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LAW ON MINING COMPANIES' LEGAL RIGHTS TO SURFACE OCCUPANCY

The Mining Code has legal mechanisms that empower investors to occupy or withdraw surface lands required for their activities, including lands belonging to a private owner, whose rights are also taken into account.

Authorization to carry out mining operations is derived from mining titles granted by the state, since minerals contained in the surfaces and sub-surfaces of the Republic of Congo are part of its national mining heritage. This said, mining operators need to occupy lands inside and outside mining areas to build the structures and installations needed for their work.

Law 26-2004 of 26 March 2004, on the general principles applicable to land and property tenure, stipulates that the national lands are composed of lands belonging to public entities and lands belonging to private individuals.

MINING CODE SETTLES PROBLEM OF COMPETING RIGHTS

There is no problem if the land surface is part of public land. If, on the other hand, the surfaces are owned by private individuals, mining operators are often accused of dispossessing the landowners, forcing whole villages to relocate, and participating in the eradication of customs and traditions.

By establishing the distinction between property and mining rights
the 2005 Mining Code firmly ascertains that mining titles are not to be mistaken to mean property rights over land areas in the mining area. This seeming competition of rights causes practical problems. Conflicts arising from such situations disrupt the activities of mining operators, whose operations then depend on the outcome of disputes.

Yet the Mining Code seeks to reassure potential investors in the mining sector. It provides mechanisms that allow mining operators to occupy surfaces or have them withdrawn if required for their activities all the while giving due attention to the interests of the resident populations and surface owners. The Code provides for three surface occupancy and withdrawal terms.

1) OCCUPANCY RIGHTS

Pursuant to Articles 104 to 108 of the Mining Code, occupancy rights are granted to permit holders exploiting mineral and fossil substances and to research permit holders. The following are the prerogatives associated with easements, lands subject to occupancy, and how the lands are determined.

Prerogatives connected to occupancy rights

According to Article 104 of the Mining Code, these rights may be granted to for mineral and fossil resources exploitation permit holders and include the possibility of occupancy of lands needed for exploitation and installations, including:

- emergency facilities such as shafts and adits to facilitate ventilation and water drainage;
- workshops for the preparation, washing and concentration of fuels and ores extracted from the mines;
- facilities for storing and depositing products and waste resulting from the aforementioned activities;
- canals, roads, railroads and all surface structures used to transport the products and waste referred to above, or products destined for the mine.

Land subject to occupancy rights

Occupancy may be authorized on surfaces inside or outside the mining area. But occupancy rights cannot be granted for land adjoining dwellings or enclosed by walls or equivalent enclosures.

Granting occupancy rights

Occupancy rights may be granted by prefectural decree or by Declaration of Public Interest.

By prefectural decree:

Under Articles 104 and 105 of the 2005 Mining Code, occupancy rights are granted by prefectural decree. However, Decree No. 2007-274 of 21 May 2007 setting out the conditions for the prospection, research and extraction of minerals and the exercise of administrative oversight, in Article 75 confers jurisdiction on an authority other than the one designated by the law itself, namely the Minister in charge of Mines. We believe that the Mining Code now being drafted will eliminate this contradiction.

By declaration of public utility:

According to Article 114 of the Mining Code, a declaration of public utility/interest may be issued for surfaces or parts of surfaces that are to support staff housing as well as processing, carbonization, smelting and gasification plants, and also power stations, sub-stations, facilities and installations intended for the full implementation of the operation. The Mining Code does not include the public declaration procedure, but does stipulate that such declarations must be made in accordance with the law.

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2) EASEMENTS

Under Article 109 of the Mining Code, easements may be granted to mining title holders, both inside and outside the mining boundaries.

The rights of permit holders

Easements give mining permit holders the possibility, in a strip of land five (5) meters wide, demarcated by prefectural decree or an official act declaring the land to be in the public interest:

- to permanently install, at a minimum height of 4.75 meters above the ground, cables, pipes or transport equipment as well as the pylons and masts required to support them;
- to bury cables or pipes at a depth of at least 0.50 meters and build facilities for the cables or pipes on a land area under 4 square meters , as well as the demarcation signs;
- to clear the ground of all trees, shrubs and other obstacles.

It should be noted that on forested land, land clearing is allowed up to 15 meters.

Easements also provide the possibility, to have access to a 15-meter land strip known as the "wide strip", which includes the 5-meter strip of land, for the passage of persons responsible for installing, monitoring, maintaining, repairing or removing equipment, as well as the passage of machinery being used.

The procedure for granting easements and other rights

If the easement relates to land within the mining area, it may be granted by prefectural order. If the easement relates to land outside the mining area, it may be declared to be in the public interest.

Specifically, Article 114 of the Mining Code provides that a declaration of public interest (or public utility) may also be issued, in the same way, for surfaces or parts of surfaces required to support:

- pipelines and installations for the transport of mining products to the processing, major consumption and export areas and their storage;
- electricity lines, including installations for the transport, storage or disposal of products or waste resulting from the activity of these plants.

The communication routes, pipelines and facilities thus declared to be in the public interest may be subject to public service obligations, under the conditions stipulated in the technical specifications.

3) EXPROPRIATION IN THE PUBLIC INTEREST (PUBLIC UTILITY)

Through the expropriation procedure, the state may take over land belonging to a private individual or a group of people for reasons of "public interest"

In the case of mining, property required for essential mining works and installations may be expropriated in the public interest, both inside and outside the area covered by the mining title.

The expropriation procedure is subject to law No. 11-2004 of 26 March 2004 on expropriation procedures in the public interest, and is implemented in two phases, an administrative phase which includes a preliminary enquiry to inform the public about the project likely to give rise to expropriation, and a public interest declaration.

4) ACCOMMODATING THE INTERESTS OF THE POPULATIONS AND OWNERS OF LANDS SUBJECT TO EASEMENTS OR EXPROPRIATION

The current Mining Code shows that mining operators can only occupy surfaces after having paid an occupancy fee, and abiding by certain of the surface owner's rights.

Payment of occupancy fee

Under Article 108, paragraph 2 of the Mining Code, the beneficiary of a legal occupancy right may only occupy a land area covered by a prefectural authorization after presenting the deed attesting to the payment or guarantee of payment of the occupancy fee to the government mining authority. If the land occupancy may deprive the landowner of the enjoyment of the premises, the mining operator is obliged to pay him compensation, unless such deprivation exceeds one year. Mere passage over the land does not entitle the owner to compensation if no damage is caused. However, repeated passage that causes inconvenience, damage or disturbance of enjoyment entitles the owner to just compensation.

Rights of surface owners

Article 101 of the Mining Code stipulates that mining contractors shall exercise the rights conferred on them showing due respect for the rights and interests of the surface landowners.

The Code identifies the right to be consulted and to give consent, the right to compensation on the basis of damage suffered and other rights that may be described as residual rights.

The right to be consulted and give consent

Under Article 108 of the Mining Code, the issuance of occupancy authorization predicates on prior observations by the owners and, where applicable, the persons working the lands in question.

If, however, the land is owned or used by indigenous populations, their consent may be required in application of Article 38 of Law No. 2011 of 25 February 2011 on the promotion and protection of the rights of indigenous populations, which states that: “indigenous populations shall be consulted prior to the formulation or implementation of any project affecting the lands and resources that they traditionally own or use”.

The right to compensation

With regard to the recipients of said compensation, Article 113 of the Mining Code stipulates that: “legal rights to occupation and passage instituted for the activities referred to in Articles 102 and 103 and in application of Articles 104 to 112 give rise to a right to compensation for the landowner, his successors and in particular, the persons working the land in case of losses”. This means that anyone claiming to possess customary land rights, without having such rights recognized in accordance with the procedure laid down for this purpose by Law No. 21-218 of 13 June 2018 stipulating the rules for occupying and acquiring land, will not be recognized as a landowner.

Residual rights of landowners

In addition to the right to compensation for deprivation of enjoyment of the property, the landowner subjected to the easements and rights referred to in Articles 104 and 105 above, will, in accordance with the provisions of Articles 106, 108 paragraph 3 and 110 of the 2005 Mining Code, have the right to require the purchase or expropriation of the land; the right to demand that the occupancy permit holder acquire all or part of the land, and the right to demand the removal of existing obstacles.

From the above, we can ascertain that the existence of legal mechanisms enabling mining operators to occupy land or have it withdrawn, and consequently to overcome the resistance of landowners tempted to oppose the installation of mining companies, attests to the preeminence of mining rights over customary land rights. However, the mining law does not ignore the interests of the surface owners ■

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