

# KENYA – MINING UPDATE



**Recent events in Kenya have the potential to impact not only the mining sector but wider natural resources, including oil and gas.**

Earlier this month, the international mining industry was shocked by an announcement from the Kenyan Mining Secretary Najib Balala which reportedly outlined that:

- Kenya has revoked 42 mining licences granted between 14 January and 15 May 2013. These licences have been revoked on the basis that they were said to be improperly awarded by the previous administration during the transitional period between governments earlier this year. During this period it is alleged licences were issued without review of the Parliament (as is usually expected under the 2010 Kenyan Constitution) and instead issued as 'special licences' by the Commissioner of Mines without the grant of a lease, under the Mining Act 1940.
- All mining licences issued since January 2013 will be reviewed and an independent report prepared concerning their validity.
- Royalties on minerals are to be increased:
  - to 5% of gross sale value on gold
  - to 10% of gross sale value on rare earths, niobium and titanium
  - to between 1 and 12% of gross sale value on other minerals
- Exploration drilling charges are to be increased by more than ten fold.
- Kenya has a moratorium on mining licences, until the Mining Bill 2013 is passed into law.
- The Commissioner of Mines, Moses Masibo has been relieved of his post.



This move follows Mining Secretary Najib Balala's recent announcement of a proposed new mining law regime, which is expected to repeal the current requirement for foreign mining companies to cede 35% ownership – which was controversially introduced last October and shattered confidence in the fledgling Kenyan mining sector.

#### Next steps:

At the date of publication, the Kenyan government is yet to enact the Mining Bill 2013 which is tipped to substantially replace the Mining Act 1940, particularly in relation to:

- Mining licence approvals.
- The holding, transfer and speculation in mining and exploration permits.

- Mining royalties and other fees.
- The establishment of a dedicated ministry in charge of mining.
- Announcements of mineral finds requiring independent government verification and approval of the Ministry.

While the recent changes have not had any effect on the oil and gas sector, which over recent years has seen rapid growth and foreign direct investment, the moves, in particular to cancel licences coupled with a rise in royalty payments, has no doubt shaken confidence for players in the oil and gas sector.

#### Bribery and corruption:

Whether or not it ultimately comes to light that the award of mining licences in Kenya was influenced by bribes or other illegal or corrupt practices, these recent events serve as a timely reminder for market participants of the extraterritorial reach of both the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act 1977 and the steps companies should be taking to minimise risk under these regimes.

For more information, please also see:

- Our recent Singapore bribery update at <http://www.hfw.com/Bribery-Laws-in-Singapore-August-2013>
- Our recent Australia bribery update at <http://www.hfw.com/Australia-Bribery-Update-July-2013>.
- Our analysis of the risk of political intervention in mining investments at <http://www.hfw.com/Riskybusiness>.

#### What can you do?

If you have been affected by the recent events in Kenya, or you are considering investing in the resources sector in Kenya, or Africa more generally, you can:

- Contact HFW. We are actively monitoring the situation and are discussing this on an ongoing basis with our clients and contacts in the region, with a view to identifying the scope and impact of the proposed legislation changes, and what steps companies may be able to take to mitigate the commercial implications to their business.
- Monitor developments. Kenya's position will be further clarified following:
  - the enactment of Kenya's new mining regime
  - release of an 'audit taskforce' report into all mining licences issued from January 2013. Affected miners have the opportunity to engage with the audit taskforce during the review period (approximately 2 months)
- Consider your position under applicable:
  - Bilateral investment treaties
  - Political risk and business interruption insurance policies - the revocation of licences will have a major impact on contracts and finance arrangements with operators possibly being in breach of contract following the revocation of their licences. Therefore, check your insurance policies to assess coverage.

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