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Mining 2023

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Botswana

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Law and Practice

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▼ 1. Mining Law: General Framework

▼ 1.1 Main Features of the Mining Industry

Supported by a stable political climate and currency, Botswana's mining industry, and particularly diamond mining, remains one of the best in the world. Botswana is the world's leading producer of diamonds in terms of value. As a result, the mining industry has largely contributed to Botswana's Gross Domestic Product (GDP).

In order to diversify the mining sector and lessen its reliance on diamond mining, the Ministry of Energy and Minerals ("Ministry of Minerals") is aggressively encouraging more investment in the sector through the discovery and exploitation of non-diamond minerals. Other minerals that are mined are granite, nickel-copper, coal, soda ash, gold and silver. Botswana's favourable geologic environment, mineral investment climate, low tax rates and political stability are expected to keep the country as a magnet for foreign mineral investment.

Further, the mining industry in Botswana has a competitive environment that supports private sector mineral exploration and production operations. The Government of Botswana (GoB or "the State") aims to strike a balance between investment attractiveness and revenue maximisation for the GoB.

In Botswana, the mining industry is highly regulated. The extant legal framework ensures that mining contributes to the economic growth of the country through the enactment and administration of legislative, fiscal and institutional policies to attract investors subject to international standards. The principal relevant policy documents at the national level include national visions, the Strategy for Economic Diversification and Sustainable Growth, Citizen Economic Empowerment Policy (GoB Paper No 1 of 2012) and National Development Plans, which are expounded on below.

The relevant legislation includes, but is not limited to:

- Mines and Minerals Act [Cap 66:01] ("Mines Act");
- Mines, Quarries, Works and Machinery Act [Cap 44:02] ("Mines, Quarries, Works and Machinery Act");
- Environmental Assessment Act [Cap 65:07]; and
- Botswana Energy Regulatory Authority Act [Cap 74:11].

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Bookbinder Business Law

<https://chambers.com/law-firm/bookbinder-business-law-global-2:238054> (BBL) is a multidisciplinary, full service corporate and commercial law firm. It is considered, locally and internationally, as one of Botswana's pre-eminent law firms. BBL's corporate department is the largest team in Botswana, boasting four partners, one associate and three candidate attorneys. BBL has a strong track record in various practice areas including mining and energy, banking and finance, project finance and development, restructuring and insolvency, and dispute resolution. BBL has acted for the following clients, among others: Royal Gold, Inc ("Royal Gold"), in a USD265 million streaming agreement involving the securing of assets situate at Khoemacau Mine, this

The duty of the Ministry of Minerals is to dutifully enforce the above-mentioned legal framework. The MME formulates strategies for implementing the approved policies and programmes on minerals and energy.

▼ 1.2 Legal System and Sources of Mining Law

Botswana has a dual legal system. The sources of law applicable in Botswana consist of the following:

- legislation;
- common law;
- judicial precedent;
- customary law;
- law reports; and
- legal writings.

Legislation is the main source of law respect of the mining industry. The laws enacted by Parliament are the primary source of mining law in Botswana, provided that such law is not beyond the powers of the Constitution of Botswana (“Constitution”).

The mining sector in Botswana is regulated by, amongst others, the:

- Mines Act;
- Mineral Rights in Tribal Territories Act [Cap 66:02] (the “Mineral Rights in Tribal Territories Act”);
- Precious and Semi-Precious Stones (Protection) Act [Cap 66:03];
- Diamond Cutting Act [Cap 66: 04];
- Petroleum (Exploration and Production) Act [Cap 67: 01];
- Mines, Quarries, Works and Machinery Act; and
- the Botswana Geoscience Institute Act [Cap 67:02].

The regulation of mining in Botswana covers activities relating to the prospecting and extraction of minerals such as diamonds, copper-nickel-cobalt matte, copper in concentrates, gold, soda ash, salt, silver, coal, semi-precious stones and the quarrying of building materials. The Department of Mines under the Ministry of Minerals regulates mining in Botswana.

▼ 1.3 Ownership of Mineral Resources

In terms of Section 3 of the Mines Act, all rights of ownership in minerals are vested in the GoB. A duty is placed on the Minister to ensure that the mineral resources are investigated and exploited in the public interest and in the most efficient, beneficial and timely manner.

According to Sections 5 and 6 of the Mines Act, the right to prospect for, retain and mine minerals may be acquired and held in accordance with the provisions of the Mines Act, notwithstanding ownership of the above-mentioned rights by the GoB.

Further to the above, the aforementioned rights may be transferred to an individual or a company through the issuing of a prospecting and mining licence. A prospecting licence in terms of Section 20 of the Mines Act, grants the holder of the licence the following rights:

- entry upon any land to which his prospecting licence relates together with his servants and agents;
- prospect for the mineral to which his prospecting licence relates;
- drill boreholes and make such excavations as may be

being part of the largest private-sector financing transaction in Botswana history (“Khoemacau Project”); and Premium Nickel Resources, in its acquisition of certain mining and business assets of BCL Limited (in liquidation) (BCL). BCL is a former copper mine in Botswana and the largest insolvent estate in Botswana history.

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necessary; and

- erect camps and put up temporary buildings for machinery necessary for prospecting purposes.

On the other hand, subject to the provisions of the Mines Act, in terms of Section 44 of the Mines Act, the holder of a mining licence may:

- take all reasonable measures on or under the surface to mine the mineral to which his mining licence relates;
- erect the necessary equipment, plant and buildings for the purposes of mining, transporting, dressing, treating, smelting or refining minerals recovered by him during mining operations;
- dispose of any mineral product recovered;
- prospect within his mining area for the mineral for which he holds a mining licence and for any other mineral; and
- stack or dump any mineral or waste product in a manner approved by the Director of Mines.

▼ 1.4 Role of the State in Mining Law and Regulations

The role of the State in the mining sector in Botswana is of a hybrid nature, in that it is a mix of both grantor-regulator and owner-operator. The GoB's role in mining operations is evident in the extant legal framework of Botswana.

The GoB may grant an individual and/or a company mining rights through the issuing of a mining licence subject to Section 6 of the Mines Act. Thereupon, the GoB regulates mining operations through the administration and enactment of the relevant laws and regulations in the mining industry while strengthening economic and financial policies to encourage private sector participation and sustaining investments in the mineral sector.

Further to the above, the title to mineral resources in Botswana is vested in the State. Consequently, the State is the owner of all mineral resources. Subject to Section 40(3) of the Mines Act, the GoB also has an option to acquire up to 15% of a mining company, effectively exercising the role of an owner-operator.

The State also acts as a grantor-regulator. In terms of the Mines Act, the State may issue a mining licence to an individual or a company meeting the requirements prescribed by Section 6 of the Mines Act. Thereupon, the State is granted the option to acquire a 15% working interest participation on mutually agreed commercial terms. If the State exercises this option, obligations arise.

In terms of Section 40(b) of the Mines Act, the State has an obligation like other shareholders to contribute its pro rata percentage of working interest capital. Upon exercising its option, the State shall, on issuing the licence, inform the applicant as to whether it is exercising its option and of the working interest percentage it wishes to take.

There is no mandatory national or government joint venture, however an option is granted to the State to acquire an interest in the mining operations subject to limitations provided in Section 40(3) of the Mines Act.

▼ 1.5 Nature of Mineral Rights

In Botswana, the Constitution is the supreme law of the land, as a result, the extant legal framework relating to mining is required to conform to the provisions of the Constitution. The

Constitution does not specifically vest the title of minerals in the State nor does it provide for the granting of mineral rights to individuals and companies.

As alluded to in **1.3 Ownership of Mineral Resources**, mineral rights are derived from the Mines Act. Further to this, according 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.

▼ 1.6 Granting of Mineral Rights

The granting authority in Botswana is the Minister of Minerals on a national level. The extant legal framework relating to the mining sector applies retrospectively throughout Botswana. In terms of Section 13 of the Mines Act, a person who desires to obtain a prospecting licence is required to make an application to the Minister by completing Form I set out in the first schedule to the Mines Act.

In terms of Section 14, the Minister may grant a prospecting license if:

- the applicant has, or has secured access to, adequate financial resources, technical competence and experience to carry on effective prospecting operations;
- the proposed programme of prospecting operations is adequate and makes proper provision for environmental protection;
- 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
- the applicant is not in default.

Further, Section 37 of the Mines Act provides that a mining licence grants the right to mine minerals provided for in the mining licence area in respect of which the mining licence is granted and in respect of the mineral covered by such prospecting licence, retention licence or waiver, as the case may be. A person wishing to obtain a mining licence shall apply to the Minister by submitting an application in Form V of the first schedule to the Mines Act.

The Minister shall grant a mining licence if satisfied that:

- the proposed programme of mining operations will ensure the most efficient and beneficial use of the mineral resources in the proposed mining area;
- 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 application in terms of the Mines Act;
- the proposed mining area extends to cover only that area reasonably required for surface mining and treatment facilities and also to cover the proved, indicated and inferred reserves;
- the applicant has or has secured access to adequate financial resources, technical competence and experience to carry on effective mining operations;
- 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;
- the parent company guarantee in the prescribed form has

been furnished;

- the applicant is not in default; and
- in the case of an application to mine diamonds, agreement has been reached following a negotiation under Section 51 of the Mines Act.

Further, the Minister shall not reject an application unless the applicant has been so notified and has failed to propose reasonable amendments to his proposed mining operations or financing plan satisfactory to the Minister within three months of such notification.

▼ 1.7 Mining: Security of Tenure

A prospecting licence is valid for the period requested by the applicant, which cannot exceed three years. The holder of a prospecting licence may, at any time not later than three months before the expiry of such licence, apply to the Minister for renewal by completing Form I set out in the First Schedule and submitting, together with the application, a report on prospecting operations so far carried out, as well as the direct costs incurred and a proposed programme of prospecting operations to be carried out.

In terms of Section 23 of the Mines Act, a prospecting licence or any interest therein, may be transferred to any other person provided the Minister is notified at least 30 days before the intended transfer. In such notification, the applicant must provide the Minister with the same information about the transferee that would be required in the case of a prospecting licence application. If the Minister is satisfied that the transferee is not barred from holding a prospecting licence under any provision of the Mines Act, he shall notify the applicant of his approval of the transfer of the prospecting licence or an interest therein.

According to Section 42(1) of the Mines Act a mining licence shall be valid for such period, not exceeding 25 years, as is reasonably required to carry out the mining programme. Further, the holder of the mining licence shall mine the minerals provided in the mining licence in accordance with the programme of mining operations that is to be issued once the license is granted.

The holder of a mining licence cannot transfer, assign or encumber any mining interest without the consent of the Minister. In an application to the Minister for his approval, the applicant shall give such particulars concerning the proposed transferee, assignee or other party concerned.

In order to progress from exploration to mining, the holder of a prospecting licence, retention licence or a waiver should apply for a mining licence for an area in respect of which the waiver has been issued, or for an area within his prospecting area or retention area, in respect of the mineral covered by such prospecting licence, retention licence or waiver, and in the case of a prospecting licence or a retention licence, the issue of a mining licence shall have the effect of reducing the prospecting area or retention area, as the case may be, by the area in respect of which the mining licence is granted.

Section 47 of the Mines Act provides that the holder of a mining license must notify the Minister one year in advance of any proposed cessation of production from his mine, six months in advance of any proposed suspension of production from his mine, and three months in advance of any proposed

reduction in production. In each case, the holder must provide justification for the proposed cessation, suspension, or reduction in production. Further, if a mining licence holder terminates, suspends, or curtails production from his mine without giving notice as required by the subsection, he must notify the Minister within 14 days of such termination, suspension, or curtailment.

▼ 2. Impact of Environmental Protection and Community Relations on Mining Projects

▼ 2.1 Environmental Protection and Licensing of Mining Projects

The Environmental Assessment Act [Cap 65:07] (the “EA Act”) provides for environmental impact assessment to assess the potential effects of planned developmental activities; to determine and to provide mitigation measures for effects of such activities as may have a significant adverse impact on the environment; to put in place a monitoring process and evaluation of the environmental impacts of implemented activities and to provide for matters incidental to the foregoing. The Department of Environmental Affairs (DEA) is responsible for the implementation of environmental laws in Botswana. The DEA has the power to impose penalties for non-compliance with the EA Act.

The EA Act and the Mines Act make it mandatory for licence holders to conduct their operations in an environmentally friendly manner. An application for a mining licence will not be granted without a valid environmental authorisation.

According to the EA Act, as read with its regulations, the extractive and associated industries are subject to the requirements of the EA Act as follows.

- Prospecting and exploration for oil, coal bed methane and natural gas, heavy metals and radioactive minerals are subject to:
 - an environmental management plan (EMP) in accordance with Section 6(5)(c) of the EA Act when prospecting and exploration is on freehold land; or
 - an environmental impact statement (EIS) in accordance with Section 9 of the EA Act when prospecting and exploration are on tribal or state land.
- Operations for the extraction of pit sand, gravel and clay are subject to:
 - an EMP when the extraction is on freehold land or from existing burrow pits; or
 - an EIS on all new activities where extraction is on tribal or state land.
- Mining within a river system or wetland, regardless of the size of the mining project, is subject to an EIS on all projects.
- Exploration of minerals where geothermal drilling and blasting is involved is subject to:
 - EMP when exploration is on freehold land; or
 - EIS when exploration is on tribal or state land.
- Exploitation of minerals, including quarrying, is subject to an EIS on all projects.
- Extraction and processing of hydrocarbons, including coal, is subject to an EIS on all projects.

The Monuments and Relics Act (CAP 59:03) (“Monuments Act”) prohibits any damage, alteration or movement of archaeological resources from places of origin without consent from the

Minister, through the Department of National Museums and Monuments (DNMM).

Furthermore, the Monuments Act stipulates that it is mandatory that an Archaeological Impact Assessment is undertaken prior to any developmental interventions with the possibility of disturbing the earth's surface which automatically poses a threat to historical and archaeological resources. The Monuments Act stipulates measures to be employed should there be need for a mitigation or rescue exercise intended to pave way for developments.

The Monuments and Relics Act defines an archaeological pre-development impact assessment as:

- the study, by an archeologist, of an area in which development or any ground-disturbing activity is to be carried out, to determine the likelihood of the development or activity impacting negatively on any cultural material or evidence that may be present in the area to be disturbed; and
- any recommendation made by the archeologist on how to prevent or mitigate any negative impact to the cultural material.

▼ 2.2 Impact of Environmentally Protected Areas on Mining

According to the National Development Plan 11 (NDP 11), Botswana is focused on building a sustainable and resilient development pathway. The Wildlife Conservation and National Parks Act [Cap 38:01] (the "Wildlife Conservation and National Parks Act") provides for the conservation and management of the wildlife of Botswana, giving effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and any other international convention for the protection of fauna and flora to which Botswana is a party, for the establishment, control and management of national parks and game reserves.

The Chobe National Park, Gemsbok National Park and Makgadikgadi Pans National Park, are areas which, pursuant to Section 5 of the Wildlife Conservation and National Parks Act, have been declared a national park for the propagation, protection and preservation therein of wild animal life, vegetation and objects of geological, ethnological, archaeological, historical or other scientific interest for the benefit and advantage and enjoyment of the inhabitants of Botswana.

The Central Kalahari Game Reserve, Bathoen Dam Bird Sanctuary, Mogobane Bird Sanctuary, Moremi Game Reserve, Maun Game Sanctuary, Nnywane Dam Game Reserve, Khutse Game Reserve, Gaborone Game Reserve and Mannyelanong Game Reserve, are areas which have been declared to be a game reserve or a sanctuary in respect of the animals, species or variety, specimen or sex of animal specified in relation thereto.

The Kwando Wildlife Management Area, Okavango Wildlife Management Area Ngamiland Statelands Wildlife Management Area, Nunga Wildlife Management Area, Nata Statelands Wildlife Management Area, Southern District Wildlife Management Area, Okwa Wildlife Management Area and Quago Wildlife Management Area are areas which have been declared to be wildlife management areas.

The Ngamiland District Controlled Hunting Area NG/1 – NG/12 are areas declared to be controlled hunting areas.

The Wildlife Conservation and National Parks Act provides that, subject to any mining rights lawfully acquired in any area by any person before the date on which such area became a national park, any prospecting or mining area or the acquisition of any prospecting or mining rights in the area in terms of the Mines and Minerals Act shall be prohibited except with the written permission of the Minister of Environment and Tourism.

Pursuant to the above, in order for mining operations to be undertaken in a conservation area, clearance is required from the Minister of Environment and Tourism.

▼ 2.3 Impact of Community Relations on Mining Projects

Though there is no mandatory requirement in respect of community relations in respect of a mining project, it must be noted that Section 12 of the Mines Act provides that the holder of a mineral concession shall, in the conduct of his operations under such concession, and in the purchase, construction and installation of facilities, give preference, to the maximum extent possible consistent with safety, efficiency and economy, to:

- materials and products made in Botswana; and
- service agencies located in Botswana and owned by Botswana citizens or bodies corporate established under the Companies Act [Cap 42:01].

Further, the holder of a mineral concession shall, in all phases of his operations, give preference in employment to citizens of Botswana to the maximum extent possible consistent with safety, efficiency and economy. Additionally, the holder of a mining licence shall, in his operations, conduct training programmes in consultation with the Minister of Minerals and Energy for the benefit of employees so that such employees may qualify for advancement.

▼ 2.4 Prior and Informed Consultation on Mining Projects

As discussed above, a person who proposes to enter the extractive industry will be required to submit an EMP or an EIS pursuant to their project. The contents of an EMP include a section on stakeholder consultation. The section should discuss the objectives, methods and results of consultations undertaken with the interested and affected parties (IAPs) as well as the relevant institutional stakeholders. A record of all stakeholders consulted, as well as the minutes of the consultation meeting(s), should be annexed to the report. It should be noted that it is not mandatory for the developer to publicise the activity in the mass media as per Section 7(2)(a) of the EA Act nor will the developer be obliged to prepare and submit the scoping report and terms of reference for developing the EMP. However, where it is deemed necessary, the competent authority may at its discretion, require for such.

Further, part of the EIA process is the scoping exercise and report. The scoping exercise helps to determine IAPs. IAPs have a major role in identifying issues and ensuring that local knowledge and values are understood. The views of those affected should be taken into account in choosing between alternatives, in deciding on the importance of issues, and in framing mitigation measures, compensation provisions and management plans. Additionally, the consultation plan forming part of the EIA must indicate the IAPs to be consulted.

Once the public consultation plan has been finalised, the applicant should proceed with the scoping exercise as set out in the plan, taking note of the provisions of the EA Act, Section 7(2) of which states that in seeking the views of the people or communities, the applicant shall:

- publicise the intended activity, its effects and benefits in the mass media using the official languages for a period not less than 21 days; and
- after the expiry of the period of 21 days, hold meetings with the affected people or communities to explain the activity and its effect.

After a scoping exercise has been undertaken, a report must be submitted to the Department of Environmental Affairs outlining, amongst others, the outcome of the consultation undertaken with IAPs.

The EA Act, therefore, mandates that consultations must be undertaken with the respective affected communities by the proponents of a mining project for purposes of an EMP or EIA.

▼ **2.5 Impact of Specially Protected Communities on Mining Projects**

There are no specially protected communities in Botswana. The GoB does not recognise any group in particular as indigenous to the country. Further, the Constitution, though it makes reference to rights of citizens, does not make reference to indigenous people or minorities as it has adopted an ethically neutral approach in this regard. The Basarwa people in Botswana have, however, been declared as indigenous people by the African Commission on Human and Peoples Rights.

▼ **2.6 Community Development Agreement for Mining Projects**

Community development agreements (CDA) are not mandatory in Botswana. However, as stated above, one of the requirements which one has to meet when producing an EMP or an EIA is the prior consultation with IAPs. One of the main objectives of such a requirement is that the project developer (if the applicant has hired a practitioner to lead the scoping exercise) usually knows most about the proposal and will know most about the factors that influence the site location. The scoping exercise will allow the project developer to recognise the perspective of others, to consider alternatives and issues of concern raised by those affected, and to make changes to the proposal which will both address the concerns raised and improve the proposal.

In short, therefore, though CDAs may not be common cause, a prospective holder of a mineral concession would have to ensure that their proposed programme provides for adequate protection of the environment (including IAPs).

▼ **2.7 Environmental, Social and Governance (ESG) Guidelines and Regulations**

Though there are no guidelines and regulations dealing specifically with ESG in the mining sector, the country's commitment to sustainable development through the NDP and policies such as the Botswana Minerals Policy, 2022 have created a framework which encourages the implementation of ESG operating frameworks. Further, the various pieces of legislation dealing with the mining sector (the EA Act, the Mines Act, the Waste Management Act, and the Mines,

Quarries, Works and Machinery Act) place obligations which mandate persons engaged in the extractive sector to implement ESG initiatives.

▼ **2.8 Good and Bad Examples of Community Relations/Consultation Impacting Mining Projects**

A good example of community relations and consultation is to approach the community in accordance with the EA Act. The investor or his representatives must consult with all the interested and affected persons in relation to the proposed project and find ways to address concerns raised by the community in that respect.

Further, one of the policy objectives of the Botswana Minerals Policy, 2022 is to increase opportunities for citizens to directly participate in mining, whether as contributors of capital, labour, goods or services, to the greatest extent possible consistent with the maintenance of commercial conditions attractive to minerals investment. In light of the foregoing, it is also advisable that, to the extent possible, a proponent of a mining project should incorporate and involve citizen participation.

A proponent that implements a mining project without an EIA authorisation and implementation of an environment management plan is a bad example of community relations/consultation impacting mining projects.

▼ **3. Climate Change, Energy Transition and Sustainable Development in Mining**

▼ **3.1 Climate Change Effects**

The Botswana National Development Plan 11 Volume 1 [April 2017- March 2023] (NDP 11) provides for an environmental protection programme. The Environmental Protection Programme is focused on mainstreaming climate change in terms of both mitigating the effects of emissions and developing adaptation strategies for economic diversification, agricultural growth, malaria eradication, communicable disease control, and policy and strategy development.

The programme aims to strengthen the resilience of economic sectors, communities, and institutions to enable them to adapt to the changing climatic scenarios. This initiative serves as a guidance to the mining industry to adhere to the rules pertaining to environmental protection and controlling the emissions during mining operations.

▼ **3.2 Climate Change Legislation and Proposals Related to Mining**

Currently, there is no legislation focused on climate change and related to mining primarily, however the National Development Plan shows that GoB has made considerable strides to achieve the goals under the thematic area of sustainable development.

Botswana is a signatory to international conventions that have been created to reduce the effects of climate change. One of these international conventions to which Botswana is a signatory is the United Nations Framework Convention on Climate Change which is committed to developing a long-term, low-carbon development strategy and supporting the necessary mitigation and adaptation activities to reduce its vulnerability to climate change and protect its people's livelihoods. The environment, water resources, sustainable land management, agriculture and health sectors are all prioritised.

▼ **3.3 Sustainable Development Initiatives Related to Mining**

NDP 11 is a national strategy developed to guide the medium-term economic development path for the country under the theme “Inclusive Growth for the Realization of Sustainable Employment Creation and Poverty Eradication”. NDP 11 focuses on six broad national priorities: Developing Diversified Sources of Economic Growth; Human Capital Development; Social Development; Sustainable Use of Natural Resources; Consolidation of Good Governance and Strengthening of National Security; and Implementation of an Effective Monitoring and Evaluation System.

One of the strategy’s main pillars is sustainable environment. In this regard, the strategy will concentrate on two broad areas: environmental protection and natural resource management. The following programmes will be supported to that end: i) Clean Air Programme which includes, among other things, the implementation of the national waste management policy, the development of hazardous waste treatment and disposal facilities, and the intensification of public education and awareness; ii) Chemicals and Waste Management Programme which includes, among other things, the implementation of the national waste management policy, the development of hazardous waste treatment and disposal facilities and the intensification of public education and awareness.

The Botswana Minerals Policy is another initiative put in place to promote sustainable development in Botswana. The policy aims to enhance development in the mining industry for the public benefit notwithstanding environmental and other related policies for sustainability in accordance with international standards. The policy provides a framework in light of various challenges in the mining sector. Further, the policy represents a vital source of guidance for decisions on minerals in the context of Botswana’s sustainable development. The policy has the following objectives:

- maximisation of economic benefits to the nation while enabling private investors to earn competitive returns;
- sustainable minerals development that support environmental conservation and protection;
- strategic and responsible management of geological and minerals-related information; and
- value addition and beneficiation.

▼ 3.4 Energy-Transition Minerals

Botswana does not have exclusive legislation that deals with the increasing demand for the so-called energy-transition minerals. However, Botswana is party to the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC sets out the basic legal framework and principles for international climate change co-operation with the aim of stabilising atmospheric concentrations of greenhouse gases (GHGs) to avoid “dangerous anthropogenic interference with the climate system”.

During the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow in 2021, some UNFCCC countries adopted the Breakthrough Agenda. COP26 brought parties together to accelerate action towards the goals of the Paris Agreement and the UNFCCC. The Breakthrough Agenda recognises the need to accelerate clean energy transitions quickly enough to avoid the worst impacts of climate change.

Pursuant to the Breakthrough Agenda, the Energy Transition Council (ETC) was formed to enable an effective dialogue

between countries that require support for their energy transition on the one hand, and the major international actors offering support on the other, to find, co-ordinate and implement tailored solutions more rapidly. Therefore, the ETC brings together the global political, financial and technical leadership in the power sector to provide support in a range of areas, including integrated energy planning, green grids and energy efficiency.

Botswana's membership in the UNFCCC and its active participation in the initiatives of the convention, has demonstrated its willingness to participate in collaborative efforts towards energy transition minerals as well as strategic co-ordination towards environmental management, taking carbon emissions into consideration.

According to the Botswana Minerals Policy 2022, particularly as it relates to coal, Botswana is committed to putting measures in place to exploit the country's coal resources through exploring clean coal technologies and technology transfer in the subsector in order to derive maximum benefit for economic diversification in an environmentally sustainable manner. The GoB's objective is to achieve optimal and sustainable utilisation of the country's coal resources to drive economic growth by increasing the contribution of clean coal to Botswana's energy mix and establishing Botswana as a sustainable coal beneficiation hub in the Southern African region.

▼ 4. Taxation of Mining and Exploration

▼ 4.1 Mining and Exploration Duties, Royalties and Taxes

The Income Tax Act [Cap 52:01] (the "Income Tax Act") provides for the imposition, assessment and collection of tax on incomes. Botswana currently follows a source-based system in respect of the taxation of income. According to Section 55 of the Income Tax Act, the chargeable income of mining operations shall be ascertained in accordance with the provisions of the 12th schedule to the Income Tax Act (the "12th Schedule"). The 12th Schedule provides that mining profits, other than profits from diamond mining, are taxed according to the following formula: $\text{annual tax rate} = 70 \text{ minus } (1,500/x)$, where x is taxable income as a percentage of gross income. The tax rate shall not be less than the flat company tax rate for resident companies, which is 22%.

As Botswana's taxation system is source based, both resident and non-resident entities are liable for income tax. Income tax for non-resident companies is levied at a rate of 30% of all taxable income whilst income tax for resident companies is levied at a rate of 22% of taxable income.

The holder of a mineral concession shall be liable to pay royalties to the government on any mineral obtained by him in the course of the exercise of his rights thereunder at the rates and in the manner prescribed under the Income Tax Act. The royalties payable shall be the following percentages 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 product on disposal: precious stones – 10%; precious metals – 5%; and other minerals or mineral products – 3%.

▼ 4.2 Tax Incentives for Mining Investors and Projects

In accordance with the Income Tax (Botswana Innovation Hub Companies Development Approval) Order, the government introduced a reduced corporate tax rate of 15% for companies operating under the Botswana Innovation Hub to promote technology, entrepreneurship and commercialisation. This tax incentive is focused on multiple sectors including mining technologies.

Further, pursuant to the Income Tax (Special Economic Zones Development Approval) Order of 2021, the income of an investor or a developer, which has been approved as a special economic zone area licensed business arising from its operations in any special economic zone shall be taxable at a special rate of 5% for the first ten years of the operation of the business in the special economic zone.

The income of an investor or developer referred to above shall, after the first ten years of operation within the special economic zone, be taxable at a special rate of 10% for operations in the special economic zone.

The Income Tax (SPEDU Region Development Approval) Order of 2018 provides that the income of a company, which has been approved as a SPEDU business, arising from its operation in the SPEDU Region shall:

- for a new business, be taxable at a special rate of 5% for the first five years of the business operation; and
- for an existing business, be taxable at a special rate of 5% for the first five years of the business operation commencing on the date specified in the Tax Relief Certificate.

The income of a company referred to under the first bullet point above shall, after the first five years, respectively, be taxable at a special rate of 10% for operations in the SPEDU Region.

▼ 4.3 Transfer Tax and Capital Gains on the Sale of Mining Projects

Where the property disposed of is a business sold as a going concern, the person disposing of the business shall furnish the Commissioner General with a breakdown of the price at which the property was disposed of, showing the value apportioned to each asset and the net aggregate gain or loss of such person shall be ascertained by ascertaining the gain or loss on each such asset.

In the premises, when a business is sold and the purchase price is allocated, the portion allocated to the sale of capital assets is subject to capital gains tax.

▼ 5. Mining Investment and Finance

▼ 5.1 Attracting Investment for Mining

As stated in Botswana's Vision 2036, the diamond-led mineral sector is an important contributor to the economy of the country. It is a major source of government revenue, foreign direct investment and foreign exchange earnings. Botswana's policies are therefore designed, to a certain degree, to attract investment in the sector.

The Botswana Minerals Policy 2022, aims to achieve, among others, the following:

- maximisation of economic benefits to the nation while enabling private investors to earn competitive returns; and
- a competitive environment to stimulate private sector investment in minerals development.

Pursuant to the foregoing, one of the guiding principles that underpin the development and implementation of Botswana's Minerals Policy is fostering a competitive investment environment. The policy provides that, in the quest to maximise national benefits, effective measures will be taken to create a conducive and competitive environment for attracting and sustaining investment in mining and beneficiation projects.

Further, the Botswana Investment Trade Centre Act [Cap 42:12] (the "BITC Act"), the former Botswana Export Development and Investment Authority and the Botswana International Financial Services Centre have been merged into a single entity, namely the Botswana Investment Trade Centre (BITC). The mandate of the BITC encompasses investment promotion and attraction, export promotion and development, and management of the nation brand.

Through its critical role within Botswana's economy, BITC encourages domestic investment and expansion, promotes locally manufactured goods to regional and international markets, contributes towards the improvement of the investment climate through policy advocacy, increases citizen participation in the economy and creates sustainable job opportunities. One of BITC's pre-existing strategic national priorities that are focused on delivering economic growth, development and diversification include mining and energy. Opportunities for investment in the mining sector include:

- prospecting and surveys;
- expansion of existing mining projects;
- new mining projects;
- beneficiation of minerals; and
- improved value chain benefits.

Further, in addition to other commercial and fiscal incentives, income accruing to an investor or developer from SEZA-licensed operations is to be taxed at a special rate of 5% for the first ten years of operation in a SEZA and 10% thereafter.

▼ 5.2 Foreign Investment Restrictions and Approvals in the Exploration and Mining Sectors

The exploration and mining sector in Botswana is one of the key attractors of foreign direct investment in Botswana. In light of the foregoing, there are limited restrictions in the sectors.

Notwithstanding the above, pursuant to the Mines Act, a person who is not a citizen of Botswana must have been ordinarily resident in Botswana for a period of four years prior to being issued with a mineral concession. Further, a company needs to be domiciled in Botswana in order to be issued with a mineral concession. In the case of a mining company, the company has to be a company established in accordance with the Companies Act in Botswana and must be incorporated with the sole intention to carry on the business of mining.

▼ 5.3 International Treaties Related to Exploration and Mining

Botswana has entered into various treaties/agreements aimed at the procurement and provision of investment opportunities at both bilateral and multilateral levels.

Botswana is a member of the Southern African Customs Union (SACU) along with South Africa, Lesotho, Namibia and eSwatini. SACU is a duty-free trading area with a common external tariff. With the exception of certain foodstuffs, import permits are not required for goods entering Botswana from other SACU

members. Botswana's membership in SACU allows investors to take advantage of selling duty free in the far larger South African market.

The Southern African Development Community's (SADC) objective is to pursue a common integration plan based on economic, political and trade interests (members include: Botswana, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, South Africa, eSwatini, Tanzania, Zambia, Zimbabwe, Angola, Democratic Republic of Congo, Seychelles and Malawi). The SADC Free Trade Area (FTA), though in place, is not yet implemented. In August 2008, Botswana was one of the 12 SADC members to sign the FTA. Under the SADC FTA, tariffs and non-tariff barriers will be eliminated on substantially all trade between the members.

Further, Botswana is party to some bilateral agreements. One such treaty is the treaty between the Federal Republic of Germany and the Republic of Botswana concerning the Encouragement and Reciprocal Protection of Investments (the "Germany BIT").

The Germany BIT seeks to create favourable conditions for investments by nationals and companies of either state in the territory of the other state. It recognises that the encouragement and contractual protection of such investments are apt to stimulate private business initiatives and to increase the prosperity of both nations. The states have agreed that, amongst others, neither contracting state shall subject investments in its territory owned or controlled by nationals or companies of the other contracting state to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third state. Investments in the Germany BIT include business concessions under public law, including concessions to search for, extract and exploit natural resources. Botswana has entered into an agreement of the same nature with the Swiss Confederation.

▼ 5.4 Sources of Finance for Exploration, Development and Mining

The sources of financing for exploration, development and mining include ordinary corporate finance methods such as debt financing and equity finance. In addition to these sources, where the government, pursuant to Section 40 of the Mines Act, exercises its option to acquire up to 15% working interest participation in a proposed mine, government shall be obliged in the same manner as other shareholders to contribute its working interest percentage.

Upon its exercise of its option government shall be issued a single P1.00 special share at par, which shall carry the right to appoint up to two directors, with alternates, and to receive all dividends or other distributions in respect of its working interest percentage.

▼ 5.5 Role of Domestic and International Securities Markets in the Financing of Exploration, Development and Mining

A majority of companies which undertake exploration, development and mining in Botswana secure financing from international securities markets as opposed to the Botswana Stock Exchange. As the sector is capital intensive, most investors prefer to obtain hard currency from the London Stock Exchange, the Toronto Stock Exchange, Australian Securities Exchange, etc. Major players in the market such as Tlou Energy

Limited and Sandfire Resources Limited are listed on the Australian Securities Exchange; Premium Nickel Resources Limited is listed in the Toronto Stock Exchange.

▼ 5.6 Security Over Mining Tenements and Related Assets

In respect of movable property, one may register a deed of hypothecation (DoH), or in the alternative, a notarial general bond (NGB). In order to register a DoH, one will have to make an application for registration as an authorised creditor in terms of the Hypothecation Act [Cap 46:05] (“Hypothecation Act”) to take security. An NGB is a statutory pledge which requires one to seek a court order in order to perfect same. An NGB is cumbersome and if not effected timeously could mean that the security is lost in an insolvency situation if the NGB is not perfected prior to the date that insolvency proceedings are instituted. The strength of a DoH is that the security is perfected ab initio and in terms of the Hypothecation Act and where available is the preferred form of security over movables.

Further, a cession entails a transfer of rights from the cedent to the cessionary. A valid agreement between a creditor and debtor is sufficient in order to effect security. There is no requirement to register a cession and perfection is not required to protect the cessionary.

▼ 6. Mining: Outlook and Trends

▼ 6.1 Two-Year Forecast for the Mining Sector

The mining sector in Botswana continues to be one of the most successful in the world. The index of mining production stood at 88.9 during the second quarter of 2022, showing a year-on-year growth of 3.8%, from 85.6 registered in the second quarter of 2021. The main contributor to the increase in mining production was copper in concentrates, contributing 7.6 percentage points. Diamonds, gold and salt were the negative contributors to the percentage change in total mining production. Since the early 1980s, the mining industry has been the largest contributor to real GDP, contributing between 20% and 50%.

It is anticipated that the mining sector will continue to prosper for years to come as the portfolio of minerals mined in the country expands. The increase in the discovery of non-diamond minerals such as granite, nickel-copper, coal, soda ash, gold and silver shall foster this shift.

Botswana, being one of the most business-friendly and stable countries in Africa, provides investors with a conducive and welcoming operating environment, a high degree of safety and security, as well as a strong focus on the rule of law. The following incentives have been put in place by the GoB to create a conducive investment environment:

- no foreign exchange controls, remittance and full repatriation of profits and dividends;
- no restrictions on business ownership;
- duty-free import of machinery and equipment for manufacturing purposes;
- customs duty exemption on raw materials for goods going outside of SACU; and
- competitive tax regime – 22% corporate and 25% personal tax, with 15% corporate tax for manufacturing.

Botswana, being a party to the United Nations Framework Convention on Climate Change, remains committed to developing a long-term, low-carbon development strategy and supporting the necessary mitigation and adaptation activities in order to reduce its vulnerability to climate change, and protecting the livelihoods of its population. Key focus is on the sustainability of the environment, water resources, sustainable land management, agriculture and health sectors.

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