Analysis of the D.R. Congolese Legal Framework Pertaining to the Mining Industry: Comparative Perspectives from the South African Framework

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Doctor of Philosophy

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Abstract

This thesis examines legislation relating to the disposition of mining titles or rights and the specific imports that relate to the mining of mineral deposits, hereafter referred to as mining laws, in the Democratic Republic of Congo (DRC) and in South Africa. With a comparative case study of the DRC and South Africa legal frameworks pertaining to the mining, the study uses a blackletter research approach in terms of both data collection and analysis. The comparative analysis focuses on the existing body of knowledge concerning the world's best practices in the mining industry and the DRC's and South Africa's relevant authorities and mining regulations, where the mining legislator and legislation play a paramount role in the mining industry. In overall terms, the study aims to explore the extent to which the DRC's mining legislator, legislation and regulatory framework could effectively address the existing legal shortcomings of the Mining Code and other mining-related laws. The comparison of the DRC's mining legislation framework with that in South Africa indicated that efforts toward good practices in the mining industry in the DRC are seriously flawed. Based on lessons learned from mining industry good practices, the Congolese legislator needs to design and implement mining industry best practices and appropriate legislation to improve conditions in the sector. Furthermore, the DRC's legislator needs to conduct a comprehensive legal review of the DRC's mining industry regulatory regime and align it with mining best practices.

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'*Abba God is constantly working all things out for my good (Rom. 8:28) ... He who did not spare Jesus Christ, but gave Him up for me —how will He not also, along with Jesus Christ, graciously give me all things (Rom. 8:32) ...? I can do all this through Him who gives me strength (Philippians 4:13) ... for Without Christ I am nothing (John 15:5).*'

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List of Abbreviations

ACP:	Africa Caribbean and Pacific
ASM:	Artisanal and small-scale mining
BB/BEE:	Broad-Based/ Black Economic Empowerment
BITs:	Bilateral Investment Treaties
CAMI:	[*Cadastre Minier*] Mining Registrar
CCCI:	[*Compagnie du Congo pour le Commerce et l'Industrie*] Congo Company for Trade and Industry
CEEC:	[*Centre d'Expertise d'Evaluation et de Certification*] Centre for Evaluation, Expertise and Certification of precious and semi-precious mineral Substances
CNKI:	[*Commité National de Kivu*] National Committee of Kivu
CODELCO:	[*Corporación Nacional del Cobre de Chile*] National Copper Corporation of Chile
CSK:	[*Comité Spécial du Katanga*] Special Committee of Katanga
CTCPM:	[*Cellule Technique de Coordination et Planification Minière*] Technical Cell for Coordination and Mining Planning
DEA:	Department of Environmental Affairs
DFI:	Diamond Fields International
DMR/E:	Department of Mineral Resources /and Energy
DRC:	Democratic Republic of the Congo
DWS:	Department of Water and Sanitation
EAs:	Environmental Authorisations
EBIT:	Earnings Before Interest and Taxes
EIAs:	Environmental Impact Assessments
EIC:	[*Etat Indépendent du Congo*] Congo Free State
EIE	[*Etude d'Impact Environnemental*] Environmental Impact Study
EITI:	Extractive Industries Transparency Initiative
EMA:	Environmental Management Assessment
EMP:	Environmental Management Plan
EMPs:	Environmental Management Plans or Programmes
EMRA:	Egyptian Mineral Resources Authority

EP: Equator Principles
EPA: Economic Partnership Agreement
ESG: Environmental, Social and Governance
ESIA: Environmental and Social Impact Assessment
ESTA: Extension of Security of Tenure Act
EU: European Union
FOMIN: [*Fonds Miniers*] Mining Funds
FP: Financial Provision (Regulations)
FPIC: Free, Prior, and Informed Consent
GATT: General Agreement on Tariffs and Trade
GDP: Gross Domestic Product
GEC: [*Groupe d'Entreprises Chinoises*] Chinese Enterprises Group
GECAMINES: [*Générale des Carrières et des Mines*] General of Quarries and Mines
GFT: Green Flash Trading
HDSAs: Historically Disadvantaged South Africans
ICCAs: Indigenous Community Conserved Territories and Areas
ICJ: International Court of Justice
ICLG: International Comparative Legal Guide
IEM: Integrated Environmental Management
IFP: International Finance Compliance
ICG: International Crisis Group
IIED: International Institute for Environment and Development
IMF: International Monetary Found
IPILRA: Interim Protection of Informal Land Rights Act
ITA: Income Tax Act
LRA: Labour Relations Act
METR: Marginal Effective Tax Rate
MHSA: Mine Health and Safety Act
MHSI: Mine Health and Safety Inspectorate
MIBA: [Mines de Bakwanga] Bakwanga Mining
MLC: [*Mouvement de la Libération du Congo*] Movement for the Liberation of Congo
MMSD Mining, Minerals and Sustainable Development
MPRDA: Mineral and Petroleum Resources Development Act

MPRRA:	Mineral and Petroleum Resources Royalty Act
MPTRO:	Mineral and Petroleum Titles Registration Office
NEMA:	National Environmental Management Act
NEMAQA:	National Environmental Management: Air Quality Act
NEMBA:	National Environmental Management: Biodiversity Act
NEMPAA:	National Environmental Management: Protected Areas Act
NEMWA:	National Environmental Management: Waste Act
NFA:	National Forests Act
NHRA:	National Heritage Resources Act
NWA:	National Water Act
OECD:	Organization for Economic Cooperation and Development
OES:	One Environment System
OIF:	[*Organisation Internationale de la Francophonie*] International Organization of French Speakers (OIF)
PAIA:	Promotion of Access to Information Act
PAJA:	Promotion of the Administration of Justice Act
PAR:	[*Plan d'Atténuation et de Réhabilitation*] Mitigation and Rehabilitation Plan
PMA:	Precious Metals Act
RCD:	[*Rassamblement Congolais pour la Démocratie*] Congolese Rally for Democracy
S&EIR:	Scoping and Environmental Impact Reporting process
SACU:	Southern African Customs Agreement
SADC:	Southern African Development Coordination Conference
SAESSCAM:	[*Service d'Assistance et d'Encadrement du Smal-Scale Mining*] Small Scale Mining Assistance and Support Service
SAMREC:	South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves
SLAPP:	Strategic Lawsuits Against Public Participation
SOMINKI:	[*Société Minière et Industrielle du Kivu*] Mining and Industrial Company of Kivu
SYSMIN:	[*Système de Stabilisation des Recettes d'Exportation des Produits Miniers*] Mining Products Export Revenue Stabilisation System
Tcf:	Trillion cubic feet

TIH:	Transport, Insurance and Handling
ULTRA:	Upgrading of Land Tenure Rights Act
US:	United States
USD:	United States Dollar
VAT:	Value Added Tax
WTO:	World Trade Organization
ZAR:	South African Rand

Chapter One: Research Settings and Methodological Framework

1.1. Introduction

The mining industry is one of the most prominent sources of earnings in many countries where its developments regulate the country's resource acquisition potential and economic growth. In relation to geophysical or chemical industries, mining is much less diverse and on a smaller industrial scale, it complies with the waste management initiatives or explores initiatives to reduce mining-generated waste at the source level or protects the surrounding environment and environmental components. According to Chaudhery et al., by the mining industry is understood to be the constellation of processes including the extraction, management, and processing of naturally occurring solid ores from the earth's surface.[1] It emerges from this assertion that various economically valuable products including coal, diamonds, metallic ores and oil, can be obtained from mining. In view of this, the mining industry is associated with other various processes such as mineral processing, surface mining, and the marketing of mining equipment, etc. Its sustainability largely depends on the related industrial impacts on the environment.[2] For all the possible detrimental impacts, the advantages of the industry are paramount.

Looking at the potential market size of the mining industry worldwide, it may be noted that many of the mined goods are used either for energy production or as raw materials for chemical industries. The mining industry thus contributes to the development of various industries including energy production, chemical, electrical, and electronics industries, among others. However, the age-old anthropogenic dependency[3] of the human being on natural resources makes mining a very old one. Mining has been gradually evolving since the Stone Age.[4] Mining potential and capacity also help a country to develop. This is the case in the Middle East where some countries have successfully extracted oil and achieved tremendous economic growth over the years.[5] However, the

[1] Chaudhery Mustansar Hussain, Mosae Selvakumar Paulraj and Samiha Nuzhat, *Source Reduction and Waste Minimisation* (Elsevier, 2021), 102-111.
[2] *Ibid.*
[3] Human anthropogenic dependency on natural resources refers to the idea that human-beings depend on natural resources for their survival and well-being, and that such activities could involve negative impacts on the environment.
[4] Elma Satrovic, Ahmet Cetindas, Ibrahim Akben, and Sadeq Damrah, Do Natural Resource Dependence, Economic Growth and Transport Energy Consumption Accelerate Ecological Footprint in the most Innovative Countries? The Moderating Role of Technological Innovation, Gondwana Research, Vol 127, (2024), 116-130.
[5] *Ibid*.

sole existence of geological resources cannot support economic growth in the absence of innovative and modern elements alongside the contemporary processes of mining.[6] The Chinese case, for example, shows how the country was able to promote its mining industry with the aid of the government and innovative ideas.[7] However, the mining industry is not without its challenges, such as the lack of sustainable methods, the need for expensive and advanced technologies, and geophysical or climatic variables. Indeed, geological resources, innovative and modern elements or technology, and contemporary processes are crucial for economic growth. In the same vein however, it is also important to acknowledge that the quest of sustainable development through a combination of natural resources, technological innovations, and economic growth significantly alters the ecological footprint. Thus, the importance of appropriate legislations and policies for minerals or natural resources that upgrade technological innovations, and other mining sustainable-related methods in order to attain mining-sustainable development goals.[8]

With diamonds, oil, gold, copper, cobalt, cassiterite, coltan, etc. the subsurface of the Democratic Republic of Congo (DRC) is one of the richest in the world. References from Gann and Duignan indicate that in recent years, new mining developers such as Chinese groups or Emirati intermediaries have come to invest several billion dollars in the mining sector.[9] And yet this windfall does not flow into the Congolese economy and the country cannot escape poverty. It stems from Gann and Duignan's study[10] that more than 70% of Congolese people today live on less than $2 per day. Minerals, a curse for the country? The curse of raw materials has been a constant fact in the history of the Congo.[11] It is indicated that when Leopold II, King of the Belgians (1865-1909),[12] made the Congo his

[6] Marco Bianchi and Mauro Cordella, Does Circular Economy Mitigate the Extraction of Natural Resources? Empirical Evidence Based on Analysis of 28 European Economies over the Past Decade, Ecological Economics, 2023.

[7] Peilei Fan, Zutao Ouyang, Corina Basnou, Joan Pino, Hogeun Park, and Jiquan Chen, Nature-based Solutions for Urban Landscapes under Post-industrialisation, and Globalisation: Barcelona versus Shanghai, Environmental Research, Vol. 156 (2017), 272-283; Peilei Fan, Lihua Xu, Wenze Yue, Jiquan Chen, Accessibility of Public Urban Green Space in an Urban Periphery: The Case of Shanghai, Landscape and Urban Planning, Vol. 165 (2017), 177-192.

[8] *Ibid, 6.*

[9] L. Gann and P. Duignan, The Rulers of Belgian Congo, 1884-1914 (Princeton University Press 2000), 12.

[10] *Ibid*.

[11] Foreign investment does not produce alleviation of poverty in the DRC because the country still faces many challenges including the sluggishness of the judicial system in in rendering verdicts or adhering to legal protocols despite the existence of laws safeguarding investors, resulting in protracted investment disputes. Also, the dearth of rudimentary digitalisation in the court system impedes the tracking of cases, documentation of rulings, and provision of essential resources to judges for informed decision-making. Low-paid judges are exposed to corruption, human rights abuses in the artisanal mining, particularly the notably use of exploitative and child labour.

[12] Leopold II was the second King of the Belgians. He reigned from 1865 to 1909. Known for founding the Congo Free State, a private colony that he owned from 1885 to 1908, Leopold II's administration was marked by atrocities in the Congo Free State, including forced labour, torture, murder, kidnapping, and the amputation of hands. Estimates suggest that the Congolese population declined by 1-15 million during Leopold II's rule.

personal property in 1885, he committed to ensuring that the country's raw materials and minerals remained accessible to the great powers of the time.[13] It is further said that since the arrival of the first Europeans[14] in this immense Central African country - the DRC, the Congolese subsoil still remains an object of covetousness, more than 60 years after the country's independence (1960)[15]. Philippe Chalmain, a raw materials market specialist, commented that although the country has incurred a series of resource pillages since the colonial days, its raw materials wealth still remains without parallel.[16]

The DRC has a diverse mining potential scattered across all its provinces. The extremely varied range of minerals offers enormous potential for exploitation.[17] The importance of this sector to the national economy is well established, as shown by the fact that in 1970, the mining industry contributed around 50% of GDP and 80% of exports from the country. Today, despite the difficulties it faces, the new 2002 Mining Code attracts foreign investment to the extent that the mining sector contributes 28% to GDP and 25% to its growth rate. Nowadays, the mining sector in the DRC accounts for around 70% of the total value of the country's exports.[18] At the heart of the industrial exploitation of these mineral substances are public, mixed, and private mining companies which have concluded various mining agreements in which the State is directly or indirectly involved. These mining agreements are said to have generally improved national production in this sector compared with the period before 2002.[19] Articles 241 and 251 of the new Mining Code 2018, are to the effect that given the high level of national sovereignty that characterises the mining and quarrying sector, these companies are, by the will of the Congolese legislator, subject to a special regime linked in particular to certain aspects of the companies constitution as legal entities.[20] As shown below, the development of the Congolese mining sector and its legislation is inextricably linked with the development of the State.

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[13] Magha-A-Ngimba Charles Gimba, *Der Kongo in der Geschichtsschreibung [The Congo in the Historiography]*, in Philipp Gieg, Julien Bobineau, and Timo Lowinger (ed.), *Handbuch Demokratische Republik Kongo,* (Frank & Timme, 2024), 109-130.

[14] The first European to arrive in the Congo was Portuguese navigator Diogo Cão in 1482.

[15] Isidore Ndaywel è Nziem, *Nouvelle Histoire du Congo, des Origines à la République [new History of the Congo, from Origins to the Republic],* (Association pour les études des littératures Africaines, 2009).

[16] Lewis H. Gann and Peter Duignan, *The Rulers of Belgian Africa, 1884-1914* (Princeton University Press, 2000), 134-138.

[17] DRC's Mineral Potentials 2023. Available at: www.mines-rdc.cd. (Accessed: 12 January 2024).

[18] *Ibid, 17;* DRC's Economic and Commercial Guide, 2013, 16; L. Tambwe, Mining Statistics Bulletin (Ministry of mines 2019). Available at: www.mines-rdc.cd. (Accessed: 12 January 2024).

[19] DRC Mining Ministry (2020) Mining Statistics 2013-2019; *Ibid, 18*.

[20] Articles 241 and 251 of the Mining Code 2018 (Law No. 18/001).

1.2. Setting: Back to the Roots of a DRC Construct-in-history

Independent since 1960 and the second-largest Francophone[21] country after France, the DRC is the second-largest African country (2,345,000 km^2) after Algeria, with more than 100 million inhabitants. With an interesting geostrategic position at the central, southern and western parts of the continent, the DRC is bordered by nine neighbouring countries: South Sudan and the Central African Republic to the north, Angola and Zambia to the south, Burundi, Rwanda, Uganda and Tanzania to the east, and the Congo-Brazzaville to the west. The map of the DRC is shown in the figure 1.1 below.

Figure 1.1 : Map of DRC

Source: Maps of India.

Referred to as a *geological scandal*,[22] the DRC is one of the world's most resource-rich countries, where various types of natural resources are bountiful. By way of striking

[21] *Francophonie* is the International Organization of French (OIF) Speakers. The OIF's aim is to promote democracy, human rights, and peace. It provides member countries with access to its network of institutions, academics, and non-governmental organizations to help with conflict resolution, building national capacities, and ending crises. The choice of French as the colonial language in the Congo was influenced by the socio-political landscape of Belgium at the time, where French was more dominant in governance and culture, despite the presence of Dutch-speaking regions.

[22] The concept of "*geological scandal*" has been coined to portray the wealth of natural resources in the DRC, including minerals, water, and arable land.

contrast, the Congolese people are, regardless of the country's mineral wealth, among the world's poorest.[23]

The constitutional change that has taken place in the DRC since the first independence statute has been a continuous source of protest. Following the bloodshed upon independence protests on 4 January 1959 – the Day of Martyrs – the post-colonial DRC has been mired with continued mass freedom fighting, which has always culminated in huge loss of life. The 1990s, for instance, saw vicious turbulence with the massacre of Christians in the country as a direct result of the behaviour of the political and economic elite which has been continuously contested by the popular classes, with strikes and demonstrations.[24] In 2016 further fatal disturbances followed at the postponed DRC elections and more recently 2017/18 involved the sporadic killing of dissenters at religious venues, random on-street vitriol and nightly kidnapping of protesters with a claimed anti-authority agenda. Recorded evidence by the International Crisis Group (ICG) for example informs that elections in the DRC involve numerous uncertainties and risks owing to the government and opposition always being unable to reach a consensus on key aspects of electoral operations, while abuses by security forces and hatred rhetoric between communities' fuel tensions. Consequently, results from poor-run polls are generally contested or rejected by several opposition members; something which has been triggering a major crisis for the state, destabilising the country and increasing inter-community tensions.[25]

With this confrontation, a complicitous arrangement often arose between local elites and their international backers.[26] In such confronting configuration underlines the ICG report, "fair elections consequently became a parody of genuine democracy: a situation that continues to bleed into the fabric of the Congolese nation, in the form of mass poverty and unemployment."[27] The DRC has never witnessed the peaceful transfer of power

[23] *Ibid, 16;* World Bank, *The World Bank in the DRC* (World Bank Group 2024).
[24] On February 16, as many as one million Zairian Christians marched through the streets of Kinshasa in a "March of Hope" to demand the resumption of the National Conference. Mobutu's security forces responded with lethal force, and at least 30 demonstrators died, and hundreds were wounded. Injuries also occurred at protests in other cities. Organised by an ad hoc committee of priests and lay people outside the Catholic hierarchy, the march – probably the largest demonstration in Zairian history – together with the international response to its suppression, forced Mobutu to allow the Conference to reconvene in early April (Human Rights World Report 1993 -Zaire).
[25] International Crisis Group, Elections in DR Congo: Reducing the Risk of Violence, Crisis Group Africa 30 October 2023, Report No. 312, 18.
[26] David Van Reybrouck, *Congo: The Epic History of a People* (Harper Collin, 2014), 212-216.
[27] *Ibid, 25*.

since independence from Belgium in 1960.[28] The Polls held in 2018 and 2023 respectively raised various concerns over how this wide political encounter would be conducted since questions were still unresolved, ranging from logistical and financing difficulties to various threats to peace and security, including militia violence and disorder in west and east of the country.[29] DRC's birth as a nation-state stems from a series of upheavals going back to its distant past from 1885.

The DRC was already subject to major disruptions prior to its fundamental transformation during the colonial period. Between the 15th and 17th centuries, Congolese societies had developed several important state systems such as the *Kongo* kingdom and *Luba-Lunda* states, each with elaborate political institutions buttressed by symbolic kingship and military force.[30] Power was dispersed from the capital to remote zones via nominated clan chiefs. Kingship rivalry regularly led to civil fighting, while the rise of the slave trade brought in a new source of instability, which influenced regional politics. In human terms, the reduction in scale of communities led to "the formation and partnership of socio-economic functions resulting in a trade-gift economy".[31] Bantu and pygmy societies, for example, co-habited typically in harmony in savannah lands, although this was broken by the slave trade, and reinforced by colonial imposition.[32] The pre-colonial history of the Congo saw the *Kongo* Kingdom, comprised of tribal kingdoms which were very wealthy, due to the region's mineral wealth. Throughout that time, the civilisation started to develop and implement iron and copper technology, in addition to trading in ivory and other goods. At the same time a strong commercial demand for metal technologies arose, and "these kingdoms were able to institute a long-range commercial net to the Indian Ocean establishing a strong central government based on chieftainship by the 16th century."[33] It is in these circumstances that the Kongo Kingdom initially interacted with other civilisations.

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[28] *Ibid, 13.*

[29] Julien Bobineau, Philipp Gieg, and Timo Lowinger Bobineau, Einleitung, in Philipp Gieg, Julien Bobineau, and Timo Lowinger (ed.), *Handbuch Demokratische Republik Kongo* [*Handbook Democratic Republic of the Congo*], (Frank & Timme, 2024), 13-24.

[30] *Ibid,13.*

[31] Jan Vansina, *How Societies Are Born: Governance in West Central Africa before 1600* (University of Virginia Press, 2009).

[32] Julien Bobineau, Prakoloniale Geschichte [Precolonial History], in Philipp Gieg, Julien Bobineau, and Timo Lowinger (ed.), *Handbuch Demokratische Republik Kongo*, (Frank & Timme, 2024), 131-144.

[33] *Ibid, 31; 15*; J.L. Vellut, *Context Africain du projet colonial de Leopold II* [African context of the colonial project of Leopold II]. Racine (Éditions de l'Érablière 2009), 121-130.

King Leopold II of the Belgians set in motion the conquest of a vast territory that was to become his private fiefdom. His thinking follows Henry Morton Stanley's[34] exploratory process into the Congo (1878) using the *Comité d'études du Haut Congo* (Committee for the Study of the Upper Congo) marketing the Congo River, which had by 1884 established uniform trading standards throughout the territory. Leopold also benefited from his participation in the Berlin Congo Conference,[35] less a humanitarian affair than a tool of Western intrusion and control, loaded in favour of the self-granted authority gained by forced recruitment and maximum potential realisation of the native population.[36] Despite the international criticism of Leopold, the Congo suffered further oppression from its incorporation into the national structures of the Belgian state. In other words, King Leopold II acquired the *Kongo* Kingdom by contrivance, formally acquiring rights over territory at the Conference of Berlin of 1885. He then made the land his private property and named it the '*Congo Free State*;' a name closely associated with extraordinary suffering and atrocities.[37]

Leopold's regime began various infrastructure projects to extract resources from the colony. Rubber, used to make tyres for the growing automobile industry, was the main export from the Congo Free State and its sale made a fortune for Leopold. Leopold's colonisation of the Congo was extremely brutal leading to thousands of Congolese being forced to work on his plantations. The practice of cutting off the limbs of the natives was widespread in the colony and set as a means of enforcing rubber quotas.

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[34] Henry Morton Stanley was a British explorer. His exploration of the Congo in 1878 was part of a larger expedition that involved traveling across Central Africa. Stanley's report of the Congo interested Leopold II, the Belgian King. Leopold II employed Stanley to claim land in the Congo for him. Stanley worked to set up Belgian bases and build roads in the Congo from 1879-1884. Stanley's work showed that there was money to be made in the Congo (*Ibid, 29*), *173, 221-228*.

[35] Berlin Conference of 1884–1885 is an international meeting where the then major European powers, including United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire) negotiated and formalised claims to territory in Africa. It marked the climax of the European competition for territory and its resources in Africa, a process commonly known as the scramble for Africa. At the Berlin Conference, King Leopold II and Henry Morton Stanley worked together to claim the Congo for Leopold's private ownership (Henry Louis Gates, Jr. and Kwame Anthony Appiah, Encyclopaedia of Africa (Oxford University Press 2010); Felix Losing, Kongo-Freistaat und Leopold II [Congo Free State and Leopold II], In Philipp Gieg, Julien Bobineau, and Timo Lowinger (ed.), *Handbuch Demokratische Republik Kongo*, (Frank & Timme, 2024), 145-171.

[36] *Ibid, 15*; Patrick Mbeko and Honoré Ngbanda-Nzambo, Stratégie du Chaos et du Mensonge [the Strategy of Chaos and Lying] (Éditions de l'Érablière, 2014).

[37] *Ibid, 26.*

This resulted in millions of Congolese dying of exploitation and disease from 1885 through 1908.[38] This disaster caused a drastic decline in population in some areas. In 1904, British reporter Edmond Morel, British diplomats Roger Casement, Mark Twain[39] and various missionaries strongly criticised the actions of the Free State's administration, sparking international protests and condemnation of the practice. In 1908, the Belgian parliament reached an agreement with Leopold II on taking over the Free State from the King. "Congo switched from being the King's personal holding to the Belgian colony, under Belgian rule and named the *Belgian Congo.*"[40] Widespread social disruption caused by the Leopold system complicated the construction of an effective administrative system and left a legacy of resentment of the West upon which later generations of Congolese nationalists[41] capitalised.

Following the 1960 Round Table Conference, the Belgian Congo achieved independence on 30 June 1960 under the name "*Congo-Leopoldville*", led by Patrice Lumumba[42] as Prime Minister. On 5 September 1960, President Joseph Kasa-Vubu[43] dismissed Lumumba from office. Benefitting from a large parliamentary majority, Lumumba declared Kasa-Vubu's action unconstitutional and in turn sacked him as Head of State.[44] This mutual revocation precipitated a crisis between the two leaders. Lumumba had

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[38] Nancy Rose Hunt, *A Colonial Lexicon: Of Birth Ritual, Medicalization, and Mobility in the Congo* (Duke University Press, 1999); Charles Magha-A-Ngimba Gimba, The nexus between Artisanal Mining and the Recruitment, Reintegration and Re-recruitment of Combatants in the Kivus, the Democratic Republic of Congo (Coventry University, 2014).

[39] "After around two decades the Leopoldian regime in Congo became the subject of an extensive international campaign which criticised its violent and exploitative character. The accusations included general exploitation of the population, forced labour, bloody military expeditions, mutilations, but also that Leopold engaged in monopolistic economic policies which violated agreements on international free trade. The first gruesome stories and testimonies were published in travellers' reports, most famously the open letter written to King Leopold in 1890 by the Afro-American Civil War soldier George Washington Williams. Other early accusations came from humanitarian activists and from Protestant missionaries. After 1900 the protests gained strength and in 1903 the Congo atrocities became the subject of an official report by the British Consul Roger Casement and Mark Twain and were also the topic of fierce discussions in the British as well as Belgian parliament. That same year E. D. Morel established the Congo Reform Association which was dedicated to informing the public about the Congo atrocities, first in Britain but soon also in the US and other countries" (Berber Bevernage, The making of the Congo question: truth-telling, denial and 'colonial science' in King Leopold's commission of inquiry on the rubber atrocities in the Congo Free State (1904–1905), Rethinking History (The Journal of Theory and Practice), Vol. 22, No.2, 208-209.

[40] Charles Magha-A-Ngimba Gimba, The nexus between artisanal mining and the recruitment, reintegration, and re-recruitment of combatants in the Kivus, the Democratic Republic of Congo (Coventry University, 2014), 123-178.

[41] Congolese nationalists group included independent leaders with Patrice Lumumba as the spearhead.

[42] Patrice Emery Lumumba was the First Prime Minister of the Republic of Congo (DRC) from June 30, 1960, to September 5, 1960. He was assassinated on January 17, 1961.

[43] Joseph Kasa-Vubu was the First President of the Republic of Congo (DRC), serving from 1960 to 1965. He assumed the office when the Congo became independent from Belgium on June 30, 1960.

[44] *Ibid, 40.*

previously appointed Mobutu[45] Chief of Staff of the new Congo army. Taking advantage of the leadership crisis at the top of the state, Mobutu garnered enough support within the army, which mutinied on the news of Lumumba's dismissal.[46] Mobutu neutralised the two leaders and took power for a brief period. However, following secret negotiations with westerners he reinstated Kasa-Vubu, but kept Lumumba under house arrest. Lumumba escaped house arrest to join his fellow nationalist secessionists in Stanleyville but was arrested on his way. At the demand of Katanga's secessionist officials, in exchange for a peace agreement, Lumumba was transferred to Katanga where he was assassinated on 17 January 1961 with his fellow politicians Maurice Mpolo[47] and Joseph Okito.[48] His assassination plunged the already divided country into still further chaos.[49]

With financial support from the United States and Belgium, Mobutu paid his soldiers privately. He deposed Kasa-Vubu, took power in 1965, then militarily crushed secessions and rebellions with Western mercenary support. In 1971 Mobutu changed the country's name to the *Republic of Zaïre*. The new President had the support of the United States because of his staunch opposition to Communism. Western powers appeared to believe this would make him a roadblock to Communist schemes in Africa.[50] A one-party system was established, and Mobutu declared himself Head of both State and Party. Although relative peace and stability were achieved, Mobutu's government was guilty of severe human rights violations, political repression, resource mismanagement and a cult of personality and corruption.[51] By 1996, following the Rwandan civil war and genocide, and the ascension of a Tutsi-led government, Rwandan Hutu militia forces (Interahamwe) had fled to eastern Zaïre and established refugee camps as a basis for incursion against Rwanda. These Hutu militia forces soon allied with the Zaïrian armed forces to launch a

[45] On November 25, 1965, Army Chief of Staff Joseph Mobutu overthrew Kasavubu and created a military dictatorship that controlled the nation for the next three decades. Mobutu ruled Congo-Zaire from November 25, 1965, up to May 17, 1997.

[46] *Ibid, 33*.

[47] Maurice Mpolo was a Congolese nationalist and politician who served as Minister of Youth and Sports in the first government of the newly independent Republic of the Congo in 1960. He was executed alongside Prime Minister Patrice E. Lumumba in Katanga in 1961.

[48] Joseph Okito was a Congolese politician and close political ally to Patrice E. Lumumba who briefly served as Second Vice-President of the Senate of the newly independent Republic of the Congo. He was executed alongside Lumumba in Katanga in 1961.

[49] Ludo De Witte*, L'Assassinat de Lumumba* [*Murder of Lumumba*] (Karthala, 2000); Leo Zeilig, *Patrice Lumumba: Africa's Lost Leader (Life & Times)*, (Haus Publishing, 2008), 121-129.

[50] Julien Bobineau, Belgisch-Kongo und Unabhängigkeit, in Philipp Gieg, Julien Bobineau, and Timo Lowinger (ed.), *Handbuch Demokratische Republik Kongo* [Belgian Congo and Independence], (Frank & Timme, 2024), 173-188.

[51] James Gasana, *Du Parti-Etat à l'État-garnison [from State-party to Garrison-party]*, (L'Harmattan, 2002), 87-91.

campaign against Congolese ethnic Tutsis in eastern Zaïre.[52] A coalition of Angolan, Burundian, Rwandan, Ugandan and Zimbabwean armies, led by Laurent Désiré Kabila, then invaded Zaïre to overthrow the Mobutu government following the unsuccessful Outeniqua peace talks in 1997,[53] thereby launching the First Congo War in 1997.[54]

However, a few months later, after he became President and renamed Zaïre the Democratic Republic of the Congo (DRC), Laurent Désiré Kabila,[55] the then President, asked Burundian, Rwandan and Ugandan military forces to return to their countries as he was convinced that officers of these particular foreign military forces were plotting a coup against him.[56] Consequently, in August 1998 these officers and their troops in the DRC retreated to Goma and launched a new Tutsi-led rebel military movement named the *Rassamblement Congolais pour la Démocratie* or RCD (Congolese Rally for Democracy) and the *Mouvement de Libération du Congo* or MLC (Movement for the Liberation of Congo) to fight against their former ally, President Kabila, starting the second Congo war.[57] Kabila was assassinated in 2001 and succeeded by his son Joseph Kabila, who organised multilateral peace talks which ended with the signing of a peace agreement based on consensual governance of state, and also the reform of the security system.[58] By June 2003 all foreign armies except Rwanda's were expected to officially leave Congolese territory. Privately, however, they still kept fighting proxy wars for resource control in rich-resource zones in the Kivu region.[59] It is claimed that rich-mining zones in the eastern DRC are home to various rebel groups which are reportedly supported from both within and without the country.[60] Arguably, foreign coveting of the DRC's wealth, the country's strategic position, and its role as a roadblock against western ideology, coupled with continuous poor state governance have imprinted an identity of instability on the DRC throughout its construct-in-history.[61] DRC's state-building and/or

[52] *Ibid, 40.*
[53] *Ibid.*
[54] Emile Bongeli Yeikelo Ya Ato, *La Mondialisation, l'Occident et le Congo-Kinshasa [the West and the Congo-Kinshasa]*, (L'Harmattan, 2011), 65-667.
[55] Laurent-Désiré Kabila was a Congolese rebel and politician who served as the third President of the Democratic Republic of Congo from 1997 until his assassination on January 16, 2001.
[56] *Ibid, 40.*
[57] Emmanuel Murhula Amisi Nashi, *Pourquoi Ont-ils Tué Laurent-Désiré Kabila? [Why Did They Kill Laurent-Désiré Kabila?] (*L'Harmattan, 2007), 103-109.
[58] *Ibid, 40.*
[59] *Ibid.*
[60] Patrick Mbeko, *Le Canada et le Pouvoir Tutsi du Rwanda : Deux Décennies de Complicité Criminelle en Afrique centrale [Canada and the Tutsi Power of Rwanda : Two Decades of Criminal Complicity in Central Africa],* (Editions de l'Erablière, 2014), 203-209.
[61] *Ibid, 40.*

un-building has been enabled by a continuous renewal of natural resources which has turned the country into a magnet for conflict.[62] Dissatisfied with the mismanagement of resources by a cluster of corrupt elites, grieved people generally would collude with strangers to use violence to claim their rights to resource dividends.[63] Different secessions and continual rebellions, all supported by foreign countries and a few national leaders, serve to underline the above views. Figure 1.2 below illustrates the current foreign-backed-decades-long conflict in the DRC.

Figure 1.2 : The current foreign-backed-decades-long conflict in the DRC.

Source: Aljazeera.

1.3. The Mining Sector and the Legal System in the DRC

The DRC is a civil law country whose legal system is rooted in the 1804 Napoleonic Civil Code, Belgian law, and customary laws.[64] There is striking similarity between the DRC's legal system and that of Belgium since the former inherited its legislation from the Belgian colonialist. Customary or tribal law, which is used in rural territories where

[62] *Ibi,40.*
[63] *Ibid.*
[64] *Ibid, 26.*

about 56% of the people live, is another basis of the legal system in the country.[65] It regulates both personal status laws and property rights (particularly the inheritance and land tenure systems) in the various traditional communities of the country. Even though the Constitution subordinates' customary laws to civil or state laws, 75% of disputes are settled by customary law in the DRC.[66] "Customary law" refers to a general normative system enacted by legitimate law-making organs (i.e., patriarchs, family councils, clan councils, and traditional or tribal chiefs). That normative system is "customary" because it finds its expression through traditional customs.[67] Put differently, the authority of customary laws derives from a legitimate law-making organ and these traditional laws exist independently of the individuals whose behaviour they regulate. The rationale behind customary laws is that unlike state laws, ethnographic studies, as opposed to the usual (i.e. doctrinal) legal research methodologies, are necessary to ascertain the content of a given customary rule. Customary laws do not have general application; they only apply to the traditional communities from which they originate.[68]

1.3.1. DRC's Mining Industry

With substantial untapped gold, cobalt, and high-grade copper reserves, the DRC runs significant security risks accentuated by a lack of robust infrastructure. Cobalt, one of the key metals needed to produce electric vehicles, places the country in a strategic position for energy transition. Information from the Mining Department indicates that in 2022, the DRC produced 139,000 tons of cobalt or nearly 68 percent of the world's cobalt, making it the world's largest cobalt producer. DRC was also the fourth largest producer of industrial diamonds in 2023 with a production of 4.3 million carats. The country also has globally significant lithium deposits. Various reports by the Mining Department further buttress that the DRC can boast some of the highest quality copper reserves globally, with some of the mines estimated to contain grades above 3 percent, significantly higher than the global average of 0.6 and 0.8 percent.[69] The country's mining sector is witnessing a transformation of interest on the part of mining companies, with the production of mining resources increasing from 10,000 tonnes to nearly 1 million in

[65] *Ibid, 26.*
[66] Daniel Tödt, Elite formation and decolonization, The Évolués in the Belgian Congo 1944–1960 Critical studies of history (De Gruyter Oldenbourg, 2018), 11-134.
[67] Georges Nzongola-Ntalaja, *The Congo from Léopold to Kabila: A People's History* (Zed Books, 2002).
[68] Victor Chimbwanda, The Authority of the Elders, or the Colonisers? Customary Law and Culture – Which Legal Skills? *International Journal of the Legal Profession*, Vol. 29, No.1 (2024), 1–21.
[69] *Ibid, 17;* Tambwe, L. Mining Statistics Bulletin, Ministry of Mines (2009). Available at: www.mines-rdc.cd. (Accessed: 12 January 2024); *Ibid, 18*.

2021. Many international mining companies interested in high-grade and low-cost ores are increasingly involved in the DRC's copper belt in the southern part of the country.[70] It might be contended that the DRC's mining industry is on track to maintain the same level of production of its main metals in the years ahead and to do even better than in previous years for copper.

Recent updates from the Mining Department inform that the total mineral wealth of the country is estimated in the tens of trillions of dollars, thereby offering opportunities for world mining companies having a high acceptance for risk and familiar with operating in complex or fragile environments.[71] Notwithstanding continuing conflict in the mining-rich regions in the east of the country and the potential for political instability and unstable commodity prices, mining operators continue to invest in their activities in anticipation of better market conditions and to keep operational positions in this profitable environment. The mineral resource deposits that have been researched and recorded and are currently being mined are situated in the east and part of central DRC. According to the 2009 mining registry data, only 11 percent of the national territory is covered by mining activities, with 3,053 different licences granted. Most of this area has yet to be discovered through geological and mining research.[72]

1.3.2. Legal Framework Governing the Mining Sector in the DRC

The mining sector in the DRC has undergone a gradual legislative evolution from the period of the Belgian Congo (colonial legislation) to that of the independent Congo (postcolonial legislation). Colonial legislation in the mining sector began with the Decree of 16 December 1910, amended and supplemented by the Decree of 16 April 1919, which regulated mining exploration and exploitation only in Katanga.[73] It was not until 1937 that mining legislation was adopted covering the entire national territory with the promulgation of the Decree of 24 March 1937.[74] This legislation was the emanation of the Government of the Belgian Congo. The latter Decree remained in force after the Congo's independence on 30 June 1960 for more than three years. The Congo, as an independent State, was first regulated in this sector with Ordinance-Law No. 67/231 of 3 May 1967 which provided for general legislation on mines and hydrocarbons and was

[70] *Ibid, 69.*
[71] *Ibid, 17.*
[72] *Ibid, 69.*
[73] Decree of 16 December 1910; Decree of 16 April 1919.
[74] Decree of 24 March 1937.

later repealed by Ordinance-Law No. 81-013 of 2 April 1981.[75] This legislation remained in force until 2002, when the legislature introduced new incentive legislation hereinafter referred to as Law No. 007/2002 of 11 July 2002 (the Mining Code), supplemented by its implementing measures in Decree No. 038/2003 of 26 March 2003 (the Mining Regulations). The latter two texts form the basis of the legal framework governing the mining sector in the DRC.[76] The scope of the reform of the legal framework put in place by the Congolese State through the 2002 Mining Code, as revised in 2018, only pertains to the exploration, exploitation, processing, transport and marketing of mineral substances classified as mines or quarries, as well as the artisanal exploitation of substances and their marketing. The fields of hydrocarbons and thermal or mineral waters are governed by specific legislation.[77] Through this new legal framework, the Congolese State wanted to offer investors, whether natural or legal persons, a legal tax, customs and foreign exchange environment favourable for the development of their activities in the mining sector.[78] As can be seen from the explanatory memorandum to the new Mining Code, the legislature was keen to set up incentive legislation with objective, rapid and transparent procedures for granting mining or quarrying rights.

1.4. Gap in the Literature

The analysis of the legal framework governing the mining sector in the Democratic Republic of Congo (DRC) in the light of South African mining law sheds light on what could be improved in the management of this sector. It offers the opportunities to appraise the unexplored and unconsidered existing relationship between the Mining Code and its regulations, and other related legislation such as environmental law, health and safety legislation, forest law and land law in the DRC. Based on the observation of the author, it might not be easy to reconcile all these sets of laws and regulations. In South Africa for example, the mining sector is regulated by a number of national legislative instruments simultaneously, with the Constitution coming at the vanguard. The section 2 of South African Constitution 1996 provides that the constitution is the supreme law of the Republic, any law or conduct inconsistent with it is invalid and will not have any legal force. All South Africans are guaranteed a fundamental right to an environment that

[75] Ordinance-Law No. 67/231 of 3 May 1967.
[76] Law No. 007/2002 of 11 July 2002; Decree No. 038/2003 of 26 March 2003.
[77] Law No. 007/2002 of 11 July 2002.
[78] Emery Mukendi Wafwana, *Le Droit Minier: Principes de Gestion du Domaine Minier [Mining Law: Management Principles for the Mining Domain],* (Juricongo, 2005), 66-73.

is not harmful to their health and wellbeing. Sections 7(2) and 24 of the South African Constitution,[79] vests the state with a duty to take positive action to fulfil and ensure the respect of South Africans' right to a healthy environmental. As a result, several legal instruments in line with resource exploitation draw their purpose from this fundamental right.

In the DRC, the legal framework governing the mining industry does not seem to work in harmony with other laws that directly or indirectly impact the governance of the mining sector in the country. Although all the reforms carried out by the 2002 Mining Code, as revised in 2018, have laid down the conditions for the exploitation of the minerals, the protection of the environment and land rights of indigenous persons, these reforms seem to lead to difficulties in interpretation. It is difficult to reconcile the Mining Code with other laws on the sustainable and efficient management of mineral resources and environmental protection. Article 47 of the DRC's constitution and Title VII of the Labour Code guarantees all Congolese the right to a decent, safe, and healthy environment.[80] However, the ineffectiveness of the laws in this matter is striking.

One example is that mining regulatory framework does not define the fundamental principles and the rules of organisation for health, safety, and environment in the DRC's mining industry. The interlocking of different types of legal texts in the field of mineral resources, land, forestry and the environment can be seen in the following areas: environmental assessment of mining activities, the protected areas regime, the basis of civil liability, and access to justice for environmental protection associations defending collective interests. The dearth of harmony and combination in the interpretation of the various laws relating to the mining industry has resulted in a legal impasse that requires a solution. The Congolese mining industry lacks a coherent legal framework bringing together all the legal texts involved in the exploitation and management of the mining sector. Such a legal deficiency makes the interpretation and application of the mining legal texts difficult, with the meaning of each text becoming more ambiguous. This is a knowledge gap which needs to be addressed in this study.

This research aims to revisit the legal framework pertaining to the mining industry in the DRC through comparative perspectives from the South African mining framework. It particularly seeks to understand how and whether the DRC's legislature effectively

[79] The constitution of South Africa,1996.

[80] The Constitution of the Democratic Republic of Congo, 2006; The Labour Code of the Democratic Republic of Congo, 2002, Law No. 015/2002.

addresses the existing legal shortcomings between the Mining Code and other mining related laws that affect the mining industry, particularly legislation concerning land, forestry, health and safety, and the environment. The overall objectives of the research are to:

1. Review the DRC's mining legislative and regulatory framework in light of the world's mining legal frameworks.
2. Appraise if the South African mining legislative and regulatory framework could serve as best practice for the DRC's mining industry.
3. Analyse the relevance of the DRC's Mining Act against other mining-related regulatory frameworks that effectively control mining activities.
4. Evaluate the appropriateness of developing a mining legal framework that includes all other mining-related legislation and regulations governing the mining sector in the DRC.

Against this setting, the analysis of the mining legislation in the DRC and South Africa constitutes the core theme of this research. On this basis, the overarching research question that this research aims to address is 'to explore the extent to which the South African mining regulatory regime might serve as a model of best practice for mining regulation in the Democratic Republic of Congo?'

Similarly, the research seeks to address the following specific research sub-questions:

1. What is the mining legal environment in the DRC and how does the mining legislature respond to the shortcomings in the current mining legislation?
2. How does the mining legislation in the DRC comply with the international mining legal practice?
3. To what extent is the Congolese legislature prepared to put in place a body of mining legislation that effectively integrates and addresses licensing, mining health and safety, and environmental conditions in a concomitant and harmonious manner?
4. Why would the harmonisation and combination of the Mining Code with other mining-related laws be effective and useful for the DRC's mining industry?

The extent of mining-related environmental and land degradation in the DRC is still unknown. Despite relatively low historical deforestation rates over the period 1990-2010,

environmental degradation has increased sharply in the country in recent years, and future land-use scenarios predict a continued increase in deforestation due to population growth and the expansion of commercial agriculture, as well as timber and mineral extraction. Notwithstanding the State's exclusive ownership of land and subsoil resources, a number of specific land rights are attached to customary occupation, as recognised in the Indigenous Peoples' Rights Act.[81]

However, the legal regime applicable to the mining industry ignores these rights. The DRC has legal obligations under the international instruments it has ratified, but the recognition of land rights under national law does not comply with these international obligations; neither does the procedure for granting mining concessions and licences under the national mining legislation comply with the requirements of international human rights standards. The shortcomings in the current legal framework governing the mining sector are said to be mainly the result of the lack of harmonisation and combination of the Mining Code with other mining-related laws. They also resulted from the international interventions in the elaboration of the DRC's Mining Code, whose contribution notably failed to address the issues of state sovereignty over minerals, land rights of indigenous peoples and local communities, good governance, and poverty.

1.5. Research Rationale

The rationale behind the choice of the jurisdiction of South Africa as the comparator in this research lies in the historical similarities in the development of the land and minerals law in both countries. First, it is worth noting that South African and the DR Congolese land and mineral laws result from an oppressive history and have always been based on the Roman law premise that the landowner is also the owner of the minerals embedded in and under the soil of the land he owned.[82] The underlying basis for this premise differed through the ages with the early Romans regarding minerals as the fruits of the land,[83] thus only exploitable by those who had the right to the fruits of the land, and the later

[81] Law No. 22/030 of 15 July 2022 on the Protection and Promotion of the Rights of Indigenous Pygmy Peoples.

[82] Trojan Exploration Co v Rustenburg Platinum Mines Ltd, 1996, (4), SA 499 (A), p. 537C; H Mostert and A Pope, The principles of the law of property in South Africa (Cape Town, Oxford University Press, 2010), p. 269.

[83] BE Morton, "The acquisition and registration of mineral rights in horizontal strata" (LLM, University of the Witwatersrand, 1985), p. 1; M Kaser, Römisches Privatrecht (München, CH Beck'sche Verlagsbuchhandlung, 1971), p. 93; HP Viljoen, "The rights and duties of the holder of mineral rights" (PhD, Leiden, 1975), pp. 6-9; J De Boer, De winning van delfstoffen in het Romeinse Recht, De Middeleeuwse juridische literatuur en het Franse Recht tot 1810 (Leiden, Universitaire Pers, 1978), p. 54.

development of the '*cuius est solum eius et usque ad coelum et ad inferos*' [whose is the soil, his it is up to the heavens and down to hell, meaning a landowner's rights extend vertically, encompassing the space above and below their property] maxim also known as the '*ad coelum*' doctrine[84] imported by the Glossators during the Middle Ages.[85]

Secondly, both countries went through oppressive history based on the land confiscation process during the colonisation time prior to its gradual process of recovery. From onset, in the mining sector, black diggers were largely prevented from gaining any significant mining discoveries as rules were created to prevent them from acquiring digging permits. The 1913 Land Act in South Africa prohibited black people from buying or renting land in areas designated as white and paved the way for further legislation restricting the rights of black people and their ownership of land such as Native Trust and Land Act 1936 and henceforth minerals rights.[86] In the Democratic Republic of Congo likewise, the 1885 and 1888 Royal Decrees, then the colonial Decrees of 1910 as amended and supplemented by the Decree of 1919, established the principle that no one had the right to occupy unoccupied land without a title and that such land should be considered as belonging to the State. King Leopold II and then the Belgian government prohibited the unauthorised exploitation of mines or quarries whose ownership had not been legally recognised on 30 April 1887.[87] Subsequently, the colonial administrations in the DR Congo considered that the land occupied by "natives" was without owners because their holders had no title deed. This principle, known as the presumption of '*domaniality*', enabled the colonial administration in practice to dispose of the land in which it had interest. These vacant lands were therefore nationalised by the colonial administration; something which led to a legal problem of reconciling the interests of the parties involved: the indigenous populations and the colonial power. It is submitted that both countries have striking similarities in the development of land and minerals legislations. Unlikely the DR of Congolese however, the South African mineral regime and industry

[84] This maxim – "Ownership of what lay beneath the surface of private land went with ownership of the land" was especially important for minerals even during the pre-classical period - JA Crook, Law and life of Rome (New York, Ithaca Publishers, 1984), p. 161; GJ Pienaar, "Ontwikkelings in die Suid-Afrikaanse Eiendomsbegrip in Perspektief", THRHR, 1986:1, pp. 216-227.
[85] MO Dale, "A historical and comparative study of the concept of acquisition of mineral rights" (LLD, UNISA, 1979), p. 78; BLS Franklin and M Kaplan, The Mining and Mineral Laws of South Africa, (Durban, Butterworths, 1982), p. 4.
[86] Native Trust and Land Act 1936; Land Act 1913.
[87] *Ibid, 15*; *Ibid, 33*; William A Taylor, Konfliktrohstoffe [Conflict Raw Materials] in Philipp Gieg, Julien Bobineau and Timo Lowinger (ed.), Handbuch Demokratische Republik Kongo, (Frank & Timme, 2024), 269-280.

comply with mining good practices and have made tremendous improvements in terms of equity before the law and rule of law in its mining industry.

1.6. Historical Perspective on Mining Legislation in the DRC

The organisation of land ownership was one of the first concerns of the independent Congo. On 1 July 1885, having proclaimed the principle that no one had the right to occupy unoccupied land without a title and having decided that such land should be considered as belonging to the State, King Leopold II prohibited the unauthorised exploitation of mines or quarries whose ownership had not been legally recognised on 30 April 1887.[88] The Royal Decree of 8 June 1888 was the first legal text relating to the organisation of mining activity in the country. This Decree had the merit of:[89]

1. establishing a distinction between the ownership of mineral resources and the ownership of land, the latter not conferring any rights over mineral resources,
2. making mining activities subject to the granting of a special concession by the State,
3. recognising the right of indigenous peoples to undertake mining activities on the land they occupy.

For Ndaywel, this last achievement was the prelude to artisanal mining. In 1906, three large, chartered companies were created. These mining companies later played an important role in the country's economic development and were required to give some 30% of their profits to the state.[90] However, under the 03 July 1890 Loan Agreement, Belgium had the right to annex the Independent State of the Congo should the latter fail to fulfil its obligations at the end of the ten-year period. In November 1907, the Belgian government signed a Cession Treaty with the Independent State of the Congo in which Belgium reaffirmed its willingness to respect the acquired rights.[91] The new status of the Congo as a Belgian colony was organised by the Law of October 1908, known as the "Colonial Charter".[92] During the colonial period, there were three legal Acts relating to the organisation of mining activities: the Decree of December 1910, amended and

[88] *Ibid, 15*; *Ibid, 33*; William A Taylor, Konfliktrohstoffe [Conflict Raw Materials] in Philipp Gieg, Julien Bobineau and Timo Lowinger (ed.), Handbuch Demokratische Republik Kongo, (Frank & Timme, 2024), 269-280.
[89] Royal Decree of 08 June1888.
[90] *Ibid, 15*; *Ibid, 33*.
[91] *Ibid, 13.*
[92] Law of 18 October 1908.

supplemented by the Decree of 16 April 1919, and the Decree of 24 September 1937 which regulated mining activities throughout the Belgian Congo.[93] It should be noted that the first two Decrees regulate mining exploration and exploitation in the province of Katanga only.[94]

After the independence of the country on 30 June 1960, the legislation prior to the Ordinance-Law No. 66-33 of 7 June 1966, commonly known as the "Bakajika Law", did not revoke the legal framework for the mining sector established by the colonial authorities. However, the Constitution of 1 August 1964, while continuing to guarantee property rights under customary or written law, empowered the legislator to transfer certain property rights to the State in return for fair compensation on grounds of public interest.[95] It is worth noting that the two Decree-Laws are the basis for the various mining laws later passed in the country since they restored to the Congolese State its original rights and power to act with full sovereignty. Finally, Ordinance-Law No. 66/243 of 07 June 1966 established the principles that are the basis of the current Mining Code.[96] Decree-Law No. 67-231 of 11 May 1967 on general legislation of mines and hydrocarbons, and Decree-Law No. 67-416 of 23 September 1967 on mining regulations had the same objective as Decree-Law No. 66/243 of 7 June 1966.[97] It is important to underline that the 1937 Decree remained in force until the promulgation of the first mining legislation of the independent Congo in 1967. This period was mainly characterised by two laws and their implementing measures:[98] Ordinance-Law No. 67/231 of 11 May 1967 on general legislation of mining and hydrocarbons, supplemented by Ordinance-Law No. 67/416 of 23 September 1967 on mining regulations, which replaced the 1937 Decree, and Ordinance-Law No. 81/013 of 2 April 1981 which amended and supplemented the 11/05/1967 Law. These two texts reformed the colonial mining legislation of 1937 by introducing two mining regimes: the common law regime and the conventional regime.[99] It should be noted that the 1967 legislation was in turn

[93] The Decree of December 1910, amended and supplemented by the Decree of 16 April 1919 and the Decree of 24 September 1937.
[94] Decree of 16 December 1910; Decree of 16 April 1919; Decree of 24 September 1937.
[95] *Ibid, 15.*
[96] Ordinance-Law No. 66/243 of 07 June 1966.
[97] Decree-Law No. 67/231 of 11 May 1967; *Ibid, 89.*
[98] Ordinance-Law No. 67/231 of 11 May 1967; Ordinance-Law No. 67/416 of 23 September1967; Ordinance-Law No. 81/013 of 02 April 1981.
[99] Law No. 67/231 of 11 May 1967 on general legislation of mining and hydrocarbons, supplemented by Ordinance-Law No. 67/416 of 23 September 1967 on mining regulations and Ordinance-Law No. 81/013 of 2 April 1981 which amended and supplemented the 11 May1967 Law.

amended and supplemented by Decree-Law No. 81/013 of 2 April 1981 on general mining and hydrocarbon legislation.[100] Nevertheless, this amendment did not introduce any major innovations since it did not depart from the broad lines of the 1967 amendment. However, it is worth underlining that the 1981 Decree-Law was quickly supplemented by other laws including: Decree-Law No. 82/039 of 5 November 1982 and Law No. 86/008 of 27 December 1986. The former introduced a selective liberalisation of artisanal mining to fight the illegal export of minerals, while the latter required mining and oil companies to extend their corporate objects to include agricultural and social activities, and to have at least one building made of durable materials in each centre of activity, as far as trading posts for precious minerals are concerned.[101]

Initially, the mining and hydrocarbon sectors were governed by the same legislation, which is Decree-Law No. 81/013 of 2 April 1981 on mining and hydrocarbons, as amended and supplemented by Decree-Law No. 82/039 of 5 November 1982.[102] This was repealed and replaced by Law No. 007/2002 of 11 July 2002 on the Mining Code, which separates mining from hydrocarbons.[103] The new legislation introduced in 2002 was intended to be more competitive, objective and fast, with transparent procedures for the granting of mining or quarrying rights, as well as to set a tax, customs and foreign exchange regime that is attractive to investors. A few weaknesses in the Mining Code or Law No. 007/2002 of 11 July 2002 led to its amendment by Law No. 18/001 of 09 March 2018.[104] The revised Mining Code of 2018 contains several advances and innovations which, if properly applied, could significantly improve the governance of the mining sector and bring significant economic and social benefits to citizens. However, fiscal issues are monopolising the attention of stakeholders, while the implementation of other provisions, such as the rights to land and resources for indigenous people, the protection of the environment, cultural heritage, and health and safety are being relegated to second place or even neglected. For example, nowadays, the land crisis in eastern DRC has become a source of violence, resulting from the fight for access to and control of natural resources, as well as issues of power and identity.

[100] Decree-Law No. 81/013 of 2 April 1981.
[101] Decree-Law No. 82/039 of 5 November 1982; Law No. 86/008 of 27/12/1986.
[102] Decree-Law No. 81/013 of 2 April 1981 on mining and hydrocarbons, as amended and supplemented by Decree-Law No. 82/039 of 5 November 1982.
[103] Law No. 007/2002 of 11/07/2002.
[104] Law No. 18/001 of 09 March 2018.

1.6.1. Research Methodology: Qualitative Doctrinal Legal Research

Several subjects on legal research are accessible and have been approved as textbooks for legal research courses across the world.[105] Admittedly most of these manuscripts on research methodology for law are targeted exclusively at blackletter law rather than non-traditional, interdisciplinary research projects. These documents are useful in terms of equipping researchers with basic research skills including the knowledge of the sources of legal authorities, locating cases and statutes, the use of indexes and citators, and the use of computer information retrieval systems such as Westlaw and LexisNexis. In a word, the blackletter law approach also known as doctrinal legal research, or theoretical legal research, relies extensively on using court judgments and statutes to explain law. It aims to systematise, rectify, and clarify the law on any particular topic by a distinctive mode of analysis of authoritative texts consisting of primary and secondary sources. One of its assumptions is that "the character of legal scholarship is derived from law itself."[106] The research under study is methodologically qualitative. It applied a doctrinal legal approach and a case-study respectively as the method and technique to analyse the mining legislation in the DRC and South Africa. This section lays down and offers an in-depth explanation of the methodological approach applied to this study.

1.6.1.1. Qualitative and Doctrinal Methods for Legal Research

The relevance of the choice of a methodological approach for research depends on the identification and analysis of its advantages and shortcomings. Bryman's logic of triangulation based on the parallelism between qualitative and doctrinal research identifies some ways to bring together these two research approaches. It stems from this that "(1) the qualitative research outcome can support the doctrinal method, (2) the contrary (vice versa) is true, (3) the combination of both approaches provides a more general picture of the subject under study, (4) the doctrinal approach analyses structural features (5) while the qualitative deals with procedural aspects, (6) the quantitative approaches derive from the researcher's perspective, (7) while qualitative research highlights the perspective of the subjective, (8) qualitative research can solve the generality of the problem by adding doctrinal findings, (9) whereas qualitative findings

[105] Richard Collier, We're All Socio-Legal Now? Legal Education, Scholarship and the Global Knowledge Economy: Reflections on the UK Experience, Sydney Law Review, Vol. 25 (2004), 66-88.
[106] Terry Hutchinson, and Nigel James Duncan, Defining and Describing What We Do: Doctrinal Legal Research, Deakin Law Review, Vol. 17, No. 1 (2012), 83-119.

may enable the understanding of correlations between variables in data sets, (10) the combination of both approaches -qualitative and doctrinal, can clarify the relationship between micro and macro levels in a substantial area, (11) which can be suitable in different stages of the research process, and (12) there are hybrid forms that use qualitative research in quasi-experimental designs."[107]

Doctrinal legal research critiques legal doctrines through the recent analysis of statutory provisions and cases. This approach emphasises the analysis of legal rules, principles or doctrines as compared to non-doctrinal legal research, which analyses the ties of law with society, groups, and people. Non-doctrinal research involves an empirical inquiry into the operation of law, seeking to understand how the doctrine or principle has been adopted in real world settings. While doctrinal legal research is based upon researching the blackletter of the law, non-doctrinal research focuses on research about the wider ambit of law, i.e. the law in action. In view of this, doctrinal research may be understood as armchair research or basic or fundamental research, while non-doctrinal involves empirical research. The doctrinal method begins with a proposition as a starting point or focus. It then determines the law in statutes, judicial pronouncements and discussions in commentaries, textbooks, journals, and debates. It reads and analyses information in a holistic way before writing up its findings. Doctrinal legal research can be either quantitative or qualitative.[108]

Qualitative research has thrived, based around multiple dimensions focusing on the real world, rather than specialised research settings, in order to understand, describe and explain social phenomenon from the inside in multiple ways. A qualitative approach proceeds from the analysis of individuals' or groups' experiences, focusing on interactions and communications or documents. The common element in every qualitative study is that it seeks to identify how people understand the world, what they are doing or what is happening to them in a way which could be meaningful and offer rich insights.[109] Qualitative and doctrinal research converge in their methodological, theoretical, or epistemological processes, to some extent but also diverge. Table 1.1 below identifies a few elements of convergence and divergence in both approaches.

[107] Uwe Flick, *An Introduction to Qualitative Research*, (SAGE Publications Ltd., 2006), 33.
[108] *Ibid, 103.*
[109] *Ibid.*

Table 1.1: Comparative analysis of qualitative research and doctrinal research

	Convergence	Divergence
Qualitative Research Vs Doctrinal Research	Experiences, interactions, and documents are analysed in their natural context. Concepts and hypotheses are developed and refined in the process of research. Researchers themselves are also an important part of the research process, either due to their own personal experiences, or research experiences. A major part of the research relies on texts and documents, and issues of transcribing complex social situations into texts is one of the major concerns of qualitative research. It proceeds from the idea that theory and method should be appropriate to what is studied. They can be adapted if they do not fit in. It takes cases and contexts seriously.	Qualitative research places a different emphasis on legal doctrines and concepts. The emphasis of doctrinal research however is purely basic and fundamental in exposing the law as it exists. It looks at the law from the perspective of social reality. Qualitative research seeks to address broader issues in terms of aims and objectives. Doctrinal research's focus is on a particular point of law. Qualitative research does not focus exclusively on case reports and other traditional primary and secondary legal documents for analysis. However, doctrinal research relies on doctrinal methods for which a thorough grasp of the fundamentals is needed for the qualitative researcher to plan the research trajectory in a meaningful manner. Qualitative research takes a different route from doctrinal research, focusing on the analysis of law in action as distinguished from law in books.

Source: Magha-A-Ngimba Charles Gimba 2024.

1.6.1.2. Aims and Objectives of Qualitative and Doctrinal Methods

As identified in the table below, qualitative, and doctrinal methods have different aims and objectives. While the aims and objectives of doctrinal research are to determine and analyse the legal concepts and doctrines, those of qualitative are about law in action or analysing the legal idealism from the perspective of social reality. Qualitative research focuses on the social facets of the law; thus, its primary aim is to use empirical data to determine how the law and legal institutions affect or mould human attitudes and assess their impact on society.[110] It is worth noting that while each of these approaches has its utility and uniqueness, they remain independent of each other. Table 1.2 below provides a comparison of the two approaches.

Table 1.2: Qualitative research aims/objectives vs. Doctrinal research aims/objectives.

Qualitative research aims and objectives	Doctrinal research aims and objectives
Determining the forces that shape, reshape and mould the law. Analysing how far the law has been enforced and administered. Investigating the factors which mould the attitudes and behaviour of the enforcement machinery when interpreting and enforcing the law. Understanding whether beneficiaries under the law use it or if the law is merely symbolic, whether the targeted beneficiaries are benefitting from the law, or if the law is failing to help people where the problem lies. Aiming at finding the root causes responsible for the poor performance of the law. Aiming at analysing the impact of law on the behaviour and attitudes of society, people, and groups.	Identifying the law from the legal statutes, subordinate legislations, and judicial precedents. Examining the purpose and policy of existing law. Aiming at the consistency and certainty of laws. Aiming at the study of legal institutions.

Source: Magha-A-Ngimba Charles Gimba 2024.

[110] Mike McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh University Press, 2017).

1.6.1.3. Tools of Qualitative and Doctrinal Legal Research

Each research approach has its own appropriate tools and methods. Appropriate tools ensure a well-planned and systematic enquiry. When conducting qualitative research, the researcher is required to develop procedures that are reliable and valid. Reliability in this context refers to the consistency of a measure, while validity concerns the way in which the measure is to achieve its aims.[111] Like doctrinal research, qualitative research has two main ways of garnering data, namely primary and secondary sources. Primary sources for qualitative research involve interviews, questionnaires, schedules, interview guides and observation. The secondary sources are published or unpublished documents. On the other hand, statutory materials, subordinate legal materials, and case laws are the primary resources for doctrinal research, while textbooks, legal articles, parliamentary debate, etc. are referred to as the secondary resources.[112] The table 1.3 below offers some merits and shortcomings of both approaches.

Table 1.3: Merits and shortcomings of qualitative and doctrinal methods

Qualitative Research		Doctrinal Research	
Merits	Shortcomings	Merits	Shortcomings
Highlights the gaps between goals and social reality. Depiction of a true picture of law in action. Highlights the gaps in relation to the practice of law enforcement agencies. Highlights the reasons behind the failure of a law in the real world. May be inactiveness or willingness on the part of those entrusted with the task of enforcing the law or may be	Time-consuming and costly. The researcher must build upon the groundwork of doctrinal research, being familiar with the doctrines and concepts essential for effective research. Its primary tools of data collection require a specialised skills set right from the stage of planning through to execution.	Provision of quick answers to practical problems through analysing legal principles, concepts, and doctrines. Takes less time to ensure a constant stream of information regularly. Provides insights into the evolution and development of the law. Offers a logical explanation of the law, at the same highlighting	Subjective and easily victim of the researcher's bias towards the subject matter in hand. A different researcher may therefore explore an entirely different dimension to the same question. Lack of social facts, rendering projections far removed from social reality (this is a serious concern as law can act as an instrument of social

[111] Dianne Hinds, *Research Instruments in The Researcher's Toolkit* (Routledge, 2000), 42; Charles F. Cannell and Robert L. Kahn, *The Collection of Data by Interviewing* (Amerind Publishing Co.,1953), 330-331.
[112] *Ibid, 104.*

resistance on the part of intended beneficiaries for multifarious reasons. Exposition of the weakness in the operation of law. Identifying the role and contribution of law in bringing about desired changes. Highlights the gaps left in the law in relation to social reality so that law can be reassessed in the light of new information. Significant resource in the form of social feedback to policy-framers, legislators, and judiciary so that they can better enforce, legislate, and interpret the law. Shapes social legislations in tune with the social engineering doctrine of the modern state.		inconsistencies and uncertainties in the law. Reveals gaps, ambiguities and inconsistencies in the law and sets out how the law can be rendered more purposive and effective. Lays down a roadmap for the development of the law by avoiding the pitfalls. Helps in incrimination of legal knowledge base. The future direction of the law can be predicted based on such studies. Provides a sound basis for non-doctrinal research (in the absence of the required preliminary knowledge, non-doctrinal research would be directionless and therefore futile).[113]	transformation). Neglect of the factors lying outside the strict parameters of the law, which might have a bearing upon legal principle, theory, or doctrine. Disregards the practice and attitudes of officials and others implementing the law.

Source: Magha-A-Ngimba Charles Gimba 2024.

It follows from the above that qualitative research emerged primarily as a critique of doctrinal research because the outcomes of the latter were viewed as inadequate and incomplete in the absence of an analysis performed in real-world settings. Nowadays, however, both methods have proved to be complementary, as they can inform the law

[113] S.K. Verma and Afzal Wani, Legal Research and Methodology, (India Law Institute, 2001), 656-657.

and policy and are interdependent of each other irrespective of their merits and shortcomings.

1.6.2. Mining Legislation Study as Qualitative and Theoretical Legal Research

This research examines the legal framework pertaining to the mining industry in the DRC in light of South African mining law. In this regard, it has been placed under the heading of doctrinal legal research. Theoretical legal research may in essence be viewed as research that asks what the law is in a particular area.[114] In doing so, it seeks to collect and then analyse a body of case law, together with any relevant legislation, also known as primary sources. As outlined above, in the case of doctrinal research, the collection and analysis of information are often undertaken from a historical perspective and may also cover secondary sources such as journal articles or other written commentaries on case law and legislation.[115] The main aim of doctrinal research is to describe a body of law and explain how it applies. As such it helps the researcher provide an analysis of the development of the law in terms of judicial reasoning and legislative enactment.[116] In this context, the research is regarded as normative or just theoretical. Similarly, purely doctrinal research is not empirical.[117] Whether the activity of engaging in legal research may be regarded as part of social science has already been discussed in detail elsewhere.[118] The main argument of the research under study is that mining regulation is an authoritative, rules-based discipline where doctrinal comments are merely self-referential and do not disclose anything about the outside world. However, this view also acknowledges that where mining legislation engages with society in a way revealed by legal realists or where a researcher goes beyond jurisdictional authority to reflect on comparative mining legal issues, that theoretical legal study can take on some of the fundamentals of social science research.[119] While the conventional assumption is that legal research does not qualify as social science research,[120] some would not agree but would contend that theoretical legal research is qualitative not merely because it is non-

[114] *Ibid, 103.*
[115] *Ibid, 103.*
[116] *Ibid.*
[117] H. Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 2014), chapters 3 and 4.
[118] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961); Ronald Dworkin, *Taking Rights Seriously*, (Cambridge University Press, 1978); *Ibid, 103.*
[119] *Ibid, 103.*
[120] *Ibid, 110.*

numerical, but because modern academic legal research has migrated beyond a strictly scientific or formalistic approach to rules.[121]

Contemporary legal research like the one under study is not about asserting the law or solely the pursuit of textual analysis. Doctrinal research tends to be conducted within an approved social setting with specific inferences drawn which could be verified (that is, they are confirmable) by a superior court.[122] In any case, when the main objective is to consider legal research from a best or good practice perspective, as is the case in question, such classification is rather meaningless. Engaging in blackletter research involves acknowledging challenges regarding the legal dilemmas that the researcher is expected to face. Admittedly, the legal sources needed to determine what the law is, in terms of case law and legislation, may be accessible, but the application of the law remains contentious.[123] This might indeed be the very reason why the research was conducted in the first place. Doctrinal research may fail to cover what would technically be described as an empirical method, but this does not signify inferences will not be gleaned from what is found. Many legal researchers find it difficult to readily draw the line between research pointed at finding a specific statement of the law and an in-depth analysis of the process of legal reasoning. For example, Glanville Williams[124] identifies several types of legal research: one being "the task of establishing the exact state of the law on a particular point" and the other "the kind of work done by lawyers (often but not always academic lawyers) who desire to discover at greater length some implications of the state of the law."[125] Williams' approach could be defining one type of research which differs only in degree, namely that of theoretical legal research. The methodology applied would be common to both approaches.

1.6.3. Doctrinal and Qualitative Research to the Mining Legislation Study

The present research established a methodology which relies on key resources to ensure that all possible relevant documents are discovered. Doctrinal research applied to this study confirms two key points already revealed by previous studies in the field. The first

[121] *Ibid, 103.*
[122] *Ibid, 111.*
[123] John Finnis, *Natural Law, and Natural Rights* (Oxford University Press, 2011); *Ibid, 103.*
[124] David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005); Neil MacCormick, *Institutions of Law* (Oxford University Press, 2007); Joseph Raz, *The Authority of Law*, (Oxford University Press, 2009).
[125] Ronald Dworkin*, Law's Empire*, (Harvard University Press, 1986); *Ibid, 116; Ibid, 103.*

is that law is not objectively ascertainable because it is not there to be found. The second is that lawyers are not trained in an effective research methodology.[126] The methodological steps summarised below indicate that the underlying rationale behind legal research remains formalist. However, the discovery of relevant law and the development of an argument regarding the application of the law can only proceed based on the knowledge of the social context which triggered the creation of the rules.[127] Law is not just self-referential but can teach us something about the real world. Admitting that doctrinal legal research could be perceived as qualitative is the first step toward developing a trustworthy qualitative doctrinal legal research methodology. However, if the law can solely be found through the application of a methodical approach and the same law would be discovered no matter who was conducting the research then arguably doctrinal research is, in a way, quantitative.[128]

Hutchinson describes doctrinal research as quantitative rather than qualitative research.[129] She also notes lawyers' reluctance and inability to transcend the doctrinal in their research and widen their approach to embark on social science methodologies. She advises that qualitative research is an investigation of "social interactions and reality as experience"[130] rather than "dealing in specific cases."[131] Hutchinson's description of theoretical legal research as not being qualitative reveals the established paradigm of legal research which suggests that there is some way of an objective approach to finding the law. Conversely, Hutchinson and Duncan observe that nowadays, more than ever, it is imperative for academic lawyers who are working within an increasingly sophisticated research context to explicate and defend what they do when they conduct "blackletter research." There is a need for lawyers to elucidate their methodology in language similar to that used by other disciplines.[132]

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[126] *Ibid, 103.*
[127] *Ibid, 110.*
[128] S.A. Farrar, *Islamic Jurisprudence, and the Role of the Accused: A Re-Examination* (Cambridge University Press, 2003).
[129] William Twining, *Karl Llewellyn, and the Realist Movement* (Cambridge University Press, 1973), chapter 8.
[130] Hugh Collins, *Marxism and Law* (Oxford University Press, 1982); Roger Cotterrell, *The Sociology of Law: An Introduction* (Oxford University Press, 1992).
[131] Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Carol Smart, *Feminism, and the Power of Law* (Routledge, 1989).
[132] Roscoe Pound, Law in Books and Law in Action, American Law Review, Publication: 44, (1910); *Ibid, 103*.

The assumption that doctrinal research is quantitative but not qualitative is at odds with the type of judge's reasoning. Judges' reasoning is inductive, analysing a variety of authorities pertinent to the facts, originating a general principle of law from these authorities, and applying it to the facts they are dealing with. This dynamic construction between law and facts is described as the "stepping stone approach."[133] In common law, the lawyer uses a process of distinguishing cases on their facts until what is left is an applicable principle. This inductive reasoning based on the process of elimination is known as a principle which is drawn from a comprehensive analysis of all relevant precedent.[134] Based on the social science perspective, it is contended that judicial inductive reasoning, which is what doctrinal research is all about, should be qualitative in its research methodology. On the grounds of what has been developed above, it is submitted that theory constructed from qualitative data analysis typically includes a statement or set of statements regarding correlations between variables or concepts that focus on meanings and understandings. Theories influence the conduct of qualitative analysis. So, the qualitative researcher tries to put in place a theory to explain the phenomenon in a more useful and comprehensible way.[135] However, some believe that focusing on meanings makes qualitative research challenging, as meanings are more elusive than quantitative statistics.[136]

Ultimately law could be knowable, but it is not necessarily foreseeable. Doctrinal research is not merely about determining the correct legislation and the relevant cases and then coming up with a statement of the law which is factually provable. Its process involves selecting and weighing materials, considering hierarchy and authority as well as knowing social background and interpretation.[137] Black letter research is not merely textual analysis or self-referential exercise. It is rather a process of understanding the social context of decisions and garnering implications which should be pondered in a range of real-world factual circumstances.[138] Under doctrinal approach, the researcher seeks to build knowledge from the provision of advice and the pursuit of litigation since modern academic legal research deals with and explains the outside world. Admittedly

[133] Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, 1999); John Gardner, and Timothy Macklem, *Reasons, Reasoning, Reasonableness* (Oxford University Press, 2002); Alfred R. Mele, and Piers Rawling, *The Oxford Handbook of Rationality* (Oxford University Press, 2004).
[134] *Ibid, 103.*
[135] *Ibid, 103.*
[136] *Ibid, 116.*
[137] *Ibid, 103.*
[138] *Ibid, 106.*

any law prediction in given environments could ultimately be verified in a court.[139] In view of this, it is admitted that doctrinal research is qualitative. In any case, even if this view cannot be supported from a strict social science or epistemic stance, it is not an offence for a researcher to analyse an issue concerning legal rules using the discipline or organisation of a qualitative approach. Traditionally, doctrinal legal research proceeds on the basis that it is possible to find the law without inquiry into meaning or origins.[140] As a matter of illustration, it might be argued that the lawyer is encouraged to research from the perspective of the client whereas the science researcher or scientist has to acknowledge contrary positions.[141] "In a modern interdisciplinary framework, where the research is being directed, read and more importantly 'judged' by those outside a narrow legally trained discipline, articulation of method is vital – especially if funding is tied to quality, and quality depends on methodological clarity", said Hutchinson and Duncan.[142]

1.6.4. Doctrinal Research Methodology to the Mining Legislation Study

Doctrinal legal research is said to be qualitative owing to the law being reasoned and not found. Theoretical legal research acknowledges the fact that the law cannot be objectively isolated. Doctrinal legal research methodology aims to establish it as an approach which takes into account the nature of law.[143] In doing so, the researcher needs to refer to the social sciences to get a sense of the objectives of a research methodology. These objectives include three elements, namely the techniques, the research community and the methodological rules, which together constitute a methodological process through which each piece of research should pass for it to attain certain standards of integrity and validity.[144] Research methodology acts as a mediator between the researcher's subjective beliefs and views and the data and evidence produced by his/her research. When the research methodological approach functions properly, it acts as a filter that prevents poor-quality research from passing through.[145]

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[139] *Ibid, 103.*
[140] Browne v. Dunn (1893) 6 R. 67, H.L.; R v. M & N [2011] EWCA Crim 648.
[141] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2010), 340-346.
[142] Douglas W. Vick, Interdisciplinarity and the Discipline of Law, (2004), *Journal of Law and Society*, Vol. 31, No. 2, 163-193.
[143] *Ibid, 99.*
[144] *Ibid, 103.*
[145] Report to HEFCE by King's College London (ARC Network and The University of Manchester 2015). Available at: www.hefce.ac.uk/. (Accessed: 12 January 2024); Corporate Report, UK Department for Business Innovation and Skills: March 2014. Available at: www.rcuk.ac.uk/media/news/140416. (Accessed: 20 January 2024).

With legal doctrinal research, the methodology is very specific because the identification of relevant legislation, cases and secondary materials in law could be understood as corresponding to a social science literature review. Fink's definition of a literature review refers to "a systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars and practitioners."[146] For Fink, a thorough literature review should be able to select research questions and bibliographic or article databases, choose search terms, apply practical and methodological screening criteria, do the review, and systematise the results.[147] Fink's template applies to the research under study because the study on the mining legislation reflects the discipline of social science research. Since the research being looked at sits within the blackletter law approach and literature, it can also be viewed as providing a model which can be adapted to law. Frank's paradigm, when considered in the context of this research, fits as the foundation of a comprehensive approach.

1.6.4.1. Selecting Research Questions and Bibliographic or Article Databases

This research is about a comparative analysis of the legal framework on the mining industry in the DRC and South Africa and applies doctrinal legal research as the methodological approach for data collection. Its question is developed from a search for law that applies to the mining industry. Unlike policy research, this study does not involve the need for apparent value judgments. The established postulation however is that the law for the mining industry in the DRC and South Africa is there to be found. A research methodology must, however, seek to eradicate the possibility of selectivity. Cautions from Manderson and Mohr suggest that the natural penchant of the legally trained researcher is to investigate as a supporter and not as an academic.[148] It is also noteworthy to admit that the law is there to be derived from the reasoning applied to the sources found.

The analysis of the mining legislation in the DRC and South Africa sits under doctrinal law and is based on authority and hierarchy. As such, its objective will always be to base any statements about what the law on mining in both countries is on primary authority: that is, either mining legislation or mining case law. Secondary sources such as journal

[146] *Ibid, 103.*
[147] Tim Hope and Reece Walters, *Critical Thinking about the Uses of Research* (Centre for Crime and Justice Studies King's College London, 2008).
[148] *Ibid, 99.*

articles or textbooks thereon may be valuable in supporting a particular interpretation, but they cannot be a substitute for primary sources. In doctrinal legal research, the aim remains to conduct research as an academic rather than as an advocate.[149] In doing so, the methodological approach should be thorough, systematic, justifiable, and reproducible.[150] A number of other approaches can be envisaged but this will depend on the nature of the search. To set the stage for the theoretical legal approach in this research, a number of theoretical legal research tools have been applied, and their use and value also explained. To fit into a methodology, this research has garnered information from primary and secondary doctrinal sources. Primary sources include:

1. Encyclopaedic works– the use of this source helped as a starting point toward applying the research question in a specific circumstance. The concept of "encyclopaedic work" refers both to legal encyclopaedias and reference publications that endeavour to cover the law of jurisdiction, so the discussion will embrace a broad range of works in the field being explored.[151]
2. Legal encyclopaedias – in the context of this research, this source of information, largely published in LexisNexis, was essential for an understanding of the rationale underlying mining legislation and regulatory frameworks. Mining legislation is written in propositional style, which includes a series of statements or propositions of law, with every statement being supported by primary authority, that is, legislation or case law. Legal encyclopaedias are not interested in looking at the history of the law or analysing its social context, nor do they express any opinions about the law.[152]

It is of note that legal encyclopaedias will not appear where a legal principle cannot be buttressed by primary authority. In the circumstance of selecting a data source in a discipline that relies on authority, as in this case study, the legal encyclopaedia is a useful starting point. It is worth underscoring that although it is frequently quoted in court it is not in itself a source of law. It is used to determine authority and the next step must always be to refer to the original source of law.[153] As a strict blackletter law approach, legal encyclopaedias can be regarded as symbolic of the description of legal research

[149] *Ibid, 103.*
[150] *Ibid, 110.*
[151] *Ibid, 100*; *103.*
[152] *Ibid, 103.*
[153] *Ibid, 110.*

since it is exclusively normative. It represents a formalist or scientific approach to defining the law. Yet pretending that the traditional legal encyclopaedias are an objective approach to the law as it stands, would seem to be a mistake.[154] The use of legal encyclopaedias is faced with two possible criticisms. One is that notwithstanding their reputation as a result of their strict blackletter law approach there is still authorial involvement in choosing which cases are selected to represent the law. Besides, law should be regarded in a broader way and not strictly as blackletter. The way in which law, particularly mining legal frameworks, is applied may be described by policy. However, as part of a doctrinal methodology, these works are, as alluded to above, a valuable preliminary point as long-standing and stable sources in the history of publication. Furthermore, their easy accessibility either online or in hard copy is ensured in major law libraries. Any research grounded on legal encyclopaedias as a foundation may be seen as a reliable and reproducible stage of a methodology.[155]

This study has also used case digests as a source of information. A case digest is another encyclopaedic law resource consisting of publications that do not provide an overview of an area of law but instead digest case facts and holdings, classifying them under a comprehensive legal topic classification system known as a legal taxonomy.[156] Case digests assume knowledge of the area of law being researched. In the case under study, the application of this tool expects that while the researcher knows the topic, the circumstances that have instigated the need for research are slightly unusual, and the researcher needs to read through several cases to discover either relevant legislation or a parallel fact situation to see how the law might be applied.[157]

As a starting point, the legal encyclopaedia has offered this research an overview of the mining legal frameworks with case lists and relevant legislation, while the use of the case digest has assisted in accessing judicial authorities carefully categorised under the topic area being researched. It is worth noting that unlike an advocate who would favour the authority that supports the position being argued, an academic researcher should consider all authorities. This is not the last of the research steps; case law and legislation must be checked for currency and further judicial consideration. To live up to this purpose, this

[154] *Ibid, 99.*
[155] *Ibid, 103.*
[156] *Ibid, 110.*
[157] *Ibid.*

research has applied case-citators, which are most often used to find the correct citation or parallel citations for a case. Case-citators for this study had as the main purpose to enable the researcher to check the status of this research and to find other cases which have discussed the legal principles expressed in this research.

Under doctrinal legal research, checking the status of a case means pursuing its subsequent treatment to see if it is good law.[158] It also involves understanding the acceptable differences between the interpretations used to characterise the cases, for example the terms "followed," "applied" and "distinguished." Reflecting on the dynamism of law, it can be argued that "if the case has been followed, the expectation is that the subsequent case has similar facts; if the case has been applied, then the principle of law has been relied upon in different factual circumstances."[159] This means that law developed from a case which has subsequently been consistently applied rather than followed will typify a more fundamental and significant legal principle. Where a case has subsequently been illustrated, this may indicate that either the case was less relevant, or the legal principle on which it was based is narrow and should be restricted to the situations of the original case.[160] It is of note that the classification process can imply a subjective editorial element. Classifications may be trusted to support an assumption of a formalist approach to law. However, an evaluation of opposing citators covering the same case may end up in different assessments.[161]

From a formalist assumption's viewpoint, doctrinal research is purely about determining objectively verifiable rules. However, the use of a case citator to check any cases derived from an encyclopaedic search has been proven to be essential in finding the relative value of case authority that the researcher desires to rely upon. The use of a case citator by an advocate is aimed at finding authority which supports a particular proposition. For a researcher, however, a case citator is used to ensure that every aspect of interpretation or application of the law has been canvassed. A case citator can also be referred to as an encapsulation of the legal issues discussed within the case. In the context of this research, searching the mining legislation for a case using a citator allowed all the other cases

[158] *Ibid, 100.*
[159] *Ibid, 103.*
[160] *Ibid*.
[161] *Ibid, 110.*

considered to have the same issues to be found.[162] In such a case, a citator search can be a far more efficient approach than a Boolean search.

- Legislation - This research has used legislation as a source of information because the settings where the study is being conducted are governed by legislation, thus the relevant sources have been straightforward. However, these sources were screened for currency and judicial consideration. For research such as the present, a currency check is a routine technical process, while the check for judicial consideration of a law or section certifies that any personal assumptions about interpretation or application follow appropriate orientations.[163] Checking currency and judicial consideration also assisted in understanding the background against which the legislation was created.
- Statute annotators –These are publications that track changes in legislation over time, including listing any amending legislation and identifying the commencement dates of any changes.[164] For this study, a statute annotator was used to indicate where there has been judicial consideration. Once relevant legislation was updated and useful case references had been found, the cases were checked in a citator to verify if there has been subsequent treatment of the issues involved.
- Hansard – a thorough approach to mining legal frameworks involves research into the environments in which the legislation was enacted. Mining jurisdictions which this study relied upon have statutory interpretation provisions which enable reliance on extrinsic sources to help establish the meaning of a section. For the present case study, this involved second-reading speeches.[165]

The application of Hansard as a source of information in this research revealed that when investigating legislation, it is important to consider the respective circumstances of the creation of the legislation, such as Hansard, in order to appreciate its objectives. In deciding whether or not this environment of creation may legitimately be used in the

[162] *Ibid, 103.*
[163] *Ibid, 116.*
[164] *Ibid.*
[165] David Simon, *Homicide: A Year on the Killing Streets* (Ballantine Books, 2008).

interpretation of the legislation, a second-reading speech can be useful for obtaining a brief synopsis of an Act.[166]

Secondary sources –Secondary materials were also important in developing the blackletter legal approach and in the analysis of issues. Secondary materials enable the researcher to know the leaders in a particular field. They are used in in-depth doctrinal research as they help acknowledge work that has been done earlier in the field. They also serve to establish the context of the law.[167] This research used the following secondary sources:

1. Textbooks – leading textbooks in mining and licensing were consulted. Arguably, it might be held that doctrinal research will be partial if leading textbooks in the field are not referred to. Even where such textbooks may be less authoritative, they may still be persuasive as they frequently characterise the typical form of expression of particular fields of law.[168] Long-established texts will imbed the author's association with a legal field.
2. Periodicals – this research used articles on mining legislation, and other thematically mining-linked works were also useful. Law reviews containing in-depth articles emphasising theoretical and practical approaches were used to garner the information. When preparing the methodology for this legal research it was important to choose between a practice and an academic approach. The doctrinal research used in this research is not just asking a question in line with determining the relevant appropriate law. Had that been the case, then researching journals would have been adequate. However, the reason for using doctrinal research in a particular case is for the critique of whatever law is found. As such, the study has also searched academic law reviews to build a theoretical basis for analysing the law.
3. Finding articles – this research has also done a free text search on an online legal information aggregator such as LexisNexis, Westlaw or HeinOnline to find relevant mining articles on mining legislation and regulations. However, this

[166] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulating Agency* (Oxford University Press, 2003), 102-122.
[167] *Ibid, 103.*
[168] Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (London: Routledge, 1991); David Dixon, *Law in Policing* (Oxford University Press, 1997); Caroline Hoyle, *Negotiating Domestic Violence* (Oxford University Press, 1998); *Ibid, 159.*

> process limits the researcher by the holdings of the respective service and by the researcher's Boolean searching skills.[169] To resolve this shortcoming the research, before commencing an online search, would refer to legal journal indexes such as the Index to Legal Periodicals (ILP), the Legal Resource Index, and the Attorney-General's Information Service (AGIS), etc. which index law journals from various countries. These indexes are available online or in hard copy.

Overall, with regard to selecting sources for this study the doctrinal legal research has involved six steps: the analysis of legal encyclopaedias which helped establish an overview of the mining law and garner an initial list of relevant authorities; reference to case digests to find other useful authorities for inclusion; a check for current awareness services to help complement the latest cases; the use of case citators to verify the status of the authority upon which the research depended and as a means of discovering further authority; a check for the currency of the legislation using a current awareness service; a check for judicial consideration using a statute annotator or an online search; and a survey of secondary sources to compare approaches of other works in the field of mining legislation and to establish a context for the relevant law.

1.6.4.2. Choosing Search Terms

Legal research has moved from readily accessible information (texts) to vast online databases. Arguably, the nature of legal research has been transformed by the change of medium. Nowadays, outside the context of the library, legal research is unstructured, something which challenges the emphasis on authority. "We no longer live in a universe where absolutes can be discovered through judicious reading of common law precedents…For the modern Supreme Court, there is no final primary authority, only a kaleidoscope of sources that one can shift to provide any of a number of pictures…"[170] Even if Fink underscores the necessity of making a Boolean search when using an online service, it must be admitted that owing to the volume of legal materials available online, Boolean or free text searching has become obsolete, or rather may be a less efficient way to proceed.[171] With the application of the doctrinal legal research method in this study, online services were used with the understanding that they are set to be either *browsed* or

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[169] *Ibid, 138*.

[170] Mike Redmayne, Character in the Criminal Trial (2002), *The Cambridge Law Journal*, Vol. 61, No. 3, 684-714.

[171] Michel Foucault, *Archaeology of Knowledge, and the discourse on language* (New York: Pantheon Books, 1972); Richard Sparks and Ian Loader, *Situating Criminology: On the Production and Consumption of Knowledge About Crime and Justice* (Oxford University Press, 2012), 233-246.

searched. "*Browsing* means relying on the structure of a database, where navigation is done by using an alphabetical list, a table of contents, a date range, or an index, simply using mouse clicks to find a particular document. *Searching* means using Boolean search logic to find documents."[172] The application of a Boolean search has shown certain shortcomings in the sense of either finding too many hits or finding relevant hits but being uncertain as to whether every relevant document has been found.[173] Browsing on the contrary permitted this study to approach the search with a more systematic step-by-step methodology.[174] Herein lies the importance of conceptual and hierarchical indexes since they have been useful in this research in terms of drilling down from broad to more specialised topics and in cross-referring to areas which have been more relevant to this study.[175]

Some presume that Boolean searching obviates the need for an index.[176] But the contrary is true. It can be established that the more overwhelming the information available online the more important the proper indexing of a database. This implies that when conducting an online search in respect of databases enabling browsing that are organised by the information provider, discovering information through a Boolean search can happen to be a more thorough approach. If there is no option but to conduct a Boolean search across a database, then it is essential to be careful when selecting search terms. There is an element of skill involved in successful Boolean searching.[177] There is a balance between understanding the relative weight of legal terms and the operation of the logical relationship between the concepts that many operators find hard or impossible to comprehend. The other dilemma lies in the fact that Boolean searching can improve with experience; however, many researchers are less interested in conducting enough Boolean searching to become experts.[178]

Currently, legal research has become intrinsic to internet usage with most researchers being familiar with Google. However, Boolean searches in the law databases do not provide the same levels of success. The regular use of internet searches in the context of this study has proved that Google works by offering a hit list which is relevance-ranked

[172] *Ibid, 138*.
[173] *Ibid.*
[174] *Ibid, 103.*
[175] *Ibid, 103.*
[176] *Ibid, 138*.
[177] *Ibid.*
[178] *Ibid, 103.*

according to an amalgamation of the search concepts and in order of other web pages which point to that document. These hit lists are dynamic and influenced by the importance assigned to specific web pages by the internet community. This means that any search in a way second-guesses the information a researcher is seeking.[179] The use of Google or the internet supplants the deficiency of legal information providers who lack this level of sophistication and interactivity. With the internet or Google, search results are based exclusively on the application of the terms and the logical rapport between them created by the researcher.

1.6.4.3. Application of Practical Screening Criteria and Methodological Screening Criteria

Legal literature is considered unique. As such, the application of screening criteria and methodological screening criteria is often conducted conjointly. Since law is precedential and hierarchical, relevant documents in this research were self-selected. The rationale behind this process is simple: a superior court judgment will have pre-eminence over or will be desirable to, an inferior court's judgment.[180] However, Manderson and Mohr caution that lawyers are qualified to be advocates and may be inclined to be selective in a literature review.[181] Based either on quality or relevance, the screening of sources in research should not be conducted based on whether it supports the researcher's legal position. For common law lawyers, the relationship between the law and the facts is the challenge, because a holding within a case is dependent upon the facts which gave rise to the dispute, while the law which is relevant to the researcher will be determined by the facts or circumstances which gave rise to the research task. The researcher is proceeding by a combination of fact analogy and principles of law.[182]

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[179] *Ibid, 138*.
[180] *Ibid, 138.*
[181] Marianne Giles, R v. Brown: Consensual Harm and the Public Interest (1998), *Modern Law Review*, Vol. 57, No.1 (1994); Leslie J. Moran, Laskey v. United Kingdom [1997]: Learning the limit of privacy, Vol. 61, No.1; Chrisje Brants, The State and the Nation's Bedrooms, in Peter Alldridge and Chrisje Brants (ed.) *Personal Autonomy, The Private Sphere and Criminal Law: A Comparative Study* (Hart Publishing, 2001), 118-121.
[182] R v. Wilson [1997] QB 47; Attorney General's Reference (No. 6 of 1980) [1981] QB 715 (CA); Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press 2010), 340.

1.6.4.4. Doing the Review and Synthesising the Results

In legal research, a literature review is based on primary sources stating the law or on secondary sources that analyse the law.[183] In the present study, the process of reviewing the documents relative to mining was a process of inductive reasoning, i.e. the process of judicial reasoning.[184] It consisted of the summarisation and acknowledgement of mining authorities, with a general principle deriving from the survey. At this stage, the difference between the application of these steps in conventional legal research and legal research based on a more thorough and systematic methodology is that the outcome should have more credibility.

1.7. Reflexive Review of my Motivation as a Researcher

My identity as a researcher has impacted the choice of the methodological framework for the research in question. These effects, hereinafter referred to as reflexive influence, extend to the collection and analysis of data for this research. As a researcher, I am interactively and intrinsically linked with the subject I am investigating. In my view knowledge is value-laden, so that any claims made by a research project are necessarily reflective of the values of the researcher, irrespective of the methodological framework applied.[185]

I hold a PhD degree in the governance of natural resources, and I am a professional with over ten years of experience as a researcher and a mining consultant. I have developed value-laden thoughts about the mining legislation frameworks pertinent to this study. Likewise, I have tacit knowledge of the mining industry and its jurisdictions. As such, my role as a researcher is not just well-informed but obtains a unique and valuable focus.

My motivation to conduct this research came about as a consequence of my previous PhD in the governance of natural resources and conflict management that I completed concurrently with my Master in Oil and Gas management in 2015 at Coventry University. As part of the academic curricula of Master in Oil and Gas, I was required to study a number of modules. Among these were petroleum economics and contracts, subjects that exercised a particular fascination for me. This module explores the financial

[183] *Ibid, 103.*
[184] *Ibid.*
[185] *Ibid, 40:25-51.*

risks and rewards associated with the petroleum industry, and agreements between governments and oil companies that govern the exploration, development, and production of oil and gas.

Upon successfully completing petroleum economics and contracts, I realised that without legal knowledge of mining and Oil and Gas contracts, I might be unable to realise my ambition of working as a corporate lawyer or corporate legal adviser. I then became fascinated with the law in the fields of mining, oil and gas and registered for a master's degree in business law and corporate governance (LLM) at the University of Wolverhampton. In this regard I wished to understand how companies interact with their stakeholders, and how such companies are managed and controlled. During my LLM studies, I came to understand that much of the research in the legal field was qualitative; in part this could be explained by the fact that legal research provides a deeper understanding of people's experiences, emotions, and attitudes, which can help improve legal systems and analysis. I then became interested in mining industry legislation and in the various interpretations of mining law and regulation, thereby broadening the scope of my research.

In the course of my research, my reading expanded, and I encountered Mining Codes, case laws, statutes and academic publications on the mining industries. These academic and non-academic legal documents specifically explored the relevant participation of governments and various mining operators in the mining industry. It was here that I was introduced to mining law and mining regulations as two concepts with different contents and significance. It also dawned on me that I would be significantly exposed to grey literature approach in lieu of other social science methods to conduct my research.

For the most part, the legal sources consulted are based on existing organisational research. However, when I investigated mining sector-related legislations in more depth, I discovered that the legal academic literature could also be quantitative in nature. This created the opportunity to conduct a comparative legal study looking at the DR Congolese legal framework pertaining to the mining industry and that of South Africa, using qualitative methodology with doctrinal legal research method.

Contrary to my previous doctoral research where I used Constructivism Grounded theory to understand the dynamics of conflict minerals in the East of the DRC, the use of the doctrinal legal research approach in my current research exposed me to a wide range of

legal texts regarding the mining industry, from which I have been able to identify good practices in the worldwide mining industry and how these practices could serve as lessons for the DRC's legislator and the country's mining sector.

The decision to use the doctrinal legal research approach as a method in this research indicates that this research is not wholly objective or value-free. From my previous research and studies, I learned that subjectivity as part of social science allows for the re-assessment of ways of knowing and developing theories about how social dynamism can be understood.[186] I acknowledge the influences and impacts that my identity background (academic, professional, cultural) may have on this study. However, I would also submit that my participation in this research process provides a valuable opportunity rather than a simple intrusion, since its results contribute to an understanding of the scope for improvement of mining legislation in the DRC. In view of this, it is evident that reflexive interaction in legal studies is critical in ensuring the transparency of the research and that the latter recognises the ontological and epistemological engagement of the researcher with the knowledge s/he is investigating.[187]

My research, which is in essence a blackletter legal research, helped me establish an understanding of legal documents that provided me answers I could not have obtained from mining legislators or jurisdictions which hold official or relevant information on the mining industry, due to the lack of governmental transparency in this sector. I may happen to be on the margin of customary legal discourse, but I am part of another group in both the professional world and academia.

This research creates potential that may be denied to a researcher with a different background from my own, as a professional researcher with Congolese roots. My personal involvement has the merit of bringing me closer to the subject I am researching. This is the result of a practice where researchers engage with subjects in a process of improvement. Moreover, I do not have to consider issues from the viewpoint of the mining legislator or mining lawyer when explaining the experiences of the DRC's mining legislation, I do however need to consider my privileged position as a researcher and my ability to shape research experiences.[188] The ontology and epistemology of doctrinal legal research accommodate this ongoing reflexivity and enable me to acknowledge this

[186] *Ibid, 40:25-51.*
[187] *Ibid,40: 25-51.*
[188] *Ibid.*

as part of the research process. Furthermore, the methodological framework section of this work could be of help for readers to interpret the extent of my personal involvement in this study.

1.8. Limitations of the Study

Challenges regarding the methodological approach have been elaborated and discussed above. This section will shed light on other limitations. One such limitation relates to the process of identifying and retrieving the necessary information or the laws and legal principles that apply to the mining sector to support the research in question. Legal research is a notoriously difficult process, involving both law libraries and legal experts. The process is time-consuming and complicated. This research case study is a comparative legal analysis of the DR Congolese legal farmwork pertaining to the mining industry and the South African framework.

As legal research, this study was complex and challenging because of the vast amount of legal information available and the continually evolving nature of the mining sector and relevant legislation. Since the research topic is current, it is difficult to appraise the results of such a comparative study. Challenges include information overload, keeping up with changes, identifying relevant sources, understanding complex legal language, accessibility of resources, time constraints, jurisdictional variations, and the verification of information. Therefore, some of the research results are only possible trajectories. This means that this research summarises the results of the analysis of the existing information about the mining sector and legislation. Secondly, it requires an urgent response by and proposals for the DRC's mining industry and legislation. Even if its findings might not be generalised for application in other mining sectors with bad practices, there are lessons to be learnt from each case.

The study draws from the theoretical foundations of the mining industry, focusing on global legislative trends. It elaborates and demonstrates how good and bad practices in the mining industry, can be directly or indirectly related to appropriate and inappropriate legislation in the sector. This approach also showed some limitations towards establishing whether the weakness of mining legislation in the DRC is a result of the state's ownership of mineral resources. One of the recommendations in this regard was the need for transparency and accountability in the mining industry. It is therefore a

limitation of the research that it excludes this aspect from the study as the research focus is on understanding the ability of the DRC's mining legislator to effectively address the existing legal shortcomings in the mining industry. Therefore, it would make sense to focus only on the Mining Code and other mining related laws both in the DRC and South Africa, and on how best practices learned from other mining jurisdictions could help the mining legislator to refine mining law and the regulatory framework for the DRC's mining industry.

1.9. Research Organisation

This thesis covers seven Chapters. Chapter One sets the theoretical and methodological frameworks. It offers a general overview of the intrinsic link existing between the development of the state-building in the DRC and the mining industry, as well as introducing the research design and methodology used in this study.

In Chapter Two, the study is contextualised in the dynamics of the theoretical foundation of the mining industry. It provides an account of the trends in world mining legislation setting the stage for the comparative analysis. It mainly discusses various issues relating to the mining legislation including special treatment of the mining sector, legal frameworks and regulations, licensing, ownership and allocation of mineral rights, security of tenure and contract, taxes, fees and charges, the licensing, financial and administrative burden, and small-scale mining.

In Chapter Three, the research critically assesses the dynamics of the South African mining regulatory regime, exploring its approach to mineral rights and its system of resources custodianship in order to set the grounds for the upcoming comparative analysis.

Chapter Four explores the legal environment of the DR Congolese mining industry and the preeminent role of the State. It mainly speaks for the legal developments of the DRC's mining laws and the discrepancy of legal regimes in the mining sector.

Chapter Five focuses exclusively on the analysis of the formal uniqueness of the mining management regime set by the 2002 Mining Code in the DRC. It contextualises the discussions around the principles laid down by the 2002 Mining Code in line with the exploitation of the mines in the DRC.

The analytical insight from the DR Congolese mining legal framework considering the South African framework is investigated in Chapter Six. In particular, this Chapter undertakes a comparative study of South African and DRC's mining legislation. It also underlines the importance for the state to appropriately manage minerals licensing in order to have a significant impact on land tenure and acquisition, and on the exercise of mining rights.

A summary and conclusion of this study are presented in Chapter Seven. This is done considering the research questions raised at the commencement of this thesis. The analytical and methodological frameworks used in this research are also revisited.

Chapter Two: Theoretical Foundation of Mining Industry: Trend of the World Sector Legislations

Resume
The theoretical foundation of the mining industry is based on the best practices, methods, specifications, licensing requirements, standards of care (including skills, diligence, safety, and performance), environmental health and safety standards, as well as acts generally engaged in or monitored by well-known and knowledgeable international mining companies, which are consistent with good judgment, reliability and safety, all in compliance with applicable mining licences and regulations. Under this legal framework, reasoning and interpreting mining legislation should reflect equity before the law and the rule of law, and should involve and ensure certainty, stability, and predictability to mining investors.

2.1. Introduction

Mining is the extraction of minerals from the ground or the sea. With 2,400 ores minerals exploited for various purposes, of which 100 are of economic importance, the earth's crust contains ores that are normally clustered into three categories namely, energy minerals, metallic minerals and industrial minerals.[189] Permitting procedures and costs tend to vary substantially among the three kinds of extraction, as do taxation and royalty payments.[190] As an important contributor to the state's economic growth, employment, income and wealth generation, government revenues, and exports for developed and less-developed countries alike, mining provides the most basic and most advanced industrial production. Over the centuries, the quest for minerals has proved to be a fundamental force throughout humankind, making mining of immense geopolitical significance. Nowadays, many of the ongoing world's current conflicts have their root causes in colonial development going back at least to the 15th century, much of it triggered by the need to obtain both precious and industrial minerals to raise and supply armies and to build industry.[191]

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[189] *Ibid,7*.
[190] International Alliance on Natural Resources in Africa (IANRA), *African Mining and Mineral Policy Guide: A Resource for Nongovernmental Organisations, Activists, Communities, Governments and Academics* (2016).
[191] *Ibid, 7.*

This "vilest scramble for loot that ever disfigured the history of human conscience", as termed by Joseph Conrad in Heart of Darkness,[192] continues today in the unfolded civil war in the Democratic Republic of the Congo, which has claimed an estimated 12 million lives over two decades.[193] The fast industrial development of emerging economies, particularly China, but also in many other countries, has massively amplified the demand for minerals and other commodities and has meaningfully transformed international markets, and political and economic relations among countries. Overall, mining affords a noteworthy source of high-paying employment in mineral-producing and processing countries and has proved to be a significant factor in enabling economic development, trade, progress, and poverty alleviation.[194]

The mining sector is highly cyclical with significant movement prices over time responding to shifting market conditions and broader geo-political and other factors. The ongoing economic crisis, instability in mineral prices and mining company valuations, and the provisional deferral of many mining projects are temporary phenomena unlikely to affect long-term trends. This Chapter provides a roadmap for understanding the intricate dynamics of the mining jurisdictions by delving into the theoretical lenses that frame the broader discussion. The Chapter's main argument is that mining law and mining regulations, hereinafter referred to as legislation which regulates mining licensing, the method of working a mine and the safety of mining operations respectively, thrive concurrently with a world economic contraction of the order of the great depression, and an almost irrefutable long-term rising tendency for minerals demand and prices. In other words, as this trend rises again, likely in the next few years, many mining projects and the associated legal regulations that were previously delayed will be revived. This will happen as the price outlook improves and it becomes easier to secure capital. Consequently, countries, especially emerging economies with good legal practices in the industry of mining, could be expected to attract a large share of new

[192] Jeffery Meyers, Ivory, silver, coal: Joseph Conrad and the Ecology of Empire. Available at: https://www.thearticle.com/ivory-silver-coal-joseph-conrad-and-the-ecology-of-empire (Accessed 15 March 2024).

[193] Charles Onana, *Holocaust in Congo: The Omerta of the International Community* (L' Artilleur, 2023).

[194] The Investment Climate Advisory Services, Sector Licensing Studies -Mining Sector (World Bank Group 2010). Available at: www.southamericastudytrip.com/study_abroad_class_resources/Chile-MiningRoyalty.pdf. (Accessed 15 January 2024); International Finance Corporation, Sector Licensing Studies: Mining Sector (World Bank 2011). Available at: https://hdl.handle.net/10986/27787. (Accessed 21 March 2024).

mining investment. However, their legislation may also be tempted to exploit the upturn in demand and prices to impose additional restrictions and taxes on mining companies to the detriment of the mining sector in those countries. As an opening guidepost which enlightens the path toward a comprehensive comparative analysis that unfolds in subsequent Chapters, this Chapter's main argument is addressed through a few sections including special treatment of the mining sector, legal frameworks and regulations, licensing, ownership and allocation of mineral rights, security of tenure and contract, taxes, fees and charges, licensing financial and administrative burden, and small-scale mining.

2.2. Special Treatment of the Mining Sector

Governments of highly mineral-reliant economies are faced with perpetual pressure between the wish to encourage investment to develop the country's mineral resources and the desire to grab as large a share as possible of the revenues that stem from those mining investments. As discussed below, this frequently cumulates in special tax and ownership treatment of the mining sector by government authorities.

2.2.1. Tax Treatment

Surveys on the effective tax burden conducted in some mineral-producing countries reveal that contingent upon the state of the national economy and other variables, mining investments could result in favourable or onerous tax treatment.[195] Sierra Leone's case, for example, depicts that following the end of the civil war, the first significant investment in the mining company was granted nearly tax-free status, while other companies that invested only a few years later paid up to 60% marginal tax rates on profits.[196] In Nigeria, however, mining companies face a normal marginal effective tax rate (METR) of as much as 38%, but with various tax incentives the rate falls to -25%.[197] The "gold formula" put in place to determine taxes for gold companies in South Africa

[195] World Bank Group, Sector Study of the Effective Tax Burden (English), FIAS Washington, D.C. (2023) Available at:http://documents.worldbank.org/curated/en/297601468104634538/Sector-study-of-the-effective-tax-burden; Laws and Regulations 2024. Available at: <https://iclg.com/practice-areas/mining-laws-and-regulations> (Accessed: 11 March 2024).

[196] World Bank Group, Sector Study of the Effective Tax Burden (English), FIAS Washington, D.C. (2023) http://documents.worldbank.org/curated/en/297601468104634538/Sector-study-of-the-effective-tax-burden. (Accessed: 11 March 2024).

[197] A Emrich and Holland & Hart LLP, International Comparative Legal Guide: Mining Law (10th edn, Global Legal Group Ltd, 2023); A Emrich and Holland & Hart LLP, International Comparative Legal Guide: Mining Law (11th edn, Global Legal Group Ltd, 2024).

can bring about tax rates as high as 45% or as low as zero for companies whose profit to revenue ratio is less than 5%.[198] It could be contended that mining companies in many countries could receive very generous investment inducements even as the normal tax regime can be onerous.

When commodity prices soar high, governments often tend to impose special taxes on mining companies in order to capture a greater share of mineral revenues. The recent introduction of mineral royalties in both Namibia and South Africa epitomises how tax treatment remains a contentious issue in the mining industry, especially in Namibia's case where a basic corporate income tax rate amounts to 37.5%.[199] Namibian and South African laws have also sought to impose higher royalties on raw mineral exports in an attempt to hearten domestic beneficiation and processing.[200] In 2006, Mongolia initiated a 68% bonus profits tax on gold when the international price is above $500 per ounce and on copper when the price exceeds $2,600 per ton. However, there are some indications that the Mongolian government could now consider a rate reduction. Likewise, in Zambia where minerals constitute 75% of total export earnings, the government has also imposed a windfall profits tax which could increase the average tax rate from 31.7% to 47%.[201] With a few exceptions of good examples from countries such as Sierra Leone and Mozambique, it could be argued that in mineral-producing and reliant countries, mining permitting or licensing often falls victim to competing interests to the point that in many countries it is not uncommon for each mining company to operate under an individual and different licensing, regulatory, and fiscal regime. Although larger mining companies are prone to be granted the most favourable treatment, this is neither a guarantee, nor always the case.[202]

2.2.2. State Ownership

International financial institutions often encourage emerging and mining-producing economies to structure their mining agreements in a way that guarantees a certain

[198] *Ibid, 190.*
[199] Dorina. A. Bekoe, Stephanie. M. Burchard, Sydney N. Deatherage and Erin L. Sindle, Rare Earth Elements in Namibia, and South Africa: Considerations for U.S. Investment Institute of Defence Analysis (IDA), Document NS D-33189 Log: H 22-000322.
[200] *Ibid, 190.*
[201] IMF, International tax reform (2023). Available at: file:///Users/magha-a-ngimbacharlesgimba/Downloads/PPEA2023001.pdf (Accessed: 14 March 2024).
[202] *Ibid.*

percentage of government ownership of mining companies. Botswana saw the apogee of such an approach, as Debswana, which runs the country's diamond mines, is a 50-50 joint venture between De Beers and the Botswana government, while Debswana, in turn, owns 10% of De Beers.[203] Although some state-owned mining companies, such as the Czech state, are privatising their mineral assets, their dominant trend tends to increase their shares in mining companies. Such an increase would happen especially in companies where governments may already have a minority stake, usually through outright purchase or by taking shares in lieu of a portion of royalty or tax payments. The threat of cancellation of mining rights, however, may also motivate companies to invite greater government participation.[204]

In 2009, the Kazakhstan government engineered a stock swap that gave it a 22.2% share in Kazakhmys Plc, a leading producer of copper, gold, silver, and zinc, whose shares are jointly listed in London and Kazakhstan. In Russia, the share of the country's largest gold producer was also increased by the government to 44%, reportedly to acquire a majority stake in the business as well as, possibly, acquiring a controlling share of Norilsk Nickel.[205] The government of the DRC increased its share of the $1.9 bn Tenke Fungurume copper and cobalt joint venture with Freeport-McMoran from 17.5% to 45%, and also takes a 51% stake in most new mining ventures.[206]

A priori, nothing is wrong or problematic with full or partial state ownership of mining companies as this can be a motive of tension reduction between governments and mining companies, and can moderate the government's efforts to augment taxes, fees, and royalties, since the dividends received by the governments will reduce taxation rises. Seen as one of the best examples of the mining laws in Africa, Tanzania's mining framework provides for the state to hold a 10% equity share in mining companies.[207] CODELCO, Chile's main copper producer company, is 100% state-owned, and Chile's

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[203] Kaulani Fichani and Kegomoditswe Koitsiwe, Assessing the impact of Botswana's fiscal regime on the Karowe Mine, Extractive industry and society, Vol. 8, No. 2 (2021).
[204] *Ibid.*
[205] RIA Novosti, Russian Government Takes Over Gold Mining Sector, 2023. Available at: http://en.rian.ru/analysis/20070821/73010774.html (Accessed: 10 March 2024); Mining Law (2024). Available at: https://practiceguides.chambers.com/practice-guides/mining-2024/kazakhstan. (Accessed: 14 March 2024).
[206] Richstone, Group Sector Licensing Study: Congo Seeks to Double Stake in Freeport Mine Project (2008). Available at: http://www.richstonegroup.com/En/Article.asp?ID=109 (Accessed: 05 March 2024); *Ibid, 190.*
[207] *Ibid, 199.*

mining legislation is widely regarded as one of the world's best mining regulatory regimes.[208] From the perspective of having good practice mining outcomes, it might be contended that the most important consideration is not whether mining companies are publicly, privately or jointly owned. Rather, the key issue lies in state-owned companies being treated through mining-specific regulations and licenses the same way as wholly private ones. Contrarywise, renegotiating existing mining arrangements is more problematic. Various studies on the mining sector concurred that many governments prefer to renegotiate agreements. They contend that the original agreements were signed when the country was in a weaker position and had limited options, leading to an emphasis on miners' interests (or other stakeholders) over the national interest. It could therefore be argued that whatever the rationale behind the governments' arguments, post hoc renegotiations often tend to go along with the explicit or veiled threat of license revocation which would leave the miners with few options. This approach is likely to create greater uncertainty, increase the risk premium investors will demand, and deter further investment.[209]

In their attempt to own minerals, governments use licensing and other regulations to reduce the adverse effects of mining and/or to increase their share of mining revenues. This widespread approach is not limited to developing countries. Developed countries such as the United States have also established laws which seek to increase royalties and impose stricter conditions on mining, although such conditions might be as much for environmental as for revenue concerns.[210] Governments can introduce or change licensing and regulation to achieve legitimate public goals fairly and transparently. Often state garment institutes implement licensing and regulation with the goals of enriching a few well-placed individuals in an unfair, opaque, and excessive manner. This inevitably disadvantages local communities and the broader national interest.[211] These two approaches may coexist both in developed and developing countries so that a reasonable licensing system can occasionally be hijacked for illegitimate purposes. Upcoming sections seek to examine the rationale for licensing and experiences of mining licensing worldwide.

[208] *Ibid, 190; 199.*
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*

2.2.3. Legal Frameworks and Regulations for the Mining Sector

All states' governments regulate the mining industry and sector. The rationale for regulation covers various aspects of the mining business including ensuring public health and safety, controlling and protecting the use of scarce and finite resources, ensuring local communities' protection and compensation for any adverse effects resulting from mining, protecting worker safety and worker rights, compiling and disseminating information on industrial production, correcting misallocation of resources by the market and/or misuse of market power and collecting mineral revenues, to name a few. Mining regulation for example will focus on environmental, planning, public safety, and worker protection since these issues are critical concerns of public authorities in regulating the mining sector. However, the mining industry often sees government efforts to correct perceived or potential misallocation of resources by the market as the paramount concern that underpins much of the regulatory framework.

Many countries explicitly regulate the mining sector to ensure that mining proceeds are equitably distributed, that mineral wealth is used for the country's benefit, and that artisanal and small-scale miners are especially protected against vulnerability and illegal exploitation. On the contrary, mining companies fear that disproportionate regulation aimed at redistributing the mineral-dependent wealth could trigger the investment and operating costs augmentation, potentially making some projects unrealisable.[212] Based on this view, mining companies could contend that governments do not have interest in trying to achieve a more equitable distribution of wealth, because they often fail to consider the longer-term effects of regulation on investment, job creation, and government revenues. These long-term concerns in many countries however could be trumped by opposing interests in the allocation of profits from mining, particularly in countries with high mineral-economy reliance, or where mining is paramount to the national economy. Such countries are sensitive to charges that give them less control over national resources because they feel they cannot spread benefits to the people.

Information from Zambia and Indonesia suggest that the very low mining taxes introduced by Zambian government in 1998 was harshly criticised for failing to capture

[212] *Ibid, 190; 199.*

an adequate share of mining revenues.[213] These critics led the Zambian government, in February 2008, to announce its plans to rescind tax breaks for copper mining companies. Indonesia also passed a new mining legislation in December 2008 after three years of parliamentary debate. One purpose of debate in both countries was to maximise provincial governments' share of mining taxes and fees and to increase domestic value addition by foreign mining companies.[214]

Mining revenue allocation can also be a source of instability within a country. In Nigeria, oil and gas revenues have dominated the economy since the first commercial shipment of oil in 1958. It is proved that the allocation of these revenues to state governments has been a source of political instability, coups d'état, corruption, and civil war since the country became independent in 1960 rather than being a factor of stabilisation and poverty alleviation in the country.[215] Comments from the Revenue Watch Institute, an organisation that promotes the responsible management of oil, gas and mineral resources for the public good, submit:

> "Oil, gas, and mining companies make payments directly to governments in the form of royalties, bonus payments and taxes, providing the state with an autonomous flow of funds that is independent of its citizens. These windfalls reduce the need for taxation and thereby eliminate a key motivator for citizens' scrutiny of public finances… Extractive income gives governments ample resources to buy political support through patronage, and legislatures often have little or no budget oversight. Thus, the connection between citizens and the public purse is weakest in resource-rich countries where the need for well-informed, vocal, and active public oversight of government funds is greatest... In the absence of public awareness or participation in government processes for revenue collection and distribution, corruption and mismanagement of public finances are free to thrive. World Bank and IMF studies have concluded that the extractive sector

[213] *Ibid, 190.*
[214] *Ibid.*
[215] *Ibid*, *190; 199.*

> is a major determinant of corruption in the economies of resource-rich countries, and this partly explains the poor development outcomes."[216]

It is submitted that policymakers and governments' concern is not simply to improve statutory regulations, but to guarantee their appropriate application and use. Statutory licensing practises themselves could be reasonable and transparent, but their application may fail to be so. A perfect epitome of this is the DRC's 2002 Mining Code. This excellent mining legislation enables licenses to be granted very quickly throughout the country. In practice, however, the system falls apart, due to the government's lack of either the institutional capacity or an effective cadastre or registrar system to keep track of mining rights and collect the appropriate fees.[217] Based on the World Bank report, it may be argued that the lack of clear and transparent procedures for granting licenses, and the lack of an efficient mineral rights cadastre reduce the security of tenure for mineral rights in the DRC.[218] Corruption also plays a part, as in many mineral-rich countries, since government officials negotiate special deals with mining companies even if the law forbids such practice.[219] Licensing and regulatory uncertainty in other jurisdictions may not result from corruption, but from groups of interests that use legal means to deviate an investment for a range of reasons, including concerns about environmental risks and adverse effects on local and/or aboriginal communities. Thus, limiting these extra-legal intrigues may be a challenging task. Uncertainty therefore can deter companies from conducting mining exploration or investing in the sector even in countries with good, transparent, and fair legal and regulatory systems.[220]

According to the mining companies' survey by the Fraser Institute, Finland and Quebec are ranked lowest among 68 jurisdictions surveyed in perceived uncertainty concerning the administration, interpretation, and enforcement of existing regulations as measured by the percentage of respondents – fewer than 10% in both cases – who considered such uncertainty a mild, strong, or complete deterrent to investment. Perhaps unsurprisingly, DRC, Mongolia, Philippines, Venezuela, Kazakhstan, and Zimbabwe fared worst, with

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[216] Revenue Watch Institute (2014). Available at: http://www.revenuewatch.org/our-work/issues/revenue-transparency.php (Accessed: 02 April 2024).
[217] The Mining Code (2002); *Ibid, 190.*
[218] Enrique Ortega Girones, Alexandra Pugachevsky and Gotthard, Promoting Transparent Access to Mineral Resources, Walser Mineral Rights Cadastre, Extractive Industries for Development Series No. 4 (2009).
[219] *Ibid, 199*; *190.*
[220] *Ibid, 211.*

over 90% of respondents considering regulatory uncertainty as a deterrent to investment. More surprising was the poor performance of many high-income jurisdictions, including the United States.[221] Although Nevada ranked just behind Finland and Quebec, with about 12% of respondents considering regulatory uncertainty a "mild deterrent" to investment, and Utah scored well with about 14%, between 70% and 80% of respondents considered Minnesota, Montana, and Colorado unfavourable environments for investment. Indeed, these US states had poorer scores than Mali, Colombia, Tanzania, Zambia, and Papua New Guinea (and much worse scores than Botswana, Namibia, Ghana, and Burkina Faso, among other developing countries).[222] The stakes, however, are much higher in poorer countries with heavy reliance on mining. Even Arizona, the largest minerals producer in the United States, draws less than 5% of its GDP from mining. In countries with high incomes, a less-than-optimal licensing and regulatory system is not economically or socially catastrophic, even though it may discourage some investment.[223] However, this would not always be the case in poorer countries.

Nevertheless, mining development, if properly run, can create a better environment for long-term, sustainable growth and development. Therefore, removing unnecessary regulatory uncertainty, often caused by corruption, overlapping and unclear laws, authorities and regulations, and litigation is crucial. Experience from mineral-rich countries suggests that mineral wealth can drive general corruption and a morbid dependence on a single sector. However, it is worth noting that corruption is not an unavoidable consequence of resource wealth, even in the poorest countries. The Botswanan economy highly relies on diamonds, but the government has managed its wealth wisely by investing in infrastructure and avoiding most of the worst excesses of corruption that so often plague similar economies. For this reason, Botswana is now ranked among middle income countries (per capita GDP at an official exchange rate of more than $5,200), while many other countries that hold even greater mineral wealth are still mired in poverty.[224]

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[221] *Ibid, 190.*
[222] Fraser Institute, Annual Survey of mining companies (2022). Available at: https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2022. (Accessed: 16 April); *Ibid, 190.*
[223] *Ibid.*
[224] *Ibid, 215; 190.*

2.3. Mining Regulation

There is a range of agreements on mining regulation across the political spectrum, mining companies and activist organisations. Report by the International Institute for Environment and Development (IIED) and the World Business Council for Sustainable Development provides several propositions for what constitutes good practice.[225] These include the following:

1. "The adverse effects of minerals and metal products on the environment and human health should be minimised through all phases of the minerals' life cycle,
2. Responsible stewardship of minerals should be promoted throughout the life cycle,
3. In its use of non-renewable resources, the present generation needs to consider the needs of future societies,
4. Authoritative, independent sources are critical to ensure that information is trusted and to respect the right of stakeholders to have access to accurate and relevant data,
5. Access to information is linked to the ability of individuals to secure and defend fundamental rights to resources. Information must be collected and distributed in an equitable manner to ensure this,
6. Systems of accountability and verification are essential to monitor the performance of companies, governments, and civil society,
7. Participatory and democratic decision-making structures should be adhered to,
8. Decisions should be decentralised and taken as close as possible to the stakeholders most directly affected."[226]

These are values that any responsible mining company would adhere to, even if there is divergence over the extent to which these values are applied. From a World Bank's report on assistance in mining sector reform, it is noted that:

> "Although the policy, legislative and regulatory solutions adopted by various countries may have different features, some common themes are

[225] Mining, Minerals and Sustainable Development (MMSD) Project, *Breaking New Ground* (Earthscan Publications Ltd., 2002).
[226] *Ibid, 199.*

> apparent. 'Successful' countries have well-articulated policies and legal and institutional frameworks which support small- and large-scale mining without imposing uneconomic fiscal burdens. Future minerals development models will differ from past best practice because of the requirement that the developments must be sustainable and pay due regard to both environmental and social impacts."[227]

This report quoted several examples of "successful" countries that had implemented and realised good practices. According to the report, Chile and Ghana are two examples of such successful countries due to their mining regulatory framework and good practices such as:

1. Non-discriminatory policy towards foreign direct investment in the minerals sector.
2. Assurances of fair investment dispute settlement through international arbitration
3. State ownership of minerals, which allows the state to grant constitutionally protected property rights and access to them and permission to prospect where no existing exploration or mining rights have been granted,
4. Transferability of exploration and mining licenses,
5. Grant of licenses on technical grounds,
6. Ability to refer adverse decisions to the courts,
7. Government's commitment to private sector minerals development,
8. Mining law and regulations[228] confirm the state's ownership of mineral deposits and its right to grant licenses to exploit them; allow foreign enterprises to obtain prospecting, exploration and mining rights; and confer the powers to issue, amend and revoke licenses on one state agency which also has the requisite technical expertise to assess applications.[229]

Likewise, an analysis of the Egyptian mining licensing procedures suggests the following as best practices:

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[227] *Ibid, 199.*
[228] *Ibid, 199;* Ghana's Minerals and Mining Act 703 of 2006 – improves the legal framework and grants more explicit property rights to holders of mining licenses.
[229] *Ibid, 190.*

1. "The procedures of granting all kinds of licenses should involve controls for screening non-serious applicants. This could be undertaken through adjusting the licensing fees and careful investigation for the applicant's financial situation prior to granting the License.
2. Limit the need to acquire an exploration license, as a mandate for the issuing of an exploitation license, only when there is a real need for that (if, for example, the subject piece of land is in a natural state or virgin and/or if there is not sufficient information about it).
3. Reducing the licensing cycle time as much as possible through abridging the permitting processes, shortening the number of steps in each process as much as possible, and decreasing the number of involved agencies by creating coordination mechanisms between the Egyptian Mineral Resources Authority (EMRA) and these Agencies.
4. Curtailing the application's exposure time to the procedure.
5. Advertising the essential procedures describing data for the Applicants, such as the licensing procedures, time, and cost, etc. on websites.
6. Availing the required forms to the Applicants for free
7. Describing corruption indices and following them up in public.
8. Advertising associated laws and regulations published and preferably in different languages."[230]

Indications from a World Bank review of the mining sector in Mongolia inform that there exists a growing consensus that good practice in mining legislation entails:

> "Transparency and fairness, clarity, non-discretionary mineral license administration, conclusive decision making within specific time frames, non-discrimination, uniform standards and administrative procedures, lead agency coordinating authority, and coordination with other legislation and regulatory authorities."[231]

[230] *Ibid, 199.*

[231] World Bank, The Role of the State in Mongolia's Mining Sector, (World Bank, 2021); World Bank, Extractive Global Programmatic Support (World Bank Group, 2021).

Another report by the World Bank on the potential for development of the mining sector in Afghanistan emphasised a few policy and regulatory reforms essential for the sector to grow. These reforms are associated with the following:[232]

1. State ownership of mineral rights.
2. A clear legal basis for access to mineral rights.
3. A new minerals law which explicitly establishes the right of private entities to obtain mineral exploration and production licenses from the government; constitutional protection of mining rights granted by the state to avoid expropriation without fair compensation, and the State's authority to enter commercial contracts with private entities concerning mineral rights.
4. Uniform and transparent rules for granting mineral rights to prevent case-by-case negotiation of mineral rights which favours uncertainty and unfairness and imposes a heavy regulatory burden on the government.
5. Transparent taxation.
6. Clear identification and definition of mandates of government institutions concerning mineral rights granting and regulation of the mining sector.
7. The role of the State as a regulator of private mining activity rather than as an explorer, operator, or equity partner.
8. Appropriate governance, oversight, and equal treatment of companies involved in mining activity, and a clear path to eventual privatisation of these companies.
9. Security of Tenure
10. Transferability of Title.
11. General Best Practices in Investor Protection.
12. Suitable and transparent environmental, health, safety, and social protection laws.
13. Special regulation of small-scale mining.

Table 2.1 below summarises examples of good regulatory practices in a number of countries as selected by the World Bank and the IIED.

[232] World Bank, Transitional Islamic State of Afghanistan: Mining as a Source of Growth (World Bank, 2013).

Table 2.1 : Synopsis of good mining regulations as per the World Bank and the IIED

Mining regulation paradigm according to IIED & World Bank	Values to adhere to by responsible mining company
Reduction of the adverse effects of minerals and metal products on the environment and human health. Promotion of responsible stewardship of minerals Consideration of the needs of future generations when using non-renewable resources. Authoritative and independent sources respecting the right of stakeholders to access accurate and relevant data, Ability of individuals to secure and defend fundamental rights to resources. Accountability and verification to monitor the performance of companies, governments, and civil society, Adherence to participatory and democratic decision-making structures. Decentralisation of decisions which considers and consideration of the stakeholders most directly affected.	Well-articulated policies and legal and institutional frameworks which support small- and large-scale mining without imposing uneconomic fiscal burdens. Developments of mining that is sustainable and pays due regard to both environmental and social impacts.

Examples of a few successful cases			
Chile & Ghana	**Egypt**	**Mongolia**	**Afghanistan**
Non-discriminatory policy. Assurances of fair investment dispute settlement. State's protection of property and mineral rights. Transferability of exploration and mining licenses. Grant of licenses on technical grounds. Ability to refer adverse decisions to the courts. The State's right to grant and protect mineral rights holders. State agency having the power and the requisite technical expertise to assess the viability of mining applications	Controls for screening non-serious applicants before license grating. Limitation of the need to acquire an exploration license. Reducing the licensing cycle time. Curtailing the application's exposure time to the procedure. Advertising the essential procedures describing data for the applicants. Availing the required forms to the applicants for free. Describing corruption indices and following them up in public. Advertising laws and regulations in different languages	Transparency, fairness and clarity. Non-discretionary mineral license administration. Conclusive decision making within specific time frames. Non-discrimination. Uniform standards and administrative procedure. Lead agency coordinating authority. Coordination with other legislation and regulatory authorities.	State ownership of mineral rights, a clear legal basis for access to mineral rights. Legally establishment of the right of private entities to obtain mineral exploration and production licenses. Uniform and transparent rules for granting mineral rights, transparent taxation, clear identification and definition of mandates in granting mineral rights. State role as a regulator of private mining activity. Appropriate governance, oversight, and equal treatment of mining companies. Security of tenure, transferability of title, general best practices in investor protection. Suitable and transparent environmental, health, safety, and social protection laws. Special regulation of small-scale mining.

Source: Magha-A-Ngimba Charles Gimba 2024.

It follows that many countries have incorporated regulations and practices identified in these reports as good practices into their laws. These countries are widely considered to have good mining regimes. The variations between countries are relatively minor. In

Egypt for example, best practices include "controls for screening non-serious applicants through careful investigation of the applicant's financial situation."[233] On the contrary, "non-serious applicants" approach is not regarded as a problem requiring regulation, especially for exploration licenses, in some good-practice jurisdictions such as Quebec and Chile.

In these countries instead, the focus is on specific requirements for compliance with laws and regulations on land use, environmental protection, and other important public concerns.[234] However, it is important to underline that in jurisdictions with weak monitoring and enforcement capacity, some due diligence on investors, at least for production licenses, may apply. The environmental tragedy at the Summitville involving the Colorado gold mine serves as a cautionary specimen. From 1984 to 1991 the use of cyanide leaching with inadequate safeguards by the Colorado gold mine killed all aquatic life in a 17-mile stretch of the Alamosa River, and polluted other streams and groundwater in the area. After the shutdown of the mine by the state authorities in 1991, the mine owner, Galactic Resources, declared bankruptcy, leaving the U.S. Environmental Protection Agency with over USD$250 million in clean-up costs.[235]

It transpires from the World Bank report on Afghanistan that State ownership of mineral resources is a common practice that enables government authorities to allocate mining rights fairly and transparently and can guarantee security of tenure in the form of a secured and transferable property rights. This approach has proven highly effective in Chile, Canada, and many other countries. However, it is not an indispensable condition in jurisdictions such as the United States and South Africa where property rights and cadastral systems are highly developed.[236] Hence, it is challenging to come up with a precise conclusion from these various prescriptions, except for the requirement of transparency and sustainability.

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[233] International Finance Corporation, Sector Licensing Studies: Mining Sector (World Bank, 2011). Available at: https://hdl.handle.net/10986/27787. (Accessed 21 March 2024); *Ibid, 190.*
[234] World Bank, Sector licensing studies (World Bank, 2008); *Ibid, 190*.
[235] *Ibid, 190.*
[236] World Bank, Sector licensing studies (World Bank, 2018); *Ibid, 225; 190.*

2.3.1. The Role of Regulation in Balancing Different Interests

In most mineral-producing countries, authorisation to operate a mining business involves balancing of various interests including private and public interests; national, regional, and local interests; and the interests of investors, communities, and individuals. Even in the most market-oriented societies, businesses do not operate free of regulation or supervision and must meet various conditions namely national security, public health and safety, environmental protection, competition policy, land use planning and zoning, and worker rights and safety. Some of these conditions apply to small businesses such as restaurants and shops as well as huge industrial concerns. The mining industry is a huge industrial concern and special case because of the size and scale of investments and operations involved. It implies an economic impact on employment, investment, exports, and government revenues; and has potential social and environmental effects on fragile ecosystems and communities. In poorer countries, the potential effects of mining investments are larger, relative to the overall economy, than in high-income countries.[237]

Information about the good management and the good regulation of the mining sector is patchy in some countries. In many poor countries, governments do not have sufficient knowledge, experience, and capacity to negotiate mining agreements and regulate mining activity in ways that protect and advance the national interest. However, some developing and emerging economy governments including Botswana, Namibia, Ghana, and Chile, have realised high sophistication levels in their technical and financial dimensions as well as management of mining risks.[238] Even in a jurisdiction where government authorities have adequate capacity to appraise and properly regulate various complex issues associated with the mining sector, there are still situations that remain complex and difficult to manage. Conflicts, for instance, can erupt between investor rights and community rights, as well as over-competing concepts of the public interest, such as job creation versus environmental preservation. Such complex issues frequently happen in the United States where projects are severally deferred or stopped by proceedings that can last for years.[239] Likewise, poorer countries should find a proper balance between environmental and social protection and possibly substantial

[237] *Ibid, 199*; *190.*
[238] *Ibid, 227; 229; 190.*

contribution to poverty mitigation and generation of funds needed for social and physical infrastructure development.

Governments, mining companies, local communities, and other stakeholders can have overlapped and/or diametrically opposed interests which are difficult to reconcile. When the interests of a local community should predominate, the results may not be to everyone's satisfaction or in the general national interest, but it may be difficult to conclude from this that national or regional interests should always surpass local ones. Indeed, adherence to participatory and democratic decision-making is one best practice principle mentioned by the Mining and Minerals Sustainability and Development Initiative since it commonly engages a maximum possible devolution to lower tiers of government, even if national governments and mining companies could sometimes be displeased with the results. Concomitantly, a fully democratic licensing procedure as in the Warren, in the north-eastern Unites States, could culminate in long drawn-out processes that may push many potential investors to leave as they balance the cost of continuing against the eventual benefit of winning the license, taking into account as well the opportunity cost, they incur by not pursuing other investment opportunities that could get developed in significantly less time.[240]

A thorough research on the legal frameworks for mining in Latin American countries sheds light on what should be regarded as good practices in the mining sector. According to this research by Spalding, successful mining regimes should speak for issues in line with transparency and accountability, surface rentals, non-discrimination, access to land, and modernisation of cadastre and mineral concession. It emerged from Latin American mining frameworks that successful mining legal regimes reduce the likelihood of corruption and decrease drawn-out processing time by eradicating discretion in implementing the law. This involves removing any requirement for a mining right applicant to prove either the existence of a commercially viable deposit or the applicant's financial and technical capacity to undertake a work programme; removing or standardising work/investment/production requirements; creating clear procedures for the granting of mining title; specifying the responsibilities of holders of mining rights and the means of complying with them; and defining the grounds for their cancellation. Under a successful mining regime, the title holder should be vested with exclusive rights

[240] *Ibid, 199.*

to explore or exploit all concessionable minerals within a concession, since there is not any efficient way to administer multiple concession rights for district minerals within a single concession area.[241]

In a successful mining regime, security and transferability of title are treated as the top priority. It means that the law should also acknowledge the right of the title holder to transfer both exploration and exploitation concessions to another investor or other third party. This flexibility improvement allows liquidity for investors by enabling them to obtain financing and is an essential condition for the development of an active mineral property market.[242] Lessons learned from the Latin American mining sectors also inform that the mining cadastre modernisation is an essential prerequisite for a mining sector driven by private investment. Given this, the law should require concession to conform to a regular geometric shape, and that they are identified by their Mercator Universal Transverse projection coordinates.[243] It should be borne in mind that the major legal issue in this context is the integration of existing concession rights when a new system is introduced to reduce potential conflicts and disputes.

Access to land is a common problem in unreformed mineral law regimes, as vast areas or lands are usually protected by the government fiat for potential future exploitation by state entities in perpetuity by government fiat. Thus, the success of a mining regime also lies in the reform of a mining law which liberates such reserves and limits the ability of the government to create reserves in the future. Non-discrimination in the issuance of mining rights has a key role to play in the success of a mining regime. To this effect, it is important to consider that the mining legislation should avoid any discriminatory eligibility criteria for holding of mining rights. Legal provisions which exclude non-nationals from acquiring mining titles have the effect of limiting capital creation in home mining industry. Legal reforms should also ensure that under the law, parastatal mining companies should not have preferences over private sector mining companies and investors. Most mining regimes oblige the concession holder to make regular payments of a per hectare fee to keep the concession. This is what is referred to as surface rentals.

[241] Rose J. Spalding, *Breaking Ground: From Extraction Booms to Mining Bans in Latin America* (Oxford University Press, 2023), 211-215.
[242] *Ibid.*
[243] *Ibid.*

A successful mining regime is characterised by having low surface rentals during exploration, when they constitute a significant share of total cost, and higher rentals during exploitation in those countries with a two-concession system. Rates must be stated within the mining framework or regulations and indexed for inflation. An alternative is the application of annual minimum work or investment requirements, but these demand supervising and implementation which many countries are ill-equipped to provide.[244] As for transparency and accountability, it is noteworthy that licensing of mining concessions should be transparent and accountable. A mining legal framework should:

1. Be explicit about the procedures for acquiring, maintaining, and ceasing mining rights,
2. Specify timeframes within which applications should be logged and licenses should be issued,
3. Set out notice periods and an opportunity to be heard before any significant action is taken,
4. Require all decisions affecting solicited or acquired rights to be in writing,
5. Provide opportunities for administrative and/or judicial review of decisions.[245]

Broadly, it might be argued that in all aspects of mining regulation there is a tension among many different objectives. These objectives may be associated with augmenting near-term government revenues, supporting foreign direct investment, promoting growth of employment, income, exports, protecting the environment, public health and safety, protecting and developing local communities and/or autochthonous populations, and using mineral wealth to attain long-term development goals.[246] Additional to these are the immediate political pressures, including rising nationalist sentiment, budget shortfalls, and popular demands to benefit in the near-term from a country's abundant resources, to which governments could be subject. These conflicting demands are yet to have responses about the way they should, or can, be balanced fairly. Good practice in mining licensing, therefore, refers to the way decisions are made rather than the character of the decisions themselves.[247]

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[244] World Bank Industry and Mining Division, Characteristics of successful mining legal and investment regimes in Latin America and the Caribbean Region (2018).
[245] *Ibid, 234.*
[246] *Ibid, 237.*
[247] *Ibid, 199; 190.*

2.4. Licensing and the Mining Sector

Licensing is a means through which government regulation imposes on businesses (or individuals) a range of conditions, obligations and rights that regulate entry into and conduct within markets. Licensing is one of the most important issues within the overall administration of regulations that affect the mining sector. Other regulatory requirements can comprise company registration, conditions on foreign ownership, customs, taxation, work, and residence permits for expatriate employees etc. Mineral resources are the state's property in many countries, irrespective of who owns or holds usage rights to the surface land. But even in jurisdictions where underground minerals on private land are privately owned, governments still keep an eye on the development and exploitation of these resources due to public interest, in a way that other sectors of the economy are not subject to.

Indications from a 2008 analysis of Egyptian industrial licensing[248] suggest that most countries no longer practice general industrial licensing. Au contraire, mining licensing is an almost universal practice in both developed and developing countries. Mining developments, particularly on public land, often culminate in a vigorous domestic contestation because of their greater detrimental effects on the environment of the communities where they occur. Herein lies the importance of underlining that mining activities are often developed in remote and ecologically sensitive areas where supporting infrastructure including roads, dams, and power plants are often required. While mining can positively and greatly transform the local and/or indigenous populations' livelihood, its development also involves dangerous activities. Therefore, considerations of workers' health and safety, as well as workers' rights come into play.

Mining activities and their related works, in most countries, are treated by different government ministries or agencies responsible for different regulatory requirements. Each mining component involves a particular government's department. Land Ministry or agencies set conditions for use of public lands. Environment agencies or ministries ensure compliance with environmental laws and regulations. Labour ministries set conditions or standards of employment and worker health and safety. Ministries of

[248] IFC, Summary of Mapping and Analysis of Administrative Procedures in the Mining Sector in Egypt (Megacom/International Finance Corporation, 2007); IFC and Krakoff C, Egypt: Strategy Assessment and Recommendations for the Industrial Development Authority (2008).

health, food and drug agencies, and agricultural ministries set and apply standards for food processing and pharmaceutical industries. Ministries of transport regulate the movement of cargo by land, air, and sea. Most of these ministries or agencies have powers to inspect company premises and impose charges or penalties where laws and regulations are not complied with. Up to the 1980s, industrial licensing was common in many countries. Nowadays, there has been a noticeable development away from this practice and decentralisation of responsibilities for specific matters to competent ministries or agencies. Even India, which was once known for the "License Raj," has phased out general industrial licensing except in a few specified sectors.[249] However, mining remains subject to sector-specific licensing, even in the most devoted free-market economies.[250]

Licensing laws, regulations and practices widely differ from one country to another. Studies on mining regimes, licensing, and practices in various countries mostly aim at identifying suitable or best and bad practices that may help guide other countries as they develop or reform their mining laws and regulations. Mining law includes common issues in mining laws and regulations namely the acquisition of rights, ownership requirements and restrictions, processing, transfer and encumbrance, environmental aspects, native title, and land rights to name a few. All these issues are referred to as licencing. Licensing practices in the mining sector always vary from one sector to another. As recapitulated below, there are naturally at least two main types of licenses - prospecting and production, each associated with different fees and conditions. The two licenses are:[251]

1. Prospecting or exploration license which vests a company with an exclusive right to search for commercially exploitable mineral resources within a determined zone for a defined period. This license attaches conditions to the "search" process. Usually, exploration licence is associated with a pre-exploration or reconnaissance license issued for preliminary survey and testing work. Areas opened to exploration license may be very large – covering 1,000 km^2 or more – but the duration tends to be short, though it may be renewable.

[249] *Ibid, 234.*
[250] *Ibid, 237.*
[251] *Ibid, 234; 190.*

2. Production license which grants a company the exclusive right to extract minerals from a demarcated zone for an indicated period. Sometimes a retention license can be used, which grants an exclusive right over a deposit with no instant requirement to develop the mine (this may be useful when current market conditions make development unfeasible in the immediate term).[252] A production license usually includes a much smaller zone than a prospecting license but is conceded for a longer duration.

License fees and charges, often known as "surface rents," are lesser per unit of territory for exploration than for production licenses. The fees, terms, and conditions for these can change widely, and form much of what makes for good or bad licensing practices.

2.4.1. Licensing and the Distribution of Mining Wealth

Conflicts over the distribution of mining proceeds or other resource wealth are among the main causes of corruption and civil wars in poor or developing mineral-rich countries. Rationally and efficiently used, mining revenues could substantially drive a country's development, as illustrated in countries such as Botswana, Namibia, South Africa and Chile. In many other mining and/ or petroleum-producing countries mired in governance malpractices, mining has turned into a "resource curse" which can tear apart a society and social fabric, as embodied in countries like Sierra Leone, Democratic Republic of Congo, Sudan, and Angola.[253] Lastly, ill-management of mining by the government contributes to endemic corruption, despotism, civil unrest, deterioration of agriculture and industry, crumbling infrastructure, and general lawlessness, as this has occurred throughout much of the history of Bolivia and Nigeria.[254] Even when the worst effects of the "resource curse" are not immediately felt, it is however submitted that many countries have misspent their resources and have little to show for it, as is the case in Gabon, Cameroon and Nauru.[255] Most disputes over mineral resources usually originate from disagreements over the distribution of mineral wealth.[256] Provinces, regions, or states, as well as indigenous groups, often complain that they receive insignificant benefit from mining that is developed and exploited in their territory, while often suffering from

[252] *Ibid, 237.*
[253] *Ibid, 199; 190.*
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid, 190.*

environmental degradation and obliteration of old ways of life. As a response to this, many countries have adopted the approach of more stringent environmental controls. Now governments also require mining companies to invest in public infrastructure such as roads, power plants, water and sewage systems, schools, and hospitals etc. in the areas where they are operating.[257] As useful as these initiatives may look, they barely, or do not always, address the root cause of unequal share of mineral wealth. If the reform of mining licensing procedures cannot address all these problems, it can however have a significant profound and positive effect.

2.4.2. Sub-national Licensing

Countries such as Canada, the United States, and Australia, where mining licensing responsibility is devolved to sub-national levels, appear to have fewer mining-based conflicts. This is attributed to the freedom that states or provinces enjoy within the wider framework of national policy, to lay down their own mining regulations, which can incorporate the right to tax mining activity.[258] It follows from this practice that each sub-national jurisdiction can strike its balance between the benefits that mining produces and the risks and damages that are associated with such benefits. Certain requirements need to be met prior to sub-national licensing and regulation to be effective. These conditions include appropriate national policies on business, investment, and environmental protection. Secondly, it also requires the country to have effective rule of law and sub-national governments that can afford to set and staff their own regulatory bodies that possess sufficient technical and financial expertise. Finally, it works best in an environment in which transparency and public participation (community consultation), through public discourse and comment, are encouraged or even required in licensing decisions.[259]

It is worth noting that delegation of regulatory responsibilities to sub-national government may fail to work as expected in centralised countries and can be exceptionally difficult to apply even in a federal state such as Nigeria, where mining and other resources encompass a huge portion of national income. Put differently, the mining regulation and licensing devolution is not just an option for rich countries. In India,

[257] *Ibid, 234.*
[258] *Ibid, 227; 190.*
[259] *Ibid, 234.*

where mining accounts for about 2% of GDP, authority over mining licensing and regulation remains the domain of state governments, except for uranium and iron which require prior consent of the central government.[260] In Indonesia, the 1999 Law states that "... regional government has full authority to promote and develop the national resources available in its region and is fully responsible to maintain the sustainable environment based on the existing regulation."[261] Indonesia's new mining law, enacted in 2008, devolves even more authority to provincial and municipal levels of government. Some have advised that this law is likely to have a damaging effect on the development of the Indonesian mining sector.[262]

2.5. Ownership and Allocation of Mineral Rights

In the mining industry, licensing is essentially about ownership and granting of mineral rights. The role and rights of the State concerning both could differ, as could the mechanism by which usage rights are conferred or transferred.

2.5.1. Ownership

Most countries own all mineral resources regardless of ownership of the surface land. No company can lawfully extract and sell any mineral commodity without first getting permission from the government. The World Association of Mining Lawyers informs that the United States and South Africa are some of the few major mining countries where mineral deposits can be privately owned. In both Australia and Canada, for example, mineral rights are vested with the State. In the original land grants to settlers in the United States, the British Crown did not have mineral rights, nor did the colonies and later the state and federal governments in subsequent grants to individuals. Property owners thus had both surface rights and mineral rights, a sort of whole private ownership referred to as a "fee simple estate." Under fee simple estate, the owner has the right over the surface, the subsurface and the air above a property, and is free to sell, lease, gift or bequest these rights individually or entirely to others.[263] In some U.S. states, namely Wyoming, surface and mineral rights are disconnected, while in others they remain

[260] *Ibid, 215; 190*.
[261] Marc Rayos, Indonesia, Mining by the number (2023). Available at: https://www.spglobal.com/marketintelligence/en/news-insights/research/indonesia-mining-by-the-numbers-2023. (Accessed: 21 January 2024); *Ibid, 190*.
[262] *Ibid*.
[263] *Ibid*.

united. In practice, however, since most mineral extraction in the U.S. occurs on land possessed by the Federal Government, which also possesses the subsurface rights, most minerals are also owned by the government, which then lets their exploitation to private companies.[264]

However, the advent of commercial-scale mining has seen ownership becoming much more complex, in a way that even in countries where private ownership of mineral resources is permitted, such ownership may be detached from ownership of the surface. Put differently, ownership of mineral resources can now be sold, leased, or otherwise transferred without reference to surface land ownership.[265] Both law and negotiated contracts ensure certain rights to owners of both the surface and the subsurface. Mineral rights owners should be given access to the deposits and granted the right to exploit them by the surface owner. In return, however, the miner must pay compensation for any damages to surface property and may be required to restore the land and improvements to their original state or in situ.[266] Even where the surface and subsurface are privately owned, government permission is typically needed for the development of any mining activities, and projects should comply with all applicable land use, environmental, and other laws. Similarly, exploration and mining licenses are still required for privately owned deposits, and the State often levies land use fees and royalties, although the mine developer is also bound to pay fees and/or royalties to the property owner to obtain or lease the mineral deposits.[267]

2.5.2. Usage Rights and Their Allocation

In most mining-producing countries, the United States being almost the only exception, the government oversees the allocation of rights to explore and exploit mineral deposits. Even in the United States where the state is less involved in the issuance of mining licences, mining rights on all public lands are overseen and issued by the government.[268] This entails that State ownership does not prevent the creation of a secure property right linked to a mineral lease or concession. In countries such as the United States, Chile, Tanzania, Ghana, Lao PDR, Namibia, and Papua New Guinea, mining/production

[264] *Ibid, 215.*
[265] *Ibid, 199; 190.*
[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid.*

licenses are transferable, yet prospecting and exploration licenses are not transferrable or may be subject to certain restrictions.[269]

2.5.3. Auction or First-Come First-Served

Most countries, even those considered to have good mining regimes, issue prospecting/reconnaissance and exploration licenses on a first-come first-served basis. Russia is an exception, in that all licenses are allocated by auction to the highest bidder. China also auctions licenses for tracts that have already been prospected or explored but grants licenses on a first-come first-served basis for unexplored claims.[270] Russia's auctioned licenses approach naturally includes both exploration and mining rights. The price paid at auction is in lieu of the surface rent that other jurisdiction often evaluates and is often cheaper than a corresponding surface rent or land use rent might be. In 2006, Russia conducted an auction of exploration and mining rights for the 242km^2. Apsakan gold mining tract in the Amur region, previously prospected with encouraging results. The fee paid at auction was USD$237,000, about USD $980 per km^2 or just under USD $1.00 per hectare.[271] This is in comparison to Indonesia, where mining license rents range from USD $1.50 to $3.00 per hectare and Sierra Leone, where the 4km^2 Koidu diamond mining area is subject to an annual "lease rent" of USD $200,000 plus a "surface rent" of USD $32,258 for use of the surface above the deposit.[272] It is far less than the fees and rents in the new Kyrgyzstan mining law.[273]

Each method of license issuing has its advantages and disadvantages. An auction system, openly and fairly conducted, establishes a market price given available information about prospectivity and regulatory (and other risks) and will reflect bidders' assessments of the possible risks and rewards. It thus lacks the arbitrary nature of other countries' lease and rent schedules, some of which appear to have been established with scant reference to financial viability, prospectivity or risks. It also helps avoid both the reality and the perception that mining rights are conferred unfairly or corruptly, and also protects investors by bundling together exploration and extraction/production rights.[274] This is

[269] *Ibid, 215; 190.*
[270] *Ibid, 190.*
[271] *Ibid.*
[272] *Ibid.*
[273] *Ibid, 229; 229.*
[274] *Ibid, 215.*

especially if the government has accumulated enough geological data from previous prospecting or exploration activities, as prospective bidders can weigh risks, estimate projected returns on investment, and submit well informed bids. An auction system also helps filter out frivolous applications for it is highly unlikely that mining companies would spend hundreds of thousands of dollars (or more) for rights to a concession they do not intend to develop.[275]

An auction process, however, is less appropriate for countries with large unexplored tracts, especially those countries subject to extensive economic and/or political uncertainty. In these territories, potential investors are reluctant to incur substantial up-front costs. Nigeria, for example, is trying to refresh a once-vibrant mining sector that flopped in the 1970s and 1980s, and so has reduced barriers to entry with a first-come first-served system and insignificant surface rents: $0.25 per hectare per year for exploration and $1.00 for mining.[276] The overriding principle in issuing exploration and mining licenses is that any method agreed on should be transparent and accountable, and encompass not only equality but also suitability and recourse to fair and speedy adjudication of disputes. Particularly in the United States, activist groups may and do file proceedings and obtain temporary injunctions against a project for various environmental reasons. These reasons may be valid, but the process can be open-ended and delay mining projects for years. A good practice system, while encouraging a fully open process of public consultation and redress, tends to impose a reasonable time limit within which a decision must be rendered.[277]

2.5.4. Non-Discrimination and Competitive Neutrality

In most countries, private industries dominate mining sectors. Many countries have also privatised state-owned mining companies and have put in place legal frameworks that focus on competitive markets and private sector development of the mining industry. In countries where state-owned mining firms are active, the operation of competitive and effective markets advises that government authorities should not favour state-owned firms at the expense of private firms in matters of taxation, access to finance, or licenses to explore and develop mines. Such non-discrimination is sometimes known as

[275] *Ibid, 215.*
[276] *Ibid, 190.*
[277] *Ibid, 215.*

"competitive neutrality" and is a keystone of competition policy and effective markets. Similarly, it is also important to avoid unnecessary or harmful discrimination between foreign and domestic mining firms.[278] Lessons learned from Chilean mining sector show that the country has a robust and dynamic mining sector. The state-owned Codelco remains the largest mining company and Chile has avoided discrimination in Codelco's favour and continues to attract substantial private mining investment – both domestic and international. Codelco, in fact, pays a higher percentage of its earnings in taxes than any private mining company.[279] Indonesia, whose previous mining law required foreign companies to enter into joint ventures with local entities, rescinded this requirement in its 7th generation Contract of Work framework, as well as in the new mining law of 2008.[280] Non-discrimination should also extend to the screening of applicants for exploration or mining licenses. Many countries examine the bona fides and the financial and technical resources of applicants as a way of screening out "unserious" ones. Some countries oblige applicants, particularly for a production license, to prove the financial means required to develop the mine. This approach disregards the reality of mining exploration and finance, in which junior companies may run risky exploration and preliminary development of deposits before raising capital or taking in a larger partner with greater technical, financial, and marketing resources. Additionally, discrimination against smaller mining companies can delay the finding and development of mineral deposits, including smaller ones that the major companies are less likely to be interested in, and it can also hamper the development of home mining companies.[281]

2.6. Security of Tenure and Contract

Mining is a capital-intensive industry that requires a huge initial capital investment. However, sometimes this investment can fail to generate a positive return for many years. To avoid such a risk, mining legal frameworks should work towards ensuring security of mining titles. Any regulatory and licensing framework which does not offer security of mining rights for the expected life of mine is thus likely to discourage investment or raise risks and/or minimise the expected return on investment. It is proven that uncertain environment created by renegotiations of the terms of a mining license and

[278] *Ibid, 215.*
[279] *Ibid, 234.*
[280] *Ibid, 254.*
[281] *Ibid, 215.*

contract by the governments often deters investment. In such environments, governments often tend to take or augment their equity share in a mining project.[282] In mining business, like all other business sectors, investors want certainty and security of their tenure and contract beyond any specific regulations, conditions, taxes, or royalties. It is worth underlining that for mining investors to raise capital at minimal cost and/or commit capital to a given project, they will always require all possible guarantees that protect them from any arbitrary decisions, and ensure that their rights, granted in their licenses and contracts, will not be withdrawn or altered arbitrarily.[283]

There are many ways, depending on each country, to achieve security and certainty. In Chile, a mining concession creates for the holder an inalienable property right which must be considered as any other asset under normal commercial law.[284] This most iron-clad form of security may be difficult to be adopted in many countries because of Constitutional and/or other legal impediments. The Chilean example proffers the creation of a property right tantamount to ownership of mineral resources, but it is also potentially controversial. It comprises many advantages including enabling smaller and undercapitalised companies to pledge that property as collateral to raise financing efficiently and at minimal cost. However, it has been mainly criticised for carrying or including the contention that once the property right has been created the resources are managed for private benefit rather than the national interest. Therefore, herein rises the requirements of a balance which encourages the development of mining, provides security of tenure for mining companies and ensures that risks and windfall gains are distributed between mining companies and the state in a transparent, predictable, fair and equitable manner.[285] Legally enforceable contracts, as was the case of Indonesia's former practice of contracts of work, or entirely clear and transparent licensing practices and conditions that avert arbitrary administrative removal of licenses, as is the case in Quebec, are other ways to ensure security of tenure.[286]

Security of tenure is also contingent on preferential access to a production license for the discoverer of the deposit. It might be contended that investment to explore a mining tract is unlikely if the investor is not guaranteed the ability to secure rights to exploit mineral

[282] *Ibid, 190.*
[283] *Ibid, 234.*
[284] *Ibid, 190.*
[285] *Ibid, 234.*
[286] *Ibid, 190.*

deposits s/he discovers. This is where automatic or preferential access to production licenses for exploration license holders becomes more important because the exploitation of minerals will automatically increase the attention to environmental matters and to the rights of local and/or indigenous peoples.[287] Mining developments are obviously associated with significant environmental concerns. These concerns do not start with mine development and production per se, but with its exploration. Secluding exploration from production can divide and reduce accountability among different companies; something that could obstruct legitimate efforts to recover compensation in the event of environmental damage.[288] It can also have deterrent effects on investment for in development and production, the investor may inherit contingent liabilities from the exploration company, which can be difficult to identify or quantify in advance.[289] Successful and sustainable mining operations also lies in engaging with local communities and indigenous peoples from the beginning. It goes the same that without continuity of stewardship from mining prospection or exploration to production, it may be difficult for mining to work effectively. It is important to bear in mind that security of tenure to a large degree relies on exclusivity of rights over a given property or concession.[290] In Kyrgyzstan for example, more than one entity or company is allowed to explore then exploit a given claim or tract for different minerals.[291] This kind of permission often leads to disputes over incompatible rights and to logistical nightmares if two companies are permitted to work the same claim tract. Finally, it is difficult to protect any exploration or mining rights if claims and concessions are not well defined. This is best achieved with some form of mapping system and electronic filing of claims together with a good mining cadastre, as is the case in both Chile and Quebec.[292]

2.7. Taxes, Fees, and Charges

In mining, taxes, fees, and charges are imposed and taken for the use of public lands and depletion of non-renewable resources. There is not any universally acknowledged “best

[287] *Ibid, 234.*
[288] *Ibid, 215.*
[289] *Ibid.*
[290] *Ibid, 190.*
[291] *Ibid.*
[292] *Ibid.*

practice" for mining taxes, fees, and charges. However, good practice generally points to the following trends:[293]

1. Up-front payments, which can be surface rents or land-use fees, should be moderate, since otherwise, they can place a heavy fiscal burden on companies that have not yet begun to generate revenues and/or where prospects are uncertain.
2. Simplicity. A good system for imposing taxes, fees and charges is clear, transparent, and non-arbitrary.
3. Avoidance of double or triple taxation is desirable. Kyrgyzstan's new mining fiscal regime adds a new "land tax" on top of existing royalties and the bonus tax on reserves; this constitutes double, even triple, taxation.

Businesses and governments usually share the financial gains through taxes on company profits during periods of high profitability. However, some countries would use a further windfall profit tax or resource rent tax to attempt to capture "rents" from high prices, which can in turn temporarily allow mining companies to make profits far higher than their threshold rate of return (or above what policymakers consider an acceptable profit margin). In 2008, the United States debate over taking a windfall profits tax on oil companies when the price of oil was at historic highs highlighted the difficulty in determining what is a "reasonable" profit margin or return on investment and, henceforth, a windfall profit.[294]

Mining is not a regulated utility like water or electricity. In a regulated utility, concession agreements with private companies with significant market power specify a rate of return as a reference for increasing or decreasing user tariffs. The unpredictability in mineral prices and production costs and volumes however can produce huge swings in profitability from one year to the next.[295] It follows from this view that tax policies that repossess all or most windfall profits expose mining companies to much lower returns when mineral prices are low or exchange rates less favourable. Put differently, without the ability to use windfall profits to counterbalance low profits in some years, mining

[293] *Ibid, 234; 190.*
[294] *Ibid, 215; 190.*
[295] *Ibid, 215.*

companies are likely to adopt a much more conservative approach to investment.[296] South Africa's "gold formula" is one way around this problem, since a company earning 5% profit or less pays no taxes, while progressive rates of up to 45% are applied for profits above this level.[297] This gives an inducement for companies to keep on working marginal mines. However, the gold formula is only applicable for gold. It has never been applied in any other countries and may deter profit maximisation.[298]

It may be argued that various countries are increasingly realising the importance of introducing or revising their taxing regime for mining contracts and licensing systems to ensure greater profitability for the state. In Mongolia, for example, the government has recently realised that windfall profits tax appears ill-considered and may sacrifice the long-term development of the country's mining industry for short-term revenue gains.[299] However, it should be also noted that over-zealous efforts to capture a larger share of mining proceeds through taxes may sometimes force the closure of a mine particularly when market prices for minerals go down. It can also delay or even stop new investment in marginal mines and/or discourage some new investments altogether. It is submitted that each country has the right to change its taxing regime as it sees fit. Maintaining a climate of stability and certainty required by the mining industry implies that changes in taxation should not specifically target the mining industry, and should any changes be approved and introduced, they must be in accordance with established legislative rules and procedures.[300] In the view of this, many countries have now introduced some form of tax stabilisation as a way of preserving the value of mining rights. Chile for example applies tax stabilisation at a total rate of 42% of profits over 10 years, although a company can choose the lower corporate income tax rate, royalties, and other payments that could fluctuate over time. Kazakhstan, Uzbekistan, Argentina, Peru, Burkina Faso, and many other countries apply some form of tax stabilisation either for a fixed term or for the life of mine.[301]

[296] *Ibid, 199; 190.*
[297] *Ibid, 190; 199; 215.*
[298] *Ibid. 215.*
[299] *Ibid, 190.*
[300] *Ibid.; 215.*
[301] *Ibid, 190.*

In Indonesia, tax stabilisation was formerly written into contracts of work for the life of the contract, but all this has been repealed in the new mining law.[302] The entire contracts of work concept was exceptionally useful in securing tenure and offering certainty and stability in a country like Indonesia, where rule of law is weak and corruption has been endemic.[303] The rising of commodity prices in recent years has seen many countries seeking to impose new royalties or windfall profits taxes and demand for a greater share of mining company profits through ownership or profit sharing. In such circumstances, the stability of a contracts of work approach would have been a welcome protection. Tax stabilisation approach, however, should be taken with caution for it may drive unequal competition if different mining companies that have acquired their licenses at different times are subject to different tax rates.[304]

2.8. Licensing Financial and Administrative Burden

Licensing fees are generally insignificant compared to the cost of exploration and exploitation or the royalties and taxes paid on mineral production and profits. Seen in a wide range of jurisdictions as developed above, licensing fees and ground or surface rents, which are both a form of license fee, are relatively small. Whatever the merits of the tax and royalty regimes in the jurisdictions, their governments do not impose additional entry barriers in the form of high initial licensing fees and charges.[305] It is, however, often challenging to draw the line between licensing fees and charges, and other types of mining fees, rents, royalties and taxes because the nomenclature could differ widely from one country to another. Countries and/or sub-national jurisdictions naturally are likely to capture a reasonable share of the revenues and profits coming from their ore resources, but they use various methods to achieve this. As a general rule, for a government which would like to encourage mineral exploration and production, excessive licensing fees and onerous licensing procedures can refrain companies from prospecting, exploring, and mine development, since they constitute costs that could be recoverable only after a long period, if at all.[306]

[302] *Ibid.*
[303] *Ibid, 190.*
[304] *Ibid, 215.*
[305] *Ibid, 234.*
[306] *Ibid, 199.*

Mining is a risk-taking activity at every stage of its developments and in most circumstances. In view of this, any licensing conditions which call for a substantial up-front expenditure also add to this risk and dissuade investment, while the revenues governments get are far less than those they might capture from royalties and taxes on production and/or sales.[307] Put differently, it could be held that better mining licensing and tax regimes would impose reasonable or minimal license fees which are based on the cost of providing regulatory services to the mining sector. By contrast, the land tax and "bonus" in Kyrgyzstan's new mining regime, which are fundamentally different kinds of licensing fees, are onerous in the extreme.[308] Rather than producing any meaningful government revenue, they are likely to deprive the government of future taxes and royalties, while creating plenty of opportunities for *ex gratia* payments that culminate in private pockets rather than the public purse.[309] Similarly, the new mining regime in Indonesia revokes a simple first-come-first-served licensing approach with an auction or tender for both exploration and production licenses, with no guarantee that the holder of the exploration license will be conferred a production license.[310] This could increase the up-front costs of both exploration and production licenses, and raise the financial risk for exploration companies. High or increased risk will raise the required returns on investment and would therefore make otherwise viable mineral deposits unbeneficial and leave them unexploited.

2.9. Small-Scale Mining

Licensing and regulation of small-scale mining has introduced in the mining jurisdictions a completely different set of challenges from those of large-scale mining. Small-scale mining does not have universally accepted definition, and different countries may base their definitions on some combination of level of mechanisation, value of production, fixed investment cost, and employment. Small-scale mining operators face different challenges from medium and large-scale miners and deserve different licensing and regulatory treatment or regime. The costs and regulatory burdens to which larger mining companies are subjected cannot apply to small miners because many, if not most of them,

[307] *Ibid.*
[308] *Ibid, 199.*
[309] *Ibid, 190.*
[310] *Ibid, 254.*

would be driven out of the formal sector or out of business altogether.[311] As it stands nowadays, a large portion of individuals and enterprises function in the informal sector, partly because of the burden of compliance. The Tanzanian case, for example, indicates that small-scale mining employment is estimated at 550,000, 50% higher than in medium and large-scale mining. An estimated 95% of the participants in small-scale mining operate informally. In Zimbabwe, the 350,000 large-scale mine workers are matched by an estimated 350,000 small-scale participants, with 85% of them in the informal sector.[312]

One important component of best practice for small-scale mining is to distinguish the distinct nature of the sub-sector and to use different sets of regulations, fees, and taxes from those applicable to large mining companies. In some countries, this is achieved via completely different laws regulating large-scale and small-scale mining. The more common practice is for an umbrella mining law to contain special stipulations for small-scale mining, which may put together smaller claim areas and shorter lease or rights duration with lower fees and abridged registration procedures.[313]

Many experts in the field of mining consider Tanzania's 1998 Mining Act as an example of best practice in small-scale mining regulation. This legislation grants separate status to small-scale and artisanal miners, with different provisions concerning mineral rights; environmental, health, and safety approvals; and duration of tenure. Tanzania grants a five-year "Primary Mining License."[314] Crucially, and contrary to other countries that discriminate against small-scale miners, Tanzania accepts small-scale mining rights to be transferred and mortgaged. This has qualified small-scale miners to get credit and enter joint ventures with larger companies.[315] Where many countries limit small-scale mining licenses to citizens, Tanzania accepts minority foreign participation in small-scale mining ventures. Tanzania's approach has the benefit of transferring valuable know-how and technology to small-scale miners.[316] As it might be noted, the processes of small-scale mining can vary substantially.

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[311] *Ibid, 234.*
[312] *Ibid, 190.*
[313] *Ibid, 234.*
[314] *Ibid, 190.*
[315] *Ibid. 234.*
[316] *Ibid*, *229; 190.*

In a nutshell, based on the theoretical foundation of the mining industry as analysed above, it emerges that mining law or legislation is about best practices of licensing. Reasoning and interpreting mining legislation should involve and ensure certainty, stability, and predictability to mining investors. Certainty, stability, and predictability are what is referred to as mining industry best practices and should constitute the pillar of the mining regulatory regime which in turn must comply with two fundamental principles including:

1. Equality before the law. This principle involves two conditions that are:
    i. The mining regulatory framework for the allocation and management of mineral rights should provide for equality before the law.
    ii. The requirements for mineral rights' application should be standardised as far as possible and preferably included in legislation or, failing that, subordinate legislation.
2. The rule of law which lies within the following six principles:
    i. Stating the law clearly and unambiguously, which means:
        a) The legal framework governing the mining rights should be unambiguous.
        b) Mining investors should be able to accurately determine their obligations under the regulatory framework, and thus meet the relevant requirements without unnecessary difficulty.
    ii. Administrative discretion should be legally limited, which states:
        a) The mining regulations or frameworks should circumscribe, as far as possible, the discretionary powers of administrative officials. The law should be stated objectively, and the enclosure of subjective criteria should be limited as far as possible.
        b) Where it is necessary to allocate officials discretionary powers, the latter should be appropriately guided and limited by the law.
        c) Administrative discretion circumscription generally helps investors to determine, with reasonable certainty, what is expected of them. Furthermore, it can also decrease the potential for corruption or bias.
    iii. Well defined institutional responsibility includes:
        a) The defined regulatory framework with roles and responsibilities of mining registrar or cadastre and other mining regulatory agencies and

enforce them in practice to ensure that there are no overlaps in regulatory functions, or gaps in regulatory responsibility.

iv. Timeframes for licensing functions should be prescribed. Put differently:
   a) Mining registrar or cadastre should specify timeframes for actions taken under the regulatory regime ideally in primary legislation, subordinate legislation or, at the very least, publish it.
   b) There should be timeframes for actions taken by the mining cadastre and for actions by mining companies.
   c) The time frame provision guarantees the effective and predictable performance of licensing functions.

v. Security of tenure should be protected, portending that:
   a) Without protection, an investor may become reluctant to invest in a long-term, capital-intensive mining project. Thus, mining legislation and institutions should ensure and protect the security of the tenure of mineral rights holders to minimise the risk assumed by resource extractors.
   b) Prospecting rights holders should be given the exclusive right to develop any mineral resource they discover in the licensing area.
   c) There should be a proper mining contract for all exploration and mining rights which gives rights holders adequate time to explore for and exploit the resource. Licence renewal should also be made through reasonable provision.

vi. Mineral rights holders should have access to administrative and judicial review, meaning:
   a) Mining rights holders should be able to challenge the decisions of a regulatory authority through administrative or judicial review.
   b) The governing legislation should provide this right.
   c) The independence of the judiciary in this regard is crucial because it protects the company's rights and security of tenure.

Table 2.2 below provides some issues regarding mining regulation and licensing.

Table 2.2 : Selected Issues in Mining Licensing

Licensing	Why Regulate?	Why License?	Problems Associated with Licensing	Ways to reduce or eliminate problems	Good practices
Exploration/ Prospecting Licenses	Protect the environment, Protect public health and safety, Protect vulnerable communities, Prevent conflict over claims.	Ensure clarity and accountability, Facilitate collection of taxes and royalties, Better planning of mineral resource development.	Lack of transparency, Excessive fees, Insecure rights, Poorly defined claims, Excessive documentary requirements and proof of capabilities.	Security of tenure, Use a first come- first served or auction system, Charge only nominal surface rent/lease payment, Install GIS-based mapping and claim registration system.	Create a secure and transferable property right via Licensing, A first come-first served system, Install GIS-based mapping and claim registration system, Transparent licensing requirements and procedures, Ensure exclusivity over licensed claims.
Production/ Exploitation Licenses	Protect the environment, Protect public health and safety, Protect vulnerable communities, Prevent conflict over claims, Protect worker rights and safety.	Ensure accountability, Facilitate collection of taxes and royalties, Ensure clean-up and rehabilitation, Better planning of mineral resource development.	Lack of transparency, Excessive fees, Insecure rights, Non-automatic transferability of exploration to production license, Conflict between national and sub-national interests and/or authorities,	Security of tenure, Avoid excessive surface rent or lease payment, Install GIS-based mapping and claim registration system, Clearly defined rights and responsibilities.	Create secure transferable property right via licensing, Install GIS-based mapping and claim registration, Transparent licensing requirements and procedures, Clear environmental, planning laws and regulations, Guarantee first refusal on production license to holder of exploration license,

			May not focus on health, safety, and other key risks.		Ensure exclusivity over licensed claims.
Small-Scale Mining (SSM)	Encourage informal miners to enter the formal sector, Protect livelihoods, Reduce exploitative practices, Protect environment, health, and safety, Alleviate poverty among artisanal and small-scale miners.	Give formal status to mine operators, Grant and protect legal rights and claims of mine operators, Create property rights and increase access to finance, Increase revenue collection, Stimulate investment	Lack of licensing leaves operators in legal limbo, with no security of property rights and limited access to capital, Applying normal licensing procedures to small-scale miners can be costly and difficult, Regulatory failure – SSM has no effective incentives to protect workers, the environment, or local communities.	Simplify licensing procedures and reduce costs, Security of tenure Ensure transparency and fairness.	Recognise smaller claim sizes for SSMs, Create a secure and transferable property right via licensing, Provide extension services to SSMs on environmental, safety, marketing, and technical matters, First-come-first-served approach to licenses, Draft a simple code of conduct for SSMs.

Source: Magha-A-Ngimba Charles Gimba 2024.

2.10. Conclusion

This Chapter aimed at understanding the complex dynamics of mining jurisdictions by delving into the theoretical lenses that frame the broader discussion. It posited that without a world economic contraction of the order of the great depression, a long-term rising tendency for minerals demand and prices seems almost irrefutable. The Chapter further contended that as this tendency ascends again, possibly within the next few years, many of the mining projects pushed back will be renewed as the price outlook recovers and it becomes easier to raise capital. Thus, countries, especially emerging economies, could entice a large share of new mining investment, whilst exploiting the upturn in demand and prices by imposing additional restrictions and taxes on mining companies. This however, could also disadvantage their own mining sector.

Summarily, the review of the literature has proffered that in the mining industry, as in many other endeavours, there is no such thing as a one-size-fit licensing practice or set of best licensing practices applicable in every circumstance. Laws, regulations, and practices are developed and applied in a specific social, cultural, economic, geographic, environmental, and political context. What works in one mining country may not work in another, or all countries. Conversely, identifying numerous features of licensing laws, regulations, and practices common to countries where mining contributes positively to national economic and social development goals could be possible. Likewise, it is possible to focus on features of licensing common to countries where the mining sector has the potential to make a larger contribution to development. In a nutshell, it could be concluded that the analytical review of licensing practices conducted in this Chapter sought to identify certain principles that are embodied in most mining regulatory regimes. In view of this, it identified some of the different approaches and the way these approaches have been put into practice by various mining-rich countries and their jurisdictions. Regardless of national and regional adjustments, most mining regimes or frameworks that successfully balance investor rights, individual and community rights, and government policy goals and revenue requirements comprise all or most of the common rudiments, which can be considered as mining licensing practices. These elements include clear legal authority, security of tenure, subject to relevant regulatory requirements, transferability of exploration and mining rights, exclusivity of exploration and mining rights in designated concession areas, non-discrimination between local and foreign nationals, preferential rights to convert exploration licenses into production licenses, low or

moderate surface/land rent charges, moderate and fixed royalty schedule, transparent licensing procedures, precise mining cadastre, clear and uniform policy on government ownership, protection against speculation, and special licensing and regulatory regime for small-scale mining. The following Chapter appraises South African mining legislation and regulatory framework.

Chapter Three: From State's Resources Custodianship System to Mineral Rights Ownerships: Insight from the South African Mineral Regulatory Regime

Resume

South African mining industry is subject to a wide range of regulations and compliance obligations which includes the MPRDA (which is the primary legislation governing mining rights in the country, and which provides for the requirements and procedures for obtaining, maintaining, and transferring mining rights, as well as the environmental, social, and financial obligations of mining rights holders); the MHSA (which sets out the health and safety requirements for mining operations and operators to comply with in order to ensure the safety and well-being of workers, communities, and the environment); NEMA (which organises the regulatory framework for environmental management, including the requirements for environmental impact assessments, environmental authorisations, and environmental management plans for mining operations) and BBBEE requirements. The regulatory framework compacts all the texts applicable to mining and offers the state reasonable control of mining operations at every stage regarding mining rights acquisition and legal compliance during various operation developments.

3.1. Introduction

The South African mining and land issue had been marked by oppressive history. In the 17th Century, the country witnessed the arrival of Europeans which restricted black land and ownership and led to forced removals. The first known inhabitants were the Khoi and San followed by Bantu speaking peoples. In 1899-1902 the Anglo Boer War was fought between the British and the Boer republics (Transvaal and Orange Free State) resulting in Brish victory and the birth of Union of South Africa. From onset, in the mining sector, black diggers were largely prevented from gaining any significant mining discoveries as rules were created to prevent them from acquiring digging permits. The birth of apartheid was entrenched by various legislations. The 1913 Land Act in South Africa prohibited black people from buying or renting land in areas designated as white and paved the way for further legislation restricting the rights of black people and their ownership of land such as Native Trust and Land Act 1936 and henceforth minerals rights. The Group Areas Act of 1950 provides for separateness put to south Africans based on racial groups of

lines. With this legislation, black people were displaced aware from cities and placed in townships. Although the Constitution of South Africa 1996 and other relevant legislation proclaims that South African's mineral and petroleum resources belong to the nation, the country seems not to be benefitting its citizens.[317]

South African legal system is a hybrid of Roman Dutch civilian law, English common law, customary law, and religious personal law. The Roman Dutch civilian law and English common law influence reflects South Africa's history of successive colonial governance by the Dutch and English. With one of the world-famous mining industries, the country holds some of the world's richest resources more than a century after its establishment. However, it carries the legacy of contributing to and being sustained by institutionalised racial oppression in the pre-democratic era. The Chapter mainly argues that despite a complete overhaul of the mineral regulatory regime in 2004 from a system of private ownership of minerals to a system of State custodianship, the mining industry remains largely opened to further transformations from an ownership perceptive.

Mining still contributes a significant amount to South Africa's gross domestic product. The mining industry has been identified as key to driving long term growth. The 2018 Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) was enacted after extensive public consultation with all the mining stakeholders in the country. From this legislation, a new mining right must have a minimum of 30% black economic empowerment (BEE) shareholding distributed as follows: at least 5% non-transferable carried interest to qualifying employees, at least 5% non-transferable carried interest or "equity equivalent benefit" to host communities, and at least 20% effective ownership in the form of shares to a BEE entrepreneur; 5% of which must preferably be for women.[318]

An Amendment Bill to the 2002 Mineral and Petroleum Resources Development Act (MPRDA); which was pending in the Parliament since 2012, brought in legal uncertainty. With the publication of the Mining Charter in 2018/9, this Bill was withdrawn and a plan to develop separate legislation to govern the upstream petroleum industry emerged. The government's move towards regulation of the extraction of shale gas through fracking

[317] Native Trust and Land Act 1936; Land Act 1913; Group Areas Act 1950; Constitution of South Africa 1996; Henri Mostert Mineral Law: Principles and Policies in perspective (2012 19 & 26).
[318] BEE 2018/9.

and marine mining specifically related to petroleum in 2015 was set aside by the High Court in October 2017.[319] Further technical studies conducted in 2017 evidenced that the initially estimated 485 trillion cubic feet (Tcf) of shale gas is in fact closer to 13Tcf.[320] In 2018, a restriction was issued for the granting of exploration permits for petroleum in South Africa's exclusive economic zone (the sea) until the government publishes an invitation for further applications. This Chapter reviews South African mining legislation and regulatory framework. It begins with the sources of the South African mining laws. It then looks at the state's resources custodianship system prior to expanding on the regulatory structure and analysing South African approach to the mineral rights.

3.2. Mineral Rights Sources

South African resources sector is primarily regulated by the 2002 Mineral and Petroleum Resources Development Act (MPRDA). The MPRDA sides with the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018 (Mining Charter III) which governs Black economic empowerment (BEE). Mining Charter III, which came into force in 2019, significantly increased the BEE threshold requirements with respect to ownership, procurement, and employment equity. To understand the BEE obligations' scope for South African mineral sector, it is worth looking at the Implementation Guidelines for the Broad-Based Socio-Economic Empowerment Charter for the 2018 Mining and Minerals Industry. Furthermore, prospecting and mining activities are regulated by various environmental and health and safety laws which are considered in more detail in section 9 of the Mining Charter III.

According to the South African constitution, the state is the custodian of mineral and petroleum resources of which it has a duty to administer for the benefit of all South Africans. Pursuant to the MPRDA, the Minister of the Department of Mineral Resources and Energy (DMRE) is the legal authority, vested with the power to grant or refuse applications for mineral rights. It is to say that at a national level, the mining industry is regulated by the DMRE which implements and administers the MPRDA through its regional offices. The Department of Environment, Forestry and Fisheries, which is in charge of environmental matters, is responsible for drafting all relevant legislation and

[319] Minister of Mineral resources v Stern (1369/2017); Treasure the Karoo Action v Department of Mineral res. [2019] ZASCA 99.

[320] Michiel O. de Kock, Deflating the Shale Gas Potential of South Africa's Main Karoo Basin, South African Journal of Science, Vol. 113, No. 10/20 (2017).

regulations governing mining and environmental issues. The DMRE, in turn, is responsible for implementing these laws or regulations insofar as the laws/regulations pertain to the mining sector.[321]

3.2.1. Mining Law-related Sources

The 1996 South African Constitution is the supreme law of the Republic. Any law or conduct inconsistent with it is invalid. To the extent where the MPRDA does not regulate a specific issue, the common law will apply, but the provisions of the MPRDA will prevail to the extent of any inconsistency. Other relevant statutes affecting the mining industry include the National Environmental Management Act, 1998 (NEMA); the National Environmental Management: Waste Act, 2008 (NEMWA); the National Environmental Management: Air Quality Act, 2004 (NEMAQA); the National Water Act, 1998 (NWA); the National Environmental Management: Protected Areas Act, 2003 (NEMPAA); the National Environmental Management: Biodiversity Act, 2003 (NEMBA) (and the relevant provincial conservation ordinances and statutes); the National Heritage Resources Act, 1999 (NHRA); the Mineral and Petroleum Resources Royalty Act, 2008; the Labour Relations Act, 1995; and the Mine Health and Safety Act, 1996 (MHSA).[322]

It is important to note that depending on the region in which exploration or mining activities are undertaken, exploration and mining companies will need to comply with various local provincial and municipal laws. These may include, for example, the Land Use Planning Ordinance 15 of 1985[323] which applies in the Western Cape and parts of the Eastern Cape and North-West, and which prescribes that land needs to be re-zoned for mining and prospecting purposes. Exploration and mining companies may take cognisance of the South African Development Community Treaty[324] (including the Protocol on Mining and the Protocol on Finance and Investment). The Protocol on Mining, among other things, imposes regional standards for the mining industry,

[321] Constitution of the Republic of South Africa, 1996; Mineral and Petroleum Resources Development Amendment Act, No.49 of 2008 (MPRDA).
[322] National Environmental Management Act 107 of 1998; National Environmental Management: Waste Act 59 of 2008; National Environmental Management: Air Quality Act 39 of 2004; National Environmental Management: National Water Act, 1998; National Environmental Management: Protected Areas Act 57 of 2003; National Heritage Resources Act 25 of 1999; Mineral and Petroleum Resources Royalty Act, 2008; Labour Relations Act, 1995; Mine Health and Safety Act, 1996 (MHSA).
[323] The Land Use Planning Ordinance, 1985.
[324] Treaty of the Southern African Development Community and its Protocols, including the Protocol on Finance and Investment (The SADC Treaty).

encourages information exchange and promotes sustainable development, whereas the Protocol on Finance and Investment provides selected investment protection mechanisms.

3.2.2. Political Developments-related Sources

The most recent political developments in the mining industry include the consolidation of the previously separate portfolios of mining and energy into the DMRE. Since 2019, significant regulatory changes involve the lapsing of the MPRDA Amendment Bill and the commencement of Mining Charter III. Recently, some information from the DMRE informs that the DMRE intends to publish a Petroleum Resources Development Bill to regulate the oil and gas sector separately.[325] There are a few specific steps the mining industry is taking in light of political developments. While the end of the MPRDA Amendment Bill is welcomed by the private sector, the obligations imposed under Mining Charter III remain a source of contention. In 2019, the Minerals Council of South Africa instituted judicial review proceedings against the Minister and the DMRE whereby the High Court was requested to review and rescind certain onerous provisions of Mining Charter III including:

(i) the ownership obligations regarding the renewal and transfer of existing mining rights;

(ii) the obligations imposed on applicants for new mining rights to have a minimum of 30 per cent BEE shareholding comprising a minimum of 5 per cent non-transferable carried interest to each of the Qualifying Employees and Host Communities; and

(iii) 20 per cent effective ownership to BEE entrepreneurs (5 per cent of which must preferably be owned by women). The Minerals Council has also demanded the High Court to review and suspend the provisions which would empower the DMRE to invoke the MPRDA's enforcement mechanisms when a mining right holder fails to comply with the obligations imposed by the Charter.[326]

[325] The Minister of Minerals and Energy has, under section 107(1) of the Mineral and Petroleum and Resources; Development Act, 2002, read with the provisions of section 14 of the Interpretation Act 1957, made the regulations in the Schedule.

[326] Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others (20341/19) [2021] ZAGPPHC 623.

3.2.3. State Investment Treaties-related Sources.

South Africa is party to various bilateral investment treaties (BITs), many of which include clauses aimed at protecting investments and restricting the South African government's ability to expropriate the property of foreign investors in South Africa. It should, however, be noted that South Africa has terminated many BITs in recent years on the basis that the protection offered to investors therein is also provided under the Protection of Investment Act, 2015. In addition to the BITs, South Africa is also party to several relevant international treaties which play an important role in foreign investment, including: SADC Treaty; The Economic Partnership Agreement between the European Union and the Southern African Development Community EPA Group; Southern African Customs Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (SACU); Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the People's Republic of China promoting Bilateral Trade and Economic Co-operation; African Continental Free Trade Area Agreement.

3.3. From State Resources Custodianship System to Ownership Right-holds

Under the South African constitution, the state has custodianship over mineral and petroleum resources, and has a predominant duty to administer these resources for the benefit of all South African communities.[327] It means that the rights to exploit mineral resources are only derived from the state via the Department of Mineral Resources and Energy. In terms of the 2002 Mineral and Petroleum Resources Development Act (2002 MPRDA), the application for, and the obtaining of, the appropriate right by any person who wishes to exploit mineral resources are first required prior to exploiting resources. This disposition further informs that owners of surface rights cannot claim the minerals found on, in or under the surface of their land.[328] Applicants may apply for either a 'prospecting right' – which vests them with the exclusive right to prospect for prescribed minerals over a prescribed area of land, or a 'mining right' – which entitles them to the exclusive right to mine for prescribed minerals over a prescribed area of land.

[327] *Ibid, 313.*
[328] Mineral and Petroleum Resources Development Amendment Act, 2008 (MPRDA).

Under the 2002 MPRDA, the Minister has the power to grant or refuse applications for rights. However, applicants cannot be arbitrarily denied a prospecting or mining right if they meet all the requirements relating to the right they have applied for.[329] Contrariwise, in specified circumstances the right can be rescinded or suspended by the Minister. Technically it is submitted that once a right is granted and registered, the right holder has a limited real right over the mineral or petroleum and the land to which such right relates. Likewise, third parties cannot be vested with prospecting or mining rights in the same land where another party was already entitled to the same rights. However, a third party may apply for a right to a different mineral that is not included in a holder's existing right.[330]

Considering the MPRDA, acquired mineral rights must be registered in the Mineral and Petroleum Titles Registration Office[331] because the Department of Mineral Resources and Energy (DMRE) requires prospecting rights holders to submit a number of reports or data records related to their exploration activities. Thus, the DMRE is responsible for making available information and data related to mining activities, and the rights granted by way of application under the MPRDA. Relatedly, section 2 of the Promotion of Access to Information Act informs that the DMRE has compiled a Promotion of Access to Information Act (PAIA) Manual which outlines the procedure for public access to the recorded information held by the DMRE, subject to the discretion of the Director-General of the DMRE.[332] The 2000 PAIA Manual, as amended in 2022, allows interested and affected parties to access information from the DMRE without having to follow the PAIA process. Furthermore, the DMRE PAIA Manual (section 7) permits persons to automatically access certain information without formally requesting it.[333] The DMRE government website avails list of the names of mines, their owners, postal addresses, commodities mined, operational status, type of mine, and location, to all who access their website.

While the MPRDA requires prospecting rights holders to submit data records related to their exploration activities to the DMRE, this information is not readily available in the public domain. In terms of clause 3 of the South African Code for the Reporting of

[329] *Ibid.*
[330] *Ibid.*
[331] The Mining Titles Registration Amendment Act, 2003.
[332] Section 2 of the Promotion of Access to Information Act 2 of 2000, (PAIA).
[333] *Ibid, 324: Section 7* provides that the Act is South Africa's access to information law, and it enables people to gain access to information held by both public and private bodies.

Exploration Results, Mineral Resources and Mineral Reserves (SAMREC Code 2016/2017),[334] mining reports for public interest are however prepared and include annual and quarterly company reports, press releases, information memoranda, technical papers, website posting and public presentations, which are reported publicly in accordance with SAMREC, and are available to private parties. The South African Council for Geoscience is responsible for the collection and curation of all geoscience data and knowledge in South Africa and gathers geological information available to private parties. Certain information contained on the South African Minerals Deposit Database, however, is restricted and is subject to the PAIA.

3.3.1. Acquisition of Rights by Private Parties

Pursuant to the MPRDA, any natural, juristic, foreign, or local person may apply for and be granted a prospecting right, a mining right, a retention permit, or a mining permit. The Minister is the ultimate administrator of mining-related rights and permits in South Africa and must accept applications for these rights and permits where no other person holds such right or permit for the same mineral and land, and where the applicant meets the application requirements. To note is that prospecting rights and mining rights are respectively governed by sections 16 to 21, and sections 22 to 30 of the MPRDA.[335] Prospecting rights grant the holder the exclusive right to prospect for prescribed minerals over a prescribed area of land, whilst the holder of a mining right is entitled to mine the prescribed minerals, in terms of the mining right, over a certain area of land. The prospecting right holder is also vested with the exclusive right to apply for and be granted a mining right solely for the minerals and land which are the subject of the prospecting right. The MPRDA outlines several obligations and requirements which apply to the holders of a prospecting right. Equally the holder of a mining right should comply with a number of obligations for the mining right to remain valid.

3.3.2. Renewal and Transfer of Mineral Licences

Subject to the MPRDA requirements, holders of different mineral licences (prospecting rights, mining rights, retention permits, or mining permits) have the

[334] Clause 3 of the SAMREC Code 2016/2017.
[335] *Ibid, 320: Sections 16 to 30.*

exclusive right to apply for and be granted the renewal of such licence in line with the same mineral and same area of land as follows:[336]

1. Once for a period not exceeding three years, for a prospecting right (s18),
2. For further periods each of which may not exceed 30 years, for a mining right (s24),
3. For three periods, each of which many do not exceed one year, for a mining permit (s27) and
4. Once for a period not exceeding two years, for a retention permit (s34).

Subject to the MPRDA, the holder of a prospecting right or mining right must obtain the Minister's consent prior to transferring that right, or part thereof, to a third party. This rule extends to the transfer of a direct or indirect controlling interest in a company, except those listed on a recognised securities exchange, which holds the prospecting or mining rights. It should however be noted that mining permits and retention permits are not, as it stands, capable of being transferred to third parties.[337]

3.3.3. Duration of Mining Rights: Domestic Parties vs. Foreign Parties Acquisition

Subject to the provisions of the MPRDA, mining and prospecting rights may be respectively granted for an initial period of up to 30 years and five years. These rights may be suspended or cancelled by the Minister in specified circumstances. Holders of rights are empowered to make representations regarding any proposed suspension or revocation of rights and may also approach the courts for judicial review of any decision made in relation to rights granted under the MPRDA.[338] The September 2021 High Court judgment regarding the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter III) came with much-needed certainty surrounding various ownership provisions of Mining Charter III that were being imposed on rights holders who were applying for renewal of their respective mining rights.[339]

In addition to local investment in the industry, the South African mining industry largely attracts foreign direct investment. Under the MPRDA, all mining rights applicants (foreign and local) must comply with the requirements and provisions of the MPRDA and

[336] *Ibid, 320: Sections 18, 24, 27 and 34.*
[337] *Ibid, 320: Sections 16 to 21.*
[338] *Ibid, 320: Sections 22 to 30.*
[339] *Ibid, 318;* Mining Charter III, 2018.

any industry-specific obligations that are imposed on applicants.[340] The South African mining industry and Government have been working on programmes to attract foreign investment into the mining industry, but these programmes have been impaired by concerns such as the ease of doing business and the administrative requirements including applications for rights, lengthy delays, security, and corrupt practices. Despite these impairments, the South African mining industry still attracts significant foreign investment mainly due to the high rates of return on investments in the country.[341]

3.3.4. Mining Rights Protection: The Theory of Surface Rights

The South African legal system provides for the protection of the holders of mining licences with regard to the land and minerals over which these licences are granted. Section 5(3)(a)(b) of the 2002 MPRDA read together with sections 25 and 26(3) of the 1996 Constitution provides that both prospecting and mining rights are recognised as limited real rights, and the holders of these rights are afforded the proprietary protections.[342] Holders of rights may approach the courts for enforcement of their rights, and to review any decision made that may arbitrarily, or otherwise, affect their use and their enjoyment of their rights. Subject to the provisions of the 2017 (No 15) International Arbitration Act, any foreign arbitration awards are legally recognised in South Africa.[343]

Under the relevant provisions of the MPRDA, holders of mining and prospecting rights have right to access the land forming part of their prospecting or mining right. Depending on the nature of the rights, the rights holders may bring equipment and machinery onto the prospecting or mining right area to build relevant infrastructure and enjoy the use of their rights. Where another party holds other proprietary rights to the land, namely, there is an owner or lawful occupier of the property, the mining and (or) prospecting company will usually enter into compensation agreements for use and access to the land concerned.[344] In this case, applications for mining and prospecting rights do not need the prior endorsement of the landowner for that right to be granted. Section 54 of the MPRDA informs that holders of mining and prospecting rights may approach the regional

[340] *Ibid, 320: Sections 103 and 104.*
[341] South African Mining in Transition. Available at: https://www.pwc.co.za/mining. (Accessed: 03 March 2024).
[342] *Ibid, 313: Sections 25 and 26 (3); Ibid, 320: Section 5(3)(a) and (b).*
[343] International Arbitration Act, 2017 (No 15).
[344] *Ibid, 320: Section 5(3)*; Joubert and Others v Maranda Mining Company (Pty) Ltd (296/08) [2009] ZASCA 68.

manager of the relevant region to enforce their rights in circumstances where the landowner is unreasonably denying entry to or placing unreasonable demands in return for access to the land.[345] It is important to note that the South African legal system does not provide specific legal requirements for the state to participate directly in mining operations. However, the transformation and empowerment objectives of the MPRDA are achieved through the implementation of Mining Charter III.

3.3.5. Government Expropriation of Licences and Protected Areas

Proprietary right is constitutionally protected in South Africa; no one may be arbitrarily deprived of their property, but in terms of a law of general application. Section 25 of the Constitution specifically provides for compensation for expropriation under the laws of general applications, where land may be expropriated for a public purpose or in the public interest. The amount of compensation to be paid and the time and manner of payment is subject to what the rights holder and state agree to or what is determined by the court.[346] Parliamentary debates about the potential amendment of section 25 and the transmission of draft bills for land expropriation have been ongoing since, and as it stands, the courts may be readily approached for arbitrary deprivation of land and (or) any arbitrary acts taken by the government in expropriating licences granted to mining companies.

Under the MPRDA, various areas are expressly protected from mining and prospecting activities. These areas include land comprising residential areas; any public roads, railways or cemeteries; any land being used for public or government purposes or reserved in terms of any other law; or areas identified by the Minister because of national interest, the strategic nature of the mineral in question, and the need to promote the sustainable development of the nation's mineral resources.[347] In addition to section 23(1)(d), section 25 of the MPRDA expressly proscribes the granting of a mining right if the mining would result in unacceptable pollution, ecological degradation, or damage to the environment.[348] Furthermore, the 2003 (No.57) National Environmental Management Protected Areas Act[349] expressly disallows commercial prospecting or

[345] *Ibid, 320: Section 54.*
[346] *Ibid, 313: Section 25.*
[347] *Ibid, 320: Section 49.*
[348] *Ibid, 320: Sections 23 (1)(d) and 25.*
[349] National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA).

mining activities in the following areas: special nature reserves, national parks or nature reserves; areas declared as 'protected environments' without the written permission of the Minister; mountain catchment areas; world heritage sites; marine protected areas; and specially protected forest areas including forest nature reserves and forest wilderness areas declared in terms of the 1998 (No.84) National Forests Act.[350]

3.4. Regulatory structure: Framework and Authorities

Mining in South Africa is primarily regulated by the MPRDA and other relevant statutes[351] including Mineral and Petroleum Resources Royalty Act 2008; Mining Titles Registration Act 1967; Precious Metals Act 2005; Diamonds Act 1986; Mine Health and Safety Act 1996 (MHSA); National Environmental Management Act 1998 (NEMA); and National Water Act 1998. The Spatial Planning and Land Use Management Act 2013 and the relevant provincial and municipal regulations and by-laws govern land use planning (including zoning for future prospecting and mining operations).[352]

The Department of Mineral Resources (DMR) is the primary regulator for the mining industry. Under the MPRDA, the DMR is primarily responsible for regulating matters regarding mineral and petroleum resources. As part of this, the DMR governs Environmental Impact Assessments (EIAs) and Environmental Management plans or Programmes (EMPs) for new and existing mining activities. Since 2014, environmental authorisations (EAs) are required for prospecting or mining operations and related activities in addition to an EMP. As such, the DMR is the legal authority to grant EIAs and approve the prescribed financial provision (an amount of money to be set aside by mining companies for the remediation and rehabilitation of the environment in relation to mining activities).[353] The Department of Environmental Affairs (DEA) remains the appeal authority,[354] whilst the Department of Water and Sanitation (DWS) regulates wastewater discharges that may affect a water resource. The DWS disposes of several policy instruments and mechanisms, including the water use licence regime and the proposed wastewater discharge charge system, to ensure compliance with prescribed standards and

[350] National Forests Act 84 of 1998.
[351] Minerals and Petroleum Resources Royalty Act 28 of 2008 (MPRRA); *Ibid, 323*; Precious Metals Act, 2005; Diamonds Act, 1986; Mine Health and Safety Act, 1996 (MHSA); National Environmental Management: National Water Act, 1998.
[352] Spatial Planning and Land Use Management Act 16 of 2013.
[353] *Ibid, 320: Section 5(1).*
[354] Section 43(1) of the National Environmental Management Act 107 of 1998.

water management practices according to the 'user pays and polluter pays' principle, and to move some of the usages and clean-up cost back to the polluters.[355]

3.4.1. Ownership

The 'first come-first served' principle is the South African system for the allocation of mineral rights. However, applications from historically disadvantaged persons are given preference if other various applications are received on the same day. The MPRDA provides that both legal and natural persons can hold rights. In South Africa, private and public companies, or foreign companies, or a joint venture or partnership, are usually used to carry on mining operations. As separate legal entities, private and public companies are taxed in their own right, and their shareholders have limited liability regarding the debts of the company. There is no distinction between local and foreign applicants under the MPRDA. Nevertheless, all mineral rights applicants must meet the same requirements, including compliance with the 2018 Mining Charter. The 2010 Mining Charter requires 26% ownership by historically disadvantaged South Africans or Black Empowerment, and the current 2018 Mining Charter requires 30%.[356]

3.4.2. Authorisation: Lease/Licence/Concession Term

Mining rights are granted under the MPRDA for up to 30 years. These rights are renewable for any number of times provided that the applicant meets the renewal requirements set out in the MPRDA. Prospecting rights are granted for up to five years and can be renewed once for up to three years, if the MPRDA renewal requirements for such a right are met. Following the grant of a prospecting right or mining right, it must be lodged for registration with the Mineral and Petroleum Titles Registration Office within 60 days of the notarial execution of the mining right. Upon registration, mining rights become limited real rights binding against third parties,[357] and the holder of such rights has various obligations during the duration of the right, including reporting obligations. For example, the Black Empowerment requirement of 26% and 30% under the 2010 Mining Charter and the 2018 Mining Charter respectively is often achieved through an empowerment agreement. The empowerment agreement may be an integrative part of the mining right as a condition to ensure that the agreement is executed in conformity with its

[355] National Water Act, 1998; Water Services Act, 1997.
[356] The Deloitte Global Millennial Survey 2019; Mining Charter Analysis 2018.
[357] Mining Titles Registration Act 16 of 1967.

terms as a term and condition of the mining right. The ores and any products resulting from the exploitation of the mineral must be sold at market prices, even if the purchaser is an affiliate or subsidiary of the holder, to ensure that minerals are disposed of on an arm's length basis. Mining and prospecting rights can be transferred or leased with the prior written consent of the Minister of Mineral Resources.[358]

3.4.3. Fees, reporting, Liability, Restrictions

In terms of the MPRDA, prospecting fees are payable by holders of prospecting rights, while royalties must be paid by holders of mining rights on the transfer of minerals. Reporting obligations are also included in the prospecting right and mining right where the activities may impact the environment, relevant resources, employees, and host community.[359] It implies that holders of mining rights and prospecting rights are statutorily liable for the remediation of the mining and prospecting areas where they operate. They must make financial provisions for such remediation in an agreed manner by placing funds in a rehabilitation trust or procuring insurance products or financial guarantees before conducting operations. The holder of any mining licence must actively conduct operations in compliance with the approved licence (mining work programme or prospecting work programme). For the cession, transfer, letting, subletting, assignment, alienation, or other disposition of a mining or prospecting right (or the controlling interest in a company holding such right), ministerial consent is required. There is an exemption for a shift in control of listed companies holding mining or prospecting rights.[360]

3.4.4. Access to Land

The holder of a mining or prospecting right has the right to access the land over which the right applies for its operations. Nonetheless, the owner or lawful land occupier must be informed during the application process for the mineral right. In practice, a lease or similar arrangement is agreed on with the landowner or lawful occupier to regulate the impacts of the prospecting or mining activities on the surface. The provisions of the lease or similar agreement should also set rent payment or compensation to the landowner. Conversely, licence holders cannot be refused land access by the landowner or lawful

[358] *Ibid, 320: Section 11.*
[359] *Ibid, 320: Section 16(1)(c).*
[360] *Ibid, 320: Section 25(2).*

occupier, and the MPRDA provides mechanisms of dispute resolution in relation to access to the land between the parties. According to the MPRDA, applicants for a prospecting, mineral or petroleum right must comply with the requirements thereof, and applications must be lodged in the form approved in the MPRDA regulations for the right to be granted. These requirements relate (among other things) to the technical and financial capabilities of the applicant; ownership of historically disadvantaged South Africans (for mining rights); optimal exploitation of the relevant mineral; and mitigation of environmental impact.[361] Usually, landowners and host communities who are interested and affected parties, can comment on the application. The consultation with a lawful occupier or landowner is hence a crucial aspect of the application for a prospecting or mining right. When the Minister of Mineral Resources is satisfied that the applicant complies with all the MPRDA requirements for a particular right, the Minister will grant the right subject to certain terms and conditions.[362]

3.4.5. Environment and Health and Safety

Prior to conducting any prospecting or mining operations, a prospecting or mining right holder must have an approved Environmental Assessment. Applications must be submitted to the DMR. Under the National Environmental Management Act 1998 (NEMA), every holder, holder of an old order right or owner of works is accountable for any of the following regarding the mine: environmental liability; pollution or ecological degradation; the pumping and treatment of polluted or extraneous water; and the management and sustainable closure of the mine (regardless of the closure certificate).[363] In terms of section 24P of NEMA, and the Financial Provisioning Regulations, financial provision for the rehabilitation of mining-related impacts must be set aside. By law, South African mining companies should undertake rehabilitation work as part of their ongoing operations in accordance with an approved environmental management assessment (EMA) that supports the mine closure plan. Also, under the National Water Act 1998, a holder of a mining right also requires a water use licence.[364] The following may also be necessary; an atmospheric emission licence (for example for smelting operations) under

[361] *Ibid, 320: Section 5(3*); Joubert and Others v Maranda Mining Company (Pty) Ltd (296/08) [2009] ZASCA 68.
[362] *Ibid, 190.*
[363] National Environmental Management Act 107 of 1998.
[364] *Ibid, 355: Sections 28, 24P*; Sections 21(c)(i) of the National Environmental Management: National Water Act, 1998.

the National Environmental Management Air Quality Act 2010[365] and a waste management licence for the reclamation of residue stockpiles under the National Environmental Management Waste Act 2009.[366]

Health and safety in the South African mining industry is primarily regulated by the 1996 Mining Health and Safety Act (MHSA). This legislation's primary objective is to ensure the protection of the health and safety of employees and other persons at mines. Subject to the MHSA, employers are required to ensure that their operating and non-operating mines offer a safe and healthy working environment, as far as reasonably practicable regarding the design, establishment, operation and decommissioning of the mine. The MHSA provides penalties and a system of administrative fines for non-compliance. It also authorises employees to refuse dangerous work and further provides for employee participation by requiring that health and safety committees are formed, and that health and safety representatives are appointed. The MHSA finally arranges the powers and functions of the Mine Health and Safety Inspectorate (MHSI) (a part of the DMR) which is responsible for enforcing the MHSA.

Conforming to the MHSA, the MHSI can limit or end work at any mine and require an employer to take steps to minimise health and safety risks at the relevant mine.[367] As far as reasonably practicable, every employer must ensure that non-employees who may be directly affected by the activities at a mine are not exposed to any health and safety hazards. Any breach of the MHSA by any person including an employer constitutes a criminal offence and is liable to a fine, imprisonment, or both. On the grounds of the MHSA, an MHSI can suspend all or any part of the operations of a mine in any circumstances that the MHSI has reason to believe endangers the health and safety of any person at the mine. The MHSI can also impose administrative fines on an employer in the event of an MHSA breach. The maximum administrative fine is ZAR1 million per offence. The Occupational Diseases in Mines and Works Act 1973[368] governs the payment of compensation and medical costs regarding certain illnesses (such as silicosis) contracted by persons employed in mines or at sites where activities ancillary to mining are conducted.

[365] National Environmental Management: Air Quality Act 39 of 2004.
[366] National Environmental Management: Waste Act 59 of 2008.
[367] Mine Health and Safety Act, 1996 (MHSA).
[368] Occupational Diseases in Mines and Works Act 78 of 1973.

3.4.6. Mineral Rights Acquisition Theory: Mechanisms

Regarding rights acquisition, as addressed in the MPRRA from sections 16 to 30, any person who wishes to conduct reconnaissance or prospecting (exploration) operations must first apply for and obtain a reconnaissance or prospecting right or permission. Reconnaissance permission is valid for one year and cannot be renewed or transferred. In reverse, a prospecting right holder is granted the exclusive right to prospect for prescribed minerals over a prescribed area of land. The holder of such a right also has the exclusive right to apply for and be granted a mining right in relation to the minerals and land to which the prospecting right relates. A prospecting right is granted for a period of up to five years and may be renewed once for a period not exceeding three years. Concerning the required rights to conduct mining, it derives from the MPRDA that any person wishing to conduct mining activities must first apply for and obtain a mining right which vests its holder with the exclusive right to mine for prescribed minerals over a prescribed area of land. This right may be granted for a period of up to 30 years and may be renewed for further periods, each of which may not exceed 30 years. Likewise, small-scale mining operations in relation to mineral deposits also require mining permits. Such permits however do not exceed five hectares in size and can be mined optimally within a period of two years. This permit is valid for a period of up to two years and may be renewed for three further periods, each of which may not exceed one year. The procedures set out in the MPRDA apply to all minerals equally.[369]

3.4.7. Native Title and Land Rights

Considering the MPRDA, the applicant for a prospecting right, mining right or mining permit must notify and consult with the relevant landowner or lawful occupier and any other affected party. In circumstances where the holder of a reconnaissance permission, prospecting right, mining right or mining permit is prevented from commencing or conducting any reconnaissance, prospecting, or mining operations because of the actions of the landowner or lawful occupier, various dispute settlement mechanisms are provided. Equally, recent judicial decisions on the MPRDA and the 1996 Interim Protection of Informal Land Rights Act (IPILRA) indicated that informal land rights holders must be consulted and in some instances may need to consent to the mining operations before a

[369] *Ibid, 320: Sections 16 to 30.*

mining right is granted.[370] The definition of an informal right to land includes, amongst other things, the use of, occupation of or access to land in terms of any tribal, customary or indigenous law or practice of a tribe.[371]

3.4.8. Indigenous vs. Foreign Mining Ownership

Under the MPRDA, any person (natural or juristic, foreign, or local) may apply for and be granted a prospecting right, a mining right, a retention permit, or a mining permit. The MPRDA does not distinguish between local and foreign applicants. Irrespective of the nationality of the applicant, all applicants for mining rights must comply with the requirements of the MPRDA, which includes compliance with Mining Charter III. The Minister's prior written consent is required for the transfer of a controlling interest (both direct and indirect) in a company that holds a mining or prospecting right. The transfer of any interest in a company listed on a recognised stock exchange is exempt from having to obtain the Minister's consent. The Minister's consent must be granted if the transferee is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and if it satisfies the requirements for the initial granting of such right. The MPRDA provisions require mining companies which hold mining rights to comply with the requirements imposed under Mining Charter III.[372]

In view of this, existing holders of mining rights that achieved a minimum of 26 per cent BEE shareholding will be recognised as compliant for the duration of the mining right. This is so irrespective of their current BEE shareholding. Conversely, new mining rights applicants must have a minimum of 30 per cent BEE shareholding encompassing: a minimum of 5 per cent non-transferable carried interest to each of qualifying employees; host communities; and a 20 per cent effective ownership to BEE entrepreneurs (5 per cent of which must preferably be owned by women). The minimum level of BEE shareholding may be met at holding company level, mining right level, on units of production, shares, or assets. Where the BEE shareholding is met at any level other than mining right level, the flow-through principle will apply.[373] It is noteworthy that South Africa does not have any free carry rights or options to acquire shareholdings.

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[370] Joubert and Others v Maranda Mining Company (Pty) Ltd (296/08) [2009] ZASCA 68; Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).
[371] *Ibid, 320.*
[372] *Ibid, 190.*
[373] *Ibid, 320*; Mining Charter III, 2018.

3.4.9. Rights to Use Surface of Land

According to the MPRDA, the holder of a mining or prospecting right has a statutory right to access land. They may enter the land to which such right relates together with their employees and bring onto that land any plant, machinery, or equipment and build, construct or lay down any surface, underground, or undersea infrastructure that may be required for mining. Both the holder of the prospecting or mining licence and the owner of the surface rights must exercise their rights with due regard for the rights and entitlements of the other party.[374] It comes from this that the surface rights owner may not unlawfully or unreasonably deny the holder of the prospecting or mining right access to the property, nor interfere with the holder's ability to carry on the prospecting or mining activity on the land. Reversely, notwithstanding the holder's mining or prospecting statutory right of access to the property, it is common (although not a legal requirement) for mining companies to enter into access and compensation agreements with landowners. The rationale for this is to mitigate potential risks for disputes and disruptions to mining operations, mostly in environments where the land is possessed or occupied by rural communities.

Section 25 of the Constitution says that no one may be arbitrarily deprived of their property (including a limited real right such as a prospecting or mining right) except in terms of a law of general application, for a public purpose or in the public interest. If the right holder is deprived of the property, the Constitution further stipulates that the holder is entitled to just and equitable compensation. The compensation must reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.[375] Separately, subject to section 54 of the MPRDA read with section 25 of the Constitution, the Minister may expropriate any land or any right to provide equitable access to the nation's resources, stimulating economic growth, advancing employment and promoting the sustainable and ecological development of mineral and petroleum resources.[376]

[374] *Ibid, 320.*
[375] *Ibid, 313: Section 25.*
[376] *Ibid, 320: Section 54; Ibid, 313: Section 25.*

3.4.9.1. Processing, Sale of Mineral Resources and Tax

Subject to section 26 of the MPRDA, the Minister can initiate or promote the beneficiation of minerals and prescribe the levels required for beneficiation. As such, minerals unearthed in South Africa can be beneficiated outside of the country only after written notice is given to the Minister, and after consultation with the Minister.[377] Moreover, under the Precious Metals Act 2005[378] and the Diamonds Act 1986,[379] which regulate the processing of precious metals and diamonds, it is noted that when considering applications for the processing of diamonds and precious metals, the South African Diamonds and Precious Metals Regulator must consider the promotion of equitable access to and local beneficiation of South Africa's diamonds and precious metals. Export permits and export levies are necessary for the export of precious metals and diamonds outside South Africa.[380]

There are no restrictions or limitations on the sale, export or import of extracted or processed minerals. However, restrictions or limitations may apply to the sale, export and import of precious metals and diamonds, in which case an export and import permit is required under the Precious Metals Act, for precious metals, and the Diamonds Act, for diamonds.[381] Also, subject to the Precious Metals Act, the approval of National Treasury in terms of the Exchange Control Regulations, made under the Currency and Exchanges Act 1933, is required for the export of unwrought or semi-fabricated gold (granted with the concurrence of the Minister of Mineral Resources). However, the export of unwrought or semi-fabricated platinum group metals will require the written approval of the Minister of Mineral Resources.[382]

Considering the 2008 Mineral and Petroleum Resources Royalty Act (Royalty Act), it is submitted that a royalty is payable on refined and unrefined minerals payable to the South African Government. The royalty for refined minerals (including gold and platinum) is calculated by dividing earnings before interest and taxes (EBIT) by the product of 12.5 times gross revenue calculated as a percentage, plus an additional 0.5%.

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[377] *Ibid, 320: Section 26*.
[378] Precious Metals Act, 2005.
[379] Diamonds Act, 1986.
[380] *Ibid, 370; 371.*
[381] *Ibid.*
[382] Currency and Exchanges Act, 1933; *Ibid, 370.*

A royalty cap of 5% of the revenue applies for refined minerals.[383] The South African Government does not have any free carry rights or options to acquire shareholding. Provisions from the 2007 Diamond Export Levy Act for instance indicate that the export rate of duty for diamonds is 5% of the total value less overpaid or plus underpaid.[384]

3.4.9.2. Processing, Refining, Beneficiation and Export

Pursuant to section 6 of the MPRDA, the Minister may initiate or promote the beneficiation of minerals in the country.[385] Historically, however, based on the 2005 Precious Metals Act's (PMA) and the 1986 Diamonds Act (Diamonds Act) provisions, only the precious metal and diamond industries have been the subject of local beneficiation requirements. In terms of the PMA and Diamonds Act, persons that wish to process, refine, beneficiate, sell, import or export precious metals (in unwrought or semi-fabricated form) and unpolished diamonds must first obtain the relevant licence in terms of such legislation, but individuals intending to beneficiate any minerals mined in South Africa from another country may only do so after written notice and in consultation with the Minister. Furthermore, the PMA and Diamonds Act require any individual intending to export precious metals (in unwrought or semi-fabricated form) and unpolished diamonds to obtain the necessary permit under such legislation.[386]

3.4.9.3. Transfer and Encumbrance

According to the MPRDA, reconnaissance right may not be transferred, while prospecting and mining rights may only be transferred with the prior written consent of the Minister. In view of this, lenders will take security over mining assets in South Africa. Such security generally takes the shape of share pledges, mortgages over mining rights and general and special notarial bonds over mining equipment. Nevertheless, before taking security over any mining assets, lenders should carefully consider the provisions of section 11 of the MPRDA. As mentioned above, the Minister's consent is required for the transfer of a prospecting or mining right by the holder to a third party and for the transfer of a controlling interest (both direct and indirect) in a company that holds a mining or prospecting right. Thus, the Minister's consent will generally be

[383] Sections 2 to 6 of the Minerals and Petroleum Resources Royalty Act 28 of 2008 (MPRRA).
[384] Section 3 of the Diamond Export Levy Act, 2007.
[385] *Ibid, 320, Section 6.*
[386] *Ibid, 370; 371; 320.*

required for lenders to enforce their security. Foreign lenders (i.e., other than a bank as defined in the Banks Act, 1990) may require the Minister's consent to enter into the security arrangements and to enforce their security.[387]

3.4.9.4. Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

A reconnaissance right may not be sub-divided, while prospecting and mining rights may be sub-divided, on condition that the Minister consents to this in writing. Under the MPRDA and the 1967 Mining Titles Registration Act, reconnaissance, prospecting, and mining rights can be held in undivided shares.[388] As such, a mining right holder may only mine the minerals identified in its mining right. If the holder wishes to mine any secondary minerals, the Minister's consent must first be obtained to amend the existing mining right and include the right to mine the secondary minerals. Tailings dumps or residue deposits created during mining operations conducted before the MPRDA are not subject to the provisions of the MPRDA. These tailings dumps are movable assets and are capable of private ownership. The holder of a mining right granted under the MPRDA may process any tailings dumps or residue stockpiles created under such right but only for so long as the right subsists. The MPRDA does not distinguish between onshore and offshore exploration and mining.[389]

3.4.10. Mining Environmental Regulation

With reference to the NEMA and the 2014 Environmental Impact Assessment Regulations, reconnaissance, exploration, prospecting and mining operations require an environmental authorisation.[390] Depending on the nature of the activities undertaken and the environment, a number of other licences may be required including a water use licence in respect of the NWA; a waste management licence in respect of the NEMWA; an atmospheric emissions licence in respect of the NEMAQA; permits relating to protected fauna/floral species in terms of the NEMBA and/or the relevant provincial ordinances or legislation; permits relating to the exhumation and relocation of graves not contained in a cemetery in reference to the NHRA; permits for the collection, removal and/or destruction of heritage resources in terms of the NHRA; permits for the

[387] *Ibid, 320;* Banks Act 94 of 1990.
[388] *Ibid, 320; 376.*
[389] *Ibid, 190.*
[390] *Ibid, 355*; Environmental Impact Assessment Regulations 2014.

destruction, alteration or damage to buildings older than 60 years in terms of the NHRA; and re-zoning approval in terms of the relevant municipal laws.[391]

Before 2 September 2014, financial provisioning was regulated by section 41 of the MPRDA read with regulations 53 and 54 of the MPRDA. Based on these provisions, mining rights applicants had to make financial provisions for rehabilitation due to negative environmental impacts arising from their mining activities. Should the mining rights holders fail to fulfil their remediation obligations, the DME could implement these obligations using this financial provision. In reference to the abovementioned regulations, it is noted that financial provision could be secured by means of a financial guarantee, contributing money to a rehabilitation trust or depositing money into an account managed by the Minister. The initial quantum and subsequent increases thereof were determined in accordance with the DME's *Guideline Document for the Evaluation of the Quantum of closure-related Financial Provision Provided by a Mine* (DME Guideline). From the DME Guideline and the MPRDA Regulations follows that the selected financial provision must cater for the actual costs associated with the premature closing, decommissioning and final closure, and post-closure management of residual and latent environmental impacts.[392]

With effect from 2 September 2014, section 41 of the MPRDA was removed and replaced with section 24P of the NEMA. Like section 41, section 24P states that the holders of a mining right must annually assess their environmental liability in the prescribed manner and increase the financial provision to the satisfaction of the Minister.[393] The only material difference between section 41 and section 24P is that, in terms of the latter, the holder is required to maintain financial provision notwithstanding the issuing of a closure certificate by the Minister while in terms of the former; the holder would be absolved of environmental liability once the closure certificate was issued.[394] From 2 September 2014 until 20 November 2015, the quantum of financial provision was calculated in accordance with the DME Guideline. On 20 November 2015, the 2015 Financial Provision Regulations (FP Regulations) were published. The FP Regulations

[391] *Ibid, 320: Section* 41, 53 and 54; National Environmental Management: National Water Act, 1998. *Ibid, 358; 357;* National Environmental Management: Biodiversity Act 10 of 2004; National Heritage Resources Act 25 of 1999.
[392] Official guideline as contemplated in Regulation 54(1) to the MPRDA 2002.
[393] *Ibid, 355: Section 24 (P).*
[394] *Ibid, 320: Section 41: Ibid, 355: Section 24 (P).*

transformed financial provisioning in South Africa and were viewed by the mining industry as burdensome and prohibitive. Unlike the MPRDA and the MPRDA Regulations, the FP Regulations require that financial provision must be made for: "annual rehabilitation, as reflected in the annual rehabilitation plan; final rehabilitation, decommissioning and closure of the mining operations at the end of the life of operations, as reflected in the final rehabilitation, decommissioning and mine closure plan; and remediation of latent or residual environmental impacts as reflected in the environmental risk assessment report".[395]

When reading the FP Regulations with section 37A of the Income Tax Act, it is construed that the applicant or holder of a licence must ensure that the financial provision provided is equal to the sum of the actual costs of implementing the plans and reports contemplated above, for a period of 10 years. Where financial provision is provided using a rehabilitation trust, these funds cannot be used for financial provision required for annual rehabilitation or final rehabilitation, decommissioning, and closure of the mining operations. This implies that money held in a trust fund may only be used for latent and residual environmental impacts. This restriction has effects on the use of trust funds in that, monies held in trust funds cannot be withdrawn to fund other forms of financial provision acceptable in terms of the FP Regulations for annual or on-going rehabilitation. Such withdrawals would attract significant tax penalties in terms of section 37A, on the basis that the funds were not being distributed for the prescribed purposes set out in the Income Tax Act.[396]

In reference to the Regulations, the financial provisioning must be audited on an annual basis and adjusted by providing for the shortfall within 90 days of the audit. If the financial provision is more than the amount, such amount must be deferred against future assessments. These restrictions, however, only apply to financial provision contemplated in terms of the FP Regulations. Under the transitional provisions of the FP Regulations,

[395] The Financial Provisioning Regulations were published in terms of the NEMA 1998 (Act No. 107 of 1998), in November 2015, in line with the "One Environmental System", under which all environmental matters pertaining to mining are be regulated in terms of the environmental legislation and implemented by the Minster responsible for mineral resources. As part of the "One Environmental System", the requirements for financial provisioning for rehabilitation in the mining sector were transferred from the MPRDA 2002 (Act No. 28 of 2002) to NEMA through the Financial Provisioning Regulations, as of November 2015. The purpose of the Regulations is to make financial provision for costs associated with the remediation and rehabilitation of environmental impacts associated with mining activities.

[396] Financial Provisioning Regulations of 2015; Section 37A of the Income Tax Act 62 of 1968 (the ITA).

financial provision that was already in place at the time the FP Regulations came into effect needs to be converted in accordance with the FP Regulations by February 2020. However, given the apparent difficulties with the FP Regulations, various drafts of the FP Regulations published for comment have been amended. Since February 2020, new regulation drafts have been expected to come into effect in order to adjust the defects identified above. However, these drafts for comment have also been riddled with problems.[397]

Section 43 of the MPRDA requires the holder of a prospecting right or a mining right to apply to the relevant Regional Manager for a closure certificate within 180 days of
(i) the lapsing, abandonment or cancellation of the right,
(ii) the cessation of the prospecting or mining operation,
(iii) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate, or
(iv) the completion of the prescribed closing plan to which the right relates. The application must be accompanied by all information, programmes, plans and reports prescribed by the MPRDA and NEMA.[398] In light of this, the holder of a prospecting right or mining right must comply with the relevant procedures and requirements on mine closure, especially as they relate to compliance with the conditions of an environmental authorisation. Depending on the precinct wherein the prospecting or mining operations are envisioned to be undertaken, there may be zoning requirements which require re-zoning applications in line with a town planning scheme.[399]

3.4.11. Health and Safety and Administrative Aspects

The 1996 Mining Health and Safety Act regulates health and safety in mining. Regulations have also been promulgated in terms of the Act (MHSA). Owners of mines are accountable for ensuring the health and safety of their employees at a mine. The chief executive officer (or similar person) is responsible for ensuring that the mining owner complies with the requirements set out in the MHSA. The chief executive officer can delegate these responsibilities to other parties to fulfil these obligations. Such

[397] Financial Provisioning Regulations of 2015.
[398] *Ibid, 355: Section 43.*
[399] *Ibid, 355.*

delegations, however, do not absolve the chief executive officer (and the owner) of their obligations under the MHSA.[400]

The Mineral and Petroleum Titles Registration Office (MPTRO) acts as a central registry for all rights granted in terms of the MPRDA. These rights must be registered with the MPTRO within a certain period after they have been granted. Any person whose rights or legitimate expectations are materially and adversely affected, or who is aggrieved by any administrative decision made under the MPRDA, may appeal that decision within 30 days of becoming aware of it. This internal appeal process must be exhausted before a person may apply to a court to have an administrative decision reviewed. Appeals in respect of matters governed under NEMA must be lodged with the Minister of Environment, Forestry and Fisheries.[401]

3.4.12. Taxes and Royalties

Mining and prospecting companies are subject to various rules on taxation in terms of the 1962 Income Tax Act. There are certain capital expenditure deductions available in specific circumstances. Royalties are payable in accordance with the obligations imposed under the MPRDA. The payment of royalties is triggered once a mineral resource is "transferred" (i.e. disposed of, consumed, stolen, destroyed, or lost). Royalties are calculated on the value of the minerals and the royalty percentage rate, which is applied to the base amount. The aforementioned royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources.[402]

3.4.13. Cancellation, Abandonment and Relinquishment

In light of section 43(4) of the MPRDA, a prospecting or mining right holder may abandon such right totally or partially, subject to, amongst others, obtaining a closure certificate from the DME. There are no obligations upon the holders of an exploration or mining right to relinquish their part. However, under section 47, the Minister may rescind or suspend a right, permission or permit where the holder conducts prospecting or mining operations in contravention of the MPRDA; breaches any term or condition of such right, permit or permission; contravenes any condition in the environmental authorisation; or

[400] *Ibid. 359.*
[401] *Ibid, 320*; *Ibid, 355.*
[402] Income Tax Act, 1962; *Ibid, 320; 375.*

has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the MPRDA. Prior to acting upon these contraventions, the Minister must notify the holder of the right of the ministerial intention to suspend or cancel the right, permission or permit and allow him or her a reasonable opportunity to remedy the contravention.[403]

3.5. Analysis of South African Approach to the Mineral Rights

Section 3(1) of the MPRDA provides that "all mineral and petroleum resources are the common heritage of the people of South Africa, and the state is the custodian thereof for the benefit of all South Africans". As such, the government has the discretion to grant, issue, refuse, control, administer and manage any mining and petroleum rights."[404] In view of this, it is submitted that South Africa's mining legislation is a state 'custodianship' of mineral resources' system. As such, the state issues different types of licences and rights to applicants on a 'first come, first served' basis and upon satisfactory demonstration of the applicant's ability to comply with the financial, technical, environmental, health and safety, and socio-economic development requirements set out in the legislation.[405] The paramount mining legislation is Act 28 of 2002 (MPRDA), which came into force in 2004 and was amended in 2008. The MPRDA is complemented by other important legislation such as the Mine Health and Safety Act 1996, the Mining Titles Registration Act 1967, the Mineral and Petroleum Resources Royalty Act 2008, the Precious Metals Act 2005, the Diamonds Act 1986, the National Environmental Management Act 1998, and the National Water Act 1998.[406]

In light of the above, the most noteworthy licences, rights, and permits relating to mining and prospecting include:[407]

1. Prospecting rights (which authorise invasive prospecting and exploration work, on an exclusive basis for the prospecting area and mineral concerned, but do not entitle the holder thereof to mine for the mineral in respect of which the right is granted);

[403] *Ibid, 320: Sections 43(4) and 47.*
[404] *Ibid, 320: Section 3(1).*
[405] *Ibid, 320: Section 9.*
[406] *Ibid, 190.*
[407] *Ibid, 320: Sections 16 to 30.*

2. Mining rights (which authorise mining and exploration on a large scale and for an extended period, on an exclusive basis for the mining area and mineral concerned); and
3. Mining permits (which authorise small-scale mining on areas less than five hectares and where the mineral in question can be mined optimally within a period of two years, on an exclusive basis).

Other mining-related licences comprise reconnaissance permissions (which authorise non-invasive exploration activities on a non-exclusive basis), and retention permits (which protect the exclusivity enjoyed by prospecting right-holders during periods when it would be uneconomical to apply for a mining right or mining permit due to, for example, adverse economic conditions).[408]

Historical development of the South African mining jurisdiction informs that before the MPRDA, South African mining regulation existed for more than 100 years. Under that legislation, the right to mine was subject to a system of private ownership of 'mineral rights' (being essentially limited real rights and servitudes in respect of land), which could be freely traded. The dawn of the MPRDA however was received as a radical and important departure from the preceding regulatory environment. To accommodate the transition, the MPRDA provides the conversion of 'old order rights' into prospecting rights and mining rights regulated by the MPRDA. This process seems to be largely completed, with old order rights and conversion playing a less important role in the mining industry and, indeed, legal practice. However, a small number of old order mining rights are yet to be converted into new mining rights.[409] South African mining regulations also refer to a few international treaties such as a variety of trade agreements with various countries, the Treaty on the Non-Proliferation of nuclear weapons, various treaties on climate change and the World Trade Organisation. Equally, mineral reporting requirements are largely regulated by the JSE rules Limited.[410]

Mining legislation in South Africa is administered and enforced by the Department of Mineral Resources and Energy (DMRE). The DMRE is divided into five main services, namely mineral policy, and promotion; mineral regulation; mine health and safety; corporate services; and the chief financial officer. The mineral regulation service is

[408] *Ibid.*
[409] *Ibid, 190; 320; 339.*
[410] *Ibid.*

primarily responsible for the processing of applications, awarding of licences and rights and enforcement of the MPRDA. The mine health and safety service are primarily responsible for the administration and enforcement of the 1996 Mine Health and Safety Act (MHSA), including investigations into safety incidents, injuries and fatalities occurring at mines in South Africa. In both cases, there are regional offices of the DMRE in each of the nine provinces of South Africa, which are primarily responsible for the administration of the MPRDA and MHSA.[411] However, particularly in the case of mineral laws, the ultimate policymaking, especially the granting of licences and rights, consideration of internal appeals and decisions to suspend or revoke licences and rights owing to non-compliance, remains a national-level matter. Such decisions are taken by officials in the DMRE Head Office in Pretoria.[412]

3.5.1. Mining Rights and Required Licences

For all practical purposes, the state could be seen as the 'owner' of underground minerals. However, to prevent various contentions on expropriation of mineral rights as a result of the transition from the old legal system of private ownership, the MPRDA provides that the mineral resources are the 'common heritage' of all South Africans, and that the state is the 'custodian' thereof for the benefit of all South Africans. Through the Minister of Mineral Resources and Energy (or his or her delegate), the state confers on (private) third parties the right to mine underground minerals, based on a 'first come, first served application system. Such granting is upon satisfactory demonstration of the applicant's ability to comply with the financial, technical, environmental, health and safety, empowerment and socio-economic development requirements set out in the legislation.

Following this process, the holder of the mining right becomes the owner of the minerals for all practical purposes. Pursuant to section 11 of the MPRDA, in any event, the holder of the permit to mine becomes the owner of the minerals upon extraction of the mineral from the land where it naturally occurred. Thus, once a private party holds a prospecting right or mining right, it is possible for the private party to transfer such right (or a portion thereof) to another private party, subject to the consent of the Minister of Mineral Resources and Energy. The requirement of consent for transfers also applies to the

[411] *Ibid, 320; 359.*
[412] *Ibid, 320: Section 3(2)(a).*

transfer of a controlling stake in the business entity that holds the right unless that business entity is a listed company.[413]

3.5.2. Surface and Mining Rights

Prospecting rights, mining rights and mining permits are the most noteworthy mining licences. Section 5 of the MPRDA provides that prospecting rights and mining rights are limited real rights in respect of the land to which they relate. In other words, prospecting and mining rights constitute limitations on the rights of ownership of the landowner. Furthermore, section 5 explicitly permits the holder of a prospecting right or mining right to access the land in question, together with his or her personnel, and to bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or undersea infrastructure that may be required for the purpose of prospecting, mining, exploration or production, as the case may be.[414] It emerges from this that a prospecting or mining right incorporates not only the right to exploit the minerals in question but also the surface rights necessary for the exercise of that right. However, an emphasised recognition of the conflict between the rights of mineral right-holders and informal land right-holders (customary title holders), provided in the Interim Protection to Informal Land Rights Act 1996 (IPILRA), has brought about an increase in recent litigation.[415]

The regulation provides that applicants are granted mineral rights upon satisfactory compliance with certain requirements. The MPRDA is peremptory such that the Minister 'must' issue a mineral right when all requirements have been met. Following the recent ruling of the High Court,[416] this authority can now only be exercised upon the additional compliance with the provisions set out in the IPILRA, where applicable, that protect Historically Disadvantaged South Africans' (HDSAs)[417] or traditional communities who hold informal land rights as a result of the previous dispensation's failure to recognise customary title of land.[418] Due to the invasive nature of mineral rights on surface rights, the High Court ruled that the granting of a mining right in terms of MPRDA amounts to

[413] *Ibid, 320: Sections 3(1)(2) and 16 to 30.*
[414] *Ibid, 320: Section 5.*
[415] *Ibid, 362.*
[416] *Ibid, 362.*
[417] Historically Disadvantaged South Africans means any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa 1993 (Act No. 200 of 1993) came into operation.
[418] Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).

deprivation for purposes of the IPILRA as it goes beyond the normal restrictions on property use and enjoyment, and as such, triggers the requirement of 'consent' in terms of IPILRA. In other words, where land is held on a communal basis by a community that is subject to IPILRA, a mining right can only be granted if that community provides its full and informed consent thereto, through a majority decision at a meeting convened for the purpose of considering such disposal, and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.[419]

Despite benevolent intentions to reconcile these opposing rights, the socio-political environment may make this additional requirement deter holders and investors. Investors are reluctant to tolerate delays and expensive and prolonged court proceedings. This is compounded if investors also face ineffective or time-consuming community engagements, where uncertainty reigns in relation to recognised community representatives and their decision-making powers on behalf of the community. To ensure that the landowner or lawful occupier of the land in question does not incur or suffer undue hardship as a result of prospecting or mining activities on the land, the MPRDA provides that the holder of a prospecting right or mining right can, and which has become common practice, compensate the landowner or lawful occupier for any loss or damage suffered by the landowner or lawful occupier as a result of the prospecting or mining activities. The amount of compensation payable may be decided contractually between the parties, or it may be determined by the court or by way of private arbitration.[420] It has become a common practice for mining companies to enter into surface leases or 'surface rights usage and cut contracts with landowners or lawful occupiers, which sets out the parties' respective rights and obligations, and fixes a compensation amount for purposes of the MPRDA. However, neither payment of reimbursement nor arrangement between the mining right-holder and the landowner as to the quantum of compensation are prerequisites for access to land for the purposes of mining or prospecting activities.[421]

The recent decision of the Constitutional Court culminated in a power switch in favour of the landowner or lawful occupier,[422] insofar that it ruled that, should the landowner or

[419] *Ibid, 362.*
[420] *Ibid, 320: Section 54.*
[421] *Ibid, 190.*
[422] Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829.

lawful occupier prevent the mineral right-holder from commencing with its prospecting or mining activities, the latter must first exhaust its internal remedies in terms of Section 54 of the MPRDA before it can commence with its mining activities on the land.[423] This basically means that the regional DMRE office should be relied on to resolve such disputes. In practice, the right-holder faces significant obstacles to overcome in the form of delays and possible prohibitions imposed by the Regional Manager and ultimately expensive and time-consuming court proceedings concerning the enforcement of their rights. Under a compliance lens, the court's attempted settlement of communities' and mineral right-holders rights has provided for a disconnect between legal precedents and mining legislation. This is evidenced by the Minister, who guided by the legal precedents, published the Draft Mine Community Resettlement Guidelines for public comment, in December 2019. The Guidelines, inter alia, prohibits the start of mining undertakings until a resettlement agreement is reached on the appropriate amount of compensation as a result of resettlement. Some believe that if published in their current form, the guidelines will be rendered unenforceable if they are effected prior to making the necessary amendments to the MPRDA, to give force and effect to such guidelines.[424]

Prospecting and mining rights are granted through an application lodged in an approved form to the Regional Manager of the DMRE in the province or region where the projected mining setup is to befall. The one application must include all the required documents, and the applicant must comply with the other requirements set out in the legislation. These documents include, for example:[425]

1. A prospecting or mining works programme containing a detailed description of the geology of the resource being mined, the method and time schedule according to which the resource will be mined and a financing plan setting out the economics of the operation and the proposed method in which it will be financed,
2. Documents demonstrating how the applicant will comply with black economic empowerment requirements,
3. A social and labour plan, indicating how the mine will contribute to the sustainable socio-economic development and empowerment of its workers, surrounding communities and labour-sending areas, and

[423] *Ibid, 320: Section 54; Ibid, 414.s*
[424] South African Parliamentary Monetary Group, Available at: https://pmg.org.za/committee/58/ (Accessed: 15 June 2023).
[425] *Ibid, 320: Sections 16 to 30.*

4. An application for environmental authorisation.

Upon lodging the application to the DMRE, the relevant environmental reports must be submitted by the applicant as required in terms of the 1998 National Environmental Management Act (NEMA). Similarly, on approval of the application, it will be required to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result thereof in the relevant environmental reports. Where an environmental impact assessment has been identified as the relevant environmental instrument to inform an application for environmental authorisation, the environmental impact assessment is separately submitted from the other documents when the application is first lodged to the DMRE. However, it is conducted and developed concurrently with processing of the application for the mining right.[426] In terms of time limits, the MPRDA provides a maximum period of eight years (up to five years' initial period and one renewal for up to three years) for a prospecting right granting; up to five years (an initial period of two years and up to three renewals for one year each) for a mining permit; whilst a mining right may be renewed an unlimited number of times for up to 30 years at a time. The period of rights granted under the MPRDA depends primarily on the motivation submitted in support of a specific period, subject to certain statutory limits.[427] For example, if an applicant can only demonstrate a life of mine of 20 years, that applicant cannot, generally, obtain a mining right for a period of 30 years.

Prospecting and mining rights are commonly subject to conditions that are little more than restatements of the legal principles applicable to these rights in terms of the legislation. Under the MPRDA, the most significant of these terms and conditions comprise (in the case of a mining right) the extent of the right, the payment of royalties to the state, the black economic empowerment requirements, limitations on the transferability of the right and the undertakings made in terms of the mining work programme, the social and labour plan, and the environmental authorisation. In some cases, statutory conditions are further circumscribed by the terms and conditions of a specific right. For example, some mining rights are subject to a limitation on the transfer of any shares (not only a controlling interest) in the holder (whereas the MPRDA only limits the transferability of a controlling interest in the holder). Some believe these

[426] *Ibid, 355.*
[427] *Ibid, 320: Sections 16 to 30.*

conditions are ultra vires and, therefore, invalid. However, they are seldom if ever tested in South African courts.[428]

Mining titles are secured through various means. Subject to the MPRDA, for example, interfering with the lawful mining activities of the holder of a valid mining right constitutes an offence, and may be punishable by imprisonment or the imposition of a fine or both. The DMRE further keeps a public registry of all prospecting and mining rights which inform the public about the existence and extent of all prospecting and mining rights. In civil law, the holder of a mining right may obtain an interdict (injunction) prohibiting all third parties, including a landowner, from hindering or interfering with its mining activities, and may enforce its rights against any third parties. At the moment, there is no special restriction on the surface rights or mining rights that may be acquired by foreign parties, save to note that all new mining rights are subject to the requirement that HDSAs must have at least 30 per cent in the economic benefit and voting rights of the holder of a mining right.[429] In addition to a mining right, a party coveting to conduct mining activities will be required at least the following additional licences:[430]

1. A further environmental authorisation authorising in detail the listed activities that will form part of the mining and mineral processing activities, should these listed activities incidental to the operations not be covered by the environmental authorisation forming part of a mining right,
2. A waste management licence in respect of, inter alia, management of tailings,
3. A water use licence in respect of use of any natural water sources, as well as to make provision for the treatment, storage, and disposal of water in the mine itself and in tailings dams, etc. And
4. Air quality licences, if required.

Other licences associated with those included in the MPRDA depend on the nature of the mining activities to be conducted, or the natural, social, or cultural environment where the mining activities are to occur. The most notable permits are likely to be:[431]

1. Permits for the possession, processing, and beneficiation of precious metals,

[428] Section 11 (2)(A) of the MPRDA Bill 2008.
[429] *Ibid,190.*
[430] *Ibid, 359; 349; 375; 770; 371; 355;* National Water Act, 1998.
[431] Available at: https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper (Accessed: 17 July 2023).

2. Permits for the possession, processing, and beneficiation of uncut diamonds,
3. Permits for the possession, beneficiation, transportation and exporting of nuclear materials and radioactive materials,
4. Permits for the destruction or relocation of archaeological sites or graves and
5. Zoning of land for mining purposes in areas subject to town planning schemes.

Depending on the circumstances, many other authorisations may be applicable. The above enumeration is not exhaustive and only serves to illustrate the most important and most common authorisations.

3.5.3. Closure and Remediation of Mining Projects

In terms of Section 24 of NEMA 1998, the holder of a prospecting right, mining right or mining permit must provide acceptable financial provision for the rehabilitation, closure, and on-going post decommissioning management of negative environmental impacts. The financial provision may take the form of a cash deposit into the DMRE's bank account, a cash deposit in a rehabilitation trust account, a bank guarantee or an approved insurance product provided by a recognised financial institution. The manner in which rehabilitation is to be done is prescribed in terms of a closure plan, which must be developed by the mining right-holder and approved by the DMRE after the cessation of mining activities. The contents of the closure plan will be dictated by: the attributes of the environment; the nature and extent of the disturbances to be rehabilitated; the likely consequences of not rehabilitating (or partially rehabilitating) the disturbances concerned; the commitments and mitigation measures set out in the environmental authorisation; and a value judgment as to the acceptable level of environmental degradation, which may remain after conclusion of rehabilitation.[432]

In theory, the MPRDA makes provision for the issuing of a closure certificate upon successful finalisation of the remedial action set out in the closure plan. The issuing of a closure certificate terminates the holder's statutory liability for rehabilitation and potential claims arising from environmental degradation that remains as a result of mining activities. Very seldom is a closure certificate issued in practice, given that it is not in the government's interest to release mine owners from liability for environmental degradation, even if rehabilitation seems to be completed.

[432] *Ibid, 355: Section 24.*

3.5.4. Environmental and Social Considerations

Environmental activities in South Africa fall in with mining activities and are governed under NEMA. The statute sets out a number of core principles concerning sustainable development, sustainable exploitation of natural resources, management of environmental impacts from economic activities, and highlighting the right of people to live in an environment that is not detrimental to their health and well-being. Pursuant to Section 2(2) of NEMA: environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural, and social interests equitably. To acquire a prospecting or mining licence, an applicant must prove that the mining-related activities will not culminate in 'unacceptable' pollution or environmental degradation.[433] To this end, the applicant must perform either a basic assessment or an environmental impact assessment and get an environmental approval for concerned mining activities which incorporates an environmental management plan or programme.

Health and safety in South African mines are closely measured under the MHSA and detailed regulations, of which some date from before the commencement of the MHSA. The MHSA aims to hold the mining employer primarily responsible for the health and safety of all persons at a mine including employees, contractors, and occasional visitors. The employer is legally obliged to provide sufficient training regarding the health and safety hazards and risks encountered at the mine, and how to deal with such situations. The employer is also accountable for providing sufficient personal protective equipment to all persons at the mining site. The employer is further compelled to keep records on the health of employees, including establishing each employee's baseline health upon commencement of employment, undertaking annual health assessments for all employees, and performing final 'exit' assessments upon termination of an employee's employment.

Under section 91 of the MHSA, any person who fails to comply with their duty under health and safety regulations at a mine, or to obey lawful instructions concerning health and safety issued by a person responsible for enforcement of the mine's health and safety rules and policies, is liable for an offence. Similarly, failure by an employer to take reasonable steps to ensure safe and healthy working conditions for employees at a

[433] *Ibid, 355: Section 2(2).*

workplace amounts to an offence. Additionally, the Chief Inspector of Mines and other delegates are empowered to issue far-reaching directives in reference to health and safety at a mine, including terminating all activity at a site until an identified risk is sufficiently addressed.[434]

In May 2020, the Labour Court upheld the relief sought by the mineworkers' association to oblige the Minister and the Chief Inspector of Mines to impose binding obligations under the MHSA on mining companies to take certain recommended minimum procedures to protect mineworkers from covid-19. Following this court order, the Chief Inspector of Mines, in consultation with the Mine Health and Safety Council, developed and issued 'Guideline on the Mitigation and Management of COVID-19 outbreak' in accordance with Section 9 of the MHSA. This Guideline requires employers to prepare and implement a code of practice for the prevention, mitigation and management of the covid-19 outbreak. An updated Guideline was issued by the DMRE in 2021.[435]

Under the NEMA regime, to acquire a prospecting or mining right, an applicant must perform either a basic assessment or an environmental impact assessment after which an environmental authorisation that incorporates an environmental management plan or programme should be issued. The procedure for obtaining an environmental authorisation consists, very broadly, of the following:[436]

1. An application submitted to the DMRE (which administers the provisions of NEMA insofar as it relates to mining activities),
2. A scoping phase, when environmental risks are identified at a basic level and remedial measures are suggested. The scoping report compiled at the conclusion of this phase is then published for public comment within a period of 30 days,
3. Following public comments and consultations on the scoping report, detailed field studies are then performed by experts in various scientific disciplines (depending on what is appropriate in the circumstances), including ecology, biology, hydrology, archaeology, geophysics, etc. At the conclusion of this phase, an environmental impact assessment report and a draft environmental management

[434] *Ibid, 359: Sections 62, 63(3), 71, 85, 86, 88, 89, 90 and 91.*
[435] Association of Mineworkers and Construction Union (AMCU) v Minister of Mineral Resources and Energy and Others (JA 58/2020) [2021] ZALAC 22; *Ibid, 359: Section 9*; Guideline on the Mitigation and Management of COVID-19 outbreak.
[436] Centre for Environmental Rights, National Guideline for Climate Change Implications. Available at: https://cer.org.za (Accessed: 25 July 2023).

programme is compiled, which is then published for public comment within a period of 30 days,

4. Following receipt of public comments on the environmental impact assessment report and draft environmental management programme, a final environmental impact assessment report and environmental management programme is compiled, taking into account (and addressing as far as possible) all comments raised during the process and
5. The final environmental impact assessment report and environmental management programme is then submitted to the DMRE for approval.

In circumstances where the reports are complex and commodious and any members of the public (including lobby groups) request an extension, timelines for public comments on the documents may (and should) be extended. The environmental impact assessment process may take between eight and 18 months to complete, depending on how sensitive the environment is and how many reports need to be compiled and peer reviewed.[437]

Based on Section 104 of the MPRDA, communities have a 'preferent right' to apply for prospecting or mining rights in respect of communal land. The Supreme Court of Appeal has recently preserved the principles pertaining to a community's preferent right in two similar cases, concerning the Bengwenyama-ya-Maswazi Community. Pursuant to Section 104(2) of the MPRDA , the community applied for a preferent prospecting right regarding two farms wherein they are resident.[438] With reference to the first farm, they had always been resident on the said farm and with regard to the second farm, they had submitted a land claim based on their historical occupation of the farm and unlawful relocation from that farm. The Supreme Court of Appeal held and confirmed that (1) a community does not have to demonstrate formal legal title to the land over which the right pertains to apply for a preferent right; and (2) a community would be entitled to apply for such a preferent right using a corporate vehicle, provided that the community's shareholding in the corporate vehicle is appropriate.[439]

The new 2018/9 Mining Charter introduced a number of broad-based black economic empowerment compliance criteria on the holders of new and existing mining rights,

[437] *Ibid, 355.*
[438] *Ibid, 320*; Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others (783/2013) [2014] ZASCA 139.
[439] Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others (783/2013) [2014] ZASCA 139.

together with certain additional socioeconomic requirements to which holders of mining rights must comply. The six requirements are: (1) ownership of HDSAs, including procurement, supplier and enterprise development; (2) human resource development; (3) employment equity; (4) mine community development; (5) housing; and (6) living conditions.[440] The previous Charters were subject to engagement between the government, labour, and industry, while Mining Charter 2018/9 was unilaterally adopted by the government and effectively imposed on the mining industry, which gave rise to various disputes between the DMRE and the Minerals Council of South Africa, resulting in the ground-breaking High Court case of *Minerals Council of South Africa v. Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) (*Minerals Council*).[441] The Minerals Council requested the High Court to review and suspend certain provisions of the Mining Charter 2018/9 on the grounds that Section 100 of the MPRDA does not empower the Minister to make law in the form of subordinate legislation and that therefore the Mining Charter 2018/9 is simply a policy document. The High Court ruled in favour of the Minerals Council that the Mining Charter 2018/9 is policy and not law and suspended a number of its provisions, including the provision qualifying the Minister to end a mining right in the event of non-compliance with the Mining Charter 2018/9. The result of the *Minerals Council* case is accordingly that:[442]

1. The principle of 'once empowered, always empowered' was upheld by the High Court. This means that if the holder of a right has previously complied with its ownership obligations, it will not be required to re-empower or 'top up' the ownership percentage should it transfer or renew such a right. This means that if a right holder has previously complied with the ownership requirements under a mining charter, that compliance will be recognised for the duration of the right,
2. All new mining right applications must have a 30 per cent black economic empowerment ownership requirement, but the manner in which the 30 per cent is constituted, is no longer prescribed,
3. The prescribed provisions relating to procurement have been set aside in their entirety and

[440] Mining Charter 2018/9.
[441] *Ibid, 318.*
[442] *Ibid, 318; 320:* Section 100.

4. The Mining Charter 2018/9 no longer applies to any new or existing licences and permits issued in terms of the Diamonds Act 1986 and the Precious Metals Act 2005.

Not all the Mining Charter provisions were suspended. The requirements regarding employment equity, human resource development, mine community development and housing and living conditions are still in force and effect but non-compliance with them is no longer grounds for termination of a right due to non-compliance with the Mining Charter. In 2022, the DMRE published 'the Exploration Strategy for the Mining Industry of South Africa' aiming at attracting mineral exploration investment, reigniting mineral development, accelerating new mineral discoveries, and encouraging the optimal utilisation of the South African mineral resources in connection with the current environmental, social, and corporate governance principles. The strategy seeks to attract 5 per cent of the global exploration expenditure by 2021 (approximately US$9 billion).[443]

3.5.5. Operations, Processing and Sale of Minerals

There aren't any other limitations over processing, possessing, transporting or exporting precious metals, diamonds and nuclear materials other than the environmental licensing requirements, and special permits required for processing, possessing, transporting or exporting. Also, it should be mentioned that owing to South Africa's high rate of unemployment, the general rule is that recourse to foreign labour, which is regulated by immigration laws,[444] must only be possible only when skills are scarce. Other than the special permits above, there are no general restrictions on the sale, import and export of extracted or processed minerals. However, the 1964 Customs and Excise Act may impose customs duty on imports.[445] On the grounds of the lapsed MPRDA Amendment Bill,[446] the government proposed imposing some limitations on the export of unprocessed minerals, being those minerals declared as 'strategic minerals', to encourage local beneficiation of minerals. However, the withdrawal of the MPRDA Amendment Bill by the government late in 2018 made these restrictions less effective.

South Africa implements a system of exchange control which is approved by the South African Reserve Bank to transfer money to and from South Africa. Reserve Bank

[443] Exploration Strategy for the Mining Industry of South Africa, 2022.
[444] Immigration Act, 2002.
[445] Customs and Excise Act, 1964.
[446] Section 26 of the MPRDA 2002 (Amended Bill 2012/13).

approval may be obtained in advance in respect of any proposed or potential transactions regarding all dividends payable to a foreign investor's shareholding in a South African company. Generally speaking, the Reserve Bank finalises applications for exchange control approvals relatively quickly. Foreign investors in South Africa enjoy various levels of protection for their investments, depending on whether South Africa has a bilateral investment treaty with the investor's country. Where no bilateral investment treaty exists, the 2018 PIA will apply. Some argue that this legislation gives legal protection to foreign investments equivalent to that of South African citizens, with regard to property rights under section 25 of the South African Constitution.[447] This Section of the Constitution has been constantly interpreted by the courts and is in the process of being reviewed. There is case law to the effect that South African legislation does not recognise any forms of constructive or indirect expropriation. Moreover, the Protection of Investment Act provides that investment disputes will be decided by the domestic courts, unless the government consents to international arbitration.[448]

3.5.6. Charges: Royalties, Taxes and Duties

Under the 2008 Mineral and Petroleum Resources Royalty Act (the Royalty Act) regime, a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource to another party must be paid by anybody who wins or recovers a mineral resource in South Africa (an extractor). Section 4 of the Royalty Act prescribes a formula for calculating the extent of the royalty, based on the earnings before interest and taxes from the gross sales of refined or unrefined mineral resources.[449] Following amendments to the Royalty Act, with effect from 1 January 2019, gross sales, concerning refined mineral resources, exclude any insurance and handling expenditure incurred after being refined to a specified condition, or any amount received to effect the disposal thereof. With regard to unrefined mineral resources, it excludes all transport, insurance and handling (TIH) expenditure incurred after being brought to a specified condition or any TIH expenditure to effect the disposal thereof – irrespective of whether such expenditure is specifically considered in the determination of gross sales and irrespective of whether it is of a capital nature. The maximum royalty regarding refined mineral

[447] *Ibid, 313.*
[448] Uys N.O and Another v Msiza and Others (1222/2016) [2017] ZASCA 130; Msiza v Director-General for the Department of Rural Development and Land Reform and Others (LCC133/2012) [2016] ZALCC 12.
[449] *Ibid, 375: Section 4.*

resources is 5 per cent, and the maximum royalty concerning unrefined mineral resources is 7 per cent. An extractor is exempt from the imposed royalty if the total gross sale of mineral resources won or recovered by the extractor for purposes of testing, identification, analysis, and sampling, pursuant to a prospecting or exploration right, do not exceed 100,000 rand during a year of assessment.[450]

Apart from royalties, South African mining companies pay normal taxes such as standard income tax on companies, withholding taxes on dividends to shareholders, value added tax (in certain circumstances), transfer duties in respect of transfers of land or prospecting and mining rights and carbon tax (if the taxpayer conducts a prescribed listed activity and such activity exceeds the prescribed greenhouse gas emissions threshold). However, mining companies may deduct large portions of capital expenditure against their taxes and may ring-fence capital expenditure and taxable income in respect of distinct mining operations (redemption allowance). Moreover, gold mining companies enjoy a special tax dispensation whereby income tax rates increase as the company's profits increase, while allowing shareholders to receive dividends even when no income tax is payable because of low profits.[451] In 2020, the National Treasury proposed certain changes to the mining tax regime pertaining to the treatment of mining contractors pursuant to a Supreme Court of Appeal judgment. The court held that mining contractors were entitled to the same treatment afforded to mining companies with regard to redemption allowance.[452] However, public submissions demonstrated against the proposal on grounds that it would result in a myriad of unintended consequences for the mining tax capital deduction system. The proposal was thus withdrawn, leaving the mining industry without clarity in this respect. A detailed discussion of the tax regime applicable to mining companies in South Africa is open to debate. Mining companies pay duties such as transfer duties and custom duties for the importing of goods. On top of taxes, duties, and royalties, mining companies also pay prospecting fees based on the area of the land where exploration occurs, and small fees for various applications and administrative processes.[453]

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[450] *Ibid.*; Lexology, South Africa. Available: https://www.lexology.com/library/detail.aspx?g=8a7271d7-346e-4ebc-912c-051b2bf8f273 (Accessed 24 March 2023).
[451] *Ibid, 375.*
[452] Enka Insaat Ve Sanayi AS v OOO Insurance Company [2020].
[453] MPRDA 2002; Royalty Act 2008.

3.5.7. Outlook and Trends: Critical Analysis

The *Minerals Council* case[454] shed light on the status of the Mining Charter 2018/9 and the HDSA requirements prescribed for the holders of prospecting and mining rights. There is no indication yet, as to whether the existing legislative framework would be amended as a result of the legal findings regarding the Mining Charter 2018/9. The announcement of the withdrawal of the MPRDA Amendment Bill, which introduced controversial concepts such as restrictions on the export of strategic minerals and substitution of the 'first come first served' right application process with a process of periodic invitation by the Minister, is regarded as a welcome development towards creating regulatory certainty within the mining sector from the government side. The withdrawal offers a way towards the anticipated split of the MPRDA into separate legislative frameworks for minerals and petroleum resources, respectively, following a stagnation in legislation development in the oil and gas sector and particularly in the wake of the recent gas condensate discovery in the Outeniqua Basin off the southern coast of South Africa by petroleum giant Total. The publication of draft regulations by the Minister of Forestry, Fisheries and the Environment pertaining to the exploration and production of onshore oil and gas requiring hydraulic fracturing, seemingly portrays an effort to encourage oil and gas exploration in South Africa. With the focus on economic recovery, the importance of prioritising environmental, social and governance (ESG) has also been recognised, and South Africa's mining industry is expected to move beyond independent reporting requirements in terms of the current framework and develop mining specific ESG standards.

On the grounds of the MPRDA, it is provided that only the Minister of minerals can grant mining licences. However, it might be argued that conferring the power to grant mining licences solely to the Head of the Department of Minerals seems to give enormous power to a single individual, the minister. With this power there is always a risk of bribery and corruption and the power being exploited for personal gain. To reduce such risk perhaps a scheme might be devised where two or even three ministers, from various interested departments such as land, environment or health and safety, might have to act in concert in agreeing to grant such a licence, by analogy, like the doctrine of

[454] Minerals Council v Minister of Mineral R [2021].

overreaching in English Land Law.[455] The advantage of the doctrine of overreaching in English Land Law is that it allows purchasers to acquire land free from the rights of beneficiaries under a trust, provided the purchase money is paid to two trustees, thus protecting purchasers and simplifying land transactions.[456] Applied to the South African mining regime, this would not eliminate the risk of corruption but would reduce the risk anyway, since the two or three ministers involved in the process of mining developments would to a degree act as a check and balance on each other, so as to reduce the risk of fraud, but obviously not eliminate it.

South African mining legislation has unquestionably gone a long way towards bringing policy and regulatory certainty to the minerals industry. However, it is also important to note that this achievement has not yet brought about a meaningful transformation of the industry, particularly in terms of reducing the fears of investors who wish to avoid South Africa and neither has it been able to effectively stabilise the industry. Likewise, it is fair to say that South African legislation regarding the planning process for mining closures at the end of a mine's life cycle suffers from a lack of social impact assessment, contingency planning, and public participation. The MPRDA, for example, makes no specific mention of sudden mining closure planning, nor does it provide for any regulations regarding financial provisioning or the NEMA. The dearth of these provisions is risky for both the mining communities and the environment. Finally, the regulatory process needs to take into account the participation of the community, non-profit organisations and activists: an approach neglected in the current legal procedures.

3.6. Conclusion

This Chapter relied on the South African Mineral and Petroleum Resources Development Act (MPRDA) and other mining-related legislations to discuss the main features of a typical mining regime. It mainly argued that despite a complete overhaul of the mineral regulatory regime, the mining industry still needs transformation from an ownership perceptive.

Broadly it is submitted that in the end, for any mining legislation, the legal test should be whether the legislation boosts the orderly exploitation and development of minerals and ensures that mining activities benefit local communities. To meet these objectives,

[455] Sections 2 and 27 of the Law of Property Act 1925.
[456] *Ibid*.

mining legislation and regulations must ensure that mining licences are issued by competent individuals, that mineral deposits are reasonably accessed on reasonable conditions, good mining practices are used to secure and protect the environment and that mining expanses are not hoarded by entrepreneurs indisposed to develop the minerals.
To a large extent, the MPRDA and other mining-related laws succeed both in removing the previous South African system of mineral titles based on original private mining rights and in consolidating the current system of state custodianship. The legislation offers the state reasonable control of mining operations at every stage regarding mining rights acquisition and legal compliance during various operation developments. The 2018/9 Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, for example, ensures the attainment of the Government's objectives. These laws, however, grant the mining rights holder substantial rights, such as the acquisition of the exclusive legal right to enter the land and to explore. Should the holder discover minerals, they may obtain the exclusive right to develop, produce, and sell the minerals. Yet, the mining right holder should need an agreement with the lawful land occupier prior to the exercise of such rights.

Conversely, through its discretionary power to grant or withhold mining rights, the state derives its greatest benefit, as it is thus able to use judicious control over the minerals and miners. It thus warrants that mining rights are not conferred on reckless people without the means to initiate and develop mining activities. The South African approach to mining legislation curtails the possibility of mineral-land monopolies through its expenditure obligations, fixed tenure of mining rights, and requirement of operation programs. It eradicates the holding of mineral land for speculative purposes. However, this progress needs to bring about meaningful transformation of the industry and to address issues such as social impact assessment, contingency planning, and public participation. On the whole, South African mining law is all-encompassing; however, its future success would rely upon the state's readiness to adopt future laws to address changing circumstances in the mining industry and the development of technical capacity to monitor the mining industry. The next Chapter examines the legal environment of the mining industry in the DRC.

Chapter Four: The Legal Environment of the DR Congolese Mining Sector and the Preeminent Role of the State

Resume

The legal environment of the mining industry in the DRC is mainly governed by the Mining Code of 11th July 2002, along with a wide range of laws including Sanitation, Environmental, Tax, Insurance and Comparative Laws. It is a mosaic of disparate texts whose characteristics and applications are often difficult to grasp. The 2002 text adopted during the war only governed the mining domains located in half of the territory under government control, while the other half, formerly occupied by rebel movements, was subject to uncontrolled exploitation. With the reunification of the country in 2003, a review of the 2002 mining law has been necessary to take into account the new State's political situation. The 2002 mining law was criticised for being detrimental to investment security in parts of the territory occupied by rebel movements, and where cohabitation between local communities and mining licensees was difficult. This explains the difficulties in its implementation, and the justification of the 2018 reform.

4.1. Introduction

The legal environment of the mining basin of the Democratic Republic of Congo (DRC) is without parallel, complex, and difficult – and for good reason, as it was a long time before the legislator defined what was meant by the term "mine." It was the Mining Code of July 11, 2002, that took up the concept, clarifying it for the adoption of special legislation on hydrocarbon mining. According to the 2002 Code, a mine is "any deposit or deposit of artificial metals of mineral substances classified as mines, exploitable either on the surface or underground, and/or any treatment or transformation plant for the products of this exploitation located within the mining perimeter, including installations and movable and immovable equipment assigned to the exploitation".[457] In most of the African Francophone countries the development of mining laws is regarded as a result of several disciplines falling under the legal categories known until then. This is the same

[457] The Mining Code, 2002.

for the DRC where the laws applicable to the matter are highly varied including the Mining, Sanitation, Environmental, Tax, Insurance and Comparative Laws.

This Chapter's main argument is that the mining legal regime in the DRC epitomises a veritable mosaic of disparate texts whose nature and applications are often difficult to grasp. From this perspective, the mining law relates on the one hand to a set of legal and regulatory provisions relating to mines in the strict sense; and on the other hand, to the broader domain of the operator's interactions with the public authorities. Mining legislation in the DRC underwent spectacular development during the last decade of the 20th century. The stakes represented by mines in this new context of economic globalisation are emerging. The first three sections of this Chapter address the legal developments of the DRC's mining laws, whilst the last two sections address the discrepancy of legal regimes in the mining sector.

4.2. Insights from the Roots of the DRC's Mining Laws

In the DRC, mining law derived from the will of the colonial legislator who intended to exploit surface and underground resources for the development of the colony, following the resolutions of the Berlin conference on the partition of Africa between the powers of the time (1884-1885).[458] This context explains why the first laws relating to the management of mining resources were initially included under land legislation. Indeed, in the first years of the 20th century, the problem of the economic exploitation of colonial territories implied that the colonial powers had control of the land, a major part of which consisted of land considered, in European logic, as "vacant and without masters" since it was unoccupied and unvalued by Indigenous peoples. The real problem that arose was that the colonial administrations considered that the land occupied by "natives" was without owners because their holders had no title deed. This principle, known as the presumption of *domaniality*, enabled the colonial administration in practice to dispose of the land in which it had interest. These lands called "vacant and without masters" or "*res nullius*," were therefore effectively nationalised. This led to a legal problem of reconciling the interests of the parties involved: the indigenous populations and the colonial power.

[458] The Berlin Conference on the partition of Africa between the European powers engaged in the conquest of the African continent recognised the territory explored by Stanley as a Congo Free State, governed personally by King Leopold II. The latter ceded it by treaty to Belgium on October 18, 1908. It then became the colony of the Belgian Congo until June 29, 1960.

From an economic point of view, there was no less interest in the problem. To ensure the economic development of the colony, it was necessary to avoid improvident and abusive exploitation of natural wealth and to adopt a management system that would allow the appropriation of land to promote development through public and private investment. The legal justifications for this choice are found in the general scheme of the Berlin Act of 1885, which linked the recognition of the rights of each of the signatory States over the controlled territories to the effective occupation of these territories and the promotion of social and economic well-being of the people.[459] Colonial land law was thus characterised by the permanent search for control of the land which was exercised whenever necessary through the technique or procedure of expropriation for public utility. The expropriation was *de facto* in the absence of law since there was, legally, no property. On the other hand, colonial land law was characterised by the institutionalised inferiority of the indigenous populations who could only access property with great difficulty. It is therefore through the land law that the public appropriation of surface and underground mining resources was achieved.

4.2.1. Mining Law, an Essential Element of State Development Law

With colonisation came the first milestones of mining law. Indeed, the texts introduced on the subject reflected the interests of the partners of King Leopold II of Belgium, then "owner" of the Independent State of Congo, and subsequently the interests of the colony of the Belgian Congo after the secession of the Congo Free State to the Belgian State in 1908. It should be noted that all the European partners of the Congo Free State had been interested in the exploitation of mining resources (copper, diamonds, gold, tin, cobalt, uranium, etc.) and invested a great deal of capital for this purpose. When the country gained independence, the need to "decolonise" law in general and mining law became apparent. It is within this context that several laws were adopted that governed the management of surface and underground resources. Some basic legal instruments may be quoted from this batch of legislative texts, in order of importance; the Ordinance - law n° 66/343 of 07 June 1966 known as BAKAJIKA Law[460] justifying the public appropriation

[459] The Berlin Act of 1885.

[460] This text lays down the principle of public domain ownership of the ground and underground: The soil and subsoil belong to the State.

of the ground and the underground, followed a year later by the Mining Code (Ordinance law n° 67/231 of May 5, 1967).[461]

Mining law may be defined as a "set of legal rules relating to the management of surface or underground substances."[462] The soil contains precious and non-precious materials, otherwise known as raw materials which are used for human activities. Their importance at all levels has prompted States to take an interest in their exploitation by enacting rules recorded in a document called the "Mining Code".[463] Since colonial times, public authorities have attempted to manage or regulate areas containing mineral substances or resources in partnership with the private sector within the framework of the liberal economy. Mining law has its own characteristics compared to the traditional classification of law (public law – private law), making it more specialised. It can be classified among the branches of mixed law relating to both private law and public law but claiming its autonomy. Regarding new classifications, mining law is part of the disciplines under economic law; particularly public economic law with recourse to certain principles and techniques (public domain, land concession, role of the State). This, however, does not exclude private law. Additionally, there is an amalgamation between private and public law regarding the relationship between holders of mining rights, land ownership, the rules relating to mining pledges and mining mortgages as new guarantee mechanisms for financing investments in the sector. In lieu of this, mining is subject to a varied regime, resulting from the combination of elements of private and public law, with the latter predominating. This particularity is explained by the importance of mineral materials for the economic and social development of the country which was formerly and largely financed by resources coming from, among other things, the export of mining products. These characteristics are also manifested in the relations of the operator with the government administration and with third parties. In addition, mining law is made up of a set of scattered texts most often supplemented by provisions relating to investment law, tax law, company law, land law, town planning and construction, foreign exchange law and social security law.

[461] Ordinance law No 67/231 of May 5, 1967.
[462] *Ibid, 190.*
[463] The Mining Code 2002 [2018].

4.2.2. DRC's Mining Law Sources

The classic sources of law are Acts, Customs, Jurisprudence and Doctrine. However, the mining law sources go beyond the aforementioned traditional sources and include:

1. The laws and other regulatory provisions of European origin which continue to strongly inspire the national legislator among which are:
    i. The General Act of the Berlin Conference of February 26, 1885, on the partition of Africa between the powers of the time,
    ii. The Royal Decree of June 8, 1888 (establishing the public ownership of land),
    iii. The Decrees of July 22, 1904, regulating the possession and transport of precious substances; of April 20, 1928, defining precious stones; and of September 27, 1937, relating to the mining management system by the signing of agreements with chartered companies.

2. Laws and regulatory provisions adopted since independence:
    i. Two statutes fundamentally mark the management of the mining domain in the Democratic Republic of Congo. These are:
        a) Ordinance-law n° 67/231 of May 3, 1967, setting out general legislation on mines and hydrocarbons, modified by Ordinance-law n° 81-013 of April 2, 1981, on general legislation on mines and hydrocarbons. It should be noted that this latter text of law is still in application concerning hydrocarbons, as well as for certain mining conventions signed before the adoption of the 2002 Code,
        b) Law n° 007/2002/ of 11 July 2002 on the Mining Code amended and supplemented by Law n° 18/001 of 08 March 2018. It should be noted here that this law provides more detail, certain provisions of the colonial mining decree of 1937, whilst relaxing some provisions taken from the 1981 Code.
            - Regarding regulatory texts, there are several, which include: the 1982 ordinance on the small-scale exploitation of precious mineral substances, on health and safety in mines and quarries, on mining taxation; Decree No. 038/2003 of March 26, 2003 on Mining Regulations as amended and supplemented by Decree No. 18/024

of June 8, 2018 (implementing measures for Law No. 007/2002 on the Mining Code); several ministerial decrees in line with changes in the holders of ministerial cabinets. This is the case of Inter-ministerial Order n°129/CAB.MIN/MINES/01/2017 and n°032/ CAB.MIN/FINANCES/2017 of July 08, 2017 regulating the marketing and export of mining product merchants.

3. Foreign mining laws:

   They are currently a very valuable source.[464] Undeniably, the 2002 Mining Code was strongly inspired by the Mining Codes of some West African countries, drawn up with the active support of international financial institutions, mainly the World Bank. These include the codes for the Republic of Guinea, the Republic of Niger, the Republic of Mali, and the Republic of Ghana, among others. In terms of hydrocarbons, the current practice is inspired by the experiences and legislation of the countries of the Gulf of Guinea and especially of Central Africa (Angola, Congo, Gabon, Equatorial Guinea). These different codes are characterised by the principles of economic liberalism, especially regarding the right of ownership of mineral substances extracted on the surface and below ground, the ownership of which is recognised by investors, which distorts the principle of absolute ownership of the State in respect of surface and underground resources enshrined in constitutional texts or having constitutional value.

4. Doctrine:

   Very few books deal with mining law in general. The principles and rules in question were drawn from numerous reports drawn up during the time of colonisation by European government officials stationed in Africa. There are, however, some thoughts from specialists from both academic and professional forums (lawyers, historians, town planners and geographers) who have worked on issues relating to the management of mines and hydrocarbons.

[464] *Ibid, 17;* Decree of 16 December 1910; Decree of 16 April 1919; Decree of 24 March 1937; Ordinance-Law No. 67/231 of 3 May 1967; Law No. 007/2002 of 11 July 2002; Decree No. 038/2003 of 26 March 2003; Law No. 007/2002 of 11 July 2002; Emery Mukendi Wafwana, Mining Law: Management Principles for the Mining Domain, (2005), 8.

4.3. Historical Context of State Preeminent Role in the Legal Environment of the DRC Mining Sector

In Africa more than elsewhere, the State remains the main actor of development. This role has remained unchanged since the colonial period and remains so even more today despite the implementation of public policies of liberal inspiration during the last decade of the 20th century. "The art of mining, as it is intuitively understood nowadays, did not appear at the beginning of humanity."[465] Indeed, primitive people did not perceive the possibility of using the soil as a source of minerals. They devoured the raw flesh of animals which contained a sufficient quantity of salt, and it was not until the further development of mankind that was seen the first attempts at an embryonic culinary art, when the addition of salt to food became a habit.[466]

4.3.1. The DRC's Historical Evolution of the Mining Sector: Resources and Industry

Exploiting natural deposits of sodium chloride, which appears to be one of the earliest forms of the mining industry, developed to give rise to the major underground exploitation of significant salt deposits in modern times. While searching for gold, prehistoric man also came across black chalcocite deposits (raw copper which, when hammered with a stone, looked like gold, and could also be used as an ornament and as instruments: the use of copper marked the end of the Stone Age). In the Middle Ages, recognition of the value of metallic products led to the more systematic exploration of metals, thereby enhancing the profession of miners. However, it was not until the 19th century that intensive, scientific, and successful research into minerals was conducted. Coal mining remains one of the most important parts of the mining industry. The DRC has considerable mineral resources which render it among the richest countries in the world. These resources have given rise to a mining and processing industry that remains the country's main industrial activity. In addition, mining products account, in value, for more than half of Congolese exports. Almost all the provinces of the country have abundant underground mineral resources with the main ores exploited being:

i. <u>Copper:</u>

   Copper is Congo's primary mining resource. The largest copper zone is that of Haut-Katanga. The principal copper ore is malachite. Copper

[465] M. Cazi, Les Mines [The Mining] (PUF 1941) 1-14.
[466] *Ibid, 15*; *Ibid, 33.*

mining began in Katanga in 1906.[467] Reduced to ingots or mattes, Congolese copper was and is exported to Belgium, the United States, and other European countries. Katanga's copper reserves are estimated at some 55,512,000 tonnes. Industrial production underwent an expansion in the final colonial decade, reaching more than 400,000 tonnes in 1972. Today, production barely exceeds 10% (30,070 tonnes) of the previous level (442,828 tonnes in 1983).[468] "The poor public policies carried out from the 1970s mixed with instances of corruption and the embezzlement of public funds contributed to the fall in mining production. Moreover, the failure to renew the productive equipment and the creaming off of its resources led it to collapse."[469]

ii. Cobalt:

The DRC is the world's leading producer of this strategic metal used mainly in aeronautics. Reserves are estimated at half the world's reserves and are put at 3,665,000 tonnes. The cobalt is produced in Luilu and Chituru in the form of granules and electrolytic cobalt.[470] Cobalt is also used in the manufacture of special steels for tools that must withstand high temperatures or for cutting tools. It is also involved in the manufacture of magnets, enamels, and cemented carbide ceramics. Cobalt is also used in glassware manufacture, electrochemistry, and numerous alloys.[471]

iii. Zinc:

The exploitation of zinc began in 1936; it is used to manufacture sulphuric acid. As an indication, the country produced 54,043 tonnes in 1989. But ten years later, i.e. 1999, this production was only in the order of 1,126 tonnes, whereas national reserves are estimated at 7,000,000 tonnes.

iv. Manganese:

After being reduced to powder, manganese is used in battery manufacture. The production of manganese in the DRC came to an end in 1993, even though the country was one of the world's leading producers of this highly sought-after ore used in the production of ferrous alloys.

[467] F. Kama, Géographie 3ème Secondaire [Geography 3rd Year Secondary School] (Hatier 1971), 58-65.
[468] Didier Mumengi, The Future Head on Prospects for the Development of the Democratic Republic of Congo, (Editions Universitaires Africaines 2001), 249.
[469] *Ibid, 15; 33.*
[470] *Ibid, 457.*
[471] *Ibid.*

v. Tin and cassiterite

Extraction of these minerals is extremely difficult and expensive due to the low grade of the ore.

vi. Gold:

Gold is found particularly in the eastern province. In reality, however, gold is present in most provinces of the country. The Kilo-Moto gold mining company exploits gold industrially in the north of Bunia. Gold is essentially exploited by the parallel market and experts claim that the country loses more than 300 million dollars every year. Gold exploration works cover only a tiny part of the main auriferous district of the eastern province, extending from the Uélé to Katanga via Ituri.

vii. Diamond:

The DRC is one of the main diamond-producing countries in the world. The diamond deposits are concentrated in the two current provinces of Kasai (Kasai Occidental and Kasai Oriental), but diamonds are also found in other provinces: in Bas-Congo, Maniema, Equateur, and Bandundu. Artisanal mining and fraud have significantly hampered the normal production of diamonds, to the point of constituting a great shortfall for the public treasury.

viii. Uranium:

Little is at present known about the country's uranium reserves, which are located mainly in the mine at SHINKOLOBWE, on account of the recurrent insecurity in this part of the country.

ix. Niobium:

This rare ore, involved in the manufacture of alloys for the nozzles of rockets and satellite engines, reinforces the strategic role of Congolese underground mineral resources in the world. The known deposits are in Kivu, and it is difficult to establish production and export statistics. The other ores exploited are cadmium, cermium, lead, colombo-tantalite (coltan). It should be noted that the DRC contains other as yet unexploited mining resources, in particular iron in Uélé in the eastern province, bauxite, oil and gas, and hydrocarbons.

Mining production estimates are as shown below in table 4.1:[472]

Table 4.1 : DRC's mining production estimates

N°	Mineral Substances	Quantities (tonnes)
1	Copper	75.000.000
2	Lithium	31.000.000
3	Niobium	30.000.000
4	Manganese	7.000.000
5	Zinc	7.000.000
6	Cobalt	4.500.000
7	Ion (more than 60%)	1.000.000.000
8	Cassiterite	450.000
9	Gold	600
10	Diamond	206.000.000 Carats

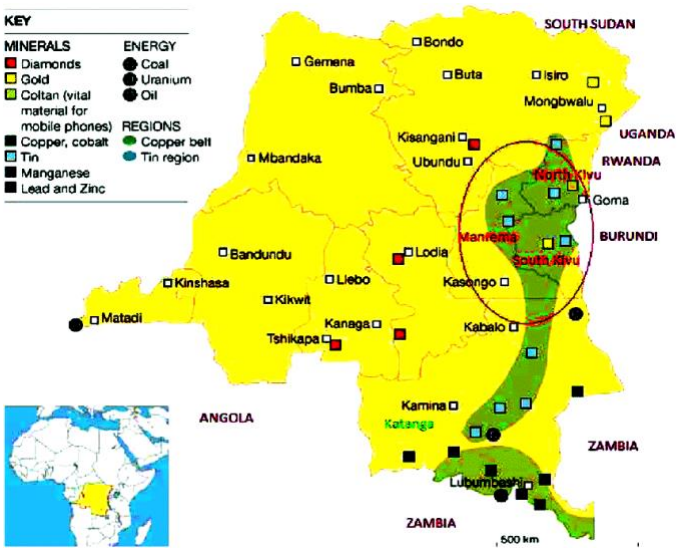
Source: Magha-A-Ngimba Charles Gimba 2024.

4.3.2. Geographical Distribution of Mining Potential in the DRC

As shown in figure 4.1 below, it is submitted that the mining potential in the DRC is highly diversified and unevenly distributed throughout the various provinces. Most of the deposits known to date were discovered nearly a century ago using rudimentary methods and techniques. There is therefore a high probability of further discoveries, using modern research techniques.

[472] Investor's Guide to the Mining and Hydrocarbons Sector, Ministry of Mines, Kinshasa (2004).

Figure 4.1 : Maps of minerals in the DRC



Source: BBC 2021.

4.3.3. The Importance of the Mining Industry

"Mining remains the most important sector of the Congolese economy. Its added value has for several years accounted for nearly a quarter of gross domestic product".[473] The mining companies play an important role, and their decisions in respect of wages and employment, social facilities and provisioning have a significant impact on other branches of the economy nationwide and determines the entire economic structures of the mining regions. The richness of Congolese mining resources has attracted and still attracts many investors today. "The mining industry is the spearhead of the Congolese economy; its predominance is one of the main characteristics of this economy."[474] A few figures will suffice to demonstrate this. The mining industry has long contributed without competition to gross domestic product and to exports. In 1970, it accounted for some 50% of gross domestic product and 80% of exports. Expressed in monetary terms for the same year, the mining companies contributed 44.5% of State revenue.[475] In 1978, 1979 and 1980, the contribution of mining companies to the State Budget amounted to 83.7%, 86.8% and 89.6% respectively, of State revenue in foreign currency.[476] The importance of mining resources sufficiently shows why the Democratic Republic of Congo considers

[473] Republic of Zaire, 1st Five-year Plan for Economic and Social Development 1986 – 1990, 100.
[474] *Ibid, 457.*
[475] *Ibid.; 463.*
[476] Usele Mawisa, Importance of the Zairian Economy Sector and Prospects, in Wajengaji (edn.), Mining Industry and Development in Zaire, Vol. 1, (1973), 108.

the economic development of this sector as a key element in its economic and social development policy.

Furthermore, the importance of the mining sector for economic and social development may be seen in the country's economic stabilisation and recovery programmes, in which the new political authorities of the 3rd Republic have assigned the mining sector a strategic place. Achieving the target of US $20,850 million in government revenues in the medium term will depend on: cobalt, 40,000t/year, zinc US $200,000; i.e. 200,000t / year1, diamonds US $600 million, gold US $40 million, and US $1 million.[477] In the view of this, Mulumba Lukoji contends that "the number of jobs offered by the mining industry is an indication of the importance of the mining sector in social life in the Congo. It has been shown in the past that mining companies are in almost all cases the only employers in the areas where they operate. It was estimated in 1984 that out of every million employees in the Congo, about 7% earn their living in the mining industry and up to around 150,000 workers are dedicated to the extraction of gold, diamonds and cassiterite."[478]

In its 1991 report, the Central Bank notes that, conversely, the malfunctioning of the mining industry leads to a decline in the current receipts for the State budget. This was the case in 1990, when current receipts in the State budget increased by only 73.3% as against 140% in 1989. This slowdown was mainly due to the public mining company *Gécamines* whose share of public sector current receipts fell from 35% in 1985 to 25% in 1990".[479] In its economic and social development policy, the DRC regards the development of the mining sector as a key element. As proof, various projects and developments carried out by the country since its independence in 1960 or even during colonisation have been financed mainly by resources from the mining sector. This dependence of the country on the mining sector has been criticised many times so that it was recommended, in a colourful form, that the DRC abandon its "monogamous marriage" with the mining industry that it strives to further diversify its economy, in short

[477] Communication from the Congolese Government to the Friends of Congo Meeting, December 3-4, 1997, In Congo – Afrique, no. 321, January 1998, 48.
[478] Crispin Mulumba Lukoji, African Mining Legislation, Why Do It? Case of Zairian Mining Legislation, in Zaire (1990), 7.
[479] Banque Du Zaire [Zaire Bank], Annual Report (1991), 73.

to become "polygamous".[480] It should also be noted that, "the mining industry is an element of a broader development strategy based on the ripple effect of extractive industries on other upstream sectors; this is the case of agriculture and industry in Katanga, which are dependent on the social and supply policy of *Gécamines* and downstream, the processing of minerals and metallurgical and steel industries".[481] It is the strategic base of high-tech industry. Thus, the most advanced countries in high technology are those which devote more money to prospecting on their territory.[482]

4.3.4. Mines: Socio-legal Meaning and Understanding

Mines entail both the places where minerals are extracted, and all the work used to exploit a deposit of useful material. The Mine concept originally comes from the old verb "*mineor*." In the oldest documents, it is used in the sense of digging, making an underground passage, and mining. In the modern period, this word refers to the wise idea of military mine work designed to destroy personnel, ships, or vehicles when the latter encounter it. Mining, in the industrial sense, consists of extracting rocks from the place they occupy in the earth's crust: A stone quarry is only an open-air mine. One could say, in a general way, that the mining work entails exploiting the deposits of the substances which are within the earth's crust, and which are useful to human-beings. Deposits can be solid, liquid, or gaseous in nature. Seen under the legal aspect, natural law provides no decisive reason for attributing a mine to the inventor, the State, the owner of the field, or the workers who exploit it.[483] In Congolese law, the classification of mineral substances is done by the nature of the substances, and it is the prerogative of the Head of State to carry out this classification. A distinction is drawn between:

1. Mines (*juris sensu*), which include the ores of the metals themselves and certain other metallic substances (sulphur, coal, bitumen, petroleum, natural gas).
2. Quarries, which include slates, sandstones, building stones, marbles, etc.

[480] Crispin Mulumba Lukoji and Mu Kanda Diambomba, Impact of the Mining Industry on the Dualistic Structure of the Economy of Zaire, in Wajengaji (ed.), Mining Industry and Development in Zaire Vol 1. (1973), 81.
[481] Republic of Zaire, 1st Five-year Economic and Social Development.
[482] Sovereign National Conference (CNS) (1992); Report of the Commission for Water, Forests, Minerals and Energy, 95.
[483] *Ibid, 455.*

In the legal sense, "the mine applies to all the rights that can be established on the deposit or on the substance and which are subject to a special regime."[484] In other words, it is "any deposit or deposit of mineral substances, open-pit or underground, in sufficient quantity and quality to justify profitable industrial and commercial exploitation and/or any processing plant necessary for the transformation of minerals into a marketable product."[485] After this brief reminder of the characteristics and importance of the mines, it is appropriate to determine their current administrative framework.

4.4. Administrative Framework for Public Intervention in the Mining Sector

This amounts to the overall functioning of the operation as covered by a series of legislative and regulatory texts imposing multiple and precise technical and financial obligations on the operator. Since the Congo Free State came into being, the public authorities have always sought to ensure control of surface and underground resources through public appropriation. This mission has not completely disappeared. Indeed, to ensure the development of mineral resources, the public authorities have resorted to profit-sharing with private partners. Post-independence, the public authorities sought to implement their role as the main driver of economic development by the nationalisation of the leading mining companies, which were in fact subsidiaries of multinational groups controlled by the Belgian, British, and American financial lobbies. Since then, there has been a disengagement of the State, whose role today is limited to the promotion and regulation of the mining sector. Using specialist bodies, the State may, however, engage in geological examination for the sole purpose of improving the state of knowledge of the country or for scientific purposes that do not require obtaining a mining or quarry permit. When the State engages alone or in association with third parties in a mining activity, the public legal persons as well as the specialised organisations created for this purpose are treated on the same basis as private investors involved in the same activity. The competences of the various bodies or institutions involved in intervening in mining management are the following:

[484] Mukendi Wafwana Emery, Le Droit minier: Principes de Gestion du Domaine Minier [Mining Law: Management Principles for the Mining Domain], (Juricongo, 2005) 8-28.
[485] *Ibid.; 455.*

4.4.1. The Prime Minister

Under the revised Mining Code, the Prime Minister is competent to:

1. Establish the mining regulations for the application of the code,
2. Classify, declassify, or reclassify mineral substances as mines or as quarry products and investments,
3. Declare, classify, or declassify an area prohibited for mining or quarrying,
4. Declare, classify, or downgrade a mineral substance as a "reserved substance,"
5. Confirm the reservation of a deposit subject to the call for tenders made by Ministerial Order.

According to the wording of Article 9 of the Mining Code 2002, the above powers are exercised by the President of the Republic.[486] This is based on the fact under the 2002 Code the President of the Republic has general regulatory powers and may issue decrees. Since the entry into force of the Constitution of February 18, 2006, the general regulatory power is conferred to the Prime Minister under Article 92 of the Constitution which provides that the Prime Minister ensures the execution of the laws and has regulatory powers subject to the prerogatives devolved to the President of the Republic by the Constitution.[487] Unlike the Mining Regulations of 2003 signed by the President of the Republic, that of 2018 is consequently signed by the Prime Minister.[488]

4.4.2. The Minister of Mines

In general, the Minister in Charge of Mines is responsible for managing the national mining domain in accordance with the government's mining policy as set out in the Mining Code and its implementing measures. In accordance with the provisions of this Code, the Minister is competent to:

1. grant or refuse to grant mining and/or quarry rights for mineral substances other than commonly used building materials,
2. withdraw mining and/or quarry rights, disqualify the holder of a mining or quarry right, issue declarations of renunciation of mining and/or quarry rights and record the expiration of mining and quarrying rights,
3. authorise exports of raw minerals,

[486] Article 9 of the Mining Code, 2002.
[487] Article 92 of the 2006 Constitution.
[488] Mining Regulations 2003 and 2018.

4. establish artisanal mining zones,
5. approve and withdraw the approval of trading houses for the purchase of artisanal products,
6. exercise the supervision of institutions, public or *parastatal* bodies engaged in mining and quarrying activities,
7. reserve the deposit to be submitted to a call for tenders,
8. approve the constitution of mortgages,
9. accept or refuse the extension of a mining or quarrying title to related or non-related substances,
10. issue authorisations for the treatment or transformation of artisanal mining products,
11. propose to the President of the Republic the classification of reserved substances, mineral substances classified as mining or quarry products and vice versa, as well as prohibited zones,
12. establish a no-go zone,
13. appoint and convene the members of the Inter-ministerial Commission responsible for selecting the tenders relating to the exploitation of a deposit for which there has been a call for tenders as well as the members of the Inter-ministerial Commission responsible for examining the lists of goods to be imported for mining activities,
14. approve agents in mines and quarries.[489]

Except for the prerogatives provided for in point 11 of this Code, the Minister exercises the above prerogatives by means of a Ministerial Order published in the Official Journal. To do this, the Minister allocates mining and quarry rights and controls all activities carried out under these rights. The Ministry in charge of Mines includes the Minister's Office, the administration of mines, the technical services, and specialised organisations.

4.4.3. The Minister's Office

In the performance of his duties, the Minister in Charge of Mines is assisted by a College of Advisors and benefits from the services of a support office. The Advisors issue opinions on any files submitted to the Minister for action. The Support Office is attached to the Minister's Office to ensure the execution of various administrative tasks.

[489] Law No. 007-2002 of July 11, 2002; Law No. 18-001 of March 9, 2018.

4.4.4. Mining Administration

The Administration of Mines is the Service that carries out the day-to-day tasks of implementing Government decisions in the mining sector, monitoring and controlling mining activities. It assists the Minister in the management of the mining domain. The Head of Administration is the Secretary General. The Administration of Mines includes central and provincial services. The central services are:

1. General Secretariat, which includes: The General Secretary; the Technical Unit placed under the supervision,
2. Directorates

Six directorates have been created to ensure the management of business. They are Directorate of Geology; Department of Mines; Mining Environment Protection Department; Department of Studies and Planning; Directorate of Examinations; Department of General Services and Personnel. The provincial services consist of eleven mining and geology divisions, offices, and branches.

4.4.4.1. Technical Services and Specialised Organisation

At present, two Technical Services operate within the Ministry of Mines and two specialised organisations are under the supervision of the Minister responsible for Mines.

4.4.4.2. Technical Services

i. The Technical Unit for Coordination and Mining Planning (CTCPM)

Created by Ordinance No. 78-153 of 11 April 1978,[490] the CTCPM is a body for advice, studies, and coordination of activities in the mining sector. Its responsibilities include:

a) Development of mining sector development policies and strategies,
b) Investigation of ways and means for the optimal exploitation of the mineral resources of the country,
c) Centralisation and circulation of mining sector information,
d) Harmonisation and coordination between the ministries and bodies concerned with the solution of mining problems,

[490] Ordinance No. 78-153 of 11 April 1978.

e) The realisation by itself or by third parties of studies relating to the development of the mining sector,
f) Identifying solutions to the problems facing the mining industry in the DRC,
g) Supervision of artisanal mining.[491]

Hierarchically, the CTCPM comes under the hierarchical authority of the Minister responsible for Mines, but nevertheless enjoys financial autonomy.

ii. Small Scale Mining Assistance and Support Service (SAESSCAM)

SAESSCAM is a technical government department responsible for assisting and supervising Small Scale Mining and artisanal mining, in accordance with Article 14 of the Mining Regulations.[492] This service was created by Decree No. 047-C/2003 of 28 March 2003[493] and is intended in particular to:

a) Provide training, as well as technical and financial assistance to mining cooperatives and operators in the small mine sector in order to strengthen their managerial capacity and promote the emergence of a Congolese middle class in the mining sector,
b) Ensure the follow-up of the material flows of the Small Scale and Artisanal Mines sectors from the construction site to the point of sale in order to channel all the production in the official marketing circuit,
c) Encourage the grouping of artisanal miners into mining cooperatives,
d) Promote the integrated development of local communities where artisanal and/or small-scale mining activities take place through the retrocession of the share of surface rights intended for these communities, in application of the provisions of the Mining Regulations,
e) Work in synergy with the Public Administration concerned and the other technical services of the Ministry as well as with other

[491] Ordinance No. 78-153 of 11 April 1978.
[492] *Ibid, 453: Article 14.*
[493] Decree No. 047-C/2003 of 28 March 2003.

organisations for the design, manufacture and acquisition of equipment adapted to the geological conditions of the deposits exploited by small-scale mining operators and artisanal miners in order to improve their qualitative and quantitative productivity,

f) Popularise safety standards on operating sites and ensure their strict application,
g) Encourage the small-scale or artisanal miner to invest in other sectors of the national economy with a view in particular to ensuring post-mining activities.[494]

4.4.4.3. Specialised Services

1. The Centre for Evaluation, Expertise and Certification of precious and semi-precious mineral Substances (CEEC). Created by decree No 036/2003 of 24 March 2003,[495] the CEEC is a public enterprise of a technical nature with legal personality and placed under the supervision of the Ministries of Public Enterprises and that of the Mines. These ministries have responsibility to:
    a) Intervene in its own particular field,
    b) Organise expertise relating to diamonds, gold, coltan and all other precious and semi-precious mineral substances in the DRC,
    c) Supervise trading houses, negotiations and founders by monitoring and controlling material and monetary flows,
    d) Export and pay export taxes on precious and semi-precious mineral substances,
    e) Approve Congolese evaluators,
    f) Promote mineral industry of the diamond, gold, coltan and other precious and semi-precious mineral substances,
    g) Combat fraud of precious and semi-precious mineral substances.

[494] *Ibid, 483.*
[495] Decree No. 036/2003 of 24 March 2003.

4.4.5. Decentralised Services

4.4.5.1. The Mining Cadastre

The institution of the Mining Cadastre was one of the main innovations introduced by the legislator on 11 July 2002.[496] The Mining Cadastre is a government department with legal personality and financial autonomy, placed under the dual supervision of the ministers responsible for mines and finances. Its statutes, organisation and operation are regulated by decree n° 068/2003 of 03 April 2003 as amended.[497] The role of the Mining Cadastre and other bodies involved in granting mining rights is specified in the provisions of the Mining Code.

4.4.5.2. Ordinary Procedure

In accordance with Article 12 of the Mining Code, the Mining Cadastre is responsible for the registration and cadastral examination of applications for mining and/or quarry rights. At the end of this process, it issues favourable or unfavourable cadastral opinions and sends the file to the Ministry of Mines for the granting or refusal of mining or quarry rights, as the case may be, by means of an order. Based on the Ministerial Mining Grants Decree, the Mining Cadastre registers the rights thus granted and issues the titles to the applicant, after payment of the surface rights.

4.4.5.3. Tendering Procedure

In accordance with Articles 33 of the Mining Code and 44 of the Mining Regulations, the deposits known, studied, documented or possibly worked by the State or its agencies must be reserved by the Minister of Mines, on a proposal from the Authority or the agency concerned, or on its own initiative and confirmed by the Head of State, to be submitted to the call for tenders.[498]

4.4.5.4. Procedure for Establishing Artisanal Mining Zones

Under the promulgation of law n°007/2002 of 11 July 2002 bearing the Mining Code in title IV and in Articles 109-128,[499] the legislator establishes the legal existence of the

[496] *Ibid, 453.*
[497] Decree No. 068/2003 of 3 April 2003 as amended.
[498] *Ibid, 453: Articles 33*; Article 44 of the Mining Regulations 2003 and 2018.
[499] Law No 007/2002 of 2002; *Ibid, 453: Articles 109-128*.

artisanal exploitation of mines. Under the terms of Article 109 of the new Mining Code, when the technical and economic factors which characterise certain deposits of gold, diamonds or any other mineral substance do not make it possible to ensure artisanal mining, such deposits are transformed, within the limits of a determined geographical area, in an artisanal mining zone.[500] The institution of an artisanal mining zone is made by order of the Minister of Mines after consulting the Directorate of Mines and the governor of the province concerned. The establishment of an artisanal mining zone is notified to the Mining Cadastre, which carries it on the mining fallout maps so that no other application for mining rights is processed there. On the proposal of the Minister of Mines, after consulting the Geology Department, the President of the Republic may, by Decree, declare a mineral substance a "reserved substance," subject to special rules.[501] Uranium, thorium ores and all other radioactive minerals are thus considered reserved substances.

4.4.5.5. The Directorate of Mines

Under the terms of Article 14 of the Mining Code, the Directorate of Mines is responsible for the inspection and control of mining activities.[502]

4.4.4.6. The Geology Department

In accordance with the provisions of Article 13, the Directorate of Geology is responsible for promoting the mining sector.[503]

4.4.4.7. The Department Responsible for the Protection of the Mining Environment

Another important innovation introduced by the 2002 mining legislator is that the department responsible for the protection of the mining environment within the Ministry of Mines exercises, in coordination with the other State services responsible for the protection of the environment, the prerogatives assigned to it by the Mining Code and by any other regulation in terms of environmental protection, in particular:[504]

1. The definition and implementation of mining regulations in terms of environmental protection with regard to the regime for prospecting; the scheme for artisanal

[500] *Ibid, 453: Article 109.*
[501] *Ibid, 453: Article 7.*
[502] *Ibid, 453: Article 14.*
[503] *Ibid, 453: Article 13*.
[504] *Ibid, 453.*

miners, guidelines for mining and quarrying exploration and exploitation operations; and the procedures for monitoring obligations with regard to environmental protection,

2. The technical guidance of the Mitigation and Rehabilitation Plan (PAR), in relation to the research operations for mineral substances classified as mines and quarries; and
3. The technical guidance of the Environmental Impact Study (EIE) presented by the applicants for mining rights and/or quarry exploitation (Article 15 of the Mining Code).[505]

4.4.5. The Provincial Governor and the Head of the Provincial Mining Division

4.4.5.1. The Provincial Governor

In accordance with the provisions of this code, the provincial governor is competent for:

1. Issuing trader's cards for artisanal mining products,
2. Deciding on the opening of quarries for works of public utility on state lands.

The provincial governor exercises the above prerogatives under a provincial decree promulgated in the official gazette.

4.4.5.2. The Head of the Provincial Division of Mines

The Head of the Provincial Mining Division is responsible for:

1. Issuing artisanal miner cards,
2. Granting the right to prospect for quarry products and to operate permanent or temporary quarries for building materials for everyday use.

The new Constitution of 18 February 2006 allocates competences between the central power and the provinces within the framework of regionalisation. It recognises the autonomy of the provinces in relation to the central power. This autonomy stems from the combined provisions of Articles 2 and 3 which give the provinces legal personality and autonomy in the management of their economic, financial, and technical resources. This constitutional text has an impact on mining management.[506] The Constitution of 2006 therefore sought to emancipate the local authorities, granting them legitimacy and

[505] *Ibid, 453: Article 15.*
[506] Constitution of the DRC, 2006; Official Journal of the Democratic Republic of Congo, 47th Year, Special Issue, February 18, 2006.

influence, and positioning them as a privileged partner of the State. They are required to play a fundamental role in the political, administrative, and economic life of the country. This will involve bringing the texts on mining into line with the new provisions introduced by the Constitution, which effectively establishes a hybrid state that is neither unitary nor federal.[507]

4.5. Variability of Mining Management Regimes

The evolution of mining legislation has been more than eventful. This evolution takes into account the public policies adopted by the established authorities. Even though the main objective during the colonial period was to ensure the supply of the colonial power with essential raw materials for industry, industrial development in the colony was also achieved. The fact that the public policies implemented by the national authorities were implemented towards this objective in an unfavourable international situation did not make things any easier. The country has therefore gone from a dual management regime lasting almost a century to a formal unity which, given the new challenges of economic globalisation, is difficult to implement.

4.5.5. Duality of Mining Management Regimes before the 2002 Mining Code

Historically, there have been two legal regimes for managing the mining domain: the regime of the Congo Free State (EIC), reaffirmed by the colony of the Belgian Congo, and that adopted by the national legislator up to 2002. These two regimes have in common the search for the control of surface and underground resources by means of the public appropriation of the areas containing those resources.

4.5.2. The Congo Free State's Mining Legal Regime (1885 – 1908)

This regime stems from various provisions in the Berlin Act signed on 26 February 1885 and the Ordinance of 1 July 1885 on land occupation. In addition to these texts, there are the provisions of the Decree of 22 August 1885 relating to the recognition of acquired rights and the organisation of landed property in the Congo Free State. All these texts were published in 1887.[508]

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[507] G. Bakandeja Wa Mpungu, The New Constitution of the Democratic Republic of Congo, Sources and Innovations, Annals of the Faculty of Law (2007), 215-259.

[508] Berlin Act 1885; Land Occupation Ordinance 1885; Land Recognition and Organisation Decree 1885.

4.5.2.1. The Provisions Instituted by the Ordinance of 1 July 1885

In the beginning the main concern of the Congo Free State was to ensure control of the vast territory it had just been granted under the terms of the Berlin Act, while at the same time safeguarding the rights of the indigenous people on the lands they occupied. The first legal text relating to land use was the Ordinance of the General Administrator of the Congo on 1 July 1885. This Act automatically assigns to the Congo Free State the lands declared vacant and without owners as they were unoccupied and undeveloped.

4.5.2.2. Contents of the Ordinance of 1 July 1885

The land policy of the Congo Free State was governed by the 1885 Ordinance of the General Administrator. On the grounds of this Act, "no contract or agreement entered into with the indigenous people for the occupation of any part of the land had to be recognised or protected by the government, unless the contract or agreement was made through the intervention of a government official appointed by the General Administrator, subject to the rules drawn up by the latter in each particular case. It went further stating that no one had the right to occupy vacant land without title, or to dispossess the indigenous people of the land they occupy; the land must be considered as belonging to the State."[509] It should be borne in mind that, well before the constitution of the Congo Free State, some Europeans, Dutch, Portuguese and British people who were for the most part scientists (geographers) occupied and had rights to the land under the terms of the agreements made with traditional leaders. However, what is important to underline here is the affirmation of the principle according to which all the lands unoccupied or unexploited by the indigenous people were by this fact alone without masters and henceforth belonged to the State. Thus, it is understandable that the State had a land monopoly over almost the entire territory.

Important to note is that the 1885 Colonial Charter conferred on the Congo Free State proprietorship and rights over the immense unexploited territories in that neither land arrogation nor jurisdiction could be exercised without its endorsement. This concurs with the General Administrator's explanatory memorandum which read: "the purpose of the

[509] Van Zuylen, The Land Policy of the Congo Free State with regard to Catholic Missions, (1962) 46; Official Bulletin, 1885, 30; G. Bakandeja Wa Mpungu, Mastery of Soils and Regional Planning in Zaire, Comparative Study with French and Belgian Law, (1998), 236-237; Alain Rochegude, Land Rights in Mali as an Instrument of Economic Development (1970).

Decree is to ensure, in the forms to be prescribed, the recognition of the acquired rights and to allow the proper organisation in the near future of the landed property of the State." It is also contended that "this provision was usually intended to preserve the national wealth from abusive use on the part of the natives and also to prevent foreigners from appropriating it at the expense of the interests of the community." All this was designed to fit swimmingly Article 6 of the Berlin Act on the obligation to promote the welfare of the indigenous population.[510]

It is obvious that the Congo Free State had every interest to take over an unoccupied land from natives with the view to promote the exploitation of the territory. For this, General Administrator needed financial resources that the Belgian State could not provide to King Leopold II, Belgium losing interest at the time of the colonial adventure of its sovereign. Heyse and Leonard note that "the Congo Free State was then in such a situation that it had to strive to stand on its own two feet. However, it happened that it contained many natural resources whose exploitation would benefit not only the Congo Free State itself, but also the local populations. It is for economic and financial considerations that the Congo Free State was led to appropriate all the land not yet exploited at that time".[511] The Ordinance of 1 July 1885 had a dual purpose including crystallising or consolidating the rights of indigenous persons and foreigners acquired prior to 1 July 1885, and allocating vacant and ownerless land to the State: this is the beginning of the constitution of the State land monopoly on which the State grants mining concessions.

4.5.3. Regulation of the Mining Sector

The land tenure system of the Congo Free State incorporated mining regulations. Also, to prevent the explorers' taste for adventure from leading them to take an interest in sectors vital to the State, it was decided to regulate the mining sector. Such was the object of the Decree issued on April 30, 1887. Article 5 of the Decree of 30 April 1887 provides: "no one may, without the authorisation of the Governor General or the official designated by him exploits mines on lands whose ownership has not been legally assigned to him".[512] This provision evidence that the Congo Free State was already presenting itself as the

[510] Van Zuylen, The Land Policy of the Congo Free State with regard to Catholic Missions, (1962), 47.
[511] Heyse and Leonard, Regime of Transfers and Concessions of Land and Mines in the Belgian Congo, (1932); G. Bakandeja Wa Mpungu, Mastery of Soils and Regional Planning in Zaire, Comparative Study with French and Belgian law, (1998), 238.
[512] Article 5 of the Land Management Decree 1887.

owner of the land, with the exploitation of its immense wealth being subject to prior authorisation. It should be noted that only Belgian companies benefited from the provisions of the aforementioned Decree with the aim of profiting the treasury of the crown. For locals and other expatriates, this left the clandestine search for precious mineral substances as their way out. The first offences relating to artisanal diamond mining date back to this period.

On the grounds of Article 1 of the Decree of 8 June 1888 on land tenure, "the Congo Free State assumes ownership of the mines." This provision reads: "the disposal by the State of lands acquired in conformity with the land tenure regulations does not confer on the purchasers and owners of these lands any right of ownership, or exploitation of the wealth that the ground may contain. Such mineral wealth remains the property of the State."[513] This is a corrective of the decree of 30 April 1887, because it might otherwise be thought that having received authorisation from the representative of the King, one would obtain unrestricted possession of the goods of the Congo Free State. Regarding diamonds, for example, which are easy to handle from exploitation to transportation, there was a fear that a rush would be triggered too soon and to the greatest detriment of the vested authority. In general, companies decided to operate various activities, such as trade, transport, agriculture, and livestock. Those involved in mining were understood as collaborating closely with the government to which they were accountable.

By the Decree of 8 June 1888, the legislator therefore sought to avoid others from becoming more powerful than the State, the riches contained in the ground paying better than those exposed on the surface. The new Decree accordingly aims at a balanced heritage, protecting the underground resources of the State and reserving to the State the rights to any exploitation and so be able to pursue its government policies. The Decree of 8 June 1888 had the effect of enshrining the public appropriation of the mines. But the exploitation of the mines was to be done in partnership with the private sector to take into account the protests made following a letter from the King which expressed his thoughts in these terms: "my territory contains immense wealth in ivory and rubber; if I left the trade in these products to private individuals, merely asking them to pay only a few taxes, my receipts would remain insufficient; on the contrary, if I reserve the harvesting of rubber and ivory to myself, not only could I easily balance my budget, but I would

[513] Article 1 of the Land Tenure Act, 1888.

have the prospect of considerable bonuses, for I have the right to harvest them on "my" domain, as these are the state products which belong to me like the land itself ."[514]

The main reason for the 1888 Decree was to make the distinction between the land ownership and that of the ground and underground's mineral resources. The 1888 Act introduces the common law regime for the land ownership however the mineral ownership remains the State's which can authorise individuals by agreement to exploit them. It should be noted that while this Statute decrees that all deposits of mineral substances in the surface or underground are the exclusive property of the state, the indigenous populations however are granted the right to continue exploiting on their account the mines on the lands they occupied in accordance with the customary law. The 1888 Act also specifies what should be considered as mines: "all deposits of metals, ores or metallic materials, stones or other precious substances, mineral fuels and mineral oils." At issue therefore was:

1. Determining the transferable substances,
2. Giving power to the government to determine the provinces where mining exploration is authorised, subject to payment to the owner of the ground an indemnity double the damage caused by the owner,
3. Rendering the concessions of the mines transmissible; these cannot be alienated by batches without authorisation of the government.[515]

The regulations had to undergo some modifications to supplement some of its provisions, particularly with regard to the details to be provided concerning the deposits of mineral substances to be transferred. Under the terms of Article 1 of the Decree of March 20, 1893, mines or transferable substances may be understood as:

1. All mineral substances usable for their metal content. These were the following ores: gold, silver, platinum, iridium, mercury, copper, lead, zinc, cadmium, iron, manganese, chromium, tin, bismuth, cobalt, nickel, tungsten, antimony, arsenic, molybdenum,
2. Substances that can be used for their sulphur content, including native sulphur, sulphides not included in the previous group, and lime phosphate,

[514] G. Bakandeja Wa Mpungu, Mastery of Soils and Regional Planning in Zaire, Comparative Study with French and Belgian law, (1998), 243.
[515] Decree of June 8, 1888.

3. Combustible fossil or bituminous substances including authracite, coal, lignite, graphite, mineral waxes, petroleum, asphalt, mineral oil rocks, and fossil copal,
4. Rock salt, metallic salts and salt springs containing alumiferous rocks; barium sulphate, and vitriolic ores (iron and copper sulphates),
5. Diamonds and precious stones.[516]

4.5.4. Contractualisation of Mineral Exploitation

The Congo Free State expropriated native Congolese of their land for public utility. Indeed, the vastness of this territory required significant financial means for its exploitation. For this reason, King Leopold II was led to seek financial assistance both from private operators and from States such as France, Great Britain, Germany, Portugal, Spain, and the United States. These countries were not only signatories of the Berlin Act but also were coveting the natural and mineral wealth of the Congo Free State, which to their eyes ought to be a land opened to international trade without any hindrance. As a result, the 1888 Act brought in the contractualisation of mineral exploitation. Seen as economic development of the territory, contracts of mineral exploitation were done in partnership with the private sector. Highly skilful and a fine diplomat, King Leopold II quickly understood that it was necessary to free his private domain from the gluttonous appetites of the great colonial powers. It is within this framework that the *Compagnie du Congo pour le Commerce et l'Industrie* [the Congo Company for Trade and Industry] (CCCI), the first Congolese commercial company, was created in 1887 on his initiative. The object of this company was to promote all industrial, public works, commercial, agricultural, and financial operations in the Congo.

The Decree of June 2, 1900 authorises the Congo Free State to conclude an agreement with the *Compagnie du Katanga* [Katanga Company].[517] It was the birth of the Concessionary powers. To accelerate the effective occupation of the territory and its development, several commercial companies were created. These included the Katanga Company (about 500,000 km^2), the Kasaï Company (about 250 km^2), the *Compagnie des Chemins de Fer du Congo Supérieur au Grands Lacs Africains* [Company of the Upper Congo to the African Great Lakes Railway] (8 million hectares), the *Compagnie Anversoise des plantations Belges de Lubefu* [Lubefu Antwerp Company of Belgian

[516] Decree of March 20, 1893.
[517] Decree of June 2, 1900.

Plantations] (approximately 100,000 hectares), Anglo Belgian India Rubber Companies, International Forestry and Mining Company of Congo (1,100,000 hectares), Mayumbe Vicinal Railway Company (100,000 hectares). Of particular note are the *Compagnie du Katanga*, later renamed the *Comité Spécial du Katanga* [the Special Committee of Katanga], and the Company of the Upper Congo to the African Great Lakes Railway, which had received from the Congo Free State the power to manage the land granted to them in accordance with the transfer agreement signed between the Congo Free State and Belgium.

The cooperation between the Congo Free State and chartered companies was contractually based on a few principles including:

1. The convention with the special committee of Katanga (CSK), which came into being on June 19, 1900.

   This convention granted the CSK the most extensive powers of administration, management and alienation without exceptions or reservations. As such the CSK, which occupies the current region of the Great Kanga and part of Kasaï, had the authority to manage Katanga on behalf of the EIC, i.e. the administration and the mines. The CSK received civil personality on 6/12/1900.
2. The 1902 convention establishes the Company of the Upper Congo to the African Great Lakes Railway to have jurisdiction in what is now Oriental Province.

Finally, in relation to the legislation applicable to mines, it is worth noting the provisions of the Decree of 20 March 1893 modifying certain provisions of the Decree of 8 June 1888 in order to clarify the meaning and scope. Article 1 of the aforementioned 1893 Decree states: “by application of Article 3 of the 1888 Decree are considered as transferable substances subject to what is stated in Article 2 of the 1893 Act,[518] all usable mineral substances by their metal content, other substances usable under their sulphur or phosphorus content, combustible fossil or bituminous substances, rock soil, metallic salt as well as salt springs, and diamonds and gemstones which include:

i. Gold, silver, platinum, uranium, and palladium ores (precious metals); those of mercury, copper, lead, zinc, cadmium, iron and manganese, chromium, tin, bismuth, nickel, cobalt, tungsten, antimony, molybdenum,
ii. Native sulphur, sulphides not included in the previous group, lime phosphate.

[518] Articles 1 and 2 of the 1893 Decree on Land Tenure; Article 3 of the 1888 Decree.

iii. Anthracite, seabed mineral resources, lignite, graphite, mineral salts, petroleum, asphalt, mineral oil rocks, fossil copal,
iv. Alumiferous rocks, sulphate, petroleum ores (iron sulphate, copper).

Article 3 of the Decree of 20 March 1893 specifies that the Government determines by decree the provinces where mining research is authorised either to all individuals without distinction or to the persons specified in the decree.[519] The Decree of 20 March 1893 confers on whoever discovers a mine in the regions where one is authorised to research a 10-year concessional preferential right.[520] To this end, the concessionaire was invited to send the Government or the special official delegated for this purpose information as complete as possible on the geological and mineralogical nature of the mine as well as its location and the extent to which the concession was being requested. The application must be accompanied by a surface map on a minimum scale of 1 in 20,000. The concession Decree is registered under the land titles convention, with a concession certificate being issued. This prevision is still of application in the 2002 Mining Act.

4.5.4.1. The Mining Regime of the Belgian Congo Colony (1908-1959)

In broad terms it is submitted that this mining regime was an extension of that set up by the Congo Free State. In the interests of a more detailed understanding, it is also necessary to identify the principles laid down in the Colonial Charter and in certain Statutes adopted subsequently relating to the management of the mining domain. So, the principles laid down in the Colonial Charter of 18 October 1908 need to be analysed together with the Decrees of 1928, 1937 and the subsequent rules laid down in the final colonial Decree relating to mines issued on 31 March 1959. The Colonial Charter was promulgated on 18 October 1908, which was also the date on which King Leopold II ceded the Congo Free State to the Belgian State. Section 15 of the Colonial Charter addresses the private property pertaining to the lands and mines belonging to the colony of the Belgian Congo. It also distinguishes three categories of transfer and concession, each subject to a particular administrative procedure.

[519] Article 3 of the 1853 Decree.
[520] The 1893 Decree.

4.5.4.2. The Decree of 13 January 1928

The Decree of 13 January 1928 created a third conceding power: "The *Commité National de Kivu* –CNKI [National Committee of Kivu]". This Committee was granted the mining rights and powers of administration, management, and disposal with regard to the transfer and concession of state lands. The objectives were to study and develop the Kivu region regarding transport and communication routes, the development of agriculture and the development of land forming part of the private domain of the colony and of the mines not yet subject to concession. As part of its mission, the National Committee of Kivu replaced the local authorities in respect of the management of state lands and forests as well as the management of mines. This is a mission of colonisation, development and exploitation of quarries and mines. The application of this Decree was at the heart of numerous conflicts between the colony and the indigenous population, the great customary chiefs (called Mwami) being very attached to their lands, which they regarded as customary property.

4.5.4.3. The Decree of 24/9/1937

The general internal principles of the concession policy were laid down by the 24/9/1937 Act. This Decree as well as its internal modifications defines the general principles, setting the modes of concession and integrating the granting bodies with which the Congo Free State sought directly to develop the Eastern part of Congo. The principles relevant to the mining sector are:

1. The separation of the ownership of the ground and the mines. These belong to the state (article 1), being in fact the application of article 15 of the colonial charter,[521]
2. The exploitation of the mines can only be carried out by virtue of a concession granted by the colony or the beneficiaries (the granting bodies),
3. The indigenous people may, without deed of concession, continue the exploitation of their mines in the concessions where it was being practiced on the date of entry into force of the decree,
4. Mining concessions are granted under conventions and permits,
5. Mines are considered as deposits comprising:
    i. Ferrous and non-ferrous mineral substances,

[521] Article 1 of the Decree 1937; Article 15 of the Colonial Charter 1908.

ii. Fossil substances, fuels, bituminous, metallic soil, asbestos, nickel, diamonds, and other precious stones.[522]

The Decree of 24/9/1937 distinguished two types of concessions: concessions granted by agreement and approved by decree and concessions granted under a permit. This Act organised four types of permits:[523]

1. The general research permit:

   The permit was an essential precondition for engaging in prospecting activities. This permit was issued by the registrar of land titles. Having access to this permit were on the one hand, natural persons registered in the Belgian Congo or in Rwanda Urundi as well as Congolese and non-registered inhabitants of Rwanda Urundi; on the other, profit-making companies and commercial enterprises provided they were founded under colonial law or had fulfilled the formalities required to establish a headquarters in the colony or in Rwanda Urundi.

2. The special research permit:

   This licence allowed the holder of a general licence who discovers indications of mineral resources to acquire an exclusive right to prospect in a two km square area. The permit was issued for a period of two years renewable three times, i.e. for a maximum period of eight years. The special research permit conferred the following rights:

   Within the square:

   i. An exclusive prospecting right,
   ii. The right to establish access roads, carry out construction activities, to use a non-navigable or potable watercourse and to dig,
   iii. The right to graze animals and log wood on land belonging to the colony but not occupied by the government.

Outside the square (2 km^2), the right to establish access roads was given.

3. The operating licence:

   After the discovery of serious signs of deposits, it is then a matter of exploiting these. The exploitation permit allowed the extraction of mining

[522] Decree of September 24, 1937
[523] Article 1 of Decree 1937.

deposits. It was granted to the holder of the special research permit. The issuing authorities were the colonial legislature for concessions exceeding 800 hectares or 8 km^2, and the Governor General in the case of a concession not exceeding 800 hectares.

4. The treatment permit:
   This permit was independent of other related permits and had to be sought by anyone seeking solely to treat the minerals extracted from the mine conceded by the government of the colony. It was issued by a minister of the colony.

The Decree of 24/9/1937 set down a conventional regime. Subject to Articles 10, 109 and 131, areas where this regime applied were those granted to a few organisations including the special committee of Katanga, the railway company of the Upper Congo to the African Great Lakes, and the National Committee of Kivu.[524] The functions of the registrar of land titles and of the mining department of the colonial administration were exercised there by an agent of the granting bodies.

4.5.4.4. The Decree of 31/03/1959

This Statute regulated the research and exploitation of hydrocarbons. The regime established by this Decree failed to reach application due to the political tensions arising from the demands for independence based on moral grounds. In terms of oil, the colonial power limited itself to affirming that this resource belonged to the colony, which only granted concessions to individuals for exploitation and transportation.[525] A Decree of 15 October 1910 specified the conditions for granting land to companies for the transportation and sale of oil in the Belgian Congo.[526] It may be noted that the major concern of the colonial power was to consolidate the achievements of the Congo Free State by ensuring total control of the mining domain, including hydrocarbons, and exploit mineral and hydrocarbon resources in partnership with large incorporated companies (in the best interests of the colonial power). The colonial undertaking was ambitious in terms of territorial planning and economic and social development. A ten-year development plan was drawn up, reflecting the desire of the colonial power to ensure the colony's sustainable development. By the end of the Second World War, mining production had

[524] Articles 10, 109 and 131 of Decree 1937.
[525] Decree of 1959.
[526] Decree of 1910.

increased by more than 64% due to an influx of capital from donors, including the World Bank and many multinational mining companies (including the General Minerals Company and several Belgian banks).

4.6. The Mining Regime of the Independent Congo (1960-2002)

With the country's accession to national and international sovereignty, the need to rethink the entire system bequeathed by the colonial power emerged. This included the reconsideration of public policies to adapt them to the new situation. Thus, in the field of mines, several experiments were undertaken with a view to the recovery by the national authorities of surface and underground mineral resources to meet the imperatives of national development. Mining reform was until then oriented more towards advancing the interests of the former colonial power through the medium of mining policy, especially about mineral substances designated for export. It should be noted, however, that the first five years of independence were weighed down by the difficulties of the decolonisation process, thereby imposing a degree of continuity with respect to mining policy. The subsequent laws adopted only had the ultimate effect of strengthening the public control of surface and underground resources.

4.6.1. The Continuation of the Policy of Granting Concessions

The political problems experienced in the aftermath of independence (civil war, rebellions, and secession) constituted a handicap for the implementation of a national policy in terms of management of the mining sector. This situation was confirmed by the Constitution of the first Republic which was to use the contractual technique in order to resume dialogue with incorporated companies suspected, rightly or wrongly, of supporting insurrectionary movements and armed rebellions against the established power. In terms of constitutional principles, the Fundamental Law of 9 May 1960 reserved to the central government the competence to set the rules relating to the granting of mining concessions (Article 219, s26).[527] Article 220 of the Fundamental Law specified that the granting of mining concessions fell within the powers assigned to the provinces.[528] There is a problem here which has given rise to many difficulties because of the overlapping of competences between the central authorities and those of the provinces, even though the centralising practice of power as justified by the

[527] Article 219 (s26) of the Fundamental Law 1960.
[528] *Ibid, Article 220.*

circumstances did not lead to major conflicts of competence except in Katanga, a province which would later proclaim its independence based on the immensity of its mineral wealth. Articles 48 and 50 of the Constitution of 1 August 1964 laid down the same principles of exclusive competence within the framework of the Federal State.[529] However, Article 43 (s4) of the 1964 Constitution provided a provision limiting its scope in these terms: "Notwithstanding the provisions of the previous 3 paragraphs, a national law shall take in regulating the legal regime of land transfers and concessions made before 30 June 1960".[530]

It is worth noting that on 25 May 1960 and 20 June 1960, ten days before the proclamation of independence, several conventions serving to guarantee the rights of companies under colonial law that risked losing their interests upon independence, in particular by the inevitable change of legal status, were signed in a hurry. It was therefore necessary to ensure control of all economic activities and the main production units, especially in the flourishing mining sector. To guarantee this situation, the companies concerned were brought under Belgian law by legislative means. But in the months following independence, the desire to decolonise the law grew to the point of precipitating a contentious disagreement that caused much ink and saliva to flow, namely the *Belgo-Congolese* dispute. Thus, in application of Article 43 paragraph 4 of the Constitution of 1 August 1964, a Member of Parliament answering to the name of Bakajika initiated a bill aimed at ensuring that the Democratic Republic of the Congo had full property rights over its domain and full sovereignty in granting land, forestry and mining rights throughout the national territory. This bill was to be given effect two years later by an Ordinance-Law dated 7 June 1966 (n° 66/343 of 7/6/1966).[531]

4.6.2. The First Attempt to Regain Full Sovereignty Regarding the Concession of Land, Forestry and Mining Rights

This was confirmed by the provisions of the ordinance-law of 7 June 1966, the implementation of which was hampered by the outbreak of a rebellion in the east of the country.

[529] Articles 48 and 50 of the Constitution 1964.
[530] Article 43 (s4) of the Constitution 1964.
[531] Ordinance-law 1966 (n° 66/343 of 7/6/1966).

4.6.3. The Provisions of Ordinance-Law No. 66/343 of 7 June 1966

Ordinance-Law No. 66/343 of 7 June 1966 enshrines the resumption of full sovereignty by the Republic of land, forest, and mining rights. In other words, the Democratic Republic of the Congo resumed full and free disposal of all its land, forestry and mining rights granted or transferred before 30 June 1960, in ownership or in partnership with third parties, either natural or legal persons. This is the pure and simple application of the principle of the public domain. This Ordinance-Law, described as revolutionary, thus repealed all contrary legislative or regulatory texts which had as their object the exploitation or management of surface or underground resources. In execution of this Law Ordinance No. 66-413 of 8 July 1966 was enacted, requiring land, forestry and mining assignees or concessionaires to submit a new application for assignment or concession before 30 June 1960. A period of 30 days was granted to assignees and concessionaires to comply with this measure. It was specified that foreclosure would be pronounced without appeal for all those who did not comply with the new law, dictated as it was by the desire to safeguard the national interest.

The nationalist spirit expressed in the provisions of the Ordinance-Law of 7 June 1966 encountered resistance from former assignees and concessionaires and contributed to marked diplomatic tensions between the national authorities and those of the Kingdom of Belgium. The latter represented the interests of Belgian subjects whose property and rights were, according to them, no longer protected by the Congolese State, which had expropriated them without respecting the procedures. Hence the need to compensate them, explained the Belgian authorities. It is of note that this political tension between the Congolese and Belgian authorities was the basis of the first rebellion in Kivu, led by a former Belgian officer from the colony, Colonel Jan Schram. However, the desire of the national authorities to ensure total control over the mining wealth was concretised by the adoption of specific legislation on the mines namely the Ordinance-Law n°67/231 of 3 May 1967 enacting general legislation on mines and hydrocarbons.[532]

[532] The Ordinance-Law n°67/231 of 1967.

4.6.4. Total Control of Mineral Wealth: Ordinance-Law No. 67/261 of 11 May 1967 Enacting General Legislation on Mines and Hydrocarbons

The 1967 law established two management regimes for mines: the common law regime and the conventional mining regime. In addition, some milestones of the hydrocarbons' regime were laid down. The general system of common law regime lays down three principles in terms of mining sector management and introduces an innovation with the introduction of provisions relating to artisanal mining.

4.6.5. Principles

Ordinance-Law No. 67/261 of 11 May 1967 establishes the following principles:

1. The separation of underground resources; the mines constituted assets distinct from the ownership of the land and belong to the State. This enshrined the public domain.
2. No one was permitted to engage in prospecting, research and exploitation unless granted a right by the State (prior authorisation regime).
3. A distinction was drawn between:
    a. mines, transferable or reserved substances,
    b. quarries,
    c. solid, liquid, or gaseous hydrocarbons subject to special provisions
    d. mineral water sources governed by specific legislation,
    e. a natural person can only obtain a mining right if he has elected domicile in the national territory and is of high moral standing.
    f. a legal entity can only obtain the right if it is incorporated according to Congolese law, i.e. if it has its registered and administrative headquarters in the Republic and finally, if its corporate object is limited to prospecting, research and exploitation, to the processing of minerals and related activities at depth, and to carrying out on an exclusive basis all the operations of prospecting, research and exploitation of the transferable substances for which they have been issued.[533]

[533] Ordinance-Law No. 67/261 of 11 May 1967.

Compliance with these principles also confers the right to carry out any concentration, metal and chemical treatment, transformation, marketing and exploitation of these substances.

4.6.6. The Artisanal Mining Permit

This represented an innovation compared to the previous regimes under the Decree of 1937. The artisanal mining permit was granted to natural persons of Congolese nationality or to artisanal mining cooperatives, without going through the stage of the personal authorisation of prospecting where the permit covers a square of 500m on a north-south geographic orientation. It is important to note that the perimeter was not delimited. The only condition was to obtain registration with the civil authorities of the territory in which the research and prospecting were planned.

Conversely, in terms of Articles 40 and 45 of Ordinance-Law of 1967, the conventional mining regime system is intended to promote the contribution of new capital to the mining sector by granting promoters and foreign investors the establishment facilities provided for in the investment code.[534] The granting of this conventional regime constitutes a derogation from the common law regime as decreed above. The conventional regime is reserved exclusively for legal persons and consists of the granting of one or more exclusive prospecting areas within which operating permits or concessions may be issued. It is this (conventional) regime that favours the current authorities in the context of reconstruction. The conventional regime is laid down by the provisions of Articles 82 to 100 of the Mining Code.[535] Contrary to the mining regime, which is strongly supervised by the State, the legislator has shown itself to be too liberal by refraining from learning the lessons of the legislative embedding of its full sovereignty over surface and underground riches. From the outset, it should be specified that this regime incorporates the essential provisions of the Decree of March 31, 1959 on liquid and gaseous hydrocarbons.

It may be recalled that this law was not implemented until independence, with the oil industry requiring the mobilisation of major financial resources; moreover, research was very expensive in the post-war context. Mining rights for hydrocarbons were granted by

[534] Articles 40 and 45 of Ordinance-Law of 1967.
[535] *Ibid, 453: Articles 82 to 100.*

agreement to legal persons only. This particular regime distinguishes three types of mining rights: reconnaissance, exploration and exploitation. The right of reconnaissance is the equivalent of prospecting in the common law mining regime. Prospecting is done by hand and on dry land. This is the right to recognise any indication of transferable substances in the form of hydrocarbons. Exploration right involves drilling and operation right involves the recovery of identified oil deposits and the harvesting of methane. It is the exploitation of bituminous shale discovered through exploration and prospecting in an area limited to no more than 450,000 km². The operating concession was set at a maximum of 250,000 km^2.

The implementation of this legislation led to numerous abuses that were at the heart of a financial dispute between Belgium and its former colony. In addition, several mining conventions were signed with multinational companies, mainly of American and English origin, for the exploitation of hydrocarbons. These long-term exploration-exploitation agreements (25 to 50 years renewable) granted property rights to these multinationals in contradiction with the legal provisions. Their one-sided nature was obvious. Character was manifest. The hydrocarbons sub-sector has therefore remained shrouded and debate to this day remains the subject of. As an indication, the agreement signed between Golf Congo and the Republic of Zaire provided for operations covering a period of 45 years, renewable twice. Article 93 of the 1967 Mining Law also specifies that hydrocarbon concessionaires are not liable for income tax, property tax, personal tax, and any other tax of any kind, or any entry and exit fees, except for remunerative taxes.[536] Such an exemption deprives the Congolese State of significant financial resources earmarked for development needs. Some have referred to these agreements as acts involving the cession of territory. Numerous criticisms levelled against this mining legislation led to a reform introduced in 1981. It is the object of the Ordinance-Law no 81 of 2 April 1981 enacting general legislation on mines and hydrocarbons.

4.6.7. Reforms of Ordinance-Law No. 81/013 of 2 April 1981

These reforms apply to both sectors. The new legislation of 2 April 1981 was designed to respond to the criticisms made against the previous mining legislation by laying down new management principles, while retaining the two management regimes which specify

[536] Article 93 of the Mining Law 1967.

the relationship between the parties to the agreements, but with another innovation as well. Basic issues are addressed and clarified.

4.6.8. General Principles

Reforms of Ordinance-Law No. 81/013 of 2 April 1981 had the following four principles:

1. The Congolese soil is and remains the property of the nation and includes, in particular, mines, quarries, mineral water sources and hydrocarbons.
2. The ownership of mines and hydrocarbons constitutes a right distinct and separate from those resulting from a financial concession.
3. Mining rights are granted by virtue of personal prospecting authorisations, research permits, exclusive-research-zones, exploitation, and concession permits, exclusive reconnaissance, exploration, and exploitation zones.
4. To obtain mining rights, applicant must have elected domicile in the DRC and to have provided a guarantee of ethical conduct. For legal persons, these must be considered, in accordance with positive law, to have their registered and administrative headquarters in the DRC, and for their corporate object to be confined to mining activities.[537]

4.6.9. Established Management Regimes

Like its 1967 predecessor, the Ordinance-Law of 2 April 1981 establishes two management regimes for the mining sector: the common law regime and the conventional regime and the special regime for hydrocarbons. In terms of the common law mining regime, it could be noted that articles 4 and 7 determine the conditions for granting authorisation and the rights conferred on the holder of such authorisation.[538] The competent authority to issue a personal prospecting authorisation is the Minister of Mines. Its validity is two years non-renewable. Under the terms of Article 12 of the law of 1981, the applicant for an exploration permit is required to provide proof of the possession of a personal prospecting authorisation; to effectively occupy the land in question; to present a technical report and a programme of activities, and to obtain the approval of the mining Department.[539] A single exclusive personal and indivisible prospecting and research right is conferred. This right is assignable and transferable.

[537] Ordinance-Law No. 81/013 of 2 April 1981.
[538] Articles 4 and 7 the Ordinance-Law of 2 April 1981.
[539] Article 12 of the Mining law of 1981.

Subject to article 13, a person cannot obtain more than 20 permits. The area covered is a square with sides of 5 kilometres. The permit is valid for two years, renewable three times.[540] The competent authority to issue the exploration permit is the Minister of Mines.

To apply for an exploitation permit, it is necessary to have a research permit and an exclusive research area. With regard to the concession, there must be a usable deposit. In addition, the applicant must present a production and investment programme and provide evidence of the necessary financial and technical means. According to articles 20(2), 22 to 26, the permit confers the right to carry out any operation of extraction, concentration, chemical and metallurgical treatment, transformation and marketing. This right also extends to Allied substances and is assignable and transferable. For the exploitation permit, the area is identical to that of the exploration permit. The period of validity differs according to permit. It is five years renewable for the operating permit and twenty years renewable twice for a period of ten years for the concession. The competent authority to issue these permits is the Minister of Mines.[541] In accordance with the provisions of Article 31 of the Mining Code of 1981, artisanal mining is reserved only for Congolese natural persons, regularly registered, and counted in the civil registry of the territory of the zone concerned. Such individuals must obtain miner's or trader's cards issued by the governor of the province of exploitation. Mining companies established in the area are required to be consulted for their opinion. The rights conferred are those to hold and transport any precious mineral substance and to carry out any exploration and exploitation activities. The area covered is that of the administered territory declared open to artisanal mining. The period of validity of the permit is one year, renewable indefinitely. It should be noted that when the mining title is renewed, the legislator provides for a halving of the land granted.[542]

Contrary to the common law mining regime, the conventional mining regime is reserved for legal persons. No distinction is drawn here between the exclusive research areas and the exploitation permit. The elements that must be found in the agreement relate to the area covered by the agreement and the durations of successive periods of validity; the area reduction rate; the minimum prospecting and research work programme; the

[540] *Ibid, Article 13.*
[541] *Ibid, 529: Articles 20(2), 22 to 26.*
[542] *Ibid, 529: Article 31.*

minimum programme of related activities; the tax law applicable to the company; the possible participation of the State in the Company's share capital; any renegotiation clauses and special conditions. To benefit from the conventional regime, the applicant must be a legal person constituted in accordance with Congolese law (i.e. company law), have a registered and administrative office in the DRC, have a corporate confined to mining activities, justify sufficient technical and financial means to carry out research work and carry out the exploitation programme and meet the conditions of admissibility to the conventional regime of the investment code. The Ministers of Mines, Finance and the one of the State holding companies are in charge to determine the applicable tax regime and the possible participation of the State in the share capital of the concession company.

Rights conferred by the conventional regime are practically the same as those granted to natural persons. This is the exclusive, personal, and individual right of research and prospecting, and the right to obtain any exploitation and concession permit in accordance with the common law mining regime. The exclusive research area covers a maximum area of 50,000m^2. The limits of this zone are made up of permanent physical borders that can be detected on the ground including mountain ranges, watercourses, cracks due to earthquakes, and polygonal contours. The agreement is established for a period of five years renewable three times for successive periods of five years or 20 years. With each renewal, a halving of the area of the exclusive research area is planned. To encourage investment in the mining sector, international financial institutions (the World Bank in particular) were already proposing at the time to States holding mineral wealth the relaxation of their legislation moving in the direction of a total liberalisation of mining activities, while taking care to avoid discrimination between nationals and foreigners by establishing a single system, that of common law; this regime was to be sanctioned by the 2002 reform as it will be developed below.

The Ordinance-Law of 2 April 1981 also regulated the special regime for hydrocarbons. Here lies in the importance to note that very oddly, the principles governing hydrocarbons to which the legislator referred are taken from the colonial mining law of 1959.[543] These principles may be briefly summarised as the following:

[543] The Ordinance-Law of 2 April 1981; The Decree of 1959.

1. The mining right for hydrocarbons is granted by agreement only to persons of moral standing.
2. The agreement is initiated on behalf of the Government by the Minister responsible for energy and hydrocarbons.
3. The agreement is signed for the Congolese part by the Ministers responsible for oil, hydrocarbons, finance, and the minister in charge of state holding companies.
4. The signed agreement must be approved by a presidential decree.
5. Renewals are granted by ministerial orders.
6. This regime does not apply to associated substances.
7. The corporate purpose must be limited to the reconnaissance, exploration, exploitation, hydrocarbons processing and related operations.
8. The mining right for hydrocarbons cannot be granted in joint ownership (meaning it cannot be issued to more than one person at a time).
9. The Petroleum Agreement confers within the limits of one or more exclusive zones of research:
    i. The right of reconnaissance and exploration of solids, liquids, or gases,
    ii. The right to obtain any exploitation concession.[544]

Reconnaissance and exploration rights cover a period of five years each. The contents of the petroleum agreement are the same as those of the conventional mining regime noted above. It should, however, be pointed out that contrary to the legal requirements, the State has shown itself to be unduly liberal or lax in the application of oil agreements. On several occasions, extra-conventional facilities have been granted to oil companies, resulting in an excessive loss of revenues for the treasury. In practice, the implementation of the hydrocarbon regime calls for a revision of the agreements.

4.7. Relationship between the Parties Interested in the Management of Mining Rights

4.7.1. Mining Rights Holders, Land Concessionaires, and the State

4.7.1.1. Safeguards

Under the 2002 Mining Code as amended and supplemented by the 2018 Mining Code,[545] carrying out exploration and exploitation work in an exclusive zone of less than 50m is forbidden. The restriction involves:

[544] The colonial mining law of 1959; Ordinance-Law of 2 April 1981.

1. Properties classified as walls, villages and agglomerations, wells, public buildings, and sacred places except with the prior agreement of the concessionaire of the land concerned and the owner of the buildings erected there or their beneficiaries, and subject equally to authorisation by the competent provincial governor. The persons concerned must be heard beforehand and compensated, if necessary.
2. On either side of communication routes, water pipes, public utility works and works of art, except with the authorisation of the competent provincial governor.

The legislator has also provided for safeguards to assure the holder of the full exercise of his mineral rights. These involve:

1. Within the delimited perimeter:
    i. To occupy the land necessary for its activity and related industries, and to build industrial facilities,
    ii. To deal with non-occupied environment,
    iii. To use non-navigable or negotiable watercourses, especially to establish within the framework of a concession waterfalls for a hydroelectric power station designed to satisfy the energy needs of the mine (mbuji-mayi and tshikapa have dilapidated equipment today),
    iv. To dig canals and drains,
    v. To establish means of communication and transportation of any kind.
2. Outside the delimited perimeter, the holder has the right to establish means of communication and transportation of any kind.[546]

4.7.1.2. The Consistency of the Reports

1. The relationship between the different mining rights holders

In order to prevent the development of a mine from unduly benefiting the neighbour or causing it any damage with impunity, the legislator has adopted the following principles:[547]

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[545] Mining law in the DRC is governed by Law No 007/2002 of July 11, 2002 related to the Mining Code (Mining Code), as amended and supplemented by Law No 18/001 of March 9, 2018, as well as Decree No 2003/038 of March 26, 2003 related to Mining Regulations (Mining Regulations), as amended and supplemented by Decree No 18/024 of June 8, 2018 and Special No. of June 12, 2018.

[546] Law No 007/2002 of July 11, 2002; Law No 18/001 of March 9, 2018.

[547] Mining law in the DRC is governed by Law n° 007/2002 of July 11, 2002 related to the Mining Code (Mining Code), as amended and supplemented by Law No. 18/001 of March 9, 2018, as well as Decree No 2003/038 of March 26, 2003 related to Mining Regulations (Mining Regulations), as amended and supplemented by Decree No 18/024 of June 8, 2018 and special No. of June 12, 2018.

i. The communication channels created by the holder of an exclusive exploration or exploitation title inside or outside the delimited perimeter may, when there is no obstacle to exploitation, be used to provide the establishments with fair compensation and also be open to public use,
ii. If it is recognised as necessary to carry out the work in the interests of two neighbouring mines, the holders may not oppose such work and are bound to participate in it in proportion to its interest.

2. Mining works damage to a neighbouring mine

On the other hand, if this work brings a reduction in the charges of a neighbouring mine, there are grounds for compensation. The Mining Department may prescribe the construction, at the expense of the interested parties, of a protective bulwark of sufficient size without the maintenance of this block being able to give rise to compensation.[548]

4.7.1.3. Mining Rights Holders, the Land Concessionaires and Third Parties

Land concessionaires and third parties are protected by the following rules:[549]

1. Any liability arising from the fact of the occupation is incumbent on the holder of the mining title or the leasing agent (i.e., the person who rents a mining title).
2. Any damage caused to the property of third parties is settled at their real replacement value increased by half unless it has been made good.
3. In the event of a transfer of an operating permit or a concession, the liability for damage resulting from work prior to the transfer is jointly and severally incumbent on the former and the new holder.
4. The holder of a mining right may be required by the Mining Department to post a bond in order to ensure the payment of any compensation if the work is likely to cause specific damage and if it is feared that the resources in question are not sufficient to meet its potential liability.
5. Any occupation of land depriving the rights holders of the enjoyment of the land for a period of a year or any modification rendering the land unsuitable

[548] Mining law in the DRC is governed by Law No. 007/2002 of July 11, 2002, related to the Mining Code (Mining Code), as amended and supplemented by Law No 18/001 of March 9, 2018, as well as Decree No. 2003/038 of March 26, 2003 related to Mining Regulations (Mining Regulations), as amended and supplemented by Decree No. 18/024 of June 8, 2018 and Special No. of June 12, 2018.
[549] *Ibid.*

for cultivation entails for the holder or the lessor of the mining title, at the request of the rights holders, the obligation either to pay a rent established on a rental income increased by half, or to pay the amount of the value of the land at the time of its occupation increased by half.[550]

4.7.1.4. Mining Rights Holder and the State

With regard to the State, Mining Acts provide the following principles as limitations of the enjoyment of the mining title:[551]

1. The authorisation to occupy the land does not prevent the execution of public utility works or the exploitation of quarries to provide the necessary materials.
2. The state may enact any provision obliging operators to comply with any measure taken in the general interest consisting in particular of increasing, restricting, regularising production, centralising the sale of products or reserving them for the supply of a national iron and steel enterprise.
3. Through the mining department and its related services, the state is empowered to oversee the mineral research activities and the exploitation of the mines, in particular by:
    a. Application of the mining code. This covers the conservation and management of the mine according to the prevailing regulations rules and, in general, the administrative, technical, economic, and social monitoring of the activities covered by the mining legislation and its implementing measures,
    b. The inspection of labour conditions in the mines and their outbuildings,
    c. Conservation of the mining title,
    d. The development, conservation and distribution of general documentation concerning mineral substances,
    e. Any holder or lessor of mining rights and, in general, any person engaged under its responsibility and on its behalf in mining activities is required to:

[550] Decree No. 18/024 of June 8, 2018 and special No. of June 12, 2018.

[551] Mining law in the DRC is governed by Law No. 007/2002 of July 11, 2002 related to the Mining Code (Mining Code), as amended, and supplemented by Law No. 18/001 of March 9, 2018, as well as Decree No. 2003/038 of March 26, 2003 related to Mining Regulations (Mining Regulations), as amended and supplemented by Decree No. 18/024 of June 8, 2018 and special No. of June 12, 2018.

1. Provide upon request by the mining department any information of a technical, geological, mining, financial, economic, social, or accounting nature as well as any copy or any plan.
2. Send to the mining department the periodic documents listed in the mining regulations as well as the balance sheet, operating accounts, the consolidated results, and the list of administrators and concessionaires to the accounts as well as the dates of ordinary and extraordinary meetings.
3. Keep an update of the mining-related documents on site on a daily basis as required by the mining regulations.
4. Declare without delay to the mining department any serious incident in a mine.[552]

4.7.1.5. Grounds for Forfeiture

The State granting the title may, should the beneficiary prove unworthy, disqualify the holder, or withdraw the title. Articles 65 to 75 of the law of 1981 determine the grounds for forfeiture of conferred rights.[553] In the view of these articles, the holder of a right deriving from a licence to operate a concession or an approval as a purchasing trading house for precious mineral substances may be deprived of its rights in the following cases:

1. If the preparatory work for commissioning a mine has not started within three years from the issue of the initial title or if it ceases to be regularly pursued for the same period,
2. If the mine is not brought into regular operation within 10 years from the issue of the initial mining title,
3. If all activity has ceased for three years,
4. In the event of total or partial non-performance of the obligations of the holder of the operating permit or in the event of fraudulent infringement of the rights of the state,
5. If it is found that the exploitation is not being carried out in accordance with the regulations or is not making best use of the deposit or if the safety, health or social interests of local populations are not being safeguarded.[554]

[552] Decree No. 18/024 of June 8, 2018 and Special No. of June 12, 2018.
[553] Articles 65 to 75 of the law of 1981.
[554] *Ibid, 529: Articles 65 to 75.*

4.7.1.6. Tax Obligations of Mining Operators

In addition to taxes and contributions under common law, mining operators are liable for the following contributions, taxes, and royalties:[555]

1. A contribution in the form of a provision for replenishing the deposit of a maximum of 15% of the gross amount of the sale, subject to a limit of 50% of the net result,
2. The remunerative tax on the occasion of the installation or renewal of a title mining,
3. The annual surface royalty for the benefit of traditional communities whose land concession rights have been harmed wholly or partly as a result of the granting of the mining right.
4. For gold and diamond trading houses, the tax obligations are the following:
    a. Payment of a deposit of US $ 150,000
    b. An annual anticipatory fee of US $ 150,000,
    c. An annual fee of US $ 30,000 per buyer recruitment additional to such authorised purchasers.

4.8. Regulation of Artisanal Mining of Precious Mineral Substances

Following its impact on the daily life of the populations living near the mining areas, the small-scale exploitation of precious mineral substances has been the subject of specific regulations, the legal basis of which needs to be specified, together with the advantages and disadvantages.

4.9. The Legal Grounds

Articles 30 to 34 set the rules for artisanal mining. Pursuant to the provisions of these articles, several ministerial decrees have been issued with a view to regulating the exploitation and marketing of precious mineral substances.[556] According to article 30, paragraph 2 of the Mining Code, there is artisanal mining when the economic and technical factors which characterise the deposits of precious mineral substances do not allow industrial mining within the meaning of the Mining Code. Paragraph 3 of this article specifies that such deposits will be established by means of decrees in artisanal

[555] *Ibid, 529: Articles 219 to 224.*
[556] *Ibid, 453: Articles 30 to 34.*

mining zones.[557] A Ministerial Decree n°0072/DPM/ MINER/82 of 1 December 1982 defines precious materials. The following are considered as precious stones: diamonds, rubies, sapphires, emeralds, and topaz. The following are considered precious metals: gold; silver, palladium; radium, rubidium, platinum. The following substances are considered to be reserved and not liable to artisanal mining (for strategic reasons): uranium, thorium, and radioactive ores such as palladium and radium. Persons admitted to artisanal mining of precious mineral substances and their obligations. These are moral or natural persons.[558] Moral persons are either diggers or companies and associations. The required conditions are as follows:

1. Possession of Congolese nationality (even for companies),
2. Submission of a certificate of moral standing,
3. Possession of a diggers or Trader's card,
4. Identification and registration in the civil registry of the territory.[559]

To be approved as a gold and diamond buying trading house, the applicant must:

1. Be a natural person of Congolese nationality,
2. Send a request in duplicate to the Minister of Mines with an appendix indicating the new trade register, the statutes for legal persons, and the identification or directory of importers and explorers of the Central Bank of Congo,
3. Hold a valid tax certificate, a certificate of non-identification at the Central Bank of Congo, proof of payment of the deposit of 250,000 USD and advance payment of the annual fee of 150,000 USD.[560]

4.10. Advantages and Disadvantages of the Artisanal Mining of Precious Mineral Substances

The exposure of certain mineral substances to artisanal mining has certainly been beneficial for the populations living in areas abounding in these minerals in terms of the financial resources accumulated from the sale of the products and especially in terms of psychological satisfaction, as a sign of dignity regained after independence. The national government was unable quickly to change the policy and methods for reining in the frustrations of peoples reproaching the rulers for depriving them of the ability to benefit

[557] *Ibid, 453: Article 30 (2)(3).*
[558] Ministerial Decree No 0072/DPM/ MINER/82 of 1 December 1982.
[559] *Ibid.*
[560] *Ibid.*

from their wealth. Artisanal mining has enabled the Congolese State to mitigate the effects of the economic crisis resulting from the difficulties faced by the two main State enterprises: providers of foreign currency whose production activities were suspended as equipment had not been renewed and on account of divestment. Fraud in the sector has been detrimental to the Treasury.

4.11. Conclusion

This chapter examined the legal environment of the DR Congolese mining sector and the preeminent role of the State. It mainly contended that the mining legal environment in the DRC epitomises a veritable mosaic of disparate texts whose nature and applications are often difficult to grasp. From this perspective, mining law relates on the one hand to a set of legal and regulatory provisions relating to mines in the strict sense; and on the other hand, to the broader domain of the operator's interactions with the public authorities. The history of the mining legislation in the DRC informs that the mining laws and regulations have strong colonial bearings; whereby natives were unable to own land and mineral/resource rights due to land expropriation by the colonial legislator for public utility. It is also indicated that the shift of land ownership to the colonial State for public utility has been the grounds for the variation of legal regimes as it currently occurs in the mining sector.

Broadly, information from the legal environment of the Congolese mining sector informs that the law applicable to the mining sector is more complex. This complexity is linked not only to the existence of many texts drawn up by the legislator, but also to their sometimes-unfortunate drafting with contradictions which have contributed to a measure of confusion. The hydrocarbons sub-sector governed by the 1981 Mining Code is a typical case. The 2002 Mining Act, adopted during the war time, was supposed to only govern those mining areas that were under the control of the government, while the other part formerly occupied by the rebel movements were the object of uncontrolled exploitation. With the reunification of the country in 2003 following political power-sharing agreements, a reinterpretation of the 2002 Mining Code becomes necessary to take account of the new situation, several criticisms having been levelled against the 2002 Mining Code with regard to the mining rights sometimes granted to investors on land occupied by local populations, creating a situation of difficult cohabitation that can prejudice the security of the investments. Implementation was consequently difficult.

These criticisms led to the 2018 reform, developed in the upcoming Chapter, abolished the conventional regime in favour of the sole legal regime.

Chapter Five: Analysis of the Formal Uniqueness of the Mining Management Regime Set by the 2002 Mining Code

Resume

In the environment where the mining, customs, tax, and foreign exchange regimes were not conducive although the introduction of the new mining law, emerged the idea of introducing new legislation that would be more attractive to investment, with simplified and transparent procedures for granting mining and/or quarrying rights. The scope of the 2002 Mining Code covers prospecting, research, exploitation, transport, and marketing of mineral substances classified as mines or quarry products, as well as artisanal exploitation of substances and their marketing. In terms of mining management, the 2002 Code introduces a common law regime, thereby excluding the conventional regime of the old Code, which was much criticised for the imbalance and discrimination it created, mainly through the freezing of concessions granted by convention, with exclusive exploration zones. This prevented the granting of mining and/or quarrying rights to other investors.

5.1. Introduction

The Democratic Republic of Congo's (DRC) 2002 Mining Act, as revised in 2018, has been on the spotlight for its shift in favour of the State. This Act recognises a greater share of the proceeds from mining operations for the State, greater State ownership and increased emphasis on local development. As such, it is viewed as consistent with a wider trend in Africa towards greater resource nationalism and a re-balancing of mining regimes in favour of the State. Yet, all these detailed impacts still depend on how it is implemented. Inversely, it also contributes significantly to a wider environment of uncertainty for investors in the country's mining sector, due to the country being embarked on a vast process of renegotiating the joint venture arrangements with its partners, all of which points to a period of continued unease for the industry.

Faced with a situation of severe economic crisis aggravated by disinvestment in the mining sector, the public authorities of the DRC were led to seek ways and means to revive the sector hit by the effects of the economic crisis. Since the colonial era, the development of mineral and hydrocarbon resources by industrial methods had in fact required the mobilisation of very significant financial resources that the country as a

general producer could not assemble on its own without the assistance of private partners or outside officials – as demonstrated by the mining history of the DRC in the previous chapter. In more than 60 years of independence, the DRC has not created any industrial mining unit of the size of those bequeathed by the colonial power. These are currently experiencing major operational difficulties (*la Minière de Bakwanga* MIBA, quarries in general and the GECAMINES mines),[561] or have been shut down due to technical problems. Investments in this sector are now made in external public-private partnerships. There are certainly modest partnerships between Congolese and foreign private parties, but they only concern medium-sized production units. This is the case for gold-buying trading houses.[562]

This Chapter contends that the partnerships established during the 1990s were not successful for various reasons, especially the failure to respect contractual commitments.[563] The uniqueness form of the mining management as provided by the 2002 Mining Act sets the rate of free-carried state participation in the equity of mining companies, as the said mining legislation is meant to give the state the right to acquire additional equity. Discussions in this Chapter involve the principles laid down by the 2002 Mining Code, organised rights, the relations of holders of mining and/or quarry rights, applicable taxes, the return to contractualisation or contracting, problems of implementation of the mining law in the DRC, and solutions provided by the 2002 Code for the revival of mining activities.

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[561] *Société manière de Bakwanga*; MIBA in short, is the DRC's diamond mining company based in Kasai-Oriental province in south central DRC. Prior to the DRC's independence up to the end of the 1980s, MIBA was the world largest diamond producer. Currently however, its producing capacity has significantly shrunk following decades of decline due various issues including mismanagement. Approximately 80% of MIBA's stock is state-owned, with 20% owned by private. GECAMINES is the DRC's owned mining company. The Congolese government is the sole shareholder. GECAMINES current production of metals includes copper and cobalt. The Company's mining potential also includes tin and its companions.

[562] DRC represents an estimated USD 24 trillion in untapped deposits of cobalt, diamonds, gold, copper and other minerals. The country is a key mining destination for a large number of foreign mining companies that operate across the country. Mining companies in the DRC include both large, international mining houses and Artisanal and Small-Scale Mining companies.

[563] With regard to the State-foreign private partnership, some details can be given in the cross-checking some breakdowns are provided below:
- Congo - Tin: 50% shares of the shares for the State, 50% shares of shares for GEOMIN (Belgian company),
- MIBA: 80% for the State, 20% for the Belgian-South African consortium SIBECA, which withdrew 3 years ago by selling its shares on the stock exchange),
- SOMINKI: 20% for the Congolese State; 70% for Metallur (German company); 10% for Confimines (Belgian Group). It should be noted that the State has more often become a shareholder by governmental action or by the transfer of shares, sometimes courtesy of the partners.

5.2. The Principles Laid Down by the 2002 Mining Code

The 2002 Mining Code lays down four principles including state's mineral ownership, mining and/or quarry rights ownership, the distinction between mining concessions and land concessions, and prohibition of mining activities in particular circumstances such as national security reasons[564] as substantiated below.

1. First, with the provisions of the new code the 2002 legislator reaffirmed the principle of State ownership of the mineral substances contained in the ore bodies. The role of the State is now limited to the promotion and regulation of the mining sector. Several ore bodies are covered. With regard to mineral deposits, there are several types: natural mineral deposits, artificial deposits, geothermal bodies and groundwater found on the surface of the ground and underground. The reaffirmation of this principle of nationalisation of mineral substances was presented as a way of understanding that the exercise of mining and/or quarrying activities is now open to all persons seeking prior authorisation from the competent services, on condition of fulfilling the objective conditions of eligibility, priority and capacity provided for in the code. The same applies to artisanal mining and the marketing of the resulting mineral substances, authorised under the provisions of the code.
2. Secondly, the mining legislation in the DRC organises the right of ownership of the products in favour of the holders of mining and/or quarry rights. With the aim of attracting investment, the 2002 code recognises that the holder of a mining or quarrying exploitation right has the right to own commercial products. These are mineral substances, in any form whatsoever, extracted by virtue of mining or quarry exploitation rights and/or any product produced from these substances in concentration, treatment or processing for commercial purposes. This is a major innovation intended to facilitate the search for investment finance.
3. Third, the distinction between mining concessions[565] and land concessions[566] principle is reaffirmed such that the rights deriving from a mining concession are

[564] *Ibid, 453.*

[565] Mining concession is a mining track allocated by the government to companies for minerals extraction. It is a form of contract whereby private companies are granted a permit, license, or other types of rights to extract minerals from public lands.

[566] Land concession is a form of contract between the government and another actor in which the actor is granted specific rights to control a piece of land for the conduct of specific activities for a limited period of time.

distinct from those of land concessions.[567] Thus, it should be noted that within the legal framework a land concessionaire can in no way avail himself of his title to claim a right of ownership over underground mineral substances. Contrary to Anglo-Saxon law, land ownership does not include ownership over surface and underground resources.[568]

4. Lastly, the 2002 legislation grants the Head of State exclusive competence to declare a zone prohibited for mining activities or quarrying for reasons related to national security, the safety of populations and the incompatibility of mining activity and quarry work with other existing or planned uses as well as the protection of the environment.[569] Similarly, the President of the Republic is recognised as having the power to declare certain mineral substances "classified substances" for reasons of the safety of national or international populations.[570] This applies particularly to uranium ores, thorium and certain radioactive ores which are currently placed under the special regime for reserved substances.

Thus, it should be noted that within the development framework for mining activities, the DRC engages both in bilateral and multilateral cooperation.

5.3. Organised Rights

The 2002 Mining Act recognises two different types of rights: mining rights and quarry rights.

5.3.1. Mining Rights

Mining rights are defined in the provisions of Articles 50 to 108 as exploitation for industrial purposes and in those of Articles 109 to 128 for artisanal exploitation.[571]

5.3.1.1. Mineral Rights for Industrial Purposes

Three types of mineral rights for industrial purposes are granted including the exploration permit for mining exploration, the exploitation permit for mining exploitation, and the tailings exploitation permit for the exploitation of mine tailings.

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[567] These two rights are different in that, land concession ownership is limited for surface substances while mining concession ownership includes rights over both surface and underground substances.
[568] *Ibid, 453;* Land Registration Act 2002 (UK); the Mining Law of 1872 (US).
[569] The Mining Code 2018.
[570] *Ibid, 453.*
[571] *Ibid, 453: Articles 50 to 128.*

1. Research Permit:

   This permit confers on its holder the exclusive right to carry out, within the perimeter on which it is established and during the period of its validity, research work for mineral substances classified as mines for which the permit is granted and the associated substances if the holder requests the extension of the perimeter to these substances. The holder of the permit cannot undertake research work without prior approval of his Mitigation and Rehabilitation Plan.[572]

   According to paragraph 2 of Article 50, the holder of an exploration permit is authorised to take samples of mineral substances within the perimeter covered by the permit in order to carry out analyses or industrial tests in the laboratory or industrial unit of its choice.[573] Irrespective of the application of the provisions of the customs legislation to exports, the holder of the research permit who wishes to send samples abroad for testing is obliged to file a description of these samples including their number, volume and weight with the Geology Department of the Ministry of Mines and to obtain the approval of this service on a copy of the description providing authorisation for the samples taken. Another obligation imposed on the holder of this permit consists of depositing with the Geology Department of the Ministry a control sample or batch of samples taken in the perimeter covered by its title. Under no circumstances may research work lapse into exploitation activities. The legislator wanted to ensure the peaceful enjoyment of this right by specifying in the provisions of paragraph 5 of Article 50 that as long as a perimeter is the subject of an exploration permit, a request for mining rights for all or part of this perimeter can only be investigated where this emanates from the holder of the said exploration permit.[574] It is important to underline that the exploration permit also confers on its holder the right to obtain an exploitation permit for all or part of the mineral substances which are the subject of the exploration permit and the substances within the area covered by the exploration permit if its holder discovers an economically exploitable deposit.

The exploration permit is a real, property, exclusive, assignable, and transmitted right under the conditions set by the Mining Code. It is evidenced by a title called a

[572] *Ibid, 453: Articles 50 to 52.*
[573] *Ibid, 453: Paragraph 2 of Article 50.*
[574] *Ibid, 453: Paragraph 5 of Article 50.*

"prospecting certificate".[575] The duration of the permit is four years, renewable twice for a period of two years upon each renewal for precious stones and five years, and twice for a period of five years upon each renewal for other mineral substances.[576] This right is subject to a number of limitations. The first relates to the area covered by the permit, which must not exceed 400 km^2. The second concerns the number of permits that a person may hold, which is limited to 50. Articles 54 to 63 establish the elements of this procedure; the starting point being the filing of the application, and the end point the partial transfer of the exploration permit into an exploitation permit or into a small mine exploitation permit. The authority empowered to grant or refuse the exploration permit is the Minister of Mines. A period of thirty days is granted for this purpose. Any decision to refuse the request must be reasoned and gives the right to appeal under the conditions set by the Mining Code. In the exercise of this competence, the minister is assisted by the Mining Cadastre, which examines the request.[577]

Application for an exploration or research permit must be submitted to the Mining Cadastre for examination. This request must be accompanied by proof of the minimum financial capacity of the applicant. At this stage, no technical or environmental specifications are required. The conditions for granting the exploration permit relate more to establishing the applicant's financial capacity. This must be equal to ten times the total amount of surface area fees payable for the final year of the first period of validity of the exploration permit applied for. The applicant is required to prove that in order to carry out the mining research programmes; it has funds of its own, borrowed funds or a bank guarantee likely to cover the perimeters of both the old and new permits. Any person eligible for this permit can request certification of their financial capacity from the Mining Cadastre.

The holder of a research permit who intends to carry out exploration for mineral substances other than those for which the permit was established must request and obtain approval for the extension of the initial perimeter to these other substances. This extension is automatically granted if the research permit is valid and if its holder describes the information that makes him believe in the existence of the mineral substances for which the extension is requested. The permit holder may renounce in

[575] Articles 50 to 52.
[576] *Ibid.*
[577] *Ibid, 453: Articles 54 to 63.*

whole or in part his/her right to the covered perimeter. The declaration of partial or total renunciation must be sent to the Minister specifying the coordinates of all or part of the perimeter and of the one retained. It takes effect on the day of the Ministerial order or within three months from the filing of the declaration.

Article 28 provisions also specify that the part subject to waiver must be made up of whole squares and that the part of the remaining perimeter must respect the shape of a mining perimeter (i.e. a polygon made up of squares forming a contiguous whole, subject to the limits imposed by the borders of the national territory and zones of prohibited and protected reserves, the national territory being the subject of a mining cadastral grid).[578] Partial or total abandonment does not involve any reimbursement of fees and costs paid to the State for the granting or maintenance of the permit. Nor does it relieve the holder of his/her responsibility relating to the protection of the environment. The research permit expires when it comes to an end or in the event of non-renewal at the end of the periods of validity, and when it has not been transformed into an exploitation permit or a small mine exploitation permit. A notification of the expiry of the permit is sent to the holder by the Mining Cadastre with a copy to the Geology Department of the Ministry of Mines.

The research permit is renewed provided the holder has not failed to meet his/her obligations to maintain the validity of the permit provided for in Articles 196 to 199 of the Mining Code and that s/he submits a report of the research work during the previous period of validity of his title and the results obtained.[579] The request for renewal of the research permit must be sent by the applicant to the Mining Cadastre at least three months before the date of expiry of the permit, and must contain the following information:

i. Particulars relating to the identity, nationality, domicile and contact details of the applicant and/or his agent if the application is submitted by the latter; the reason or the company name, nationality, registered office and where applicable, the

[578] *Ibid, 453: Article 28*.

[579] In accordance with the provisions of Article 196 of the 2002 Mining Code, the validity of the mining and/or quarry rights is maintained if the holder has started the work within six months from the issue of the title establishing his right and is paying the surface right per square relating to its title each year, the amounts of which are fixed in the mining regulations. Article 199 determines the level of the fees to be paid: -0.03 USD per hectare for the first two years; 0.31 USD for the remainder of the years of the first period; 0.51 USD per hectare for the second period of validity and 1.46 USD per hectare for the third period of validity of its title).

place of business if it is a legal person and/or the identity of its representative if the request is submitted by the latter; the professional and legal situation of the applicant and the address of the head office of the legal person, if applicable (Article 35 paragraph 1, litera a, b, c),[580]

ii. The number of squares to be renewed and their location,

iii. The nature, number, and area of the perimeters of exploration permits held by the licensee and its affiliates.

On the grounds of the Mining Act, the application is examined by the Mining Cadastre which decides beforehand, the admissibility of the request for renewal of the permit. If this is admissible, the cadastral examination is triggered. Important to note is that with each request for renewal, the holder of the permit automatically relinquishes 50 per cent of the perimeter covered by his/her permit. To avoid wasting time in examining the renewal application, the legislator has set a 30-day deadline for the Minister of Mines to decide on the issue examined by the Mining Cadastre. After this period, the requested renewal is acquired. Any refusal to renew an exploration permit must be reasoned and opens the right to recourse by internal or international arbitration.[581]

The 2002 Mining Act allows the holder of a research permit to request at any time its partial transformation into an exploitation permit or small mine exploitation permit for part of the area covered by his exploration permit, while maintaining its exclusive research rights over the rest of the area on condition of respecting the provisions of Articles 28 and 29, 69 to 76 and 103 to 105.[582] These Articles relate to the shape and location of the mining perimeters and/or quarries, to the limitations of the permit and to the establishment of the application for the permit and the conditions of deposit, admissibility and examination of the application for the small-scale mining permit. The holder of an exploration permit may also apply for an exploitation permit, or a small mine exploitation permit for the perimeter which includes the areas of several exploration permits.

[580] *Ibid, 453: Article 35, paragraph 1, litera a, b, c*.
[581] *Ibid, 453: Articles 317 to 320.*
[582] *Ibid, 453: Articles 28 and 29, 69 to 76 and 103 to 105.*

2. The Exploitation Permit:

The exploitation permit is a real property right, exclusive, assignable, transferable, and leasable. This right is established by a mining title called a Certificate of exploitation. Article 64 of the 2002 Code determines the scope of the exploitation permit.[583] The permit confers on its holder the exclusive right to carry out, within the perimeter on which it is established and during the period of its validity, research, development, construction, and exploitation work relating to the mineral substances for which the permit is established and the associated substances if its holder has requested an extension. It also grants a limitless right to enter the mining exploitation zone in order to carry out activities such as mining operations, mining infrastructure building and installation; the use of the water and timber resources located inside the mining zone in compliance with the standards defined in the environmental impact study and the environmental management plan of the project; the unrestricted disposal, transportation and marketing of commercial products from the exploitation zone; concentration, metallurgical or technical treatment activities; transformation of the mineral substances extracted from the deposit within the exploitation perimeter; and the execution of extension works for the mine.

Paragraph 2 of Article 64 specifies that as long as the perimeter is the subject of an exploitation permit, no other application for mining or quarry rights for all or part of this same perimeter may be processed.[584] However, paragraph 3 provides that an applicant to whom the holder of the exploitation permit has refused consent to open a quarry within the perimeter may file an application for authorisation to operate quarries on a part of the perimeter forming the object of the exploitation permit but which is not being used for mining operations.[585] If necessary, the request is investigated and is the subject of an administrative dispute in which the holder and the applicant participate if the latter submits proof together with his request that the holder refused to give his consent in bad faith. The exploitation license gives the right to exploit the substances for which it is specifically established. These mineral substances are those that the holder has identified and for which s/he has demonstrated the existence of an economically

[583] *Ibid, 453: Article 64.*
[584] *Ibid, 453: Article 64.*
[585] *Ibid, 453: Paragraph 3.*

> exploitable deposit. It may extend to associated substances under the conditions provided for in Article 77 if the holder demonstrates that they are found with the substances for which the permit was granted in a state of association such that it necessarily involves their simultaneous extraction. The period of validity of the operating permit is 30 years, renewable several times for a period of five years. The area subject to exploitation is that of the research permit from which it derives or that of the part of the perimeter of the research permit transformed into an exploitation permit.[586]

Procedure for granting the operating or exploitation permit is determined by the provisions of Articles 69 to 76 of the Mining Law.[587] It begins with the filing of the application, its admissibility, the conditions for issue and the possible refusal of the application. The applicant of the exploitation permit must submit her/his application to the Mining Cadastre. The following documents must be attached to this request: a copy of the valid prospecting certificate, the report on the results of the search regarding the nature, quality, volume and geographical location of the identified mineral resource, the feasibility study for the exploitation of the deposit, the technical framework plan for the development, construction and exploitation of the mine, the environmental impact study and the environmental management plan for the project; on the consultations with the authorities of the local administrative entities and with the representatives of the surrounding communities; the plan for the contribution of the project to the development of the surrounding communities; the financing plan with identification of the targeted sources of financing; and proof of payment of the costs of deposit. The application for the exploitation permit is received and processed by the Mining Cadastre under the conditions and procedures outlined above.[588]

The conditions for granting the exploitation permit are determined in the provisions of Article 71 of the Mining Code.[589] They testify to the will of the public authorities to ensure the materialisation of the projects by means of participation in the share capital of the operating companies. The applicant is in practice required to:

[586] *Ibid, 453: Article 77.*
[587] *Ibid, 453: Articles 69 to 76.*
[588] *Ibid, 453: Articles 69 to 76.*
[589] *Ibid, 453: Article 71.*

i. Demonstrate the existence of an economically exploitable deposit by presenting a feasibility study accompanied by a technical framework plan for the development, construction, and exploitation of the mine.
ii. Demonstrate the existence of the financial resources necessary to carry out his project according to a financing plan for the development, construction and operation of the mine as well as a rehabilitation plan for the site upon its closure. This plan specifies each type of financing, the targeted sources of financing and evidence for their likely availability.
iii. Obtain prior approval of the environmental impact study and the environmental management plan of the project.
iv. Transfer 5 per cent of the shares of the applicant company's share capital to the State. These shares are free of any charges and are non-dilutable.[590]

Pursuant to Article 46 of the Mining Law, the competent authority to issue the exploitation permit remains the Minister of Mines except in the event of litigation for non-registration of the mining or quarry right by the Mining Cadastre, involving the intervention of the judicial authorities, namely the president of the tribunal of the territorially competent High Court empowered to render a judgment equivalent to a mining or quarry title as the case may be.[591] Any refusal to grant the operating permit must be reasoned and appeals are open to the applicant. Article 73 of the law specifies the conditions for refusing an operating permit. This applies if the feasibility study is rejected, if the applicant's financial capacity is insufficient, or if the environmental impact study has been definitively rejected. To avoid any arbitrariness, the legislator has sought to frame the grounds for refusal by giving details on each case invoked.[592]

The feasibility study can only be rejected for the following reasons: non-compliance with the directive of the Ministry of Mines specifying its content in accordance with generally recognised international practice; the existence of a manifest error; and non-compliance with the environmental impact study. Similarly, proof of the applicant's financial capacity can only be rejected for one of the following reasons: non-compliance of the financing plan with the feasibility study; and manifest insufficiency of the financing likely to be obtained from sources identified by the applicant. In addition, proof of financial capacity

[590] *Ibid.*
[591] *Ibid, 453: Article 46.*
[592] *Ibid, 453: Article 73.*

cannot be rejected if the applicant has, in the event of external financing, produced certificates from identified sources of finance proving the feasibility of financing within the parameters set out by the applicant, and in the event of internal financing, the financial statements of the person or company certified by a chartered accountant or an accountant approved by the courts demonstrating its financial capacity.

Articles 74, 75 and 76 of the 2002 Mining Code determine the deadlines for the two types of instructions provided for and the decisions that the Minister of Mines must take accordingly. The technical examination of an application for an operating permit that is declared admissible must be carried out within 60 working days from the date of receipt of the application as confirmed by the Mining Cadastre. The examination of the environmental impact assessment and the environmental management plan of the project must be carried out within 180 working days from the date on which the office of the Mining Cadastre transmitted the application to the environment protection department at the Ministry of Mines. If the cadastral opinion on an application for an exploitation permit is unfavourable, the Minister must make her/his decision to reject the application within 15 working days from the date of receipt of the application sent to her/him by the Mining Cadastre. If the technical opinion on an application for an operating permit is unfavourable but the cadastral opinion is favourable, the Minister takes her/his decision of rejection or preliminary and conditional approval within thirty working days from the date of receipt of the application from the Mining Cadastre. If the cadastral and technical opinions following the examination of the permit application are favourable but the environmental opinion has not yet been issued, the Minister takes a preliminary and conditional decision within twenty working days from the date of receipt of the application from the Mining Cadastre and defers her/his final decision to grant or refuse the exploitation permit until receipt of the environmental notice. The Minister's preliminary and conditional decision has the effect of definitively ratifying the cadastral and technical opinions. It makes its final award decision conditional on receipt of a favourable environmental opinion. The Minister takes and sends the decision to grant or refuse the exploitation permit to the Mining Cadastre within thirty days from the date of receipt of the environmental notice from the Mining Cadastre.[593]

[593] *Ibid, 453: Articles 74, 75 and 76.*

The 2002 legislation wanted to frame the way in which the holders of the exploitation permit must manage the area granted to them in order to develop their activities. Under the terms of Article 77 paragraph 1, the holder is required, before carrying out research or exploitation activities targeting minerals other than those for which an exploitation permit has been established, to obtain the extension of her/his permit to those associated or non-associated substances. Paragraphs 2, 3 and 4 of Article 77 specify that the extension of the exploitation permit to associated mineral substances is automatic if the holder of the permit demonstrates that they are found with the substances for which the permit was granted in a state of association necessitating their simultaneous extraction. If the permit holder does not request such an extension, the mines management will give him formal notice to request such extension within sixty days.[594]

However, if the holder of an exploitation permit wishes to extend it to non-associated substances, they must follow the procedure required for the issuance of their valid exploitation permit. In this case, they update and submit the documents approved during the examination of his initial permit application, including the operations planned for the exploitation of the additional substances. The extension of the exploitation permit to associated or non-associated mineral substances is granted by the Minister for a period not exceeding the unexpired period of the exploitation permit.[595]The exploitation permit expires at the end of a period of validity not followed by renewal in accordance with the provisions of Article 80 or when the deposit is exhausted.[596] At the expiry of the exploitation permit, the Mining Cadastre immediately notifies the holder of the expiry of their title, reserving a copy to the mines management. In this case, the area covered by the operating permit is free of any rights from the date of expiry of the permit.

Under Article 79 of the 2002 Mining Law, the holder of an exploitation permit may, by declaration addressed to the Minister of Mines, renounce at any time in whole or in part the right covering his perimeter.[597] This declaration must specify the coordinates of the part of the area renounced and those of the retained part. It takes effect on the day of or in any case within three months from the filing of the declaration. The remaining part of the permit must respect the form of a mining perimeter provided for in Article 28 of the

[594] *Ibid, 453: Paragraphs 1, 2, 3 and 4 of Article 77.*
[595] *Ibid, 453.*
[596] *Ibid, 453: Article 80.*
[597] *Ibid, 453: Article 79.*

Mining Code.[598] The perimeter covered by the operating permit is unencumbered, in whole or in part as the case may be, of any rights from the date of the Ministerial order total or partial pronunciation does not entitle the holder to any reimbursement of the fees and costs paid to the State for the granting or maintenance of the permit. Nor does it relieve the holder of his responsibility relating to the protection of the environment and his commitments towards the local community.

Subject to Article 80 of the 2002 Mining Act, the operating permit is renewable for successive periods of fifteen years if the holder:

i. Has not failed in its obligations to maintain the validity of the permit.
ii. Demonstrates the non-exhaustion of the deposit through an update of the feasibility study.
iii. Demonstrates the existence of the financial resources necessary to continue carrying out its project according to the financing plan and the exploitation works as well as the rehabilitation plan of the site at its closure. This plan specifies each type of financing being targeted and the justifications for their availability.
iv. obtains approval for the update of the environmental impact study and the environmental management plan of the project.
v. subscribes in good faith to a commitment to actively continue its operation.[599]

The renewal application is sent to the Minister of Mines at least one year and no more than five years before the expiry date of the exploitation permit and must include the details relating to the mandatory information specified in Articles 35 (a),(b),(c),[600] in particular the identity, nationality, domicile and contact details of the applicant, the object or the company name, nationality and registered office, the professional situation; the identity of the affiliated companies; the nature, number and area of the perimeter held by the holder and its affiliated companies. The renewal of the operating permit is subject to a rigorous procedure. Subject to penalty of inadmissibility, the application for renewal must be attached to the title of the valid operating permit and proof of payment of the deposit fees. The Mining Cadastre decides on the admissibility at the time of filing. If the application is declared admissible, the Mining Cadastre triggers the cadastral, technical,

[598] *Ibid, 453: Article 28.*
[599] *Ibid, 453: Article 80.*
[600] *Ibid, 453: Articles 35 (a), (b), (c).*

and environmental investigation in accordance with the provisions of the Mining Code as specified above.

The study of the technical document provided by the operator is limited to the verification of the updated feasibility study and the commitment that it has subscribed to in good faith. The environmental examination period for the approval of the updated environmental impact study and the environmental management plan for the project's holder may not exceed 90 working days from the submission of the application by the Mining Cadastre to the environmental protection agency at the Ministry of Mines.[601] After the investigation, the Mining Cadastre sends the application file, with the technical opinions of the mines and environmental department, to the Minister within five working days from receipt of the environmental opinion. When an application for renewal duly filed within this period has not been the subject of a refusal notified within thirty days from receipt of the application file by the Minister, the renewal is deemed granted.[602] With regard to the registration of the renewed right, the legislator imposes a period of five days on the Mining Cadastre to do so. The rejection of renewal must be justified, with the possibility of appeal for the applicant as in the case of granting of an operating permit.

Conditions for processing or transformation of mineral substances, transport, and storage as well as the marketing of operating products are provided by Articles 81 to 85 of the Mining Code.[603] In principle, the treatment or transformation of mineral substances is carried out either by the holder of the exploitation permit or by a treatment or transformation entity. Any person intending to engage solely in the processing of mineral substances must apply for and obtain a treatment or processing permit under specific legislation. The establishment and operation of a plant for the treatment or transformation of mining substances are subject to the environmental protection regulations provided for in the Mining Code and specific environmental legislation.[604] However, the legislator did not think it essential to involve the two ministries from the outset in issuing instructions in relation to the request, especially any questions relating to the protection of the environment: Subsequent intervention by the environmental department could hardly

[601] *Ibid, 453: Articles 35 (a), (b), (c).*
[602] *Ibid, 453: Article.*
[603] *Ibid, 453: Articles 81 to 85.*
[604] *Ibid, 453: Article 83.*

ensure that the requirements of protection could be met after the cessation of mining activities.

Based on the provisions of Article 84,[605] the holder of an exploitation permit has the right to transport or to have transported by the carrier of their choice the products obtained from their perimeter of exploitation. The exploitation permit holder also has the right to store their mining products in fenced sites, fitted out for this purpose, located around the places of loading, on condition that they respect the regulations concerning the safety of the site and on control of industrial pollution. Conversely, it is important to note that the legislator has established the principle of freedom for the marketing of mining products. Thus, the holder of an operating permit can sell their products to the customers of their choice at freely set prices. However, a permit from the Minister of Mines is necessary for the processing of minerals in the raw state for processing outside the national territory. Such authorisation will only be granted if the holder demonstrates both the lack of a possibility of treatment in the national territory at an economically profitable cost for the mining project and the advantages for the Democratic Republic of Congo if an export permit is granted. This provision inspired by the desire to promote the creation of jobs in the sector is difficult to implement, since the export of mining products can involve fraud and tax prevarication.

3. Mine Tailings Exploitation Permit:

   One of the innovations introduced by the 2002 code is the organisation of a legal regime for the exploitation of mine waste. This regime is set out in the provisions of Articles 86 to 96.[606] In accordance with the provisions of Article 86 of the Mining Code, the exploitation permit carries the right to exploit the artificial deposits located in the mining perimeter covered by the permit, unless the permit expressly excludes the exploitation of artificial deposits. The holder of an exploitation permit may assign the right to exploit artificial deposits located within their perimeter to third parties while retaining his rights to the subsoil. In this case, they request the partial transformation of his exploitation permit into a mine tailings exploitation permit as well as the transfer of this permit to the assignee. The Minister of Mines may also grant a licence to exploit waste from an artificial deposit that is not being mined.

[605] *Ibid, 453: Article 84.*
[606] *Ibid, 453: Articles 86 to 96.*

The area constituting the perimeter covered by the tailings exploitation permit must comply with the provisions of Article 28 of the Mining Statute which specify that this perimeter is in the form of a polygon composed of contiguous squares, subject to the limits imposed by the borders of the national territory and those relating to prohibited and protected areas.[607] The scope of the tailings exploitation permit is the same as that of the operating permit with the rights conferred. However, the right granted to the holder of the tailings exploitation permit is limited to the surface area it covers and does not extend in depth. Like the operating permit, the tailings operating permit is a real, real estate, exclusive, assignable, transferable, and leasable right. This right is established by a mining title called a Tailings Exploitation Certificate. The tailings exploitation permit is valid for five years, renewable several times for the same period. The conditions for the granting of a permit to exploit tailings are the same as those for an exploitation permit,[608] while those for refusal of a tailings exploitation permit are identical to those for the mining permit.[609] The tailings exploitation permit expires under the same conditions as those for the exploitation permit.[610] The same applies to the examination of an application for renewal of the tailings exploitation permit that is submitted, instructed, granted or refused.[611] Otherwise, renunciation of the licence to exploit tailings is the same as that for the exploitation permit.[612]

5.3.1.2. Mining Rights for Non-industrial Purposes

The small-scale mine exploitation and artisanal exploitation permits fall under the mining rights for non-industrial.

1. <u>The Small-scale Mine Exploitation Permit</u>:

   The small-scale mine exploitation permit is a real, real estate, exclusive, assignable, leasable, and transferable right, which is evidenced by a mining title called the “small mine exploitation permit.” Articles 97 to 108 establish the rules and modalities relating to small-scale mining. Any person eligible for access to

[607] *Ibid, 453: Article 28.*
[608] *Ibid, 453: Articles 71 and 72.*
[609] *Ibid, 453: Article 73.*
[610] *Ibid, 453: Article 78.*
[611] *Ibid, 453: Article 80.*
[612] *Ibid, 453: Article 79.*

mining rights can apply for and obtain a Mine Exploitation Permit.[613] This permit is granted when the technical conditions characterising certain deposits of mineral substances do not allow them to be exploited on a large and profitable scale, but allow "small-scale" mining exploitation with a minimum of fixed installations using semi-automatic or semi-industrial processes; these are considered small-scale mining deposits.[614] These small-scale deposits may result from exploration work undertaken by the holder of an exploration permit or from work carried out by the State with the aim of improving the geological knowledge of the national territory or for scientific purposes that do not require a mining or quarry right subject to the tendering procedure.

The perimeter in which the small-scale mining deposit is located is that of the exploration permit from which it derives or that part of the perimeter of the exploration permit that has been converted into a small-scale mining exploitation permit. If the small-scale mining deposit results from exploration work undertaken by the State, the perimeter covered by the small mine exploitation permit is that determined by the State. It must be of such a nature as to allow mining. The mining regulations set the parameters that characterise small-scale mining, including the volume of reserves, the level of investment, the production capacity, the number of employees, the annual added value, and the degree of mechanisation.

As in the case of mining, the small-scale mine exploitation permit grants its holder the exclusive right to carry out, within the assigned perimeter, research, development, construction and exploitation works for the mineral substances to which it relates. In addition, the holder is allowed to transform this permit into that of exploitation if the technical conditions so justify. The period of validity of the small-scale mine exploitation permit is variable, but may not exceed ten years, including renewals. However, subject to the opinion of the Directorate of Mines, the Minister may extend the small mine exploitation permit cases for substances whose exploitation exceeds ten years. The small-scale mine exploitation permit confers on its holder the right to exploit the mineral substances for which it is specially established and for which the holder has identified and demonstrated the

[613] *Ibid, 453: Article 97.*
[614] *Ibid, 453: Article 98.*

existence of a deposit. It may extend to associated or non-associated substances.[615] The establishment, filing, admissibility and examination of the application for the small-scale mine exploitation permit meet the same conditions as those established for the exploitation permit discussed previously. As for the granting conditions, these should include the need to demonstrate the existence of a deposit whose technical factors do not allow profitable industrial exploitation on the basis of a feasibility study. In addition, foreigners are required to create companies under Congolese law in association with one or more persons of Congolese nationality with a stake in the share capital of at least 25%.[616]

2. Artisanal Mining:

   Artisanal mining is governed by the provisions of Articles 109 to 128 which establish the rules and procedures. Artisanal mining is possible only when the technical and economic factors which characterise certain deposits of gold, diamonds or any other mineral substance do not permit industrial or semi-industrial mining. Hence the establishment of a special zone reserved for artisanal mining. The institution of such a zone is made by means of a Ministerial Order after consultation with the Department of Mines and the Governor of the province concerned. A mining perimeter covered by a valid mining title cannot be transformed into an artisanal mining zone. The establishment of an artisanal mining zone is notified to the Mining Cadastre, which will then indicate these on its mining maps. As long as an artisanal mining zone exists, no mining title can be granted there except for an exploration permit requested by a group of artisanal miners working in the zone. However, the Geology Department may at any time carry out prospecting and research work in the artisanal mining areas. The mining regulations set the conditions for the exceptional granting of the Exploration Permit to the group of artisanal miners.[617]

In accordance with the provisions of Article 110,[618] the closure of an artisanal mining zone may be ordered by the competent authorities if the factors that justified the establishment of an artisanal mining zone have ceased to exist or if a new deposit that

[615] *Ibid, 453: Articles 99, 101 and 102.*
[616] *Ibid, 453: Articles 103 to 108.*
[617] *Ibid, 453: Articles 109 to 128.*
[618] *Ibid, 453: Article 110.*

does not come under artisanal mining has just been discovered. Such closure is notified to the Mining Cadastre which then informs the artisanal operators, who are required to vacate the artisanal mining area within 60 days of notification of the closure decision. However, a right of first refusal is recognised for the group of artisanal miners working in the artisanal mining area concerned, who may apply for a permit for industrial or small-scale mining. This group has a period of 30 days from the information of the closure made by the Mining Cadastre to indicate whether it intends to exercise its right of pre-emption. The mining regulations determine the terms of access of the group of artisanal miners to industrial or small-scale mining.

Artisanal mining of gold, diamonds or any other artisanally exploitable mineral substance is subject to a prior condition namely possession of a valid artisanal miner's card for the area concerned.[619] Artisanal miner cards are issued by the Head of the Provincial Division of Mines within the jurisdiction to eligible persons who request them and who undertake to comply with the regulations in terms of environmental protection, hygiene and security in the artisanal mining areas, in accordance with the procedures laid down in the mining regulations. An artisanal mining card is valid for one year, renewable for the same period without limitation. In the event of loss, destruction, or theft of the card a new one may be requested. The mining regulations lay down the procedures for issuing the artisanal miner's card. The artisanal miner's card may be withdrawn[620] by the Head of the Provincial Division of Mines or by their local representative who issued it after a formal notice of 30 days in the event of failure on the part of the holder to remedy any breach of the obligations imposed by the legislator. Withdrawal of the artisanal miner's card gives right to legal appeal. However, it should be noted that a person whose artisanal miner's card has been withdrawn ceases to be eligible for a new artisanal miner's card for three years. The holder of an artisanal miner's card must comply with the regulatory standards applying to the artisanal mining operations in terms of safety, hygiene, use of water and protection.[621] The card's holders must compensate farmers for any damage caused by their activities. The mining regulations lay down the procedures for implementing the standards in terms of public safety, public health, and the environment.

[619] *Ibid, 453: Article 111.*
[620] *Ibid, 453: Article 119.*
[621] *Ibid, 453: Article 112.*

In addition, the holder of an artisanal miner's card is not authorised to process the products of artisanal mining, except with prior ministerial authorisation.[622]

5.3.2. Quarry Rights

Quarry rights are organised by the provisions of Articles 129 to 167 of the Mining Code.[623] They are subject to the prior administrative authorisation of the competent authorities. Such authorisation is granted on a case-by-case basis by the Minister responsible for all quarry substances and by the head of the Provincial Mining Division for construction materials for everyday use. The required titles are issued by the Mining Cadastre.

5.3.2.1. Quarry Categories

There are four categories of quarry:[624]

1. Permanent quarries open either on state land or on a perimeter covered by a land title held by a third party for commercial exploitation by private individuals.
2. Quarries open on a temporary basis, either on state land or on a perimeter covered by a land title held by a third party for commercial exploitation by private individuals.
3. Quarries open temporarily on state land for public utility works.
4. Quarries opened on a temporary basis by the duly authorised occupant or the owner of land for non-commercial exploitation or exclusively for his own domestic use.

In the event of a change in the reclassification of a mining substance as a quarry substance, the holder of a mining title established for the substance in question retains all the rights attached to her/his title in relation to the substance until the expiry of its title. In the event of reclassification of a quarry product that is the subject of an authorisation for permanent quarry exploitation in the category of mining products, the holder of the exploitation authorisation has the right to obtain an exploitation permit for the substance

[622] This legislative provision (Article 112 of the 2002 Mining Code) seems curious. Indeed, it seems abnormal to us that the minister who did not issue the artisanal mining card is the competent authority to authorize the processing of artisanal mining products.
[623] *Ibid, 453: Articles 129 to 167.*
[624] *Ibid, 453: Article 132.*

in her/his name, subject to requesting it within one year from the date of such reclassification. However, the exploitation authorisation remains in force.

Authorisations to open quarries are granted for public utility works or for domestic use. In the first case, the authorisation is granted by the Provincial Governor, by decree, after assent by the competent service of the Ministry of Land Affairs and an opinion from the provincial or municipal administrative authorities concerned as well as that of the Mining Cadastre.[625] When the execution of works of public utility is entrusted to a private company, the latter is subject to the payment of the extraction tax in accordance with the provisions of common law. In the second case, the exploitation of quarries opens on a temporary basis by the duly authorised occupant or the owner of land for non-commercial exploitation exclusively for her/his own domestic use does not require either authorisation or prior declaration. However, this activity remains strictly subject to safety and environmental protection regulations.[626] Lastly, regarding the commercial exploitation of quarries, Article 135 provides that the exploration and commercial exploitation of quarries are authorised according to the nature of the activities to be fulfilled. It is also specified that any collection of materials on national land or dependencies for use other than domestic is considered as quarrying and is subject to the same conditions as permanent quarrying.

5.3.2.2. Quarry Titles

There are two: the research authorisation and the exploitation authorisation.

1. Authorisation for quarry research:

   The quarry products research authorisation is an exclusive, non-assignable, non-transferable, and non-leasable real estate right. This right is evidenced by a quarry title called a *Certificat de Recherches des Produits de Carrières* [research certificate for quarry products].[627] Temporal and spatial limitations are imposed on the holder of this title. In this respect, it should be noted that the area covered by an exploration authorisation for quarry products may not exceed four square

[625] *Ibid, 453: Article 133:* The Provincial Order for the opening of a public utility quarry specifies:
a) The authority and the government department responsible for the exploitation works. b) The private company to which the work is entrusted by the said service; c) The location of the quarry in accordance with the provisions of Article 29 of this Code; d) Substances the extraction of which is authorised; e) The conditions of access to the quarry; f) The extraction plan; g) The duration of the works and the methods of restoration to original condition of the premises after exploitation.
[626] *Ibid, 453: Article 134.*
[627] *Ibid, 453: Article 137.*

kilometres[628] and is valid for one year, renewable once for the same period.[629] The provisions relating to the exploration permit apply mutatis mutandis to the authorisation of exploration and their legal regimes are comparable. However, the special nature of quarry rights requires that the holder of such a title has the exclusive right to explore and potentially exploit quarries within the granted perimeter,[630] even though mining titles relating to the same perimeter are admissible.[631] The procedure for access to this title is subject to the submission of an application to the Mining Cadastre for its consideration[632] made by an applicant meeting (in particular) the conditions required to obtain mining rights and to justify minimum financial capacities.[633] The competent authority to grant this authorisation is the Head of the Provincial Division of Mines. Refusal must be reasoned and opens the way to administrative appeals instituted under the legislation in force.[634]

2. Authorisation to operate quarries:

   The 2002 legislator instituted two types of quarrying authorisations, one permanent, the other temporary. Like the permits to exploit mining rights, these are real, real estate, exclusive, assignable, transferable and leasable rights.[635] They are evidenced by quarry titles: either a permanent quarry exploitation certificate or a temporary quarry exploitation certificate.[636] A temporary or permanent quarry operating permit may be granted over the entire perimeter covered by the valid exploration authorisation for quarry products held by the applicant or over a part of the perimeter to which the right relates. If this perimeter has not been the subject of a permit for quarry research, it may not exceed four square kilometres in size. In addition, the perimeter for quarry exploitation may not be superimposed on an area that is the subject of a quarry exploration authorisation, or a mining exploitation right held by a third party, unless the latter gives its

[628] *Ibid, 453: Article 139.*
[629] *Ibid, 453: Article 138*.
[630] *Ibid, 453: Article 136 Al. 3*.
[631] *Ibid, 453: Article 136 Al. 4.*
[632] *Ibid, 453: Article 140.*
[633] *Ibid, 453: Article 141*.
[634] *Ibid, 453: Article 142.*
[635] *Ibid, 453.*
[636] *Ibid, 453: Article 148*.

written consent.[637] This provision is designed to avoid conflicts between parties interested in the operation of the mines.

However, the Minister may authorise the establishment of a quarry exploitation perimeter on a perimeter covered by an exploitation permit or a small mine exploitation permit if the holder of the permit has refused to give consent in bad faith. If necessary, the application will be investigated and be the subject of an administrative dispute in which the holder and the applicant participate if the latter submits evidence together with her/his request that the holder refused to give her/his consent in bad faith. Access to these titles is governed by the procedures provided for in Articles 151 to 153, relating respectively to submission of the application for the title, its examination and the competent authority.[638] The application for authorisation to operate permanent quarries must be made in French and is filed with the Mining Registry, together with the documents required to identify the area in question and upon payment of the required deposit. The contents of an application for a temporary quarry exploitation authorisation as well as the documents to be attached are governed by the mining regulations.

The admissibility of these requests is subject to the same conditions as the mining rights in respect of submission to the cadastral and technical instructions issued by the Mining Cadastre and the Directorate of Mines. The relevant authorities to issue or refuse to grant authorisations for permanent or temporary quarrying are, on the one hand, the Head of the Provincial Division of Mines for building materials for everyday use, and on the other hand, the Minister on the technical advice of the Directorate of Mines and after assent by the relevant service of the Ministry of Land Affairs as well as by the local administrative authorities for other quarry substances. In so far as the title relates to the exploitation of the substances covered by the request and is within the perimeter in question, these rights may be extended to other substances. The conditions of such extension are provided for by Article 162 of the Mining Code,[639] which specifies that before carrying out research or exploitation activities targeting quarry substances other than those for which the exploitation authorisation has been established, the holder is required to obtain the extension of its authorisation to these other substances. Such an extension is automatic if the holder submits the request in the prescribed form. To obtain

[637] *Ibid, 453: Article 150.*
[638] *Ibid, 453: Articles 151 to 153.*
[639] *Ibid, 453: Article 162.*

the extension of its authorisation to substances other than those for which the authorisation was established, the holder must follow the same procedure as that for issuing her/his operative exploitation authorisation. The extension is granted for the unexpired period of the holder's exploitation authorisation. Apart from the common principles above, each title is subject to specific conditions.

The permanent quarry exploitation authorisation is valid for five years, renewable several times for the same period. However, the holder has the right to request a new temporary operating authorisation for the same perimeter taking effect upon the expiry of the current authorisation.[640] Independently of the general procedure described previously, the granting of the authorisation for permanent quarrying is subject in particular to compliance by the applicant with the following conditions:[641]

1. demonstration of the existence of a deposit by presenting a feasibility study accompanied by a technical framework plan for the development, construction, and operation of the quarry.
2. proof of the existence of the financial resources necessary to carry out the project according to the financing plan for the development, construction and operation of the quarry as well as the rehabilitation of the site upon its closure. This plan must specify each type of financing, the sources of targeted financing and the justifications for their probable availability.
3. obtaining prior approval for the environmental impact assessment (EIA) and the project environmental management plan (PEMP).
4. provision of proof of the consent of the land concessionaire, if the area which is the subject of the application for the authorisation to operate the quarry is located in the land perimeter of the latter.
5. provision, if the requested perimeter is included in the perimeter of a valid mining exploitation right, of proof of the consent of the holder of this right or establishment that her/his consent was refused in bad faith.

However, it is possible that such permission will be denied. The law specifies the limiting conditions of this refusal that must also be justified. Article 155 provides that the authorisation to operate a permanent quarry can only be refused if: the feasibility study is

[640] *Ibid, 453: Article 149.*
[641] *Ibid, 453: Article 154.*

rejected;[642] the financial capacity of the applicant is insufficient;[643] the EIA has been definitively rejected; the owner of the land title refuses in good faith to give her/his consent to the opening of the quarry; or if the holder of a mining exploitation right has refused in good faith to give her/his consent to the opening of the quarry. The examination and decision deadlines in connection with the application for authorisation to operate permanent quarries are determined by Articles 156 to 158 of the Mining Code.[644] These articles specify that the technical examination of an application for authorisation to operate permanent quarries is carried out within a period not exceeding 45 days from the date on which the application file was received from the Land Registry by the Directorate of Mines. The environmental instruction of the EIA and the PEMP relating to a request for authorisation to operate permanent quarries must be carried out within 180 days from the date of receipt by the relevant department of the Environment Protection Agency from the Mining Cadastre.

Finally, the decision of the relevant authority in granting this title is subject to taking into account cadastral and technical opinions. Thus, if the cadastral opinion is unfavourable, the relevant authority must convey the decision to reject the application within 15 working days of receipt of the application from the Mining Cadastre. If the technical opinion is unfavourable, the relevant authority must make her/his decision of rejection or preliminary and conditional approval within 30 working days of receipt of the application from the Mining Registry. If, on the contrary, the cadastral and technical opinions following the examination of the application are favourable, but the environmental opinion has not yet been issued, the relevant authority shall take a preliminary and conditional decision within a period of 20 working days from the date of transmission of the application by the Mining Cadastre and defers her/his final decision to grant or reject the permanent quarry exploitation authorisation until receipt of the environmental notice. This decision has the effect of definitively ratifying the favourable cadastral and

[642] *Ibid, 453: Article 155.*
The feasibility study for permanent quarry operating authorizations can only be rejected on grounds of non-compliance with the directive of the Ministry of Mines specifying its content in accordance with generally accepted practice in the area, the presence of manifest error, or non-compliance with the EIA.

[643] Proof of the applicant's financial capacity can only be rejected due to the non-compliance of the Financing Plan with the feasibility study or for the manifest inadequacy of the justifications of the availability of the financing obtained from the sources identified by the applicant. Proof of financial capacity cannot be rejected if the applicant has, in the event of external financing, produced certificates from identified sources of financing of the feasibility of the financing within the parameters envisaged by the applicant, and, in the case of internal financing, the financial statements of the person or company, certified by an approved auditor, demonstrating its capacity for self-financing.

[644] *Ibid, 453: Articles 156 to 158.*

technical opinions. In any case, the relevant authority takes and transmits her/his decision to grant or issue a reasoned refusal of the authorisation for permanent quarry exploitation to the Mining Registry within 30 days from the date of receipt of the authorisation environmental notice from the Mining Cadastre.

Contrary to the permanent authorisation, the temporary quarry exploitation authorisation is valid for one year, non-renewable. During this time, only the holder has the right to file a request for a new operating authorisation on the same perimeter.[645] The scope of this title is determined by Article 149 of the Mining Code. With regard to the temporary quarrying authorisation, it is submitted that it specifies the volume of substances that may be extracted, the taxes to be paid and the necessary conditions for occupying the land for the purposes of sampling and related activities. It also specifies the obligations of the beneficiary, particularly regarding the environment and the restoration of the premises after sampling. Any quantity in excess of the volume fixed by the exploitation authorisation may be confiscated or be subject to additional taxation. As long as a perimeter is the subject of a temporary quarry exploitation authorisation, no further quarry authorisation may be granted in that zone.

However, the holder may, before the expiry of her/his authorisation, request the transformation of the temporary authorisation into a permanent authorisation. To do this, s/he must follow the procedure relating to the granting of the authorisation for permanent quarrying. As for its granting conditions, Article 159 provides that the temporary quarrying authorisation is granted to the first eligible person who submits a written application in French, specifying in particular the rights requested and respecting the rule of priority examination[646] for admissibility, and meeting the following conditions:

1. Demonstrate the existence of an economically exploitable deposit by presenting a technical framework plan for the quarry exploitation works and a related PAR.
2. Present, if the quarry is located on a perimeter subject to a land title held by a third party, the latter's written consent to the opening of the quarry.

[645] *Ibid, 453: Article 149.*

[646] According to Article 160 of the 2002 Mining Act, the technical and environmental examinations of an application for Authorisation to operate temporary quarries are carried out within a period which may not exceed 15 days from the date of transmission of the application file to the competent departments of the Ministry of Mines.

3. Present, if the quarry is located on an area covered by an operating permit held by a third party, the latter's written consent to the opening of the quarry, or proof that the consent has been refused in bad faith.[647]

Thus, following the opinions given by the departments specialising in the examination of the applications, the relevant authority will reasonably decide on the granting or refusal of the temporary quarry exploitation authorisation to the Mining Cadastre in a period of 45 days from the date of filing of the request. After this period, the requested authorisation is deemed granted and gives rise to the registration of the right and the issuance of the quarry title by the Mining Cadastre upon request by the applicant. The refusal of registration in such cases opens the possibility of appeal to registration by judicial means.[648]

5.4. The Relations of Holders of Mining and/or Quarry Rights with Each Other and with the Occupants of the Land

The legislator regulates the relations between the holders of mining and/or quarry titles in their relations and with the occupants of the land. To guarantee the peaceful enjoyment of the rights that have been granted, the legislator sought to prevent neighbourhood disturbances. In doing so, the 2002 mining legislator provides measures which regulate works affecting two neighbouring mines and rights of way.

Pursuant to Article 277, rights holders cannot oppose any necessary work that is of common interest to two neighbouring mines. But they are required to participate in proportion to their particular interest. In the event of damage caused to a neighbouring mine, the originator of the work is required to repair the resulting damage. In the event that these works provide relief from the charges faced by a neighbouring mine, they give rise to a right of compensation. Herein lies the importance to note that a protection block of sufficient width may be prescribed by the Mines Department between two neighbouring mines without the maintenance of this protection block being able to give rise to compensation.[649] Likewise, the holder of an exploitation permit or a small mine exploitation permit is recognised as having a right of way on the tailings exploitation perimeter in order to access her/his exploitation perimeter. The easements in question are

[647] *Ibid, 453: Article 159.*
[648] *Ibid, 453: Article 161.*
[649] *Ibid, 453: Article 277.*

governed by common law provisions[650] that are not contrary to mining legislation. The holder of a tailings exploitation permit is entitled to compensation when the passage on the perimeter of the holder of an exploitation permit or a small mine exploitation permit causes her/him significant damage entailing an additional charge to their mining activities. The terms and conditions for the establishment of easements are laid down in the mining regulations.[651]

Likewise, the legislator imposes a number of restrictions on the occupants of the ground which, in the event of non-compliance, may result in their liability. Subsection 1 of Article 279 is quite explicit concerning the restrictions[652] by stipulating that without the consent of the competent authorities, no one may occupy land that is reserved for a cement plant; containing archaeological remains or a national monument; is located on or within 90 meters of a dam or a building belonging to the State; is close to National Defence facilities; forms part of an airport; is reserved for a railway project; is reserved for a nursery for a forest or plantation of forests; is located less than 90 meters from the limits of a village, a city, a commune or a town; constitutes a street, road or highway; or is included in a national park. Moreover, subsection 2 of the same Article continues: "except with the consent of the owner or legal occupant, no one may occupy land located less than 180 meters from occupied, unoccupied or temporarily unoccupied houses or buildings; 45 meters of land weeded and ploughed for farm crops; 90 meters from a farm with a cattle ranch, a reservoir, a dam or a private water reserve".[653] Other perimeters not included in these prohibited areas may be subject to limitations specified in the permits without the ability of the holder of the mining title to claim any compensation, except for the payment of the expenses disbursed for the development.[654]

Conversely, under the terms of the provisions of Article 280, the holder or the lessee is, by law, required to repair the damage caused by the works (even authorised ones) carries out within the framework of his mining activities. However, in the event of a transfer of a mining exploitation right or a permanent quarry exploitation authorisation, the principle of solidarity is invoked between the former and the new occupant with the obligation for

[650] Articles 170 to 179 of law n°73-020 of July 20, 1973 on the general property regime, land and real estate regime and securities regime.
[651] *Ibid, 453: Article 278*.
[652] These restrictions should not be confused with the prohibition zones which may be established in accordance with the provisions of Article 282 of the 2002 Mining Code.
[653] *Ibid, 453: Subsections 1 and 2 of Article 279.*
[654] *Ibid, 453: Article 279 para. 3 and 4*.

the former to inform the new one, in writing, of the dangers of exploitation. In addition, the holder may be required to provide security in order to pay full compensation should her/his activities cause specific damage or if there is reason to fear that her/his resources are not sufficient to meet her/his possible liability.[655] This guarantee may only be invoked under the control of a judge, who fixes the nature and the amount. The implementation of this responsibility can lead to the payment of compensation to the occupants of the land whose enjoyment is disturbed, the amount of which must correspond either to the rent or to the value of the land at the time of its occupation, increased by half. An amicable settlement is possible under the conditions provided for in Article 281 of the Mining Code.[656]

Under the 2002 Mining Act, authorised activities are those recognised in accordance with mining or quarry titles held, excluding property rights to the ground and underground and any rights of third parties to the ground. In addition to these rights, the holder of a mining exploitation right or of a permanent quarry exploitation authorisation has, with the authorisation of the Governor of the province concerned, after consulting the competent department of the Mines Administration, the right to:

1. Within its delimited Perimeter:
    a) Occupy the land necessary for its activity and related industries, including the construction of industrial, residential, and other social facilities.
    b) Use groundwater, water from non-navigable, non-floatable rivers, in particular to establish, within the framework of a waterfall concession, a hydroelectric power station intended to meet the energy needs of the mine.
    c) Dig canals and drains.
    d) Establish means of communication and transport of all kinds.

[655] *Ibid, 453: Article 280*.

[656] Paragraphs 3, 4, 5 and 6 of Article 281 of the 2002 Mining Act specify the following: The amicable settlement of the dispute is carried out by all non-jurisdictional means of law, in particular settlement, compromise, arbitration or appearance before a Judicial Police Officer or a Public Prosecutor's Officer. In the absence of an amicable settlement between the parties within three months from the date of the occurrence of the dispute, the compensation will be awarded by the competent court under the rules of legal organisation and jurisdiction in force in the Democratic Republic of Congo. However, the occupier of customary land may, in agreement with the holder, continue to exercise its right of cultivation provided that the work in the fields does not interfere with the mining operations. The owner of the land will therefore no longer be able to continue constructing buildings there. Finally, a simple passage on the ground does not give right to any compensation if no damage results. The passage must be located in the best place for the preservation of the environment.

2. Outside its delimited Perimeter: the right to establish means of communication and transportation of any kind.[657]

The occupancy rights, as provided by the 2002 Mining Act, constitute legal servitudes in the public interest. They may not be affected either directly or indirectly by the granting of subsequent mining and/or quarry rights. It should be underlined that the holder of a mining or quarry exploitation right has the right to dispose, for the needs of her/his exploitation and related industries, of mineral substances other than those s/he exploits and for which felling be required. The occupant of the land may request that s/he be allowed to dispose of these substances if they are not used by the operator, against payment of fair compensation, if necessary, except if they come from the treatment of extracted mineral substances.[658]

On the contrary, it is noted that failure to comply with the mandatory requirements provided for by the mining legislation entails consequences that may lead to sanctions. These breaches relate to the non-payment of the annual surface area fees per square, and failure to start the work within the set legal deadline. The following are considered breaches of administrative obligations: the non-payment of annual surface area fees per square and the failure to develop the perimeters subject to the rights granted within the legal deadlines of respectively six months for the exploration permit, three years for the operating permit and one year for the small mine and tailings permits.[659] Articles 289 to 295 of the Mining Code determine the various penalties incurred by holders of mining and/or quarry rights whose breaches have been noted by the relevant authorities. This concerns the forfeiture of the holder of the mining and/or quarry rights, the cancellation of mining rights and/or authorisation for permanent quarrying, prohibition, suspension for proven fault; and confiscation of the provision for rehabilitation of the site.[660]

[657] Mining Act 2002.
[658] *Ibid, 453: Article 285.*
[659] *Ibid, 453: Articles 286 to 288.*
[660] *Ibid, 453: Articles 289 to 295.*

Apart from these administrative sanctions, pecuniary and penal sanctions are provided for,[661] in particular for illicit mining activities, theft and concealment of mineral substances, diversion of mineral substances, illicit possession and transport of mineral substances, fraud and violation of health and safety rules.

5.5. Applicable Tax, Customs and Exchange Rate Regimes

The 2002 legislator does not seem to have reserved a special regime for the activities of concentration, treatment and/or transformation carried out by the holders of the mining rights and/or its affiliates and subcontractors. These activities are subject to the tax and customs regimes under common law. In practice, from a fiscal point of view, mining companies and holders of mining rights are subject to the following taxes: real taxes (property tax, vehicle tax, tax on the area of mining and hydrocarbon concessions), the special road traffic tax; income taxes (tax on rental income, personal property taxes and professional taxes on remuneration, income taxes) and taxes on turnover.[662] The same is true at the customs level where the duties withheld are as follows: entry fees at preferential rates, exit fees and consumption and excise duties are regulated under the exceptions provided for in the law in question.[663] As the rate regime, Articles 263 to 272 address a special exchange rate regime reserved for mining activities. This concerns the conversion of foreign currency into Congolese francs at free market rates, transfers of funds abroad, the control exercised by the Central Bank of Congo and the payment of the exchange control fee.[664]

5.6. Challenging the Common Law Regime: The Return to Contractualization

The adoption of the common law regime in 2002 was justified by the concern to ensure the equal treatment of applications submitted by investors who complained about the

[661] It is worth underlining that these sanctions are included in title 13 of the 2002 Mining Code (Articles 299-311); as an indication, Article 299 relating to illicit mining activities sets the fine at a sum ranging from 10,000 USD to 250,000 USD; Article 300 relating to the theft and concealment of mineral substances from 5,000 USD to 20,000 USD; Article 302 relating to the illicit purchase and sale of mineral substances from 10,000 USD to 30,000 USD; Article 306 relating to the violation of health and safety rules from 5,000 USD to 10,000 USD, and finally, for the corruption of State public service agents, Article 307 sets a modest sum of 1,000 USD.

[662] See Tax Code of the Democratic Republic of Congo, in the Larcier Codes, Democratic Republic of Congo, Volume V, Tax Law, Brussels, Larcier, 2003; Law No. 007/2002 of July 11, 2002 on the Mining Code, cited above, Articles 236-262; BAKANDEJA wa MPUNGU, Public finances, For better economic and financial governance in the Democratic Republic of Congo, Brussels, Larcier, 2006.

[663] See on this case, Articles 225-235 of the 2002 Mining Code (70 Articles 263–272 regulate the foreign exchange operations of mining operators).

[664] Articles 263–272 of the 2002 Mining Act regulate the foreign exchange operations of mining operators.

administrative burden and related hassles. Furthermore, it was necessary to respond to certain changes that had been departures observed in the implementation of the various mining and oil conventions. More than five years later, the public authorities appeared to favour the contractual route in order to make certain urgent investments in the mining sector. Examples include the partnership contracts signed between the public company GECAMINES, and a consortium of Chinese companies called the *Groupe d'Entreprise Chinoises* [Chinese Enterprise Group] (GEC),[665] guaranteed by the Congolese State, and very recently the Contract with the French Group AREVA for the exploitation of uranium deposits.[666]

By way of background, contractualization hereinafter referred to as contracting or contractual approach, is the set of operations which contribute to the signing of reciprocal contractual commitments between public authorities (states, decentralised communities, etc.) and public and/or private companies that create, improve, develop and sustain public services, universal services or services of general interest.[667]

Contractualization is fundamental to the sustainable management of essential services. In the context of the present research, the return to contracting involves the signing of mining contracts between the Government of the DRC and the private companies based on the government's mining legal framework or regime, hereinafter referred to as Law No. 18/001 of March 8, 2018, and known as reform of March 8, 2018. This informal return to contracting seems curious insofar as the legislator nevertheless criticised the conventional system for not having favoured the creation of jobs in particular by the fact that the exclusive research areas granted under mining conventions had created the freezing of concessions, thereby preventing the State from granting mining rights to other investors. In addition, the lack of improvement in the social infrastructure, the lack of integration with other economic sectors and the reduction in the development possibilities of other sectors through the knock-on effect granted to investors, which justified the abolition of the conventional regime, remain so today in the new context of

[665] These contracts, which were the subject of heated debates in the National Assembly during its March 2018 session, fall within the framework of the materialisation of the campaign programme of the President of the Republic, Mr Joseph KABILA, which became a government programme under the name of "*Cinq Chantiers*" [Five Building-sites].

[666] This last contract, the terms of which have not been made public, was signed during the official visit of the President of the French Republic, Mr. Nicolas Sarkozy, 26 March 2009.

[667] *La Contractualisation: Une Clé pour la Gestion Durable des Services Essentiels* [Contracting: A Key for Sustainable Management of Essential Services]. Available at: https://issuu.com/objectif-developpement/docs/43-notes-documents. (Accessed: 10 April 2024).

relations with Chinese investors and other Westerners who criticise the public authorities for the lack of transparency in this new form of economic cooperation.

5.7. Reform of 8 March 2018: Consecration of the Legal Regime as the Sole Exploitation Regime

The Congolese mining regime experienced a spectacular turning point with Law No. 18/001 of 9 March 2018 amending and supplementing Law No. 007/2002 of 11 July 2002 concerning the Mining Code. This fundamental reform was built around the debates between the desire of the public authorities to see the mining resources benefit the Congolese people and the calculations of using the reform as a political business in the face of the international community. The 2018 legislature criticises the 2002 code for the following elements, which it intends to resolve:

1. The survival of the conventional system and that of common law, as well as the stability clause of the rights acquired over a period of ten years, regularly impacting the yield of the tax and customs system.
2. The inadequacy of the provisions relating to the freezing of mineral substances in the perimeters covered by the mining and quarry rights.
3. The low percentage of State participation in the share capital of mining companies.
4. The low rate of fixed fees for the registration of mortgages and contracts of assignment.
5. The extension, without preconditions, of the privileged regimes of the Code to subcontractors and affiliated companies as well as to the holders of mining rights that had been in production for several years.
6. The eligibility for mining and quarry rights of individuals unlikely to have the required financial and technical capacities for mining and quarry rights.
7. The question of excess profits generated by very sharply rising market prices and their distribution.
8. The absence of a standard contract, a reference to the development of partnership contracts together with public companies.
9. The absence of standard specifications covering the socio-environmental obligations of mining operators vis-à-vis local communities.

10. The lack of transparency and the low profit derived by the Congolese State from the exploitation of the mineral substances in its soil and underground.[668]

Officially, the 2018 reform aims, on the one hand, to increase the level of control of the management of the State mining domain, mining titles and quarries; to redefine the elements relating to the social and environmental responsibility of mining companies with regard to the communities affected by their projects; and to balance the tax, customs and exchange rate regime within the framework of the partnership between the State and the mining operators. On the other hand, the reform aims to address the legislative need to harmonise the Mining Code with the evolution of the politico-administrative context, as marked by the advent of a new Constitution in 2006 bringing into play new stakeholders in the management of the Code. Thus, it introduced several innovations, in particular:

1. The inclusion of the storage, possession, and transport of mineral substances within the scope of the code.
2. The restriction of eligibility for mining rights to legal entities only.
3. Raising the share of state participation in the share capital of mining companies.
4. The payment of proportional fees.
5. The strengthening of the conditions for the granting, transformation, renewal and transfer of mining and quarry rights.
6. The introduction of incentives for provinces with infrastructure deficits in order to encourage their economic development.
7. Confining subcontracting activities in the mining and quarry sector and to companies the majority of whose capital was held by Congolese nationals.
8. Specifying the methods for superimposing the perimeters of mining and/or quarry rights; the requirement for a minimum 10% stake in the share capital of mining companies by natural persons of Congolese nationality.
9. The restriction of access to artisanal mining to only adult natural persons of Congolese nationality, and members of an approved cooperative.
10. The withdrawal of mining rights and the recovery of the perimeter.
11. The participation of Congolese nationals in the capital of trading houses for the purchase and sale of precious materials and processing.

[668] Law No. 18/001 of 9 March 2018.

12. The introduction of the concept of a separate mine and the obligation to create a company under Congolese law for its exploitation.
13. The introduction of specifications for mining companies in relation to their social responsibility vis-à-vis local populations.
14. The introduction of the environmental certificate for obtaining an operating permit.
15. The reinforcement of the holder's industrial responsibility.
16. Taking into account the principles and criteria of the initiative to promote the transparency of extractive industries.
17. The restriction of the privileged regime of the code.
18. The broadening of the base and the raising of the rates of mining royalties.
19. The cessation of the benefit of preferential rate entry fees for holders who will have completed six years or more of operation.
20. The effectiveness and control of the repatriation of 60% or 100% of revenue from export sales.
21. The intervention of other departmental ministers coming under the sphere of competence of the minister of mines due to the cross-cutting nature of mining.
22. Clarification of the legal framework that may exceptionally authorise the export of raw ores.
23. The export authorisation, depending on the mineral substances in question.
24. The establishment of collaboration between the Congolese Environment Agency and the Directorate of Environmental Protection on matters relating to environmental and social directions.
25. The replacement of environmental opinions by environmental certificates.
26. The exclusive attribution to the prime minister of the competence to classify or declassify an area prohibited to mining activity or quarry work, and to declare the classification or the declassification of a mineral substance as a reserved substance.
27. The obligation to construct a head office in the capital of the province of operation.
28. The application of straight-line depreciation rules for fixed assets.
29. Setting the amount of the share capital at least 40% of the resources necessary for the realisation of the investment.

30. The valuation of the deposit in the event of the transfer of real estate assets and taking its value into account in the share capital of the joint venture.
31. The allocation of key money to the commercial company belonging to the state that carried out the study and documentation work on the deposit.[669]

5.8. Problems of Implementation of the Mining Law in the DRC

Apart from the difficulties of application and interpretation of the texts, the mining legislation comes up against many other problems. These are essentially due to the international and national economic environment, which is particularly unfavourable to the promotion of investments in the mining sector, but also to the public policies adopted by governments. The historical evolution over the past 40 years shows that these problems are linked to the difficulties encountered in the marketing of minerals given the fluctuations in the selling prices of exported mining products, and to the practices of predation and prevarication that have inspired policies unfavourable to the state, and more recently to the impact of economic globalisation on trade with development partners. In terms of hydrocarbons, the opacity of the management of this sub-sector, which is poorly regulated by the rules of law, is a source of sustained confusion that requires reforms that have been demanded for more than 20 years. In a nutshell, it is submitted that legal-related implementation problems in the mining sector result from the particularity of this sector and its poor management.

5.8.1. Specific Problems of the Mine Sector

Specific problems of the mining industry in the DRC include issues such as fluctuations in the prices of mining products, adopted strategies to mitigate price fluctuations, and the impact of economic and financial globalisation.

5.8.1.1. Fluctuations in the Prices of Mining Products

Specific problems of the mining industry in the DRC may be traced back to the fluctuations in the prices of mining products on the international market for which certain corrective measures were taken in the 1970s and to the impact of the troublesome management of export earnings by the political leaders. The fluctuations in question concern the main mining export products (copper, cobalt, manganese, iron, uranium) whose falling prices on the international market have had negative repercussions on the

[669] *Ibid, 658.*

activities of the public companies producing these minerals. This resulted in a decrease in national output and disinvestment, with the State no longer being able to finance the development of activities in this sector.[670] These difficulties were compounded by the problems of transporting mining products from the centres of operation to the places of consumption outside the country. With the abandonment of the southern railway line for the export of mining products through the Angolan port of Lobito following the insecurity due to the war of independence in Angola from 1975 to 2000 and the destruction of the Pont-Route-Rail linking the Congolese copper province of Katanga to the North-West of Angola, the export of mining products experienced an exorbitant increase in transport costs. Until the end of the 1980s, the Congo derived 85% of its income from the sale of mining products (copper - cobalt 60% and diamonds 10 to 15%). It was from the 1970s that the prices of the main mining products, including copper and cobalt, fell sharply on the international market (particularly on the stock exchange), thus upsetting the domestic plans for the allocation of resources from the sale of these products.

5.8.1.2. Adopted Strategies

Another problem involves strategies adopted against price fluctuations. Faced with this problem of price for mining products exports, two strategies were adopted by exporting countries, especially those producing copper, to avoid brazen prices. The first consisted in setting up, like the cartel of oil-producing countries, an international organization bringing together the largest copper-exporting countries; the second to create, within a multilateral framework, mechanisms for stabilising commodity prices. In this way special mechanisms were developed with the countries of the European Union through negotiations within the framework of trade agreements (Yaoundé and Cotonou Agreements). Two major periods may be distinguished in this regard: the first relates to

[670] Since 1990, mining production from the State mining Company (Gécamines) has continuously declined. Since 1996, mining production has shrunk to less than 50,000 tonnes compared to 400,000 tonnes produced in the 1980s. This decline is due to poor governance's management. Likewise, the drop of mining production coupled with political instabilities caused a series of departures of Congolese engineers from the Company. Those particularly who were not originally from the mining region of Katanga emigrated to neighbouring countries such as Zambia, Zimbabwe, and South Africa. Human resources concerns were worsened by financial and disinvestment problems following cooperation crisis with multilateral donors. Broadly, mining industry faced various problems including a technical obsolescent state of production plant, the lack of programming, the increase in operating costs, the depletion of surface mines and the deepening of underground mines requiring the acquisition of increasingly efficient equipment; and at financial level, absence of the state's new investments or self-funding, lack of taxation in the sector, cooperation cessation with external partners, development of substitute products (optical fibres, copper, synthetic diamonds).

the Yaoundé and Lomé Agreements, the second to the Cotonou Agreement and the post-Cotonou period.

1. Solutions within the framework of the organisation of copper-producing countries:

   The organisation of copper-producing countries brought together at the time of its creation in 1975 the three main copper-producing countries of the time: Zambia, Chile, and the Democratic Republic of Congo, former Republic of Zaire.[671] This was in reaction to the sudden collapse of copper prices on the international market. The measures recommended to ensure a rise in prices and their stabilisation consisted of:

   i. A reduction in production by allocating to each of the member countries a quota for copper production for the international market.
   ii. The exhortation of the states to construct factories with a view to the local transformation of products.
   iii. The adoption of a common price support policy.

2. The use of stabilisation mechanisms within the framework of agreements with the European Union:

   To guarantee the prices of mining products, the European Economic Community (the European Union today), and the ACP States (Africa Caribbean and Pacific) signed several economic and commercial cooperation agreements granting certain advantages to the ACP States as support for their development projects. ACP-EU cooperation began in 1957 with the establishment of the European Economic Community by the Treaty of Rome.[672] It was not until 1960 that the association took shape with the establishment of economic cooperation agreements with the African French-speaking countries which had just gained their independence. The first cooperation agreement was signed in 1963 under the name of the Yaoundé Convention, renewed in 1969. Following the accession of the United Kingdom in 1973, a new agreement, the Lomé Convention including certain Commonwealth countries, was signed in 1975

[671] It should be noted that this organization is no longer operational, two of its main African members experiencing major operating problems (Zambia and the Democratic Republic of Congo) which have led to the closure since the 1990s of several mineral production.

[672] Articles 131 to 136 (now 182 to 188) of the Treaty of Rome mention that "the Member States agree to associate with the Community the non-European countries and territories maintaining with Denmark, France, the Netherlands, and the United Kingdom special relations.

with the newly formed Africa, Caribbean and Pacific (ACP) Group – the Georgetown Agreement. From then on, cooperation has been reviewed every five years to keep pace with current events and the global environment in which ACP-EU relations take place. By way of illustration, the four Lomé conventions, like those of Yaoundé which preceded them, were based on two main principles:

i. The principle of non-reciprocity. This means that countries with a high level of development grant certain advantages to underdeveloped countries without reciprocity.
ii. The principle of preferential cooperation. This led to the establishment of the generalised system of preferences involving a waiver or reduction by the European States of certain taxes on the entry of ACP products into their territories.
iii. A mechanism for stabilising the prices of certain raw materials has been put in place called "Stabex." This system has led to the guarantee of stable selling prices, enabling the ACP States to retain a minimum of export earnings from their products, independently of fluctuations in the price of raw materials.[673]

It is with this in mind that SYSMIN was set up to guarantee the prices of mining products (copper, cobalt, iron, manganese, uranium, etc.) These advantages and privileges were called into question by the principles of economic globalization, as confirmed in the Marrakesh Agreement creating the World Trade Organisation, which inspired the negotiations that led to the Cotonou Agreement of 23 June 2000. This agreement, like its predecessors, constitutes the legal basis for cooperation between the ACP States and the European States.[674] Consequently, the privileges clashed with the rules of WTO law, leading to new negotiations to create a new cooperation framework by the signing of economic partnership agreements.[675]

[673] Articles 182 to 188 of the Treaty of Rome mention that "the Member States agree to associate with the Community the non-European countries and territories maintaining with Denmark, France, the Netherlands, and the United Kingdom special relations.

[674] The Cotonou Agreement establishes a close link between the political dimension, trade, and development cooperation. In 2005, in order to take into account new international agreements, the Agreement was reviewed and revised, resulting in the revised Cotonou Agreement.

[675] It may be noted that the Cotonou Agreement came to an end on 31 December 2007 to be replaced by economic partnership agreements. These have been signed by only three African States (Ivory Coast,

5.8.1.3. The Impact of Economic and Financial Globalisation

The new rules of international trade have challenged the existence of these privileges. The rules of the World Trade Organisation lay down the principles of commercial freedom and non-discrimination between partners in international commercial dealings. The implementation of these principles should ultimately lead to the abolition of the privileges granted to the ACP States. This globalisation of the economy is reflected in the opening of borders, the interpenetration of economies, and the removal of customs barriers between countries with unequal levels of development is regarded as morally unacceptable in terms of working towards sustainable development in all countries. It remains to be seen how the developing countries that benefit from certain privileges are going to organise themselves to participate comfortably in this new international market.

1. New trade cooperation under WTO rules:

The Marrakesh agreements of April 1994 provided for the entry into force of the World Trade Organisation on 1 January 1995. This international organisation was created to promote international trade and put an end to the restrictive trade practices of countries that had not been completely eliminated by the General Agreement on Tariffs and Trade – GATT – during the various rounds of negotiations (Kennedy Round, Tokyo Round, Uruguay Round). To return to the case that concerns us, it should be recalled that SYSMIN was abolished in 2001, as if to say that WTO law had already dealt a fatal blow to this privilege reserved for African ore-producing States. This situation, based on the rules of equality advocated by the WTO, has led to genuinely unequal treatment, the African continent being marginalised by this liberalisation of international trade.[676]

Ghana, and Cameroon), contrary to the agreements it was expected would be signed with economic regions, this on account of the need to comply with the WTO rules.

[676] For further details on these WTO principles, read in particular G. BAKANDEJA wa MPUNGU (2001). International trade law justified fears of Africa in the face of market globalization, Brussels, De Boeck Université & Larcier.

2. The regional strategies of African countries:

The strengthening of regional cooperation took the form of regrouping within sub-regional and regional economic groups (the Economic Community of West African States, the Economic and Monetary Union of East Africa, the Economic Community of Central African States, the Economic and Monetary Community of Central Africa, the Southern African Development Community, and the Common Market for Eastern and Southern Africa) as well as South-South cooperation.

5.8.2. Impact of the Poor Management of Resources as Generated by the Export of Minerals

The management of the mining sector before independence was more flourishing in that it provided the public treasury with the foreign exchange it needed to cover almost all state expenditures. This situation changed significantly from the 1970s for reasons already mentioned. It has worsened with the reckless and short-sighted use by rulers, of the revenue generated by the export of mining products. As an indication, until the beginning of the 1970s, the Democratic Republic of Congo supplied 62% of Belgium's copper imports and 8% of France.[677] In 1989, zinc production was around 54,043 tonnes, but had fallen in 1999 to 1,126 tonnes, while national reserves are estimated at 7,000,000 tonnes.[678] In the same vein, the country was one of the world's leading producers of ferrous alloys.[679] The country's uranium reserves, especially located in the Shinkolobwe mine, remain very poorly known.[680] In 1989, the country, which had achieved a record production of copper of up to 500,000 tonnes, had collected more than USD 450 million in bonuses which could have been used to upgrade the production equipment. These statistical data are quite explicit in illustrating the misuse of financial resources by political leaders who, moreover, favoured fraud and looting in the sector, especially in relation to the export of precious materials (diamonds, gold).

5.8.2.1. Generalisation of Fraud in the Mining Sector

As a general concept, fraud is understood as any act of deception or conduct likely to obstruct the application of a law or regulation relating to the exploitation, possession, marketing or export of goods.[681] It was in the first years of independence that the illicit

[677] *Ibid, 458: 251.*
[678] *Ibid, 248.*
[679] *Ibid*.
[680] *Ibid*.
[681] *Ibid, 472.*

exploitation of diamonds developed as well as the fraudulent export of precious materials.[682] Precious mineral substances (gold, diamonds and currently columbite-tantalite (coltan) are exploited and marketed fraudulently. However, these minerals make a vital contribution to the State through royalties, taxes, and government participation in the capital of the operating companies. These substances are not inexhaustible: it would have been wise to try and maximise the profit from them by means of reinvestment. Furthermore, there is the problem of marketing precious materials through the official export channels, a politico-financial mafia favouring roundabout ways to sell products outside the country. This leads to a significant loss of earnings for the public treasury. This fraud is also reflected in the undervaluation of products exported through the official channel.

5.8.2.2. The Criminal Organisation of Resource Plundering

This is due to the recurrent wars in the country, and the pillaging by mining companies, due in particular to the allocation of operating monopolies to certain crooked investors.

1. Facts of recurring wars:

When it comes to the exploitation of minerals, the repeated wars in the DRC[683] have fostered the development of the criminal economy. The actors in these conflicts are recruited both from national political circles and from the external economic circles that maintain them.[684]

2. The pillaging by public mining companies:

The development of a criminal war economy led to the disappearance of all the exploitation companies that had until then carried out their activities in territories plagued by recurring conflicts. These companies accordingly went bankrupt, with both economic and social consequences. To revive these mining activities, the State was led to sign agreements with investors outside the regulatory regimes applicable to the exploitation of mineral substances. It is this situation that led to the government's decision to revise the

[682] *Ibid.*

[683] The armed conflicts following the accession of the country to independence almost all resulted from economic motives (Katangese secession 1960-1963, Secession of South- Kasai 1962-1963, Muleliste rebellions 1964-1967, Shaba wars 1977, 1978, 1984, Liberation war 1996-1997, Rwandan-Uganda-Burundian war of aggression 1998-2003, Nkunda rebellions 2004-2008).

[684] United Nations report on the looting of natural resources in the Democratic Republic of Congo, November 2001, 28.

mining conventions signed during the various wars. Long before this revision of the agreements, the public authorities considered solutions to remedy the shortcomings noted above. Herein lies the importance for noting that less than a decade following the 1966-67 resource nationalisation,[685] the Congolese mining sector was faced with challenges relating to the effects of the 1970s world crisis. These challenges were further exacerbated by the 1980s IMF and World Bank short-term adjustment programme supposed to strengthen African economies that were hit by the 1970s world great recession. The privatisation of the Congolese mining sector put in place to overcome this situation turned into economic ruin largely because of political turmoil and protracted armed conflicts that have continued to devastate the country since 1996.[686]

This conducive environment of the weakness of State development coupled with the callousness of the political leadership and the World Bank's advice regarding mineral resources capitalisation led the DRC to sign disadvantageous mining contracts that sanctified the pillage of the State's natural resources with multinational companies. Consequently, in 2002, a new Mining Code offering foreign mining companies favourable taxation, incentives for exploration, an open door to expatriate profits, and the right to circumvent labour and environmental regulations, came into force. The 2002 mining law forbade amendments for ten years and had a clause which provided that any changes to the fiscal regime could not come into effect until 2022. In 2005, the Parliamentary Commission investigations disclosed that the Head of State and other officials were secretly colluding with mining corporations in return for personal gains, which paled in comparison to the massive advantages given to foreign companies.[687]

5.9. Solutions Provided by the 2002 Code for the Revival of Mining Activities

The 2002 legislation provided mechanisms for the revival of mining activities in terms of both financing and the marketing of mineral substances.

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[685] Ordinance-Law No. 66/243 of 07/06/1966 on State's Land Right; Ordinance-law 67-231 of 11/05/1967 on Mining Regulations.

[686] Sungur Savran and E Ahmet Tonak, *In the Tracks of Marx's Capital: Debates in Marxian Political Economy and Lessons for 21st Century Capitalism* (London: Palgrave, 2024).

[687] Anthony O. Goriainoff and Christian Moess Laursen, 'Glencore 2023 Production Volumes in Line with Guidance', *Wall Street Journal*, (2024). Available at: https://www.wsj.com/finance/commodities-futures/glencore-2023-production-volumes-in-line-with-guidance-1d29a3ab (Accessed: 31 October 2024).

5.9.1. The Financing of Mining Activities: The Institution of Mining Sureties

To encourage investments in the mining sector, the 2002 legislation created two sureties: the mining pledge and the mining mortgage.

5.9.1.1. Mining Mortgages

On the grounds of Article 168 of the Mining Code, all the mining titles that fall within the framework of the general system are mortgageable. Clearly, Article 168 refers to the fixed assets by incorporation within the mining exploitation perimeter, particularly the factories, the installations and the machines built for the concentration, treatment and transformation of the mineral substances contained in the deposits or in the artificial deposits as well as the buildings assigned for mining purposes.[688]

1. Mortgage approval process:

This is determined by Article 169, which specifies that any mortgage contract relating to one of the assets listed in Article 168 of the Mining Code must first be approved by the Minister at the request of the mortgagee or the titleholder. The request for approval addressed to the Minister involves other structures of his ministry: the Mining Cadastre and the Directorate of Mines, the former dealing with cadastral investigation[689] and the second with technical examination.[690] Following these investigations, the Minister takes and transmits his reasoned decision of approval or refusal to the Mining Registry within 45 days from the date of submission of the application. The Mining Cadastre registers the mortgage within five days following the transmission of the Minister's approval decision. In the event of refusal, the applicant may use the judicial process to register his

[688] Exploitation permit, the tailings exploitation permit, the small mine exploitation permit, and the permanent quarry exploitation permit, in whole or in part.

[689] Article 169 of the 2002 Mining Code stipulates: "The request for approval is addressed to the Mining Cadastre. The following elements must be attached: the deed or the mortgage contract indicating the amount, or the estimate of the debt secured by the mortgage; and a certified true copy of the mining or quarry title whose right is affected by the mortgage. The examination of the request for approval of the mortgage is performed in accordance with the provisions of Articles 40 and 41 of this Code. The Mining Cadastre carries out the cadastral examination of the request within a maximum period of seven working days. This examination consists of verifying the possible existence of one or more previous mortgages, the authenticity of the mortgage deed that is the subject of the request and the validity of the title evidencing the mining or quarry right covering the perimeter forming the object of the mortgage".

[690] The technical examination is carried out by the Directorate of Mines. It consists of verifying whether the mortgage contract is duly drawn up to guarantee financing of the holder's mining activities within the perimeter that is the subject of his mining or quarry title. The Department of Mines sends its technical opinion to the Mining Cadastre within ten working days of receipt of the file from the Mining Cadastre (Article 169, continued).

mortgage.[691] The person in charge of the Mining Registry or his agent has notarial power concerning the authentication of mortgage contracts.

2. Reasons for refusal of mortgage approval:[692]

Refusal to approve a mortgage may only be justified if:

i. the value of the mortgage is lower than the secured claim. In the event of a prior mortgage, the contract may only relate to the unencumbered part of the asset; - the mortgage secures debts that have no connection with the mining activity for which it is granted.
ii. the amount of financing obtained is insignificant.
iii. the mortgagee is prohibited from holding mining and/or quarry rights.
iv. the holder's mining or quarry exploitation right is no longer valid.

Any refusal to approve a mortgage must be reasoned and given a right to appeal.[693]

3. Registration and enforceability of mortgage deeds:[694]

The mortgage is registered in return for payment of a right accruing to the treasury. The rate is set by the Mining Regulations. To be enforceable against third parties, any mortgage approved by the Minister must be entered on the back of the mining or quarry title before being entered in a register established and kept for this purpose in the Mining Cadastre in accordance with the procedure provided for by the Mining Regulations.

4. Realisation of the mortgage:

This is done under practically the same conditions as those for a civil law mortgage. Article 172 indicates that if the holder is found to be in default of his obligations towards the mortgagee on the due date agreed and fixed in the mortgage deed, the latter may initiate the procedure of forced execution in accordance with common law. However, the mortgagee may, by derogation from the provisions of Article 261 of the Land Law,[695] replace the defaulting debtor and thus request the partial or total transfer of the mining or quarry right to his own name provided he meets the conditions of eligibility.[696] The letter requesting the transfer of the right in favour of the mortgagee is addressed to the Mining Registry. It must be accompanied by a certified true copy of the mortgage deed; must

[691] *Ibid, 453.*
[692] *Ibid, 453: Article 170.*
[693] *Ibid, 453: Articles 313 and 314.*
[694] *Ibid, 453: Article 171.*
[695] Law No. 73-021 of July 20, 1973 on the general property regime, land and real estate regime and securities regime as amended and supplemented to date.
[696] *Ibid, 453: Article 23.*

certify that the mortgagee is eligible under mining or quarry law to grant the mortgage and must contain its commitment to assume the rights and obligations arising from the mining or quarry law relating to the mortgage. If the mortgagee is not eligible for mining and/or quarry rights, s/he will be granted a period of six months either to comply with the eligibility rules or to be replaced by another person eligible for mining or quarry rights relating to the mortgage.

5. Cadastral transfer examination:

This is specified in the provisions of Article 173. Subject to the provisions below, the Mining Registry accordingly proceeds with a cadastral examination under the conditions set out in Article 40 of the Mining Code. Upon conclusion of the cadastral examination, the Mining Cadastre proceeds:

i. to the provisional registration of the mining or quarry right relating to the mortgage on the cadastral map. This registration is valid for the full duration of the examination.
ii. display the result of the examination in a room determined by the Mining Rules. A copy of the notice is given to the applicant.
iii. rejection of the application in the event of an unfavourable opinion and notification of the rejection decision to the applicant.

In the event of a favourable opinion, the Mining Cadastre registers the transfer and issues a new title drawn up in the name of the mortgagee or substitute third party within five days. The validity of the new title corresponds to the unexpired period of validity of the initial title. After the period of five days provided for in paragraph 3 of this article, the mortgagee, or the substitute third party may avail himself of the provisions of Article 46. The transfer of the mining or quarry right in the name of the mortgagee or substitute third party is carried out within one month from receipt of the request. As for the effects of the transfer, Article 174 specifies that in the event of realisation of the mortgage and transfer of the mining or quarry rights to their benefit, the mortgagee or substitute third party are required to assume all the obligations arising from the initial title vis-à-vis the State and third parties. Finally, concerning legal mortgages, Article 175 refers to the provisions of Articles 253 to 255 of the Land Law relating to mortgages from the Treasury and the rescuer, which only apply when they are not contrary to those provided for by the Mining Code.

5.9.1.2. The Mining Pledge

The mining pledge is one of the great innovations introduced by the 2002 legislator. It relates to mining products and is repeated by Article 176 in these terms: commercial products from deposits or artificial deposits are subject to pledge, organised in accordance with the rules of common law as laid down by the Land Law.[697]

5.9.2. The Marketing of Minerals

Marketing concerns both artisanal mining products and those from quarrying.

5.9.2.1. Case of Artisanal Mining Products

The legislator reserves the marketing of artisanal mining products to traders, stock markets, trading houses or organisations approved or created by the State in order to ensure control over the marketing circuit.[698] Apart from the latter, artisanal miners can also sell their mining products to artists approved by the Ministry of Culture and the Arts for the needs of their profession.[699] In addition, it is recommended that authorised traders only sell artisanal mining products to: trading houses or organisations approved or created by the State, as well as on stock markets; and approved artists unworked artisanal mining products by virtue of a special authorisation obtained for the exceptional cases of the liquidation of excessive stocks.[700]

1. Traders of artisanal mining products
    i. Requirements:[701]

Holders of a valid artisanal mining zone trader's card are authorised to buy gold, diamonds or any other artisanally-exploitable mineral substance from persons who hold artisanal mining cards. Trader's cards are issued on request by the Governor of the province to adults of Congolese nationality. The applicant for a trader's card must, in support of her/his request, produce proof of her/his registration in the New Trade Register. A fixed fee, the amount of which is determined by regulation, is collected when each card is issued. A trader's card is valid for one year. It is renewable for the same period and without limitation. In the event of loss, destruction or theft of the trader's

[697] Articles 322 to 336 of Title IV of Law No. 73-021 of July 20, 1973 on the general regime of property, land tenure and real estate and securities regime as amended and supplemented to date.
[698] *Ibid, 453: Article 116*.
[699] *Ibid, 453: Article 115*.
[700] The procedures for establishing the special authorisation are set out in the Mining Regulations.
[701] *Ibid, 453: Article 117.*

card, the holder is required to file an objection, although the latter may also request a new one. The Mining Regulations lay down the procedures for issuing a trader's card.

5.9.2.2. Obligations of Trader's Card Holders[702]

The approved trader must sell the purchased artisanal mining products to trading houses or organisations approved or created by the State or to stock markets approved by the State. S/he must also provide reports of her/his activity in accordance with the relevant regulations. Failure to comply with these obligations may result in penalties including the withdrawal of the trader's card. Under the terms of Article 119 of the Mining Code, the trader's card can be withdrawn by the Governor of the province who issued it after a formal notice of 30 days, in the absence of rectification of the situation by the person who holds the card, for any breach of the obligations incumbent on that person under Article 118. In such a case, the person from whom the card was withdrawn is not eligible to obtain a new card for three years. The withdrawal of the trader's card gives a right to the remedies specified in Articles 315 and 316 of the Code.[703]

1. Approved trading houses:
    i. Accreditation conditions[704]

Approval as a trading house for the purchase and sale of artisanal mining mineral substances is granted by the Minister. Approval as a trading house for the purchase and sale of mineral substances from artisanal mining is valid for a period of one year, renewable without limitation. A fixed fee, the amount of which is determined by regulation, is collected upon approval and at each renewal. In accordance with the provisions of Article 121, the number of authorised trading houses for the purchase of gold, diamonds, and other mineral substances from artisanal mining in the national territory covering mining activities is unlimited. However, the number of buyers per trading house is limited by regulation.

    ii. Buyers of accredited trading houses:[705]

The legislator has created a new profession of purchaser of accredited trading houses. The exercise of this profession is subject to the following conditions:

[702] *Ibid, 453: Article 118.*
[703] These provisions regulate legal recourse in mining matters.
[704] *Ibid, 453: Article 120.*
[705] *Ibid, 453: Article 122*.

a) Holding a work card for foreigners in the artisanal mining sector valid for expatriates or a work card valid for nationals.
b) Submission of recent medium format photographs to the Department of Mines.
c) Possession of an authorisation to stay and travel in mining areas for expatriate buyers.
d) Compliance with the regulations for trading house activities.

The Mining Regulations lay down the procedures for requesting, examining, granting, or refusing approval as a buyer, as well as the circulation of foreign buyers in artisanal mining areas.

iii. Accreditation procedure:

In accordance with the provisions of Article 123 of the Mining Code, the application for approval of the title of the trading house for the purchase and sale of gold, diamonds or other artisanal mining mineral substances is addressed by the agents in mines and quarries or their representatives to the Department of Mines and must include the following elements: proof of registration in the New Commercial Register; the notarised articles of association, if it is a Corporation; an extract from the criminal record of the first residence dating back no more than three months and a certificate of good conduct, life and morals, if it is a natural person; the National Identification number; proof of holding an account opened in the name of the applicant in an approved bank as well as the letter of registration at the Central Bank of Congo. The examination of the application for approval as a trading house for the purchase and sale of mineral substances from artisanal mining is carried out by the Directorate of Mines which, after acknowledgement of receipt of the application, registers it in an ad hoc register, examines and verifies its formal regularity with the possibility of rectifying and completing it. Furthermore, this technical examination may require an enquiry. In this case, it requires useful information concerning the authenticity of the attached documents from the government departments that issued them. The examination period may not in any case exceed 60 days from the date of filing of the application for approval. After this period, the opinion of the Department of Mines shall be regarded as favourable. After examination, the Directorate

of Mines sends the file with an opinion to the Minister for decision and reserves a copy of its opinion for the applicant.[706]

iv. The results of the examination: approval and rejection of approval[707]

If the opinion of the Department of Mines is favourable, the Minister makes the decision within a period not exceeding 30 working days. After this period, the applicant has the right to an administrative appeal.[708] If the opinion of the Directorate of Mines is unfavourable, the Minister takes the decision to refuse approval within a period that may not exceed 15 working days from the date of receipt of the application from the Department of Mines. The refusal decision must be reasoned and gives the right to administrative appeal.

v. Obligations imposed on licensed trading houses:[709]

Approved trading houses must on the one hand submit to checks during the purchase and sale of artisanal mining products by the Mining Administration and by a public body responsible for expertise, and on the other provide reports of their activities in accordance with this Code and its implementing measures. They are also bound by the obligations to communicate to the Minister and to the Central Bank of Congo from the date of the approval, the fixed and verifiable locations of the trading houses for the purchase of gold, diamonds and other mineral substances of artisanal exploitation; to buy gold, diamonds and other artisanally mined mineral substances presented to authorised trading houses regardless of their size, quantity and quality; to pay the taxes and duties relating to their activities; to own at least one building made of sustainable materials in each centre of activity.

vi. Sanctions:[710]

Non-compliance with the above obligations entails the withdrawal by the Minister, of approval as a trading house for the purchase and sale of artisanal mining mineral substances. This withdrawal must be preceded by a formal notice of 30 days, in the absence of rectification of the situation by the approved trading house in question. The

[706] *Ibid, 453: Article 124.*
[707] *Ibid, 453: Article 125*.
[708] This appeal is organised by Articles 313 and 314 of the 2002 Mining Act.
[709] *Ibid, 453: Article 126*.
[710] *Ibid, 453: Article 127*.

applicant also runs the risk of not being eligible for approval as a trading house for five years. The withdrawal of approval as a trading house for the purchase and sale of artisanal mining mineral substances does, however, give the right to administrative appeals.

2. Stock markets:

The 2002 legislator provided places for the marketing of artisanal mining products (gold, diamonds, and other mineral substances), namely the stock markets. These can only operate after prior approval from the Central Bank of Congo.[711] Only persons approved as buying trading houses for gold, diamonds and other artisanal mining mineral substances are authorised to buy on the stock markets. In addition, the Code provides that the Mining Regulations must specify the procedures for authorising, organising, and financing the stock markets.[712]

i. Case of Quarry Products:

It is necessary to recall the rules related to transport and storage of the products, in addition to rules relative to the marketing of quarry products:

a) Transport and storage of products.

Under the terms of Article 166 of the Mining Code, the holder of a Quarry Exploitation Authorisation has the right to transport, or to have transported by the transporter of his choice, the quarry products which are the subject of her/his authorisation, and which come from its perimeter of operation. S/he also has the right to store her/his quarry products in fenced sites, fitted out for this purpose, located around the places of loading, on condition that s/he respects the regulations on the safety of the site and on the control of industrial pollution.

b) Marketing of products

In accordance with the provisions of Article 167 of the Mining Code, the marketing of commercial products which come from the perimeters subject to and authorisation of

[711] It should be noted that stock markets are not yet effective in the Democratic Republic of Congo. A first attempt was made in 1999 with the creation of the Congolese Precious Materials Exchange (BCMP), which was unable to function for lack of support from various operators in the sector, who preferred to export their products to Tel Aviv.

[712] *Ibid, 453: Article 128.*

exploitation of the same products is free. The holder of an Operating Authorisation may sell her/his products to the customers of her/his choice at freely negotiated prices.

In light of mining legislation developments, as elaborated in this Chapter, attention may be drawn to a number of shortfalls in line with the mining code. The DRC mining code was designed, planned, and implemented by the government under the influence of foreign mining companies and the World Bank at a time when the country was at war. At the time, the country was divided into three parts controlled by foreign armies. Each territory put in place its mining legislation and regulations. This situation left the Congolese government in an uncomfortable and weak position when negotiating with multinational mining companies over the exploitation of its mineral resources. This impasse appears to be at the root of a number of legal shortcomings reflected in the 2002 Mining Code. The Code established a legal and administrative framework that favours foreign mining companies to the detriment of the country's economic development and at the expense of the local content or corporate social responsibility that mining companies should provide to the local population. For example, the 2002 Mining Code does not clearly define the mechanisms for the coordination of the Mining Code and the other laws related to mining, including the Land Law, the Environment Law, the Forestry Law, the Health and Sanitary Law, the Nature Protection Law, and the Law on the Rehabilitation of the Environment and Society. The lack of a clear relationship between the Mining Code and other laws related to mining, combined with the lack of integration or cohesion between the various laws applicable to mining, has contributed to the lack of transparency and accountability in the mining sector. The 2002 Mining Code is perceived as being tailored to the size of the warring parties and foreign mining multinationals and does not meet internationally recommended criteria for good mining and management practice.

The lack of a compact legal framework encompassing all the laws related to mining has created a culture within the sector of relativisation and meant the neglect of several fundamental principles of the Congolese Constitution and mining law, such as the constitutional rights of citizens to live in a safe and healthy environment, the principle of corporate social responsibility, the restoration of mining sites to their original or initial state at the end of the life-cycle of a mining operation, and the establishment of social rehabilitation funds following the de-industrialisation of a mining zone. This dearth of coherence and cooperation within the legal and regulatory framework has left room for

opacity, corruption, and the plundering of minerals. The reform introduced by the 2018 Mining Code focused essentially on economic and financial readjustment. This involved correcting and readjusting the taxes and royalties that the Congolese state should receive from its minerals. However, it did not address the legal and regulatory shortcomings that continue to characterise the Mining Code and other mining legislation in the DRC. The DRC mining sector is characterised by a legal framework that focuses primarily on financial aspects, neglecting other aspects such as the environment, land, health and safety, forestry and even the restoration of the socio-economic well-being of local communities living in mining areas. Congolese mining legislation is incomplete and does not take into account all the different laws relating to mining in the country. It encourages a lack of transparency and corruption among the elite and fails to meet global standards for the good practices required in the mining sector.

5.10. Conclusion

The 2002 Mining Act, as revised in 2018, gives the government the right to participate in mining activities through holding equity interests in any mining venture including mineral beneficiation. Its aim is to rebalance the mining revenues in favour of the State, with the former legislations perceived as having failed to generate substantial revenues for the country's development. This Chapter explored the formal uniqueness of the mining management regime set by the Mining Code. Its main argument lies in the view that the 1990s partnerships established by different mining legislations were not successful for various reasons, especially the failure to respect contractual commitments. In contrast, the new Mining Act establishes a unique approach to mining management whereby the State is empowered with the ability to set both the rate of free-carried State participation in the equity of mining companies and the right to acquire additional equity. Overall, it emerged from the analysis that the 2002 Mining Code is meant to provide for harmonised principles and regulations, transparency in the management of mining revenues and the fair and the reasonable redistribution of revenues. As such, it imposes on the government obligations regarding the sound governance of the mining industry by setting tax and exchange rates favourable to investments, and by providing for mechanisms aimed at safeguarding the environment through rehabilitation schemes to be implemented at the end of mining operations. Broadly, it is submitted that transition from discriminating mining laws to the common law system is the result of non-

implementation of the previous laws by different mining actors. These failures have been blamed on the obsolescence of the texts, which did not attract investment and had a negative impact on the State's mining output, with the mining regulatory systems, customs, tax, and exchange rate regimes not being an incentive either.

Hence, the idea of introducing new more attractive legislation for investment with simplified and transparent procedures for granting mining and/or quarry rights. The scope of the new code relates to prospecting, research, exploitation, transport, and marketing of mineral substances classified as mining or quarrying products and also to the small-scale exploitation of substances and their marketing. In the context of mining management, the 2002 Code establishes a system of common law thereby excluding the conventional system of the old Code, which was strongly criticised for the imbalance and discrimination it engendered, especially the freezing of concessions granted by conventions, with exclusive research areas; something which is believed to have prevented the granting of mining and/or quarry rights to other investors. The comparative analysis in the next Chapter zeroes in on this issue.

Chapter Six: Analytical Insight from the DR Congolese Mining Legal Framework Considering the South African Framework

Resume
Mining rights in South Africa are governed by specific requirements, regulations, and compliance obligations aimed at ensuring responsible and sustainable mining practices. Obtaining and maintaining mining rights requires compliance with various laws and regulations, including the MPRDA, MHSA, NEMA, and BBBEE requirements, among others mining rights holders must also comply with these laws. By understanding and adhering to these requirements contribute to sustainable mining practices and comply with relevant laws and regulations.
In the DRC however, mining rights are governed by the 2002 Mining Code and other mosaic and disparate mining-related laws and regulations. Mining rights can be acquired through competitive bidding, or through first-come, first-served process. However, the code is subject to criticisms. The scope of the mining regulatory regime remains uncertain due to disparate texts, difficulties of interpretation and the lack of clarity of certain provisions that need substantial clarifications.
Considering South African experience, the DRC's legislator needs to conduct a comprehensive legal review of the DRC Mining industry regulatory regime and align it with mining best practices.

6.1. Introduction

In the DRC as in South Africa, mining activities are commonly associated with a change in land use or detrimental effects on the environmental system. Environmental change will always have a significant harmful impact on local communities, including reduced access to land, forests and other vital natural resources and ecosystem services. Articles 53 and 58 of the DRC Constitution and Section 24 of the South Africa Constitution[713] protect everyone from an unhealthy environment that is contrary to socioeconomic development. While everyone has the constitutional right to a healthy environment, the State must also ensure the health and safety of the population, the protection of the environment, and the right of all people to enjoy national wealth. It also has the duty to redistribute the wealth equitably and to safeguard the right to development.

This Chapter aims to provide a comparative study between South African mining legislation and that in the DRC. It argues that the mining laws aim to ensure the conditions for minerals exploration and mining, and to ensure that environmental aspects, civil rights such as land proprietorship and a safe and healthy environment, are included

[713] Articles 53 and 58 of the DRC Constitution 2005; *Ibid, 313.*

in, and protected by the permit process. Put differently, the state's ability to appropriately manage minerals licensing has a significant impact on land tenure and acquisition, and on the exercise of mining rights. Three main sections are organised to address this postulation. The first two sections of this Chapter offer an in-depth analysis of the case-study countries' mining jurisdictions, while section three compares the two legislations.

6.2. The South African Mining Regulatory Framework

Appropriate national regulations contribute to the mitigation of detrimental environmental impacts caused by the extraction of minerals. The relevant South African background indicates that the mining sector is regulated by a number of national legislative instruments at once, with the Constitution coming at the vanguard. In the first instance, Section 24 of the 1996 Constitution guarantees all South Africans a fundamental right to a healthy environment that is not harmful to their health and well-being.[714] A combined reading of Sections 7(2) and 24 of the Constitution makes it clear that not only must the environmental right be respected, but that the state also has a duty to take positive action to fulfil and ensure that right.[715] As a response to the duty imposed by Section 24, several environmental law instruments, such as the National Environmental Management Act, 1998 (NEMA), have been promulgated. The NEMA has become the main environmental framework from which several sector-related regulatory instruments draw their purpose. This section focuses on the NEMA and the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) as amended by the 2008 MPRDA Amendment Act as well as the procedural aspects concerning the mining sector in South Africa.

6.2.1. Section 24 of the Constitution 1996

As the South African supreme law, the Constitution acts as the framework within which South Africa's environmental legislation should operate.[716] It therefore has a significant impact on the nature, implementation and enforcement of environmental law and the development of environmental jurisprudence and precedents in South Africa.[717] A constitutionally-rooted environmental right ensures substantial benefits in terms of the

[714] *Ibid, 313: Section 24.*
[715] *Ibid, 313: Sections 7(2) and 24.*
[716] *Ibid, 313: Section 2.*
[717] A Du Plessis and LJ Kotzé, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3(1) *Journal of Court Innovation 157*, 169.

welfare of South African peoples and is vital for the development of environmental law in South Africa.[718] Section 24 of the Constitution makes room for two different aspects of the environmental right, namely the right of South Africans to a safe and healthy environment, and the duty of the state to protect the environment for present and future generations by implementing reasonable legislative and other procedures.[719] These procedures should be implemented to avert pollution and ecological degradation in a way that promotes the conservation of the environment.[720] Likewise, they must encourage ecologically sustainable development, while at the same time promoting reasonable economic and social development.[721]

Section 24 of the Constitution also establishes various methods to facilitate this right. In this regard, the state must ensure compliance with the protection and conservation of the environment via reasonable legislation and other actions in the interest of present and future generations.[722] Likewise, it must encourage conservation and ensure the sustainable development and use of natural resources.[723] This means that the state is responsible for recognising the environmental right by putting in place a proper legislative framework for the mining sector, for the benefit of current and future generations.[724] This is known as the common heritage principle, which the state must not infringe. It must not only respect and protect this right but must also fulfil obligations imposed by the environmental right.[725] This constitutionally entrenched environmental right ensures that any conduct by the state or individuals that could be detrimental to the environment must comply with all legislation guaranteeing the health and well-being of the people.[726]

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[718] Van der Linde and Basson Constitutional Law in South Africa 50-8. 2nd Edition Stu Woolman & Michael Bishop January 2013: Revision Service 5.
[719] *Ibid, 313: Section 24.*
[720] *Ibid, 313: Section 24(b)(i)(ii).*
[721] *Ibid, 313: Section 24 (iii).*
[722] *Ibid, 313: Section 7(2) and Section 24(b)*; Carmichele and Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 10 BCLR 1059; 2007 6 SA 4 (CC) as the leading Constitutional Court decision on the scope and the content of Section 24(b) of the Constitution; Government of the Republic of South Africa and Others v Grootboom and others 2000. (11) BCLR 1169 (CC) para 42 in terms of the right to housing, but also applicable as to the positive duties imposed on the state.
[723] *Ibid, 313: Section 24(b)(i)(ii).*
[724] *Ibid, 313: Sections 24(b)(ii) and Section 152 (1)(b)(d); Sections 4(2)(d)3 and 4(2)(i),4 73(1) and (2)* of the Municipal Systems Act 32 of 200 to ensure that the right to a clean and healthy environment is fulfilled.
[725] *Ibid, 313: Section 8 (1).*
[726] Currie and De Waal, The Bill of Rights Handbook 522-523.

Arguably, it could be held that the perceived negative impacts of mining activities highlight the importance of any enforceable legislative measures.[727] The South African legislator specifically regulates the detrimental effects of the mining activities within various legislations. Under these provisions, the state is compelled to ensure that the fundamental right to health and well-being of all present and future generations is secured.

6.2.2. The National Environmental Management Act 1998 (NEMA)

The NEMA 1998, an environmental framework legislation, is the response to the obligation imposed on the state to expand and ensure compliance with the environmental right.[728] An environmental framework legislation in essence specifies different mechanisms to create new legislation, to amend any existing legislation, and to interpret and apply other sectoral norms as applicable.[729] In light of this, the NEMA's aim is to provide overarching, generic environmental principles and to create broad, integrated environmental management objectives on which South African environmental law should be grounded.[730] As such, the NEMA objective is to endorse, or give effect to, the environmental right at a foundational level.[731] It is applied to all environmental aspects, including land-use planning and development, natural resources regulation and development in the mining sector as well as pollution control and waste management. Consequently, any environmental legislation must fall within the environmental management principles entrenched within the NEMA.

6.2.2.1. National Environmental Management Principles

Environmental management principles that have been sourced from international environmental law norms are established in Section 2 of the NEMA.[732] These principles

[727] *Ibid, Chapter 2 para 2.5.*
[728] *Ibid, 355: Article 107*; W Nel and JD Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Legislation' (2001) 8 SAJELP, 1-2.
[729] W Nel and JD Plessis (2001) SAJELP, 2.
[730] *Ibid.: 2-4.*
[731] A. Blackmore, 'Relationship between the NEMA and the Public Trust Doctrine': The Importance of the NEMA Principles in Safeguarding South Africa's Biodiversity' (2015) 20(2) *South African Journal of Environmental Law and Policy*, 89.
[732] *Ibid, 355: Section 2*.

aim to assist decision-makers, such as organs of state,[733] in developing overall acceptable management practices for the environment.[734]

They are also used as a general framework for environmental plans to ensure that development is environmentally, socially and economically sustainable.[735] These environmental management principles are crucial in decision-making and highlight all the provisions integrated into environmental management legislation, including those for mining.[736]

Section 2(3) of the NEMA provides for the need for a protected environment for the benefit of present and future generations through careful planning and management.[737] The earth's resources need to be used wisely in such a way as to guard against the danger of their future depletion and to ensure that benefits from such utilisation are shared by all mankind.[738] Section 2(4)(a) of the NEMA further indicates that the achievement of sustainable development requires a duty of care to ensure that the disturbance of ecosystems and landscapes, pollution, and the degradation of the environment should be avoided, remedied and minimised.[739] Additionally, this section elaborates on the responsible and equitable use and exploitation of non-renewable natural resources and warns about the consequences of exhausting these non-resources.[740] Under Section 28, this duty of care principle is extended to the people by requiring every person or entity which has caused, or is likely to cause, pollution or degradation of the environment to take reasonable measures to prevent or mitigate such harm.[741] It also provides for the state to intervene where environmental harm or the possibility thereof may occur.[742]

Section 28 of the NEMA has a two-fold objective:[743] it imposes a duty on all persons to take reasonable actions in terms of environmental protection, and secondly to take

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[733] *Ibid, 313: Section 239.*
[734] *Ibid, 355: Section 2(1)(b)- 2(1)(e);* J. Glazewski, Environmental Law in South Africa (LexisNexis Butterworths, 2013)142; W. Scholtz, 'The Anthropocentric Approach to Sustainable Development in the National Environmental Management Act and the Constitution of South Africa' (2005) *Journal of South African Law*, 69.
[735] *Ibid, 355: Section 2 (3).*
[736] *Ibid, 355: Section 2(1)(b)- 2(1)(e).*
[737] *Ibid, 355: Section 2(3).*
[738] Principle 5 of the Stockholm Declaration.
[739] *Ibid, 355: Section 2(4)(a)(i) to 2(4)(a)(vi).*
[740] *Ibid, 355: Section 2(4)(a)(v).*
[741] *Ibid, 355: Section 28.*
[742] *Ibid, 721.*
[743] W Du Plessis and LJ Kotzé, 'Absolving Historical Polluters from Liability through Restrictive Judicial Interpretation: Some Thoughts on Bareki NO v Gencor Ltd' (2007) 18(1) *Stellenbosch Law Review*, 161.

responsibility for previous damage to the environment.[744] Research shows that mining activities involve serious disturbances to environmental ecosystems, which generally result in environmental degradation.[745] Therefore the specific regulation for mining sector is clearly and unavoidably part of the duty of care towards the environment as imposed on the state.

Conversely, the precautionary principle,[746] referred to as the principle of foresight, also plays the role of a guideline in the development of environmental law and is a fundamental element in decision-making. The precautionary principle draws on customary international law and has been applied by the International Court of Justice (ICJ) in the Pulp Mills on the River Uruguay case.[747] This principle holds that a cautious approach is needed in situations where knowledge about the potential consequences of an action is limited. Based on this view, it is contended that knowledge of the exact environmental impacts that mining activities may have been for the most part still unknown.[748] It is therefore crucial that a precautionary approach is respected in the framing and application of any regulatory provisions for mining activities. Based on this principle, any activity which causes or will cause environmental harm should be banned.[749] The preventive principle seeks to mitigate harm by acting proactively. As mining activities also involve environmental harm,[750] regulatory instruments in South Africa are created and implemented in a way that prevents and manages the detrimental environmental effects of mining activities, especially before they occur.

Section 2(4)(o) of the NEMA introduces the public trust principle. This common law principle avers that the environment is held in public trust by the state for current and future generations and for the beneficial use of the people.[751] This principle is now part of the South African environmental law instruments as the state has decided to embrace

[744] *Ibid.*
[745] *Ibid, 733: para 2.5, 186-187.*
[746] *Ibid, 355: Section 2(4)(a)(vii)*; Principle 15 of the Rio Declaration on Environment and Development 1992 UN Doc.
[747] Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Reports 2010, para 164.
[748] Roux and Horsfield "Review of National Legislations Applicable to Seabed Mineral Resources Exploitation" 310.
[749] *Ibid, 355: S 2(4)(a)(viii).*
[750] *Ibid, 355: Chapter 2, para 2.5.*
[751] *Ibid, 355: Section 2(4)(o).*

the fundamental idea of this doctrine.[752] The incorporation of this principle in environmental law derives from the duty that is placed on the state under Section 24 of the Constitution with regard to environmental rights.[753] This principle holds that the state has the duty to ensure that the utilisation of environmental resources serves the public interest and is protected as the people's common heritage. Section 2(4)(f) of the NEMA introduces the principle of public participation,[754] claiming that public participation improves the legitimacy and quality of environmental management decisions.[755] With the potential risk of significant environmental and social impacts from mining activities, the South African legislation has put in place mining regulations to ensure that proper decisions are made to avoid and minimise any adverse impacts. In light of Section 2(4)(b) of the NEMA, environmental management must be integrated, and all aspects of the environment must be interrelated.[756] Therefore, the best realistic options must be selected to manage the environment.[757]

The 'polluter pays' principle states that those responsible for producing any adverse effects on the environment are responsible for the costs of preventing, mitigating, controlling, and cleaning up the pollution.[758] These adverse effects can also include environmental degradation and damage as well as any consequent health effects. Mining companies in this context will be responsible for the costs associated with the above. Section 2(4)(c) of the NEMA addresses the principle of environmental justice. It reads that environmental justice must be attained so that adverse impacts on the environment do not adversely affect or discriminate against any person.[759] Environmental management of mining therefore ensures that environmental justice is realised and there is equitable access to minerals to all South Africans. The NEMA further ensures the lifecycle responsibility for an activity, or environmental management of activities from

[752] *Ibid, 355: Section 2*; *Section 3 of the NEMPAA 2003; Section 3* of the National Environmental Management: Biodiversity Act 10 of 2004; E. Van der Schyff, 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory' (2010) (13)5 *PER/PELJ*, 122; A. Blackmore, 'Getting to Grips with the Public Trust Doctrine in Biodiversity Conservation: A Brief Overview' (2018) 48(1) *Bothalia African Biodiversity and Conservation*, 1.
[753] *Ibid, 313: Section 24.*
[754] *Ibid, 355: Section 2(4)(f).*
[755] Stern and Diets (eds.) National Research Council Public Participation in Environmental Assessment and Decision Making 2.
[756] *Ibid, 355: Section 2(4)(b).*
[757] *Ibid, 355: Section 2(4).*
[758] *Ibid, 355: Section 2(4)(b).*
[759] *Ibid, 355: Section 2(4)(c).*

beginning to end.[760] Under this principle, mining companies will be responsible for the environmental management of their mining project throughout its lifecycle. They must ensure that the public is provided sufficient opportunity to partake in the decision-making and management processes.[761]

6.2.2.2. Integrated Environmental Management

The environmental management principles are the reference legal instrument in South Africa for the implementation of the Integrated Environmental Management (IEM) framework.[762] The IEM comes into effect when mining companies implement activities that may cause any sort of harm to the environment. In such a case, the IEM procedure serves as a tool to understand, plan, and guide the development process of any activities pertaining to the welfare of the environment. Chapter 5 of the NEMA relates to the IEM, which comprises Environmental Management Plans (EMPs) and Environmental Authorisations (EAs). The IEM involves the identification, prediction and evaluation of actual and potential impacts on the environment, whilst supporting implementation and compliance with the environmental management principles in Section 2 of the NEMA.[763] An impact assessment further involves the provision of proposed steps to mitigate any negative impacts (such as pollution) that may have been identified. It must also include a report on the uncertainties and gaps in knowledge when the assessments are made.

6.2.2.3. Environmental Authorisations

One way towards making the IEM effective is to acquire environmental authorisation prior to the implementation of activities that are likely to have detrimental effects on the environment. Such activities must be considered, investigated and reported to a competent authority for authorisation with an EIA.[764] In instances where those activities are identified as having an implication in terms of international commitments, the Minister for environmental matters is the competent authority.[765] However, in the case of mineral resource exploration, prospecting, extraction and processing, the Minister in

[760] *Ibid, 355: Section 2(4)(e).*
[761] *Ibid, 355: Section 2(4)(f).*
[762] *Ibid, 313: Section 239.*
[763] *Ibid, 355: Section 2.*
[764] In the province in which activities are expected to be undertaken, the competent authority is the environmental authority.
[765] *Ibid, 355: Section 24C (2).*

charge of mineral resources is the competent authority to decide on an EA application.[766] The Minister of Environment, Forestry and Fisheries will be responsible for deciding on any appeals that are lodged in line with the EA.[767] However, any such decisions will be subject to the requirements of the NEMA and the 2014 Environmental Impact Regulations. This implies that all environmental management aspects regarding mining activities are regulated through the NEMA framework. The NEMA provides the minimum, general and specific conditions for EAs.[768] General conditions cover the cooperation between organs of state in respect of the EA, and the environmental management principles as organised in Section 2 of the NEMA. They also encompass the assessment of the potential impacts on the environment and the provision of information on the public participation process. Specific conditions will apply where an EIA is a specified requirement for the completion of an EA.[769] Specific conditions comprise an investigation and an indication of the meaning of the potential environmental impacts of any suggested options to the activity, as well as any mitigating measures available. They also involve the indication of the impacts of any failure to implement the activity, for example, the likely impacts on the South African economy of not approving a mining project.

6.2.2.4. Environmental Impact Assessments and Management Programmes

The South African legislator created the EIA as a tool to establish the potential impacts of an activity on the environment. These environmental concerns are then included in the decision-making process.[770] For example, in situations where public and private developmental projects are prone to have serious impacts on the environment, EIAs ensure that suitable scientific techniques are explored and applied to avert damage.[771] EIAs in general make room for transparency and objectivity in decision-making by ensuring that the environment is considered as a key factor in the process. An EIA allows for broad public participation to take into consideration individuals' rights and attain sustainable development.[772] The assessment process for EIAs can be a basic, or a

[766] *Ibid, 355: Section 24C(2A) (1).*
[767] *Ibid, 355: Section 43(1), (1A).*
[768] *Ibid, 355: Section 24E(4)(a)(b).*
[769] *Ibid, 355: Section 24(4)(b).*
[770] Principle 15 of the Rio Declaration on Environment and Development 1992 UN Doc.
[771] Sands Principles of international environment Laws 263.
[772] Principle 15 of the Rio Declaration on Environment and Development 1992 UN Doc.

Scoping and Environmental Impact Reporting process (S&EIR).[773] In terms of mining activities, a basic assessment process is required for activities that involve a prospecting right or a mining permit[774], while an S&EIR is required for activities that require a mining right.[775]

According to Section 24N (1A) of the NEMA, the Minister of Mineral Resources must request an Environmental Management Plan (EMP) with the application of an EA for all mining-related activities.[776] The EMP and S&EIR may be submitted simultaneously. The EMP should have information concerning the proposed environment management actions with respect to the mitigation, protection, and remedial efforts to be implemented throughout the mining project, from the planning stage to the closure and rehabilitation of the mine. The appraisal and forecast of actual and potential harmful impacts on the environment, and on socio-economic conditions and cultural heritage, should be included. The steps and mechanisms to monitor compliance with the compulsory actions and the assigned responsibilities for regulating environmental damage and pollution within and outside the boundaries of the mining zone should also be provided by the EMP. However, it is important to bear in mind that the accurate impacts of mining activities will still be unidentified, so that EMPs for mining projects should take this and include alternative remedies, such as further and alternative research, for any probable unknown impacts that might occur.

6.2.3. The Minerals and Petroleum Resources Development Act 2008 (MPRDA)

The MPRDA 2008 is the primary South African legal instrument for the regulation of mining. It is considered as a development tool towards socio-economic progress.[777] This underlying fundamental principle is stated in Chapter 2 of the MPRDA. The MPRDA objects, as provided in its Sections 2 (c), (d) and (e), are the promotion of equitable access to all mineral resources for South Africans, the expansion of opportunities for previously disadvantaged people (including women), and the promotion of economic

[773] Regulations 19 to 24 of the EIA Regulations 2014; EIA Regulations Listing Notice 1 published in Government Notice 327 of 7 April 2017 and Notice 324 for specific geographical areas in Notice 3 of April 2017; Notice 2 Government Notice 325 of 7 April 2017.
[774] Activities 20 and 21 in the EIA Regulations Listing Notice 1.
[775] Activity 17 in EIA Regulations Listing Notice 2.
[776] *Ibid, 355: Section 24N(1A).*
[777] F Belinkie, Sasha, "South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies," (2015) *Cornell International Law Journal*: Vol. 48: Iss. 1, 5.

growth and mineral resource development in South Africa.[778] The MPRDA specifically acknowledges the state's duty to promote development and boost communities affected by mining practices.[779] Section 3 admits the state's sovereign and internationally accepted right to the country's minerals.[780] Through the MPRDA, the public trust doctrine is affirmed in the sense that it allows natural resources to be bequeathed to the people of South Africa, whereas the state acts as the custodian.[781] Put otherwise, the state is the exclusive owner of all natural resource rights and has the exclusive authority to grant legal rights to citizens in terms of their prospection and extraction.

At the same time, the state has a corresponding duty attached to this right. In its capacity as custodian, it is responsible for protecting natural resources for the common heritage of humankind and benefit of all South Africans.[782] The Minister has the duty to ensure that all mineral resources are sustainably developed within a framework of national policy, while also ensuring the right to have the environment protected for all South Africans and concurrently complying with the duty of care principle towards the environment.[783] The legal nature of citizens' rights to mineral resources is described in Section 5 of the MPRDA, which holds that rights created in respect of the MPRDA are limited real rights.[784] The Court in Holcim v Prudent Investors[785] acknowledged this standpoint by stating that this right is the same as the common law mineral right. It is submitted that this mining right is a real right which authorises its holder to search for minerals and to extract and exploit them for profit.[786] In terms of the Mining Title Registration Act 16 of 1967,[787] these rights must be registered. The following section looks at the MPRDA provisions pertaining to the South African mining activities.

[778] Chapter 2 (c)(d)(e) of the MPRDA 2008; MO Dale et al, *Mining, Minerals and Explosives Minerals and explosives* (LexisNexis, 2020), 314.
[779] W Du Plessis and H Kloppers, 'Corporate Social Responsibility, Legislative Reforms and Mining in SA' (2008), *Journal of Energy and Natural Resources 26(1)*, 93.
[780] *Ibid, 320: Preamble, Sections 2(a)(b) and 3(2*).
[781] *Ibid, 742.*
[782] *Ibid, 320: Section 3(1)(3).*
[783] *Ibid, 313: Section 24(b); Ibid, 355: Sections 2(4)(a)(i) to (iv) and 28.*
[784] *Ibid, 320: Section 5.*
[785] Holcim v Prudent Investors [2010] ZASCA 109.
[786] PJ Badenhorst, 'The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?' (2017), *South African Law Journal 361,* 134.
[787] *Ibid, 349.*

6.2.3.1. Regulatory Provisions in the MPRDA

These are prospecting rights and reconnaissance permits, as well as mining rights and mining permits.

6.2.3.1.1. Prospecting Rights and Reconnaissance Permission

On the grounds of Section 1 of the MPRDA, in conjunction with Section 17 of the MPRDA, prospecting is the process of searching for a mineral and thereby disturbing the surface or subsurface of the earth, which also includes any area that is in the sea.[788] Prospecting is done to determine the existence of any mineral and to determine its extent and economic value.[789] Minerals prospecting rights procedures are described in Sections 16 to 21 of the MPRDA. The regional manager is responsible for notifying the public about the receipt of an application for prospecting or reconnaissance permission.[790] Such applications are opened up for public comment, while an objection must be referred to the Regional Mining Development and Environmental Committee for advice.[791] The public participation in this process is an important element of procedural justice. It ensures that people's considerations in respect of the proposed mining operation are factored in.[792] It is therefore a crucial element in the system of checks and balances and determinative of representative democracy.[793] It is important to note that while the State Department has a positive obligation to comment on the scoping report, there is no express obligation for the public to participate.[794] In fact, it is only stated that the public is allowed to participate.[795] It follows from the above that participation is not mandatory, nor is the public legally obliged to do so. Hence, it could be reasoned from this point of view that there could be a lack of public participation and consultation at any critical stage in the process. That in turn would entail a risk that the state department would not be informed of any concerns relating to the mining project.[796]

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[788] *Ibid, 320: Section 1.*
[789] *Ibid, 320: Sections 1 and 17.*
[790] *Ibid, 320: Sections 8 and 10(1)(a)*; Regulation 3 of the MPRD Regulations.
[791] *Ibid, 320: 10(1)(b)(2) and 64.*
[792] JK McLean and PJ Carrick, 'Environmental Management and Rehabilitation under the MPRDA' (2007) 14 *SAJELP*, 187.
[793] L Vértesy, 'The Public Participation in the Drafting of Legislation in Hungary' (2016) 14(4) *International Public Administration Review*, 115.
[794] Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829.
[795] *Ibid, 320: Sections 10 and 22.*
[796] *Ibid, 782.*

Under Section 17 of the MPRDA, a prospecting right should be granted when all the requirements are met by the applicant.[797] It should be noted that the requirements regarding prospecting activity are not expected to result in unacceptable pollution, ecological degradation or damage to the environment.[798] This, together with the confirmed financial and technological capacity of the applicant to prospect,[799] must be submitted and accepted by a regional manager of the DMR.[800] Based on regulation 8 of the MPRD Regulations, an annual progress report on prospecting operations should also be submitted to the regional manager.[801] Once granted, a prospecting right must be registered with the Mineral and Petroleum Titles Registration Office within 60 days of becoming effective.[802] The maximum duration of such a right is eight years.[803] In view of Sections 18(2) and 18(3), the Minister must renew a prospecting right if all the requirements have been met,[804] but such renewal may only occur once.[805]

If a prospecting activity is successful, the prospecting right may be converted into a full exploiting mining right.[806] Under Section 16(4), an unsuccessful applicant for a prospecting right must be provided with written reasons explaining the refusal of the application.[807] Additionally, an application should be rejected if it is found that it will end in an exclusionary act, trigger unfair competition, or lead the applicant to have a concentration of minerals under its sole control.[808]

The Minister may issue a non-transferrable retention permit for a prospecting right if certain requirements have been complied with.[809] These requirements comprise the occurrence of a probably mineable mineral in the retention area.[810] The retention permit puts on hold the conditions of the prospecting right and may not be granted for longer

[797] *Ibid, 320: Section 17; Regulation 4 of the MPRD Regulations.*
[798] *Ibid, 320: Section 17(1)(c).*
[799] *Ibid, 320: Section 17(1)(a).*
[800] *Ibid, 320: Section 17(5).*
[801] Regulation 8 of the MPRD Regulations.
[802] *Ibid, 320: Section 19 (2)(a).*
[803] *Ibid, 320: Sections 17(6) and 18(4).*
[804] *Ibid, 320: Section 18(2)(3).*
[805] *Ibid, 320: Section 18(4);* Regulation 9 of the MPRD Regulations.
[806] *Ibid, 320: Section 19(1)(b)*.
[807] *Ibid, 320: Section 16(4)*; Section 5 of the Promotion of the Administration of Justice Act 3 of 2000 (PAJA); Section 33 of the Constitution regarding fair administrative action.
[808] *Ibid, 320: Section 17(1)(2)*.
[809] *Ibid, 320: Section 36*; Regulations 16 and 17 of the MPRD Regulations.
[810] *Ibid, 320: Section 32(1)(c).*

than three years.[811] It is renewable for a further one-off period of no more than two years.[812] Additionally, Sections 13-15 of the MPRDA set out the conditions for issuing a reconnaissance licence or permit for mineral exploration.[813] In light of these provisions, a reconnaissance licence should be granted if no other person holds a right or permit for the same mineral or land,[814] the requirements of adequate financial and technical ability have been proven,[815] expenditure is proportional to the programme, and the applicant further complies with all the other provisions of the MPRDA.[816] A reconnaissance permit does not confer on the holder an exclusive right to apply for a prospecting right or a mining right.[817] The holder of such a permit is compelled to keep and store records of activities and to submit progress reports to the regional manager.[818]

As previously noted, the MPRDA provisions pertaining to prospecting and reconnaissance permits are currently applicable to the prospection for ores. It is important to note that the MPRDA authorises any person or entity to search for any ore in South Africa. If it is believed to be financially feasible, such person or entity can apply for a prospecting right and then apply for a mining right.

6.2.3.1.2. Mining Right and Mining Permit

In terms of the MPRDA, the Minister in charge of mineral resources must grant a mining right to a prospector should the latter comply with the requirements. In the same disposition, the applicant should have successfully conducted mining prospection,[819] conformed with the Mining Charter provisos,[820] demonstrated that the financial and technical capacity has been proven,[821] and submitted an approved technical and economic plan, together with an employment and social plan.[822] It is prohibited to commence mineral activities prior to being granted a mining right or a mining permit.[823] The regional manager must inform the public about the receipt of a mining permit

[811] *Ibid, 320: Section 32(4).*
[812] *Ibid, 320: Section 34(3).*
[813] *Ibid, 320: Sections 13;14 and 15.*
[814] *Ibid, 320: Section 13(2)(b).*
[815] *Ibid, 320: Section 14(1)(a).*
[816] *Ibid, 320: Section 14(1)(b)(c).*
[817] *Ibid, 320: Section 15(2)(b).*
[818] *Ibid, 320: Section 21(1).*
[819] *Ibid, 320: Section 23(1)(a).*
[820] *Ibid, 320: Section 23(1)(f).*
[821] *Ibid, 320: Section 23(1)(*b).
[822] *Ibid, 320: Section 23(1)(c)(d)(e).*
[823] *Ibid, 320: Section 4(b) of the MPRDA 2008*; Regulation 10 of the MPRD Regulations.

application.[824] If there are any objections, they should be raised with the Regional Mining Development and Environmental Committee for consideration.[825]

The mining right must be registered at the Mineral and Petroleum Registrations Office by the holder within 60 days.[826] Once registered, the right comes into force for a maximum period of 30 years and is renewable by increments of 30 years afterwards, until the end of the mine's economic life.[827] When the requirements of Section 23(1) of the MPRDA have been fulfilled, the Minister must renew mining rights for the life of the mine.[828] Analysis of mining licensing indicates that these requirements mainly relate to those of best extraction of minerals, satisfactory financial resources of the license holder and the provision of, and compliance with, social and labour plans. Most importantly, Section 23(1)(d) holds that the mining operation should not result in "unacceptable pollution, ecological degradation or damage to the environment". Nonetheless, the concept of "unacceptable" is unquantified and unclarified in this context. Thus, its understanding needs to be drawn from the baseline environment description proffered in the EIA.[829] An EIA for mining activities is therefore of fundamental significance for ensuring that possible adverse effects triggered by the operation are predicted and adequately addressed beforehand the commencement of the project.[830]

The mining rights and permits holder has the duty to keep and record all information about mining activities as well as all financial information concerning these activities at the registered office of the business.[831] Section's 28(2) provisions establish that monthly submissions of this information should be provided to the director-general, including the yearly financial reports to prove liquidity and compliance reports for all the required plans that were submitted.[832] This serves as a system to monitor and enforce compliance with the requirements. Arguably, however, it could be held that the one-sided submission of information without any method of verification may not be enough to evaluate whether the rights-holder complies with the provisions.

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[824] *Ibid, 320: Section 10(1)(a).*
[825] *Ibid, 320: Section 10(1)(b).*
[826] Ibid, 320*: Section 25(2)(a).*
[827] *Ibid, 320: Sections 23(6) and 24(4).*
[828] *Ibid, 320: Section 24(3).*
[829] *Ibid, 320: Section 39(3)(a)*; Regulation 50(a) of the EIA Regulations.
[830] Alan Boyle and Catherine Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn) (Oxford University Press, 2021), 164-165.
[831] *Ibid, 320: Section 28(1).*
[832] *Ibid, 320: Section 28(2).*

All holders of prospecting and mining rights should make financial provisions to mitigate and repair any environmental degradation and pollution that result from prospecting and mining operations.[833] Section 41 of the MPRDA was revoked and replaced with Section 24P of the NEMA with effect from 2 September 2014. Section 24P of the NEMA read in combination with the Financial Provisioning Regulations[834] indicates that the mining right holder must conduct an annual evaluation of their environmental responsibilities. At her/his own discretion, the Minister may upgrade the prerequisite financial provision to effectively ensure that the requisite means to remedy any environmental damage will be accessible. The financial provision or parts thereof may be used by the Minister to restore the environment should the holder of the right fail to do so.[835] The stipulation regarding financial provision engagement to fully implement the requirements of the EMP after mine closure is an important measure imposed by the state to ensure the sustainable closure and rehabilitation of a mine as well as the environmental right to a healthy environment for South Africans.[836] As stated in Section 47 of the MPRDA, the Minister may revoke or suspend prospecting and mining rights if the right holder infringes any provision of the MPRDA.[837] The Minister must provide written reasons as well as remedial measures to rectify the contravention.[838] Such a suspension may be lifted if it is found that the right holder has acted in conformity with a given directive or compelling reasons are given for the upliftment.[839] In conformity with Section 47, a right, permit or licence will lapse if it is abandoned or expires, if the holder becomes insolvent, or if it is cancelled by the Minister.[840]

Pursuant to Section 26 of the MPRDA, the DMR may induce the public to promote mineral beneficiation.[841] If so, the Minister in charge of resources in agreement with the Minister of Trade and Industry will come up with these inducements should it be contended that a mineral could be economically advantageous.[842] The granting of the

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[833] *Ibid, 355: Section 24P (1).*

[834] GN 1147 in GG 39425 of 20 November 2015 Financial Provision Regulations.

[835] *Ibid, 355: Section 24P (2).*

[836] Dixon Dixon C, 'Mine Closure from a Legal Perspective: Do the Provisions of the New Mineral and Petroleum Resources Development Act and Draft Regulations Make Closure Legally Attainable?' (2003), *The Journal of The South African Institute of Mining and Metallurgy, (2003)* 483.

[837] *Ibid, 320: Section 47(1).*

[838] *Ibid, 320: Section 47(2)(3).*

[839] *Ibid, 320: Section 47(5).*

[840] *Ibid, 320: Section 56.*

[841] *Ibid, 320: Section 26(1).*

[842] *Ibid, 320: Section 26(2).*

aforementioned prospecting rights to Green Flash Trading 251 (Pty) Ltd (GFT 251), Green Flash Trading 257 (Pty) Ltd (GFT 257) and Diamond Fields International Ltd (DFI Ltd) in 2012 and 2014[843] could justify the DMR's idea that the prospecting for and eventual mining of minerals was economically beneficial for South Africa.

All applications and all mining operations in an indicated zone may also be prohibited or restricted by the DMR if this is in the national interest and beneficial for the sustainable development of South Africa's resources.[844] This is referred to as a moratorium. The applicability of Section 49 of the MPRDA will relate to whether the prohibition of any type of mining project will be in the national interest and whether it will be beneficial for sustainable development. Section 49 itself does not elaborate on what is specifically defined as being in the national interest and what is beneficial for sustainable development. Thus, the extent to which the environmental protection of the mining zone is desirable and what the consequences of environmental damage would be for South African citizens would appear to be answerless. This question triggers a discussion of the most pertinent regulatory aspects of mining permits and licences. As regards environmental protection, the MPRDA imposes a duty on the right holder to restore the mining environment and to ensure financial provision to remedy any undesirable impacts that the mining activities may have had on the environment.

6.2.4. Environmental Management in terms of the MPRDA and the NEMA

Prior to its amendment, the 2002 MPRDA had several provisions in respect of environmental protection. These stipulations however were found to be inadequate and were a replica of requirements documented in the NEMA.[845] Hence, the environmental management framework of the mining sector was revised. The amendment of the MPRDA and the NEMA gave effect to the One Environment System (OES).[846] OES came into effect on 8 December 2014 and governs all environment-related aspects of mining through the NEMA. It abolishes all the environmental-related provisions in the MPRDA. Its primary aim was to substitute the previously disintegrated, contradictory and ineffective fragmented system with a regulatory system to manage environmental

[843] Chapter 1 para 1.3 for the discussion on these prospecting rights.
[844] *Ibid, 320: Section 49.*
[845] *Ibid, 782.*
[846] T. Humby, 'One Environmental System': Aligning the Laws on the Environmental Management of Mining in South Africa' (2015) 33, *Journal of Energy & Natural Resources Law,* 110.

damage.[847] OES is a clear endeavour to remedy the disintegration which subsisted in the multitude of reproduced requirements of environmental and administrative obligations that applicants had to comply with in terms of both the MPRDA and the NEMA.[848] As result, all EA provisions in the MPRDA were rescinded and the EA provisions of the NEMA became applicable to the mining industry.

In accordance with Sections 38A(1) of the MPRDA and 50A(c) of the NEMA, an EIA as per Chapter 5 of the NEMA must be conducted to determine the possible impacts of a proposed activity.[849] The applicant must then comply with the requirements provided by the EIA.[850] Likewise, the holder of such a right is obligated to submit an annual report regarding the scope of compliance with the above-mentioned requirements.[851] The applicant is compelled to consult with interested and affected parties in the prescribed manner and to record the results of the consultations in the environmental reports.[852] Moreover, the NEMA makes arrangements for the appointment of environmental mineral-resource inspectors specifically for the mining sector.[853] It also grants the Director of Mineral Resources the power to issue a directive under Section 28 of the NEMA, covering the duty of care and remediation of environmental damage.[854]

Section 37 of the MPRDA explicitly states that the Section 2 environmental management principles of the NEMA apply to all prospecting and mining operations in South Africa.[855] It specifies that these principles should be applied as guidelines for the administration and implementation of regulatory provisions for all mining-related activities.[856] That said, the objectives identified in Chapter 2 of the MPRDA, together with the application of the environmental protection principles and provisions set out in the NEMA, should constitute a basic foundation for the environmental protection of mining-related areas. The National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) creates protected areas and nature reserves for the conservation of

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[847] *Ibid, 836.*
[848] Kotzé, *Environmental Governance,* Improving unsustainable environmental governance in South Africa: the case for holistic governance (2006)103, 125.
[849] Discussion in para 4.3.2 on integrated environmental management in the NEMA.
[850] *Ibid, 320: Sections 22(4)(a) and 25(2)(e).*
[851] *Ibid, 320: Section 25(2)(h).*
[852] *Ibid, 320: Section 22 as amended.*
[853] *Ibid, 355: Section 31BB and (2A).*
[854] *Ibid, 355: Sections 10(a) and 24.*
[855] *Ibid, 320: Section 37(a) of the MPRDA; Para 3.3.2.1* for discussion on the NEMA principles.
[856] *Ibid, 320: Section 37(b).*

ecologically viable areas to represent South Africa's biological diversity on land and sea. Section 48(1) of the NEMPAA states that no person may conduct any mining-related activities in an identified nature reserve or in a protected area without the written permission of the Minister.[857] The Minister may however – in consultation with an applicable cabinet member – prescribe conditions under which such mining activities may proceed, whilst taking into consideration the impacts on the environment concerned and the interests of local communities.[858] Under Section 48(4) of the NEMPAA, the Minister must consider all the environmental management principles provided for by Section 2 of the NEMA.

It is worth noting that other various laws have been enacted and work together with the MPRDA, the NEMA and the Constitution to regulate specific mining-related activities. These are the Environmental Waste Management Act 2008 (NEMWA), the Mining Titles Registration Act 1967, the National Heritage Resources Act 1999 (NHRA), the Interim Protection of Informal Land Rights Act 1996, the Extension of Security of Tenure Act 1997, the Mine Health and Safety Act 1996 (MHSA), the Mineral and Petroleum Resources Royalty Act 2008 (MPRRA), the National Water Act 1998 (NWA), the National Environmental Management: Air Quality Act 2004 (NEMAQA), the National Environment: Protected Areas Act 2003 (NEMPAA), the National Environmental Management: Biodiversity Act 2003 (NEMBA) (and the relevant provincial conservation ordinances and statutes), and the Labour Relations Act 1995, among others.

6.3. The DR Congolese Mining Regulatory Regime

According to Article 44 read together with Article 125 of the 2006 Constitution, the Democratic Republic of Congo (DRC) has the permanent right of inalienable sovereignty over all national wealth and natural resources, which are fundamental elements of the country's development. The state's natural resources are for the enjoyment of all Congolese people, and the state has the right to ensure that these resources are shared equally.[859] Furthermore, the current land tenure system in the DRC follows the 1973 law which gives complete power to the state as owner of the land,[860] and the State may

[857] Section 48(1)(a)(b) of the NEMPAA 2008. Sections 48(1) of the NEMPAA 2003.
[858] Section 48(3)(4) of the NEMPAA 2003; Para 4.3.1 on the Section 2 NEMA principles.
[859] Articles 44 and 125 of the Constitution of the DRC 2006.
[860] The Land Law No. 73-021 of 20 July 1973.

allocate it for conservation, real estate development, construction in an urbanisation programme or availability for public or private investors.

The DRC's mining industry is mainly governed by the Mining Code and the Mining Regulations that draw their legality from the 2006 Constitution. The Mining Regulations provide the implementing measures of the Mining Code. This principal legislation includes environmental standards pertinent to the mining industry. The DRC's mining legislation is a set of norms of general application throughout the country. The Mining Code and Regulations regulate and manage the prospecting, exploration, exploitation, processing, transportation, and sale of mineral substances, and extend to the artisanal exploitation and sale of minerals. Artisanal mining zones are yet to be established, but once this is done this will probably lead to conflict between artisans operating in concession areas that industrial companies wish to develop (and for which they hold the mineral rights).[861] This section mainly focuses on the Land Law and the Mining Code's procedural aspects pertaining to the mining licensing procedures in the DRC.

6.3.1. Land Regime

As a civil law-based state, the DRC's legal system is monist. Put differently, the international treaties ratified by the DRC form part of the national legal system. The DRC Constitution asserts the principle of non-discrimination and acknowledges the supremacy of international treaties and agreements over national laws. While the legal framework inherited from the colonial time divests local communities of their collective, customary, or other modes of land ownership, it does acknowledge the primacy of access and usage rights. Colonial and post-colonial laws deprived communities and indigenous peoples of their customary rights, and the present legal frameworks were designed to protect the interests and property rights of the government, foreign companies and investments.[862]

Although traditional practices and customs remain widespread in the country, the evolution of land tenure involves the lack of any formal recognition of communities' customary property rights to the forest lands that they have occupied and used for

[861] NPR, https://www.npr.org/programs/fresh-air/2023/02/01/1153372238/fresh-air-for-feb-1-2023-cobalt-mining-leads-to-modern-day-slavery-in-the-congo. Accessed 15 April 2024.

[862] S. Mugangu S, *Customary Land Tenure in the Democratic Republic of Congo: Status and Prospects for Legislative Reform:* in Corriveau-Bourque A and others Baseline Study on Land Tenure in the Democratic Republic of Congo (Rights and Resources Initiative 2019) 94.

generations. Whilst local communities and indigenous peoples' *de facto* customary ownership continued to apply without interruption, statutory law conversely denied peoples formal legal title to their traditional lands. Hence, the state came to exercise *de jure* control over the land and forests.[863] This resulted in most rural land being continuously subject to the state's *de jure* control, supplanting customary law. This situation of legal and institutional dualism epitomises a strong contradiction between the legal and the legitimate, the norm and the practice in land appropriation mechanisms.[864]

Under the Forest Code 2002, the Community Forest Decree 2014 and the Regulatory Framework 2016, indigenous peoples and local communities have the right to claim legal recognition of their customary and ancestral forest land in the form of a community forest title. The granting of the rights to their customary forests implies that communities are likely to repossess their lands, with a recognised management role. As such, they may exploit their forests according to their customs and manage them according to their chosen model and customary laws and traditions, provided these are not contrary to existing laws and regulations.[865] Community Forest concessions are granted upon community request, free of charge and in perpetuity. Once communities are granted community forest concessions, they are entitled to manage and use the forest and its resources according to defined limits.[866] However, community forest "titles" are not titles of land ownership; it is a mechanism through which a community can establish or provide some protection against mining activities, once it has acquired a concession, but the level of protection is not as strong as if the communities had owned the land.[867] Community forest holds some promise as an alternative way to protected customary tenure rights and community development. However, there are still major gaps between community forest in theory and in practice. For example, the transfer of forest management authority from state to communities is limited, while local control over

[863] Sections 13 and 215 of the Law of 18 February 2006 as amended by Law No. 11/002 of 20 January 2011.

[864] L Koné, *Garantir les Droits Fonciers Coutumiers en République Démocratique du Congo*: Guide Pratique à l'Intention des Acteurs Impliqués dans le Processus de la Réforme Foncière [Ensuring Customary Land Rights in the Democratic Republic of the Congo: Practical Guide for Stakeholders Involved in the Land Reform Process] (Forest Peoples Programme 2017).

[865] The Forest Code 2002; Community Forest Decree 2014 (Decree No. 14/018 of 02 August 2014); Forest Regulatory framework 2016.

[866] Decree No. 14/018 of 02 August 2014.

[867] *Ibid.*

forest management is subjected to strict regulations concerning the adoption of management plans.[868]

Notwithstanding official recognition of state ownership over lands, forests, soil and subsurface, some specific land rights are developed from the customary occupation of the land. The legal framework provides for various applicable regulations on access and usage rights. Land rights are attached to customary occupation. This constitutional recognition is reflected in Sections 34, 56 and 57 of the Constitution 2006, as reproduced in Articles 22 and 112 of the Forest Code 2002, as well as in Sections 387, 388 and 389 of the Land Law.[869] Section 389 of the Land Law provides that the rights of rural communities to use their land will be regulated under a Presidential Ordinance.[870] The Land Law was revised in 1980, but the ordinance has never been ready since – an omission which is still to be addressed. The enactment of the Indigenous Peoples' Rights Law in 2002 serves as a reminder of the principle that land rights come from the traditional occupation and use of land. Equally, it evokes the rights of the state to the land and the subsurface, something which creates vagueness in the legal framework.[871] The 2002 Indigenous Peoples' Rights Law forbids the displacement or relocation of indigenous peoples without their free prior informed consent. It also sets out provisions on compensation in the case of relocation and the right to return, but the status of indigenous land is left open to interpretation.[872]

Overall, one could argue that the DRC's land legislation does not clearly address the issue of safeguarding the customary land rights of local communities and indigenous peoples. Likewise, the legal regime applicable to the mining industry does not address this issue either. As yet there is no clear and objective explanation to justify the rationale behind this repeated omission.

6.3.2. Mining Regime

In the DRC, mining is in the Constitution and in the Mining Code. Under Section 9 of the 2006 Constitution, as revised in 2011, the state is vested with permanent sovereignty

[868] Decree No. 14/018 of 02 August 2014.
[869] Sections 34, 56 and 57 of the Constitution 2005; *Ibid, 855: Articles 22 and 112*; Sections 387, 388 and 389 of the Land Law 1973.
[870] Section 389 of the Land Law 1973.
[871] *Ibid, 855.*
[872] *Ibid, 855.*

over its soil, sub-surface, waters, forests, air space, rivers, lakes, territorial sea, and continental shelf.[873] This unavoidably implies that the Congolese state exercises permanent sovereignty over its mineral resources. Article 58 of the Constitution grants the people the right to enjoy their national wealth and assigns the state the corresponding duty to distribute it equitably and guarantee the right to development.[874] Concomitantly, the most important piece of legislation on mining is undoubtedly the Mining Code 2002, as amended in 2018. The Code declares that the principal role of the state is to "promote and regulate the development of the mining industry by the private sector.'[875] The 2003 Mining Regulations complement the Code by providing for the Code's implementation. In view of the above, the Mining Code may be regarded as the national legislation governing the mining industry in the DRC. It is complemented by Decree No. 2003/038 of 26 March 2003, relating to mining regulations, revised, and complemented by Decree No. 18/024 of 8 June 2018.[876]

Other laws regulating the mining industry are the Land Law,[877] the Forest Code[878] and the Environmental Protection Law.[879] As noted in Article 9 of the Constitution and Article 3 of the Mining Code, underground minerals are the state's exclusive property,[880] enabling the state to grant the right to private actors to explore and exploit mineral resources through conferring mining titles.[881] In essence, land rights holders (including customary rights holders) cannot claim ownership rights over underground minerals. However, the holders of mining rights or exploitation quarries acquire ownership of the marketable products by virtue of their right. Ownership of mineral deposits creates a real estate right different and independent from the rights arising from a land concession. The land concessionaire cannot use their title to claim any ownership right over the mineral deposits, including groundwater and geothermal deposits integrated in the concession.[882]

[873] *Ibid, 313: Section 9.*
[874] *Ibid, 313: Article 58.*
[875] *Ibid, 453: Section 33.*
[876] Land Law 1973; Decree No. 2003/038 of 26 March 2003; Decree No. 18/024 of 8 June 2018.
[877] Law n° 11/2002 of 29 August 2002.
[878] Law n° 11/009 on 9 July 2011.
[879] Environmental Protection Law 2011.
[880] *Ibid, 313; Article 9; Ibid, 453: Article 3.*
[881] Ibid, *453: Article 3.*
[882] *Ibid.*

6.3.2.1. Innovations Introduced by the 2018 Amended Mining Code

In March 2018, the Mining Code was adjusted to balance mining revenues in favour of the state. The main amendments involve the conditions for the transfer of mining rights, royalties, and taxes, local development, and transparency. These modifications address common issues in mining laws and regulations, namely the acquisition of mining rights, ownership requirements and restrictions, processing, transfer and encumbrance, environmental aspects, native title and land rights.[883] By way of contrast with the 2002 Mining Code, the amended Mining Code increases royalties on minerals and repeals the clause of stability which protected mining companies from changes to the tax and customs regime for ten years. Permits may only be obtained by legal entities, not individuals. Mining royalty rates have been set at 3.5 per cent of gross revenues for non-ferrous and base metals, including copper, and at 10 per cent for strategic substances.[884]

The 2002 Mining Act referred only to Environmental Impact Assessment (EIA),[885] while the amended Mining Code integrates the concept of Environmental and Social Impact Assessment (ESIA).[886] The preamble of the 2018 Mining Act recalls the absence of a standard set of specifications describing the socio-environmental responsibilities of mining companies to local communities, in addition to the need for readjusting state royalties. It also refers to the need for the relevant elements of social and environmental responsibility to be elucidated by mining companies to the communities affected by their projects, and subsequently puts in place the local community benefits agreement, which is meant to lay out mining companies' contributions towards affected local communities. It also sets up an arrangement to fulfil social responsibility commitments to local communities, encompassing the transfer of funds from mining royalties from the national level to regional and local levels.[887] Direct payments to subnational authorities also aim to resolve the central government's effective dearth of redistribution of mining royalties to local authorities as provided for in the 2002 Mining Code. While periodic lump-sum payments were made prior to the reform under this provision, they have to date been irregular.[888]

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[883] OECD 2019.
[884] *Ibid,873.*
[885] *Ibid, 453: Section 1.*
[886] *Ibid.*
[887] *Ibid, 453: Article 42.*
[888] *Ibid, 873.*

In terms of Section 285(g) of the Mining Code, mining companies must set up a fund for community development projects. The fund must amount to a minimum of 0.3 per cent of the company's annual turnover.[889] It must be managed by a legal entity comprised of representatives of the local community, the company, and the local government. No further representational requirements are specified. Concomitantly, companies are required to agree with the local community on commitments to implement community development projects. These commitments should be overseen by a local development committee and a local monitoring committee. However, the provision does not specify the composition of these committees. The costs of implementing such commitments are to be covered separately by the company's corporate social responsibility budget, and not by the 0.3 per cent annual turnover fund. A series of transparency measures requiring the publication of contracts, information on beneficial owners and politically exposed persons, and production and export statistics are also envisaged as part of forthcoming secondary legislation.[890] The Mining Regulation will define the legal nature of the entity responsible for managing the fund, the number of members of each community, and the modalities of their cooperation and control by the Department of Mining and that of Social Affairs.[891]

Against these innovations however, it is noted that despite the constitutional principle of non-discrimination, indigenous peoples living in the mining areas continue to face discrimination, as they do not hold land chieftainship over the mining concessions legally held by private holders. This lack of recognition weakens their titles or rights to the land and their participation in decision-making processes relating to their traditional lands, and hence diminishing their wider land rights. Furthermore, some other criticisms have been levelled against the mining legislation, including problems regarding the implementation of the Code, the increase of taxes for companies mining strategic minerals like cobalt, and the creation and introduction of a 50% tax on excess profits.[892] The Code also tightened restrictions on keeping export proceeds abroad and introduced a local ownership requirement.[893] Criticism has been directed against the new environmental impact of mining practices. These practices have caused significant environmental problems and neglected human rights considerations in favour of

[889] *Ibid, 453: Article 285(g).*
[890] *Ibid, 878.*
[891] *Ibid, 453: Article 285 bis.*
[892] *Ibid, 453: Article 241*; Article 524bis of the Decree of 17 April 2013.
[893] *Ibid, 453: Article 264.*

expansion of mining, leading to forced evictions, sexual assault, arson, and beatings. Health issues have also been pointed out due to illegal cobalt mining that has led to serious health issues for local workers who inhale high levels of cobalt. The reform has been criticised as being less than successful.

6.3.2.2. The 2018 Mining Code vs Indigenous Peoples' and Local Communities' Rights

Amendments brought into the 2002 Mining Act in 2018 were primarily focused on revitalising private investment in the mining sector, mining revenues and tax rates, as well as tendering procedures for the granting of mining rights. The 2002 Mining Act was mainly criticised by the DRC Government concerning issues such as the ten-year legal and fiscal stabilisation clause, the low level of free state participation in mining companies and the lack of transparency.[894] Therefore, its amendments aimed to rebalance revenue disparities between the state and investors so as to remedy the alleged revenue insufficiency in the state's mining sector, and to fill the gaps and address the weaknesses in the previous mining laws. The aim is to establish a more competitive, faster, and transparent mining framework. However, the rights of indigenous peoples and local communities potentially affected by mining activities and other environmental and social issues were not properly addressed. For example, Article 109 of the Mining Code establishes the creation of artisanal mining zones by the Head of the Mining Department, but does not take into account the needs and interests of local communities that depend on the natural resources of their customary lands.[895] This provision could have created an opportunity to formalise communities' direct access to alternative sources of income through sustainable artisanal exploitation in the same way as the regulations on community forestry. The creation of the artisanal zone of exploitation by the Community Forest Decree for cooperative or community benefit serves to safeguard customary lands and thus protects indigenous communities from mining titles that could illegally deprive them of their lands.

[894] Simmons & Simmons 2018. Available at: https://www.simmons-simmons.com/en/publications/ck0axnd39nq2s0b85x7eqddo3/160318-new-mining-law-for-democratic-republic-of-congo-4fr1ca (Accessed: 15 April 2024).
[895] *Ibid, 453: Article 109.*

6.3.3. Environmental Protection Law

Article 53 of the 2006 Constitution, as amended in 2011, states that "everyone has the right to a healthy environment conducive to their full development. They have a duty to defend it. The State shall ensure the protection of the environment and the health of the population."[896] This provision sets out a cross-sector policy aimed at ensuring that any sectoral investments stemming from the implementation of mining rights promote social and environmental sustainability. Under the 2012 Environmental Protection Law, environmental impact assessments are important instruments for that purpose. The specific investments conducted for the EIA involve identifying impacts and mitigation measures at the micro-level scale defined by the frontiers of that investment. A macro-level overview of environmental impacts is also necessary, particularly where a landscape approach, integrated planning and zoning of resources are promoted.[897] Arguably, it might be held that conducting a strategic environmental assessment can offer the DRC an opportunity to better align development needs and set up structures to manage adverse impacts. It is also necessary in terms of keeping a tab on how investments in land use are carried out - something which enforces the government's pursuit of climate-smart development and emissions reduction.

6.3.4. Environmental and Social Impact Assessment

Section 1 of the Mining Code provides that Environmental and Social Impact Assessment (ESIA) is a "systematic process of identification, prediction, evaluation and reduction of physical, ecological, aesthetic and social effects prior to the project of development, work, equipment, installation or establishment of a permanent mining or quarrying operation, or of a processing entity, and making it possible to appreciate the direct or indirect consequences on the environment".[898] Likewise, an Environmental and Social Management Plan is defined as the environmental specifications for the mining project, consisting of a programme for implementing and monitoring the measures envisaged in the ESIA to eradicate, reduce and possibly compensate for the adverse environmental impacts of the mining project.[899]

[896] *Ibid, 313: Article 53.*
[897] The Environmental Law 2012.
[898] *Ibid, 453: Section 1.*
[899] Decree No. 2003/038 of 26 March 2003 as revised by Decree No. 18/024 of 8 June 2018.

Under the Mining Code regime, every mining licence holder should commit to protecting the environment through a mitigation and rehabilitation plan. This plan should be a commitment by the mining licence holder to carry out certain measures to alleviate the detrimental impacts of the mining activities on the environment and to rehabilitate the site of the activity once mining comes to an end.[900] The Environmental Protection Law by way of background promotes mainstreaming environmental and sustainable development issues into all policies and plans and comprises an obligation to approve and implement national measures for climate change mitigation and adaptation and disaster management.[901] It also provides environmental protection and governance principles and necessitates the insertion of environmental and social considerations in decision-making and promotes sustainable development and public participation. In light of Article 21 of the Environmental Protection Law, "all development, infrastructure or exploitation projects – industrial, commercial, agricultural, forestry, mining, telecommunication or other project – likely to have an impact on the environment" must therefore carry out an ESIA.[902] Decree No. 14/019 of 2 August 2014 describes the administrative process that should be carried out and the content of ESIAs, but does not elaborate on the wording of the Law which indicates that "it should include all projects likely to have an impact on the environment".[903]

The Congolese Environment Agency, the National Fund for Promotion and Social Service, in collaboration with the Directorate in charge of the protection of the mining environment and, where appropriate, any other related-state body are responsible for undertaking the ESIA process.[904] However, the environmental regulatory framework does not set down any practical information on specific consultation guidelines, and neither does it provide details apropos the specific rights of indigenous peoples and local communities. There is no provision in the legal framework which requires the state or private companies to take all compulsory measures to protect indigenous peoples' land and natural resources following an ESIA.

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[900] *Ibid, 453: Section 1*.
[901] M R Virgiawan and J Pitulima, Green Mining: Technical Study of Offshore Tin Mining Using Cutter Suction Dredger in Bangka Island, Indonesia, (IOP Conference Series: Earth and Environmental Science, 2020).
[902] Article 21 of the Environmental Protection Law 2012.
[903] Decree No. 14/019 of 2 August 2014.
[904] *Ibid, 453: Section 42.*

6.3.5. Absence of Consultation and Free Prior Informed Consent (FPIC)

In terms of scope and process, including "meaningful consultation with potentially affected groups and other relevant stakeholders," the provisions on public consultation are not based on internationally recognised human rights standards. Based on Article 33 of the Mining Code, the granting of the mining rights and quarrying titles is subject to a tendering procedure that must be completed within nine months of the finalisation of the deposit to be tendered. It should be carried out in compliance with the procedure laid down by Congolese legislation on public procurement, generally acknowledged by international mining practice.[905] According to Law No. 10/10 of 27 April 2010 on Public Procurement, the tendering process is used by way of exception when required by the public interest.[906] Put differently, in most cases, mining rights can be granted on a discretionary basis by the competent authorities. Since the application for mining or quarrying rights does not include a need for prior consultation with communities or FPIC, there is no specific possibility for a community to rebuff a project which they may not want. Also, there is no indication of any prior baseline studies such as pre-existing customary rights, socioeconomic studies, multi-resource inventories, potential environmental impact, or impact on local communities.

The Mining Code does not clearly expand on the right of indigenous and local communities to express their opinion on the granting of mining rights or exploration licenses. Local communities are deprived of the opportunity to express their views during the mining permit application process. As a result, some communities have lost their lands in favour of private companies that hold mining concessions acquired from mining authorities in the absence of any public consultation.[907] However, it is worth noting that the enactment of Law No. 22/030 of 15 July 2022,[908] which ensures the rights of indigenous peoples, has brought in a positive development through trying to bridge the gap left by the absence of an explicit FPIC guaranteed in the Mining Code. Pursuant to Article 42 of Law No. 22/030 of 15 July 2022 on the protection and promotion of the rights of indigenous Pygmy peoples, indigenous peoples are given the opportunity to air their opinion about any project that may affect the lands and natural resources they

[905] *Ibid, 453: Section 33.*
[906] The Law No. 10/10 of 27 April 2010 on Public Procurement; *Ibid, 453: Section 35*.
[907] Mpoyi, Forest management system in the DRC: an evolutionary account and contemporary challenges (2019). Available at: https://www.oipr.net/public/storage/publications/1674645587.pdf (Accessed: 27 April 2024).
[908] Law No. 22/030 of 15 July 2022.

traditionally own, occupy or use.[909] Despite the state's proprietorship rights, indigenous peoples have the right to the lands and natural resources that they own, occupy or use, in accordance with the applicable law.[910] So, no relocation or resettlement can take place without FPIC.[911] An earlier draft of the text states that "prior consultation with a view to obtaining consent for any project directly or indirectly affecting the life of indigenous peoples, and appropriate mechanisms for consultation which take account of their customs, before any elaboration or implementation of administrative or legislative measures must be undertaken".[912] These provisions have been changed to an "involvement" of indigenous peoples in the elaboration and implementation of projects affecting them directly or indirectly. The word involvement in the new legislation does not have the same scope or legal weight as the legislative and administrative measures "consultation" suggested in the previous draft of the law,[913] as it restrains the people from voicing their views about the mining activities that may have detrimental effects on their environment.

Also, the tendering procedure of the Mining Code and the Environmental Protection Law does not sufficiently require consultation. Section 33 of the Mining Code for example states that under the tendering procedure and in the case of an invitation to tender, the Minister will consult the Provincial Minister in charge of the Mines and the local community concerned, within the framework of a Consultation Commission, before the quarrying concessions are put out to tender.[914] Conversely, the Environmental Protection Act holds that any project or activity likely to have an impact on the environment must be subject to a prior public enquiry.[915] The public enquiry's objectives are: a) to inform the public in general and the local population in particular about the project or activity; b) to gather information on the nature and extent of any rights that third parties may have in the area affected by the project or activity; and c) to collect opinions, suggestions and counter-proposals, in order to provide the competent authority with all the information

[909] Article 42 of Law no. 22/030 of 15 July 2022.
[910] Section 2 of Law no. 22/030 of 15 July 2022.
[911] Articles 42-48 of Law no. 22/030 of 15 July 2022.
[912] *Ibid, 901.*
[913] Institute for Human Rights and Business, 'What is Free, Prior and Informed Consent (FPIC)?' (*IHRB,* 13 December 2022). Available at https://www.ihrb.org/explainers/what-is-free-prior-and-informed-consent-fpic> (Accessed: 11 October 2024).
[914] *Ibid, 453: Section 33.*
[915] *Ibid, 313: Section 24*; Law no. 22/030 of 15 July 2022.

necessary for its decision.[916] However, as evident in both laws, public consultation or enquiry is not worded as a must but an option.

6.3.6. Mining Rights Acquisition

The procedure for granting mining and/or quarrying rights is governed by Articles 33 to 49 of the Mining Code as amended and supplemented by Law No. 18/001 of 9 March 2018. Under these stipulations, mining titles are granted either by tender or by an application for rights.[917] In view of Article 33 paras. 1, 2, 3, 4 and 7 of the Mining Code, the government may grant mining rights through a call for tenders as an exceptional procedure.[918] On the other hand, Article 34 para. 1 of the Mining Code stipulates that the granting of rights by means of an application is the ordinary procedure.[919] The ordinary process involves six stages, including the cadastral investigation,[920] the technical investigation,[921] the environmental and social investigation,[922] the decision of the competent authority,[923] and the registration of the right granted in the mining register. The exceptional procedure allows the Minister in charge of Minerals to consult the provincial Minister of Mines and the local community concerned within the framework of a consultation commission, the modalities of which are laid down by regulation.[924] In view of these provisions, it may be argued that the process for granting mining rights to private sector actors fails to comply with relevant international standards regarding FPIC or respect for pre-existing customary land rights. For example, the objective of the cadastral evaluation is not to check whether the area applied for infringes on pre-existing customary rights, but to certify whether it does not encroach on a zone which is the subject of a mining right or a pending application.

6.3.7. Justice and Remedy: Possible Grounds for Challenging Mining Operations

The Mining Code provides grounds for mining rights holders or actors to settle disputes arising from their mining ownerships. Such disputes can be settled through

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[916] *Ibid, 313: Section 24.*
[917] Articles 33 to 49 of the Mining Code as amended and supplemented by Law No. 18/001 of 9 March 2018.
[918] *Ibid, 453: Articles 33 al. 1, 2, 3, 4 and 7.*
[919] *Ibid, 453: Article 34 al. 1.*
[920] *Ibid, 453: Article 40 (1)(3)(4).*
[921] *Ibid, 453: Article 41.*
[922] *Ibid, 453: Article 42.*
[923] *Ibid, 453: Articles 43 (1)(4) and 47.*
[924] *Ibid, 453*: *Article 33 al. 1, 2, 3, 4 and 7.*

administrative recourse or appeal, judicial recourse and national or international arbitration procedures, depending on the nature of the said dispute.[925] In terms of Articles 258 to 260 of the Decree of 30 July 1888 on contracts or conventional obligations,[926] mining actors can be civilly liable for their activities.

Seen through the lens of the damage incurred by a person as a result of an act (whether voluntary or not), civil liability under Article 258 of the Congolese Civil Code, Book III, entails that the person (or company) responsible for the damage must fully repair damage caused to the victims of their own acts or those of the companies they are responsible for.[927] On this note, civil liability is a right recognised by any person who has been the victim of voluntary or involuntary damage due to an action by another individual. In view of this, local communities affected by the damage caused by a mining licence or activity have legal grounds to challenge, and claim civil liability from, the mining operations responsible for the said damages.

National security, the safety of the population, the incompatibility of mining activities with other existing or planned uses of the soil or subsurface, and the protection of the environment constitute grounds on which the Head of State may withdraw a mining licence or ban mining activities in a given area.[928] In reference to the safety of the population, it is worth noting that the Head of State may, by decree, declare a mineral substance to be a "protected substance" and subject it to special rules.[929] The Mining Regulation also provides for the possibility to interdict mining activities in certain areas, including those protected for reasons of national security, public safety, incompatibility with other existing or planned uses of the soil or subsurface and environmental protection. It also specifies protected areas outside the scope of mining operations.[930] In doing so, communities are given the opportunity to secure certain customary areas in relation to community forestry and Community Conserved Territories and Areas

[925] Yav and Associates, Brief on Mining Taxes, Duties and Royalties in the Democratic Republic of Congo (2021). Available at: https://www.legavox.fr/blog/yav-associates/brief-mining-taxes-duties-royalties-33923.htm. (Accessed: 25 April 2024).
[926] Articles 258 to 260 of the Decree of 30 July 1888 on contracts or conventional obligations; *Ibid, 453: Article 285*.
[927] Article 258 of the Congolese Civil Code, Book III.
[928] *Ibid, 453: Section 6*.
[929] *Ibid, 453: Section 7*.
[930] Decree No.2003/038 of March26, 2003 related to Mining Regulations as amended and supplemented by Decree No.18/024 of June 8, 2018.

(ICCAs) in order to protect them from mining operations that could negatively impact their livelihoods or lifestyle.

Upon request by any interested or affected third party, the judge may challenge a legally acquired mining right. On the grounds of illegality, inability of the granting authority, a formal defect or abuse of power on the part of the granting authority, mining rights may be withdrawn with retroactive effect. The third party victim or the public prosecutor may bring a cancellation claim before the administrative court within three months of publication of the permit-granting decision in the Official Gazette or within three months of the day when they learned of its existence.[931] Under section 285 of the Mining Code, titleholders should be compensated in the event of the occupation of their land.[932] In this view, customary landowners have the right to claim compensation for any damage related to mining. Article 285 further states that holders of mining and quarrying rights are liable, even without fault or negligence, for the damage caused by their mining activities to persons, property, and the environment, and must compensate for such damage.[933]

Local communities have the right to exact substantive revenues from mining to contribute to their community development projects. By way of background, Article 285b of the Mining Code states that: "Any holder of a mining right is liable for damage caused to persons, property, and the environment as a result of their mining activities, even in the absence of any fault or negligence. They are obligated to repair them. They can only be exonerated if they prove that the damage occurred due to a cause unrelated to their mining activity."[934] By the same token the mining right holder is accountable for damage to people and the environment by direct or indirect contamination due to mining activities that have an impact on human health and/ or lead to environmental degradation, and result in particular in the pollution of water, soil and the atmosphere, and cause damage to humans, fauna and flora. The holder of the mining and/or quarrying right must compensate for any damage caused by diseases attributable to mining activity.[935] The affected communities may also bring a case against the mining rights holder before the Congolese Environmental Agency or the Environmental Protection Directorate to

[931] *Ibid, 453: Section 27bis and Article 48ter.*
[932] *Ibid, 453: Article 285.*
[933] *Ibid, 453: Article 285.*
[934] *Ibid.*
[935] *Ibid, 453: Article 281.*

establish whether the holder has failed to meet its social obligations.[936] Congolese mining legislation also offers possible avenues for challenging mining issues in the DRC internationally. The mining rights holders may use certain international frameworks, including the Organisation for Economic Cooperation and Development's (OECD) Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones,[937] the OECD Guidelines for Multinational Enterprises and the Voluntary Principles on Security and Human Rights,[938] for relevant guidance.[939] However, some cases have indicated that corporations also use strategies to deter whistle-blowers or land rights defenders from denouncing mining bribe-fuelled transactions,[940] or environmental detrimental effects. This is known as Strategic Lawsuits Against Public Participation (SLAPP).[941] Two whistle-blowers working for a bank in Kinshasa were prosecuted by the Congolese authorities for exposing alleged money laundering involving a mining-right holder and his network.[942]

6.3.8. Artisanal and Small-Scale Mining

Section 109 of the 2018 Mining Code provides for the creation of artisanal mining zones. It provides for situations where the technical and economic factors which characterise certain deposits of mineral substances, classified as mines or quarries, do not allow them to be exploited industrially or semi-industrially, but allow small-scale exploitation.[943] Artisanal mining zones are government-designated areas where artisanal miners are permitted to work. An artisanal mining zone is part of the formalisation process whereby artisanal miners are obligated to work as cooperatives. These can help empower the miners vis-a-vis traders and the government and may increase their revenue share. However, many artisanal miners regard this formalisation as being forced upon them, and

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[936] *Ibid, 453: Article 288.*
[937] OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2016). Available at:https://giaccentre.org/chess_info/uploads/2019/10/OECD.RISKAWARENESSTOOL.WEAKGOVERNANCEZONES.pdf (Accessed: 21 February 2024).
[938] The Voluntary Principles on Security and Human Rights, The Principles. Available at: http://www.voluntaryprinciples.org/principles/introduction. (Accessed 23 Mai 2024).
[939] Shtender-Auerbach, The Voluntary Principles on Security and Human Rights (2010). Available at: https://www.miga.org/sites/default/files/archive/Documents/VPSHR_Toolkit_v3.pdf. Accessed 12 March 2024.
[940] US Department of the Treasury 2017. Available at: https://home.treasury.gov/about/history/prior-secretaries/steven-t-mnuchin-2017-2021. Accessed 17 March 2024.
[941] RAID 2023. The 26th International Symposium on Research in Attacks, Intrusions and Defences (RAID 2023). (Accessed: 17 January 2024).
[942] *Ibid.*
[943] *Ibid, 453: Section 109.*

the cooperatives are often subject to elite capture.[944] In Eastern DRC, a few minerals including coltan, cobalt, tin, tantalum, tungsten, and gold are mainly mined through artisanal and small-scale mining. Such activity provides a crucial source of income for many communities and is a catalyst for economic development. It is however largely informal, highly labour-intensive and characterised by dire occupational, environmental, and social risks.[945]

Artisanal and small-scale mining (ASM) supports and sustains the livelihoods of impoverished populations through natural resource and land-based economic activities such as farming, logging, and mining. Classed as part of the informal economy, it is messy and complex, with activities sometimes classified as illegal but often rooted in customary land and resource governance norms traditionally practised by local communities.[946] While industrial mining is more frequently associated with poverty exacerbation, ASM is said to be associated with poverty reduction.[947] Under the Mining Code, ASM is legal when mining occurs in a specifically assigned geographic zone,[948] and all miners are registered, have a permit and are members of a cooperative.[949] Furthermore, the cooperative should be registered, an ASM should operate within a specifically assigned geographic zone, all taxes and levies must be related to the registration, and the cooperative must also pay an annual flat rate of tax of 10 per cent of the turnover and an operational fee to the competent mining authorities.[950] The specifically assigned geographic zone licence for artisanal mining is granted by the Artisanal and Small-Scale Mining Division. It is not clear how large a share of all artisanal miners is recorded, but it might be expected that most ASM activities are unlawful or at least informal.[951]

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[944] Jorden de Haan and Sara Geenen, Mining cooperatives in Eastern DRC: The Interplay between Historical Power Relations and Formal Institutions (2016). Available at: https://www.sciencedirect.com/science/article/abs/pii/S2214790X1630079X (Accessed: 11 January 2024).

[945] Gender Resource Facility, Advancing Gender Equality in the Scaling Up Minerals Traceability Project. (Final Report, 2016). Available at: https://www.kit.nl/wp-content/uploads/2019/02/Advancing-Gender-Equality-in-the-Scaling-Up-Minerals-Traceability-Project.pdf. (Accessed 21 February 2024).

[946] Xiaoxue Weng, Chinese Trade and Investments in Africa's Natural Resources in the Informal Economy (University of Oxford, 2015).

[947] Gamu et al., The *Extractive Industries and Society* (2015), Volume 2, Issue 1,162-176.

[948] Section 109 of the Mining Code 2018.

[949] Sections 109, 111 and 114bis of the Mining Code 2018.

[950] *Ibid*.

[951] Wingqvist and Quinn, Democratic Republic of Congo: A Rights-based Analysis of Mining Legislation (2021). Available at: https://www.forestpeoples.org/sites/default/files/documents/DRC%20A%20rights-based%20analysis%20of%20mining%20legislation%20FR.pdf (Accessed 23 February 2024).

Broadly speaking, it may be contended that the coexistence of artisanal mining and large-scale industrial mining is a noteworthy feature in the DRC. By way of background, artisanal mining in the DRC is often alluded to as "informal" – a concept relating to non-state actors. This contrasts with the regulatory initiatives in which the definition of conflict-free minerals is based on the difference between legal and illegal behaviour. The line between legal and illegal is still unclear in the DRC mining industry. Government actors are enmeshed in legally ambiguous mining activities, profiting from the illegal exploitation of minerals. Concomitantly, the central government in Kinshasa grants most of the mining concessions to industrial mining companies, making it extremely difficult for artisanal miners to lawfully work in the mining sector.[952] It goes without saying that the system of rural informality is characterised by a number of key factors, including existing legal pluralism, informal land tenure, exclusionary and costly regulations for rural actors, and high economic profits for poverty-stricken communities. It is worth underlining that informality is also regarded as a form of resistance against unfair legislation and ineffective policy interventions.[953] Exclusionary or poorly implemented regulation may be another cause for informality in the rural economy in that government laws and regulations serve to exclude certain players from the formal economy because of the registration costs, burdensome bureaucracy, and corruption.[954]

In the DRC mining sector, legal and policy reform tend to tacitly delegitimise ASM, and the people involved, marginalising them as part of a lawless place which needs to be incorporated into the arena of national development and legal investment, primarily through so-called "formalisation" initiatives. Formalisation processes generally involve the redistribution of resources and economic opportunities and are strongly linked up with various forms of elite capture and marginalisation.[955] It is important to stress that ASM is under strong pressure from businesses and policymakers to formalise. This reluctance could be associated with the fact that artisanal minerals tend to be traded and exported outside of the state systems of regulation and taxation, thus shrinking state

[952] *Ibid, 934.*

[953] Xiaoxue Weng, Chinese trade and investments in Africa's natural resources in the informal economy (University of Oxford, 2015).

[954] James Macgregor, Muyeye Chambwera and Antonia Baker, Informal Economy: Primer for Development Professionals on the Importance of the Informal Economy in Developing Countries (International Institute for Environment and Development, 2012). Available at: www.iied.org. (Accessed 24 April 2024).

[955] Sadia Mohammed Banchirigah, How Have Reforms Fuelled the Expansion of Artisanal Mining? Evidence from Sub-Saharan Africa, Resources Policy 31(3):165-171 31(3):165-171. Available at: DOI:10.1016/j.resourpol.2006.12.001. (Accessed 23 June 2024).

revenue. Attempted reforms towards integrating artisanal miners and small mining companies into the formal economy have had limited success due to the unequal power relationship between rural communities, the elites, and companies.[956]

6.4. Comparative Analysis of the two Jurisdictions and Lessons Learned

6.4.1. Comparative Analysis of the DRC and South Africa Mining Legislations

As shown in tables 6.1 and 6.2 below, a comparative analysis of the DRC and South Africa mining legislations leads to the same principal conclusion, namely the need to consolidate and amend the laws regarding mines and minerals. Based on the objectives of these laws as set out in the explanatory notes on the individual provisions, the legislation may, in both cases, be regarded as encompassing a broad objective, which is then expanded into a laudable set of intentions. There is a gap between intention and impact, arising in many cases from the debatable nature of the underlying assumptions, commonly known in South Africa as the "talk left-walk right" approach. This section provides a comparative analysis of the main mining legislations of both countries drawing on lessons learned from both jurisdictions.

Table 6.1 : Main mining legislative provision framework in South Africa and the DRC

Country	Democratic Rep of the Congo	South Africa
Main mining legislative provision and/or policy framework	Mining Code, 2018 Mining Code, 2002 Decree 038/2003, 26 March 2003 Mining Regulation	MPRDA, 2008 MPRDA, 2002
Amendments of the main mining legislation	2018	2002, 2008, 2013, 2014
Related legislation	DRC Constitution, 2005 as amended. Nature Conservation Law, 1969. Principles of Environmental Protection Law, 2011. General Property Law (Law 73-	South African Constitution, 1996 National Environmental Management Act, 1998 (NEMA) Environmental Waste Management Act, 2008 (NEMWA) Mining Titles Registration Act,

[956] *Ibid.*

	021), as amended. Forest Code, 2002. National Forest Management Policy, 1990.	1967 National Heritage Resources Act, 1999 (NHRA) Interim Protection of Informal Land Rights Act, 1996 Extension of Security of Tenure Act, 1997 Mine Health and Safety Act, 1996 (MHSA) Mineral and Petroleum Resources Royalty Act, 2008 (MPRRA) National Water Act, 1998 (NWA) National Environmental Management: Air Quality Act, 2004 (NEMAQA) National Environment: Protected Areas Act, 2003 (NEMPAA) National Environmental Management: Biodiversity Act, 2003 (NEMBA) (and the relevant provincial conservation ordinances and statutes Labour Relations Act, 1995

Source: Magha-A-Ngimba Charles Gimba 2024.

Table 6.2 : Synopsis understanding of mining licensing practice in South Africa and the DRC.

Legislation	South Africa	Democratic Republic of the Congo
Mining legislation	The MPRDA 2002 as amended in 2008 institutes the State – through the Department of Mineral Resources and Energy - as the custodian but not the owner of the nation's mineral resources.	The Mining Code 2002 as amended in 2018 confers on the State, through the Department of mines, the ownership of the national mineral resources.
Objectives	To: promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa, expand opportunities for historically disadvantaged persons, to benefit from the exploitation of the nation's mineral and petroleum resources, promote economic growth and mineral and petroleum resources development, promote employment and advance the social and economic welfare of all South Africans, provide for security of tenure in respect of prospecting, exploration, mining, and production operations, ensure that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting social and economic	To: Enhance the government's control over the mining sector, further regulate elements related to the social and environmental responsibility of mining corporations, incorporate the latest changes in the Congolese administrative context, for instance, the introduction of the VAT in the Congolese tax regime, address financial and accounting manipulations (such as high interest rates applied by the operator's affiliate companies acting as lenders) used by mining companies to funnel company profits to their foreign shareholders' groups. The Mining Code provides for a 10-year stability guarantee. This stability guarantee provides that rights attached to valid mining rights at the promulgation date of the Act modifying the Mining Code will remain unchanged and vested for a 10-year

	development, ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.	period. This 10-year period starts either from the entry into force of the Act modifying the Mining Code, for mining rights which are valid at that time; or the date a mining right is granted provided it has been granted under a valid research permit that existed at the time of the entry into force of the Act modifying the Mining Code.
Act/Code	The Act is complemented by detailed implementing regulations which clarify the meaning of certain provisions of the law. It: clearly sets the rights related to a mining, exploration, or production right (pursuant to the MPDRA, a prospecting or mining "right" is the dominant form of license in South Africa. A mining "permit" is granted only for small mines with life-of-mine of 2-5 years), and the conditions linked to the exercise of such rights, defines the timescale of rights and terms and conditions of renewals, confers on a prospecting right holder the exclusive right to apply for a mining right on the same land or for the same mineral deposit, specifies that in interpreting any provision of the Act.	The Code is complemented by Decree No. 038/2003 of March 26, 2003, on Mining Regulations as amended and supplemented by Decree No. 18/024 of June 8, 2018 (implementing measures for Law No. 007/2002 on the Mining Code), several ministerial decrees in line with changes in the holders of ministerial cabinets. This is the case of Inter-ministerial Order n°129/CAB.MIN/MINES/01/2017 and n°032/ CAB.MIN/FINANCES/2017 of July 08, 2017, regulating the marketing and export of mining product merchants. Previous mining law: the General Act of the Berlin Conference of February 26, 1885, on the partition of Africa between the powers of the time, the Royal Decree of June 8, 1888 (establishing the public ownership of land), the Decrees of July 22, 1904, regulating the possession and transport of precious substances, of April 20, 1928, defining precious stones, and that of September 27, 1937, relating to the mining management system by the signing of agreements with

		chartered companies. Ordinance-law n° 67/231 of May 3, 1967, setting out general legislation on mines and hydrocarbons, modified by Ordinance-law No. 81-013 of April 2, 1981, on general legislation on mines and hydrocarbons.
Observation	South African legislation acknowledges the economic significance of mining and the importance of fair laws and procedures to successful mineral development while also recognising important social and environmental apprehensions. It seeks to guarantee transparency, fairness, and accountability and defends the rights of mining investors as well as those of local communities and workers.	The DRC's economy depends, for better or for worse, on the mining industry. According to Central Bank figures, the mining, and hydrocarbons sector accounts for 99.3% of the country's export earnings and 27.8% of GDP. The government seeks to attract foreign investments in the sector in order to maximise the state revenues through taxes and royalties.
Licensing issuing and administration	Mining, exploration, and production rights are conferred by the Minister of Mineral Resources and Energy or her/his delegates. The MPRDA Regulations call for the establishment of a Minerals and Mining Development Board to counsel the Minister on matters regarding mining policy and all matters regarding the application of the Act. The Board encompasses representatives of Government, business, labour, and civil society.	In general, the Minister in Charge of Mines is responsible for managing the national mining domain in accordance with the government's mining policy as set out in the Mining Code and its implementing measures. Under the Mining Code, the Ministry in charge of Mines includes the Minister's Office, the administration of mines, the technical services, and specialised organisations. The Mining Code also introduced the department responsible for the protection of the mining environment within the Ministry of Mines.
Observation	Owing to the importance of mining to South Africa's economy, integrated and standardised rules and procedures take precedence over local authority. All stakeholder groups are represented on the Minerals and Mining Development Board, which plays a central role in setting and implementing minerals development policy.	Due to the importance of the mining sector in the DRC's economy, subcontracting activities should be carried out in accordance with the Law No. 2017-01 dated 08 February 2017 setting out the rules applicable to subcontracting in the private sector. However, the said law is still particularly broad and vague.

Rationale	To guarantee the sustainable development of mineral resources and to allow equal access (and preferential access for previously disadvantaged populations) to those resources.	To create a win-win framework which encourages infrastructure and develops the human capital of the DRC and the processing capacity locally. To Develop the DRC as a destination for foreign capital and technology, and to encourage the immediate development of the country and not speculation.
Observation	The rationale in the South African case strikes a balance between the need to develop mining as an important component of economic growth, and broad policy objectives related to Black Economic Empowerment (BEE), and social and economic protection.	The rationale behind mining reforms in the DRC includes two major components which are a liberalisation of the mining sector under the impetus of the World Bank and a quest for greater transparency in mineral supply chains through traceability schemes.
Licensing procedures	Submission of completed application form, available online or from the Department of Mineral Resources and Energy to a regional office of the Department. Application for a prospecting right should have: Particulars of the applicant, Statement of participation by historically disadvantaged South Africans, Description, coordinates, and plan of land area, Type of minerals, Method(s) of prospecting,	The law provides for two procedures for granting mining rights, namely: (1) Generally, upon request, (2) Exceptionally on a tender (open or restricted). Request mining titles to the Mining Registry in accordance with the following conditions and procedures: Conditions for the grant of the Operating License The granting of the Operating License is subject to the following conditions by the applicant: prove the existence of an economically exploitable deposit by presenting a feasibility study along with a technical guidance plan for development work, construction, and operation of the

	Duration of prospecting operation. Prospecting work plan Proof of applicant's technical and financial capability.	mine, prove the existence of financial resources necessary to carry out one's project as per a financing plan of development work, of construction, and operation of the mine and the site rehabilitation plan at its closing, the plan specifies each type of financing, sources of funding and the justifications of their probable availability, transfer 5% of shares in the capital of the applicant company to the State. These shares are unencumbered and not dilutable.
Observation	The South African system officially requires contact with a single ministry and its representative office in the area of the mine.	In the DRC, contact should be made with the mining ministry and its related services both at the national and provincial levels.
Fees	Fees: Application fees from R100 to R1,000 ($10 to $100). Prospecting license fees: R1,000 to R1,400 annually for claims up to 1,000 ha., and R1.00 to R3.00 per ha. Mining right fees: There are no mining right fees or rents, but a royalty on gross mine revenue.	Prospecting license: $3.06/square for the first 2 years; $31.69/square for the 2 other years; $52.10/square for the 2 years of the first renewal; $149.22/square for the 2 years of the second renewal. Operation license fees: $511.09/square per year, Rejection operating license fees: $817.74/square and per year, Operating license of small mine fees: $335.10/square and per year, Research license of quarry products fees: $5.11/square and per year,

		Operating license of permanent quarries fees: $204.43/square and per year.
Benefits and Drawbacks	Benefits: The system is fairly transparent and impartial, and the licensing process takes account of the views of all stakeholders. Though many consider the new mining royalties excessively high, other fees for prospecting or short-term extraction, are reasonable. Drawbacks: The new Act replaced the certainty of the law of property with a state licensing system based on administrative law. This may have been a necessary step, due to the political pressures to upsurge black ownership in the mining sector, but as a consequence, it increased the discretionary power of the Minister of Mineral Resources and Energy and his delegates to grant, refuse, suspend, or cancel prospecting and mining rights, based on potentially immeasurable social objectives. As a result, between May 2004, when the Act came into effect, and May 2007, fewer than 50% of applications for prospecting rights and only 24% of mining rights applications were approved.	Benefits: The DRC mining landscape has a few positive trends including the rise of commodity prices; the high demand for DRC minerals (eg, electric vehicle batteries, renewable energy, electronics); and the resolve of the DRC president to increase production and demonstrate a positive influence on the mining sector. Drawbacks: The mining law should seek to fix deep governance flaws in the management of the mining industry rather than over-focusing on the fiscal regime. The management of mining profits has been poorly handled by political and administrative actors. Rent-seeking, where politicians are masterminds of shady mining deals, is commonplace in the mining industry. Subcontracting is a potential blind spot for mining companies. mining companies are often exposed to 'resource nationalism,' withdrawal or cancellation of operating rights, changes in legislation, expropriation or other arbitrary or discriminatory government actions. Mining companies are at the risks of demands for settlement payments to restore the licenses.

Source: Magha-A-Ngimba Charles Gimba 2024.

Mining legislation systems usually draw the line between underground and ground or surface mining rights' holders. Underground mineral rights holders are granted the ownership of minerals, while surface mining title holders possess the rights to the surface of the land.

This difference is clearly set out in the legislative provisions of both case-study countries. Article 3 of the DRC Mining Code for example dates that the tenure of natural resources, including minerals, creates a right which is detached and distinct from the rights rising from the surface area.[957] This implies that the surface rights holder is not usually entitled to claim any ownership right over mineral deposits. The dividing line between surface and subsurface rights is also critically reflected in land and mineral legislation, i.e. the ownership of mineral rights may relate to the state, an individual or a group/collective ownership.

South Africa's most recent reforms of the mining regime, which nationalise resources, specify state ownership of subsurface rights. However, state ownership of all land is still more of a mixed reality. It is worth underlining that the commercial exploitation of minerals has traditionally been beyond the preserve of the average (customary) landowner, occupier, or user because the existence of resources underneath communities' grazing lands rarely results in mining activities by those communities. However, where landholders have automatic rights over underground minerals, they are well-positioned to benefit from mining.[958] This arrangement achieved significant developmental outcomes for landowners in South Africa, though primarily for the white population.

Another feature of the South African and DR Congolese mining regimes is the extent to which government officials and agencies (especially the licensing authorities), are at liberty to exercise the powers conferred upon them in accordance with policy considerations rather than precise legal standards. While presidential and ministerial discretion may be exercised in various areas related to mining legislation, namely environmental or labour regulations, discretionary powers are neither essentially nor characteristically in some way arbitrary or beyond the law per se.[959] However, to avoid arbitrary decisions, the procedural requirements to exercise discretionary powers should side with predictability and clarity, as they are fundamental principles for ensuring legal certainty and confidence. In the mining sector, decisions for granting mining rights are taken several years prior to the consequences that would follow from these decisions. This is where the importance of predictability and clarity in decision-making is so

[957] *Ibid, 453: Article 3*.
[958] Interim Protection of Informal Land Rights Act 1996; *Ibid, 320.*
[959] African Mining and Mineral Policy Guide: A resource for nongovernmental organisations, activists, communities, governments, and academics, 2016.

critical, as mining activities can lead to irreparable costs for the communities affected by them.

The MPRDA and the Mining Code respectively confer on South Africa and the DRC the rights to their natural resources. However, resource exploration and exploitation rights are granted to companies through mining rights concessions. Mining rights allow the company to undertake mining-related activities within a circumscribed area and set out the responsibilities and obligations associated with those rights.[960] Both jurisdictions offer different ways of conferring and governing mining rights, but contracts and licensing are the two primary regimes. Under a contract regime, mineral rights and obligations are awarded via a negotiation process with commercial interests, while licensing regimes determine the process of conferring mineral licences, with the rights and obligations laid down in laws of general application. The Mining Code, the MPRDA and their related legislation set out different types of mining rights or licences depending on the phases of mining activities for which the rights or licences are drafted.[961] Three phases are distinguished: prospecting and exploration, exploitation and closure. It is worth noting that in terms of content, the granting of mining rights overlaps with other specific areas of legislation, such as community consultation or environmental protections.

Looking at both land tenure legislations, the legal interaction between mining activities and land-related issues is regulated by a number of different provisions, including the protection of certain types of land where mining will be expressly excluded, such as national parks or nature reserves; permitting the subsurface rights holder to use water, timber, and other material essential to mining processes; or requiring the consent of the landowner or the lawful occupant to grant access or use of the land for the mine itself, or for access to and from the mining site. Consent-related provisions, such as relocation, mostly comprise statutory requirements if authorisation is denied. Likewise, if proprietor authorisation is not required, the landowner or the lawful occupant may be recompensed for access or user activities.[962] The comparative analysis further indicates that both mining regimes grant mining-related activities primacy over other forms of land use.[963]

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[960] *Ibid, 453.*
[961] *Ibid.*
[962] *Ibid, 453;* the Nature Conservation Law 1969; the Principles of Environmental Protection Law 2011; the General Property Law (Law 73-021); *Ibid, 855*; *Ibid, 320; Ibid, 355;* the NHRA 1999; the Interim Protection of Informal Land Rights Act 1996; Extension of Security of Tenure Act 1997.
[963] *Ibid, 453*; *Ibid, 320.*

The rationale behind this approach derives from the assumption that mining activities create the highest and best use of land and are therefore in the public interest.

This traditional approach is questionable since various reforms of both mining regimes now assign greater value to social and economic development and issues. However, the interconnectedness of land tenure, local governance and natural resources law has resulted in major barriers that reformed mining regimes still face when it comes to local, national, and regional development. Thus, we see how governments and companies often refuse to accommodate to communities' preferred methods of land rights recognition.

The Mining Code requires the mineral rights holder to pay compensation for any occupation of land that deprives the rightful surface owners of enjoyment of the surface rights, or for any modification that renders the land unfit for cultivation. Compensation in such a context will be paid at the request of the rightful owners of the surface rights.[964] Equally, the South African Constitution requires compensation in the case of expropriation. However, such compensation depends on market considerations. This system has proved to be utterly inadequate when it comes to recompensing communities for the loss of their land. In the same vein, Section 54 (7) of the MPRDA establishes compensation for the owner or lawful occupier of land if the former or the latter has suffered or is expected to suffer any loss or damage because of the prospecting or mining operation.[965]

Based on the comparative analysis, it could be argued that the main focus of compensation in mining regimes concerns land rights. In theory, the DRC and South Africa's constitutions provide for the right to compensation in the event of land expropriation. Both legislations protect landowners from any deprivation of an interest in land or other property without arrangements for the payment of compensation. However, the challenge remains one of obtaining compensation in practice for mining-affected communities whose land occupancy or users' rights are unspecified. This applies especially where the state is the legal owner of land under customary tenure. Like other forms of land use, mining activities also affect local communities' economic, social, and cultural interests, to which mining regimes pay little or no attention. Compensation measures rarely address ongoing compensation for communities' loss of resources, and even more rarely address benefit-sharing. Another major challenge in practice is to

[964] *Ibid, 453.*
[965] *Ibid, 313; Ibid, 320: Section 54 (7).*

ensure fair, prompt, and adequate compensation for communities whose interests are affected by mining. Compensation can take various forms, including a one-off monetary payment, resettlement, the provision of job opportunities and training, and alternative livelihood schemes. However, what is important is the adequacy of such compensation, which requires careful consideration through mutually agreed methods of negotiation and evaluation in order to be successful. Otherwise, it may breed long-term tensions between mining companies, governments, and mining-affected communities.

In the DRC's jurisdiction, once a mining right is acquired, the right holders must reach an arrangement with the landowners or lawful occupants. As noted above, landowners or lawful occupants are either the state, a private landowner, communities, or a mix of these.[966] The understanding of land ownership, as defined in DRC legislation, is linked up with some important social and institutional considerations. Based on the DRC's Constitution and the Land Law, the state is the owner of the land, but individuals can also obtain rights over land.[967] The DRC's Land Law acknowledges community land and customary land tenure. As such, the status of these lands is determined by a Head of State's Decree. However, such a Decree has yet to be enacted.[968] Moreover, community and customary land holdings remain to be plotted or registered, and villagers lack knowledge about the laws.

In South Africa, however, the post-apartheid land reform provisions introduced a new statute regarding the security of tenure - the Interim Protection of Informal Land Rights Act. This relates specifically to state-owned land that is informally occupied as well as trust land. It sets out the temporary protection of certain rights to and interests in land that are not otherwise adequately protected by law. The Upgrading of Land Tenure Rights Act covers the transfer of communal land to full ownership by "traditional communities" as well as other associated matters. The Restitution of Land Rights Act makes arrangements for the restitution of rights in land to persons or communities that were dispossessed of such rights. The Communal Property Associations Act empowers communities to create juristic persons, to be known as communal property associations, in order to acquire, hold and manage property; and the Extension of Security of Tenure Act (ESTA) covers the security of tenure, mainly for agricultural and farm workers, and

[966] *Ibid, 453.*
[967] *Ibid.;* Land Law 1973.
[968] Land Law 1973.

provides protection against the unlawful removal of "occupiers", with some guidance on the resettlement process.[969]

The analysis of both mining regimes has also revealed that there is at present no comprehensive national resettlement policy or legislation in the DRC and South Africa, and both mining legislations are silent on whether resettlement is a measure of last resort. In South Africa, the legal provisions do not provide for risk mitigation and livelihood restoration measures, and there are no provisions to monitor or evaluate resettlement. In the DRC, the mining regime does not clearly regulate resettlement and relocation. The Mining Code obliges mine operators to conduct environmental impact assessments (EIAs), which should also encompass livelihood restoration measures. However, the Mining Code does not provide specific rules and criteria, such as the requirement for houses to be built and the extent of any compensation that should be given to victims. There are also no provisions in the DRC for monitoring resettlement.

Mining activities could involve diverse sets of detrimental environmental, social, and economic impacts within the different phases of a mining project. To assess those risks many countries require companies to carry out EIAs and/or social impact assessments. Managing the protection of the mining environment in the DRC is the duty of the Ministry of Mines, which focuses solely on environmental issues in the mining sector. This is implemented without intervention by the Ministry of the Environment. However, the South African Constitution acknowledges the universal right to an environment that is not harmful to health or well-being. EIAs are required for mining. The Department of Mineral Resources (DMR) in consultation with other state entities decides whether EIAs should be approved. DMR decisions may be appealed to the Department of Environmental Affairs. However, when it comes to the agencies responsible for the oversight of environmental impacts and enforcement polices, most environmental protection provisions are included in environmental management legislation, rather than in mining legislation. Also, responsibility for reviewing and approving EIAs might be either the sole responsibility of the environmental ministry, as in the DRC, or the sole responsibility of the mining ministry, as in South Africa.

[969] The Interim Protection of Informal Land Rights Act; the Upgrading of Land Tenure Rights Act; the Restitution of Land Rights Act; the Communal Property Associations Act; the Extension of Security of Tenure Act.

Recognition of the rights of mining-affected communities over their lands as the basis for negotiations about proposed mining industries should also incorporate the sharing of financial benefits, as recommended in both mining regimes. There is growing consensus that communities affected by mining should receive compensation for damage or loss and must also be included in benefit-sharing arrangements.[970] As previously noted, communities should be recompensed for loss of future earnings and usage of the land. Lessons learned from both mining regimes indicate that out of the mining royalties, 25% is paid into an account designated by the provincial administration where the project is located and 15% into an account designated by the town or the administrative territory in the area where the exploitation activities take place. Benefit-sharing is operationalised through sharing revenues from royalties, but no direct allocation to local communities is provided. The closest level of revenue allocation for local communities is the county government in South Africa which must be 26% black-owned.

Dispute settlement processes require a strong, independent mechanism to identify and settle grievances and can be vital in averting conflict between local communities and mining companies. However, the comparative study shows that access to a fair and accessible mechanism for mining-affected local communities has yet to be established in both jurisdictions under study. Also, as mining-affected communities are unlikely to be parties to mining contracts, they therefore have no direct right to enforce contractual provisions. They are often excluded from attending hearings or submitting information. Furthermore, they are unlikely to partake in the negotiations to determine the dispute resolution mechanism in the first place. The manner in which complaint mechanisms are designed and operated, therefore, is often critically important for their success.

In a nutshell, mining rights in South Africa are regulated in the form of integrated and detailed requirements, regulations, and compliance obligations that are intended to ensure responsible and sustainable mining practices. Acquiring and upholding mining rights entail not only compliance with various laws and regulations about mineral resources, reserve assessments and financial provisioning, but also that mining rights holders must comply peremptorily with environmental and mining health and safety requirements, and special labour plans, among others. So, environmental protection, health and safety, and the economic empowerment of local communities are paramount in navigating the mining rights process in South Africa. Against the South African background, the DRC's

[970] *Ibid, 453; 320.*

case shows however that the mining industry is regulated through national legislation and regulations and their ancillaries. The disintegrated core mining legislation includes environmental standards applicable to mining activities, but these norms are of general application throughout the entire country. Regulations and legislation on the application and compliance of environmental, mining health and safety, and local economy development requirements are yet to be enacted: something which could keep the DRC's mining jurisdiction from living up to the required international standards.

6.4.2. Lessons Learned for the DRC

Lessons learnt from both legislations suggest that the DRC's legislator needs to conduct a comprehensive legal review of the DRC mining industry regulatory framework to align it with best mining industry practices which recognise the rights of local communities, including consideration of human rights due diligence, free prior informed consent, customary land tenure, adequate compensation, and international human rights standards. Put differently, a request is made through this research for the DRC's legislator to improve mining legislation and then strengthen its implementation and enforcement. There are a few lessons that the DRC's legislator could gain from the experience of the South African and international mining industry to improve the Congolese mining legislation. From the viewpoint of the worldwide mining sector, it is evident that mining companies and local communities are equally ill-prepared to deal effectively with mining closures and often fail to generate post-mining economies. The DRC's mining industry is not exempted from this deficiency, as its efforts toward good practice are seriously flawed. The Congolese legislator could improve this by adopting the hands-on approach of South Africa or those of other countries such as Afghanistan, Chile, Egypt, Ghana and Mongolia. These countries have been approved by the World Bank and the IIED for having mining legislation and a regulatory framework that screen mining activities, providing secure financial guarantees and advice in advance for communities facing possible mining closures. In the DRC, on the contrary, the main challenge for the mining industry lies in the mismanagement of funds by the government and endemic corruption issues continuously reported in the country. Limited funds and corruption are among the main reasons that have prevented the Congolese mining industry from achieving and performing. Conversely, the public-private partnership, although recommended by both the private sector and government, is still experiencing implementation problems due to the mishandling of funds by the government and the existence of bureaucratic processes

when private partners seek to access funds for clean-up under the custodianship of the government.

Accessing clear-up funds following the closure of mining in the DRC is cumbersome. Qualified partners that apply for such funds to rehabilitate and clean up the abandoned mining sites often give up as the corrupt practices wreaking havoc in this sector mean that they are unable to access the funds. To remedy this inadequacy, the legislator could opt for legislation allowing mining companies to set up mining closure projects with the funds for the rehabilitation of post-mining sites concurrently with the actual course of mine production, something they would be able to self-monitor and manage. The said regulation could also empower mining companies to use a third party for clean-up and rehabilitation activities upon a mine closure. In this case, the third party would need to receive adequate funding from the mining company or the government during the mining life-cycle for use towards the post-mining activities following the site closure. Furthermore, such legislation will need to provide for a planning framework for mining closure as a part of the overall life-cycle of a mine in order to pre-empt or reduce the negative socio-economic impact of such closure.

Additionally, the analysis of various mining legislations showed how the transitory nature of the mining industry and its deep social and environmental impacts render it unique. Existing mining legislation in the DRC for example focuses on the natural or physical aspects of mining closure and on environmental rehabilitation while neglecting socio-economic rehabilitation. Although this narrow focus on the environment is evident globally, the Congolese legislator needs to think about further insight regarding the socio-economic impacts on the surrounding community. Furthermore, the legislation should ensure a viable economy in the aftermath of mining closure, and mine closure should be addressed through the establishment of appropriate partnerships between local actors, mining houses and government. Finally, following deindustrialisation or mining site closure, the government should assist communities affected by deindustrialisation. In the case of reindustrialisation processes, local partnerships, some form of national government funding and substantial public sector input should be required by law.

6.5. Conclusion

This Chapter focused on an in-depth analysis of the DRC and South Africa's mining jurisdictions. It has postulated that the state's ability to appropriately manage minerals

licensing has a significant impact on land ownership and acquisition, and on the exercise of the mining rights. Every mining legal regulation and framework is expected to ensure the conditions for minerals exploration and mining and to ensure that environmental aspects and civil rights are included in and protected by the permit process.

Broadly speaking the comparative analysis indicated that in both case-study countries, the state is the custodian or owner of minerals or resources for the benefit of the people. South Africa's mining legislation is based on a system of state custodianship of mineral resources, in which the state issues different types of licences and rights to applicants. The most important legislation is the MPRDA. Other important legislation includes the Mine Health and Safety Act 1996, the Mining Titles Registration Act 1967, the Mineral and Petroleum Resources Royalty Act 2008, the Precious Metals Act 2005, the Diamonds Act 1986, the National Environmental Management Act, 1998 and the National Water Act 1998. The South African government has also focused on the health and safety of mine workers in its latest regulatory updates. The DRC's mining legislation is based on a system of state ownership of mineral resources. The conditions under which mining concession rights are granted are determined by the Mining Code, which is the main legislation dealing with the mining industry. The implementing measures of the mining code are provided by the mining regulations. Other important legislation includes Decree 038/2003, Mining Regulation, Nature Conservation Law 1969, Principles of Environmental Protection Law 2011, General Property Law (Law 73-021), Forest Code 2002, and the National Forest Management Policy 1990.

To sum up, the South African mining framework and other related legislation provide detailed land tenure and environment management provisions. However, the norms of mining industry in the DRC are still piecemeal and of general application. They need to be reviewed in order to align with mining industry best practices. Such revision requires that these laws be elaborated and pieced together or integrated to address various mining-related challenges faced by the industry such as the environment, local communities' empowerment, mining health and safety, and deindustrialisation or mining closure.

Chapter Seven: Conclusions and Recommendations

7.1. Introduction

This research was conducted to investigate the legal framework governing the mining sector in the Democratic Republic of Congo (DRC) in light of South African mining law, shedding light on what could be improved in the management of the DRC's mining sector. It also appraised the unexplored and unconsidered existing relationship between the Mining Code and its regulations, and other related legislation such as mining health, safety, and environment (MHSE) legislation, forest law, and land law in the DRC. For a better understanding, the study has set the following main objectives:

1. To review the DRC's mining legislative and regulatory framework in light of the world's mining legal frameworks.
2. To appraise if the South African mining legislative and regulatory framework could serve as best practice for the DRC's mining industry.
3. To analyse the relevance of the DRC's Mining Act against other mining related regulatory frameworks that effectively control mining activities.
4. To evaluate the appropriateness of developing a mining legal framework that includes all other mining-related legislation and regulations governing the mining sector in the DRC.

To achieve these objectives, the research approaches the DR Congolese and South African mining legislations as a case study. This is supported by qualitative data on the following aspects: the theoretical foundation of the world's mining jurisdictions; the South African mineral regulatory regime; the legal environment of the mining industry and the role of the state in the DRC; an analysis of the principles laid down by the DR Congolese 2002 Mining Code; and a comparative study between South African mining legislation and that in the DRC. Drawing on this aspect and using the data garnered from secondary sources, this thesis seeks to extend our understanding of the DR Congolese legal framework pertaining to the mining industry by means of drawing comparative perspectives with the South African Framework. The overarching research question addressed by this thesis is: To what extent is the Congolese legislature prepared to put in place a body of mining legislation that harmoniously and concomitantly addresses both licensing and environmental conditions effectively?

The research has addressed the following four specific research questions:

1. What is the mining legal environment in the DRC and how does the mining legislature respond to the shortcomings in the current mining legislation?
2. How does the mining legislation in the DRC comply with the international mining legal practice?
3. How could the South African mining regulatory regime serve as best practice for the mining framework in the DRC?
4. Why would the harmonisation and combination of the Mining Code with other mining-related laws be effective and useful for the DRC's mining industry?

This chapter summarises the main results of this study and evaluates the findings.

7.2. Main Research Findings

The research started with a review of the theoretical foundation of the mining industry focusing on trends in worldwide sector legislations, and the resources tenure system laid down under the South African mineral regulatory regime (in Chapters Two and Three respectively), thereby shedding light on the intricate dynamics of the mining jurisdictions and on the state resources ownership systems. The review of the theoretical foundation of the mining industry based on the trends in worldwide sector legislations in Chapter Two suggested that in mining industry, as in many other areas of activity, there is no such thing as a one-size-fit licensing practice or set of best licensing practices applicable in every circumstance. The Chapter however argued that irrespective of national and regional variations, most mining regimes or frameworks that successfully balance investor rights, individual and community rights, and government policy goals and revenue requirements comprise all or most of the common rudiments that can be considered as mining licensing practices.

The analysis of South African Mineral and Petroleum Resources Development Act (MPRDA) and other mining-related legislations in Chapter Three however found that in the end for any mining legislation, the legal test should be whether the legislation boosts the orderly exploitation and development of minerals and ensures that mining activities benefit local communities. In view of this, mining legislation and regulations must ensure that mining licences are issued by competent individuals, that mineral deposits are reasonably accessed on reasonable conditions, that good mining practices are used to

secure and protect the environment, and that mining expanses are not hoarded by entrepreneurs who are unwilling to develop the minerals. The legislation offers the state reasonable control over mining operations at every stage in respect of the acquisition of mining rights and legal compliance during the various stages of operation. These laws, however, grant the mining rights holder substantial rights, such as the acquisition of the exclusive legal rights to enter the land and to explore. Should the holder discover minerals, they may obtain the exclusive right to develop, produce, and sell the minerals. However, the mining right holder should need an agreement with the lawful land occupier prior to exercising such rights. Also, based on its discretionary power to grant or withhold mining rights, the state thereby derives the greatest benefit, as it is then able to exercise judicious control over the mineral resources and miners. As such, it ensures that mining rights are not conferred on reckless people without the means to initiate and develop mining activities. The Chapter further ascertained that the South African approach to mining legislation curtails the possibility of mineral-land monopolies through its expenditure obligations, fixed tenure of mining rights, and requirement for operational programmes. It eradicates the holding of mineral land for speculative purposes. On the whole, it emerged from Chapter Three that South African mining law is all-encompassing; however, its future success would rely upon the state's readiness to adopt future laws to address changing circumstances in the mining industry and the development of technical capacity to monitor the mining industry.

The examination of the background to the legal environment of the DR Congolese mining sector and the preeminent role of the State in Chapter Four established the history of the mining legislation in the DRC. The history of mining legislation shows that the mining laws and regulations have strong colonial underpinnings, whereby natives were unable to own land and mineral/resource rights due to land expropriation by the colonial legislator for public utility. It is also indicated that the shift of land ownership to the colonial State for public utility provided the grounds for the variation in legal regimes currently found in the mining sector. It is also revealed the complexity of the DR Congolese law applicable to the mining sector. This complexity arises from both the multiplicity of texts drawn up by the legislator and at times unfortunate, often contradictory, and confusing drafting. The hydrocarbons sub-sector governed by the 1981 Mining Law is a typical case. The 2002 Mining Act, adopted in wartime, was supposed to govern only those mining areas that were under the control of the government, while

the other parts formerly occupied by the rebel movements were the object of uncontrolled exploitation. With the reunification of the country in 2003 following political power-sharing agreements, a reinterpretation of the 2002 Mining Code became necessary to take account of the new situation. Criticism was levelled against the 2002 Mining Code in respect of the mining rights that were sometimes granted to investors on land occupied by local populations. This created a situation of difficult cohabitation that could prejudice the security of investments. Implementation was consequently difficult. These criticisms led to the 2018 reform which abolished the conventional regime in favour of the sole legal regime.

In Chapter Five, the analysis of the formal uniqueness of the mining management regime established by the 2002 Mining Code examined the objectives of the Code, namely providing for harmonised principles and regulations, transparency in the management of mining revenues and fair and reasonable distribution of revenues. In order to live up to these objectives, the Code imposes on the government obligations regarding the sound governance of the mining industry. These provide for setting tax and exchange rates favourable to investments, together with mechanisms aimed at safeguarding the environment through rehabilitation schemes and implementation at the end of mining operations. The analysis further indicated that the transition from discriminating mining laws to the common law system was the result of the non-implementation of the previous laws by different mining actors. These failures have been blamed on the obsolescence of the texts, which did not attract investment and had a negative impact on the State's mining output, while the mining regulatory systems, customs, tax, and exchange rate regimes were also not an incentive. Hence, the idea of introducing new and more attractive legislation for investment, with simplified and transparent procedures for granting mining and/or quarry rights. The scope of the new Code relates to the prospecting, research, exploitation, transport, and marketing of mineral substances classified as mining or quarrying products and also to the small-scale exploitation of substances and their marketing. In context of mining management, the 2002 Code establishes a system of common law thereby excluding the conventional system of the old Code, which was strongly criticised for the imbalance and discrimination it created, especially the freezing of concessions granted by conventions, with exclusive research areas; something which is believed to have prevented the granting of mining and/or quarry rights to other investors.

The comparative analysis in Chapter Six indicated that in both case-study countries, the state is the custodian or owner of minerals or resources for the benefit of the people. South Africa's mining legislation is based on a system of state custodianship of mineral resources, in which the state issues different types of licences and rights to applicants. The most important legislation is the MPRDA. Other important legislation includes the Mine Health and Safety Act 1996, the Mining Titles Registration Act 1967, the Mineral and Petroleum Resources Royalty Act 2008, the Precious Metals Act 2005, the Diamonds Act 1986, the National Environmental Management Act, 1998 and the National Water Act 1998. The South African government has also focused on the health, safety, and environment of mine workers in its latest regulatory updates. The DRC's mining legislation is based on a system of state ownership of mineral resources. The conditions under which mining concession rights are granted are determined by the Mining Code, which is the main legislation dealing with the mining industry. The implementing measures of the Mining Code are provided by the mining regulations. Other important legislation includes Decree 038/2003, Mining Regulation, Nature Conservation Law 1969, Principles of Environmental Protection Law 2011, General Property Law (Law 73-021), Forest Code 2002, and the National Forest Management Policy 1990. The comparative study indicated that the South African mining framework and other related legislation provide detailed land tenure and environment management provisions. However, the norms of the mining industry in the DRC are still piecemeal and of general application and need to be elaborated and pieced together to address various mining-related challenges faced by the industry such as the environment, the empowerment of local communities, mining health, safety and environment.

With reference to the scholarly and legal knowledge of the dynamics of worldwide mining jurisdictions and South African mining legislation and regulatory framework reviewed respectively in Chapters Two and Three, the lessons learnt suggest that mining contributes positively to the State's economic wellbeing through enhanced economic diversification and investments in human and physical capital. To realise an inclusive mining legal regime, legislators need to develop a nuanced and harmonised understanding of the country's relevant specific laws and institutional arrangements and the relative incentives they generate for the state, labour, and business. In South Africa, for example, the introduction of the MPRDA has formalised government involvement in the social spending process, led to increased total spending and focused on the

deployment of that spending to areas as advocated by the regulations. In practice, however, the regulatory process has not fully incorporated a formal role for mining communities, nor has it prioritised the disclosure of important mining licence information to local actors. Consequently, representation, transparency and monitoring remain significant challenges for the effective design and implementation of the social benefit plans required by the regulatory process.

On top of the overarching research question, my main conclusions with respect to the sub-questions are:

1. The mining legal environment in the DRC is governed by: Law No. 007/2002 of July 11, 2002, related to the Mining Code, as amended and supplemented by Law No. 18/001 of March 9, 2018; Decree No. 2003/038 of March 26, 2003 related to Mining Regulations, as amended and supplemented by Decree No. 18/024 of June 8, 2018 and special No. of June 12, 2018. The Land Law, environmental laws and the Forest Code are other laws affecting mining. In view of the contemporary requirements in relation to environmental protection and sustainable development, the legislator created a number of mining funds (FOMIN). The funds managed by this structure will help to overcome the environmental problems that people who are constantly exposed to certain mining-related risks may encounter. The organisation and operation of FOMIN are determined by the Prime Minister's Decree No. 17/19 of November 25, 2019. Other specific steps include: reviewing the tax, customs, and exchange regime, in the best interests of the State and companies; increasing the level of control of the management of mining titles and the mining sector; re-specifying the aspects relating to the social responsibility of mining companies vis-à-vis the local communities affected by mining projects; and ensuring the emergence of the DRC and its sustainable development, through the development of soil and subsoil resources. Loopholes in the existing legal framework governing the mining sector lie in a lack of harmonising sectoral legislation with the Mining Code, while gaps in the implementation of international human rights standards create an acute risk for indigenous peoples and local communities.
2. In terms of complying with international mining legal practice, the research has noted that it is a general principle of international law that countries have

sovereignty over their natural resources. Like in other countries, the mining legislature in the DRC largely relies on national and local legal frameworks. However, the biggest challenge in the DRC's mining industry is the implementation of regulations and the lack of strong penalties, or lack of political will to enforce penalties. The mining legislator has adopted the "polluter pays" principle, whereas the main tools used to decrease environmental and social impacts remain environmental impact assessments, through which government and mining companies can conduct cumulative and strategic assessments to formulate plans and policies. Being aware of the social impacts of mining, the legislator and mining companies comply with international mining good practices through the introduction of laws and regulations that require community consultation throughout the life of a mine. Although such initiatives show promise, they do not focus on the root cause of the problem, nor do they cover all minerals. The study additionally noted that the Congolese legislator has been much slower in accepting community consultation and engagement principles, and even where this practice is enshrined in national laws, proper implementation is often problematic. Some other problems or challenges involve cases where mining company staff with limited social development expertise proceed with random decisions about community benefit projects without proper local community consultation, or where social performance expenditure follows corrupt routes via flawed tender procedures, with no ultimate benefit to the local community.

3. Lessons learnt from the South African mining regulatory regime indicate that in order to foster investment in the mining industry, the DRC's mineral regulatory regime needs to provide certainty, stability, and predictability for mining investors. With this in mind, the legislation should meet the following generally recognised principles:

    i. Equality before the law:
        a) The mining regulatory framework for the allocation and management of mineral rights should provide for equality before the law.

b) The application requirements for mineral rights should be standardised as far as possible and preferably included in legislation or, failing that, subordinate legislation.

ii. The rule of law which includes the following principles:

a) Stating the law clearly and unambiguously:

- The legal framework governing the mining rights should be unambiguous.
- Mining investors should be able to accurately determine their obligations under the regulatory framework, and thus meet the relevant requirements without unnecessary difficulty.

b) Administrative discretion should be legally limited:

- The mining code should circumscribe, as far as possible, the discretionary powers of administrative officials. The law should be stated objectively, and the enclosure of subjective criteria should be limited as far as possible.
- Where it is necessary to allocate officials discretionary powers, the latter should be appropriately guided and limited by the law.
- The limitation of administrative discretionary powers generally helps investors to determine, with reasonable certainty, what is expected of them. Furthermore, it can also decrease the potential for corruption or bias.

c) Clear definition of institutional responsibility:

- The regulatory framework should clearly define the roles and responsibilities of the mining registrar (CAMI) and other mining regulatory agencies and enforce these in practice to ensure that there are no overlaps in regulatory functions or gaps in regulatory responsibility.

d) Timeframes for licensing functions should be prescribed:

- CAMI should specify timeframes for actions taken under the regulatory regime, ideally in primary or subordinate legislation or, at the very least, by means of publication.
- There should be timeframes for actions taken by CAMI and those by mining companies.

- The timeframe provision guarantees the effective and predictable performance of licensing functions.

e) Security of tenure should be protected:
   - Without protection, an investor may become reluctant to invest in a long-term, capital-intensive mining project. Thus, mining legislation and institutions should ensure and protect the security of tenure of mineral rights holders to minimise the risk assumed by resource extractors.
   - Prospecting rights holders should be given the exclusive right to develop any mineral resource they discover in the licensing area.
   - There should be a proper mining contract for all exploration and mining rights which gives right holders adequate time to explore for and exploit the resource. Licence renewal should also be an object to reasonable provisions.

f) Mineral rights holders should have access to administrative and judicial review:
   - Mining rights holders should be able to challenge decisions of a regulatory authority through administrative or judicial review. The governing legislation should provide this right. The independence of the judiciary in this regard is crucial because it protects the company's rights and security of tenure.

4. Law No. 007/2002 of July 11, 2002 related to the Mining Code, as amended and supplemented by Law No. 18/001 of March 9, 2018 is the basis for the study of the DR Congolese Mining Law, followed by Decree No. 2003/038 of March 26, 2003 related to Mining Regulations, as amended and supplemented by Decree No. 18/024 of June 8, 2018 and special No. of June 12, 2018, the Land Law, environment laws and the Forest Code. Among the various points, the ownership of mineral goods that belong to the State, the mining licences, and the strategic importance of minerals for economic and social development, linked to environmental protection, stand out. In this regard, the harmonisation and compilation of the Mining Code together with these other mining-related laws are

> necessary for the mining industry. This happens to be a means for addressing situations where the Mining Code is not being effectively applied, for example in relation to the recovery of degraded areas, and the ineffectiveness of the intergenerational principle regarding mining health, safety, and environment (MHSE), etc. This flaw becomes evident once society addresses the environmental and social liabilities arising from piecemeal and conflicting laws. If applied correctly, harmonised laws, rules, and regulations will protect the DRC miners, society, and the environment. Although the mining regulatory regime in the DRC provides for all these aspects and has mechanisms for ensuring that mining activities are performed within the limits of commercial sustainability, thereby ensuring the best use of resources and environmental protection, there are still plenty of remaining shortcomings. These problems, involving such issues as the failure to apply the laws and to involve society and the lack of inspections by environmental agencies, combined with the slowness of assessment processes and the issues mentioned above, hold back the environmental, social, and economic viability of mining activity.

Based on the above, the thesis analysed how the DRC's legislator can draw on the best practices in mining industry elsewhere in the world, especially South African mining legislation, to improve the Congolese mining regulatory regime.

In addressing the overall research question, this research has endeavoured to shed light on the issue as to how and why the legislator should ensure and sustain mining industry best practices in the DRC's mining sector. Mining industry best practices in this research has been used as a theoretical concept. It refers to the methods, specifications, licensing requirements, standards of care, skill, diligence, safety and performance, environmental health and safety standards, and actions usually engaged in or observed by recognised and qualified international mining companies. This research was based on a comparative study using the DRC and South African mining regulatory frameworks as the case study. It involved the analysis of the mining industry's best practices to understand how the DRC's legislator could help improve mining legislation.

Specifically, the following are my main observations. The 2002 Mining Code, as revised in 2018, has introduced important changes in the mining sector, the scope of which remains uncertain due to difficulties in interpretation and the lack of clarity of certain

provisions. Drawing from lessons learnt from South African mining practices, the mining industry in the DRC should be subject to harmonised and combined regulatory framework and compliance obligations, including the Mining Code, mining health, safety, and environment (MHSE), land law, environment laws, labour law and the Forest Code. By understanding and adhering to these requirements, businesses and individuals would be able to navigate the mining rights process in the DRC, contribute to sustainable mining practices, and comply with relevant laws and regulations. The analytical observations presented in this thesis have contributed to the ongoing academic debates on mining sector best practices and international sector legislation trends. The particular contribution to the knowledge of the thesis has been to shed light on the theoretical argument for applying a coherent legal framework that would bring together all the legal texts flying to the exploitation and management of the mining sector in the DRC.

One of the lessons from this comparative study is that looking only at laws and regulations in mining permit regimes may leave out important company obligations that need in fact to be analysed. In practice, the law may be silent on many significant obligations arising under a mining permit. These obligations could in some cases include work programmes, social impact assessments, local development plans and other project-specific commitments. Identifying the most significant obligations in every jurisdiction is challenging, as mining individually negotiated contracts have historically posed the most significant problems. The mining industry in the DRC faces the same problem with government oversight as those in other countries with a large mining sector. While no country has mastered these challenges, the situation in the DRC's mining sector is far more urgent. If the DRC takes advantage of the information generated by increased transparency and the industry's growing engagement in sustainability, it may eventually get the most from its resources and prevent the worst harm.

Conversely, it should be noted that interest in the DRC's minerals, especially cobalt reserves, has grown significantly. The DRC's cobalt is now needed by the world to wean itself off fossil fuels. However, it is well established that children as young as eight are involved in artisanal activities to mine cobalt and other minerals in conditions that are exploitative and hazardous for both child and adult miners. Based on lessons learned from the mining industry's best practices, it is evident that access to this precious natural resource must ensure that artisanal miners' human rights are not ignored but are at the

heart of the energy transition. Put differently, foreign governments and mining businesses should actively support the Congolese legislator's efforts to design and implement mining industry good practices and appropriate legislation to improve conditions for artisanal miners, rather than disengage them from the Congolese mining sector altogether. Furthermore, considering the South African experience, the DRC's legislator needs to conduct a comprehensive legal review of the DRC mining industry regulatory regime and align it with mining best practices. The understanding and the legal practical understanding of the DRC mining legislation, and the application of the legal theoretical knowledge in this sector are the point to which the thesis contributes.

This research was significant because it has achieved the research objectives set in the introduction of offering a comparative analysis and data on the DR Congolese legal framework pertaining to the mining industry as set against the South African framework. The analysis has shown how the Congolese legislator can contribute to the improvement of the country's mining regulatory regime based on best mining practices such the South African mining regime and regulations. The study has further concluded that although the DRC's mining industry is still struggling to master many mining challenges of a legal nature, as do other mining-endowed countries, the DRC would be in a position to eradicate or reduce these problems if the legislator were to take advantage of the information generated by increased transparency and the industry's growing engagement in sustainability.

7.3. Lessons Learned

Based on a few lessons from other mining industries, this research has found some best legal practices that it suggests to the Congolese legislator in order to improve or update the DRC's mining legislation and align it with the worldwide mining best practices. The research suggests the following: the Congolese legislator could improve mining legal shortcomings by adopting the hands-on approach of countries that have been approved by the World Bank and the IIED. These countries have mining legislation and a regulatory framework or best practices that screen mining activities with secure financial guarantees and advice in advance for communities facing possible mining closures. Such improvements can guide the legislator to opt for legislation that allows mining companies to set up mining closure projects with the funds for the rehabilitation of post-mining sites concurrently with the actual course of mine production; self-monitor and manage funds

towards addressing various issues relating to the end of the mining life-cycle; rehabilitate activities upon a mine closure; and pre-empt or reduce the negative socio-economic impact of such closure. Additionally, the Congolese legislator needs to think about further insight regarding the socio-economic impacts on the surrounding community, ensure a viable economy in the aftermath of mining closure, and ensure that mine closure be addressed through the establishment of appropriate partnerships between local actors, mining houses and government. Finally, the legislator needs to think about the mechanisms involving mining reindustrialisation processes, and the way government should assist communities affected by such deindustrialisation.

7.4. Revising the Analytical Framework

As discussed early in this study, most human activities require a lawful framework. This may be for the dispensation of justice, the establishment of codes of public behaviour or the provision of facilities for the conduct of social or economic life by regulating and hence allowing such endeavours to be implemented in an orderly way. Industrial and social progress have been a major factor in the rise in prosperity and growth of the world's population. As in all other endeavours, the legislator is required to set rules and regulations to control the mining industry and its activities. This research is a comparative analysis of mining law in the DRC and in South Africa.

The concept of mining law used in this study refers to those enactments which in various ways regulate mining licensing, including the issue and tenure of mining rights and mining grounds and the activities of mining-right owners. Such legislation principally relates to the disposition of mining titles or rights and the specific imports that relate to the mining of mineral deposits. The main aspects of mining law as discussed in this thesis, mainly cover the definition of minerals, tenure of resources, the regulations governing the right to mine, the conditions governing the issue and holding of mining rights that authorise private parties to access mineral resources in a country, and the nexus between mineral and surface right proprietors. Mining regulations in reverse imply the method of working a mine and the safety of mining operations. It emerged from the comparative analysis conducted in this study that the concept of mining regulations covers a broad spectrum, comprising such varied components as fiscal and monetary policy, labour relations, and health and safety measures vis-à-vis machines and people. To sum up, mining regulations focus on the day-to-day processes of mining companies.

Secondly, legal scholars have traditionally treated mining law as an aspect of land law or property law. However, when visiting various jurisdictions in the mining industry, it is submitted that nowadays, the mining industry involves novel and intricate aspects relating to developments in technology, the widespread use of mineral-bearing lands, multiple methods of taxation, and techniques of leasing, financing, and operating mineral lands. This is to say, although the fixed rules of land law could have offered a groundwork upon which to build, as it is in the case being researched, it is generally conceded that mining legislation has departed from land law to respond to the practical requirements of mineworkers and the mining industry. A body of legal ideas applying specifically to mining has consequently emerged.

Thirdly, the main rationale behind any country's mining legislation is to encourage the orderly exploitation and development of its mineral resources to maximise economic benefit for the country. To achieve this objective, the laws are required to create a regime favourable for the mining sector, thereby encouraging investment and innovation, while at the same time ensuring that the country benefits from mining activities. In most developing countries, as in the case under study, mining capital is limited and mainly foreign in origin. Investors tend to be cautious about mining projects in countries labelled as risky. In the absence of sufficient local sources of capital, foreign investment in the mining industry therefore becomes desirable. Private investors do however need a fair return on their investment. It should also be borne in mind that investment in mining is dependent on the existence of operating conditions that are reasonably consistent and offer long-term stability. This entails the need to assess any existing mining industry legislation in terms of how it affects the inflow of foreign capital and also the benefits of mining to the local economy. The concepts and approaches that the DR Congolese mining legislation embody are representative and common to many mining regimes of developing countries, in particular that of South Africa.

Broadly, the investigation informs that the mining industry regulatory regime in the DRC does not align with prevailing worldwide mining industry best practices and the existing international standards have been unevenly incorporated into the national regulatory framework. One example is that government decisions to expropriate land are often justified on the grounds of public interest, however, the law does not set a clear obligation for the government to resettle affected communities in a manner that is

consistent with mining industry best practices. Mining legislation is typically weak in terms of its ability to recognise communal land rights or to deal with resettlement and compensation activities; something which biases landowners over land users. Another major challenge for the government is to ensure fair, prompt, and adequate compensation for mining-affected communities' interests.

7.5. Key Recommendations

1. Cognisant of the need to improve the DRC's mining regulatory regime, this research recommends that where appropriate and relevant the legislator should develop and implement policies on mining best practices, strategies, and regulatory instruments. These should be specifically dedicated to the mining industry and be based on the precautionary approach, with a clear guide for decision-making.
2. Such legislation should include specific regulations for mining environmental management, and tailored compliance and enforcement provisions. Appropriate environmental management based on the sustainable use of minerals and other natural resources can only be achieved with appropriate guidance and adequate information in relation to forecasting and evaluating potential consequences.
3. The current Environment Assessment and Environmental Impact Assessment Regulations in the DRC's mining industry should be reviewed to integrate specific provisions for the assessment and evaluation of the unique long-term environmental implications of mining operations.
4. A provision should be provided within the DR Congolese mining regulatory framework that compels research on the possible impacts that mining operations could have on the environment. Research is critical for determining the exact impacts on the environmental, socio-economic, and cultural contexts, and how these affect target minerals and dredging technologies. This should be done with the clear purpose of understanding the cumulative implications for the DR Congolese context. In doing so, it should be borne in mind that it is essential to ensure that mining activities do not disproportionately impact the environment and affect parties and industries that rely on this environment for their livelihoods.

5. There is always a risk of bribery and corruption and the power being exploited for personal gain when mining licences are granted by solely one individual, the minister of mines. To reduce such risk a scheme might be devised where two or even three ministers from various interested departments might have to act in concert in agreeing to grant such a licence.

It is important to note that the law reform made by this thesis could serve as a '*consolidation legal framework*' not to scrap the existing Mining Code and replace the same with a new Code but rather to suggest *further amending* the existing Mining Code of 2002 (as revised in 2018) so as to incorporate the best practice elements discussed in this thesis as borrowed from the South African mining legislation.

7.6. Future Research

There are a few thematic clusters that could be worth further research.
Firstly, it has been established in the course of this research that mining industry regulations and best practices create a safer working environment for mineworkers, prevent the environment from negative impacts, and reduce both local human rights violations and the number of resource conflicts. This research barely touches on this aspect, which is worthy of a separate research project. Such a research perspective could consider analysing the extent to which mining companies should be required to follow regulatory practices so as to avoid impacting human health and minimise the environmental impact of the mining industry.

Secondly, the mining industry regulatory framework or regulations in the DRC were discussed in Chapters 4 and 5. As a post-conflict and developing country with less well-regulated areas in the mining industry, enforcement in this sector poses a challenge. For example, any mining company which needs to obtain international financing is expected to contend with standards such as the International Finance Compliance (IFP) Standards on Environmental and Social Sustainability, Equator Principles (EP), and other criteria for socially responsible investment. Future research may need to consider how and why these organizations rely on the self-regulation of mining practices. An applied research study enabling discussion with wider national and international actors, as well as local mining communities, would be desirable.

Thirdly, there was no scope to focus on the International Council on Mining and Metals, a coalition of nine mining companies which helps to improve environmental and social performance in the international mining industry. The Council has subsidised environmental groups, but some of these make land-use decisions without any community input, leading to human rights controversies. Indigenous communities living in mining areas are not exempted from this concern. There is a need to explore various mechanisms by which sustainable collaboration between environmental groups and local communities could contribute to the well-being of local communities and promote environmentally sustainable protection.

Fourthly, the DRC's mining industry is largely unregulated. Further studies might consider assessing different ways that organizations such as the International Organization for Standards and Cares, which have a certification process for mines that involve inspections of mining procedures, could help the State's mining industry with strategies to develop an internationally standard mining framework that complies with good mining practices.

Fifth, the mining industry in the DRC, like that in all mining-producing countries, is thriving. Few benefits are however seen by local communities in mineral-rich regions. Local communities need to agitate for mining industry best practices that include disadvantaged communities in mining planning. This point is worth further research. Such a study may need to focus on corporate social responsibility in mining disadvantaged zones.

Sixthly, there is still a long way to go with the implementation of mining industry regulations governing artisanal mining in the DRC. Artisanal mining has a significant impact on local communities, but the mining sector does not abide by the Extractive Industries Transparency Initiative (EITI). There is also no unanimity on how to deal with no-cash payments from mining companies to national, local, and state governments. The EITI does not consider the discrepancy between mining companies and the local communities' understanding of the mining sector – an issue that always creates problems when local communities and mining companies seek to reach an agreement. The EITI's standards for negotiations can go beyond what is usually required, and mining companies may find it difficult to entertain suggestions to adapt standards to the communities' specific needs. These barriers may create stumbling blocks that undermine the

implementation of the EITI's standards. Governments are advised to bridge the negotiations between mining companies and communities in order to ensure that both sides are understood. In such cases, the standards may need to be sufficiently flexible to accommodate the problems in specific countries. This creates a need for research on how to regulate the artisanal mining sector and make it comply with a standardised legal framework as approved by the EITI. Such research may also investigate other issues faced by the artisanal mining sector, including local communities' conflict, informality, poverty, illegality, and state control, among others.

Seventh, nowadays technology is a strong enabler for transformation. Other non-technological aspects and challenges create a wider context for current transformation processes and need to be considered in the discussion concerning mining best practices or mining legislation. Conversely, when planning legislation for a mining future with or without low carbon, or with a minimal environmental footprint, in combination with the human side of mining, it is essential for such transformation to be reflected in the mining legislation framework. Making the human aspects of mining more explicit adds purpose beyond economic considerations alone and this context needs to be accounted for more explicitly in the discussion regarding green mining legislation. Furthermore, the DRC's mining industry needs to reposition itself as a builder of social value and societal capital. As such, it should comply with the necessary breakthroughs required at social, cultural, and societal levels. Such breakthroughs will be essential for the State's mining industry to remain competitive in the long term.

Finally, the human side of mining needs to be central for the successful development and implementation of the autonomous green mine, since the latter can help enhance the much-needed social acceptance and attractiveness of the industry, with a positive impact on the implementation of technologies, thereby creating a virtuous cycle for change. These kinds of mutually reinforcing effects may lead to breakthroughs that speed up the process of change to a much greater extent than technology alone would be able to do. All these issues are worth separate research projects.

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