

Mining 2021

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**Darrell Podowski, Brian Dominique, Brandon Manhas
and Lauren White**

Cassels Brock & Blackwell LLP

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Mining*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapter on Ireland, Nigeria and Uzbekistan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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MINING INDUSTRY

Standing

1 | What is the nature and importance of the mining industry in your country?

Thailand was formerly a major tin producer, but now produces mainly industrial minerals, including limestone, lignite, granite, and basalt. The mining industry has been less active since implementing the policy to suspend gold mining in 2016, the enactment of the Minerals Act in 2017 and issues arising regarding restriction on the use of agricultural land. See also the website of the Mining Industry Council of Thailand at www.miningthai.org and the website of the Department of Primary Industries and Mines (DPIM) at www.dpim.go.th for current information and statistics.

Target minerals

2 | What are the target minerals?

In Thailand, approximately 40 minerals are produced. Based on the latest information provided on the DPIM's website, the most-produced target minerals were industrial minerals.

Regions

3 | Which regions are most active?

There is exploration and mining activity in all regions. For example, limestone is produced in central, western, southern and northern regions. The central region covers the largest mining area.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

4 | Is the legal system civil or common law-based?

Thailand's legal system is civil law-based.

Regulation

5 | How is the mining industry regulated?

The mining industry is regulated by the Ministry of Industry (MOI) and the Department of Primary Industries and Mines (DPIM) at the central level, and by the local mineral industry officials (LMIOs) at the provincial level. However, a number of government agencies have regulatory powers over various aspects of mining projects.

6 | What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The Minerals Act, BE 2560 (2017) (the Minerals Act), came into effect on 29 August 2017, repealing the Minerals Act, BE 2510 (1967) and its amendments (the Old Minerals Act) and the Mineral Royalty Rates Act, BE 2509 (1966) and its amendments (the Old Royalty Rates Act).

The Minerals Act contains a transitory provision that any application for mining rights submitted before its effective date will also be deemed an application under the Minerals Act, and will be considered under the rules specified under the Minerals Act. Furthermore, any prospecting licence, mining lease or licence issued under the Old Minerals Act before the effective date of the Minerals Act will be deemed issued under the Minerals Act and will be effective until it expires or is revoked. Any obligation under any agreement made with the Thai government by the MOI and the DPIM before the effective date of the Minerals Act will remain effective until the expiration of that obligation.

The Minerals Act and ministerial regulations (MRs), notifications, etc, issued thereunder place significant obligations on mining businesses. The Minerals Act aims to provide strict environmental controls, decentralise administrative power, encourage the use of newer mining technologies and provide more protection for those living in mining areas.

The Minister of Industry is charged with administration of the Minerals Act, and has issued MRs, notifications and other orders. The National Minerals Administrative Policy Board (NMAPB or the Board) was established under the Minerals Act. The Director-General of the Department of Mineral Resources (DMR) and Director-General of the DPIM will be co-secretary of the Board, and the DMR will function as the secretarial office for the Board.

Three committees are responsible for mining issues:

- the NMAPB is mainly responsible for proposing national strategy, policy and the master plan on minerals management to the Council of Ministers, as well as monitoring and assessing the operation of work to ensure the implementation of such strategy, policy and plan;
- the Minerals Committee is charged with advising ministers on bidding and issuance of MRs and notifications, approval of licences, renewals, transfers, revocation of conditions of mining in Categories 2 and 3, considering complaints and providing assessments of the impact on people's health and the environment; and
- the Provincial Minerals Committee is responsible for a wide range of issues related to Category 1 mining leases.

On 31 July 2018, the Council of Ministers approved a 20-year minerals management strategy (2017–2036) and a five-year minerals

management plan for 2017–2021. The strategy and master plan aim to integrate Thailand's management of mineral resources while ensuring that the mining industry will be environmentally friendly, with an increased focus on the quality of life of people affected by the mining industry. In the approved strategy, the four points of emphasis are:

- the classification of a mineral zone;
- the formulation of mineral policy;
- the development of a regulatory mechanism; and
- the promotion of general public participation.

The principal environmental law is the National Environment Protection and Promotion Act, BE 2535 (1992), as revised by its amendment in 2018 (the Environmental Act). It is administered by the Office of Natural Resources and Environmental Policy and Planning in the Ministry of Natural Resources and Environment.

Major amendments for 2020

Effective as of 30 January 2020, a Notification of MOI was issued to revoke a notification restricting foreign ownership, which was issued for the purpose of prohibiting foreigners from operating mining businesses through the use of schemes to conceal ultimate foreign ownership. Nonetheless, restrictions on investment in mining business by foreigners under other relevant laws are still in effect.

Classification system

7 | What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no legal classification system for reporting mineral resources and mineral reserves. In practice, the DPIM will classify the ore reserves based on reserves in mining lease areas and in areas of mineral potential.

MINING RIGHTS AND TITLE

State control over mining rights

8 | To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mining rights are granted by the Minister of Industry under the Minerals Act, BE 2560 (2017) (the Minerals Act). Section 52 of the Minerals Act states that no person shall mine in any area, regardless of any person's right over the surface area to be mined, unless a mining lease has been obtained. In Thailand, minerals belong to the state. Mining rights do not grant title to minerals in the ground. The mining leaseholder can sell minerals specified in the mining lease only. Other minerals acquired incidentally may be sold by the leaseholder only after receiving a licence or special permission from the Director-General of the Department of Primary Industries and Mines (DPIM). Under section 53 of the Minerals Act, the Minister will issue a notification to classify mining into three categories:

- Category 1 mining: mining in an area of no more than 100 rai (one rai is equal to 1,600m²), where the mining lease will be issued by the local mineral industry official (LMIO) on approval of the Provincial Minerals Committee in the province where the mining is done;
- Category 2 mining: mining in the area of no more than 625 rai (1km²), where the mining lease will be issued by the Director-General of the DPIM with approval of the Minerals Committee; and

- Category 3 mining: mining other than Category 1 or Category 2 mining, offshore mining and underground mining, where the mining lease will be issued by the Director-General of the DPIM with approval of the Minerals Committee.

No limit is imposed on the number of mining leases that may be acquired by one person. Therefore, in practice, it is possible to mine over a larger area than the prescribed area limits. The application process for a mining lease for the landowner of the area to be mined is the same as for those who do not own the property.

The maximum duration of mining rights is 30 years (compared with 25 years under the Old Minerals Act).

Prospecting

The Minerals Act provides for the issuance of:

- a general prospecting licence (GPL), which is valid for one year;
- an exclusive prospecting licence (EPL), which is valid for up to two years for an area of not more than 2,500 rai; and
- a special prospecting licence (SPL), which is valid for up to five years for an area of not more than 10,000 rai onshore and not more than 500,000 rai offshore.

All three licences are non-exclusive, non-renewable and non-transferable.

Mineral dressing and metallurgical processing

Licences may be issued and are valid for up to five years.

Cancellation, amendment and revocation of licences

There are provisions for the dismissal of applications, amendment of licences, penalties and revocation of licences.

Mineral royalties, fees and special contributions

Royalty rates are established under ministerial regulations. Rates are capped at 30 per cent.

The Minerals Act includes a schedule of fees. The Minister of Industry has the authority to reduce fees.

The Minerals Act includes provisions for civil liabilities, seizure and attachment, penalties and transitional provisions.

Publicly available information and data

9 | What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency, or securities commission regulating public companies, which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Mining laws and regulations, information regarding the number of mines by the types of minerals, numbers of licence holders and applicants for licences, and mineral assessment statistics are publicly available via the DPIM's website (www.dpim.go.th). The DPIM prepares mineral assessments by collecting mineral assessment reports submitted by licence holders. The database of the DPIM is available online.

Acquisition of rights by private parties

10 | What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence or more senior tenure? What are the requirements to convert to a mining licence?

Major mining rights include exploration rights and mining leases. Mining rights are granted with certain conditions and validity as prescribed by the Minerals Act. The Minister of Industry has the power to revoke the rights if the holder fails to comply with the conditions attached to the granted right. The approval of mining rights is not specified in the law itself and can vary. To apply for any mining rights, the applicant must submit an application together with supporting documents and information required with the LMIO and pay the fees at the specified rate.

Exploration rights

For exploration activities, a prospecting licence must be acquired. In case of overlapping applications for the same area, the application that was submitted the earliest will be processed first. There are three kinds of prospecting licences: GPL, EPL and SPL.

A GPL is non-exclusive, non-renewable and non-transferable and is valid for one year. A GPL grants rights for mineral prospecting and exploration within a designated area of an administrative district or a province. The LMIO has the authority to issue a GPL. Prospecting can be conducted by geological, geochemical and geophysical methods, together with other methods, such as drilling, boring or pitting, pursuant to the Notification of the Ministry of Industry (MOI) re: rules procedures and conditions for the exploration of mining under prospecting licence, BE 2560 (2017).

An EPL grants exclusive mineral prospecting and exploration rights within a designated area and is valid for up to two years. An EPL is issued by the Director-General of the DPIM and is non-transferable and non-renewable. An EPL is limited to an area not exceeding 2,500 rai.

An SPL is issued by the Director-General of the DPIM with approval of the Minerals Committee, is valid for five years and is non-transferable and non-renewable. The exploration area that may be granted under an SPL cannot exceed 10,000 rai, except for applications to explore offshore, which may be made for 500,000 rai each. An application for an SPL must include a work plan and an estimate of expenses for each year for the whole project, as well as an offer of 'special benefits' to the government. The special benefits will bind the holder of the SPL upon receiving a mining lease for mining in the area for which the SPL has been granted. A progress report must be submitted to the DPIM for every 180-day period commencing from receipt of a licence. An SPL is suitable for large projects entailing high-value minerals or substantial investment capital, and in the event that an applicant requires more time or a larger area for exploration. The holder may relinquish areas he or she no longer wishes to prospect.

An SPL holder will generally get preferential rights to acquire a mining lease for the area the SPL covers. If there are multiple applicants, the owners or possessors of the land have priority above all other applicants under the Land Code, BE 2497 (1954) (the Land Code).

Pursuant to section 50 of the Minerals Act and the DPIM Notification re: minerals exploration report, BE 2560 (2017), SPL holders must submit minerals operation reports in accordance with the following time frame: for the 180 days after receipt of the SPL, a report describing the first operations and works undertaken within 30 days of the end of that 180-day period, and a final exploration report 30 days before the expiry date of the EPL.

Mining rights

Upon discovery of a commercial mineral deposit, a prospector must apply for a mining lease to conduct mining activities. Generally, applications will be treated on a first come, first served basis.

Mining leases are divided into three categories. There is no limit on the number of mining leases that may be applied for by one person. A mining lease is valid for a maximum of 30 years and may not be transferred without the approval of mining right issuers.

An applicant for a mining lease must provide a map showing the area to be mined, reliable evidence of the discovery or existence of the mineral to be mined, evidence showing acquisition of surface land rights, plans on the rehabilitation, proposals of special benefits to the state and other documents or evidence as prescribed in the ministerial regulation.

Special rules apply to underground mining, defined in section 4 of the Minerals Act. Applications for underground mining must provide a restoration plan and security for restoration of the mining area, and remedies for persons affected by the mining (sections 81(8) and 81(9)). For mining leaseholders for underground mining who do not provide the requisite security or insurance for damage caused by mining activities within 15 days of notice of the damage, the mining lease issuer has the power to revoke the mining lease (section 90).

Special rules for offshore mining

In August 1978, the Cabinet passed two resolutions regarding offshore mining of minerals at depths not exceeding 200 feet. The resolutions are summarised as follows.

Known deposits

After the expiry of the maximum mining lease period of 25 years, a foreign mining leaseholder may apply for a new mining lease to work an old deposit, provided that it realigns its equity interests so that Thai nationals hold at least 60 per cent of the total equity interest in the venture.

Unknown deposits

A company with foreign shareholders may apply for a mining lease to exploit a new deposit offshore, provided that Thai nationals hold at least 51 per cent of the equity interest initially, to be increased to 60 per cent within two years.

The above resolutions constitute administrative guidelines to be followed by the DPIM in its consideration of whether or not to grant or renew an offshore mining lease.

Other approvals required

Purchase of minerals

Any person who wishes to purchase controlled minerals must obtain a licence from the DPIM. A purchasing licence is valid for not more than five years. The holder of a purchasing licence may not purchase minerals at any place other than the place specified in the licence. Purchasing minerals outside the specified place of purchase requires an external purchasing licence, which will be valid for the same period as the purchasing licence. A holder of a purchasing licence must keep accounts of minerals bought and sold and minerals still on hand.

Transportation and storage of minerals

The transportation of minerals requires mineral royalty to be paid or guaranteed. For most minerals, an ore transport licence must accompany the transporting vehicle to the destination stated in the licence. Any person who wishes to store minerals outside a mining area or outside a designated place of purchase must also obtain a storage licence.

Ore dressing

Except for a mining leaseholder undertaking mineral dressing within the mining lease area, no one can undertake ore dressing operations without a licence. The licence is valid for a maximum of five years.

Metallurgical processing

Except for a mining leaseholder undertaking metallurgical processing within the mining lease area, no one can undertake metallurgical processing operations without a licence. A metallurgical licence is valid for a maximum of five years.

Renewal and transfer of mineral licences

11 | What is the regime for the renewal and transfer of mineral licences?

Exploration licences

All prospecting licences are non-transferable and non-renewable.

Mining leases

A mining lease is transferable in accordance with rules, procedures and conditions prescribed in a notification by the Minister. The application and required supporting documents for approval of a transfer or renewal must be submitted to the LMIO. Where the mining lease provides for a term of less than 30 years and the mining leaseholder applies for renewal in accordance with the rules and regulations at least 180 days before the expiration of the mining lease, the Minister of Industry may extend the terms of the mining lease, provided that the aggregate term does not exceed 30 years.

Duration of mining rights

12 | What is the typical duration of mining rights? Is there a requirement to relinquish a portion of the mining rights to the government after a certain number of years?

Prospecting

- GPL: maximum of one year;
- EPL: maximum of two years; and
- SPL: maximum of five years.

Mining

Category 1, 2 and 3 mining rights are valid for a maximum of 30 years.

Grounds for revocation are prescribed in a number of sections of the Minerals Act.

Acquisition by domestic parties versus acquisition by foreign parties

13 | Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Government policy is not to grant mineral rights to foreign nationals (including companies in which ownership by foreign nationals exceeds 49 per cent). However, it is possible to grant mineral rights to a foreign company under a special agreement. Majority foreign-owned companies wishing to operate a mining business must obtain a licence granted by the Minister of Commerce with the approval of the Cabinet, as required under the Foreign Business Operations Act, BE 2542 (1999) (FBOA). The majority foreign-owned company can operate a mining business only if at least 40 per cent, or (with approval of the Cabinet) 25 per cent, of the capital is held by Thai nationals or Thai entities and at least two-fifths of the directors are Thai nationals.

The Land Code prescribes a ceiling on foreign ownership of 49 per cent and not more than half of the shareholders; there is no restriction

on foreign nationals leasing land. If the land is forest land, more than two-thirds of the shareholders or partners must be Thai nationals holding more than half of the total number of shares and its authorised person (authorised director) must be Thai.

In case of a change in shareholding structure or a change of control in the licence holder or its parent company, the Minerals Act does not require the licence holder to submit any notice of such a change. However, in the event of a structural change that results in shares becoming majority-foreign owned, a foreign business licence would be required under the FBOA and the company would be prohibited from owning land under the Land Code and from obtaining a licence to use a forested area.

On 30 January 2018, the MOI issued a notification restricting foreign ownership. The purpose of the notification was to prohibit foreigners from operating mining businesses through the use of schemes to conceal ultimate foreign ownership. A structure that is inconsistent with the limitations that it prescribes could lead to disapproval or revocation of a mining application or cancellation of mining rights. On 28 January 2020, the MOI issued a notification to revoke the notification of 30 January 2018. This 2020 notification was published in the Government Gazette on 29 January 2020 and became effective on the day after publication. As a result, the 2018 notification was revoked; however, restrictions on investment in mining business by foreigners under other relevant laws are still in effect.

Protection of mining rights

14 | How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Thailand has an independent court system, including an administrative court to hear cases involving government agencies (such as the DPIM). Current government policy is that contracts with a government agency cannot include arbitration provisions, with exceptions approved by the Cabinet. Under Thai law, judgments entered by a foreign court are not enforceable in Thailand. Foreign judgments can be introduced as evidence in an enforcement proceeding in a Thai court. A Thai court is free to examine new issues arising in such a case. Foreign arbitration awards are enforceable under Thai law.

One factor that is often cited as an impediment to the mining industry's development is the lack of security of tenure. The existing legal system does not expressly guarantee that the holder of an exploration licence will be granted a mining lease if it makes a commercial discovery. The government bureaucracy and the limited scope of the mining laws are not the sole causes of the inability to assure the right to mine prospected land; conflicts and restrictions from other authorities as well as subsequent land use conflicts complicate the issuance of rights.

One characteristic of the Thai bureaucracy is the separate nature of Thai administration. Government agencies are divided into ministries, departments and bureaux, each of which are district juristic entities, having independent contracting powers. Thus, the MOI is a separate legal entity from the Ministry of Natural Resources and Environment (MNRE) and the DPIM, but the DPIM answers to the MOI administratively. Even though the DPIM is only one among many departments within the MOI, it can enter into contracts with a private party, independent of the Ministry. The Director-General, as the head of the Department, is the signatory to contracts. The question of whether the Department or the Director-General has the power to conclude contracts, and the parameters within which this power can be exercised, are governed by the law on public administration.

Each government agency is only concerned with administering its own law, even though that law may contradict other laws or may be

inconsistent with national policy. This poses a major problem for the mineral industry in that the DPIM is not the agency that has the final say on whether or not an exploration or mining venture can be conducted. The ultimate decision may rest with the Office of Natural Resources and Environmental Policy and Planning (ONEP) or with the Forestry Department, depending on where the land is situated.

Foreign investors often believe that, once they have signed a contract with the DPIM and have paid the bonus, they may then proceed with the exploration and development work. In reality, the contract is only a grant of mineral rights, subject to negotiation with the other agencies concerned, and there is no guarantee that investors will be given all necessary approvals in the end. The Forestry Act, BE 2484 (1941) (the Forestry Act), the Minerals Act and the National Environment Protection and Promotion Act, BE 2535 (1992), as revised by its amendment in 2018 (the Environmental Act) all have equal standing. Therefore, the DPIM, the Forestry Department and the ONEP are of equal legal status, and none has authority to dictate terms to the other. There is no 'super agency' to reconcile differences among departments, or hand down binding judgments in case of conflict.

Policies issued by the heads of various ministries and departments are the real *modus operandi* for government officials, and the failure of officials to comply with policies may result in disciplinary action. These policies are internal directives and are not known to the public. In Thai legislation many provisions give wide discretionary powers to permanent officials responsible for administering the law.

The Minerals Act includes much more comprehensive provisions regarding regulations by two ministries (the MOI and the MNRE) compared to the Old Minerals Act, a new National Minerals Administrative Policy Board and the role of the DPIM. A Minerals Committee and Provincial Minerals Committees have been established.

Surface rights

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests or does the holder of the mineral tenure have priority over surface rights use?

Mining rights under the Minerals Act do not include any rights to occupy the surface. Surface rights over a mine vary depending on the type of land. Before applying for a mining lease, an applicant must acquire the right to use the surface from the public or private owner, as the case may be. Negotiation with a private landowner is concluded by a purchase or lease. If the land is owned by the government, a permit issued by the concerned agency is required to be submitted along with the application for a mining lease before a mining lease is granted.

Ownership of private land is governed by the Land Code, the Civil and Commercial Code and regulations, as set forth by the Land Department of the Ministry of the Interior. Under Thai law, foreign nationals may own land only if a treaty has been entered into between Thailand and their country or if permission is granted by the Ministry of the Interior. Presently, there are no such treaties. A majority foreign-owned company is prohibited from owning land under the Land Code unless it obtains a Board of Investment (BOI) promotion certificate and an exemption to own land. If the operator cannot own the land, it may consider a lease as an option. A lease agreement can be valid for a maximum of 30 years and must be registered with the Land Department of the Ministry of the Interior.

Public land can be categorised as forest areas, which are supervised by the Forestry Department under the Forestry Act and National Reserved Forest, Act BE 2507 (1964), or agricultural land reform areas under the Land Reform for Agriculture Act, BE 2518 (1975), which is under the supervision of the Agricultural Land Reform Office. Licences

from the concerned authority must be obtained. Some categories of reserved areas have been declared closed to exploration and mining activities. These include wildlife reserves, national parks, forests (conservation forests and economic forests) and areas reserved for security purposes. Development activities, including mining, are strictly prohibited in Category 1A watershed areas, and restrictions apply to mining activities in economic forest areas. Other areas of land are classified as urban areas, water bodies and areas for settlement programmes.

A government resolution on watershed classification in May 1985 prescribed that, without exception, all development activities would be prohibited in forest areas classified as Category 1A. Development in watershed Category 1B is subject to government approval on a case-by-case basis, and mining operations are permitted in watershed Categories 2 to 5. It is more complicated to obtain permission to operate a mine in any category of reserved forest because of the revocation of forest concessions countrywide in January 1989. The revocation of forest concessions resulted in a reclassification of the country's forests, which are now classified as national parks, wildlife reserves, economic forests and land reform zones.

Participation of government and state agencies

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Although there is no prohibition on the government participating in mining projects, there is no precedent for such engagement by the government.

The Minerals Act provides that its requirements do not apply to the DPIM, the Department of Mineral Resources or Department of Mineral Fuels for the propose of survey, testing, study and research. Currently, no state enterprise is involved in mining operations. There is also no local listing requirement for a mining company.

Government expropriation of licences

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The MOI has the power to revoke a licence when the holder fails to comply with the regulations provided under the Minerals Act or the conditions and obligations attached to the licence.

The MOI is empowered to revoke a mining lease upon the occurrence of the following:

- it appears that a mining lease was issued as a result of a prominent mistake or misunderstanding of material facts;
- the holder does not discharge all debts imposed under the Minerals Act within 90 days of receiving a written notice of payment from the LMIO; or
- the holder violates or commits an offence according to provisions under the Minerals Act, or fails to comply with an order of the LMIO or the conditions prescribed in the mining lease or related licence.

See Chapter 10 of the Minerals Act on dismissal, cancellation, amendment and revocation of mining leases.

There is no compensation for revocation. The Minerals Act itself has no provision regarding government expropriation of mining businesses or mining leases.

There are guarantees against expropriation in the Investment Promotion Law (Board of Investment), ASEAN Comprehensive Investment Agreement and several bilateral investment treaties.

Protected areas

18 | Are any areas designated as protected areas within your jurisdiction and which are off-limits to mineral exploration or mining, or specially regulated?

Some categories of reserved areas have been declared closed to exploration and mining activities. These include wildlife reserves, national parks, forests (conservation forests and economic forests) and areas reserved for security purposes. Development activities, including mining, are strictly prohibited in Category 1A watershed areas, and restrictions apply to mining activities in economic forest areas. Other areas of land are classified as urban areas, water bodies and areas for settlement programmes.

A government resolution on watershed classification in May 1985 prescribed that, without exception, all development activities would be prohibited in forest areas classified as Category 1A.

DUTIES, ROYALTIES AND TAXES

Duties, royalties and taxes payable by private parties

19 | What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

A company earning revenues from mining is liable to pay corporate income tax under the Revenue Code. The current rate is 20 per cent of net profit. Dividend payments are generally subject to a withholding tax of 10 per cent.

Mineral royalties

The Thai government collects mineral royalties from mining and mineral production. The Minerals Act, BE 2560 (2017) (the Minerals Act) provides that persons under the Minerals Act, including the mining lease holder and metallurgical operator, must pay a mineral royalty, fees and a special contribution in Chapter 11. The mineral royalty rate for each type of mineral is determined by a ministerial regulation issued under the Minerals Act and cannot exceed 30 per cent of market price. See the Ministry of Industry's Ministerial Regulation (MR) and two notifications issued on 1 October 2018 prescribing mineral royalty rates, guidelines regarding collection, market price determination, assessments, etc.

The MR BE 2561 (2018) prescribes mineral royalty rates, based on a market price announced by the Director-General of the Department of Primary Industries and Mines, at the following rates:

- tin ore: 2.5 per cent to 20 per cent;
- mineral ore with tungsten oxide: 2.5 per cent to 20 per cent;
- lead ore: 2.0 per cent to 15 per cent;
- gold ore: 2.5 per cent to 20 per cent;
- zinc ore: 2.0 per cent to 15 per cent;
- gemstone: 10 per cent; and
- other mineral ores, as per the annex to the MR, at rates between 4 per cent and 10 per cent.

Mining leaseholders must pay a special contribution of no more than 10 per cent of the mineral royalty of the minerals produced under that licence.

The Minister of Industry, on the recommendation of the Minerals Committee, may reduce fees and issue conditions for eligibility for such reductions under defined circumstances, including reasonable grounds (section 137).

Royalties are paid based on the value of the particular mineral. Under the Mineral Royalty Rates Act, BE 2509 (1966) and its amendments, some minerals were subject to progressive rates at varying levels according to the price range and the maximum mineral royalty

rate, while other types of minerals were subject to flat rates according to the kind, type and importance of the mineral.

Value added tax

Mining companies are subject to VAT at a flat rate of 10 per cent (temporarily reduced to 7 per cent). However, a zero VAT rate applies to exports of minerals by mineral traders. VAT payable is calculated from the difference between input tax (VAT paid by the mining trader to suppliers of goods or services) and output tax (VAT collected by the mining trader from persons who purchase goods or services).

Double tax treaties with other nations

At present, Thailand has double tax treaties with 61 countries, including China, Japan and the United States.

Tax advantages and incentives

20 | What tax advantages, tax credits and incentives are available to private parties carrying on exploration and mining activities?

Board of Investment promotional incentives

Since 1 January 2015, under the Investment Promotion Act, which governs the Board of Investment (BOI), only potash mining and dressing projects are eligible for promotion. As a precondition to applying for BOI incentives, a general prospecting licence, a special prospecting licence or an exclusive prospecting licence must be obtained prior to submission of an investment promotion application for prospecting projects, and a mining lease must be obtained for potash mining and dressing projects prior to submission of an investment promotion application. Other types of mining activities are not eligible for promotion. The BOI's website (www.boi.go.th) includes a guide to the BOI and a summary of business law.

A mining project promoted by the BOI may be granted benefits, including exemptions of customs duties for one year (which may be extended as deemed appropriate by the Board) on imported equipment and raw or essential materials used in manufacturing export products, and other non-tax incentives.

Tax stabilisation

21 | Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

No legislation currently provides for either tax stabilisation or tax stabilisation agreements.

Carried interest

22 | Is the government entitled to a carried interest, or a free carried interest in mining projects?

Although there is no prohibition on the government holding an interest in mining projects, there is no precedent for such engagement by the government.

Transfer taxes and capital gains

23 | Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Consideration paid for the transfer of a licence is categorised as a taxable income, which is subject to income tax at the rate prescribed by the Revenue Code. Capital gains are treated as normal income. VAT is applicable to transfers of rights.

Distinction between domestic parties and foreign parties

24 | Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No.

BUSINESS STRUCTURES**Principal business structures**

25 | What are the principal business structures used by private parties carrying on mining activities?

A Thai limited company is the usual choice of entity to hold mining leases. To qualify for Board of Investment promotion, the entity must be a limited company. Mining rights will not be granted to branches, non-registered partnerships, joint ventures or trusts.

Local entity requirement

26 | Is there a requirement that a local entity be a party to the transaction?

Under the current law, an entity doing business in mining (excluding exploration activity) must be Thai majority-owned; otherwise, a foreign business operation licence granted by the Minister of Commerce with the approval of Cabinet must be obtained.

Bilateral investment and tax treaties

27 | Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Thailand has signed 42 bilateral investment treaties (BITs), of which 36 are in force, and it has double tax treaties with 61 countries. Among these BITs, those with Australia (Thailand–Australia Free Trade Agreement (TAFTA)), Japan (Japan–Thailand Economic Partnership Agreement (JTEPA)) and the United States (Treaty of Amity) are considered more favourable. Under the TAFTA, a company with majority shareholders holding Australian nationality (up to 60 per cent) can engage in mining activities, but must be approved by the Ministry of Industry, and at least two-fifths of the directors must be of Thai nationality. This treaty does not avoid the restrictions on foreign land ownership. The Treaty of Amity specifically includes the right to prohibit or limit US companies from engaging in activities that include the exploitation of land or resources. The JTEPA has no provisions specific to mining activities. US and Japanese majority-owned companies are, therefore, subject to the restrictions and requirements for licensing in the Foreign Business Operation Act.

The ASEAN Comprehensive Investment Agreement includes provisions regarding mining and quarrying (article 3, paragraph 3(e)).

FINANCING**Principal sources of financing**

28 | What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Domestic and foreign financial institutions are the principal source of financing for mining projects, by way of loans on standard commercial terms.

Public and private limited companies (with the consent of the Stock Exchange of Thailand (SET)) may issue debentures. Public limited companies may apply to be listed on the SET, in accordance with SET-prescribed rules.

Direct financing from government or major pension funds

29 | Does the government, its agencies or major pension funds provide direct financing to mining projects?

Generally, no. The government pension fund may invest in securities issued by mining companies, having credit ratings that meet investment grades.

Security regime

30 | Please describe the regime for taking security over mining interests.

A licence for mining activities, granted by the governmental agency, cannot be mortgaged, pledged or assigned as security under Thai law. Rights under a mining lease are not subject to the execution of a judgment.

RESTRICTIONS**Importation restrictions**

31 | What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The import of foreign machinery and equipment is subject to customs duty, at rates prescribed in the Customs Tariff, and VAT (currently at a rate of 7 per cent). Exemptions may be granted by the Board of Investment for promoted projects. In the case of a non-promoted company, under general rule, the ratio of foreign staff to Thai staff must not be greater than 1:4. An exemption to this limitation can be granted to a promoted company with the requirement that training and instruction must be expedited, and support must be given to Thai personnel in order that they can perform work in the promoted project in place of the foreign staff within a period of time prescribed by the Board of Investment.

Standard conditions and agreements

32 | Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Standard international forms are not commonly used in Thailand. In practice, international EPC contracts are split into offshore supply agreements ('sales of goods agreements' not subject to withholding tax or stamp duty) and onshore hire of work contracts (subject to withholding tax and stamp duty).

Mineral restrictions

33 | What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The person who conducts mineral processing must be the holder of a provisional mining lease or mining lease who undertakes mineral processing operations within its mining concession area, unless a mineral processing licence is obtained from the local mineral industry official, which will designate the mineral processing area. Mineral processing must be conducted in accordance with the approved flow

sheet and mineral processing procedure under the supervision and responsibility of a licensed engineer.

See the two notifications of the Ministry of Industry effective 31 January 2018 in relation to the type and condition of minerals subject to permission to import into Thailand or the continental shelf area and the amended version effective as of 6 April 2019, or export outside the country or its continental shelf area, and that are prohibited from export.

Import of funds restrictions

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Exchange control regulations are administered by the Bank of Thailand on behalf of the Ministry of Finance, under the Exchange Control Act, BE 2485 (1942).

In the past, Thailand had comprehensive exchange control regulations. Although approvals to repatriate capital and profits were discretionary, in practice, approvals were granted as a matter of routine, provided applicable procedures were complied with. A number of relaxations on exchange controls have been announced by the Bank of Thailand since June 1990, and ceilings on outward remittances have been substantially increased. Presently, commercial banks are authorised to process most applications to purchase foreign currency. Foreign currency accounts may be established abroad and in Thailand.

Generally, the proceeds from the export sale of minerals must be repatriated within 360 days.

ENVIRONMENT

Principal applicable environmental laws

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Many laws relate to the management of environmental issues. Each contains certain requirements that relate to the principal activities of the competent authorities. For example, the Factories Act contains provisions designating the Ministry of Industry (MOI) as the body responsible for dealing with environmental problems arising from a factory's operation. The public health law designates the Ministry of Public Health and local authorities as the bodies responsible for certain environmental problems, such as public nuisance or waste-water management, among others. With respect to natural resources management and conservation, laws apply to each type of natural resource, such as water, soil and minerals.

The National Environment Protection and Promotion Act, BE 2535 (1992), as revised by its amendment in 2018 (the Environmental Act), is the principal law for managing environmental issues, including water pollution, air pollution and noise pollution, as well as hazardous waste and conservation of natural resources. In addition, the Environmental Act requires both private and public sectors to prepare an environmental impact assessment (EIA) report for the prescribed operations or activities, and provides for the establishment of an environmental fund to support activities related to environmental quality promotion and protection.

The Environmental Act established three principal agencies:

- the Office of Natural Resources and Environmental Policy and Planning (ONEP);
- the Department of Pollution Control; and
- the Department of Environmental Quality Promotion.

These agencies are attached to the Ministry of Natural Resources and Environment (MNRE). Their main powers and duties are as follows.

ONEP

The ONEP has primary responsibility for the coordination and preparation of natural resources and environmental management plans to comply with the enhancement and conservation of national environmental quality law and other relevant laws, including proceedings relating to the assessment of environmental impacts that may arise from projects or activities of public and private sector companies.

Department of Pollution Control

The Department of Pollution Control is primarily responsible for making recommendations regarding environmental quality standards and standards for controlling pollution from its source. Its duties include preparing measures for controlling, preventing and solving environmental problems arising from pollution, taking steps regarding pollution complaints and taking action under the national environmental quality promotion and protection law, the pollution law, as well as other relevant laws.

Department of Environmental Quality Promotion

The Department of Environmental Quality Promotion is primarily responsible for the promotion and dissemination of information relating to the environment. In addition, it has a duty to:

- compile, develop and provide services in relation to environmental data as the national environmental information and data centre;
- promote public participation in environmental conservation, protection and utilisation of natural resources;
- act as an environmental dispute prevention and mediation centre;
- coordinate and propose plans and measures to promote and disseminate information relating to national resources and environmental protection; and
- study, research, develop, support and transfer technology and environmental management.

The National Health Act, BE 2550 (2007) provides a framework and guidelines for formulating national policies, strategies and activities in regard to national health, and provides mechanisms for securing continuous participation from all sectors in promoting health, and improving national health effectively and thoroughly. Health impact assessments, as required under the 2017 Thai Constitution (the Constitution), are formulated and supervised by this Act.

The Minerals Act, BE 2560 (2017) (the Minerals Act) contains numerous provisions on the protection of the environment and communities.

Environmental review and permitting process

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The principal rules concerning environmental quality promotion and protection, which apply to exploration and mining under the Environmental Act, are as follows.

Section 58 of the Constitution provides that any project or activity that may have a severe impact on the environment may not be carried out unless the impact on environmental quality and health of the people in the surrounding community has first been studied and evaluated. The rights of a community to have their input into any such evaluation, and to take action against a government agency or organisation for not fulfilling these rights, are protected in the same provision. The EIA report approval process is as provided in the Environmental Act.

The Minerals Act includes numerous provisions for environmental review, by both existing and new government agencies. See section 5 of the Minerals Act for powers of the MNRE and the MOI.

The National Environment Board

The National Environment Board has the power to prescribe standards under the Environmental Act in the following areas: water quality in public water sources; underground water quality; air quality; noise level; and vibration, etc.

In prescribing such standards, technical principles, scientific evidence, economic and social feasibility, as well as relevant technology, must be taken into consideration. If the National Environment Board deems it appropriate, it may prescribe higher environmental quality standards than the general standards in areas that have been declared conservation areas, environmental protection areas, areas that have been approved by the Cabinet for the use of measures to solve environmental problems or a pollution control zone.

General projects and activities

Under the Environmental Act, the Minister of Natural Resources and Environment, with the approval of the National Environment Board, has the power to require those undertaking certain projects or activities that may have an impact on the environment to prepare and submit an EIA report. The projects or activities so required must be specified by notification in the Government Gazette.

Projects may be required to undertake either an EIA or an environmental and health impact assessment (EHIA). These two different levels of assessment depend on the type and size of the project. A project that is required to prepare an EHIA report is a project that may have a severe impact in terms of environmental quality, natural resources and health of a community, and it must be in strict compliance with the notifications of the Ministry of Natural Resources and Environment regarding the criteria, procedures, regulations and guidelines for preparing such a report (found in a notification published on 29 December 2009; the latest update of this notification was published in the Government Gazette on 15 March 2021).

Mining assessments

All mining projects require an EIA report. EIA reports must be submitted in the application for the mining lease under the Ministry of Natural Resources and Environment Notification dated 24 April 2012, which came into effect on 21 June 2012.

The following mining activities require an EHIA (notification of 31 August 2010; the latest version of this notification was published in the Government Gazette on 28 November 2019):

- underground mines whose structure is designed to collapse after mining without any support, and no substitute form of support is inserted to prevent the collapse (all sizes);
- mines for lead, zinc or other metallic minerals using cyanide or mercury or lead nitrate in the production process, or other metallic minerals with arsenopyrite as an associated mineral (all sizes);
- coal mines only if coal is conveyed out of the project site by car (200,000 tonnes or more per month or 2.4 million tonnes or more per year); and
- seabed mines (all sizes).

The Minister of Natural Resources and Environment, with the recommendation of the Pollution Control Committee and the approval of the National Environment Board, has the power to prescribe standards for controlling pollution from its source, to control the release of waste water, emission of air pollution, dumping of waste or other pollution into the environment. However, other standards may be prescribed by other laws, such as the Factory Act. If the standards prescribed by other laws are not lower than those prescribed by the Environmental Act, such standards may be applied. If standards prescribed by other laws are lower than those prescribed by the Environmental Act, the government agency in charge must amend those laws to make them consistent with the rules issued under the Environmental Act.

Sustainability

37 | Do government agencies or other institutions in your jurisdiction provide incentives or publish environmental and social governance (ESG) guidelines for green projects?

The National Economic and Social Development Board issued the National Economic and Social Development Guidelines No. 12 (2017–2021). One aspect of the Guidelines is to promote and provide ideas for further development of policies to create an environmentally friendly society and economy. For instance, the Guidelines provide a framework on the control of pollution and the preservation of environmental quality.

In addition, the MOI has created a definition of 'green industry', highlighting its importance, which provides for different categories. In this regard, different levels of green industry are eligible to receive benefits from the MOI.

The Industrial Estate Authority of Thailand (IEAT) also acknowledges the importance of green industry and provides benefits to companies that are able to achieve it. For instance, the IEAT issued Notice No. 47/2558 on the provision of benefits to the business operator in industrial estate who achieves the status of green industry. The benefits include, among others, an exemption from factory inspection for the renewal of the letter for land utilisation and business operation from the IEAT, and a reduction or exemption on the renewal fee of the letter for land utilisation and business operation.

Closure and remediation process

38 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The Minerals Act, BE 2510 (1967) and its amendments (the Old Minerals Act) required that land used for mining be restored to its original state when it is no longer used for mining. No provision addressed the closure of mines under the Old Minerals Act.

The current Minerals Act includes, among others, the following provisions:

- section 19: general criteria of deposit areas for mining, including possible mining buffer boundaries, etc;
- section 32: power of the Minister to issue notifications on mining buffer boundaries, etc, applicable to all licences;
- section 56: right of people in communities to hold a referendum on issue of a mining lease;
- section 67: power of the Minister to issue notifications on establishment of a control and monitoring committee;
- section 68: obligations of holders of mining leases including restoration of mining areas according to plans of restoration, development, utilisation and monitoring on the impact on the environment and people's health during mining and after closure of the mine, as approved by the Minerals Committee, and the placing of security for restoration and, in the case of Categories 2 and 3 mining, insurance;
- section 70: revocation of mining leases for failure to place security or take out insurance; and
- Chapter 6 (sections 76 to 93): special provisions applicable to underground mining.

Restrictions on building tailings or waste dams

39 | What are the restrictions for building tailings or waste dams?

Essentially, section 68(6) of the Minerals Act provides that dumping tailings or allowing others to take tailings out of the mining area requires prior approval from the local mineral industry official. In this regard, further rules regarding tailings are provided under the Department of

Primary Industries and Mines Notification re: rules and conditions for the establishment of a place for tailings dumping or a place for tailings dumping storage outside the concession area, or the distribution of tailings outside the mining area.

In regard to waste dams, there are no specific regulations on the operation and management of waste dams. However, further details as to the operation, management, inspection and alarm systems in regard to the management of waste as a result of the mining operation, including tailings and waste dams, must be included in the EIA report conducted by the mining operator.

The Engineer Act, BE 2542 (1999) governs the licensing of persons in charge of the operation and management of projects.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

40 | What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety law is the National Environment Protection and Promotion Act, BE 2535 (1992), as revised by its amendment in 2018 (the Environmental Act), administered by the Office of Natural Resources and Environmental Policy and Planning and the National Health Act, BE 2550 (2007) administered by the National Health Commission Office. Labour laws applicable to the mining industry and administered by the Ministry of Labour include:

- the Labour Protection Act, BE 2541 (1998);
- the Civil and Commercial Code on the hire of services;
- the Labour Relations Act, BE 2518 (1975);
- the Act Establishing the Labour Courts and Procedures in the Labour Courts, BE 2522 (1979);
- the Provident Fund Act, BE 2530 (1987);
- the Social Security Act, BE 2533 (1990); and
- the Compensation Fund Act, BE 2537 (1994).

The Minerals Act, BE 2560 (2017) (the Minerals Act) provides more comprehensive oversight of health and safety applicable to the mining industry. (New ministerial regulations and notifications will prescribe procedures for implementation.)

Management and recycling of mining waste

41 | What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Under section 78 of the Environmental Act, the municipality where a mine is located is given the responsibility of managing solid waste disposal generated by mining activities or, alternatively, contracting out such services to the private sector. The rights to explore and exploit other mining waste products in tailings and waste piles belong to the mining leaseholder, or a sub-lessor that has the requisite licence to perform such activities under the Minerals Act or supporting regulations.

Use of domestic and foreign employees

42 | What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

All mining activities are subject to the labour laws of general application.

The employment of foreign individuals is subject to the laws and procedures regarding visas and work permits.

The Emergency Decree on Administration of Alien Working, BE 2560 (2017) and its amended version, which superseded the Working of Aliens Act, BE 2521 (1978), requires that every foreign national working in Thailand obtain a work permit, with certain exceptions. Presently, 39 occupations are closed to foreign nationals, including architecture, civil engineering, accounting and law. Generally, foreign nationals may start working only after a work permit is issued. In practice, little difficulty is experienced in obtaining work permits for qualified foreign nationals in positions for which qualified Thai nationals are not available.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

43 | What are the principal community engagement or corporate and social responsibility (CSR) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Thailand does not have CSR laws. However, section 58 of the 2017 Thai Constitution provides that the operation of any activity that might affect the community cannot be undertaken unless a study and an environmental impact assessment (EIA) and health impact assessment (HIA) of the affected community is completed, and a hearing involving the public and interested persons is conducted and the opinions of environmental NGOs and higher education institutions providing studies in the field of the environment are obtained. Failure to comply with this law permits the affected party to bring a claim in the administrative court, and the operation must be suspended during the proceeding.

The National Health Commission Office conducts administration of HIAs under a notification, which prescribes criteria and procedures to assess the health impact of public policy, while the Office of Natural Resources and Environmental Policy and Planning supervises the administration of EIA reports and public hearings under the National Environment Protection and Promotion Act, BE 2535 (1992), as revised by its amendment in 2018. (Additionally, community engagement and CSR requirements are specified in the government gold policy, dated 6 May 2011.)

Rights of aboriginal, indigenous or disadvantaged peoples

44 | How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

This issue is not applicable in Thailand.

International law

45 | What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The ASEAN Minerals Cooperation Action Plan 2016–2025 (AMC AP-111) promotes environmentally and socially sustainable mineral development.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

- 46 Describe any local legislation governing anti-bribery and corrupt practices.

Thailand's primary legislation covering anti-bribery and corrupt practices is the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, BE 2561 (2018) (replacing the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, BE 2542 (1999)). Thailand has continued to refine other laws, such as the Anti-Money Laundering Act, BE 2542 (1999) (last amended on 10 February and 8 August 2017), to encourage transparency and fulfil obligations under the United Nations Convention against Corruption, which Thailand ratified in 2011. The National Anti-Corruption Commission, the Public Sector on Anti-Corruption and the Attorney General's Office are all empowered to investigate and prosecute possible corrupt practices.

Foreign legislation

- 47 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies that fall under the jurisdiction of foreign anti-corruption legislation can be held liable for their activities in Thailand under the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, BE 2561 (2018) and the Anti-Money Laundering Act, BE 2542 (1999).

Examples of foreign legislation that could give rise to liability are the US Foreign Corrupt Practices Act, the UK Bribery Act and the OECD Convention on Combating Bribery of Foreign Public Officials.

Disclosure of payments by resource companies

- 48 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Thailand has initiated steps to become a candidate and become compliant with the EITI, but has not yet acceded to it.

FOREIGN INVESTMENT

Foreign ownership restrictions

- 49 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Government policy is not to grant mineral rights to foreign nationals (including companies in which ownership by foreign nationals exceeds 49 per cent). However, it is possible to grant mineral rights to a foreign company under a special agreement. Majority foreign-owned companies wishing to operate a mining business must obtain a licence granted by the Minister of Commerce with the approval of the Cabinet, as required under the Foreign Business Operations Act, BE 2542 (1999) (FBOA). The majority foreign-owned company can operate a mining business only if at least 40 per cent, or (with approval of the Cabinet) 25 per cent, of the capital is held by Thai nationals or Thai entities and at least two-fifths of the directors are Thai nationals.

The Land Code, BE 2497 (1954) (the Land Code) prescribes a ceiling on foreign ownership of 49 per cent and not more than half of the shareholders; there is no restriction on foreign nationals leasing

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land. If the land is forest land, more than two-thirds of the shareholders or partners must be Thai nationals holding more than half of the total number of shares, and its authorised person (authorised director) must be Thai.

In case of a change in shareholding structure or a change of control in the licence holder or its parent company, the Minerals Act, BE 2560 (2017) does not require the licence holder to submit any notice of such a change. However, in the event of a structural change that results in shares becoming majority-foreign owned, a foreign business licence would be required under the FBOA and the company would be prohibited from owning land under the Land Code and from obtaining a licence to use a forested area.

On 30 January 2018, the Ministry of Industry (MOI) issued a notification restricting foreign ownership. The purpose of the notification was to prohibit foreigners from operating mining businesses through the use of schemes to conceal ultimate foreign ownership. A structure that is inconsistent with the limitations that it prescribes could lead to disapproval or revocation of a mining application or cancellation of mining rights. On 28 January 2020, the MOI issued a notification to revoke the notification of 30 January 2018. This 2020 notification was published in the Government Gazette on 29 January 2020 and became effective on the day after publication. As a result, the 2018 notification was revoked; however, restrictions on investment in mining business by foreigners under other relevant laws are still in effect.

INTERNATIONAL TREATIES

Applicable international treaties

- 50 What international treaties apply to the mining industry or an investment in the mining industry?

Investment in a mining project may qualify for investment protection under a bilateral investment treaty. Thailand is currently a party to 36 bilateral investment treaties. Thailand is also party to the 2009 ASEAN

Comprehensive Investment Agreement. Mining and quarrying, and services incidental to them, are listed as one of the designated sectors to which the 2009 agreement applies.

UPDATE AND TRENDS

Recent developments

51 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry (legislation, major cases, significant transactions)?

There have been no key developments during 2020. At present, the arbitration against the Thai government for ordering the closure of the Chatree gold mine is still ongoing.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Effective for the period from 1 January until 31 December 2021, the DPIM has issued a notification to exempt fees under the Minerals Act and other regulations issued by virtue of such Act. In this regard, the following fees shall be exempted if the applicant, who is affected by covid-19, meets certain requirements provided therein:

- 1 annual fee for mineral dressing, metallurgical operating licence, mineral purchasing licence, mineral possessing licence and licence for the establishment of the place for mineral storage;
- 2 fee for the renewal of concession, which the concessionaire has applied for renewal of in 2021; and
- 3 fee for the renewal of licences that the licence owner applies for the renewal of in 2021, namely, licence fee for mineral dressing, metallurgical operating licence, mineral purchasing licence, mineral possessing licence and licence for the establishment of the place for mineral storage.

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