REVISION OF THE DEMOCRATIC REPUBLIC OF CONGO MINING CODE*

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Following the actions taken by the Ivory Coast in 2014, as well as Burkina Faso, Cameroon and Senegal in 2016, who adopted a new mining code, the Democratic Republic of Congo (hereinafter "the DRC") has recently revised its mining code enacted in 2002 (hereinafter "the Mining Code"). The bill was adopted by the Parliament in January 2018 and signed by the President on March 9th, 2018. The law no18/001 (hereinafter "the Law") reforming the Mining Code was immediately enforceable and will have a significant impact on foreign investments in the mining sector. The mining regulation enacted by Decree no 038/2003, of March 26th, 2003 (hereinafter "the Mining Regulation"), is currently under revision and should clarify the newly - amended Mining Code. The new text of the Mining Regulation is expected soon.

Due to the reforms of the Mining Code, the tax provisions applicable to mining companies have undergone significant changes, and State and local participation have increased. However, these changes may interfere not only with the Constitution of the DRC but also with international agreements of investment security, and the COMESA Treaty (hereinafter "the Treaty").

First of all, this reform leads to a very important overhaul of the tax regime. One of the major changes is the increase of the rate of the mining royalty. For example, the royalty rate for precious stones will increase from 4 to 6%, for iron and ferrous metals from 0.5 to 1%, for non-ferrous metals from 2 to 3.5%, and for precious metals from 2.5 to 3.5%. The royalty rate will remain at 1% for industrial minerals. A new category has also been created for strategic substances, adding a royalty rate of 10% for these substances.

The crucial concern with regards to what should be classified as a strategic substance, is about Cobalt. Cobalt is a rare and useful substance which is an essential component of batteries for both phones and electric cars. The DRC owns two thirds of the world's established reserves of Cobalt. The price of this metal has jumped more than 70% in 2017. The rate of the mining royalty could increase from 2% to 10 % if this metal is qualified as a strategic substance. Otherwise, if Cobalt remains classified as a non-ferrous metal, this rate will be raised only from 2 to 3.5%.

Furthermore, a special tax on «super profits» has been included in the Mining Code and can be defined as income earned when commodity prices increase to 25% above the levels included in a project's feasibility study. However, despite these tax increases, the corporate tax applicable to mining companies will remain at 30% (instead of the 35% corporate tax rate that applies to other sectors).

That being said, the reform is also characterized by heightened participation of the Congolese State as a shareholder and as a regulator in the mining process.

Firstly, as a regulator, the export or sale of minerals is subject to the State's right to determine the production quotas to be exported according to the needs of local industry. This point is a slightly change to the version from 2002, which had no provision on the issue, even if it was intermittently addressed by temporary moratorium. Moreover, any direct or indirect change in control of a mining company is now subject to the prior approval of the Congolese State.

Secondly, the State increases participation as a shareholder, because mining companies wishing to acquire a production permit must transfer 10% of their share capital to the State for free. The rate was equal to 5% in the 2002 version. Furthermore, an additional 5% of the mining company's share capital must also be transferred to the State for free at each renewal of the production permit.

Alongside these changes, which may be judged as reasonable, some new points of the reform may be deemed more questionable. A key point of the reform is the obligation of the mining companies to have 10% of their share capital held by Congolese citizens. This amendment creates a distinction in treatment between Congolese citizens and foreigners that did not exist previously. Therefore, this amendment may raise an issue with respect to the DRC Constitution, as seen in Article 50, paragraph 2, which states that “all foreigners who find themselves legally on the national territory may benefit from the same rights and liberties as the Congolese, excepting political rights.”

Plus, this local content requirement may interfere with some provisions set out in international agreements of investment security. For instance, as per article 1 of the USA-Congolese Convention on Reciprocal Encouragement and Protection of Investment (hereinafter the “Convention”), each contracting State must undertake to «accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies». Once again, the new Law may give the impression that Congolese investors receive somehow better treatment than American ones. It is noteworthy that any litigation related to the interpretation of the Convention must be submitted to an arbitration court. Thus, arbitration could be an option for US mining companies and their subcontractors to protect their share capital (The same kind of rule exists in other international agreements of investment security, like the Franco-Congolese Convention or the Swiss-Congolese Convention).

Besides not complying with the Constitution of the DRC and with some international conventions on mutual investment, this new local content obligation could be seen as inconsistent with some provisions of the COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (hereinafter “the Protocol”), which is an integral part of the Treaty. Indeed, Article 2 of the Protocol asserts a non-discrimination principle between the COMESA citizens, which means that a Congolese citizen should have the same right and not be better treated than another citizen of the COMESA community. The Mining Code reform also changes the stabilization clause included in the 2002 mining legislation. This clause previously provided a ten-year warranty of no parliamentary amendments to any rule applicable to mining projects, and now provides only a five-year guarantee of no such parliamentary amendments. This amendment to the stabilization clause may not comply with the objective of the Treaty, as shown in Article 159, which provides that the Member States shall, among other things, “create and maintain a predictable, transparent and secure investment climate in the Member States”. Given that mining projects are often very long-term (i.e. a production permit is granted for up to twenty-five years, renewable for multiple fifteen-year periods), the change in the stabilization clause reduces the visibility that is required for investment in mining projects. Taking a legal action on the ground of the Treaty could be an option to contest some new provisions of the Law although it is only when internal proceedings have been exhausted, that an appeal to the COMESA Court of justice may be lodged.

To conclude, the Law includes legitimate provisions as the mining royalty tax increases, as well as some much more questionable provisions. Either way, the Mining Regulation is eagerly awaited as it may clarify the impact of the law for investors, and will make necessary adjustments and specifications.

Contributor’s Profile
Olivier Bustin, a French and Portuguese qualified attorney. He joined Vieira de Almeida & Associados (VdA) in 2015 and is currently managing international adviser of the Oil & Gas and Projects-Infrastructure practice groups. He has been assisting clients on Production Sharing Contract Negotiations, M&A transactions, Public-Private Partnerships and Infrastructure Projects, mainly in connection with the Energy and Natural Resources Sector in Francophone Africa. Olivier has been a visiting professor for postgraduate study at OHADA Law, jointly organised by the Paris 2 and Paris 13 Universities, where he has been providing courses on various supranational legal frameworks applicable in Africa, such as the Central African Economic and Monetary Community (CEMAC) Law, the West African Economic and Monetary Union (UEMOA) Law, the Common Market for Eastern and Southern Africa (COMESA) Law, the Economic Community of West African States (ECOWAS) Law, the Inter-African Conference on Insurance Markets (CIMA) Law and the African Intellectual Property Organization (OAPI) Law. He has also been a visiting professor at the Bel Campus University in Kinshasa, where he has been teaching debt recovery and enforcement procedures.

* The authors would like to acknowledge **Lyric Perot’s** invaluable assistance in preparing this article.
* Please note that the article was written before the adoption of the Mining Regulation on 8th June 2018.