



## SPECIAL REPORT

# Modules for mining agreements

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In a study done for the Natural Resources and Energy Division, Department of Technical Cooperation for Development, (DTCD) of the United Nations, the author outlines a framework for mining agreements between developing countries and TNCs. Parts I to VII are published in this issue of RMR. Parts VIII to XII, and Annexes will be published in our next issue.

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### Introductory note

The following modules should serve two purposes:

(1) They should help drafters of a mining agreement. In this capacity they propose very basic clauses and the reasoning behind such clauses. However, the clauses are not to be understood as integral part of one "model" agreement. Before they can be included in an actual agreement drafters should make sure that each clause or module (group of clauses relating to one subject) is adapted to project conditions.

(2) They should help drafters of mining legislation to decide what subjects may be included in legislated texts, codes, regulations, directives, inter-office rules, etc, and what subjects are better dealt with in texts negotiated with the participation of an investor and against the background of a potential project.

The reasoning and certain additional explanations may assist in formulating clauses or code-provisions that reflect the special features of national mining projects, the preferences of the parties, the state of the mining industry, the system of laws and rules in regulating mining investment, and in particular capacities of the mining administration.

Emphasis has been laid on linkages between mining legislation and mining agreements, ie proposed clauses or modules are accompanied by some indications as to their relative position in both legislation and agreements. These explanations may also contribute to shorten agreements, while heightening parties' awareness of assumptions, underlying clauses or groups of clauses.

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### Part I

#### RECITALS

Particulars of the agreement  
"This agreement is made on the (date) between the Minister of Mines representing the Republic of ..... ("State") and incorporated under the laws of ..... ("Company") (or incorporated under the laws of ..... and duly registered in ..... (public commercial register) with register number ...);  
All (substantially all) of the shares of which at the time of registration are owned by (parent-company) incorporated in and under the laws of ..... : (jointly referred to as the "Parties")



### **Nature and scope of investment planned**

"Company has informed State that expenditures required to confirm the existence and the extent of mineral deposits discovered during the prospecting period and to determine the feasibility of operations to mine, treat and market the minerals may amount to ... . Based on preliminary estimates capital cost to establish such operations, including the cost to establish project-related infrastructure may amount to ... .

State desires to promote development of its mineral resources through the operations of mining enterprises. It understands that very substantial expenditures will be required to ensure efficient and economical operations. To encourage Company to assume the risks corresponding to the outlay of such sums, State is willing to define policies and to take necessary measures consonant with the National Development Plan and in furtherance of the interest of the people of .... province and of State in general."

### **Work performed so far by both Company and State**

"In the judgement of State Company has demonstrated by work done during the prospection period and on the occasion of the successful completion of other mining ventures under comparable conditions that it commands the technical and financial capabilities and resources to execute a program of mineral resource development of the kind envisaged by the Parties and to undertake operations on a scale required by standards of efficient and economic mining"

### **Rights and other authorizations and privileges so far obtained by Company**

"State on ..(date).. has granted to Company a prospecting licence and understands that information and experience acquired during the surveying and pros-

pecting periods and additional information supplied by State have encouraged Company to consider actively to undertake a program of exploration, development, exploitation, processing and marketing of mineral ores subject to the laws and regulations of State and further subject to the terms and conditions established by this present Agreement." "Company has applied for and State is favourably disposed to grant Company (special status, pioneer status) under the (Promotion of Investment Act, or other relevant legislation for the promotion of investment)."

Note: It should be examined in detail whether Company is eligible for investment incentives given that in many jurisdictions investment promotion codes may not cover investment in the primary and tertiary sectors but only industrial investment, ie while a refinery may be eligible the mining installations pertaining to it may be excluded from the scope of the investment code.)

### **Nature and scope of investment/operations planned**

"State recognizes that in order to encourage Company to engage an operations of the scale described above certain matters have to be clarified and agreed on at this early stage in order to define relations between the Parties governing all activities covered by this Agreement.

## **Part II INTRODUCTORY PROVISIONS**

The introductory provisions should reflect in a particular way the three aims of an Agreement drafted in an environment of a well established mining and investment legislation.

Provisions should *contribute precisely, adjust* otherwise rigid or too general rules to the requirements of the

project, and help *rationalise* the application of the code to mining activities.

### **1. Definitions**

### **2. Abbreviations**

Definitions and Abbreviations should conform to the structure of and should use the language of the Mining Code and other pertinent legislation. As far as the mining administration has used consistently certain terms that have not been defined in the Mining Code, these terms should be defined here. However, to the extent possible such general terms as "minerals", "exploration", etc which frequently are found in agreements although they are or ought to be defined in the Mining Code, should not be included; or, if need be only by making reference to the definition given in the Mining Code.

Defined, on the other hand, should be technical terms describing or defining criteria or events relating to operations envisaged by the Agreement and which are used in a sense proper to the agreement or which have no generally agreed definition or meaning, eg "commercial discovery", "commercial production", "affiliate", or "affiliated enterprise", "associated minerals", etc, as well as terms which have been chosen to make the agreement more readable, ie their use can help prevent unnecessary repetition.

### **3. Basic legal texts and provisions governing the Agreement**

The statutory and contractual groundwork for activities under the agreement should be set out:

a. *in detail* so as to specify provisions or texts applicable to operations;

b. with an attempt to be *as complete as possible* in order to present the investor/operator with an exhaustive set of rules and statutes applicable to his activities;

c. alternatively, the list of norms may be restricted to those that are considered *fundamental and immediately applica-*



ble. In the latter case, the provision is merely indicative; a solution which may prove necessary if it is agreed that only those statutes enumerated in the Agreement will be applicable to the Parties and will be allowed to affect the Agreement, it being understood that in case a legal provision emerges that is not consonant with the agreement, State has an obligation to:

- a) modify or repeal legislation not listed (negative enabling clause)
- b) hold harmless other parties affected by the conflictive provision in an adverse and material way.

An example of a clause that attempts to insulate the Agreement from interference by mining and investment legislation, without resorting to a full-fledged "freezing" or "stabilization" clause, is clauses that freeze legislation in any way related to the agreement by reference or otherwise to the state of the time of signing the agreement or its entry into force, could read as follows:

"The present agreement will form the basis for Company's activities and shall not be in any way modified or changed during its effectiveness other than by express mutual consent between the Parties.

State will indemnify and hold harmless Company if any law, regulation or any interpretation of any law or regulation not covered by the above provisions will result in a material and adverse change to the technical and economic feasibility of the project and/or will substantially alter the obligations and rights of Company under this Agreement."

"State has enacted Decree Law no. ... of (date), ("Mining Code") and Regulation no. ... of (date) ("Mining Regulation") as well as other relevant norms and provisions pertaining thereto and dealing with mining activities and operations of foreign companies in the mining sector. The Parties agree that these

instruments are binding and will govern relevant aspects of Company's operations.

However, and notwithstanding any rights and obligations created by these general legal instruments the terms and conditions of the present Agreement will complement such legal instruments with a view to create favorable conditions for the execution of the program of operations envisaged by the Parties.

Terms and expressions used in this Agreement and in texts ancillary to this Agreement shall have the meaning established in the general mining legislation as effective on the day the present Agreement takes effect, provided, however, that the present Agreement contains no express stipulation to the contrary in which case the Agreement will govern.

In case of discrepancies or doubt the meaning used in general Legislation shall govern the interpretation of the present agreement."

4. Mining rights granted, in particular mining rights granted or under consideration by the mining administration at a time prior to the effectiveness of the present Agreement.

This provision should give the history of transactions between the Company and the State or any entity thereof, in order to underline the continuity of its activities, and the relation between earlier rights and the position conferred upon Company by the present Agreement.

### **Part III GENERAL PROVISIONS**

General Provisions may be found under this heading or in the documents containing the mining title and the conditions governing its use. Provisions additional to the mining title are called for, eg:

- where the mining area needs further definition;

- where the Agreement spells out certain conditions to the use of the mining title that are not or not totally or not in this form contained in the mining title or in the provisions of the Mining Code governing the mining title;

- or in the event and to the extent the Agreement is meant to create the contractual framework for a string of successive operations and their pertinent agreements which at the time the Agreement has been drafted had not been defined or are not definable (see further Part V).

- (1) Mining area
- (2) Substances to be covered by title(s) granted under the Agreement for the mining area
- (3) (possibly,) provisions for a General Survey Stage
- (4) (possibly,) provisions describing in general terms future activities and financial and technical conditions for the negotiation and signing of future agreements relating to these activities and/or for rights of Parties to apply for additional mining rights or rights for a subsequent stage in the mining project cycle.

### **Part IV GENERAL RIGHTS AND OBLIGATIONS OF COMPANY**

Rights and obligations addressed here relate to those which are imposed because of and having regard to specifics of the Company and its proposed operations. The essential rights and obligations relating to mining operations will be found in the mining title. The scope and contents of this provision thus depends on the availability of generally recognized standards in this particular sector or industry, their particular meaning in the context of the operations envisaged by the Agreement and the way operations and rights of Parties need to be defined in terms that differ substantially from general standards.



Further, obligations which are not immediately connected with the proposed mining operations and therefore not mentioned in the mining title should be listed here. The majority of those obligations will be addressed in great detail by later provisions.

"1. Any titles granted to the Company pursuant to the Mining Code will confer upon the Company sole and exclusive rights and authority to conduct activities and operations in accordance with the terms and conditions established by the such titles.

2. Company shall abide by all laws and regulations of general application in State and shall comply with the present Agreement; in particular Company shall:

- develop and mine wisely and efficiently any mineral deposit in the mining area,
- process, refine, store, transport, and market all minerals and mineral products produced from minerals extracted, and,
- perform all other operations and activities which may become necessary and convenient in connection therewith;
- protect natural resources and the environment against unnecessary damage, prevent pollution and harmful emissions and dispose of waste materials in a manner consistent with the best prevailing industry standards,
- take all measures to protect the health and the safety of its employees and other authorized persons,
- protect and control fire and other hazards to the mine and to rights and property of any third party,
- install and utilize safety devices and take and observe precautions consistent with best standards of mining safety,
- and in general conduct all operations and activities in accordance with the best prevailing industry standards recognized and observed under conditions comparable to those prevailing for the operations of the Company."

### (Optional)

#### **Full control and management powers**

"Company shall have full and effective control and retain full management powers of all matters relating to the operations of the Project, subject only to the rights of State to supervise and direct certain matters of operations conferred onto State by this Agreement.

In particular, Company will conduct all production, beneficiation, processing and marketing operations in accordance with reasonable and consistent long-term policies and projections.

These powers notwithstanding, Company will make every reasonable attempt to inform State in a timely and opportune manner as to its plans and intentions and will coordinate its activities with State and the instrumentalities of State charged with the implementation of this Agreement."

#### **Part V PROGRAMME OF OPERATIONS**

Here again, provisions may be unnecessary if the matter has already been addressed in the mining title. However, it might be preferable to include a Programme of Operations in the Agreement to which the mining title could refer. Otherwise the wealth of details which might have to be defined or spelt out might overburden the text and scope of a mining title.

The following provisions have to be formulated and understood in accordance with the Mining Code provisions relating to the programme of prospection, exploration or production whichever is applicable. Depending on the contents of the Code they may be very general or they may provide in detail contents and form of the Programme of Operations. The following provisions have a special role to play if the Agreement provides a framework for a series of subsequent, staged activities. The Programme of Operations in this case

may determine the conditions under which the Company is permitted to continue operations.

Three classes of links between different stages of activities can be distinguished:

- the link between a series of mining titles whose subsequent concession depend on the applicant having fulfilled all obligations of the preceding title as provided by the Mining Code or supplementary contractual provisions, ie a mining lease will be conferred under the condition that the applicant Company has demonstrated the existence of a commercially exploitable orebody, a demonstration which Company may have promised under the exploration title;
- the link, illustrated in the present Modules, between the satisfactory preparation of a feasibility study and the obtention of a mining title depending on the (mutually agreed) satisfactory results of a feasibility study;
- the link between contracts of different scope and nature, ie between an exploration agreement that is basically a service agreement since the Company will receive a fee for services rendered, and a subsequent investment agreement between the State and the highest bidder for the explored orebody, for the acreage or lot. It is understood that since the contractor under a service agreement for exploration has received a remuneration commensurate with his services, he might not have any claim to a preferred position as against other contenders for the mining title (agreement).

The type of link envisaged can be outlined in this Part while the detailed conditions should be part of the substantive provisions on exploration, the feasibility study, etc, to be dealt with in the following Parts VI to VIII.

"1. Company in compliance with its obligations will undertake exploration work as set forth in Part VI of this Agreement.



2. Upon completion of the exploration work Company will submit to State a final report and, in case a commercial discovery has been made, will elaborate and submit for the approval of State a Feasibility Study Report in accordance with Part VII of this Agreement.

3. Upon its approval by State, State will grant a mining licence (title, lease) in accordance with art.... of the Mining Code under which Company will execute the Development and Exploitation Programme as set forth in the Feasibility Study Report, and according to provisions set forth in Part VIII of this Agreement.”

## **Part VI EXPLORATION STAGE**

Clauses covering the Exploration Stage have to conform very closely to the provisions of the Mining Code and the particulars of the mining title. Depending on their contents and nature the following provisions may be simply explanatory, they may determine the interpretation of Code or title provisions or they may institute additional rights and obligations in accordance with the capacity of the Company, the specifics of the orboddy or the operations and the requirements of the local/regional infrastructure.

Accordingly, very basic provisions which may be determined by the Code and the mining title, will not be touched upon here, eg exploration periods, the delineation and unification of areas, the procedure of how to add new substances not included in the original title to the mining title, the relations between adjacent title-holders and between surface title holders and mining lessees, etc. Likewise, basic prerequisites for obtaining a mining title will not be mentioned here, such as a showing of technical and financial capacity, unless State is convinced that the latter constitutes a major prerequisite to successful operations. In this case the Agreement will require the Company to furnish liquid security in

the form of performance bonds or a on-demand bank guarantee (“a la première demande”) in favour of State thus backing up its capacity to fulfill all obligations under the Agreement, and will stipulate details of such bonds or guarantees such as amount, form, events of default, pro rata reduction of face amount and return of the document.

What may figure prominently in Part VI are the *nature and scope of obligations* accepted under the Agreement. A Mining Code and a title drawn up in accordance to the Mining Code will establish certain general obligations, eg to provide a work programme, to commit a minimum (annual) investment, to establish a schedule for works to be carried out, and so on. Since the Mining Code is part of a general legislation, it cannot provide for details. A mining title might under exceptional circumstances provide for all the details; more likely it will refer to a mining agreement for a detailed list of obligations and rights, especially if the mining administration considers too bulky or unmanageable a title that lists in detail all obligations and rights of the beneficiary. In either case, rights and obligations during the exploration stage should be outlined in the Agreement.

If State and Company have agreed to treat the Exploration Stage as part and parcel of an integrated mining development project then again it may be essential to address some of the risk sharing aspects and *cost consequences* of the Agreement. Foremost among them is the obligation to cover certain or all cost (items) of exploration work and the right to charge it against future income from the producing mine, or if there is no common exploitation venture, to fully or partially recover it from the beneficiary of the resultant information; if exploration was unsuccessful, the obligation of Company to absorb all exploration cost.

A further point worth considering in an Agreement that complements a min-

ing title, are the problems related to *withdrawal, termination or mandatory/voluntary relinquishment* of the mining area. All these issues are addressed by the Mining Code and have to be considered inherent conditions of the mining title. Yet, given a particularly risky exploration, an out sized mining area (eg an area declared a national reserve and not subject to size limitations of the Mining Code), a mineral substance or an area which State might need in future for other purposes in the public interest, for instance as a national wild-life reserve, the Agreement might address these items as well. Likewise, if the arrangement between State and Company is based on service contract principles then the questions of ownership of information in whatever form and of installations after the termination of the Agreement may require more detailed answers than the Mining Code and the mining title would normally provide. In all these cases, provisions of the Agreement will not alter or modify the provisions of the Mining Code. They will, however, establish the framework within which the State through its mining administration will exercise its discretion provided by the Mining Code.

While the foregoing provides a list of subjects that should or might be included in Part VI, the following remarks give some guidance as to the contents of provisions that tend to be neglected or overlooked.

### **(Exploration obligations)**

Inter alia, the Agreement should spell out:

- a procedure to keep representative of State informed at all times on ongoing exploration work and its relation to future work by reports which provide State with the kind of information it needs to programme its mining activities, ie expenditure and work forecasts;
- a procedure to adjust the exploration



work programme in accordance with external influences or exploration results. The details of both procedures depend on the type of cooperation chosen by the Parties. If the cooperation is planned to be merely contractual over the entire mining operation then the PMC, see below, should be involved here. In case State envisages a joint venture operation during the development and production stages then its monitoring functions should be exercised by the mining administration with a view to later transfer the monitoring unit of the mining administration to the policy making and supervising body of the Venture Company. Likewise, the monitoring provisions should reflect the capacities of the mining administration to effectively evaluate reports and exploration information in general and to devise improved measures of curing Company's activities not in accordance with the Agreement and the best interests of State.

When drafting substantive provisions in this area care should be taken to harmonize the provisions with those found in Part XI on Reporting and Auditing in general. The substantive provisions of the exploration programme while they should require detailed information giving cost and time horizons of exploration works, should also take into consideration the *capacity of the Company to provide this kind of information within a reasonable cost and time frame*. A smaller Company may not be able to provide information with the same degree of accuracy and for the same cost than a big Company. In addition, the costs incurred in providing information on exploration activities will have to be considered recoverable cost. It may thus diminish State's return from subsequent mining operation.

Concerning the type of obligations imposed on Company the *Minimum Investment Requirement* that Mining Codes frequently mention has to be considered a secondary objective. The

main obligation of Company has to be the implementation of an exploration programme and not investing a fixed sum of money. Seen from another angle, it should be the geologist and engineer that monitor compliance with the exploration programme not the auditors. In other words, the subject of monitoring should be the physical advance of the project and its activities. Only if such control proves infeasible should disbursements of funds be examined as indicators of project's success.

#### **Extension, renewal and conversion of title**

All these items, eg length of original title, periodicity of renewal etc, are usually addressed in some detail in the Mining Code which also lists the general conditions to be fulfilled to be granted such permit. In a high risk operation, and exploration should normally be considered as such, Company might want to induce State to specify those conditions and to put them into the context of its general reporting obligations.

As regards the conversion of an exploration to a mining title in the present Modules the conditions are spelt out in Part VII dealing with the Feasibility Study.

#### **Voluntary and mandatory relinquishment and surrender**

Provisions regarding relinquishment of the mining area, ie the area subject to the provisions of the mining title and/or the agreement may or may not be found in a Mining Code. They should figure in an Agreement for two reasons:

- because relinquishment is immediately connected with the payment of a (graduated) surface/area rental fee, which in turn has to be established in an Agreement;
- because an Agreement should provide for exceptions to the payment of an increased rental fee and consequently for the relinquishment of areas in cases where the agreed exploration pro-

gramme would justify such action. Provisions regarding mutually agreed termination of the Agreement and unilateral surrender of the mining area usually will be found in Part XII, Contract Administration. However, the consequences of termination and surrender of exploration activity and of mining operations should not be treated equal altogether. In order to encourage a Company to engage in costly exploration it may be reasonable to allow it to leave the exploration area in case no commercial discovery has been made, without incurring the same type of obligations as a title holder, ie a company already engaged in mining and development activities, which decides to terminate the Agreement unilaterally. As a corollary of such licence to withdraw State may be faced with the cost of rehabilitating the exploration area.

#### **Project Management Committee (PMC)**

PMCs mentioned in the context of State's obligation to monitor the exploration programme have been a regular feature of petroleum exploration contracts. Their justification is that since the Company as the sole risk taker enjoys full management and administration powers the State as the sole owner of the area and title holder should be nevertheless involved in decision making on the management level. The PMC assures State of first hand information and a say in such matters as are reserved to the State by the Mining Code. Mining exploration may be structured along the same lines of risk taking and the distribution of management powers. A PMC could therefore play the same role as in petroleum contracts.

#### **Cost consequences**

Especially in cases where exploration is carried out exclusively by the Company it will be liable to cover all cost of unsuccessful exploration. On the other hand it will be permitted to write off



expenditures which have led to a commercial discovery against income from later mining operations. Since it is exceedingly difficult to differentiate cost items according to the objective they have furthered recoverable cost will have to be established in some detail. Here again, petroleum contracts being of the risk contract variety may provide valuable hints as to what expenditures may be related directly to exploration activity and which are part of the general cost of running a company. The lists containing the allowable items are annexed to the Modules.

"1. Company shall as soon as reasonably feasible and not later than 180 days (the period of days indicated in art. .... Mining Code relating to the exploration title) after the effectiveness of this Agreement (after the date the relevant title has been issued) commence to explore vigorously with a view to eventually prove orebodies of commercial grade and quantity that warrant their development and exploitation.

2. Company has been granted (shall be granted) an exploration licence (title, licence etc) in accordance with art.... of the Mining Code which defines the exploration area, the exploration period and the substances to be explored.

3. Company shall carry out exploration activities and any other works preceding exploration at its own risk. All expenditure covered by the definition in Annex of this Agreement shall be considered exploration expenditure and shall be treated accordingly.

4. Company at any time during the exploration stage may discontinue operations in any or all parts of the exploration area if it considers the continuation of activities infeasible and uncommercial. It will accordingly inform the Minister and surrender title and any and all rights relating to the respective areas. With regards to the effects of such voluntary surrender art. ... of this Agreement applies.

5. Company shall gradually relinquish the exploration area as defined by the exploration title according to the following schedule:

At the end of calendar year x it will not retain in excess of y km<sup>2</sup>, at the end of calendar year x+1 it will not retain in excess of 80%y km<sup>2</sup>, etc.

If Company shows that it has during the entire reference year vigorously and diligently undertaken exploration activities that covered substantially all of the exploration area, State may at Company's request waive for the following year the relinquishment requirements.

#### **(Obligations during the Exploration Period)**

6. Not later than 60 days before the end of the calendar year or any other jointly agreed period Company shall submit to State for the twelve month period commencing on the first day of January, or of the agreed period, the following documents, all in reasonable detail so as to permit State to be fully informed on the operations planned by Company during the Exploration Stage:

a. general exploration programme to be executed during the programme period as well as a minimum investment figure for the same period.

b. schedule of operations and related expenditures which shall include:

- works to be carried out
- scope and objectives of these works, as well as the techniques and equipment employed to perform the works
- projected expenditures related to these works
- preview of future works to be carried out in future periods and to which scheduled works relate.

7. Should State need clarification as to specific features of, or should State want to raise objections to, the exploration programme and the minimum investment budget it shall within not more than 21 days inform Company of its re-

quest and shall provide details and counterproposals not later than 35 days after receipt of the document it has objected to.

Promptly thereafter Company shall meet with State in order to discuss State's comments and to reach a mutually acceptable solution.

This procedure notwithstanding, State will not request or propose any change or modification of the original exploration programme and minimum investment budget which would necessarily result in a substantial increase (more than 10 %) of the pro rata share of the overall minimum investment as stipulated by the exploration title.

(As regards work plan and the expenditure forecast for the current year it is understood that State will be limited to making comments and to raising objections relating to matters not immediately connected with the technical and financial management of exploration activities.)

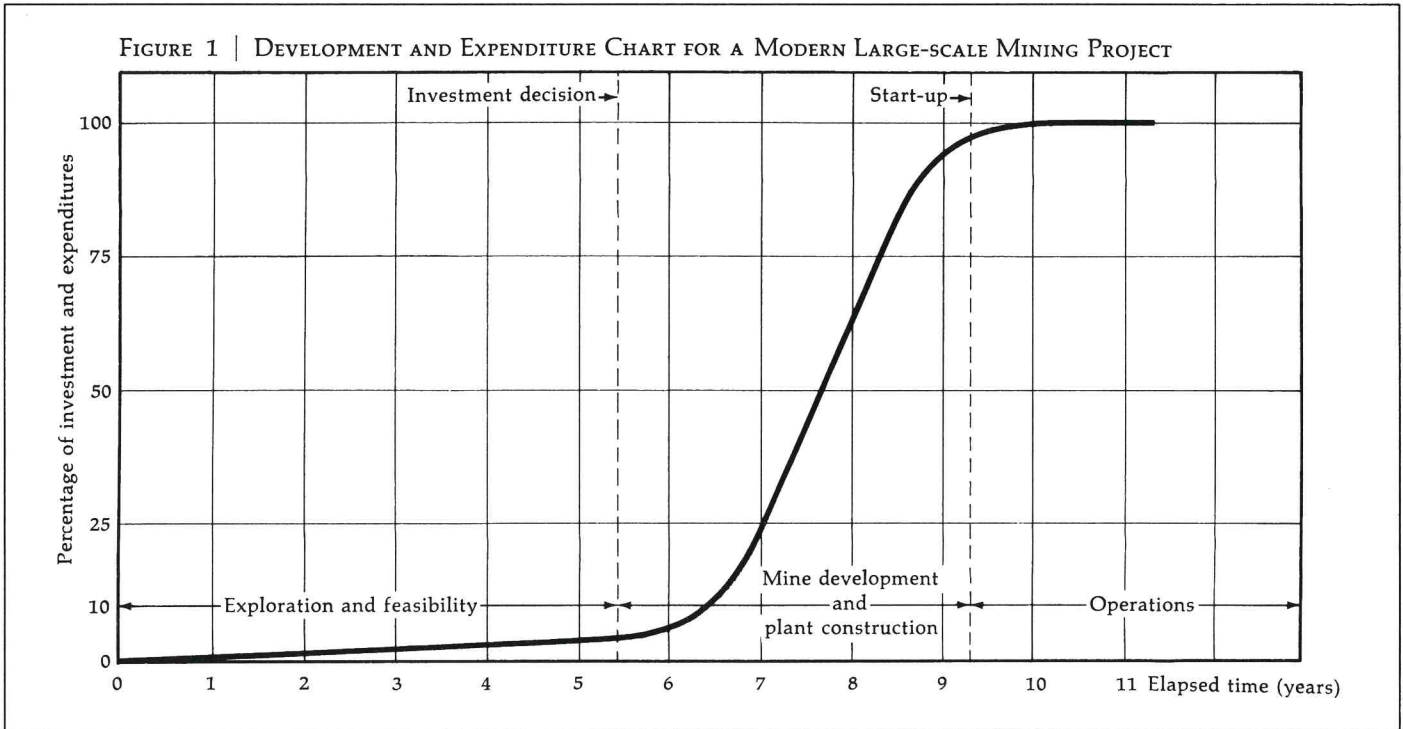
Should the work plan and the expenditure forecast of a calendar year have to be revised in the light of changed circumstances occurring during such year, Company shall inform State in due course of the necessary revisions. The approval by State of these revisions is required only in case revisions involve substantial changes that are likely to affect:

- the viability of the entire exploration programme as defined by the exploration title
- the minimum investment as defined by the exploration title
- and its reasonable and appropriate distribution over the entire exploration period.

#### **(Option: Project Management Committee)**

Company will, not later than 30 days before the end of the business or calendar year, submit to the Project Management Committee the following for its discussion and approval: (follows list of

FIGURE 1 | DEVELOPMENT AND EXPENDITURE CHART FOR A MODERN LARGE-SCALE MINING PROJECT



programme, minimum investment, work plan and expenditure plan).

Upon receipt of these documents the Chairman of the PMC will call a plenary meeting of the PMC in order to discuss these reports with a view to their eventual approval by the PMC. The decision of the PMC will be binding on both Parties.

**Graduated area rentals**

(Special obligations during the exploration stage) Company shall be bound by the obligations set out in the exploration title and in art. ... Mining Code. These obligations are detailed and supplemented by the following provisions.

Company shall pay rental fees according to art. ... Mining Code for the area held at any date during each year and according to the following schedule:

Year	base price per km <sup>2</sup>
Year +1	dto + increase
Year +2	dto + 125% increase
Year +3	dto + 150% increase
Year +4	dto + 200% increase

For any period for which State has waived the relinquishment requirement according to sec. ...(above) the scheduled rate increase shall not apply. (Payments on account of rental fees according to the above para. shall be considered exploration cost for the purposes of ... (calculation of income tax base, calculation of recoverable investment etc).

**Exploration Stage Reporting**

Company will keep State advised of progress achieved during the Exploration Stage through the submission of quarterly reports. These reports shall contain information on the state of completion of the works as proposed in the work plan and on the level of expenditures incurred. The quarterly reports will be complemented by an annual survey of technical information, including geological, geophysical, topographic, radiometric and similar pertinent information. The annual survey as well as the report on the fourth quarter shall be submitted by the Company jointly with the annual exploration plan and expenditure forecast.

**Confidentiality**

During the effectiveness of this Agreement all information, data and reports elaborated by the Parties, all reports supplied by Company to State, and any other information obtained by either of the Parties relating to the mining area (contract area, cf definitions) and to any aspects of mining operations in this area shall be treated as confidential and shall not be made commercially available to third parties other than for scientific uses or after having secured the written consent of the other party.

**Security of Performance**

(1) To ensure that Company will comply with all obligations during the exploration stage, State may ask Company to annually furnish security in a way acceptable to State representing x % of the annual expenditure as established in accordance with sec. ... (on minimum investment requirements)

(2) In case Company has not satisfactorily complied with obligations under a former mining right or has not executed a past work programme, or in case the financial capacity of Company



cannot be established within the meaning of art. .. Mining Code, or if it is to be feared that Company's finances will be substantially adversely affected during the Exploration Stage or during one or more exploration work periods, then Company will be obliged to furnish security as determined in para. 1.

#### **Applications for renewals or extension of the exploration licence**

(Here again, the Mining Code and its regulations may be exhaustive. What can be dealt with in addition to the Mining Code's provisions are the details of administrative procedures which have to be followed in order to receive a renewal or extension of the licence in question. The main details to be addressed are the notice requirements for an application for extension and the documentation which has to accompany such application. Some regulations even provide for an automatic extension in case the application has not been dealt with within a stated time period.)

#### **General Shipping Permit**

(A provision may prove useful if export and more generally transport of all mining products requires prior permission of the mining administration, or in the case of precious metals, of the monetary authorities. Since such sweeping provisions can hinder the transport of samples for testing, addressing the need for permits in the Agreement may prove useful.)

"State upon application by Company will issue transport and export permits for samples to be sent for analysis and testing to recognized laboratories abroad, provided that the value of samples to be sent abroad per year does not exceed the amount of... . The form of the permit to be issued will be attached to this Agreement as Annex."

### **Part VII FEASIBILITY STUDY STAGE**

Provisions on the Feasibility Study may occupy a rather prominent place in a Mining Agreement. The Mining Code and Regulations pertaining to it rarely address details of a Feasibility Study. However, they may provide for the preparation of a Feasibility Study as a prerequisite to the granting of a mining lease. In this case, the specifications of the study are determined only very generally, ie the study has to permit the government to base the decision for the mining lease on the data and conclusions presented.

Stipulations on a Feasibility study regularly have to address three issues, the beginning and duration of the Feasibility Study, the items to be covered and the substudies to be undertaken including the degree of accuracy of the studies and data, and, finally, the procedures for evaluation and review of the results and conclusions of such study. In addition, provisions may address the consequences of both a positive and a negative result of a feasibility study. These provisions regularly will refer to the chapter on termination of the contract and its effects in the case of a negative result. If the project is feasible and the parties agree on the result of the feasibility study the agreement will refer to the provisions addressing the development and productions stage. In dealing with these issues, two considerations should be kept in mind:

- There are two types of requirements to be complied with in order to receive a mining lease: compliance with exploration obligations and a feasibility study the results of which are satisfactory to State. In the first case, an exploration title holder that has complied with all obligations, among them the preparation of a feasibility study with results that justify the development of the mine, will be awarded a mining title. In the second case, State will base its decisions whether to grant a mining lease

purely on its evaluation of the results of a feasibility study, ie the award of a mining lease depends on State's analysis and evaluation of the study. Thus in this case, compliance with exploration obligations alone does not convey a right to Company to continue into the development stage (a right which may only be cancelled if the feasibility study submitted at the close of the exploration period has obvious (formal) shortcomings). The contents of the feasibility study then has to take into consideration the requirements of State's analysis and evaluation. These requirements should be clearly stated in terms of items to be covered and of accuracy of estimates, so as to reduce uncertainty for the operator/contractor and, at the same time, provide State with a thoroughly prepared basis for decision making. Since the cost of such Study may have to be borne by Company without reaping later benefits from that investment, Company needs to be clearly informed about the parameters which State considers necessary and sufficient for an analysis of the feasibility of a project;

- On the other hand, what is considered feasible will very likely vary over time. Market and technical developments subsequent to the signing of the Agreement may influence decisions of both parties on what can be regarded a commercially feasible project. The parties may feel therefore that an agreement, which has to be negotiated and signed before substantial exploration work has been completed, should not provide a detailed and rather rigid schedule for a future feasibility study. In particular, a feasibility study framework to be negotiated at an early stage of the project cycle may not include minimum standards or minimum tests for items which at a later stage have to figure prominently since they will determine the depth of the study. Negotiated at an early stage an agreement would refer to generally recognized industry standards



on feasibility studies. In addition, review and consultation procedures should be outlined which can serve as a forum for the common determination of criteria and parameters for such a study prior to its preparation.

In general, mining legislation or agreements refer to feasibility studies without distinguishing between the various levels of these studies. It appears that in most cases legislation and agreements address the second level, ie the level which has to cover items and with sufficiently accurate estimates to base a financing decision on. It is hence less exact than the third and last level which serves as the basis for detailed engineering and development of the mine. (For a schedule of feasibility study items, see Annex II, to be published in RMR Vol 7 No 4).

"(1) As soon as Company at any time during the Exploration Period has made a discovery of minerals of commercial grade and quantity ("a commercial discovery") it shall notify State accordingly. The feasibility study period will thus commence on the date Company submits written information of a commercial discovery.

Unless State objects to the commercial character of the discovery Company will prepare a Feasibility Study Report for the commercial development and production of minerals contained in the discovery which study shall be submitted to the Government not later than at the end of the exploration period.

(2) Upon submission of information on a commercial discovery State may grant an extraordinary extension of the exploration period so as to permit Company to have at least one year for the preparation and finalization of the studies to determine the feasibility of commercially developing and producing minerals from the explored deposits ("the Feasibility Study Period").

(3) During the Feasibility Study Period all exploration stage obligations of

Company shall be suspended except for those obligations relating to mine safety and security and except that Company will remain liable to pay area rental fees stipulated above at the rate applicable to the year preceding the Feasibility Study Period.

(4) The Feasibility Study Report shall be prepared according to internationally acceptable standards of the mining and engineering industries and shall deal with the issues and in such detail as laid down in Annex II.

(5) If the Feasibility Study Report concludes that according to best estimates the deposits in question can be developed and brought into production at an acceptable rate of return on investment (optional: defined by the reference interest rates on first name (government) securities plus a mark-up reflecting an industry average defined by reference to selected companies but adjusted to the special conditions of the project) Company shall submit to State a final report of the feasibility studies, the Feasibility Study Report, stating the conclusions and projections relating to investigations and studies undertaken and in particular describing in some detail a program for future operation of the mine and engaging in all activities relating to the commercial exploitation of the deposit.

(6) During the preparation of the feasibility studies Company shall keep State informed by regular reports on results and costs incurred so far. Upon request Company shall furnish to State preliminary findings and pertinent documents and shall endeavour to incorporate any suggestions of State for additional issues to be considered in the feasibility studies provided however that additional costs incurred will have to be borne by State and provided that studies have to be completed and the Feasibility Study Report has to be submitted by the end of the feasibility period.

(7) The Feasibility Study Report as described in the Annex shall include

substudies, dealing with secondary effects of planned operations, on one or more of the following subjects upon the election of State which will be communicated to Company not later than 30 days after the commencement of the Feasibility Study Period:

- on local employment and manpower development;
- on local supplies and subcontracting;
- on the environmental impact of operations;
- on regional infrastructure development;
- on the development of treatment, processing and manufacturing operations in the country;
- on the marketing of mining products with local (State) participation.

In case State requires that one or more of the mentioned items be included in the Feasibility Study Report, State shall communicate to Company an appropriate way to defray the resultant cost of such substudy(ies)."

#### **Review of Feasibility Study Report**

In those cases, mentioned above, where State grants a mining title only when and if it approves the results of the feasibility study, the following provisions are of critical importance. Two (out of a total of four) alternatives need to be addressed:

(b) State wants to go ahead but Company would like to opt out or, more likely, wait;

(c) Company wants to go ahead but State finds the terms and conditions of proposed development and mining operations unsatisfactory and wants to opt out.

Case (b) basically poses questions of compensation since no company should be forced to exploit State's resources in a way it deems not commercially viable. Chances are that forced operations would result in losses not only for Company but also for State. Hence, to try to



reconcile the parties' viewpoints through dispute settlement procedures will hardly lead anywhere. The recalcitrant company may nevertheless claim compensation, especially if State succeeds to contract another company with a different mix of technical and financial properties, that can turn the prospect into a viable mine, and which uses certain results of Company's endeavours that do not belong to the public domain.

Case (c) possibly might be solved by means of some kind of review and settlement procedures. The situation differs from (a) since Company may want to exercise its right to receive a mining title because of it having complied with prior exploration obligations. To refuse to honour such right may make State liable to pay compensation, a charge against the budget which it may want to forego by agreeing to Company's proposals possibly adjusted in review and conciliation proceedings.

However, the right of company to obtain a mining title may be subject to the positive evaluation of the feasibility study by State, cf above. Then arbitration may be helpful to determine those conditions which justify the cancellation of the Company's right to proceed. Whether arbitration can perform this function and determine appropriate terms and conditions for the social and economic viability of mining operations is, of course, another matter. So in the final analysis, compensation again will determine the outcome of the disagreement.

In either case (b) and (c) both parties may be allowed to try to convince the other side by means of additional information to go ahead with development. Some type of review panel in this case may determine the appropriate distribution of costs caused by additional studies.

"(1) Within ninety (90) working days from the date of submission of the Feasibility Study Report State shall com-

municate its decision in respect to its findings and:

(a) shall approve its findings and conclusions and shall subsequently grant Company a mining concession (mining title) pursuant to art. ... Mining Code on the basis of projections and programs exposed in the Report

(b) shall request Company, which request shall be supported by specific details and justification, to provide additional information and documentation in order to permit State to take a pertinent decision on the Feasibility Study Report; alternatively, State may at its expense commission a study by a reputed expert acceptable to Company examining the Feasibility Study Report, and in particular its technical assumptions and findings, the reasonableness of the proposed rate of return on investment and, in general, the commercial and technical viability of mining development; on the basis of the expert's findings State and Company will discuss the Report with a view to reconsider original conclusions and proposals and modify the program of development and production activities; if, however, no agreement has been reached within six (6) months of the date when the expert's report had been submitted or since additional information had been requested, State will be deemed to have terminally rejected the Feasibility Study Report;

(c) shall reject the Feasibility Study Report and deny Company a mining concession. In this case State shall determine total cost incurred in the preparation of the feasibility study, and shall propose to Company a mode of reimbursement of such cost. In case State rejects all or part of the Feasibility Study Report and if Company considers this decision not to be based on the merits of the Report Company may refer the decision of State to a technical commission consisting of three commissioners, one to be named by State, one to be named by Company and the third to be co-opted by the Parties appointees. The

technical commission will have the right to:

- ask for additional information
- propose modifications of the Report or add new proposals which may be more agreeable to the Parties
- render an award on cost consequences for additional work on the Feasibility Study Report, and in case the Parties cannot agree, on a modified report or on any set of proposals or on sums to be reimbursed by State to Company on account of the preparation of the Feasibility Study.

The technical commission shall refrain from taking any decisions on the merits of the Report or of any of its conclusions and proposals, except for the purpose of allocating costs and deciding on their reimbursement. It will have to render its award within 90 days after its constitution.

(2) Should the Feasibility Study Report conclude that the deposit cannot be developed and brought into production in accordance with Company's expectations of an adequate return on investment, Company may withdraw from the contract area and, subject to the completion of its obligations under Sec. .. of this Agreement, may terminate the Agreement with State.

**(No commercial discovery made)**

"If Company at the end of the Exploration Period has not discovered a deposit which warrants commercial development and production it shall notify State accordingly and shall be allowed to withdraw from the contract area and shall be allowed to terminate this Agreement subject to the completion of its obligations under Sec. .. of this Agreement and subject further to the preparation and submission of a final exploration report, summarizing investigations and findings obtained during the exploration period which should be supported by relevant data, documents and materials." ■