

# NEW KENYAN MINING ACT A BIG STEP FORWARD

## BACKGROUND

This article examines the new Mining Act 2016 in Kenya (the “Act”) which, after a lengthy legislative process, was finally signed into law by President Uhuru Kenyatta on 6 May 2016. The Act replaces the former Mining Act which had been in force since 1940 which many viewed as not only out-dated but also a significant hurdle to investment in Kenya’s mining sector.

Championed by the Kenyan Ministry of Mining as being “the continent’s most progressive Mining Act”, investors can take comfort from the fact that the Act establishes a more modern, predictable and transparent legal regime which is generally consistent with those introduced by other African countries in recent years.

Importantly, the Act brings the provisions of the Constitution of Kenya 2010 into effect which require greater public participation in the exploitation, management and conservation of the environment and natural resources for current and future generations.

Coupled with the ongoing investment in Kenya’s infrastructure development, which is another ‘key economic pillar’ of Kenya’s Vision 2030, the government hopes the reform of the mining sector, together with the Act, will pave the way for a new era of mining in Kenya.

## KEY CHANGES INTRODUCED BY THE ACT

### 1. *Government participation*

The newly introduced ‘free carry’ provision has perhaps attracted the most industry attention. It will entitle the State to a free ten per cent interest in large scale mining projects. While this mirrors the mining laws of other African countries, Kenya has gone further and introduced a new concept which requires investors, involved in mining projects with capital expenditures over a certain threshold, to offer a minimum of 20 per cent of their shares to the public on a local stock exchange (likely to be the Nairobi Securities Exchange).

### 2. *Licenses and permits*

The Act greatly simplifies the types of mining rights that may be granted to investors as well as the acquisition process for such rights. Prospecting and mining rights will now be in the form of either a permit (for small scale

operations) or a license (for large scale operations). The old restriction on prospecting licences and mining licenses being held by a company has also been lifted.

### 3. *Environment and social protections*

The Act also contains a range of environmental, social and local content provisions which include requirements to use locally produced goods and services, engage companies or businesses owned by Kenyan citizens and submit detailed mine closure plans.

Applicants for mining licences must provide an environmental protection bond or similar security, sufficient to cover the costs associated with the implementation of their environmental and rehabilitation obligations.

The Act also requires miners to invest in and facilitate social responsibility activities with local communities, which includes capacity building, skills transfer, and giving priority to Kenyans when employing staff for mining projects.

### 4. *Transparency*

As part of a strong commitment to transparency, the Act requires a range of mining industry information to be made available online which includes mining revenues paid to Government, production volumes of mining operations and copies of signed mineral agreements (which must be entered into with the State before engaging in mining activities under a mining license). Making this information more readily available follows steps taken by other African nations in recent years (such as the Republic of Guinea), and should lead to greater stability and confidence for all stakeholders in the Kenyan mining sector.

These requirements follow the launch of the Mining Cadastre Portal in February 2015 which provides for an online automated licencing and payment system with maps of current tenements, and which has been welcomed as a further step towards greater efficiency and transparency in the Kenyan mining sector.

### 5. *Investment and wealth division*

As may be expected, the reform of the mining sector has created high expectations in communities situated in areas where mineral deposits are located. In accordance with the

Constitution of Kenya 2010, these local communities and their economies have an express entitlement to benefit from mining investments. The Act requires, among other things, that mining operations take into account the local community values as well as the conditions of community development. As lands the subject of mineral rights are most likely owned by local communities, the Act requires that the consent of such communities and their county governments is obtained before mineral operations are carried out on their land.

Furthermore, and of great significance for Kenya, the Act establishes a National Mining Corporation as the Government's investment arm with responsibility for ensuring that mineral wealth is protected and harnessed for present and future generations. The Corporation will also be able to invest on behalf of the Government, engage in mineral prospecting and mining, and hold interests in mining projects.

## 6. Mining Royalties

Alongside the introduction of the Act, Kenya will also be making changes to the fiscal framework of its mining sector with a view to generating greater revenue for the State. As part of these changes is an ongoing review of the royalty rates for various mineral substances. Rates of 5% for gold, 8% for manganese, 8% for coal, 10% for titanium ores and rare earths and 12% for diamonds (applied to "gross sales value") have been suggested but not yet confirmed.

The Act itself requires that the mining royalties will be split as follows: 70 per cent to the National Government, 20 per cent to the County Governments and 10 per cent to the community where the mining operations occur.

Further to earlier discussions between the Ministry of Mining and various international mining companies, the Act requires the Cabinet Secretary of the Ministry of Mining

to facilitate the establishment of a Minerals and Metals Commodity Exchange in Kenya to help address the difficulties in accessing capital faced by entities investing in the country.

## WELCOME DEVELOPMENT FOR KENYANS

The Act contains a range of provisions which have been introduced for the benefit of Kenyan citizens and, in particular, communities located in the vicinity of mining operations. While the most obvious benefits to the State will be through the free carry provisions and enhanced royalties, the requirement to give preference to local products and services, the employment of Kenyan citizens and to businesses owned by Kenyan citizens promises to provide longer lasting benefits.

The requirement to divide up mining royalties between the government and local communities should be welcomed by many, particularly local communities who are traditionally most affected by the mining activities.

## CONCLUSION

While some corners have questioned the level of discretion afforded to the government under the Act as likely to discourage investment, even critics concede that an update to the existing mining legislation is well overdue and that many of the changes will bring Kenya in line with the other African countries who have recently reformed, or are in the process of reforming, their mining sector legislation.

The government hopes the Act's introduction will allow the mining sector to play a key role in Kenya's Vision 2030, helping the mining sector play its part in developing Kenya into a "globally competitive and prosperous nation... providing a high quality of life to all its citizens by 2030 within a clean and secure environment."

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