost of efficiency
 - the new electronic system will be a significant advance on the current National Mining Process System ("**NMPS**")
 - the new electronic system, like the NMPS, will be a Geographic Information System ("**GIS system**"), and is said to provide far greater accuracy and graphic detail than the NMPS
 - the DMR will publish standardised guidelines online, as well as electronic templates for applications
 - the online service will also "**dynamically interact**" with the databases of other governmental departments and thus be able to provide information relating to "**environmentally sensitive areas, protected areas, Deeds offices, township development, water plans**"



South Africa's New Electronic Mineral Management System (II)

- The new electronic system is intended to **“achieve more transparency”** and **“root out any prospect of corruption in the system”**
- The Minister further elaborated on the consequences of a lack of transparency and weak administration in the current system:
 - cases of double granting of rights, right overlaps and areas not reflected on the system that could not be registered, leading to litigation
 - longer waiting periods and uncertainty with regard to licence applications
 - the misalignment of boundaries as a result of a limited GIS system in the form of the NMPS
 - a serious lack of interface between the NMPS, department officials and the rest of government
 - incorrect information fed into the system by consultants
- The new electronic system will hopefully lead to greater accountability by the Department and enhanced transparency with regard to the process of awarding rights



The MMDA: an alternative

- In April 2009, the International Bar Association's ("IBA's") mining law committee embarked on a two year project to develop a model mining development agreement based on international best practice principles to serve as a negotiation template for investor-state agreements in the mining sector in developing countries
- The MMDA project was developed in recognition of:
 - mining companies' increasing concern about the need to obtain a "**social licence to operate**", which includes obtaining the support of the local community when commencing mining operations
 - at the same time, mining companies require certainty in terms of the legal regime governing their mining operations, as well as stable investment conditions under which to operate in order to ensure the long term security of their investments



The MMDA: an alternative (II)

- The goal of the MMDA project is the creation of a document which will allow for the easy deletion or substitution of, or addition to, what may be contentious or undesired clauses in a particular case, while reflecting a measure of international best practice principles
- The MMDA will endeavor to provide a practical tool for the development of agreements which addresses the matters that a potential investor, mining company, government or civil society representative may wish to see in a basic mine development agreement, which include:
 - security of tenure
 - regulatory certainty
 - clarification of rights and obligations of government and investors
- It is not intended to be a fixed policy document or to prescribe any particular point of view

The MMDA: an alternative (III)

- At the inception of the project in 2009 the IBA's mining law committee established a working group to manage the drafting process of the MMDA
- The working group compiled a confidential database of more than 60 'tried and tested' agreements from different jurisdiction on which to draw during the drafting process
- The working group then undertook the revision of the draft model provisions as legitimate concerns and ideas were raised through the consultation process
- The draft version 1.0 of the MMDA is available on the MMDA website (<http://www.mmdaproject.org/>)
- The mining law committee hopes to publish the final version 1.0 of the MMDA by April 2011
- The MMDA is an attempt to make mining in developing countries a real force for good

Conclusion

- There is an emerging consensus internationally on the necessary elements of regulatory best practice
- The development of a sustainable, best practice model for mineral regulation necessarily entails limiting administrative discretion by public bodies, greater transparency and better efficiency in the public administration of the mining sector
- To this end the examples of specialised, independent agencies to administer the minerals sector and efficient systems for the management of mining related information (ie mining cadastre) are clearly examples of regulatory best practice
- In South Africa, the new electronic system will hopefully come online in March 2011 and bring with it greater administrative certainty, transparency and efficiency
- In the absence of such regulatory measures, the IBA's Model Mining Development Agreement remains available as a freely accessible resource

Thanks

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