



Modules for mining agreements: part II

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In the second part of his study on mining agreements the author analyses the development and production stage, the formation of a venture company, the fiscal and financial regime, reporting and auditing and general provisions.

Part VIII Development and Production (D&P) stage

An agreement for an area which has been prospected and explored to an extent that does not allow to anticipate future operations with any reasonable degree of accuracy, may hardly provide specific and concrete rights and obligations during the development and production stage of the mine. On the other hand, a number of activities pursued during this stage will crucially influence the risks and rewards of mining activities, eg the rates and methods of production, the terms of marketing, the restrictions for the transfer of profits, etc.

Therefore, both parties may have an interest, to restructure the framework of rights and obligations to be followed during this stage. There are basically two ways to determine activities during the D&P stage:

- a. relevant provisions may refer to standards and rules generally recognized in the mining sector, or
- b. the determination of conditions governing the development and production stage may be postponed until the Feasibility Study Report has been completed and permits a more detailed examination of future activities.

The first method may be used to the extent that standards and rules exist which are widely applied, recognized and can be monitored. Standards of this kind may be referred to in mining legislation, especially in areas such as mining safety, mining inspection or mining and processing methods and techniques. In the area of marketing legislation may refer to arm's-length pricing rules and national development or localisation obligations may be expressed in terms of best efforts or may be specified by referring to comparable terms or providing for general preferences.

Nevertheless, reasonable interpretation against the background of existing comparable operations in the country may yield an adequate determination of

rights and obligations, in areas that are more cost-sensitive they may not suffice and need to be more detailed. For these areas, provisions may provide the obligation to include pertinent findings and conclusions in the Feasibility Study Report which, after approval and with the extensions of the Programme of Activities, will serve as the principal document determining the extent and nature of rights and obligations superseding or concretising general clauses.

Since provisions for the development and production stage will therefore reflect first and foremost the details of a feasible mining project, the following modules contain mostly considerations for the drafting of provisions of this type and to a lesser degree proposals for provisions.

"As soon as the Parties have agreed to a Programme of Activities and at the latest as soon as written approval to the Programme of Activities by State has been received and as title has been granted by State permitting Company to engage in development and production activities in the mining area there shall commence the Development and Production Stage. During the D&P Stage Company will conduct all mining operations and will comply with all obligations as defined by the Programme of Activities with respect to the mining area.

Upon approval of the Programme of Activities, State shall grant a title to Company permitting to engage in development of the mine and producing ores and minerals in the mining area. The concession of the title is subject to the conditions set forth in art. ... Mining Code and the following provisions of this Agreement. State shall also grant or cause to grant or assist in obtaining all permits, licences or authorizations necessary and appropriate to conduct operations and activities included in the Programme of Activities."

Provisions relating to Control and Inspection of the Mining Area: Provisions

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of this type will be contained in the Mining Code, which usually regulates conditions of access to the mining area by officials of the mining administration and such other matters necessary to perform controls or inspection required to monitor the timely and opportune execution of the Programme of Activities. In addition, the Mining Code or provincial/state legislation will provide for powers of the mining administration to exercise activities commonly known as mining police, ie monitor compliance with mine safety and occupational safety and health standards. Monitoring and control provisions relating to the economic activity of Company will be found in provisions of general legislation on commercial transactions, on companies, rules and regulation of tax authorities, etc. and provisions of the Agreement relating to the flow of information.

Secondary development provisions

The Mining Code in general terms and investment promotion legislation in more detail may provide for obligations that result in the State realizing a greater retained value from mining operations. In addition, State on the occasion of mining operations may want to ensure that the surrounding environment may not be unnecessarily affected by operations, that regional physical and social infrastructure and the economy of the region in general benefit from operations and that operations generate a pool of trained and skilled manpower. Resulting obligations of Company usually are couched in rather broad terms since data available at the time of negotiating an agreement does not allow the parties to specify their preferences. However, these preferences and their cost to the project should be taken into account during the preparation of the feasibility study, see above. If, however, the agreement is negotiated at a time when most of the parameters of economic viability have been deter-

mined and approved, the parties may agree to include into the agreement obligations aiming at an improved localisation of mining investment and thus expand the provisions of the Mining Code.

Employment and training of local/national manpower

Training and employment provisions should address at least the following subjects:

- how many persons will be employed or trained, and at what position or for what job ?
- who will be responsible to choose the candidates for training (and possibly for employment, although the latter is rare since it would unreasonably affect the management rights of the contractor/operator); alternatively, who will be responsible for the establishment of criteria for selection ?
- at what stage will Company have to have complied with its obligations of employment and training ?
- what will be the remuneration and the job- or training profile of those selected ?
- who will be responsible after the selection process has taken place, for further administration and management of employment and training, especially in terms of selecting of substitute candidates ?

If all these issues have been satisfactorily solved the next step is how to implement those provisions without resorting to burdensome monitoring and control provisions. Implementation of employment and training programmes might be greatly assisted if Company and State have created a VC and therefore dispose over joint bodies of decision making. In other cases the parties may want to link performance of employment and training programmes with parameters such as the number of foreign expatriate personnel and their aggregate remuneration, which may be

reduced, if the training and employment programmes have not been satisfactorily fulfilled.

Preferences for local goods and services

Provisions expressing a preference for the supply of national products and services or for products and services supplied by nationals are of a lesser importance in mining agreement, since such products and services are offered only in the bigger mining countries. Therefore, generally worded provisions as used in the mining and investment codes need not be supplemented in an agreement. If, however, preferences are established in greater detail, the wording of the provisions should reflect the potential for increased costs and long delays resulting from ascertaining the comparability of terms and conditions of foreign source or foreign offered products and services. Instead of formulating a sweeping preference clause, parties may consider a clause prohibiting abuses, ie permitting the import of necessary goods and services destined for mining operations, unless State can show that these goods and services are locally available in like quantity, quality and price in which case Company would have to give preference to nationals or, as a lesser sanction, would have to incur the cost of studying possibilities of improving national goods and services (see clause below). At any rate, before choosing the final version of the clause, the customs administration has to be examined in view of their practices in awarding duty free import permits.

“Company shall give preference, to the extent practicable and consistent with standards of efficient operations and subject to the provisions of generally applicable laws and regulations:

- to employing nationals of State on the technical, clerical and managerial levels of Company or VC, as the case may be;

- to the purchase of products and services offered by nationals of State in the territory of State, provided these products and services are offered on terms and conditions not less favourable than those offered by foreign nationals
- to the supply of nationals of State with mining products on terms and conditions granted to the most favoured purchaser of products of similar quantity and quality under comparable conditions. (see also below under Processing and Marketing)

Should such personnel or such products and services not be available on such terms and conditions or with the requisite level of qualifications, Company shall undertake to prepare studies with a view to improve skills and qualifications of nationals and to assist in the production and provision of such national services and products which will meet the demand of Company. These obligations notwithstanding, Company shall be authorized and such authorization shall be granted in an expeditious manner, to import such goods and services and to bring to State such technically and managerially qualified personnel as required in the Company's judgement to carry out operations efficiently.

However, subject to special provisions of this Agreement, Company shall observe all rules and regulations pertaining to the import of foreign goods and services and to the employment of foreign personnel. In particular, Company shall periodically report to State on foreign personnel currently employed or required for future operations, including their positions, their qualifications, their remuneration and other terms of employment, on the state of implementation of training and manpower development programmes provided for in the Feasibility Study Report the Programme of Activities, and on other development activities imple-

mented by Company in compliance with obligations under this Agreement or generally applicable legislation of State."

Processing and marketing

If processing (and possibly marketing) are not considered part of Mining operations, ie not immediately covered by the Feasibility Study Report.:

"Company, in accordance with the provisions governing the Feasibility Study Report shall undertake studies, which studies shall be reevaluated from time to time in the light of ne- economic and technical developments, relating to the installation and operation of treatment, processing and manufacturing plants in the territory of State, and accordingly report to State on the technical and economic feasibility of such plants. Such studies shall likewise explore the feasibility of using and upgrading existing third party installations for the treatment, processing and manufacturing of part or all of mine production of Company. In any event, such parties shall be permitted to purchase mining production at the most favourable terms and conditions granted by Company to any purchaser under comparable conditions."

"Subject to the provision of generally applicable customs regulations Company shall have the right to freely export products obtained from operations and provided, however, that State shall have the right to prohibit the export of minerals if such exports are in contravention of international obligations of State or of the public interest of State."

Marketing

"Company shall sell production in accordance with generally acceptable marketing practices of the industry, provided that Company first has contributed to the domestic needs for mine products."

Pricing

"In disposing of mine products Company shall endeavour to obtain arm's-length sales prices and such conditions as are currently practiced in the major international centres for the commercialisation of such mine products. Discounts and commissions on arm's-length prices granted to affiliated-companies must in no case be higher than discounts and commissions granted to third party customers. "

Control

"Company shall hold at the disposition of State copies of all sales contracts and of relevant undertakings and, upon request, shall submit documented evidence that may justify prices, discounts and commissions practiced by Company on such contracts for State's approval which approval shall not be unreasonably withheld. State shall be entitled to inspect all transports of mining products and all exports and documents pertaining thereto in addition to inspection and taking of samples authorized under relevant customs and tax legislation."

Pricing disputes

"Any doubts about prices, sales conditions and the correctness and appropriateness of documentation provided by Company to justify prices and conditions shall be communicated by State to Company not later than one month after the receipt of the documentation or after the date State has been otherwise informed. Company, within 30 days after the receipt of such communication will submit additional evidence to dispel State's doubts. In case State is not satisfied with the information provided by Company, a panel of three industry experts, one appointed by each party and one co-opted by the two appointees, will be seized with the matter. The panel which shall meet without undue delay shall be supplied with all market information available to the parties, and

after having reviewed all the evidence shall make a determination as to the appropriateness of the prices and conditions practiced by Company and their conformity with the provisions of this Agreement. The determination has to be made and communicated to the parties within 60 days of the constitution of the panel and may be made by a simple majority. The determination shall be binding on both parties which have a period of 60 days to -retroactively- adjust the prices and conditions to conform to the above provision. Expenses of the proceedings and the co-opted member shall be shared equally among the parties which shall pay the expenses of their appointees respectively. If for any reason whatsoever the panel may not become operative within a reasonable time span or may not arrive at a determination, the question at the request of either party will be referred to arbitration in accordance with the provisions of this present Agreement.”

Transfer and Conversion of Foreign Currency (see also Annex II)

There are three different groups of participants in a project which may want to press for elaborate provisions on a secure flow of foreign exchange:

- the project management in order to be able to pay for purchases in a foreign currency of capital goods (and consumables)
- the investors in order to transfer dividends or repatriate their capital
- and the external financiers in order to secure debt service and amortization of loans.

These interests are regulated to varying degrees in investment promotion legislation, especially in as much as transfer guaranties for eligible companies are concerned, and in foreign exchange regulations. Depending on the degree of

foreign exchange problems, foreign exchange regulations and Central Bank rules and practice often will cancel out whatever incentives are provided for in terms of guaranties in the investment promotion codes. So there might be a certain urgency to include special guaranties in mining agreements.

On the other hand, these guaranties might remain a dead letter in times when foreign exchange is simply not available in the country. In anticipation of these cases and on the insistence of external lenders providing major financing for mining projects, provisions have often been introduced into agreements that attempt to isolate foreign exchange inflows and especially the proceeds derived from exports from the purview of national monetary authorities and have bargained to keep foreign exchange in off-shore banking institutions. Obviously, the scope and nature of such provisions can only be determined after a close examination of the monetary and investment promotion laws and regulations and of the institutional set-up of monetary authorities, especially the Central Bank. Depending on the degree of independence the Central Bank enjoys it may be more or less acceptable as a guarantor of foreign exchange transfers and a depositor of foreign exchange proceeds. Independence should better enable the institution to honour its commitments even in times of economic duress and, in general, to allocate foreign exchange to the company on reasonable (nondiscriminatory, most favoured) conditions.

The following provisions are based on the use of a trust account established in the Central Bank or by the Central Bank in an off-shore financial institution a suggestion which may be the one corresponding most closely to investor and financier interests. However, it has seldom been implemented in its most extreme form, because it tries to sidestep attempts by the monetary authorities of State to include foreign exchange

earnings of the project in the pool available on equal terms to the commercial lenders of State or its public and private enterprises, a practice normally deemed not acceptable. Any provision to be formulated using the following modules would also have to be adjusted to currently applicable legislation and potential anticipated measures in the foreign exchange field. More recently, patterns for this kind of measures, taken in response to the restructuring of indebtedness, are gradually emerging and may help to anticipate future developments.

“Company’s conversion and transfer of funds abroad shall be governed by the generally applicable laws and regulations applicable to commercial transactions in the mining sector, and Company’s treatment in respect of such matters shall not be less favourable than treatment granted to other companies in a comparable position operating in the mining sector of State. Notwithstanding the foregoing, Company shall comply with the following provisions and benefit from the following privileges:

Investment capital

Foreign currency requirements for investment purposes shall be exclusively met by foreign sources and shall be deposited into a foreign exchange bank account for non-residents, the balance of which can be converted and disposed of according to the rules-and regulations in force for such accounts.

Sales proceeds

Proceeds of export sales of Company shall be deposited into a specially designated foreign exchange account with the Central Bank (alternatively, into an account established in the name of the Central Bank of State at a foreign commercial bank of international repute and standing and acceptable to the Central Bank).

Company shall be granted the right to transfer abroad into any currency sums deposited into the designated ac-

count with respect to the following items and provided it has previously complied with the procedures and terms set forth in Annex II of this Agreement:

- (1) payment for foreign source goods and services not available on comparable terms from national suppliers
- (2) debt service and amortization of indebtedness the terms and conditions of which have been approved by State
- (3) remuneration and expenses for foreign personnel and expenses for training abroad of national personnel conducted in accordance with the Programme of Activities
- (4) distributable net operating profit in proportion to the equity holdings of foreign shareholders
- (5) proceeds of sales, including forced sales and nationalisation of shares and assets owned by foreign shareholders and transferred to State or nationals of State
- (6) depreciation of capital assets imported from abroad
- (7) any other obligation of Company incurred in foreign currency and approved by State. Company shall keep informed Central Bank of State of its indebtedness, its maturity and applicable interest rates and shall furnish periodical reports to the Central Bank that set out in reasonable detail the nature and scope of future foreign exchange requirements."

Part IX FORMATION OF / PARTICIPATION IN VENTURE COMPANY (VC)

The following group of provisions represents an option and has to be considered an alternative to having Company as an operator, with control exercised through the PMC and the mining administration. If the option is elected, care should be taken to restrict PMC's function to the Exploration Stage, ie the

stage when Company operates at its own risk and for its own account. PC's functions are taken over in case of the creation of a VC by the VC's board and management while monitoring by the mining administration remains the same. Participation of State in a Venture Company should at the same time be considered in connection with rules of Part X relating to taxation. Dividends realised as an equity partner in a project company can substitute for or complement income received in the form of taxes, royalties or other levies. On the other hand, the right of State to participate in decision making as shareholder may mean foregoing revenues which it could have received as a tax collector.

Principles

"If State elects to establish jointly with Company a project company ("Venture Company" = VC) or if State will be accorded a participation in the Company which then will be called a VC, then the resulting VC will be organised and will carry out operations and will assume all rights and obligations of Company with the following objectives in mind:

(i) All operations in the mining area will be conducted exclusively through VC.

VC will be the sole and exclusive holder of all mining rights and all rights and permits ancillary to the mining activity granted by State with respect to the mining area and will be the successor in any such title or right granted to Company in pursuance of this Agreement and with respect to the mining area.

(ii) The distribution of shares in the VC will take into consideration State's desire to improve gradually its control over the natural resources sector of ..(country).. while recognizing the important but temporary contribution of foreign contractors and investors to the development of the sector. In recognition of this fact State will not interfere into operations of VC other than by ex-

ercising the statutory rights resulting from its shareholdings. In particular, it will not interfere into the day-to-day management of operations of VC other than by virtue of the rights and powers granted to him as shareholder under the Company Law and by the following sections of this Agreement.

(iii) VC will assume all obligations of Company with relation to mining operations. In particular it will comply with all obligations under generally applicable law and under this agreement, will keep informed State about VC's operations and will cooperate in good faith with State both as shareholder and as regulatory authority for the mining sector.

Time of formation of VC

While both Parties intend to establish VC after approval of the Feasibility Study Report and to entrust VC with the responsibilities for all operations in and relating to the mining area beginning with the D&P stage, State may at any time during the effectiveness of the Agreement exercise its option to acquire shares from Company or ask Company to set up a VC, provided however that State must give notice of its intention to Company at least one year prior to the intended registration of shares or incorporation of the VC.

Obligations of VC

Upon incorporation of the VC or upon registration of shares for State the shareholders shall take the decision to commence the DP stage and to implement the Programme of Activities for the DP Stage

Capitalisation

The following rules shall apply for the issue and allotment of shares of the VC:

(i) In consideration of works undertaken by State and of rights granted to Company, Company shall issue to State (or State shall receive) without any additional cost for State of the equity

capital of the VC Sate's shareholding shall not result in State being liable to provide additional equity capital or any other contribution to VC's funds.

(ii) Upon request of State and not earlier than 3 years after the formation of VC Company shall offer to State additional equity shareholdings amounting to not more than .. % of total equity capital of VC for which State shall have to pay the book value of such shares in a manner agreed on between the parties and taking into account the cost of foreign exchange to State

(iii) Thereafter State may elect to acquire more equity shares from Company for which it shall have to pay according to the time value of such shares. The selling price of such shares shall be determined in accordance with the criteria, methods and practice generally prevailing in the mining industry. The share value shall be established:

- in case of shares which are officially listed to be the officially quoted price on the closing date of the share transfer;
- in case of shares not officially listed, to be the value calculated by an internationally reputable accounting firm acceptable to both State and Company.

Any share price may be paid by State upon its election:

- in national currency;
- by crediting taxes due and payable against the selling price;
- by a combination of the two Shares acquired by State or shares allotted to State upon the formation of VC shall carry all rights and powers of comparable shares or classes of shares of Company, in particular, they shall be interest bearing from the date of closing the share transfer transaction.

Should it be necessary to increase the capital of VC the parties will participate pro rata in the new share capital. However, State may at its option pay its new shareholdings through constitution of a carried free interest. Both parties may forego to contract new shareholdings in case they can identify a third, arm's-

length party which is able and willing to contract the interests.

Board of Directors

VC shall have a Board of Directors ("The Board") which will be responsible for setting policies of the VC and evaluating its operations. The Board shall consist of x members with full voting rights, of which y members will be appointed by State and the rest will be appointed by Company. The General Manager will be ex-officio member of the board without the right to vote. The Board will be presided over by the Chairman who will be appointed by State and, in his absence, by the Vice-Chairman, to be appointed by Company.

Decisions of the Board shall be by simple majority except for matters of general significance for the VC including those matters that are listed below, which shall require a two thirds majority of the Board (consent of x of equity shareholders):

- approval of work programmes and its budget;
- approval of financial statements;
- approval of dividends or any other payouts to shareholders;
- increase or reduction of capital;
- strategic decisions, such as to start development and exploitation of the mine, to suspend or terminate operations;
- appointment and dismissal of the General Manager and the Chief Financial Officer ;
- approval of terms of employment of the General Manager and the Chief Financial Officer;
- approval of loan contracts or other instruments creating liabilities for the VC in excess of ... ;
- approval of all medium- and long-term contracts and agreements of VC exceeding an amount of .., all contracts and transactions between VC and an affiliated company of the Company or State, and all contracts or transactions between VC and its chief officers;
- changes of VC s statutes;

- decisions on proceedings leading to voluntary consolidation liquidation or receivership;
- approval of contracts with auditors.

A vote may be declared of general significance for the operations of VC by a majority of two thirds of all equity shareholders."

Management of operations

"Day-to-day operations of the VC will be managed and supervised by the General Manager. He shall be appointed by the Board and will be subject to its directions and control. The General Manager will be assisted by a Chief Financial Officer who will be responsible for accounting and reporting.

Both officers shall have the necessary qualifications and experience in accordance with generally accepted practices of the industry." (In some instances follow the list of those items which the General Manager or the CFO have to submit to the Board for its approval, discussion or information. By the same token, such provision will determine the scope of independence of the GM left to both officers.

Both provisions on rights and responsibilities of the Board and the Manager can be extended and detailed to take account of the particular distribution of powers between State and Company in running the Venture Company and in determining its long term policies. To create additional checks and balances, the inclusion into the Agreement of one or more technical and management committees may be contemplated which are charged with decision making or advising in their respective fields of experience and knowledge. However, while these committees may at times provide a handy compromise between quarreling parties, they tend to act as obstacles to timely decision-making once the VC is well on its tracks. On the other hand they can reverse basic decisions of the distribution of powers

between the main parties to an agreement by usurping certain powers.)

PART X FISCAL AND FINANCIAL REGIME

Introductory Note

In the matter of taxation of natural resources in developing countries, the last 15 years have witnessed enormous change. Instruments commonly used to tax mining projects in the 60s tended to be limited to royalties, surface rentals and corporate income taxes. The only major variable was the mining royalty which in some industrialised countries and in respect to precious metals developed into a rather complex instrument as they were calculated eg on a sliding scale.

The picture suddenly changed when in the wake of steep price rises for some base and precious metals agreements and tax instruments in general proved to be insufficient to guarantee an equitable distribution of the projects revenues.

At that stage, taxation instruments were reconsidered in order to analyse whether they could capture windfall or excess profits and, more generally, guarantee the project country a fair share of the project's mineral rent while on the other hand allowing the investor or project sponsor to reduce risks relating to the early stages of a mining operation to manageable limits. Owing to these emerging concepts which relied in the first place on the theory of the mining rent and to a much lesser extent on the practice of fiscal instruments a whole gamut of negotiated solutions appeared which at times were copied from the taxation of oil exploration and production projects. These latter projects in many instances were established as enclave operations. Their rules of taxation therefore did not reflect the standards of taxation and of its instruments currently practiced in developing countries. Rather they spread around standards common to the oil industry as devel-

oped in their centres. Mining taxation instruments, fashioned in accordance with petroleum taxation instruments therefore did hardly relate to prevailing taxation rules in project states as applicable to the commercial operations in general.

These developments created at times wide differences between what was actually provided for by general tax laws and what academics and some sophisticated enclave agreements provided for in terms of instruments of taxation. Moreover, some overlap emerged between 'modern' instruments as devised for the mining sector and traditional instruments applicable to the rest of economic activity. The ensuing rift was particularly acutely felt in areas of taxation which did not belong to the mining sector.

Moreover, in a good many countries, revenues from specific taxes were assigned to one or a group of beneficiaries which certainly did not take kindly to new arrangements which might have resulted in more taxes on a general level but which threatened to abolish their source of direct income. Examples include taxes, mostly in the form of royalties due to provinces, customs duties reserved to finance certain services, such as educational facilities, or levies on trading of precious metals forming part of the income of the Central Bank.

In drafting mining taxation provisions for statutory or contractual instruments one has to be aware of these limiting factors. There might be formulae around that ensure a fair and equitable sharing of a project's revenue even in times of disruptive market developments or even if exploration and production risks may change drastically.

However, only in rare cases can those formulae be incorporated into tax legislation or agreements in a pure form. Some substantial compromise has to be found combining the characteristics of a given tax system and its implementation, especially the availability of

well-tried instruments of taxation, with the ideal of a distribution of the mineral rent. In practice, this means that before drafting ingenious devices for reserving excess profits to the owner of the natural resource exploited one has to take stocks of the present system of general taxation of commercial activities.

It may be, that after applying company income taxes, royalties, rentals, export taxes, custom duties, withholding taxes and other duties levied on the transfer of dividends and capital gains to a range of project scenarios, and after accounting for tax incentives likely to be granted to the project, there might be little room and need to apply special mining taxes. Moreover, a closer look into applicable legislation and current tax practice may reveal, that instruments designed to modify traditional instruments so as to better correspond to modern sharing requirements created more problems than they solved.

A case in point were provisions determining the base for the calculation of royalties. Particularly in projects that included some type of ore treatment and processing, clauses to determine the base hardly ever were drafted in a way so they could be immediately applied by the tax administration. Quite to the contrary, they proved to be a matter of considerable and continuing dispute as calculations made by the parties to the mining agreement and based on the same clauses and on applicable mining regulations differed widely. It may be worth while to forego such clauses although in theory they achieve a measure of equity in taxation which may not be available if traditional fiscal instruments are used.

Another subject which might have to be treated when designing fiscal provisions for mining legislation and agreements is government equity participation. Some of the considerations are mentioned in part IX of the modules. As far as taxation is concerned provisions regulating the distribution of divi-

dends due to State and conversely, restrictions to the amount of profits which the investor or project sponsor is able to realize and transfer may have a general impact on taxation. Here again, it should be kept in mind, that strong non-economic arguments may militate for government participation, arguments which will have to be followed up with relevant provisions in such areas as the structure of the venture company (part IX) and reporting and auditing requirements (Part XI).

The modules as proposed in the following paragraphs try to hold a middle ground between a minimalist solution, ie clauses that simply refer to general legislation and an ad-hoc negotiated solution meaning that taxation rules are custom tailored to the project's requirements. This middle ground can be characterised by the following criteria:

- reference to general corporate income taxation;
- creation of a royalty the rate of which might be low, but should cause no problems in calculating it; it would provide basic income from mining operation;
- a ceiling for the overall tax burden which may be levied during any one fiscal period on the project;
- the integration of all fiscal imports on the project as well as all incentives due to the project into one agreement;
- an optional devise to capture excess profits the form of which would have to be fashioned according to the principles governing taxation instruments applicable in the particular project country.

Principles

"Company shall be subject to all general laws and regulations regarding taxation and shall pay the corresponding taxes, duties, fees, levies, excises and other charges. However, in order to allow Company to plan and implement a mining operation as contemplated by the Parties the fiscal regime applicable

to the mining activities of Company is set out in detail in the following section. While Company undertakes to pay the resulting imposts State undertakes that it will held Company harmless of the results of all amendments, changes and modifications of general tax legislation and the provisions of this Agreement that would substantially and adversely affect the financial results of mining operations of Company during the effectiveness of the present Agreement.

Applicable Taxes

Company shall be subject to the following imports and shall accordingly pay State the following:

- (a) area rental fees according to sec. of this Agreement;
- (b) royalties according to sec. of this Agreement;
- (c) income taxes according to the provisions of the Income Tax Act as amended complemented by sec. of this Agreement;
- (d) sales and excise taxes including value added tax according to the ...Act as amended;
- (e) export taxes according to the provisions of the Export Tax Act as amended;
- (f) import taxes according to the Import Tax Act as amended;
- (g) administrative fees of general applicability as may be charged from time to time by administrative authorities in consideration of services rendered to Company;
- (h) local and provincial taxes according to local and provincial statutes and charters however not exceeding 5 % of the annual tax liability under the Income Tax Act;

Royalties

Company shall pay royalty in accordance with Sec....of the mining Code. In order to better meet profitability requirements State and Company after approval of the Feasibility Study Report will jointly establish a graduated sched-

ule for royalty rebates in accordance to Sec.... of the Mining Code which shall take into consideration

- (1) the time elapsed since the begin of commercial operation,
- (2) the prices quoted in the London Metals Exchange for the metal mined. At no time will the applicable rate for the royalty be less than 3 % and higher than 5 % of the value of the metal mined or of the commercially recoverable metal content of mine production at the point of first delivery to a third party shipper or refiner.

All royalties will be calculated on the basis of the following data:

- (1) quantity of commercially recoverable metal of mine production or quantity shipped from the mine for delivery to the first processing stage;
- (2) For metals quoted on an international metal exchange or for commercially tradeable metal which has a generally recognized and verifiable price quotation, the price used shall be the first sellers prompt quotation price for the most widely traded type or grade or form of the metal/mineral;
- (3) For those metals/minerals not having a price quotation on international commodity exchanges the price to be used shall be any mutually agreed price, the reference price of the predominant producer as quoted by an acceptable trade journal (eg Metals Week) after export shipment, the price quoted as "net smelter return."

The applicable royalty rate shall be adjusted annually by multiplying the royalty rate with a factor corresponding to the changes in the ratio between the value of the local currency of State and the main trading currencies of the mine/mineral/product.

In case the royalty is calculated on the base of minerals shipped after having undergone treatment

Company undertakes to use processes optimising the recovery of metals from

the ore or mineral mined. In case losses of recovery of metal during the treatment exceed projections as established in the Feasibility Study Report for a substantial period of time State shall have the option to increase the royalty rate in order to compensate for losses, unless Company can demonstrate to the satisfaction of State that it has undertaken everything reasonable to improve the processes used in its treatment plant and has submitted evidence in justification of its efforts. Company may substitute this evidence by studies of internationally recognized experts on ore treatment which hold that the recovery rate as practised by Company constitutes an satisfactory recovery rate taking into account the properties of the substances to be treated, the economic assumptions underlying the treatment technology according to the Feasibility Study Report and the cost already incurred to improve the results.

Export Taxes

Company shall pay export taxes in respect of mine production exported according to the generally applicable tariffs.

If at any time the total amount of royalties, export taxes and any charges levied on the gross value of production paid during one fiscal year exceed 70 % of the combined fiscal charges of the project between royalties, export taxes and income tax, Company shall be issued a credit against future income tax liabilities. The tax credit will amount to 30 of the total of royalties and export taxes paid and can be used against general income tax payable during a period of five years after the fiscal year that gave rise to the credit. If during two consecutive fiscal years the Company has had no taxable income Company may select among the following options (a) tax credit according to sec. .. above; (b) application of the reduced rate for royalties according to Sec. (applicable during an initial period of operations).

In case Company elects option (b) no tax credit will accrue.

Additional Profits Tax

Company shall pay an Additional Profits Tax for any fiscal year in which its net cash flow as defined below is higher than the net cash flow as adjusted of the immediately preceding fiscal year. Net Cash Flow will be calculated by adding Company's net income after taxes to any non-operating income realized during the same period on account of depreciation and amortization of assets and any other allowance in respect of total capital expenditures and subtracting from the result the sum of the net balance of total capital expenditure incurred during the period and any interest received during the period.

For purposes of calculating the Net Cash Flow of the preceding fiscal period it is assumed that it will be zero if during that period Company was liable to pay any Additional Profits Tax.

If in any fiscal period the sum of company income tax plus the Additional Profits Tax plus the amount of any Additional Profits Tax, carried forward from a preceding period in accordance with this paragraph, exceeds 70 % of the assessable income under the terms of the (national income tax act), Company, at its option, may delay payment of the part of Additional Profits Tax attributable to income exceeding this figure, and may carry forward this amount for not more than 5 fiscal years, provided however, that the amount so carried forward shall not cause the total amount of net income after taxes and the Additional Profits Tax to fall below 50 % of what it would have been during any fiscal period, if the carry forward as permitted under this paragraph were disregarded.

Tax exemptions

State will exempt Company from paying the following taxes or will assume Company's tax liabilities if Company

under applicable general tax legislation or the provisions of this Agreement would be liable to pay any of the following taxes: (import taxes for all equipment and machinery used for mining operations) etc.

Tax deductions

State will allow deductions from taxable corporate income for payments of the following taxes and charges: (eg personal income taxes to be paid by expatriate personnel and such other deductions as provided for in the investment promotion legislation and as agreed between the parties.)'

(Financial obligations over and above those obligations which have been set out in the provisions relating to the formation of the VC and in its statutes, additional participation in net profits eg in the form of an additional profits tax on excess profits)

Obligation to finance

"Company shall have sole responsibility to finance and provide finance for all mining activities, including exploration, development and exploitation, processing, marketing and all those activities which Company has agreed to undertake by this Agreement. Company equally shall maintain sufficient capital and reserves to carry out these obligations and shall cause VC to maintain sufficient capital and reserves. Company may determine the structure of the capitalization of the VC and the extent to which its activities shall be financed through equity issues or through long-term borrowing, provided however, that the ratio of debt to equity shall at all times be kept at a level which does not affect or endanger the solvency of Company or VC and the interests of other participants.

Terms and conditions for long-term borrowings shall be communicated to State for approval and this approval shall not be unreasonably delayed or withheld if those terms and conditions

are reasonable and appropriate for a borrower in circumstances then prevailing in the international markets for long-term capital.”

“State undertakes to facilitate the financing of investment and of operations, in particular, State shall grant all permits, licences and authorizations required by Company to comply with its above obligations subject to generally applicable rules and regulations and special provisions provided for in this Agreement.”

Part XI Reporting and Auditing Principles

“Company shall comply with all reporting and auditing obligations imposed by generally applicable law, in particular (follow relevant provisions) ...

In addition, Company shall comply with such standards and procedures as set forth in this chapter.”

Subpart I

Exploration reports: reference to special provisions supra.

Subpart II

Reporting during the DP stage over and above the requirements of the Mining Code, on the Programme of Activities, the Company Law, on business and finances of Company or VC, and other general reporting requirements, eg reporting requirements provided for under the investment promotion law in connection with special incentives granted to Company or VC, established by general legislation and applicable to Company or the VC) The following deals only with procedural aspects of accounting and auditing. The items to be included in reports and accounts will figure either in the Mining Code or in the provisions relevant to the stages of activities. In general, items will closely resemble many items of the feasibility study or of a general DP or programme. Thus, the feasibility study is the funda-

mental pattern against which annual reports can be measured and examined to determine the state of development and any changes or modifications from expectations and assumptions which had governed the feasibility study, ie on which the decision of both the investor/operator and State to proceed into the the DP stage have been based.

“Company not later than 60 days before the close of the calendar year shall submit to State the following:

- Programme of Activities as defined in sec. ... of this Agreement for the next calendar year; summary reports of all current reports on production, export, treatment, or other form of disposition of mining products
- Expenditure plan relating to the Programme of Activities
- Marketing plan
- Copies of all effective sales contracts and related undertakings and copies of all other agreements concluded with affiliates and independent parties.

Company shall submit said documents in an appropriate form and in sufficient detail so as to enable State to review such documents and determine whether programmes and contracts are in accordance with applicable law and provisions of this Agreement. In addition, Company shall furnish to State all other information which State may reasonably request and shall keep State fully informed of Company’s activities during the DP stage. All information and all documents to be submitted to State under this chapter shall be available in the ... language and all financial data shall be recorded in the original currency.”

Subpart III

Auditing requirements, over and above those requirements applicable to the VC as part of the mixed economy sector of State; for service (risk-) contracts the requirements have to be set out in detail in an Annex III) Provisions on account-

ing rules and auditing requirements should as closely as possible reflect current rules and procedures on accounting and auditing in State as practiced by State’s tax authorities and should be formulated in accordance with the principles and standards consistently applied to comparable operations and transactions in State.

To reach this aim the accounting procedures developed and applied by the implementing authorities of the investment promotion legislation have to be taken into account. The provisions should also leave some scope for an improvement of skills and techniques of local professionals active in this sector. Provisions will likewise reflect the overall policy decision on whether State should participate in day-to-day management of activities, in policy setting or whether State should be a dormant partner and merely share in the projects financial benefits. In either case, accounting and auditing requirements will have to be carefully adjusted to the State’s interest.

However, if State limits its role in the venture to sharing the mineral rent with Company through taxing operations or profits, accounting and auditing rules will be the main instrument of monitoring and enforcing these rights. Accordingly, they might be more extensive than auditing and accounting rules applied to general business.

As to financial inspection, powers of State will usually be defined by general fiscal legislation. The mining agreement may facilitate inspection by special provision on the location of records and other relevant information and the procedures to comply with to be granted access to the location of the Company’s or VC’s technical and business records. The agreement may also single out certain documents for inspection at any time, such as sales contracts.

“The maintenance of technical and financial records, the submission of periodical reports and financial statements

and State's rights to audit and account these reports shall be governed by generally applicable law, generally acceptable standards of accounting in State and the following provisions of this Agreement. State and its authorized representatives may enter the place of business of Company to inspect operations and records from time to time. Company shall give representatives such information as they reasonably request and shall assist representatives in examining technical and financial records. Company shall maintain all records and reports relating to its activities in the mining area and under this Agreement, including without limitations, all records and documents relating to commercial transactions both with third parties and with affiliates at its head office in State."

Part XII GENERAL PROVISIONS

Subpart I Termination

(ie default and surrender, in particular in case no commercial discovery could be made during exploration.

(Default) State may terminate the Agreement if Company is in default of one or more of the obligations under this Agreement and set forth below:

- default on any payments;
- default on information, reporting and accounting obligations;
- default on certain development obligations. If any of these event of defaults occur, State shall grant Company a period of at least 60 days after the event of default has first occurred to remedy the default. Should Company not be able to remedy the default within this period State may serve written notice to Company that it henceforth terminates the Agreement and shall state the date thereof.

In case Company or its controlling shareholder shall become insolvent, ap-

plies for or has become subject of consolidation/composition or liquidation proceedings, State shall have the right to terminate the Agreement which termination will become effective immediately. State will have the same right if a major change in equity ownership of Company threatens to severely erode Company's technical and financial capacities to comply with its obligations under this agreement.

Upon termination of this Agreement by State, Company shall discharge all obligations incurred during the life of the Agreement which will become immediately due and payable. Reporting, restoration and removal obligations applicable in the case of surrender shall apply.

Surrender

Company, at any time during the exploration phase, and after giving 12 months notice during the D P phase, may surrender its rights under the present Agreement and any other rights, titles and licences it holds in respect of the mining area and regarding mining operations and thereby terminate the Agreement with immediate effect, if operations become technically and commercially unviable. On the effective date of the surrender Company shall be relieved of its obligations under this Agreement and any other titles and licences regarding mining operations in the Mining Area.

Company shall have the following obligations upon termination:

(1) If termination occurs during the exploration stage it shall remove, sell or otherwise dispose of any assets in the mining area and shall furnish State with a report on work completed so far. Any property which has not been removed shall upon election of State be removed at the expense of Company or shall become the property of State without compensation;

(2) If termination occurs during the feasibility or development and produc-

tion stages all assets in the mining area shall be offered to the State which will have an option to purchase part or all of the assets at the book value or the market value in State whichever is higher.

(3) If State does not exercise its option, Company will have the right to dispose of the assets in any way it sees fit during a period of 180 days after State has refused the option. Company will have the right to freely transfer and convert sales proceeds into any foreign currency freely available in State.

(4) Upon termination of the removal period State may elect to acquire property of the assets or dispose of them at the expense of Company. Any property of the Company which has been in public use and/or which has been purchased or constructed by Company for the use of the public shall revert into the public domain of State without any compensation to the Company and regardless of the modalities of termination. For any of this class of property provisions of the Mining Code dealing with immovable property in the mining area shall be applicable.

Rights and obligations which have become effective prior to the effective date of the termination of the Agreement and which have not been orderly and fully complied with at the effective date of termination, shall continue in effect for the time necessary and sufficient to fully exercise such rights and comply with such obligations."

Subpart II Assignment

(Here again reference should be made to the assignment provisions for mining titles as established by the mining laws. These provisions as a rule provide that any assignment or transfer of mining rights and all transactions having this effect need prior approval by State to become effective. An Agreement may in addition provide for conditions under which State may waive its rights to prior and qualified consent to the as-

signment or may add details of conditions formulated in the mining Code.)

"Company at any time during the exploration and DP stages may assign all or part of its rights and obligations under this Agreement to a third party with the prior written approval of State. The approval shall not be unreasonably delayed or withheld if the third party is an affiliate of Company and if Company as the assignor of said right guarantees the continuing performance of its obligations by the assignee.

In any other case, Company shall provide documented evidence to State that the assignee possesses the technical and financial and managerial capacity to fully comply with obligations under the present Agreement, as well as meets all other conditions which enable him to be granted the mining right.

(Alternative: Any assignment and transfer of a mining right shall become effective only and when the original holder of the mining right (transferor/assignor) has become a party to the mining title or has guaranteed complete and full execution of all duties and obligation the original holder(transfer/assignor) had assumed in the mining right and any ancillary agreements and undertakings.)

Subpart III

Force majeure

"Failure on the part of Company or on the part of State to comply with any of the terms and provisions of this Agreement or any other obligations as determined by generally applicable legislation shall not be deemed a breach of contract or shall not be considered grounds for terminating the Agreement or shall not give rise to claims of damages if such failure is caused by "Force Majeure", and if the party which would otherwise have been responsible for such failure has taken all appropriate precautions, due care and/or alternative measures in order to avoid such failure

and to mitigate any resulting damages or other consequences. Any party affected in its ability to perform its obligations according to the terms and conditions stipulated by an event constituting force majeure shall notify without delay the other party. The notification shall include facts and documents substantiating the case of force majeure and shall also inform the other party on any measures that may remove the events leading to force majeure or may mitigate its consequences.

If as a result of events constituting force majeure mining operations or any other activity to be performed in accordance with this Agreement have been delayed, curtailed or prevented, the period for performing these operations or activities and the term of this Agreement shall be extended for a period equal to the force majeure period. However, if operations under this Agreement as a result of force majeure events have been suspended for a period of six (6) months, the parties should consult in order to reach a decision on the continuing technical and economic viability of operations. For the purposes of this Agreement a case of force majeure shall be constituted by events including without limitation: wars, blockades, insurrections, civil disturbances, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts or similar adverse weather conditions, explosions, fires, strikes, lockouts or other industrial actions beyond the control of any of the parties and resulting in work stoppages or interruption, acts of God and the public enemy, breakdown of essential machinery, imposition of government controls such as quotas or other import or export restrictions relating to relevant input or output and any event beyond the reasonable control of the affected party and which is of such a nature to delay, curtail or prevent timely and opportune performance of activities of the parties, pro-

vided, however, that such event has not been caused by wrongful or negligent behaviour of the party affected and that it has not been caused by deliberate action or a foreign government."

(The Agreement may finally provide for a positive or negative list of instances of force majeure, especially with regard to measures which are neither controlled by State or Company.)

Subpart IV

Governing Law and Enabling Clause Applicable Law

"This Agreement, its implementation and operation and the relation of the parties shall be governed, construed and interpreted in accordance with the laws of State." (Forum Clause) (Enabling Clause)

(This clause should be avoided at all costs as it creates more insecurities than it can prevent and obscures the relationship between general legislation and the terms and conditions of the Agreement)

"State hereby confirms that the present Agreement is consistent with the laws and regulations in force in State, and that State shall take all measures that are necessary and appropriate to implement this Agreement according to its terms and conditions and it shall pass the necessary legislation and issue regulations to provide for the adaptation and modification of any laws and regulation which affect the implementation of this Agreement."

Subpart V

Dispute settlement

Any dispute, claim or conflict arising between the parties during the term of this Agreement and out of the Agreement or any operations or activities performed thereunder or in relation therewith, shall be settled by informal negotiations which the parties shall institute in good faith.

If such negotiations fail the parties shall refer the dispute to a high level meeting between the Chief Executive

Officer of Company and the Minister of Mines of State or any other Minister designated by the supreme executive authority of State or their respective representatives.

If no agreement results from the meeting both parties shall agree to appoint a third party conciliator with confirmed credentials in the fields of mining and foreign investment law to prepare a non-binding recommendation to the parties within not more than 90 days after the date of his appointment. Should both parties not reach an agreement on the appointment of the conciliator or should the parties object to his recommendation or should both parties agree not to refer the conflict to a conciliator then either party may request arbitration proceedings in accordance with the following provisions.

Arbitration

Subject to the foregoing provisions and after having exhausted all appropriate administrative and judicial remedies available under the laws of State with respect to the settlement of disputes the parties may refer any dispute conflict or controversial claim

(1) to the jurisdiction of the "International Centre for Settlement of Investment Disputes" ("the Centre") and the rules determined by the "Convention on the Settlement of Investment Disputes between States and Nationals of other States" ("the Convention).

(2) to arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law being ("the Rules") in force at the time of referral and the following additional rules:

- the appointing authority shall be the (Secretary General of the Commonwealth Secretariat, the President of the IDB, the AsDB or the AfDB, the Executive Secretary of ECLAC or ESCAP) or if the designating authority refuses to act or has failed to act

according to Art. 7 of the Rules the Secretary General of the Permanent Court of Arbitration at the Hague shall be requested to designate the appointing authority;

- there shall be three arbitrators;
- the place of arbitration shall be the capital of State or any other place as agreed between the parties.

(3) to a panel of three arbitrators each party appointing one arbitrator and the arbitrators appointing the third one. If the arbitrators appointed by the parties fail to agree on the third arbitrator within thirty (30) days of their appointment or if one or both parties shall not appoint their respective arbitrator within this period, the arbitrator, acting either as third (neutral) or sole arbitrator shall be designated by (see above for authorities). The third/sole arbitrator shall not be in any way related to State or Company, nor shall he be a national of State or the home state of Company.

The decision handed down by the panel or the sole arbitrator, as the case may, shall be final and binding on the parties and the parties shall comply in good faith with the decision of the panel and it shall be recognised and be enforceable in the appropriate court of any party's jurisdiction or in any third country having valid jurisdiction.

Disputes of a technical nature

(No provisions for settling technical disputes appears necessary if the PMC has been vested with the authority to solve any problems of a technical nature before these disputes reach the level of conciliation or arbitration provided for supra).

Terms and effectiveness

This Agreement shall be effective during the respective terms of the prospecting and exploration licence and the mining lease granted by State in accordance with the terms and conditions of the applicable provisions of the Mining

Code. In the event State has already granted Company any title the Agreement shall become effective on the effective date.

Notice requirements

ANNEXES

Annex I: List of items to be included in the Feasibility Study Report

1. Summary and Conclusions

Summary report on the objectives of the project, its scope, its technical aspects, economic and legal parameters, and the conclusion of the detailed studies of each item.

2. Analysis of Markets

A. Background:

- Supply and demand factors for product-markets
- Supply and demand in relation to price movements

B. List of mining products:

- Uses of products at its different processing and manufacturing stages
- Specific conditions of end-product markets

C. Market Structure:

- Position of main competitors
- Historic and current market structure

Market Conditions:

- International and
- National markets, demand and supply profile, past and projected future prices

Projections for the project's markets

- Price projections, including indications as to forces determining prices and pricing arrangements
- Long-term selling arrangements and survey of selling terms and conditions
- Sales projections
- Barriers to sale of the product

3. The Project

A. Location of project

B. Geology and reserves

- Topography
- Regional geology
- Local geology, including
 - Structure
 - Stratigraphy
 - Structure of mineralization
 - Economic mineralization
 - Genesis of mineralization
 - Microscopic analysis
 - Paragenesis
- Exploration:
 - Description of campaigns
 - Exploration methods used
 - Results
 - Conclusions
- Sampling:
 - Description of programmes
 - Samples obtained and methods used
 - Analyses made and methods used
 - Conclusions
 - Parameters of calculations
- Reserves:
 - Methodology of calculation
 - Criteria for classification
 - Classification (tonnage and grade):
 - – indicated, inferred and proven
 - – probable
 - – possible
 - Level of accuracy of estimates
 - Calculation of tonnage-curve
- Special studies carried out

C. Mining

- Development and exploitation methodology
 - Technical background
 - Criteria used for selection of method
 - Description of method selected
- Mining operations design
 - Operation parameters
 - Optimum installed capacity
 - Optimum cut-off grade
 - Dilution
 - Mining productivity
 - Utilization of equipment

- Sources and requirements for back fill
- Development and pre-production plans
- Expected mineral recovery
- Time frame for mining and operations
- Ore storage requirements
- Drainage
- Requirements for
 - Equipment and machinery
 - – Selection criteria
 - – Prices and other conditions
 - Maintenance
 - – Workshops
 - – Toll supplies
 - Personnel
 - Training
 - Energy
 - – Combustibles and lubricants
 - – Electricity
 - Water
 - Compressed air
 - Installations
 - Other consumables
 - – Explosives
 - – Timber
 - – etc.
- Waste disposal
 - Design
 - Evaluation of risks

D. Concentration, smelting and refining

- Method of obtaining samples
- Analysis of samples
 - Mineralogical analysis
 - Chemical analysis
- Metallurgical testing (determination of optimum concentration, smelting and refining processes)
 - Laboratory tests
 - Pilot plant tests
 - Discussion of results
 - Technical background
- Conceptual design and layout of the plant
 - Flowsheet and general arrangement
 - Metallurgical balances
 - Productivity of the plant
 - Metallurgical recovery
 - Optimum installed capacity

- Process control, planning and instrumentation
- Laboratories
 - Future investigations
- Tailings disposal
 - Design and layout
 - Control
- Removal of dried solids, liquids and gases
- Requirements for:
 - Equipment and machinery
 - – Selection
 - – Detailed list and prices
 - Maintenance
 - – Workshops
 - – Tools, supplies
 - Energy
 - – Combustibles and lubricants
 - – Electricity
- Personnel Training
 - Necessities for training
 - Existing facilities
 - Personnel requirements
 - Detailed plans
 - Learning curve
- Plans for Development
 - Detailed plans for development and bringing on stream of the mine and plant
 - Needs for specific assistance
 - Time schedules
 - Provisions for industrial safety and environmental control
 - Industrial safety
 - Environmental protection

4. Basic physical and social infrastructure

Infrastructure requirements and related costs of:

- Access
- Energy
- Water
- Workshops
- Transport systems
- Laboratories
- Warehouses
- Living quarters
- Social services

5. Estimates of project costs and financing plan

A. Capital costs as to:

- Basic assumptions and level of accuracy
- Escalation factors
- Physical and price contingencies
- Requirements for working capital
- Interest costs during construction
- Total financial requirements
- Time schedule for investments
 - for the following project cost items:
 - Mine
 - Processing plant
 - Smelter
 - Refining plant
 - Infrastructure
 - Preliminary works
 - Engineering
 - Administration of Project etc.

B. Operating costs as to

- Direct costs:
 - Labor, including social costs and benefits
 - Materials and supplies
 - Energy
- Indirect costs (accuracy of estimates):
 - Exploration(extension of reserves)
 - Depreciation
 - Patent fees and royalties
 - Taxes
 - Other costs
 - Administration

C. Financing plan:

- Risk capital
 - Sources of capital
 - Tax savings
- Loans
 - Amounts
 - Terms
 - Interest rates
 - Grace periods
 - Total maturity
 - Conditions for “tied” finance
 - Disbursement plan

6. Implementation plan

A. Implementation program

- Time schedule of activities
- Testing period
- Detailed program for project execution

- Project (construction and development) management techniques (critical path, PERT)
- Critical activities
- Reporting

B. Organization and administration

- Organization charts
- Description of tasks to be completed
- Budget controls
- Information and reporting controls
- Cost control
- Preliminary work
 - Temporary construction camps
 - Temporary infrastructure for water, energy, transport, labor etc.

C. Supplies

- Supply procedures
- Purchasing terms and procedures
- Identification of suppliers
- Contract planning and control procedures

D. Engineering

- Conceptual
- Basic engineering

E. Construction and Management

- Personnel and materials requirements
- Supervision and control

7. Cost-benefit analysis

A. Financial analysis

- Date and estimates of:
 - production
 - price developments
 - capital costs
 - operating costs
 - taxes, royalties and incentives
 - financing plan loan
 - repayment schedule
 - sales
 - distribution of profits
- Projections of:

- cash flow
- balance sheets
- break-even analysis
 - critical price
 - critical capacity
- critical grade
- Profitability indicators:
 - Investment recovery
 - Loan repayment
 - Internal Rate of Return (IRR)
 - for the project
 - for capital invested by each participant.

B. Economic Analysis

- Based on data and projections of:
 - Shadow price of labour
 - Shadow price of foreign exchange
 - Effect of tax incentives
 - Effect of social benefits and government contributions
- “Profitability” Indicators
 - Economic Rate of Return
 - Foreign Exchange Balances
- Sensitivity Analysis
- Social Impact of the Project: Benefits and Risks

ANNEX II TRANSFER AGREEMENT FOR DIVIDENDS AND LIQUIDATION PROCEEDS, AS WELL AS AGREEMENT RELATING TO THE TREATMENT OF LOAN AND SALES PROCEEDS IN FOREIGN CURRENCY

“The Parties to this Agreement, the Central Bank of State and the “Custodian Bank” in order to implement the above provisions and, in particular, part..., section..., of this Agreement and not later than 30 days after this Agreement shall have become effective shall enter into a “Currency Transfer Agreement” with the following terms and conditions:

Custodian Bank Account

Custodian Bank, registered and doing business in ..., shall open at its office inan account in the name of Central Bank representing Company, which account will be referred to as the Custodian Account.

Company shall remit all sums and proceeds, provided for in part VIII, Sec.... of this Agreement and received in a currency other than the currency being legal tender in State to the Custodian Account.

Custodian Bank during the effectiveness of this Agreement unconditionally (and irrevocably) is authorized to dispose of all sums and proceeds deposited into the Custodian Account in the following manner (and until the time the parties to the Agreement shall jointly and in writing issue different instructions to Custodian Bank).

Custodian Bank shall be authorized to make the following deductions:

Fees and commissions

- (1) a general commission for Custodian Bank being USD per quarter due and payable on the last day of each quarter
- (2) transfer commissions for conversion of funds in accordance with para.....being one quarter of one percent of the amounts converted and transferred

Transfers and conversion

- (3) On the written request by Central Bank which request has to be accompanied by a statement, the format of which is set out in appendix 1 of this Annex, Custodian Bank shall be authorized to:
 - transfer sums equivalent to costs corresponding to part VIII,.....of the Agreement to Company or to recipients designated by Company;
 - transfer sums equivalent to interest and amortization of approved

loans falling due during the next semester to an account with a bank designated jointly by the Parties and the Central Bank, which sums shall serve as collateral for holders of approved indebtedness) (transfer sums equivalent to ...% of prospective expenditure on capital goods and consumables to be incurred in foreign currency)

- transfer the remaining balance to be converted into local currency at a rate agreed between the Parties but not less favourable than the rate applicable to comparable companies.

Obligations of Custodian Bank

"Custodian Bank shall deliver monthly statements of information to Central Bank and the Parties that provide detailed information on the following items:

- all proceeds from whatever source deposited into the account, specifying date, amount, source and currency;
- all commissions charged by Custodian Bank
- all transfers to Company or recipients designated by Company, specifying date, amount, and category of payment;
- all transfers to the collateral account, specifying date, amount of transfer;
- all transfers to Central Bank.

Disclaimer of Custodian Bank's responsibility

(Relation to project agreement)

"At the effective date of termination of the Agreement or at the date of expiry of the Agreement whichever comes first, all instructions given shall be considered void and without effect; provided, however, that Custodian Bank will effect all transfers, payments and other actions required by earlier instructions until the end of the current quarter. At the end of the quarter Custodian Bank will file with the Parties a closing statement of the balance of all accounts.

Annex III

ACCOUNTING AND FINANCIAL PROCEDURES

The following procedures are again set out in modules ie, the various sections should and cannot be taken as a whole. Rather, number of provisions have been introduced which under different conditions may fit into different type of agreements.

The first part of these procedures deals basically with items that can be included into any agreement since their role is more to illustrate and detail existing provisions of the tax or mining codes than to create new procedures and rules.

The second part consists of a list of accounting items and rules which have to be addressed in agreements of a service type, ie in which the parties are a (sole risk or fixed fee) contractor and State which holds and intends to keep title. Remuneration therefore will depend crucially on a determination of cost incurred in operations, which in turn presupposes very detailed accounting provisions.

As far as the relation of the rules and procedures to the Agreement and established law and practice of accounting in State is concerned there exists no difference between both parts. Standard accounting rules of State which have been recognized with the force of a law will be paramount with the Agreement establishing precisions and additional details. These precisions and details should not contradict well established practice though. National and international accepted accounting principles and rules will supplement the Agreement but will not override the Agreement.

The more detailed the procedures and rules will be the more likely the opportunity for arguments and disputes between the parties, especially if the parties customarily use different bodies of accounting rules. More detailed accounting rules and procedures should

therefore provide also a forum or a means how to settle disputes or differences of opinions or, if the case arises, how to modify and develop additional or complementary rules.

If a Project Management Committee has been provided for, see above, then the PMC will be charged with these functions. As far as implementation of accounting is concerned, substantive provisions are provided for in Part XI of the Agreement, ie provisions governing reporting and accounting duties and the government's rights to audit accounts and inspect premises.

The general rules set out there notwithstanding it might be necessary to establish additional reporting duties which have as their objective to better inform State on the gross revenue and cost figures and the state of cost recovery given that State will participate in revenues or have an increased stake in the revenues once Company has recovered a substantial part or all of its cost.

PART I

Model calculations

Model calculations of fiscal instruments, eg additional profits tax; royalties, including royalty scales; rules for depreciation of various items (supposing that these rules are not set out in the Income Tax code) etc.

Depreciation for cost recovery purposes

Depreciation on each asset will be calculated beginning with the year in which the asset is placed into service with a full year's depreciation allowed for the initial year. The method used to calculate each year's allowable recovery of capital costs per depreciable item is the straight line depreciation method. The life of each depreciable asset is equal to the anticipated mine-life as based on the initial estimate of *proven* reserves, with the following exceptions:

- Construction: housing and welfare 20 yrs.

- Tangibles (Movables):

- Automobiles 3 yrs.
- Light trucks
- Trucks, heavy and trailers
- Buses
- Aircraft
- Office equipment
- Other construction and operation equipment

Calculation of overhead expenditures

General and administrative costs, other than direct charges, allocable to operations should be determined in a detailed study and the method of this study shall be applied consistently for each fiscal year. The method selected must be approved by the Parties and such approval shall be reviewed periodically in view of the practicability and equitability of the method.

Calculation of recoverable financing costs

Interest at rates not exceeding prevailing commercial rates may be allowed as recoverable Operating Cost for financing of capital investment whether such financing is obtained from affiliates or parent company of Company or from third party lenders. Details of the financing plan and amounts must be included in each year's budget of Operating Cost and approved as part of the annual operating budget by State.

PART II

Financial provisions for risk contracts,

ie contracts where exploration is at the risk of the contractor who may recover its costs out of later production or a share thereof.

The following is a rough outline of items to be considered when drafting accounting and financial provisions of such kind of contract. It should be borne in mind, however, that the kind of costs which will be incurred and the sort of classification chosen depends

very much on the operations envisaged. The mineral mined and the size of the operations will greatly influence the following provisions. They will also be influenced by the ready availability of administrative and accounting personnel in the administration of State.

General

1. Submission of charts of accounts and manuals on accounting procedure to be observed under the Agreement;
2. Definition of statements which the Company is obligated to provide to State at regular intervals, including the individual statements relative to production, to cost recovery, to exploration expenditures, and to work programmes, including all those programmes Company has undertaken to implement as part of the feasibility study?) and long- range plans of Company;
3. Standards applicable to the preparation of statements with reference to national legislation and practice also including
4. Procedures of conversion between different currencies, ie reference banks and rates for translation of currencies, procedures in case of sudden changes of exchange rates during reference periods, etc.;
5. Currencies of payments for goods and services, for fiscal obligations or other payments due to State;
6. Auditing and inspection rights of State and periodicity of audits.

Allocation of costs and expenditures

1. Exploration costs:

All direct and indirect but allocated costs incurred in the search and exploration for minerals in the Mining Area, including:

- (aerial, geophysical, geological, topographical, seismic, etc.) surveys and studies and their interpretation;
- drilling (tunnelling etc) operations
- labour and materials used in the drilling operations with the object of

For number 5, 7, 8 comparable conditions to 4 will apply to calculate arm's length costs of contracts entered into with affiliated companies or on markets which do not permit competitive pricing.

finding additional mineral deposits of not the purpose of delineating and testing the character and extent of discovered orebodies;

- facilities used exclusively in support of exploration activity, including access roads, third party purchased information, etc.;
- ... per cent of all Service Cost allocated to the exploration activity to be agreed on an equitable basis between State and Company (or Contractor);
- ... percent of all general and administrative expenses allocated to exploration activities based on the annual exploration budget to be adjusted at the end of each fiscal year to actual incurred costs;
- any other costs incurred prior to the commencement of Commercial Production and not covered either under this or the heading of Development and Production expenditures.

2. *Development and Production Cost*

All expenditures incurred in development and production operations (or during the Development and Production Stage), including:

- tangible cost of development and production;
- intangible costs of development and production such as labour, consumable materials having no salvage value, and ancillary services ((for the development and production of minerals chosen for development and production and covered by the mining lease);
- area facilities such as treatment and production units, storage equipment, tailings and waste disposal facilities and equipment, shipping and loadings facilities, etc.; engineering and design studies for production and mine development;
- ... percent of all service cost allocated to development and production operations agreed between State and Company;
- ... percent of all General and Administrative Expenses;

3. *Operating Cost*

Operating Cost are all expenditures incurred in mining operations after the start of commercial production other than exploration costs, administrative and service costs, and the balance of general and administrative expenses and service costs not allocated to the exploration or development and production operations.

4. *Service Costs*

All direct and indirect expenditures in support of mining operations including warehouses, loading and shipping facilities, vehicles, rolling stock, fire and security stations, workshops, water and sewage plants, power plants, housing, community and recreational facilities as well as all equipment used in these activities. Service costs incurred in any calendar/fiscal year shall include the total costs incurred in such year to purchase and construct as well as maintain and operate the facilities.

5. *General and Administrative Expenses:*

- Main office, field office and any other general administrative costs incurred in the territory of State;
- An overhead charge for services rendered outside the territory for managing mining operations and for staff advice and assistance, in particular financial, legal and accounting services;
- State and Company (Contractor) will agree, as part of the first operational programme and budget, on the amount or rate of General and Administrative Expenses to be charged

Recoverable costs

Subject to the Agreement, Company (the Contractor) shall bear initially the following cost items and expenses for mining operations. They are recoverable by Company according to the provisions of the Agreement:

1. Surface rentals
2. Labour and associated costs

3. Transportation

4. Charges for services,

- actual costs of contracts for services entered into with third parties on competitive terms;
- actual costs of contracts for services entered into with affiliated companies, unless they exceed the most favourable prices and terms charged to other non-affiliated customers by the affiliated company

5. Material cost

6. Rentals, duties, levies etc.

7. Legal expenses

8. Training costs

9. Insurance premia and losses not covered by insurance

10. Costs for maintaining offices, work bases and similar facilities

11. Auditing and reporting costs

12. General and Administrative costs.

A base rate for all general and administrative costs that support directly mining operations to the exclusion of any other charges, will apply. The Pl or any other body may be entitled to periodically review the equity of such provision and in particular whether the rate applicable represents a fair compensation for general and administrative costs incurred in support of mining operations.

Non-recoverable cost

All other costs expended by Company cannot be recovered, but have to be charged against Company's gross profit.

Non-recoverable items include without limitation costs incurred before the effective date of the Agreement; marketing and transportation costs beyond the point of first delivery; all amounts paid to the government on account of dividends, equity sharing, (royalties), taxes and other levies, fines and indemnities, damages owed because of wilful or gross negligence on the parts of Company or its employees, all costs regarding the administration of the Agreement not mentioned in the previous section. ■