



Analysis of the Mining ACT 2016

July 2016



Mining in Kenya

The mining sector in Kenya contributes about 0.4% of the country's GDP. Though mining activity has been present in the country for over 50 years, productivity has remained low. The scale of operations has been limited with only two projects - soda ash and mineral sands - comprising a large part of productive output by revenue. Exploration activity has also been limited even though geological surveys demonstrate a sizeable mineral potential.

Reform in the mining sector

The Government of Kenya (GoK) has recognized the potential that exists and has directed efforts to improve mineral exploitation by establishing a ministry dedicated to the development of the mining sector. The mandate of the Ministry of Mining (MoM) is centred on developing and implementing policies that will allow the country to benefit from its mineral wealth.

Mining Policy and Legislation

In April 2016, MoM launched the Mining and Minerals Policy that sets out the framework for mining activity and underpins the new Mining Act, 2016. The policy takes a holistic approach to the sector, ensuring that key issues related to sustainable exploitation of natural resources such as community engagement, environmental issues, and beneficiation from mining are addressed.

After 75 years, Kenya passed a new and modern mining code which was assented to on 6th May 2016. The new Act reflects the spirit and intent of the Constitution of Kenya 2010 to ensure that activities related to mining and exploitation of minerals are beneficial to the citizens of Kenya.

In keeping with the provisions of the Constitution of Kenya 2010, the Mining Act 2016 vests the ownership of minerals in the national government in trust for the people of Kenya. The law applies to all minerals, which are detailed in the First Schedule, except for petroleum and hydrocarbon gases.

The wins

The Mining Act 2016 breaks the concentration of decision making in the office of the Minister under the previous legislation and spreads those powers to the Mineral Advisory Board which is charged with the responsibility of governing the sector including participating actively in licence and permitting approvals. This is consistent

with international best practise where the policy, regulatory, and commercial functions of government are separated to enhance good governance in the mining sector. The Mining Act 2016 establishes a state mining corporation to undertake commercial activities on behalf of government. It also establishes the Directorate of Mines to regulate the sector and the Directorate of Geological Survey to develop the national geological database and promote interest in the mining sector. The Ministry in charge of mining retains responsibility for policy, a role it has already commenced with the publication of the Mining Policy of Kenya. In the interest of enhancing commerce and trade in minerals, the Mining Act also provides for the Ministry of Mining to establish a commodities exchange.

The Mining Act represents the development of a modernized legislative framework which, for the first time, introduces a grid system to limit mineral rights disputes due to overlaps in licensed areas. There is additional clarity on the license and permit classes, procedures, as well as conditions that would lead to revocations and suspensions. The new law also provides structures for negotiating mineral agreements and stipulates that mineral agreements will include terms and conditions for minimum activity and spend for work programs, structure for payments (i.e. royalties, fees, etc.), and other provisions.

The law also recognizes artisanal and small scale mining operations and stipulates clear processes for establishing safe operations, a clear departure from the previous legislation which also outlawed artisanal mining. These changes provide an important platform that allows communities to undertake mining activities in safer environments while allowing them greater opportunity to benefit from minerals within their lands.

County governments have a role under the new legislation and will be involved in the provision of consents for licensing operations and surface rights, promoting community engagement in mining operations and selection of the mining sector operators. The National Land Commission, a constitutional body in-charge of management of land in Kenya, also has a role in the licensing of mining operations especially where such operations involve the acquisition of land and resettlement of communities.

Environment, health, and safety provisions have been strengthened with the legislation making provisions for mine closure through a

requirement for operators to deposit environmental protection bonds with the Ministry.

Transparency is a priority in the new law with a requirement for publication of mining activity in the public domain. All mineral agreements will be published by the Ministry and those related to protected and marine land will have to be ratified by the Senate. Other information that will be availed to the public include revenue receipts and production levels. This information will allow citizens to appreciate mining activity in the country.

Missed opportunities and potential pitfalls

There are a few areas which might need further clarity in the new mining code. One of those areas concerns ambiguity in eligibility and restrictions within license class provisions. For instance, for small scale operations, the law is not clear whether the prospecting permit confers exclusive or non-exclusive rights. In another example, the reconnaissance permit under small scale operations takes a departure from cadastral unit system in defining the area and leaves specifications quite open.

Another area of ambiguity concerns the fiscal regime. Taxation is not expressly addressed except to note that mineral rights holders are under obligation to pay taxes and provide evidence of the same from time to time. It is also not clear if mineral agreements will have separate negotiated provisions for addressing taxation. In other references in the law, the requirement to have performance bonds is referenced but not explained in detail.

The new law provides that mining rights under the previous law will have a transition period of 18 months. Considering the administrative and operational timelines in the sector, the period might be a challenge even though other jurisdictions have successfully utilized similar provisions. It could be argued, however, that the relatively low level and scale of operations coupled with a move to impose a “use it or lose it” policy on inactive licenses might make it possible to have a fairly quick transition.

While it is not unusual for mining codes to rely heavily on separate regulations, there is a risk that the deference in the primary legislation to clarify administrative procedures and interpretation of the law into practice might subvert the effort to provide a stable legal and regulatory framework. The Regulations have yet to be finalized and might take a considerable

time to implement. It is worth considering whether the sector might bear costs of being over legislated.

The new law defines elaborate application processes which require extensive review of license applications and supporting information by both MoM and the Mineral Rights Board. This requirement extends to all modifications or changes to licences and permits. It is the intention of the law to lend both transparency and decentralized decision making, but this comes at a high administrative cost which might in the end lengthen approval processes and undermine the intention of promoting investment in the sector.

The mining code provides clear guidelines for regulation of the mining sector in Kenya and places great responsibility on MoM to ensure that activities are conducted efficiently, ethically, and sustainably. The capacity to enforce is a major consideration in ensuring that the objectives and ethos of the new mining code and policy will be achieved. MoM will require staff who are technically qualified and adequately equipped to perform their duties.

Equally, county governments whose role will be vital in coordinating artisanal mining efforts will require staff with expertise and training to undertake compliance monitoring and enforcement activities. If sufficient effort and investment is not directed to building this capacity, much of what we expect the new law to deliver will not materialize.

A note on benchmarking to international best practices

The new Act is ambitious in its intent to address the shortcomings of previous legislation and for the most part addresses issues related to international best practice on mineral regulation.

Among the key elements of good practice in developing mineral rights include:

- promoting equality before the law;
- good governance which balances rights and responsibilities of various parties;
- well-defined institutional arrangements that promote clear processes and transparency;
- reasonable fiscal provisions that promote equitable distribution of benefits; and
- provisions that promote social and environmental protection.¹

¹ Adapted from EI Sourcebook, 2010, Brief Good Practice Note: Granting Mineral Rights.

The Mining Act 2016 addresses these critical issues and for the most part has provisions that promote good practice. Examples of good practice in terms of governance includes provisions to allow inspections and audits of mineral operations. The stipulation of legal ownership of sub-surface resources along with provisions that ensure clarity on surface rights and access to land for mining operations are another marker of good practice.

It is important to note that matters of land access are especially important for Sub Saharan Africa where mining operations compete for allocation with livelihood activities such as agriculture and pastoralism. Good practice in this regard maintains that amounts of land covering mining operations be reasonably matched to the size of expected operations in order to limit land footprint competition with other livelihood activities. The various license and permit classes have defined maximum areas, which take this into consideration, with the exception of Artisanal Mining permit and the Reconnaissance permit.

The Mining Act also follows best practice by specifying various classes of mineral rights which are issued on first come, first served basis, as would be common practice for countries in early exploration stages. This promotes the idea of equality before law and it is hoped that as the mining sector matures, competitive bidding, as a measure of best practice, would evolve as the preferred method for issuing licenses in later stages. The new mining code does not mention how the progression to competitive bidding would be made – perhaps this means that amendments would have to be made unless the Mineral Rights Board has the ability to change procedures in collaboration with the CS's office. One would expect however that these changes be debated as national geological data becomes more uniformly available and most operations are at more advanced stages. This will make the job of marketing the country to investors easier.

In terms of licensing and permit tenures, best practice would be to limit exploration rights to be less than 10 years. The law adequately manages the duration of rights holders with the maximum anticipated length of licensing for exploration being nine (9) years.

There are specifications of best practice as related to mining agreements – but there is not a model provided by the Mining Act and we are thus unable to assess whether those specifications are met. We anticipate that the Regulations to be published will provide these details along with the opportunity to discuss the

extent to which the Act promotes good practice in major mineral project agreement provisions.

The Act addresses transparency and social protection through development of mechanisms that allow citizens a view into the mining operations. Relatedly, the promotion of local content and community beneficiation in terms of employment and provision of services, is also addressed.

Environmental protection has not been overlooked in the law and the measure of how well these issues are addressed will depend on the relationship between the Regulations on environmental management and their interactions with the related legislation on environmental matters i.e. EMCA, Water Act, etc.

Certain aspects of the fiscal regime have been provided for in the law though there is a reliance on Regulations to provide details of how royalties, fees, and other charges will be distributed. Until the Regulations are passed, it is difficult to assess whether best practice has been employed. However, it is noted that there is clarity on which license or permit classes, and minerals are subject to royalty payments, and the types of fees due each.

As with most things law and policy, the key to how the legal and regulatory framework will impact the mining sector remains predicated on implementation and enforcement. There are significant investments to be made in this regard, and the speed with which MoM takes on this undertaking, remains a critical success factor.

Features of the Mining Act, 2016

A. STRUCTURE

The Act comprises 16 parts, 225 sections, and two schedules.

B. ADMINISTRATION

The Cabinet Secretary (CS) in charge of mining is responsible for the administration of the Mining Act and has powers to develop regulations to provide for activities in the mining life cycle.

The law also provides that a Mineral Rights Board will support the CS on administration aspects such as granting and revoking licenses, designating areas for certain mining operations such as small scale and artisanal mining operations, excluding areas from mining activity.

The CS can also declare certain minerals or deposits to be strategic by advising and seeking approval of the Cabinet.

The Act also establishes two directorates to assist with the administration – the Directorate of Mines and the Directorate of Geological Survey. Together, they will manage the activities and information related to mining operations in the country including establishing operational linkages between the national and county governments.

The Act repeals the Mining Act (Cap 306), the Trading in Unwrought Precious Metals Act, and the Diamond Industry Protection Act. However regulations related to the repealed acts remain in force until revoked.

The transitional provisions of the Act stipulate that:

- Pending applications will be determined under this new Act;
- Any mineral rights and/or permits granted under the repealed laws shall remain in effect until their expiry;
- Large scale operations will be required to comply with boundaries established by the new law and related regulations; and
- Operations will be granted 18 months to come up with recommendation for compliance with the new conditions and provisions of the Act with respect to

- Environment, health, and safety, management of community and social investments, and other related matters.



C. INSTITUTIONAL ARRANGEMENTS

The Mining Act, 2016 establishes the following new bodies:

Institution	Role	Notes
Directorate of Mines	Supervise and promote activities related to the development of exploitation of minerals and mineral resources	<ul style="list-style-type: none"> • Takes up chief role in monitoring and enforcement of provisions under the Act and works through appointed inspectors of mines
Directorate of Geological Survey	Consolidates GoK's efforts in collection and storage of geological data related to prospecting in a national repository	<ul style="list-style-type: none"> • Participates in various geological surveys including geo-environmental studies. • Facilitates promotion of private sector interest and investment in mineral exploration
Mineral Rights Board	Advises the Cabinet Secretary on grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements. Other roles include regulation of fees to be paid on different minerals	<ul style="list-style-type: none"> • Has power to establish additional committees to fulfil its mandate • Is headed by a chairman and has members appointed through merit and various qualifications • CS appoints the Council of County Governors nominee and two industry professionals to sit on the Board
National Mining Corporation	Acts as the investment body on behalf of the national government in respect of minerals.	<ul style="list-style-type: none"> • Can acquire shares or interest in any firm, company or other body of persons, whether corporate or unincorporated as long as they are engaged in mining activities. • Initial capital to be provided by Parliamentary order • National Mining Corporation Regulations are to be published
Minerals and Metal Commodity Exchange	Exchange will facilitate efficiency and security in mineral trade transactions.	<ul style="list-style-type: none"> • Regulations related to establishment and functions are to be published
County office of MoM	Established by the CS and is the MoM representative in the counties with responsibility for managing as the granting, renewing and revoking artisanal mining permits, maintaining a register of artisanal miners and maintaining fair-trade.	<ul style="list-style-type: none"> • Headed by an officer who reports to Director of Mines • Provides training facilities and assistance necessary for effective and efficient artisanal mining operations • Facilitates the formation of artisanal association groups or cooperatives for the miners.
County Artisanal Mining Committee	Assists the MoM in managing mining activities in the counties together with the county office.	<ul style="list-style-type: none"> • Includes a governors representative and rep. from the MoM • Three (3) of its members are elected by the artisanal miners association. • Act's as NEMA representative in the county • Act as advisors to the representative of the director of Mines in the granting, renewal or revocation of artisanal mining permits

D. LICENSING

The new mining law differentiates between three major types of operations: (i) large scale operations; (ii) small scale operations; and (iii) artisanal mining operations. Different licenses and permits exist under each type of operations. Under law, the CS may also designate new categories of licenses and permits on the recommendation of the Mineral Rights Board.

Small scale operations include:

- Prospecting operations not exceeding 25 contiguous blocks;
- Mining operations not exceeding two (2) contiguous blocks;
- Mining operations whose actual or estimated size does not exceed 25,000 m³;

All other operations not classified as small scale or artisanal mining operations are considered to be large scale operations. In addition, operations employing specialized prospecting, mechanized mining technologies, chemicals such as mercury and/or explosives, and/or operations not meeting certain investment amounts as determined by the CS, are excluded from definition of small scale operations.

Among other key provisions to note regarding licenses are:

i. Government carried interest

Under the new law, the State can acquire 10% free carried interest in the share capital of large scale mining operations and/or those relating to strategic minerals, and reserves the right to obtain further interests at arm's length prices. Regulations stipulating the exercise of this provision will be developed and published.

ii. Local equity participation

For operations whose planned capital expenditures exceed amounts stipulated by the CS in separate regulations, there is a requirement to list at least 20% equity on a local stock exchange within three years of production operations beginning. Mineral rights owners are also allowed to apply to the CS to execute alternative mechanisms that will achieve the objectives of local equity participation.

iii. Local content

Mineral right holders are required to give preference to the maximum extent possible to materials, products, services, and workforce from Kenya.

Additionally, mineral rights holders must submit detailed programmes on recruitment and training of Kenyans. The approval of this program will be a condition for granting of a mineral right.

There is a provision for the holder of mineral right to develop a comprehensive community development agreement that secures socially responsible investment and provides for employment preference for those living in communities around mining operations.

Detailed regulations on local content are to be published separately.

iv. Mine support services

The Mining Act requires that persons or companies providing mining support services be licensed by the Cabinet Secretary upon recommendation of the Mineral Rights Board. Details on process and other pertinent matters will be prescribed in separate Regulations.

v. Public Officers' Participation

The mining Act prohibits the participation of public officers administering the provisions of the Act in some form from participating in mining operations as mineral right holders.

vi. Assignments and Transfers

Any assignments, transfers, mortgages, and trade of mineral rights must be approved by the CS on recommendation of the Mineral Rights Board. The Kenya Revenue Authority (KRA) must be notified prior to any transactions occurring and within 30 days of any approvals from the MoM. Such transactions will only be registered once all tax obligations have been met and evidence of compliance provided to the CS's office.

vii. Suspensions and revocations of licenses

Licenses and permits may be revoked if holders fail to make payments on time, fail to comply with conditions in the Act or subsidiary legislation, make false statements, commit offences covered by the Act, face financial difficulties rendering them unable to fulfil their obligations, and/or, file bankruptcy. In addition, if mineral right holders are individuals, their licenses may be suspended or revoked if they go insane or die.

Before suspensions or revocations take effect, the Act provides that holders of rights and/or

permits must be given written notice of non-compliance and have an opportunity to remedy the situation.

Revocation, if it occurs will nullify the rights of the holder with respect to the licence and/or permit and trigger requirements to provide all records pertaining to the operations to the Cabinet Secretary's office.

viii. Note on Export Permits

The law is silent on the workings of the export permits and does not provide details on how they may be acquired, their validity, etc. Hopefully this will be adequately addressed in Regulations which the law does allow for the Cabinet Secretary to make Regulations related to the form of any license or permits related to mining and other operations under the Act.

ix. Value addition on Minerals

The Act provides that the Cabinet Secretary may make Regulations on how value addition would be governed under law.



The table below summarizes the types of licenses and permits allowed under the Mining Act 2016.

Operations	Licence Type	Eligibility	Area	Terms	Restrictions
Large Scale	Reconnaissance licence	<ul style="list-style-type: none"> ▪ Citizen with sound mind, 18 years of age and above, and required technical and financial expertise; or corporate body registered and established in Kenya 	<ul style="list-style-type: none"> ▪ Minimum – one (1) block ▪ Maximum – 5,000 contiguous blocks 	<ul style="list-style-type: none"> ▪ Maximum: 2 years ▪ Condition: Not renewable ▪ Non-exclusive ▪ Work commencement: 3 months from licence approval ▪ Fees: annual charge based on area of recon ▪ Reports: semi-annual and annual ▪ Amendments: Allowable on application to CS 	<ul style="list-style-type: none"> ▪ Existing mineral rights ▪ Mining license approved for that area ▪ Finds and data collected are property of GoK; at end of operations all data and records must be surrendered ▪ No subsurface work ▪ Not transferable
	Prospecting licence	<ul style="list-style-type: none"> ▪ Citizen with sound mind, 18 years of age and above, and required technical and financial expertise; or corporate body registered and established in Kenya 	<ul style="list-style-type: none"> ▪ Minimum – one (1) block ▪ Maximum – 1,500 contiguous blocks 	<ul style="list-style-type: none"> ▪ Maximum: three (3) years ▪ Condition: Renewable, not more than two (2) times, not more than three (3) years ▪ Exclusive ▪ Work commencement: 3 months after obtaining licence approval or at approved time in work program ▪ Fees: None ▪ Reports: Issued quarterly or on requirement basis by the CS ▪ Amendments: Allowable on application to CS 	<ul style="list-style-type: none"> ▪ Minerals found belong to the national government ▪ Obligation to notify of any discoveries immediately ▪ Not transferable unless under consent by cabinet secretary ▪ Work program budgets must be paid to MoM if work obligations are not met within stipulated time. ▪ Renewals submitted 3 months before expiry ▪ Relinquishment required with each renewal: minimum of 125 blocks and not less than ½ the number of blocks ▪ Contiguous prospecting licenses for same term and mineral are consolidated ▪
	Retention licence	<ul style="list-style-type: none"> ▪ Holder of prospecting licence that has identified a mineral deposit with potential 	<ul style="list-style-type: none"> ▪ Same as prospecting licence or mining licence 	<ul style="list-style-type: none"> ▪ Maximum: two (2) years ▪ Condition: Applies to an area whole, or a part, of the area 	<ul style="list-style-type: none"> ▪ CS may compel holder to apply for mining license, if discoveries are commercial and recoverable

Operations	Licence Type	Eligibility	Area	Terms	Restrictions
		commerciality but deposit cannot be developed immediately		<ul style="list-style-type: none"> covered by a prospecting licence. Condition: Renewable, once and for not more than two (2) years 	<ul style="list-style-type: none"> License may be revoked if holder of retention license doesn't show just cause for declined application
	Mining licence	<ul style="list-style-type: none"> Citizen with sound mind, 18 years of age and above, and required technical and financial expertise; or corporate body registered and established in Kenya Holder of prospecting license who has notified CS of discovery in their licensed areas 	<ul style="list-style-type: none"> Same as prospecting license, reconnaissance license, or retention licence 	<ul style="list-style-type: none"> Maximum: 25 years or forecast life of the mine (whichever is shorter) Condition: Exclusive Condition: Renewable, for maximum of 15 years or life of the mine, whichever is shorter Work commencement: 6 months after obtaining licence approval or at approved time in work program Reports: Issued quarterly or on requirement basis by the CS Amendments: Allowable on application to CS 	<ul style="list-style-type: none"> Cannot be issued on land which is the subject of a prospecting licence, reconnaissance licence, a retention licence unless the applicant is holder of above licences or a new applicant has consent from the above licences holders Renewals submitted 1 year before expiry Obligation to notify of any new/additional discoveries immediately Obligation to notify CS of: <ul style="list-style-type: none"> cessation of activities – at least 6 months suspension – at least 3 months curtailment – at least one month or otherwise within 3 days of halting events
	Mineral Agreements	<ul style="list-style-type: none"> Holder of mining license 	<ul style="list-style-type: none"> Same as mining licenses 	<ul style="list-style-type: none"> Applicable to mining operations whose investments exceeds USD 500M 	<ul style="list-style-type: none"> Consultation of National Treasury required Must be submitted and ratified by National Assembly and Senate CS has power to negotiate All mineral agreements shall be public and made accessible to the public
Small Scale	Reconnaissance permit	<ul style="list-style-type: none"> Citizen or corporate body with at least 60% shareholding by citizens 	<ul style="list-style-type: none"> Not specified 	<ul style="list-style-type: none"> Non-exclusive rights 	<ul style="list-style-type: none"> If rights are over community land, must have consents from community land administrators or county governments, if community land is un-alienated Consent will be given by signing a legally binding agreement with Government or mining rights holder, or

Operations	Licence Type	Eligibility	Area	Terms	Restrictions
					adequate compensation
	Prospecting permit	<ul style="list-style-type: none"> Citizen or corporate body with at least 60% shareholding by citizens 	<ul style="list-style-type: none"> Minimum – not specified Maximum – 2 contiguous blocks 	<ul style="list-style-type: none"> Maximum: 5 years Condition: Renewable, once for a max of 5 years 	<ul style="list-style-type: none"> Doesn't specify whether rights are exclusive or non-exclusive
	Mining permit	<ul style="list-style-type: none"> Citizen or corporate body with at least 60% shareholding by citizens 	<ul style="list-style-type: none"> Minimum – not specified Maximum – 2 contiguous blocks 	<ul style="list-style-type: none"> Maximum: 5 years Condition: Renewable, for maximum of 5 years or life of the mine, whichever is shorter Exclusive rights 	
Artisanal Mining	Artisanal Mining Permit	<ul style="list-style-type: none"> Citizen having attained age of majority belonging to an artisanal mining cooperative association or group 	<ul style="list-style-type: none"> Not specified 	<ul style="list-style-type: none"> Maximum: three (3) years Condition: Applies to an area whole, or a part, of the area covered by a prospecting licence. Condition: Renewable, once 	<ul style="list-style-type: none"> Permit valid only for the minerals specified in application Can apply to convert it to a small scale permit as per Regulations to be developed
Dealers	Minerals Dealers	<ul style="list-style-type: none"> Citizen or corporate body with at least 60% shareholding by citizens 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Maximum: one (1) year Annual expiry Condition: Renewable Reports: Issued quarterly noting register of dealings 	<ul style="list-style-type: none"> Bankers are allowed to deal in minerals Cannot export minerals
	Diamond Dealers'	<ul style="list-style-type: none"> Citizen or corporate body with at least 60% shareholding by citizens 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Maximum: one (1) year Annual expiry Condition: Renewable Reports: Issued quarterly noting register of dealings 	<ul style="list-style-type: none"> Bankers are allowed to deal in diamonds Can appoint an agent who must be registered with MoM May be required to post bonds or cash deposits to pay any prescribed fees or royalties which may become payable
	Export Permit	<ul style="list-style-type: none"> Mineral right holder Mineral Dealer Diamond Dealer 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Diamond export operations are required to conform to international best practices Imports will be declared at points of entry into Kenya on prescribed forms.

A. FISCAL TERMS

The Mining Act 2016 contains financial provisions that comprise various fees, royalties, and taxes that mineral right holders will be required to pay. These payments will be prescribed in regulations and gazetted from time to time. The payments will be payable to an account designated by the State for collection of payments, royalties, and fees.

The major categories of fees and payments are as follows:

i. Fees

- Mineral right holders, dealers, and other license or permit holders will be required to pay application fees, report filing fees, fees for access to geological data and public registers.
- Mineral right holders, dealers, and other license or permit holders will also be subject to annual licensing or permit fees.
- The Act makes provisions for mineral right holders to pay an area-based annual charge that is equal to the number of cadastral units that comprise the mineral right area multiplied by the area-based annual charge per cadastral unit for that type of mineral right. Subsidiary legislation, specifically the Mining Regulations, will stipulate the levels of area based fees.
- The fees may be demanded and recovered in the same manner as civil debts.
- There may be other fees detailed in Regulations as the law makes a general provision for the Cabinet Secretary to publish and gazette as required.

ii. Royalties

- Mineral right holders will be required to pay royalties for various minerals according to prescribed rates set by the Cabinet Secretary, though mineral samples for testing will not be subject to royalties.
- Mineral right holders and/or permit holders will be required to file regular royalty returns as prescribed by regulations.
- The payments and returns will be filed with the Mineral Cadastre Office by the 5th business day of every month.
- Lack of payment of royalties within 60 days of filing is grounds for the license or permit to be revoked.
- The royalties collected will be distributed as follows:
 - 70% to national government
 - 20% to county government

- 10% to the community where mining operations are carried out.

iii. Bonds

The law provides for following classes of bonds including:

- Compensation guarantee bond for damages and/or losses to landowners based on the nature and extent of land to be used for mineral activities as well as probable loss of use, and/or relate damage.
- Environmental protection bonds to cover the costs associated with the implementation of the environmental and rehabilitation obligations by holders of prospecting licenses, retention licenses, and/or mining licences.
- Diamond dealers' bonds or cash deposits to pay any prescribed fees or royalties which may become payable as they conduct their transactions.

Regulations will provide details on how these will be administered.

It is worth noting that in Part I: Preliminary Provisions, the Act makes reference to a "mining bond" which would function as a form of performance guarantee against approved mining programs; however, there is no direct reference to its workings within the law itself as would be expected under a discussion on rights of the mineral holder. There may be room for this to be clarified in the subsidiary legislation.

iv. Taxes

The Act provides that terms and conditions related to taxation will be addressed in the respective mining agreements. Otherwise the law is silent on provisions related to tax except when making reference to transfer pricing provisions.

The law does mention that assignments and transfers related to mineral rights will only be effected after evidence of tax compliance is provided to the Cabinet Secretary.

v. Note on Transfer Pricing

The Act makes especial note on transfer pricing and stipulates that *The Income Tax (Transfer Pricing) Rules, 2006* or successor legislation shall apply to mining transactions. Additionally, transactions involving minerals or mineral products are deemed to have occurred at point of sale and at arm's length value. This provision seeks to entrench tax compliance in mining operations. Under transfer pricing, transactions between mining companies in Kenya are expected to be arm's length.

The key activities that will need to be benchmarked include:

- Transfer of mining rights between related companies
- Offshore sale of mining production to related companies
- Financing of mining operations;
- Procurement of expertise from related entities

vi. Resettlement Costs

The law provides that any resettlement required for mining operations to begin or take place must be conducted prior to start of the activities and the related costs will be borne by mineral right holders.

vii. Insurance

The Act provides that insurance arrangements will be addressed in the mining agreement, however, it does note that mining operations should maintain insurance cover in respect of the attached risks especially for health and safety of employees. Mineral right holders will also be required to file copies of policies and other documentation confirming that the cover is appropriate for risks associated with the operations.

viii. Mining Audit

The Mining Act required mineral right holders and dealers to keep up to date records of their operations. These records will be filed in accordance with the provisions of the Act and will be subject to audit to ascertain the royalties and other levies to be paid to the Government.

B. TRANSPARENCY

In addressing transparency provisions, the Mining Act provides that all mineral agreements will be made public, and that separate regulations will stipulate accountability measures related to reporting on mining operations, revenues, and production volumes under various licenses and permits. It is expected that EITI or Publish What You Pay provisions will be enacted to fulfil these requirements.

Consent from Senate will be sought on large scale mining operations occurring on terrestrial and marine land.

C. ENVIRONMENT, HEALTH AND SAFETY

The Act requires that mining operations comply with provisions of existing water rights law, occupational health and safety laws, land use laws, and environmental management and protection law.

Under this provision, the Act mandates that mining license be granted on condition of having obtained environmental impact assessment license, approved social heritage assessments, approved environmental management plans, as well as site mitigation and rehabilitation or mine closure plans. Regulations on site or mine closures will be developed separately as well.



Contact us

Benson Ndung'u
Partner, Energy and Natural Resources
E bndungu@kpmg.com

Clive Akora
Associate Director, Tax and Regulatory Services
T +254 709 576 245
E cakora@kpmg.co.ke

Jean Githinji
Senior Manager, Energy and Natural Resources
T +254 709 576 583
E jgithinji@kpmg.co.ke

www.kpmg.com/eastafrica

©2016 KPMG Advisory Services Limited, a Kenyan Limited Liability Company and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved. .

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.