15 October 2012

Reforming the Mining Code of the Democratic Republic of Congo

10 years ago, the Democratic Republic of Congo ("DRC"), which holds some of the world's largest deposits of copper and cobalt and significant reserves of other minerals adopted a new mining code under Law n°007/2002 of 11 July 2002 (the "Mining Code") with a view to attracting investments and turning its considerable natural resources into wealth.

In July of this year, the Minister of Mines, Martin Kabwelulu, has announced that the Mining Code is shortly to be revised in order to remedy its deficiencies.

A. The avowed objectives of the Congolese Government in amending the Mining Code

According to the Minister of Mines, the deficiencies of the Mining Code include:

- the existence of two different tax and customs regimes with companies that still benefit from the mining conventional regime of the 1981 Mining and Hydrocarbons Ordinance-law and those operating under the Mining Code;
- the absence of provisions prohibiting companies from freezing the deposits located within their mining perimeters;
- the absence of provisions governing the transfer of the shares of the mining title holder;
- the modest size of the State's shareholding in mining companies granted by the Mining Code; and
- the low percentage of certain taxes.

The Minister of Mines further stressed the need to develop the local processing of minerals and to increase the contribution of the mining sector to the State budget from 9% in 2010 to 25% in 2016.

B. The demands of civil society organisations

Shortly after the Minister's announcement, a group claiming to represent all civil society organisations involved in natural resources issues in DRC indicated that they supported the need for a revision of the Mining Code and submitted to the Minister of Mines a report containing a set of proposed amendments (the "**Report**").

In addition to general claims for increased transparency, greater involvement of local population, the need for summaries of the environmental reports to be drafted in local language or that small-scale mining projects be exclusively reserved for Congolese nationals, the Report contains a number of far reaching proposals:

(i) Public tender process for granting mining titles

The Report recommended that mining rights over recognised high value major mineral deposits be granted by public tender. Only companies with proven financial and technical capacities and with no history of corruption, tax evasion or any other illegal activity would be allowed to participate in the tender process.

(ii) A 5% participation of the local communities in the share capital of mining operating companies

In addition to the current 5% State participation in the share capital of the mining operating company, another 5% should be transferred to local communities upon the grant of a mining exploitation permit.

(iii) Local processing of minerals

In order to develop a local processing industry, the Report recommends prohibiting the marketing of raw minerals.

(iv) Increased control and taxation in respect of shareholdings

Mining companies would be required to disclose additional financial information including their ultimate shareholding, all mining agreements signed and royalties paid. The Report also suggests that shareholders of mining companies should disclose all assignments, transfers or acquisitions of their shares. Capital gains arising from any share transaction would be subject to the general tax regime (currently 20%).

The Report also proposes to increase the control exercised over transactions among affiliated companies to ensure that minerals are sold on an arm's length basis and at international market price and recommends that the preferential custom regime be eliminated.

(v) 5-year moratorium on new mining concessions and on the transfer of shares of State-owned companies

The Report proposes a five-year moratorium on the grant of new mining concessions while the tax regime is being revised.

It also recommend a five-year moratorium on the transfer of shares of State-owned companies in order to enable the valuation of their assets and deposits, and that such valuation be conducted by internationally recognised auditors.

(vi) 0.3% of net revenue from the sale of mining products allocated to a local development fund

The Report proposes that 0.3% of net revenue from the sale of mining products be allocated by the mining title holder to a fund relating to the local development for the financing of basic infrastructure. While the Mining Code provides for a centralised payment to the public treasury, the civil society organisations also propose the direct payment of the mining royalty to separate governmental entities as follows: 60% to the Government, 25% to the provincial administration where the project is located and 15% to the territorial entity.

(vii) Environmental Strict Liability

The civil society organisations proposed that the revised Mining Code clearly set out the international environmental principles to which DRC is committed, in particular regarding sustainable development, the "precautionary" principle and the "polluter-pays" principle. The "precautionary principle" is a risk management approach according to which, where there are threats of serious or irreversible damage, lack of full scientific certainty of such risk may not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The polluter-pays principle provides that the person responsible for damage to the environment should bear the costs associated with it.

By calling for the application of the precautionary principle and of the polluter-pays principle, the civil society organisations propose to delete the current provision of the Mining Code stating that the mining title holder is responsible for damages arising from its activities only to the extent that it is in violation of the conditions of its environmental plan or of its environmental obligations under the Mining Code. They appear to promote the adoption under the revised Mining Code of an environmental strict liability regime.

The Report also proposes that any environmental impact study entirely carried out by foreign consultants should be subject to the second expert opinion of local consultants.

(viii) Creation of a special court in charge of environmental issues

The civil society organisations put forward the creation of a special court in charge of environmental issues. According to these organisations, jurisdiction over environmental matters should be conferred to the Ministry of Environment rather than to the Environmental Department of the Ministry of Mines. In addition, national and local advisory committees composed of governmental authorities, representatives of private sector, local communities and civil society organisations should be created so that these stakeholders could participate in the implementation by the mining companies of their environmental obligations.

C. What next for investors?

The Government has been careful in its communication not to present this revision of the Mining Code as a threat to investors. The revision is generally portrayed as falling within the same "business friendly" category as the implementation of the OHADA treaty [(1)]. The Government has not yet commented on the Report nor made any clear statement as to another "revisitation" of mining contracts such as the one which occurred in 2002. However it has mentioned the need to increase revenues and its control over the sector: notwithstanding the Report's implied criticism of political authorities, the Government may well use the Report's contents to justify increasing economic pressure on investors and its control over mining assets as a response to popular demands. The promises of the 2002 Mining Code had been somewhat tainted by the subsequent revisitation process and controversy regarding the unilateral termination of certain major contracts and mining operations. It will be interesting to see whether history is to repeat itself.

We have been active in DRC for decades and are closely monitoring the reform of the Mining Code and the implementation of OHADA. We will be very happy to discuss these developments with you.

[1] OHADA is the acronym for *'Organisation pour l'Harmonisation du Droit des Affaires en Afrique'*, (Organisation for the Harmonisation of Business Law in Africa), an organisation comprising, since the accession of DRC, 17 West and Central African countries which share a common body of corporate and commercial laws. OHADA is recognized as a major factor in improving the business climate of the countries that have implemented it.

Christophe Asselineau
Paris
+33.1.53.89.70.80
christophe.asselineau@shearman.com

114 AVENUE DES CHAMPS-ELYSEES | 75008 | PARIS | WWW.SHEARMAN.COM