



THE MINING LAW REVIEW

BBL

BOOKBINDER
BUSINESS LAW

THE MINING LAW REVIEW

The Mining Law Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Mining Law Review - Edition 4
(published in October 2015 – editor Erik Richer La Flèche)

For further information please email
Nick.Barette@lbresearch.com

THE MINING LAW REVIEW

Fourth Edition

Editor
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

PUBLISHING MANAGER
Lucy Brewer

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Charlotte Stretch

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2015 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2015, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-73-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOCAAT LAW PRACTICE

ANDERSON & ANDERSON LLP

BOOKBINDER BUSINESS LAW

CARCELÉN, DESMADRYL, GUZMÁN & TAPIA – ABOGADOS

CGA – COUTO, GRAÇA & ASSOCIADOS

EKVITA LLC

EMERY MUKENDI WAFWANA & ASSOCIATES

ENSAFRICA

FÁTIMA FREITAS ADVOGADOS

GENI & KEBE SCP

HERBERT SMITH FREEHILLS

HERGÜNER BİLGEN ÖZEKE ATTORNEY PARTNERSHIP

HOLLAND & HART LLP

MAYER BROWN INTERNATIONAL LLP

MINTER ELLISON

MIRANDA & ASSOCIADOS

PÉREZ BUSTAMANTE & PONCE

PINHEIRO NETO ADVOGADOS

QUINZIO & CÍA ABOGADOS

Acknowledgements

REM LAW CONSULTANCY
RICAURTE RUEDA ABOGADOS
RSM BOGARÍN Y CÍA SC
SALAZAR & ASOCIADOS ABOGADOS
SQUIRE PATTON BOGGS
STIKEMAN ELLIOTT LLP
ȚUCA ZBÂRCEA & ASOCIAȚII
VÁZQUEZ, SIERRA & GARCÍA SC
WILLIAM FREIRE ADVOGADOS ASSOCIADOS

CONTENTS

Editor's Prefacevii	
	<i>Erik Richer La Flèche</i>	
PART I	MINING LAW	1-278
Chapter 1	ANGOLA..... 1	
	<i>Idalett Sousa and Hugo Moreira</i>	
Chapter 2	AUSTRALIA..... 12	
	<i>Jay Leary and Nathan Colangelo</i>	
Chapter 3	AZERBAIJAN..... 25	
	<i>Ilgar Mehti</i>	
Chapter 4	BOTSWANA 37	
	<i>Jeffrey Bookbinder and Chabo Peo</i>	
Chapter 5	BRAZIL..... 52	
	<i>William Freire</i>	
Chapter 6	CANADA..... 66	
	<i>Erik Richer La Flèche, David Massé and Jennifer Honeyman</i>	
Chapter 7	CHILE 77	
	<i>Marcelo Olivares</i>	
Chapter 8	COLOMBIA..... 87	
	<i>Margarita Ricaurte</i>	

Chapter 9	ECUADOR.....	98
	<i>Jaime P Zaldumbide and Jerónimo Carcelén</i>	
Chapter 10	GHANA.....	104
	<i>Innocent Akwayena and Enyonam Dedey-Oke</i>	
Chapter 11	GUINEA.....	119
	<i>Stéphane Brabant and Yann Alix</i>	
Chapter 12	IVORY COAST	132
	<i>Raphaël Wagner</i>	
Chapter 13	MEXICO	143
	<i>Alberto M Vázquez and Humberto Jiménez</i>	
Chapter 14	MONGOLIA.....	161
	<i>Sebastian Rosholt</i>	
Chapter 15	MOZAMBIQUE	178
	<i>Paulo Pimenta and Nuno Cabeçadas</i>	
Chapter 16	NIGERIA.....	189
	<i>Oladotun Alokolaro and Azeez Akande</i>	
Chapter 17	REPUBLIC OF THE CONGO.....	201
	<i>Emery Mukendi Wafwana and Antoine Luntadila Kibanga</i>	
Chapter 18	ROMANIA	212
	<i>Ciprian Dragomir and Bogdan Halcu</i>	
Chapter 19	SENEGAL.....	223
	<i>Mouhamed Kebe</i>	
Chapter 20	SOUTH AFRICA	232
	<i>Modisaotsile Matlou</i>	
Chapter 21	TURKEY.....	252
	<i>Safiye Aslı Budak and Yavuz Selim Günay</i>	

Contents

Chapter 22	UNITED STATES	265
	<i>Karol L Kaballey, Kristin A Nichols and Robert A Bassett</i>	
PART II	CAPITAL MARKETS.....	279–361
Chapter 23	AUSTRALIA.....	279
	<i>Simon Rear, Clare Pope, Chris Rosario, Ben Stewart and Pasan Wijesuriya</i>	
Chapter 24	BRAZIL.....	293
	<i>Carlos Vilbena and Adriano Drummond C Trindade</i>	
Chapter 25	CANADA.....	301
	<i>Erik Richer La Flèche, David Massé and Jennifer Honeyman</i>	
Chapter 26	COLOMBIA.....	312
	<i>Juan Carlos Salazar T</i>	
Chapter 27	MONGOLIA.....	322
	<i>Oyun Surenjav and David C Buxbaum</i>	
Chapter 28	MOZAMBIQUE	335
	<i>Pedro Couto, Jorge Graça and Faizal Jusob</i>	
Chapter 29	TURKEY.....	341
	<i>Safiye Asli Budak and Yavuz Selim Günay</i>	
Chapter 30	UNITED KINGDOM	349
	<i>Kate Ball-Dodd and Connor Cahalane</i>	
Appendix 1	ABOUT THE AUTHORS	361
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS....	379

EDITOR'S PREFACE

I am pleased to have participated in the preparation of the fourth edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 22 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes eight country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

The mining sector is facing uncertain times. Commodity prices are lower and continue to be soft. Demand growth from China, the world's largest consumer of commodities, has slowed considerably. New markets such as India are not picking up the slack. Operating costs in certain markets exploded during the good years and must now be reined in. Traditional lenders to the industry are more highly regulated and have less flexibility to assist companies during this difficult time. Equity markets know that big declines in the price of commodities have preceded recessions and bear markets and as a result are doubly cautious.

While times are tough, we know that mining is cyclical and that continued world population and economic growth as well as the depletion of current resources mean that growth in the mining sector will resume. The only question is when.

Editor's Preface

In the meantime, we are seeing a return to basics coupled with innovation. Companies are reducing their operating costs and curtailing exploration efforts. Executives are looking at new ways of doing things, from cost sharing to automation to alternative financing. When financing projects, companies now attempt to secure most if not all of the financing upfront. To do this they have to cobble together financings from various sources, including stream and royalty arrangements that in the past were only available once a project had been considerably de-risked. Adapting the financings to the particulars of each projects and making sure that the various bits work together and form a coherent whole is a source of interesting and sophisticated work for mining lawyers these days.

But companies are not the only ones implementing change. In some jurisdictions, Quebec for example, governments and other stakeholders (e.g., indigenous peoples) are taking advantage of the lull to put into place comprehensive strategies for welcoming new mining projects. Such strategies include clear timelines for the approval of projects, objective project approval standards, investments in infrastructure (e.g., ports, roads, railroads, airports and power lines), and transparent rules regarding the sharing of project benefits among local communities, indigenous peoples and government, all so as to be able to ramp up quickly when opportunity strikes.

As you consult this book you will find more on topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche

Stikeman Elliott LLP

Montreal

October 2015

Chapter 4

BOTSWANA

*Jeffrey Bookbinder and Chabo Peo*¹

I OVERVIEW

The government of Botswana Vision 2016 policy is geared towards, *inter alia*, prosperity for all future and current generations and a sustainable use of the environment. With a predicted decline in diamond mining revenue, the government has focused on economic diversification, accelerated economic growth rate strategies and ease of doing business to which the private sector and foreign direct investment are key components.² This includes a focus on increasing Botswana's international competitiveness and increasing and diversifying the country's export base, production and productivity in various sectors including diamonds and other minerals.³ Infrastructure has been highlighted as a determining factor in production processes and the government, through its National Development Plan 10 (NDP 10), has committed to the development of product-specific infrastructure.⁴

A component of the economic diversity drive is the country-wide mineral assessment programme in terms of which the government hopes to facilitate small-scale mining and reduce its reliance on diamonds.⁵ As at June 2013 the principal exports of Botswana were:

- a* diamonds: 66.8 per cent;
- b* copper nickel: 15 per cent;
- c* gold: 1.5 per cent; and

1 Jeffrey Bookbinder is a partner and Chabo Peo is an associate at Bookbinder Business Law.

2 Mid-term review of National Development Plan 10, Ministry of Finance and Development Planning, June 2013, pp. 32–36.

3 Botswana National Export Strategy 2010-2016, p. 36.

4 Mid-term review of National Development Plan (see footnote 2, *supra*).

5 *Ibid.*, p. 49.

d salt and soda ash: 1.3 per cent.

Coal and uranium are emerging as key future contributors to the sector.⁶ In respect of the former the government has published a document called the Coal Road Map – An Overview of Botswana’s Coal Resources and Future Plans (the Road Map).⁷ The stated goals of the Road Map for the coal mining industry are as follows:

- a* to maximise the economic benefits for the nation while enabling private investors to earn competitive returns;
- b* to create a competitive environment to stimulate private sector investment in mineral exploration and exploitation;
- c* to encourage links with the rest of the economy to expand value addition activities. Economically feasible beneficiation and downstream activities should be done in Botswana to facilitate diversification (e.g., diamonds). Miners should encourage suppliers to manufacture consumables such as reagents and equipment spares locally;
- d* to generate employment and training for Botswana’s citizens; and
- e* to safeguard the environment.

In order to facilitate foreign investment in the mining sector, the Mines and Minerals Act (the Mines Act) was amended in 1999 resulting in the abolition of the government’s right to 15 per cent free equity in all mining projects.⁸ This has been replaced by the option to acquire a 15 per cent working interest participation on mutually agreed commercial terms and an obligation like other shareholders to contribute its *pro rata* percentage of working interest capital.⁹ Botswana has approximately 28 registered mining companies at different levels of operation of which the government holds a stake in at least five of the key players in the mining industry: Debswana Diamond Company (Proprietary) Limited, Tati Nickel Mining Company (Proprietary) Limited, BCL Limited, Morupule Coal Mine Limited and Botswana Ash (Proprietary) Limited.

Within the past two years, the following notable developments have occurred.

i Diamond beneficiation industry

Botswana has moved up the value chain by processing diamonds locally rather than simply exporting the raw product. The government has entered into a transaction with De Beers pursuant to which De Beers has moved its rough stone sorting and trading division from London to Gaborone, including the relocation of over 100 employees.¹⁰ A significant consequence of the relocation is the ability for Botswana to directly sell

6 Botswana International Merchandise Trade Statistics No. 2013/17, p. 9.

7 ‘The Coal Road Map Pitso – An Overview of Botswana Coal Resources and Future Plans’, Permanent Secretary, Ministry of Minerals, Energy and Water Resources 2011–12.

8 Botswana Mineral Investment Promotion, Ministry of Minerals, Energy and Water Resources, p. 3.

9 The Mines Act [Cap 66:01], Section 40.

10 Botswana Chamber of Mines, www.bcm.org.bw.

12 per cent of its domestic production, independently. In addition, Botswana has established a state diamond trading company, the Okavango Diamond Company, that will be responsible for the direct purchasing, selling and marketing of diamonds as an independent player in the market.

ii **Cut 8**¹¹

Cut 8 is a project undertaken by Debswana to expand the lifespan of the Jwaneng diamond mine by seven years ensuring production until at least 2024 and catapulting the Jwaneng mine to 'super pit' status. Debswana is contemplating a further expansion of the Jwaneng Mine through a project known as Cut 9. Cut 9 is expected to extend the life span of the mine to 2030.

iii **Orapa mine**

After a three-month temporary shutdown for renovations and refurbishments, the Orapa, Letlhakane and Damtshaa mines' Orapa No.1 Plant, has reopened. This has resulted in Debswana seeing increased production during the first half of 2014, largely attributable to increased production at the Orapa mine.

iv **Mmamabula energy project**

Jindal Africa successfully acquired CIC Energy Corp in September 2012. Through this acquisition, Jindal Africa gains control of the Mmamabula energy project through which CIC Energy is in the process of developing a coal field, with an estimated 2.4 billion tonne deposit.¹²

v **African Energy Resources Sese integrated coal and power project**

African Energy Resources Limited is in the process of establishing an intergrated coal and power project at Sese in north-eastern Botswana. The project envisages a 300MW mine mouth power generation plant together with production of coal for export. African Energy estimates that the Sese Project has 650MT of measured resource and 1850MT in indirect and inferred resources.¹³ On 27 August 2014 African Energy Resources Limited announced that it had received a letter of intent from ZESCO, the Zambian State electricity company, which could see African Energy Resources Limited supply 300MW of base load electrical power from Sese into ZESCO's grid in southern Zambia.¹⁴

11 www.debswana.com/Operations/Pages/Jwaneng.aspx.

12 Capital Resources 'Botswana Resource Sector Overview' 2013, p. 12.

13 African Energy Resources – africanenergyresources.com.

14 <http://africanenergyresources.com/media/articles/ASX-Announcements/20140827-Letter-Of-Intent-From-Zesco--Zambia-rsquo-s-State-Electricity-Utility-393/2014-08-27-ZESCO-LOI.pdf>.

vi Ghaghoo Diamond Mine (Ghaghoo)

Ghaghoo is Botswana's first underground mine, currently being developed in phases. At present Gem Diamonds Botswana is in Phase I of this project, with the capital project complete and commission progressing well. As at December 2014, the Ghaghoo mine had 48,023 tonnes of ore with 10,167 costs recovered including a including a 20 carat white diamond, a 17 carat white diamond, and a 3 carat orange diamond (the recovery of which confirms the presence of valuable coloured diamonds in the orebody).

vii A-cap Resource Limited (A-cap) Letlhakane Uranium Project

A-cap has, over nine years, grown the Letlhakane Uranium Project into one of the largest undeveloped deposits in the world. In December 2014, A-cap announced the completion of their infill drilling programme consisting of 2,812 metres confirming the presence of high-grade uranium mineralisation.

viii Solar power plant

In light of the energy challenges covering the country and the region, the government of Botswana has in June 2015 issued a request for expression of interest to construct, operate, maintain and decommission at the end of its economic life, a scalable solar power plant to meet electricity needs for the Debswana Jwaneng mine and surrounding areas.

ix Morupule coal mine

Morupule coal mine (Morupule) was recently awarded a contract to supply cement producer PPC with washed coal for a three-year period. The tender makes PPC the largest washed-coal off-taker. A notable part of the transaction is that Morupule worked with Botswana Railways and Transnet Freight Rail in a collaborative effort to offer a competitive delivered price to PPC. This is a significant joint-venture model that will help meet Botswana's obvious infrastructure deficit. The move will help develop an infrastructure network that will serve as a key to industrial development between Botswana and South Africa.

The aforementioned collaboration is not an isolated incident and is in line with Botswana's Integrated Transport Project. Plans are underway to construct a coal rail link between Botswana and South Africa in 2014. It is envisioned that the project will facilitate increased access to regional and global markets.¹⁵ Further, Botswana and Namibia have signed a bilateral agreement to develop a trans-Kalahari railway project. The agreement paves the way for the construction of a heavy haul railway line from the Mmamabula coal fields in Botswana (which have an estimated 2.4 billion tonne deposit) to the port of Walvis Bay in Namibia.

In addition, the government has committed 8 billion Botswana pula (in addition to the 11.5 billion Botswana pula already spent) to construct the second phase of the

15 Mining Weekly, 4 April 2014, www.miningweekly.com/article/construction-of-botswana-coal-rail-link-to-start-next-next-year-gama-2014-04-04.

Morupule power plant and the refurbishment of the existing plant – ‘Morupule A’. Once completed, Morupule will produce in excess of 600MW of energy, which would safely meet the 590MW national peak demand.

II LEGAL FRAMEWORK

The primary mining legislation in Botswana is the Mines Act and the regulations promulgated therein. The Mines Act is geared towards bringing about progressive reform of the mining industry and regulates the granting, renewal and termination of prospecting licences, retention licences, mining licences and mineral permits (collectively referred to as mineral concessions), payment of royalties and all matters incidental to mines and minerals.

The extant legal framework has been strengthened by the following pro-investment initiatives introduced by the Mines Act:¹⁶

- a* a streamlined licensing procedure;
- b* increased security of tenure and transparency;
- c* free repatriation of profits;
- d* stability in environmental legislation;
- e* international arbitration of disputes;
- f* right to market mine products;
- g* freedom of commercial operation;
- h* investor-friendly equity agreements;
- i* downward revision of mineral royalty rates;
- j* the right to assign; and
- k* a favourable tax regime.

In addition to the Mines Act, the following legislation is pertinent.

i The Mineral Rights in Tribal Territories Act

In Botswana, proprietary interests in land are subject to tribal land and territorial legislation. Pursuant to the Mineral Rights in Tribal Territories Act, the rights to minerals situated on tribal land and in tribal territories are vested in the state.

ii The Mines, Quarries, Works and Machinery Act (the Mines and Quarries Act)

The Mines and Quarries Act was enacted to provide for the safety, health and welfare of persons engaged in prospecting, mining and quarrying operations including any works that are part of and ancillary to mining and quarrying operations and to make provision for the inspection and regulation of mines, quarries, works and machinery used in connection therewith.

¹⁶ Botswana Mineral Investment Promotion (see footnote 8, *supra*).

iii **The Precious Stones and Semi-Precious Stones Act (the Precious Stones Act)**

The Precious Stones Act is intended for the protection and regulation of all dealings in precious and semi-precious stones, *inter alia*, diamonds, emeralds, sapphires and rubies. The Precious Stones Act creates a mandatory duty of disclosure on any prospecting licence holder upon the discovery of any precious stones. Failure to comply with the provisions of the legislation constitutes an offence punishable by a fine, imprisonment or both. The regulations promulgated therein provide for the export and import of rough diamonds. Rough diamonds may only be exported from the jurisdiction if they are accompanied by a Kimberly Process certificate issued by the Ministry.

iv **The Diamond Cutting Act**

The Diamond Cutting Act regulates the cutting and polishing of rough and uncut diamonds. In addition, the Diamond Cutting Act provides for the licensing of cutting operations as well as the fees attributable to such licences and operations.

v **The Petroleum (Exploration and Production) Act**

The Petroleum and Exploration Act (the Petroleum and Exploration Act) enacts regulatory provisions related to the exploration for and exploitation of petroleum resources. In terms of the Petroleum and Exploration Act, 'petroleum' includes naturally occurring hydrocarbon, a mixture of hydrocarbons or any mixture of one or more hydrocarbons and any other substance. As with minerals, the ownership and control rights over petroleum on any land are vested in the state with individuals being permitted to acquire the statutory authorisation in the form of licences to explore or develop petroleum resources.

vi **The Unwrought Precious Metals Act**

The Unwrought Precious Metals Act controls dealings in any precious metal including gold, silver, their ores and any other metal as may be declared by the Minister of Mines, Minerals, Energy and Water Resources (the Minister). In terms of the Unwrought Precious Metals Act, no person is permitted to possess any precious metal unless he or she has obtained them through a mining or prospecting right, by fulfilling a related contractual obligation or unless he or she is ordinarily in the jewellery manufacturing or repairing business.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i **Title**

In terms of the Mines Act title to the underground minerals in Botswana is vested in the state and the Minister is vested with the authority to ensure that mineral resources of Botswana are investigated and exploited in the public interest and in the most beneficial, efficient and timely manner.¹⁷ Rights to prospect, retain and mine minerals may be

¹⁷ The Mines Act, Section 3.

transferred and acquired in accordance with the provisions of the Mines Act, subject to reservation of ownership of such rights in the state. The aforementioned rights may be transferred to an individual or a company meeting the prescribed requirements.¹⁸

ii Surface and mining rights

Prospecting licence

Pursuant to the Mines Act, surface rights are secured by means of a prospecting licence, which allows the holder to intentionally search for minerals within a demarcated prospecting area and determine the amount and economic value of all minerals specified in the licence.¹⁹ A person wishing to obtain a prospecting licence is required to make an application to the Minister by completing the prescribed form.²⁰ The Minister will grant a prospecting licence if:²¹

- a* the applicant has, or has secured access to, adequate financial resources, technical competence and experience to carry on effective prospecting operations;
- b* the proposed programme of prospecting operations is adequate and makes proper provision for environmental protection;
- c* the proposed prospecting area is not the same as, nor does it overlap, an existing prospecting area, retention area, mining area or minerals permit area in respect of the same mineral or associated mineral; and
- d* the applicant is not in default.

A prospecting licence may be granted for a maximum period of three years, with an option to renew three months prior to the expiry of the existing licence and subject to the licence holder reporting on the prospecting operations carried out so far and the direct costs incurred thereby; and a proposed programme of prospecting operations to be carried out during the period of renewal and the estimated cost thereof.

Any applicant will be entitled to the grant of no more than two renewals each for the period applied for, which may not in either case exceed two years.

A prospecting licence will be subject to, *inter alia*, expenditure, commercial and technical conditions as may be prescribed by the relevant authority from time to time.

Mining licence

A mining licence gives the right to mine minerals listed in the mining licence and occurring within the mining area subject to the time frames stated in the programme of mining operations.²² The holder of a prospecting licence, retention licence or a waiver may apply for a mining licence.²³ Such a licence is valid for as long as may be required to carry out the mining programme but not longer than 25 years, although it may be

18 The Mines Act, Sections 5 and 6.

19 The Mines Act, Section 2.

20 The Mines Act, Section 13.

21 The Mines Act, Section 14.

22 The Mines Act, Section 37(1).

23 Ibid.

renewed with one year's notice.²⁴ The holder of a mining licence must develop and mine the mineral covered in the mining licence in accordance with the programme of mining operations that is to be issued once the licence is granted.

The Minister may grant a mining licence if satisfied that:

- a* the proposed programme of mining operations will ensure the most efficient and beneficial use of the mineral resources in the proposed mining area;
- b* the proposed mining area is not the same as, nor does it overlap, an existing mining area or retention area unless the holder of that area consents to the grant of a mining licence, or in the case of a retention licence, has failed to make an application;
- c* the proposed mining area extends to cover only that area reasonably required for surface mining and treatment facilities and also to cover the provided, indicated and inferred reserves;
- d* the applicant has or has secured access to adequate financial resources, technical competence and experience to carry out effective mining operations;
- e* the proposed financing plan submitted as part of the feasibility study is in accordance with good financial practice, and provides for a debt to equity ratio of no more than 3:1 unless the Minister agrees otherwise;
- f* the parent company guarantee in the prescribed form has been furnished;
- g* the applicant is not in default; and
- h* in the case of an application to mine diamonds, an agreement has been reached following a negotiation with the government covering all technical, financial and commercial aspects.

A mining licence shall be subject to such conditions as may be prescribed by the relevant authority from time to time in respect of commercial, financial, operation and technical aspects of the mining activities. The holder of a mining licence in the exercise of its rights thereunder may:²⁵

- a* enter upon any land to which its mining licence relates;
- b* take all reasonable measures on or under the surface to mine the mineral to which its mining licence relates;
- c* erect the necessary infrastructure for the purposes of mining;
- d* dispose of any mineral product recovered; and
- e* prospect within its mining area for the licensed mineral and any other mineral.

The holder of a mining licence is obligated to, *inter alia*:²⁶

- a* maintain complete and accurate technical records of operations in the mining area;
- b* maintain copies of all maps and geological reports in respect of the mining area;

24 The Mines Act, Section 42(1).

25 The Mines Act, Section 44.

26 The Mines Act, Section 45.

- c* permit inspection of the books and records from time to time by the regulatory authority;
- d* submit such reports as the Minister may require from time to time concerning the operations in the mining area; and
- e* furnish the Minister with annual audited financial statements within six months of the end of each financial year.

iii Additional permits and licences

Retention licence

Prospecting licence holders may apply for a retention licence in respect of the area and mineral covered by their licence.²⁷ A retention licence will be granted if the applicant has carried out a feasibility study in accordance with industry practice and in respect of the deposit to which the application relates. The study must establish that the deposit cannot be mined on a profitable basis at the time of the application.²⁸ Furthermore, the approved prospecting programme must be completed and the applicant must not be in default of any existing mining concessions or any provisions of the Mines Act. A retention licence can be granted for a maximum period of three years, subject to one renewal three months before the expiry of the existing licence, for a further period of three years.²⁹ The licence permits the holder to maintain the retention area for future mining operations, to continue prospecting operations, to remove any mineral other than for the purposes of commercial gain and to continue such other investigations and operations to determine the prospect of mining any licensed mineral on a profitable basis.³⁰ The licence holder remains accountable to the Director of Mines and is under a duty to submit all results of studies, surveys and tests incidental to prospecting operations, as well as the interpretation and assessment of such studies.³¹

Mineral permit

Mineral permits may be granted for small-scale mining operations for any mineral other than diamonds over an area not exceeding 0.5 square kilometres.³² The application must comply with any existing land laws and regulations and the applicant must apply to the landowner or land board for consent to conduct mining operations. If the mineral permit relates to an existing prospecting, retention or mining area, the applicant must also obtain the consent of the licence holder, unless it can be proven that the licence holder will not be prejudiced by the issue of a mineral permit.³³

27 The Mines Act, Section 25.

28 The Mines Act, Section 27(1)(a).

29 The Mines Act, Section 30(1) and (2).

30 The Mines Act, Section 31(a), (b), (c) and (d).

31 The Mines Act, Section 32(3)(a)(i) and (ii).

32 The Mines Act, Section 52.

33 The Mines Act, Section 52(3).

Permits for mining industrial minerals may only be granted to citizens of Botswana,³⁴ unless the Minister finds it in the public interest to grant such mineral permit to a non-citizen or the industrial mineral will not be sold or otherwise disposed of for commercial profit. Industrial minerals include: barite, basalt, clay, dolomite, feldspar, granite, gravel, gypsum, laterite, limestone, mica, magnesite, marble, phosphate, rock, sand, sandstone, slate, talc and any other mineral as may be prescribed as such.³⁵ Mineral permits may be granted for a maximum period of five years and are subject to optional renewal for an additional period of five years.³⁶

Air pollution registration certificate

Where mining activity occurs in a controlled area (as gazetted from time to time) a registration certificate will be required in terms of the Atmospheric Pollution (Prevention) Act.³⁷ The Morupule, Jwaneng and Orapa mines have been designated controlled areas.

Explosives permit

Permits are required for both the importing and local acquisition of explosives in terms of the Explosives Regulations.³⁸

iv Closure and remediation of mining projects

The Mines Act provides that the holder of a mineral concession shall ensure the concession area is rehabilitated from time to time; and take measures as are required from time to time to maintain and restore the topsoil of affected areas and otherwise restore the land substantially to the condition in which it was prior to the commencement of operations.³⁹

In addition, the Mines Act provides that where an excavation or shaft ceases to be used: it shall be kept safely and securely fenced, covered over or filled in.⁴⁰

In addition, there shall be provided and maintained on the surface of the ground such indication of its existence (whether by a post in the ground with a notice in English and in Setswana affixed thereto, or otherwise) as an inspector may consider sufficient.

34 Includes an ordinary individual who is a citizen of Botswana, a partnership or association composed exclusively of individuals who are citizens of Botswana or a Botswana incorporated entity which is either controlled by the government or whose directors and beneficial shareholders are all citizens of Botswana.

35 The Mines Act, Section 53(1).

36 The Mines Act, Section 55(1).

37 The Atmospheric Pollution Act, Sections 7 and 8.

38 The Explosives Act and regulations [Cap 24:02], Section 8.

39 The Mines Act, Section 65.

40 The Mines and Quarries Act, Part XV.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

NDP 10 calls for environmental responsibility in the mining industry with the main objective being to maintain and improve the capacity of natural systems to function within ecological limits while supporting the development aspirations of current and future generations.⁴¹ Due to the direct reliance of Botswana's economy on the exploitation of naturally occurring mineral resources this directly affects the mining sector and will require a concerted effort from all key players. The Environmental Assessment Act (EA Act) and the regulations promulgated therein came into force to address and overcome the challenge of economic degradation.⁴² The EA Act and the Mines Act make it an obligation for any licence holder to conduct the operations in such a manner as to preserve the environment. The Department of Environmental Affairs has developed a National Environment Fund to ensure access to sufficient resources to maintain and enhance the government's environmental objectives.⁴³ In addition, the government is in the process of adopting an initiative to ensure strict compliance with the extant waste management legislation, which initiative shall directly affect the mining sector.⁴⁴

In terms of the Mines and Minerals (Health Morality and Labour Returns) Regulations,⁴⁵ every employer engaged in mining or quarrying operations involving the treatment of ore or rock must furnish the Mining Commissioner with a monthly report on the health and morality of the employees.

The Mines Act provides for the health, safety and welfare of persons engaged in prospecting, mining and quarrying operations. Under the Mines Act, inspectors are empowered to carry out inquiries into accidents that cause death or serious bodily injury in the course of mining or quarrying operations.⁴⁶ In addition, the subsidiary regulations create an extensive health and safety code and create certain duties on individuals by requiring minimum levels of conduct from supervisors, employers and persons employed in the industry. In particular, the regulations seek to eliminate illegal, reckless and negligent acts that may endanger human life or cause harm to any person.

ii Environmental compliance

The EA Act applies to all activities that are likely to cause significant adverse effects on the environment, or the locations that may be environmentally sensitive, in respect of which an environmental impact assessment (EIA) will be mandatory prior to the commencement of the activity. All extractive and associated industries, *inter alia*, exploration of minerals where drilling and blasting is involved, exploration of minerals, quarrying, mineral processing, extraction operations and metallurgical and chemical

41 Mid-Term Review of the National Development Plan, p. 73.

42 The Environmental Impact Assessment Act [Cap 65:07].

43 Mid-Term Review of the National Development Plan, p. 86.

44 *Ibid.*, p. 81.

45 Cap 66:01.

46 The Mines and Quarries Act, Section 8(1).

plants associated with mining are all deemed to fall within the category of activities requiring the submission of the EIA.⁴⁷

Prior to the commencement of mining activity in Botswana the licence holder must prepare and submit to the relevant authority a project brief for the authorisation of an activity.⁴⁸ Thereafter an environmental management plan and an EIA must be submitted to the relevant authority. The EIA must identify and evaluate the environmental impact of an activity with particular reference to:⁴⁹

- a* the health, safety or quality of life of people;
- b* the archaeological, aesthetic, cultural or sanitary conditions of the environment; and
- c* the configuration, quality and diversity of natural resources.

In respect of mining projects commissioned prior to the commencement of the EA Act, the focus shifts from identifying potential environmental impact to identifying actual environmental impact that has already taken place and how best to align activity on the mine with extant environmental policy and legislation.

iii Third-party rights

In addition to the protection of indigenous persons incorporated in the EA as set out above, the Mines Act contains a number of provisions that seek to establish a balance between the rights of the mineral rights holders and third parties who may be affected by the exercise of those rights. Part VIII of the Mines Act therefore provides a general statement that the 'rights conferred by a mineral concession shall be exercised reasonably and so as to affect as little as possible the interests of any owner or lawful occupier of the land on which such rights are exercised consistent with reasonable and proper conduct of the operations concerned.'⁵⁰ The Mines Act more specifically provides:

- a* restrictions on where a mineral concession can be utilised;⁵¹
- b* a right to graze stock by the lawful occupier of the land within the area of a mineral concession against a prohibition on the lawful occupier of such land from constructing buildings thereof; and
- c* in the event the mineral concession holder requires exclusive use of an area in which a third party is a lawful occupier thereof, the holder of the mineral concession shall be obliged to obtain a lease with the lawful occupier and to pay rent in respect of such occupation.⁵²

47 The EA Act, Schedule 1, Regulation 3.

48 The EA Act, Section 6.

49 The EA Act, Section 9(2).

50 The Mines Act, Section 61(3).

51 The Mines Act, Section 60.

52 The Mines Act, Section 62.

V OPERATIONS PROCESSING AND SALE OF MINERALS

i Processing and operations

In order to import equipment and machinery the licence holder will be obliged to acquire an import permit. If it is the intention to re-export the machinery at the termination of the contract an arrangement can be entered into with the Botswana Unified Revenue Services in respect of the treatment of import duties. Such arrangements are subject to a time limitation. Equipment that is imported on a temporary basis for a given project is admissible under the General Rebate of duty concession. It is important to note that the equipment and parts thereof should be imported under cover of a bond the amount of which is equivalent to customs duties and sales tax applicable. The bond is valid for a limited period only and as follows. Equipment attracting sales tax is covered by a three-month bond while equipment attracting customs duties is covered by a six-month bond. After the lapse of the bond period, applicable customs duties or sales tax becomes due and payable and the bond will then be called to suit as customs duties or sales tax.

In general, goods imported into Botswana from outside the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland) will require an import permit and the importation thereof will attract customs duties at rates outlined in the Customs Tariff Book.

Non-nationals are allowed to work in Botswana provided they are in possession of both residence and work permits. However, work permits are subject to a local labour availability test and the applicant will need to satisfy the Commissioner of Labour that there are no suitable national candidates for the post.

ii Sale, import and export of extracted or processed minerals

While there are no restrictions on the sale, import and export of base minerals, trade in precious minerals is regulated in terms of the Precious Stones Act and as set out above in Section II.iii *supra*.

iii Foreign investment

There are no foreign or local currency restrictions in Botswana and funds may be remitted and received free from any governmental review.

VI CHARGES⁵³

Botswana has a single comprehensive Income Tax Act in terms of which tax is levied on all income accruing to a person from a source or deemed source within Botswana.⁵⁴ All proceeds from the disposal of property and marketable securities are taxable as normal business income. Thin-capitalisation rules in Botswana apply to specific companies including mining companies.⁵⁵

53 <http://www.gemdiamonds.com/gem/en/operations/botswana/>.

54 Income Tax Act [Cap 52:01], Section 11.

55 KPMG Botswana Fiscal Guide 2012/13, p. 4.

i Royalties

The Income Tax Act prescribes the royalties payable to the government on any mineral obtained under a Mineral Concession.⁵⁶ The royalties are payable as a percentage of gross market value, being the sale value receivable at the mine gate in an arm's-length transaction without discounts, commissions or deductions for the mineral or mineral by-product of disposal. The royalties are charged as follows:

- a* precious stones: 10 per cent;
- b* precious metals: 5 per cent; and
- c* other minerals or mineral products: 3 per cent.

ii Taxes

Non-resident entities carrying on business in Botswana are liable for tax on the same basis as resident companies. Normal business expenses wholly, exclusively and necessarily incurred in the production of assessable income are allowed as deductions. Specific deductions include capital allowances, lease improvements, bad debt provisions, contributions to a mine rehabilitation fund, approved citizen training expenditure and approved pension fund contributions. Assessed losses from mining business can be carried forward indefinitely. Taxable income shall include all amounts accrued during that tax year from all mining and prospecting operations carried on.⁵⁷

iii Duties

See Section VI.ii *supra*.

iv Other fees

Other fees are laid out in the table below:

Prospecting licence fees	5 Botswana pula per square kilometre subject to a minimum of 500 Botswana pula for industrial minerals and 1,000 Botswana pula for other minerals.
Retention licence fees	5,000 Botswana pula for the first year, increasing by 5,000 Botswana pula for the second and subsequent years.
Mining licence or mineral permit fees	100 Botswana pula per square kilometre or part thereof.

VII OUTLOOK AND TRENDS⁵⁸

The economic diversification drive is facilitating a diversification of the economy from a reliance on diamond mining revenue and encouraging participation in the mineral beneficiation process and the mining of other non-diamond minerals such as coal and uranium. With the predicted limited lifespan of the diamond reserves in Botswana, mining operations will consequently shift from open-shaft mining to underground

56 The EA Act, Section 66.

57 Income Tax Act, Section 31.

58 <http://acap.com.au/projects/letlhakane/letlhakane-uranium/>.

mining, a more costly and onerous operation changing the nature of the diamond mining industry in Botswana. Botswana has large untapped reserves of coal estimated at about 212 billion tonnes that are yet to be fully exploited. The lifting of the moratorium on the issuance of prospecting licences in January 2012 increased efforts to develop production of non-diamond minerals. With the regional imbalance in the supply and demand of electricity, coal is certain to become a valuable commodity. Collaborative efforts in line with the Road Map are under way to ensure that Botswana's infrastructure is able to accommodate a thriving coal sector.

Appendix 1

ABOUT THE AUTHORS

JEFFREY BOOKBINDER

Bookbinder Business Law

Jeffrey Bookbinder was admitted as a barrister and solicitor of the Ontario Bar in 1989 and as an Attorney of the High Court of Botswana in 1993 (and as a conveyancer and notary public in 2012). Jeffrey has an LL.M. in International Business Law from the University of London. During his practice, Mr Bookbinder has acted for all major financial institutions including First National Bank of Botswana Limited, Barclays Bank of Botswana Limited, Standard Chartered Bank Limited, Stanbic Bank Limited, Bank Gaborone and Bank of Botswana. Parastatal clients have included Botswana Power Corporation, Botswana Development Corporation, Botswana Telecommunication Corporation, Venture Capital Partners, CEDA and CEMAEEF. Mr Bookbinder's recent notable transactions in the mining sector include: local counsel to Natasa Mining in a takeover bid for African Copper; local counsel to UK bank in a US\$75 million loan acquisition of Botswana Mine; counsel to the European Investment Bank in restructuring a mining finance transaction; counsel to Nata-energy in a coal methane project; counsel to Mupane Gold Mining (Pty) Ltd; and he has also acted for China Africa Fund in a proposed takeover offer for a local mine.

In addition, Mr Bookbinder has acted for Botswana Insurance Fund Management and Debswana Mining Company in providing corporate advice. He has been recommended as a preferred lawyer for mergers and acquisitions by *Which Lawyer* and is listed in *Chambers* as a 'notable practitioner' in Band One.

CHABO PEO

Bookbinder Business Law

Chabo Peo graduated in 2010 on the Dean's Merit List with an LLB from the University of Cape Town. She joined the firm in March 2011 and was admitted as an attorney of the High Court of Botswana in October 2011. She has a keen interest in mining and energy and has acted as counsel to Puma Energy Botswana (Pty) Ltd and Engen Marketing

About the Authors

Botswana (Pty) Ltd. Ms Peo works closely with Jeffrey Bookbinder and has acted as assisting counsel in an array of mining and energy transactions. Her areas of interest include mining and energy, competition law, corporate and commercial law.

BOOKBINDER BUSINESS LAW

9th Floor, iTowers North,

Lot 54368

CBD Gaborone

Botswana

Tel: +267 3912 397

Fax: +267 3912 395

jeffrey@bookbinderlaw.co.bw

chabo@bookbinderlaw.co.bw

www.bookbinderlaw.co.bw