Tax Design Issues Worldwide

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Edited by
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Preface

Tax Design Issues Worldwide is a collection of articles that is based on the presentations given at a conference 'Current Tax Issues for Developing Countries' held in Washington, DC in early 2014. The presenters are primarily tax legal drafting experts that the International Monetary Fund (IMF) has been using in its technical assistance projects. The conference was held on the occasion of the retirement of Victor Thuronyi, who worked for over twenty years at the Legal Department of the IMF as their lead counsel (tax).

The contributions in this book shed some light on a number of fundamental tax issues. The first chapter takes aim at the question whether the base for taxation should remain 'income' or shift (partly) to 'consumption.' The following part covers various issues in corporate taxation. After a basic discussion on the role the International Financial Reporting Standards (IFRS) could play in determining taxable profits, the systemic bias towards debt financing is addressed and suggestions are made to overcome this issue in practice. The final chapter on corporate taxation provides some base-erosion solutions for developing countries. The next area discussed is international coordination, especially the role tax treaties play in developing economies, how these countries deal with international tax planning, and to what extent exchange of information will help collect revenues. There follows a part dealing with VAT: after the VAT and customs treatment of the mining industry in Sub-Saharan Africa, some lessons are drawn for VAT design from working in various developing countries. The book's final part concerns the interaction of anti-money-laundering and tax, an emerging area that is relatively unfamiliar to many tax lawyers but promises to play an important role in the future.

Geerten M.M. Michielse
Victor Thuronyi
Washington DC
February 2015

Chapter 9

The VAT and Customs Treatment of the Mining Industry in Sub-Saharan Africa*

Alain Charlet

§9.01 INTRODUCTION

Africa ranks first or second in quantity of world reserves of many minerals.[1] For countries rich in natural resources but structurally poor, the establishment of a mining company is a promise of substantial revenues. Taxing the mining industry involves a delicate balance between the desire to attract foreign direct investment by granting special customs and tax (including Value Added Tax (VAT)) reliefs and the will to obtain a fair share of mining revenues.

This article describes the VAT and customs treatment that applies to mining companies in sub-Saharan African countries.[2] It builds on the experience of the author mostly in West Africa. It raises the VAT issues specific to the mining industry and reflects on some best practices that might be implemented.

Natural resources are a significant potential source of revenues for African countries.

* The author would like to give special thanks to Victor Thuronyi and Stéphane Buydens (Administrator in the Consumption Taxes Unit of the OECD Centre for Tax Policy and Administration) for their help and their suggestions.

1. UNEP, '*Africa: Atlas of our changing environment*', 2008, p. X., http://www.unep.org/dewa/africa/africaAtlas/PDF/en/Africa_Atlas_Full_en.pdf.
2. For an overview of the direct and indirect tax as well as of the customs treatment of the mining industry in francophone West and Central Africa, see '*La fiscalité minière en Afrique de l'Ouest et du Centre*' by Alain Charlet, Bertrand Laporte and Grégoire Rota-Graziosi, November 2013, Revue de Droit Fiscal n°48.

Africa holds around 30% of all minerals on the planet including 40% of gold, 60% of cobalt and 90% of platinum.[3] Natural resources (agricultural commodities, timber, minerals and hydrocarbons) have contributed to around 35% of Africa's growth since 2000. Raw and semi-processed goods accounted for about 80% of its exports in 2011 and the bulk of foreign direct investment was related to natural resources.[4] Sub-Saharan Africa accounted in 2011 for over 7% of world production of bauxite, 67% of cobalt, 19% of gold, 39% of manganese, 56% of diamonds, 21% of phosphate and 17% of uranium (see *Table 9.1* for details of the production of mineral commodities in 2011).

Commodity prices are relatively high by historical standards, despite recent weaknesses in the global economy.[5] The commodities boom encourages the exploitation of fields previously unprofitable. This offers a window of opportunity for Africa and has led several African countries to review the tax and customs regime of their mining codes.

The central tax policy issue is how to ensure that governments and investors equitably share mining revenues.[6] The levy imposed by the State should be high enough – because minerals are non-renewable resources – without discouraging mining. In theory, the income that could be taxed is equal to all mining revenues minus all costs of production (including those of discovery and development) and minus a normal return to capital.

If taxes on the income of the mining project, such as income tax, do not affect operating costs, other taxes however do increase them. Mining royalties are an addition to cost and apply notwithstanding changes in production costs. Tariffs hit capital and inputs. VAT also increases costs when it is not deductible, particularly with regard to fuel used for power generators. Social contributions increase the cost of labour.

Extractive industries are traditionally characterized by heavy investments, particularly during the construction of the mine (these costs are sometimes exacerbated by the construction of a railroad and harbour when the mine is isolated), followed by a high profitability when the mine enters into production.

Mining codes provide a number of tax reliefs that exempt mining companies from paying corporate income tax when they are exploring or building the mine.[7] A number of countries also provide tax holidays during the first years of exploitation of the mine or apply a reduced corporate income tax rate. Companies are also generally exempted from customs duties or can import a number of products under a customs suspension regime. They are generally exempt from some other specific taxes such as trading taxes or business licensing taxes (i.e., '*Patente*' in francophone countries that apply on the

3. UNEP, '*Africa: Atlas of our changing environment*', 2008, p. X., http://www.unep.org/dewa/africa/africaAtlas/PDF/en/Africa_Atlas_Full_en.pdf.
4. OECD, African Economic Outlook 2013, Chapter 6: Structural transformation and natural resources in Africa, OECD Publishing, p. 112.
5. OECD, African Economic Outlook 2013, Chapter 6: Structural transformation and natural resources in Africa, OECD Publishing, pages 31 and 112.
6. IMF, '*Fiscal Regimes for Extractive Industries: Design and Implementation*' (2012), http://www.imf.org/external/np/pp/eng/2012/081512.pdf.
7. See *generally* Charlet et al. *supra* n. 2.

rental value of immovable properties). Mining conventions signed between mining companies and governments sometimes extend even further the scope and length in time of these exemptions. In some countries, companies may end up paying mostly mining royalties when effectively extracting the ore. A number of VAT exemptions also apply before the company starts producing.

Exemptions – such as customs duties exemptions – generally involve a loss of revenues. The situation is different for VAT. VAT paid on inputs should in principle be deductible by mining companies.[8] Therefore, VAT exemptions do not create per se a loss of tax revenues. Furthermore, since these companies generally export all the ore extracted, there is normally no final consumption in the country of extraction.[9] Exports are normally zero-rated.[10] The ore will be subject to VAT in the country of import (although this VAT will be deductible when the ore is bought by a business). VAT revenues will only accrue to the jurisdiction of final consumption. VAT is thus not a tool for raising revenues in that particular case. This is the role of the other taxes such as the profit-based taxes (income taxes or resource rent taxes for instance) or mining royalties. However, VAT exemptions do affect the formalizing effect of VAT on the economy, where the mining industry is generally perceived as a way to drive structural transformation.[11]

This paper outlines some of the VAT and customs issues relevant to mining taxation.

The *following section* provides an overview of *legal background* that applies to extractive industries (*sub-section* §*9.02[A]*) and of the various specific *VAT and customs exemptions* that apply to the purchases made by mining companies (*sub-section* §*9.02[B]*). The tax regime varies largely depending on the phase of activity of the mine. Since explorers do not qualify under every legislation as a VAT taxable person and the VAT refund procedure is generally not open to taxable persons who do not export, comprehensive VAT exemptions in the exploration and development phase

8. VAT is a transaction tax, which aims at taxing the sale to the final consumer through a staged payment process across the supply chain. The tax deduction mechanism ensures that the VAT paid by businesses along the value chain is borne not by them but by final consumers. See OECD, '*Consumption* Tax Trends 2012', Stéphane Buydens, OECD Publishing; '*Chapter 1: Taxing consumption*'.
9. Typically, the ore will be transformed in the country of import (or in a third country) into a final product or incorporated into a final product or used as a means to provide a service to a final consumer. For instance, bauxite is normally transformed into alumina, which is transformed into aluminium through an electrolytic process. It is then incorporated into intermediate products or final consumption goods. From a VAT point of view, final consumption occurs when the good or service is bought by a final consumer; that is, generally speaking, a private individual that does not act as a business and has therefore no right to deduct the VAT charged on the good or service purchased.
10. Traditionally, exports are zero-rated, that is, exempt with credit – which means that the VAT taxable person who is exporting has the right to deduct the VAT on the person's inputs although the onward supply made is exempt. Imports are taxable in the country of import. This is an implementation of the destination principle according to which the value added should be taxed in the country of consumption. This achieves neutrality in international trade since the tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption.
11. OECD, African Economic Outlook 2013, Chapter 6: Structural transformation and natural resources in Africa, OECD Publishing.

of the mine avoid a large build-up of VAT credits. They ensure normally that the extractive industry does not bear any irrecoverable VAT cost at this stage.

The *second section* lists some typical VAT and customs mining-related *issues*.

Some of these issues may create a disincentive for companies to invest when they incur an irrecoverable VAT cost. This might be the case, for instance, when some of the inputs are excluded from the right to deduct *(sub-section* §*9.03[A])* or when the VAT refund procedure – normally open to mining companies who start producing – is so burdensome that it is a right difficult to exercise in practice *(sub-section* §*9.03[B])*.

Some others may put the VAT system at a risk. First, the extension of VAT and customs exemptions during the production phase to the purchases made by the mining companies and by their subcontractors may exempt a whole sector of the economy and in the long run destroy the VAT system (*sub-section* §*9.03[C]*). In that respect, mining conventions that have in most countries a legal status comparable to laws allow to derogate from the provisions of the mining code (*sub-section* §*9.03[D]*).

Second, the large spread of these exemptions poses the question of their control and application *(sub-section* §*9.03[E])*. There might be a need to improve the existing tools such as the mining lists or to implement some ring-fencing provisions to avoid an overlap between different VAT and customs regimes granted with respect to different mining rights. In addition, discrepancies exist between the rules enacted by sub-Saharan African organizations and the domestic laws of their members and this may create uncertainty *(sub-section* §*9.03[F])*.

Finally, some issues are generally not addressed by the mining codes, which may create some uncertainty. This is the question of the VAT treatment of the transfers of mining rights (*sub-section* §*9.03[G]*).

Table 9.1 Africa: Production of Selected Mineral Commodities in 2011 (Thousand Metric Tons Unless Otherwise Specified)

Country	*Bauxite*	*Aluminium*	*Chromite, Mine Output, Gross Weight*	*Cobalt, Mine Output, Co Content, (Metric Tons)*	*Copper, Mine Output, Cu Content*	*Gold, Mine Output, (Kilograms)*	*Iron Ore, Gross Weight*	*Steel, Crude*	*Lead, Mine Output, Pb Content, (Metric Tons)*	*Manganese, Mine Output, Mn Content*	*Zinc, Mine Output, Zn Content, (Metric Tons)*	*Diamond, Natural (Thousand Carats)*	*Phosphate, Rock, Gross Weight*	*Coal, Anthracite and Bituminous*	*Uranium, U3O8 Content, (Metric Tons)*
Sub-Saharan Africa															
Angola	--	--	--	--	--	--	--	--	--	--	--	8,329	--	--	--
Benin	--	--	--	--	--	20	--	--	--	--	--	--	--	--	--
Botswana	--	--	--	300	22	1,800	--	--	--	--	--	24,000	--	900	--
Burkina Faso	--	--	--	--	--	31,774	--	--	--	22	--	--	2	--	--
Burundi	--	--	--	--	--	750	--	--	--	--	--	--	--	--	--
Cameroon	--	69	--	--	--	1,600	--	--	--	--	--	10	--	--	--
Cape Verde	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Central African Republic	--	--	--	--	--	53	--	--	--	--	--	324	--	--	--
Chad	--	--	--	--	--	100	--	--	--	--	--	--	--	--	--
Congo (Brazzaville)	--	--	--	--	--	150	--	--	--	--	--	77	--	--	--
Congo (Kinshasa)	--	--	--	60,000	540	3,500	--	120	--	--	19,035	19,700	--	--	--
Côte d'Ivoire	--	--	--	--	--	9,871	--	--	--	20	--	--	--	--	--
Djibouti	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Equatorial Guinea	--	--	--	--	--	200	--	--	--	--	--	--	--	--	--

Country	*Bauxite*	*Aluminium*	*Chromite, Mine Output, Gross Weight*	*Cobalt, Mine Output, Co Content, (Metric Tons)*	*Copper, Mine Output, Cu Content*	*Gold, Mine Output, (Kilograms)*	*Iron Ore, Gross Weight*	*Steel, Crude*	*Lead, Mine Output, Pb Content, (Metric Tons)*	*Manganese, Mine Output, Mn Content*	*Zinc, Mine Output, Zn Content, (Metric Tons)*	*Diamond, Natural (Thousand Carats)*	*Phosphate, Rock, Gross Weight*	*Coal, Anthracite and Bituminous*	*Uranium, U3O8 Content, (Metric Tons)*
Eritrea	--	--	--	--	--	11,800	--	--	--	--	--	--	--	--	--
Ethiopia	--	--	--	--	--	10,700	--	130	--	--	--	--	--	--	--
Gabon	--	--	--	--	--	--	--	--	--	1,872	--	--	--	--	--
Gambia, The	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Ghana	408	35	--	--	--	82,993	--	--	--	484	--	302	--	--	--
Guinea	15,300	--	--	--	--	15,695	--	--	--	--	--	304	--	--	--
Kenya	--	6	--	--	--	2,100	--	250	--	--	--	--	--	--	--
Lesotho	--	--	--	--	--	--	--	--	--	--	--	100	--	--	--
Liberia	--	--	--	--	--	469	1,300	--	--	--	--	42	--	--	--
Madagascar	--	--	67	500	--	--	--	--	--	--	--	--	--	--	--
Malawi	--	--	--	--	--	--	--	--	--	--	--	--	--	83	998
Mali	--	--	--	--	--	35,728	--	--	--	--	--	--	20	--	--
Mauritania	--	--	--	--	40	8,172	11,160	5	--	--	--	--	--	--	--
Mauritius	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Mozambique	10	562	--	--	--	111	--	--	--	--	--	--	--	648	--
Namibia	--	--	--	--	4	2,053	--	--	8,000	48	48,950	1,256	--	--	3,746
Niger	--	--	--	--	--	1,879	--	--	--	--	--	--	--	250	5,131
Nigeria	--	18	--	--	--	100	70	400	NA	--	NA	--	--	39	--
Reunion	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Rwanda	--	--	--	--	--	3	--	--	--	--	--	--	--	--	--
Senegal	--	--	--	--	--	4,089	--	--	--	--	--	--	1,411	--	--
Seychelles	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

Country	*Bauxite*	*Aluminium*	*Chromite, Mine Output, Gross Weight*	*Cobalt, Mine Output, Co Content, (Metric Tons)*	*Copper, Mine Output, Cu Content*	*Gold, Mine Output, (Kilograms)*	*Iron Ore, Gross Weight*	*Steel, Crude*	*Lead, Mine Output, Pb Content, (Metric Tons)*	*Manganese, Mine Output, Mn Content*	*Zinc, Mine Output, Zn Content, (Metric Tons)*	*Diamond, Natural (Thousand Carats)*	*Phosphate, Rock, Gross Weight*	*Coal, Anthracite and Bituminous*	*Uranium, U3O8 Content, (Metric Tons)*
Sierra Leone	1,457	--	--	--	--	164	1,300	--	--	--	--	357	--	--	--
Somalia	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
South Africa	--	809	10,721	1,600	97	180,184	58,056	7,546	54,460	3,421	36,629	7,047	2,565	252,757	656
South Sudan	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Sudan	--	--	57	--	--	23,739	--	--	--	186	--	--	--	--	--
Swaziland	--	--	--	--	--	--	80	--	--	--	--	--	--	121	--
Tanzania	130	--	--	--	5	44,000	--	--	--	--	--	28	18	83	--
Togo	--	--	--	--	--	16,469	--	--	--	--	--	--	866	--	--
Uganda	--	--	--	--	--	--	2	7	--	--	--	--	--	--	--
Zambia	--	--	--	6,600	668	3,500	--	50	--	40	--	--	--	220	--
Zimbabwe	--	--	599	86	6	12,824	--	15	--	--	--	8,503	60	2,560	--
Maghreb															
Algeria	--	--	--	--	--	340	1,400	440	--	--	--	--	1,287	--	--
Egypt	--	540	--	--	--	7,000	250	6,486	--	4	--	--	4,700	300	--
Libya	--	--	--	--	--	--	--	100	--	--	--	--	--	--	--
Morocco and Western Sahara	--	--	--	2,159	13	520	79	460	30,675	23	45,065	--	28,052	--	--
Tunisia	--	--	--	--	--	--	171	119	--	--	--	--	2,480	--	--
Total sub-Saharan Africa	17,305	1,499	11,444	69,086	1,381	506,590	71,968	8,523	62,460	6,093	104,614	70,378	4,942	257,661	10,531

Country	*Bauxite*	*Aluminium*	*Chromite, Mine Output, Gross Weight*	*Cobalt, Mine Output, Co Content, (Metric Tons)*	*Copper, Mine Output, Cu Content*	*Gold, Mine Output, (Kilograms)*	*Iron Ore, Gross Weight*	*Steel, Crude*	*Lead, Mine Output, Pb Content, (Metric Tons)*	*Manganese, Mine Output, Mn Content*	*Zinc, Mine Output, Zn Content, (Metric Tons)*	*Diamond, Natural (Thousand Carats)*	*Phosphate, Rock, Gross Weight*	*Coal, Anthracite and Bituminous*	*Uranium, U3O8 Content, (Metric Tons)*
Sub-Saharan Africa's share of total Africa	100%	74%	100%	97%	99%	98%	97%	53%	67%	100%	70%	100%	12%	100%	100%
Sub-Saharan Africa's share of world total	7%	3%	38%	65%	9%	19%	2%	1%	1%	39%	1%	56%	3%	4%	17%
Total Africa	17,305	2,039	11,444	71,245	1,394	514,450	73,868	16,128	93,135	6,120	149,679	70,378	41,461	257,961	10,531
Africa's share of world total	7%	4%	38%	67%	9%	19%	2%	1%	2%	39%	1%	56%	21%	4%	17%
World total	252,000	56,500	29,900	106,000	15,900	2,670,000	2,980,000	1,520,000	4,730,000	15,800	12,300,000	125,000	196,000	6,460,000	63,000

Source: USGS and author's calculations.

§9.02 THE VAT AND CUSTOMS TREATMENT OF EXTRACTIVE INDUSTRIES: AN EVOLUTIONARY TAX REGIME THAT FOLLOWS THE PHASE OF ACTIVITY OF THE HOLDER OF THE MINING RIGHT

The applicable VAT regime varies considerably depending on the phase of activity of the mining company, that is to say the exploration, development, and production stages.

Extractive industries are traditionally confronted with both relatively high risks and heavy investments. Exploration might be risky, particularly because it only creates gains in case of discovery. Most of the investments take place in the development/construction phase of the mine when the discovery is brought to extraction. This is normally followed by a high profitability when the mine enters into production although this may vary depending on changes in commodity prices. Since mining is typically based on land, it is also subject to political risk.

In order to address the high level of investment required and also – to a certain extent – to share the risks between the government and the investor, most sub-Saharan African mining codes provide for exemptions. These exemptions mostly apply during the exploration and development/building phases of the mine.

Amongst the list of these exemptions are VAT and customs exemptions. These exemptions are generally not included in the tax code, in the VAT act (although there are some exceptions – see *sub-section §9.02[B][2]*), or in the Customs code, but are part of the mining code itself. This practice is not unknown in sub-Saharan Africa. Investment codes and some sector-based codes often grant preferential tax treatments derogating from the general tax code to specific sectors of industry.

In terms of legal drafting, however, a better practice might be to gather respectively all tax provisions in the tax code itself and all customs provisions in the customs code and to limit the scope of the mining code to the other areas of the law it is supposed to cover (i.e., for instance, the qualifications required for granting a prospecting or mining right; the application, granting, and duration of these rights; the rights and obligations of the holders of these rights; and the application for the renewal, surrender, suspension, and cancellation of the permits).

For instance, the scope of the South African Mineral and Petroleum Resources Development Act, 2002 does not address tax issues. The South African Mineral and Petroleum Resources Royalty Act, 2008 covers the specific issue of mining royalties but does not provide otherwise any specific tax provisions derogating from the general tax code.

[A] Some Legal Background

Before discussing the VAT regime that applies to extractive industries, it might be desirable to provide some insight into the mining legal framework defined by the mining code or act.

This is paramount because the granting of a specific mining title defines the tax and customs regime that applies to the holder of the mining title and sometimes to its subcontractors.

Mineral resources are normally regarded as the common heritage of a country. The State, acting as the custodian of the nation's mineral resources, may therefore grant, refuse, control, or administer any mining right.

There are generally *two categories of mining titles or rights*: (1) the exploration or prospecting licence or permit, and (2) the production licence or permit. These rights can be broken down by type of resources (mineral or quarriable substances)[12] and of exploitation (industrial, semi-industrial or artisanal/small scale). The name of the mining rights – as such as the names of the various mining phases[13] – may vary from country to country.

In many countries, these licences or permits are only attributed to companies incorporated under national law. This requires foreign mining companies to set up a local subsidiary. In some countries, free equity is also provided to the State in the local company that is incorporated.[14]

An *exploration licence or permit* usually gives its holder an exclusive right to search for the type of mineral substance for which the permit is issued, within the perimeter defined in the permit and with unlimited depth.

A *production license or permit* is normally granted to the holder of the exploration licence or permit that requests it, provided that the applicant has access to financial resources and has the technical ability to conduct the proposed operation. Typically, a company that has made a discovery within the perimeter of its exploration license or permit will ask for a production licence or permit in order to be allowed to exploit the mineral deposit.

12. There are traditionally three types of minerals: hydrocarbons (which are not within the scope of this study), mineral substances, and quarriable substances.

    Mineral substances are all substances other than hydrocarbons and quarriable substances. They include for example iron, bauxite, copper, tin, nickel, zinc, cobalt, and titanium. There are two important sub-categories of mineral substances: (1) radioactive substances (such as uranium, etc.) and (2) precious metals and gemstones. This last sub-category includes in particular gold, silver, platinoids, diamonds, precious stones (emeralds, rubies, sapphires, etc.) or other gemstones.

    Quarriable substances include peat, construction materials (marble, etc.), raw materials for the ceramic industry, amendments, mineral salts, etc. The extraction of quarriable substances is generally less difficult than for mineral substances. Therefore, their tax regime is generally not as favourable as the one that applies to mineral substances.
13. For the purpose of this paper, and for ease of reading, it was decided to use the terms '*exploration*', '*development*' and '*production*' to designate the three different mining phases. These terms are commonly used in many countries. This is also the terminology used in IMF, *supra* n. 6.
14. Incorporating a company under national law is of particular importance because many mining codes grant to the State a defined percentage of free shares in the capital of the mining company (for instance, 10% in Burkina-Faso and Cameroon, 5% in the Democratic Republic of the Congo, 10% in Côte d'Ivoire, between 5% and 15% in Guinea depending on the type of mineral substance, 10% in Mali, Mauritania, and Niger). In some mining codes, the State has also the right to purchase additional shares although its total percentage in the capital of the mining company is limited to a certain threshold (for instance, to a total of 20% in Cameroon, 25% in Côte d'Ivoire, 20% in Mali and Mauritania and 40% in Niger). See Charlet et al. *supra* n. 2.

In practice, production does not start immediately, but is preceded by a phase known as the development or building phase in which the company proceeds to all investments required to extract the minerals. The company will import heavy equipment and erect plant and buildings for the purposes of mining. However, from a legal point of view, the production license or permit covers both the development and production phases. A production licence or permit is therefore required to start the development phase.

[B] VAT and Customs Exemptions Granted by Mining Codes

The exploration and development/building phases are normally characterized by very broad exemptions from direct and indirect taxes, including VAT and customs duties. This is because, in the first phase, the mining company is looking for a deposit and, in the second phase, it builds the infrastructure that will be required to extract that deposit. It is therefore mostly incurring costs. When the company enters into the production phase, standard VAT and customs rules normally apply, although there are some exceptions.

[1] The VAT and Customs Regime Applicable during the Exploration and Development Phases

As far as VAT is concerned, the holder of a mining right (exploration or development licence or permit) typically benefits from very broad VAT exemptions on its imports during the exploration and development phases.[15] They are generally combined with customs duties exemptions, suspensory customs regimes (such as temporary admission regimes[16]) or preferential tariff on imports (see

15. However, in some countries, the duration of the VAT exemptions that apply in the development phase is limited in time.

    For instance, Art. 86 of the 2003 mining law of **Burkina Faso** provides that the VAT exemption on imported or locally manufactured equipment and on services provided by geo-services companies cannot last more than two years during the development phase. This may be extended to a total of three years when the investment carried out at the end of the two years period reached at least 50% of the planned investment.

    In **Côte d'Ivoire**, Art. 165 of the recent 2014 mining law, which replaced the 1995 mining law, provides that, during the development phase of the mine, the imports of equipment, materials, machines and spare parts intended to be used for mining operations made by the holder of a production permit are exempt from VAT and customs duties. However, the duration of the exemption period on imports cannot exceed the duration of the development phase provided for in the decree granting the exploitation permit. This duration may be extended under the conditions set by the decree. Nevertheless, Art. 168 provides that the holder of a production permit is exempt from VAT (only) until the date of the first commercial production on its imports of goods and purchase of foreign services, on its purchases of goods and services in Côte d'Ivoire and with respect to its sales related to mining operations.

16. Temporary admission means that goods may be imported without payment of duty (and normally also VAT) under certain conditions and re-exported afterwards in the same state as they were in at import. Normally the goods must be imported for a specific use and must be re-exported after use within a specified time without having been altered or changed. The customs duties and VAT are therefore suspended while the goods meet these conditions but become immediately due otherwise or when the goods are released for consumption. In the case

Table A.1[17] *in Annex* which presents an overview of VAT and customs regimes in a selection of sub-Saharan countries).

There are several reasons for these exemptions:

(1) The *first reason* is that mining companies must make significant imports of heavy equipment that they usually cannot find on the domestic market of developing countries. It is felt that VAT and particularly customs exemptions on imports are needed to encourage investment (although this might not necessarily be the case if VAT on imports is deductible and can be refunded).
(2) A *second reason* is that some VAT laws consider that mining companies in the exploration or development phase do not have the status of a VAT taxable person insofar as they do not yet carry out any effective economic activity.[18] Strictly speaking the economic activity begins with the first production when the extraction starts. These countries do not consider that the intent to exercise an economic activity is sufficient to qualify as a VAT taxable person. As a result, specific exemptions are needed in the exploration or development phases because, otherwise, companies would incur a non-deductible input VAT cost on their purchases. Not having the status of a taxable person, they would not be allowed to deduct this VAT and, *a fortiori* later on, claim for a refund when in a credit position.
(3) A *third reason* is that, even if the VAT legislation recognizes that a mining company in the exploration or development phase qualifies as a VAT taxable

of sub-Saharan mining codes, goods admitted under temporary admission are also often exempt from VAT by a specific provision of the mining code (which '*transforms*' the temporary VAT suspension under the customs regime into a permanent exemption).

17. The full references to the mining legislation of the countries quoted are provided in **Table A.1 in Annex**. For ease of reading, they will not be repeated in the main text or in the footnotes. Only the reference to the year of the law or of the code will be made.
18. In many sub-Saharan African francophone countries but not only these, the tax administration does not recognize the intent to exercise an economic activity in order for a person to qualify as a VAT taxable person but requires in practice that the economic activity be effectively exercised. The tax authorities generally retain a literal interpretation of the law although this is not always the case. This might go against the logic of the VAT that would normally consider it sufficient to intend to exercise an economic activity to qualify as a VAT taxable person.

For instance, Art. 322 of the Tax Code of **Burkina Faso** ('*Loi n° 6/65/AN du 26 mai 1965 portant création du code des impôts directs et indirects du Burkina Faso*') provides that a VAT taxable person is any person who is carrying out taxable transactions. Taxable transactions are defined by Art. 320 of the Tax Code as imports, sales, construction works, and supplies of services.

Similarly, Art. 358 of the Tax Code of **Guinea** provides that a VAT taxable person is any person who carries out for consideration, independently, on a regular or casual basis, taxable transactions as part of an economic activity.

In the **Democratic Republic of the Congo**, Art. 13 of the VAT Act ('*Ordonnance-loi n° 10/001 du 20 août 2010 portant institution de la TVA*') defines a VAT taxable person as any person that performs for consideration, independently, regularly, or occasionally, transactions in relation with an economic activity. However, since the Finance law for 2014, mining undertakings in the exploration or development phases may ask for a refund of their VAT credit, which implies they are now considered as VAT taxable persons (see *infra* n. 25).

Whereas, Art. 177 ter of the Tax Code of **Mauritania** seems to consider as a VAT taxable person any person who is subject to the regular direct tax regime (excluding small traders).

person because it intends to exercise an economic activity, some VAT laws only open the VAT refund claim procedure to certain VAT taxable persons, such as exporters.[19] That means that companies in the exploration or development phase who do not extract and thus are not yet exporting do not fulfil the conditions for filing a VAT refund claim. It is true that those companies would not lose this VAT credit and could normally offset it on their next VAT returns. The accumulated VAT credits will become refundable when they will start to export minerals. Nevertheless, this might significantly affect their cash flow at a time when they are still investing.

(4) A *fourth reason* is that VAT credits are subject to a statute of limitation in some VAT laws.[20] They can expire after a certain period of time. There is a risk therefore that mining companies may lose this VAT credit before starting production. Exemptions applied in the exploration and development phases address that issue by avoiding a large build-up of excess input VAT credits.

In addition to these legal reasons explaining the widespread use of exemptions, there is a *fifth reason*, which is maybe in practice the most important one. In many developing countries, when a VAT refund procedure is available, it is not uncommon that taxpayers are confronted with a relatively dysfunctional procedure (see *sub-section* §*9.03[B]* for a more detailed analysis of this issue). Therefore, investors usually require exemptions to be put in place in order to avoid incurring a potentially irrecoverable input VAT cost.

The *scope* of the VAT exemptions is usually limited to imports but some countries go further by also exempting from VAT certain services, particularly geo-services.[21] Some others exempt all cross-border and domestic purchases of goods or services made to the holder of the mining title.[22] Some others extend the preferential tax and customs

19. In the **Democratic Republic of the Congo**, Arts 63 and 64 of the VAT act ('*Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA*') provide that a VAT credit is not refundable except if the taxable person is an exporter or has stopped its economic activity. However, the refund is limited to the VAT borne on the purchase of movable goods or services. Furthermore, the VAT refund open to exporters is limited to an amount equal to the amount of exports multiplied by the applicable VAT rate.

    However, Art. 14 of the Finance Law for 2014 (*Loi de finances n°14/002*) now allows mining and oil undertakings that are in the exploration or development phases to file a claim for obtaining the refund of their VAT credits resulting from VAT incurred on purchase of movable goods and services.

20. For instance, in **Senegal**, Art. 375 of the Tax Code (revised in 2012 by the '*Loi n° 2012-31 du 31 décembre 2012 publiée au J.O. n° 6706 du 31-12-2012*') provides that input VAT can be offset against any output VAT and that otherwise a VAT credit is carried over on the next VAT returns until extinction. However, this VAT credit carryover may not exceed two years. In effect, a tax credit '*dies*' after two years if it was not possible to offset it against any output VAT.

    In **Mauritania**, according to Art. 182*bis* of the Tax Code, VAT credits cannot be carried over for more than twelve months.

21. For instance, Arts 84 and 86 of the mining law of **Burkina Faso** provide for a VAT exemption on services provided by geo-services companies and the like to the holder of the mining right during the exploration and development phases.

22. For instance, according to Arts 27 and 33 of the **WAEMU** (West African Economic Monetary Union) Mining Regulation, the holder of a mining title is exempt from VAT on its domestic and cross-border purchases of goods and services during the exploration and development phases.

regime granted to the holder of the mining right to its subcontractors (see *sub-section §9.03[C]*).

The implementation of the VAT exemptions and customs preferential regimes on imports requires a control without which all supplies imported by a mining company and its subcontractors (when they are entitled to benefit as well from tax concessions) could be exempt, including those that are not useful for the exploration and development of the mine. This control takes the form of a *mining list*, whose categories are normally strictly limited.[23] The mining list is normally filed with the application for a

For a broader discussion regarding the WAEMU and the way WAEMU legislation interacts with the laws of its Member States, see **sub-section** §9.03[F].

In **Cameroon**, Art. 95 of the 2001 mining law exempts from VAT the domestic and cross-border purchases of goods and services made by the holder of a research permit. However, new Art. 97 of the 2010 law amending the 2001 mining law provides that the imports and domestic purchases of materials and equipment made by the holder of a research permit in relation with its mining activity are exempt from VAT provided they are listed on a mining list and that a VAT exemption certificate is provided to the suppliers. During the development phase, only certain imports are exempt from VAT (Art. 97 of the 2001 mining law). It is not clear from the drafting of the new 2010 law (amending the 2001 mining law) whether new Art. 97 amends former Art. 95 since both refer to the situation of the holder of a research permit or if the intention of the legislator was to replace former Art. 97 (which refers to the situation of the holder of a production permit). In the second case, the mining code would be left with a gap as regards the VAT situation of the holder of a production permit.

In **Mali**, according to Art. 125 of the mining law, the holders of a research permit are exempt from VAT on their domestic and cross-border purchases of goods and services. According to Art. 126 of the mining law, the holders of an exploitation permit are also exempt from VAT on their domestic and cross-border purchases of goods or services during the building phase.

In **Niger**, according to Art. 92 of the mining law, the holders of a research permit are exempt from VAT on their domestic and cross-border purchases of goods and services. According to Art. 93 of the mining law, the holders of an exploitation permit are also exempt from VAT on their domestic and cross-border purchases of goods or services during the building phase.

23. Article 1 of the 2003 **WAEMU** Mining Regulation provides that the mining list is the list of capital goods and consumables established according to the WAEMU Tariff nomenclature normally used for mining activities and for which duties and taxes at import are suspended, moderated, or exempted.

In **Burkina Faso**, Arts 85 and 86 of the 2003 mining code provide that a list of the equipment, materials, machinery as well as parts and components eligible for the exemption must be attached to the mining title.

In **Cameroon**, according to new Art. 97 of the 2010 law amending the 2001 mining law, imports and domestic purchases of materials and equipment made by the holder of a research permit in relation with its mining activity are exempt from VAT provided they are listed on a mining list and that a VAT exemption certificate is provided to the suppliers.

In the **Democratic Republic of the Congo**, Art. 225 of the 2002 mining law provides that the holder of the mining title must provide a list with the number and value of the goods, equipment, vehicles, mining substances, and other inputs eligible for the specific customs regime.

In **Côte d'Ivoire**, Art. 162 of the 2014 mining law provides that a list of equipment, materials, and machines eligible for the exemption from VAT and customs duties on imports made during the research phase has to be submitted with the exploration permit and to be attached to it. Article 165 provides that a list of equipment, materials, machines, and spare parts that can benefit from exemptions during the development phase is attached to the production permit.In **Guinea**, Arts 166 and 167 of the 2013 mining law require the holder of the mining title to have with respect to each phase of activity a mining list that lists the goods that can be imported under temporary admission or VAT exemption.

mining title. Only the goods on this list will be eligible for exemption. In practice, however, managing this list can be burdensome for the customs authorities (see *sub-section* §*9.03[E]*).

[2] The VAT and Customs Regime Applicable during the Production Phase: A Return to the General Law

The production phase usually begins on the date of *first commercial production* or at the end of a '*running-in-period*'.[24] It is characterized by a return, at least partially, to the general customs and tax law rules,[25] for VAT as well. In many countries, the holder of the mining title is exempt from VAT on its imports (and sometimes on its domestic purchases),[26] or benefits from the preferential customs regime on its imports only until the date of first production[27] (see *Table A.1 in Annex*).

This is because nothing justifies, at the production stage, the allocation of preferential customs and tax regimes where most of the important investments have already been made. Preferential customs and tax regimes were justified during the exploration and development phases of the mine by the need to import capital goods of very high value without immediate return on investment, by the need to avoid the investor bearing a VAT cost when he does not qualify as a VAT taxable person, and,

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In **Mali**, Arts 133 and 134 of the 2012 mining law require that the products eligible for the customs duties exemption in the exploration and development phases figure in a mining list in order to benefit from the exemption.

In **Mauritania**, according to Art. 105 of the 2008 mining law as amended in 2009 and 2012, the holder of the mining title must provide to the Minister of Mines a mining list, which is a list of the items it wishes to import under the preferential customs regime. The list of goods to be acquired during the development phase must be established by reference to the assets described in the feasibility study introduced to obtain the mining permit.

In **Niger**, Art. 93 of the 2006 mining law also refers to a mining list but does not provide any details with respect to the content of the list.

In **Ghana**, Sect. 14 and Schedule 1 of the VAT Act exempt from VAT the supply of machinery, apparatus, appliances, and part thereof designed for use in mining as specified in the mining list.

24. For instance, in **Mauritania**, according to Art. 103 of the 2008 mining code, the '*running-in-period*' is supposed to start when the daily production exceeds 10% of the production expected in the feasibility study.
25. The 2002 mining act of the **Democratic Republic of the Congo** has a specific approach that consists in listing all customs duties and taxes that apply to the different phases of activity. The tax and customs regime is said to be comprehensive ('*exhaustif*' according to Art. 220 of the 2002 mining law). The mining act is autonomous from the Tax Code. The shift to the production phase is marked primarily by an increase from 2% to 5% of the customs duties rate on the imports of goods listed on the mining list (with the exception of fuels which remain subject to a 3% rate regardless of the phase of activity).
26. For instance, according to Art. 33 of the **WAEMU** mining regulation, the holder of a mining title is exempt from VAT until the date of first production.

    In **Cameroon**, Art. 97 of the 2001 mining law provides that any VAT exemption ceases to apply at the date of first commercial production.

    In **Niger**, according to Art. 93 of the mining law, the VAT exemption on the domestic and cross-border purchases of goods and services by the holder of an exploitation permit is over at the date of the first production.
27. This is the case for instance in **Cameroon** (Art. 96 of the 2001 mining law amended in 2010) where the entrance into production marks a return to the ordinary customs regime.

when he does, by the need to avoid a large build-up of VAT credits (see *sub-section §9.02[B][1]*).

However, this return to the ordinary *VAT* regime is *relative*. Some mining codes distinguish two phases within the production period: a tax holiday phase and a normal phase.[28] Some others continue to apply a specific VAT regime to certain categories of products during the whole duration of the production phase.[29]

In other countries, the VAT regime that applies to the holder of the mining right is not defined by the mining law itself but by the VAT act or tax code, which might be a better approach in terms of legal drafting. Some of these countries tend to apply a general VAT exemption on the purchases of specified types of equipment made by the mining company irrespective of the phase of activity of the mine.[30] That seems to be in line with VAT principles since VAT normally exempts a supply and not a person (or, more exactly, the purchases made by a person).

With respect to *customs duties*, the operating phase that should mark a return to the ordinary law system is also *relative*.[31] In fact, the mining codes often continue to

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28. In **Côte d'Ivoire**, Art. 166 of the recent 2014 mining law provides that the holder of a production permit benefits from the temporary admission regime for a three years period as from the date of the first commercial production.

    In **Mali**, Art. 127 of the mining 2012 law exempts the holders of an exploitation permit from VAT on their purchases of goods or services during three years from the start of the production phase.

    In **Mauritania**, according to Art. 112 and to Table A.1 of the 2008 mining law amended in 2009 and 2012, the import of equipment is made under temporary admission during the tax holiday period and then exempt after that. According to Art. 103 of the mining law, the tax holiday period lasts thirty-six months from the date of first production. The import of spare parts is exempt from VAT. The import of industrial inputs is subject to VAT. The import of petroleum products is subject to VAT. However, fuel for heavy equipment used for mining activities is imported under VAT suspension during the whole exploitation phase.
29. In **Guinea**, Art. 176 of the 2013 mining law provides that standard VAT rules apply, except for imports of fixed assets listed in category 1 of the mining list that remain VAT exempt.
30. See *supra* n. 23 for **Ghana**.

    In **Tanzania**, according to s. 11 of the VAT Act and to the Third Schedule of the VAT Act, the importation by or supply to a registered licensed drilling, mining, exploration, or prospecting company of equipment to be used solely for drilling, mining, exploration, or prospecting activities is relieved from VAT.
31. For instance, according to Art. 29 of the **WAEMU** Mining Regulation, during the production phase, the holder of a mining title is exempt from duties and taxes (with the exception of the Statistical Fee / '*Redevance Statistique*' – RS) on petroleum products used for energy production, extraction, transportation, ore processing and for the operation and maintenance of social and health infrastructure. Capital goods listed on the mining list are imported under temporary admission until the end of the third year of production. At of the end of this period the owners are liable to pay the customs duties. However, the equipment used for exploitation works remains exempt. According to Art. 30, chemicals, reactants, oils, and greases are exempt from customs duties.

    The common external tariff (CET) of the WAEMU (provided by the '*Règlement n°02/97/CM/UEMOA du 28 novembre 1997, portant adoption du tarif extérieur commun*' and amended by the '*Règlement n° 08/2007/CM/UEMOA portant adoption de la nomenclature tarifaire et statistique du tarif extérieur commun*') applies four rates depending on the product category (numbered from 0 to 3). **Category 0** includes exempt products (books, medicines, etc.). It is exempt from customs duties but remains subject to WAEMU community levies of 2% that is constituted by the 1% Statistical Fee ('*Redevance Statistique*' – RS) and by the 1% Community solidarity Levy ('*Prélèvement Communautaire de Solidarité*' – PCS). **Category 1** includes basic necessities, raw materials, and capital goods. It is subject to a 5% customs duties rate to which apply specific derogations to certain products, although these are generally less favourable than those existing in the research and development phases.[32]

More rarely, some mining codes simply re-conduct the existing customs duties exemptions during the production phase as well.[33] That means that basically all

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is added the community levies. **Category 2** includes inputs and intermediate products. They are subject to a 10% customs duties rate to which is added the community levies. **Category 3** includes final consumption goods. They are subject to a 20% rate to which is added the community levies.

32. For instance in **Burkina Faso**, Art. 91 of the 2003 mining law provides that the owner of a mining title is liable to pay the customs duties rate that apply to Category 1 products under the WAEMU tariff nomenclature on its import of equipment, materials, fuel, lubricants, and spare parts – irrespective of whether these belong to category 1 or not. The owner is therefore liable to the cumulative rate of 7.5% including 5% of customs duties under the WAEMU CET, to which is added 2.5% of community levies: 1% for the Statistical Fee ('Redevance Statistique' – RS), 1% for the Community solidarity Levy ('Prélèvement Communautaire de Solidarité' – PCS) and 0.5% for the community levy ('Prélèvement Communautaire' – PC). The RS and PCS are paid for the operation of the WAEMU while the PC is paid for the operation of ECOWAS (Economic Community Of West African States – another regional organization whose members include all the Member States of the WAEMU).

    In the **Democratic Republic of the Congo**, when the exploitation effectively starts, Art. 232 of the 2002 mining law provides that goods imported for a mining purpose by the holder of the mining title, its affiliates or subcontractors, are subject to a preferential 5% customs duty, provided that the goods are on the mining list. However, fuels, lubricants, reactants, and consumables for mining activities are subject to a 3% customs duty throughout the entire duration of the project.

    In **Guinea**, Art. 178 of the 2013 mining law provides that regular customs duties apply when the holder of the mining title enters into the exploitation phase. However, Art. 179 provides that imports of fixed assets and consumables used for local processing of mineral substances into semi-finished or finished products are subject to a specific 5% customs duty (to which is added the PC since Guinea is an ECOWAS member – but not a WAEMU member). Article 180 provides that imports of extraction equipment and its consumables are subject to a specific 6.5% customs duty (to which is added the PC). Heavy fuel oil is exempt.

    In **Mali**, according to Art. 134 of the 2012 mining law, the holder of an exploitation permit can import under customs duties exemption petroleum products used for the production of energy needed to extract, transport, and process ore and to operate social and health infrastructure created by the company for its employees. However, it remains liable for the PCS and PC. In addition, the holder of the mining title can import under temporary admission the equipment, machines, and vehicles listed on the mining list. He is also exempt from customs duties on tools, chemical products, reactants, petroleum products, oils and greases for machines, and spare parts listed on the mining list. Passenger vehicles follow the normal customs treatment.

    In **Mauritania**, according to Art. 104 and Table 9.1 of the 2008 mining law as amended in 2009 and 2012, the import of passenger cars is subject to a 5% customs duty. During the thirty-six-month tax holiday period, the import of equipment is made under temporary admission and the import of spare parts, industrial inputs, and petroleum products is exempt from customs duties. Once the tax holiday period is over, the import of equipment, spare parts, industrial inputs, and petroleum products is subject to a single 5% customs duty.

    In **Niger**, Art. 93 of the 2006 mining law exempts the holder of an exploitation permit from custom duties on the imports of petroleum products for energy production, extraction, transportation, processing of ore, and the operation and maintenance of social and health infrastructure. However, he remains liable for the RS. He is also exempt from customs duties on chemical products, reactants, oils, and greases. He can also import under temporary admission capital goods used for the exploitation during a three-year period starting from the first production.

33. In **Ghana**, according to s. 29 of the 2006 mining law, the holder of a mineral right is exempt from payment of customs import duty in respect of plant, machinery, equipment, and accessories imported specifically and exclusively for mineral operations.

imports in relation with the mining activity are exempt as long as the mining right is not extinguished.

§9.03 VAT AND CUSTOMS ISSUES SPECIFIC TO THE MINING INDUSTRY

The VAT regime that applies to extractive industries seems to be relatively straightforward: exemptions during the exploration and development phases followed by a return to ordinary law during the production phase. That seems fairly simple. But the application of these provisions is not.

In fact, it raises a number of important VAT and sometimes customs related issues. *Some of these issues may create a disincentive for extractive companies to invest* when they incur an irrecoverable VAT cost. This might be the case, for instance, when some of the inputs are excluded from the right to deduct *(sub-section [A])* or when the VAT refund procedure is so burdensome that it is a right difficult to exercise in practice, even when the mining company is in the production phase *(sub-section [B])*.

Some others may put the VAT system at risk. *First*, the *extension* of the VAT and customs exemptions to supplies – and sometimes purchases – made by subcontractors of the mining companies may exempt a whole sector of the economy and in the long run destroy the VAT system whereas the mining industry is generally perceived as a way to drive structural transformation *(sub-section [C])*.[34] In that respect, mining conventions that have in most countries a legal status comparable to laws allow derogation from the provisions of the mining code *(sub-section [D])*.

Second, the large spread of these exemptions poses the question of their *control and application (sub-section [E])*. On one hand, the use of the mining list does not appear to be a very efficient tool. On the other hand, the scope of the VAT exemptions that apply to each different phase needs to be clearly defined to ensure that a company, who may have both an exploration permit and a production permit covering part of the same perimeter, may not continue to benefit from VAT exploration exemptions when starting to produce. In addition, sometimes, there are discrepancies between the rules enacted by sub-Saharan African organizations and the domestic laws of their members *(sub-section [F])*.

Third, there are *some issues that are generally not addressed by the mining codes and create an area of uncertainty*. This is the case for the VAT treatment of the transfers of mining rights *(sub-section [G])*.

In **Nigeria**, according to s. 25 of the 2007 mining law, all operators in the mining industry are exempt from customs and import duties in respect of plant, machinery, equipment, and accessories imported specifically and exclusively for mining operations.

34. OECD, African Economic Outlook 2013, Chapter 6: Structural transformation and natural resources in Africa, OECD Publishing.

[A] The Question of the Input VAT Cost on Goods and Services Excluded from the Right to Deduct: The Specific Issue of Fuel Used for Power Generators

As mentioned above, the holder of a mining right benefits from large exemptions on his purchases during the exploration and development phases of its mining activity. These exemptions address the fact that the mining company may not qualify as a VAT taxable person during the exploration phase, or that it may not be able to claim a refund of its VAT credits as long as it is not exporting its production of ore. These exemptions avoid therefore a large build-up of VAT credits that might not be refundable.

However, there are circumstances where, despite the large use of these exemptions, companies may end up incurring an irrecoverable VAT cost. This normally happens when they purchase supplies of goods or services excluded from the right to deduct; i.e., that are taxed but without credit. Most mining codes expressly exclude from the scope of the exemptions the supplies, which are excluded from the right to deduct.[35]

When the mining code does not clearly exclude these supplies from the scope of the exemptions (i.e., the supplies excluded from the right to deduct), they should normally be exempt if they belong to a broader category that is exempt by the mining code. For instance, if the mining code exempts the import of vehicles but does not exclude from the scope of the exemption passenger cars (whereas a specific provision of the tax code excludes passenger cars from the right to deduct), the latter should be exempt as well. Exemptions do not create per se a loss of revenues for the State when the VAT paid on inputs purchased by mining companies (capital goods, equipment, consumables, services, etc.) is deductible. However, when these inputs are excluded from the right to deduct, exempting these inputs does result in a revenue loss. Exempting supplies excluded from the right to deduct should therefore be regarded as tax expenditure.

Amongst the supplies that are typically excluded from the right to deduct are petroleum products.[36] Fuel is generally an important issue for mining companies.

35. For instance, in **Burkina Faso**, Arts 84 and 86 of the 2003 mining law provide for a VAT exemption, in the exploration and development phases, on the import and purchase of goods necessary for the realization of geological and/or mining activities, except those excluded from the right to deduct.

In **Guinea**, according to Arts 171 and 173 of the 2013 mining code, the imports of goods which are excluded from the right to deduct by the tax code are not exempt from VAT (with the exception of heavy fuel oil).

In **Côte d'Ivoire** also, the imports of goods, which are excluded from the right to deduct by the Tax Code are not exempt from VAT (Arts 162 and 165 of the 2014 mining code).

36. For instance, according to Art. 34 of the **WAEMU** VAT Directive, fuel costs for vehicles are excluded from the right to deduct.

In **Burkina Faso**, Art. 329*bis* of the tax code provides that aviation gasoline, gasoline for motor vehicles, diesel, and bio-fuel are excluded from the right to deduct.

In **Niger**, according to Art. 247 of the tax code, petroleum oils, bituminous minerals oils, petroleum gases, and other gaseous hydrocarbons are subject to VAT at their release for consumption. Subsequent transactions on the domestic market are exempt from VAT. They do not confer any right to deduct.

Extractive industries do of course consume a significant amount of fuel for their vehicles. But power generators also very often use fuel. Many sub-Saharan countries still suffer from a shortage of electricity and, sometimes, the remote location of the mine makes it impossible anyway to connect it with the regular electricity network.

When fuel is excluded from the right to deduct, the VAT on fuel becomes a cost for mining companies. However, this restriction on the right to deduct is not specific to developing countries. Indeed, the legislation of most OECD countries provides for input tax deduction blocking on a number of goods and services.[37] The rationale behind those limitations is twofold. First, it avoids the administrative burden of controlling the actual use of such goods and services. They may be easily used for business or private purposes due to their very nature. Second, it is a way of reducing the risks for fraud. Amongst the thirty-three OECD countries that have a VAT, seven of them have implemented restrictions on the right to deduct VAT on fuel (France, Greece, Hungary, Ireland, Poland, Portugal and Slovenia).[38] In developing countries, it would be particularly difficult to control a product that is used both as an input and for final consumption.

However, some VAT laws provide that the fuel used by industry or acquired for producing electricity is deductible.[39] Some others specifically exempt the type of fuel used by power generators (such as heavy fuel oil).[40] This approach is not unknown in

37. OECD, 'Consumption Tax Trends 2012', Stéphane Buydens, OECD Publishing; see '*Chapter 3: Value added taxes yield, rates and structures*'.
38. OECD, 'Consumption Tax Trends 2012', Stéphane Buydens, OECD Publishing; see '*Table 3.12. Restrictions to the right to deduct VAT/GST on specific inputs*'.
39. In the **Democratic Republic of the Congo**, according to Art. 41 of the VAT act ('*Ordonnance-loi n° 001/2012 du 21 septembre 2012 modifiant et complétant certaines dispositions de l'ordonnance-loi n° 10/ 001 du 20 août 2010 portant institution de la TVA*'), petroleum products are excluded from the right to deduct, with the exception of fuel for resale by wholesalers or acquired for producing electricity to be sold or to be used by fixed devices of industrial undertakings. Therefore, the VAT on the fuel purchased by mining companies for power generators in order to produce electricity is deductible.

    In **Côte d'Ivoire**, according to Art. 365 of the Tax Code, only the VAT paid on petroleum products used for the operation of factories and the VAT paid on black products is deductible. According to the para. 8 of Art. 372 of the Tax Code, petroleum products used as fuel for transport vehicles are excluded from the right to deduct.

    However, according to para. 26 of Art. 355 of the Tax Code, Heavy Vacuum Oil petroleum products (HVO), fuel oil 380 and natural gas for thermal power plants are exempt from VAT. Otherwise, according to Art. 359 of the Tax Code, petroleum products are subject to a reduced VAT rate of 9%.

    Furthermore, Art. 166 of the recent 2014 Mining Law provides that the holder of a production permit (but not the holder of an exploration permit) is exempt during the exploitation of the mine from VAT and customs duties on its purchases of fuel, lubricants, and chemical or organic products for processing ore.
40. In **Guinea**, according to Art. 376 of the tax code, petroleum products (with the exception of those fuelling fixed appliances or those used as processing agents by industrial undertakings) are excluded from the right to deduct. Article 168 of the 2013 Mining Code confirms that the holder of a mining title is not exempted from VAT on its purchase of petroleum products in the research, building, or exploitation phase, the reason being that petroleum products are excluded from the right to deduct. However, the purchase of heavy fuel oil is exempt given that it is widely used in Guinea by power generators. Furthermore, Arts 171, 173, and 176 of the 2013 Mining Code indicate that these petroleum products are eligible for refund of VAT within the annual quotas set by the Minister in charge of the budget.

OECD countries. For instance, in France, petrol used as motor fuel is normally totally excluded from the right to deduct[41] and the right to deduction is also limited with respect to other hydrocarbons when they are used for vehicles excluded from the right to deduct.[42] However, when these hydrocarbons such as diesel are used for vehicles not excluded from the right to deduct (such as trucks for instance or any other industrial vehicles), the right to deduction is unimpaired. In addition, when petroleum products are not used as motor fuel but as combustible fuel, they are also fully deductible.[43]

[B] The VAT Refund Issue when the Mining Company Starts Producing

As said above, the holder of a mining right benefits from large exemptions on its purchases during the exploration and development phases of its mining activity and these exemptions avoid a large build-up of VAT credits.

However, it is worth noting that the IMF generally considers that the *best practice* to deal with excess input VAT credit is to have a proper functioning VAT refund mechanism when possible rather than to implement exemptions on imports.[44] This would suggest that VAT laws should be amended to take into account the intention to carry out an economic activity in order to qualify as a VAT taxable person[45] and that VAT exemptions on the purchases made by mining companies should be abolished. Thus, a person in the exploration or development phase would qualify as a taxable person. It would be necessary also to amend the refund procedure in order to extend the scope of the refund not only to exporters but also to mining companies in the exploration and development phases. In practice, however, the budget constraints and the compliance issues with which governments may be confronted in developing countries may render difficult a generalization of the VAT refunds. VAT exemptions in

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In **Mauritania**, according to Art. 112 and Table A.1 of the 2008 Mining Law as amended in 2009 and 2012, the import of petroleum products is exempt from VAT during the research and building phases, but not during the exploitation phase. However, fuel for heavy equipment used for mining activities can be imported under VAT suspension during the exploitation phase. This VAT treatment applies as well to imports of petroleum products made by sub-contractors and sub-sub-contractors.

41. Article 298, 4., 1 of the French Tax Code.
42. For instance the right to deduction is limited to 80% for gasoil and super ethanol E 85 used as fuel for vehicles and equipment excluded from the right to deduct. The right to deduction is limited to 50% for petroleum gas and other hydrocarbons in a gaseous form and kerosene used as fuel, when such products are used for vehicles and equipment excluded from the right to deduct.
43. Furthermore, according to Art. 298, 4., 1 ° bis of the French Tax Code, resellers of fuel and lubricants can deduct the VAT charged to them on these products.
44. IMF, The Modern VAT, 2001, Liam Ebrill, Michael Keen, Jean-Paul Bodin, and Victoria Summers.
45. In the European Union, the Court of Justice decided a long time ago that even the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity and that, in that context, the tax authority must take into account the declared intention of the business to engage in an activity subject to VAT (see, for instance, Court of Justice of the European Union, Rompelman, Case 268/83, 14 Feb. 1985 and INZO, Case C-110/94, 29 Feb. 1996).

the exploration and development phases might be therefore considered as a lesser evil although it is true that they preclude collecting the VAT at the easiest point, i.e., the import.

In any case, the issue of the refund is not limited to the exploration and development phases. Indeed, when the holder of the mining right enters into the *production phase*, he will normally still remain in a credit position because he will normally export most of the ore extracted. Exports are exempt with credit (zero-rated) and the company will therefore be entitled to deduct the input VAT on its purchases (provided that these supplies are not excluded from the right to deduct). Being an exporter, the company will have the right to claim a refund of this VAT credit position.[46]

46. Many sub-Saharan countries allow VAT refunds only to exporters and taxpayers in certain limited situations.

For instance, in **Burkina Faso**, Art. 331*bis* of the Tax Code (‘*Loi n°6/65/AN du 26 mai 1965 portant création du code des impôts directs et indirects*’) provides that no VAT refund is granted except, amongst others, if the taxable person exports goods, supplies services which are exploited or used outside Burkina Faso, or does not meet anymore the criteria to qualify as a taxable person.

In the **Democratic Republic of the Congo**, Arts 63 and 64 of the VAT act (‘*Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA*’) provide that a VAT credit is not refundable except if the taxable person is an exporter or has stopped its economic activity. The refund is limited to the VAT borne on the purchase of movable goods or services. Furthermore, the VAT refund open to exporters is limited to an amount equal to the amount of exports multiplied by the applicable VAT rate.

However, the scope of the refunds has been recently expanded since Art. 14 of the Finance Law for 2014 (*Loi de finances n°14/002*) provides now that mining and oil undertakings that are in the exploration or development phases may introduce a claim for obtaining the refund of their VAT credits resulting from VAT incurred on purchase of movable goods and services.

In **Côte d’Ivoire**, Art. 382 of the Tax Code provides that a VAT credit is not refundable except, amongst others, if the claimant exports goods, has stopped its economic activity, or is an industrial company that carries out investments.

In **Guinea**, Art. 387 of the Tax Code provides that a VAT credit is not refundable except if the taxable person is exclusively carrying out export operations. The VAT refund is then limited to an amount equal to the amount of exports multiplied by the applicable VAT rate. However, Art. 388 of the Tax Code provides for an exception according to which VAT taxable persons can ask for a limited refund of their VAT credit. The amount of the refund is limited to the amount of the deductible VAT charged on the fixed assets which were acquired or imported by the taxable person during the last calendar quarter.

In **Mali**, according to Art. 226 of the Tax Code, a VAT credit is not refundable except if the claimant is an exporter or no longer carries out an economic activity. With respect to the exporters, the VAT refund is limited to an amount equal to 60% of the amount of exports multiplied by the applicable VAT rate.

In **Mauritania**, Art. 182 ter of the Tax Code provides that a VAT credit is not refundable except if the taxable person is an exporter or does not qualify anymore as a taxable person. Article 112 of the mining law makes it clear that VAT credits are refundable as long as the mining production is exported. It states that the Tax administration automatically audits the company after the introduction of the claim. If the claim is justified, the taxable person will be refunded within three months.

In **Ghana**, according to s. 25 of the VAT act, where the amount of input tax which is deductible exceeds the amount of output tax due in respect of the accounting period, the excess amount will be credited by the Commissioner to the taxable person; except that in the case of exports the Commissioner may refund the excess credit to the taxable person where his exports exceed 70% of the total supplies within the accounting period. Other exporters will be credited with the excess, unless they remain in a credit situation for three consecutive months, in which

In practice, however – and this is often referred to as the Achilles heel of VAT – the conditions for obtaining VAT refunds are sometimes so drastic in some sub-Saharan countries that the refund is made difficult.[47] The documentation that must be provided in order to support the VAT refund claim is generally substantial[48] – although these requirements are not without reasons given the possible risks of non-compliance.

This may create an incentive for mining companies to lobby governments for obtaining specific VAT reliefs that would prevent the build-up of VAT credits in the production phase as well. This may take the form of VAT free purchase certificates or exemptions (with or without credit) on the imports and on the domestic purchases from subcontractors made by these companies. Although it is legitimate that extractive industries try to protect their interest when the VAT refund mechanism is not working properly, extending the scope of the exemptions to the production phase as well may jeopardize the whole VAT system of the country. As we will see in the following section, when the exemptions on the purchases from subcontractors are with credit, this will in effect '*push*' the VAT refund issue to the level of the subcontractors since these will find themselves in a VAT credit position.

[C] Customs and VAT Exemptions for Subcontractors

Mining codes often provide limited advantages to subcontractors, generally in the form of suspensive procedures (temporary admission) or exemptions from customs duties.[49]

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case they will also be entitled to a refund on submission of a refund claim.

47. Graham Harrison and Russell Krelove, 'VAT refund, a review of country experience', IMF Working Paper, WP05/218, November 2005: 'Experience with VAT implementation in many countries shows that refunding of credits has been the "Achilles heel" of the VAT. It has been a source of tension between tax authorities and the business sector and, in some countries, has led to complex administrative measures that have significantly undermined the functioning of the VAT system'.
48. For instance, in **Burkina Faso**, Art. 331*ter* of the of the Tax Code ('*Loi n°6/65/AN du 26 mai 1965 portant création du code des impôts directs et indirects*') provides that the VAT refund claims of exporters must be supported by all the following documents: a copy of the VAT return for the corresponding period, the transport documents and invoices stamped by the Customs authorities, a copy of the export declaration stamped by the Customs authorities, a copy of the invoices issued by the supplier and a copy of the declarations of release for consumption.

    In **Guinea**, Art. 8 of the VAT regulation ('*Arrêté n°96/3330/MF/SGG du 18 juin 1996 portant application de la TVA*') provides that a refund claim must be supported by the following documents: a copy of the last three VAT returns, of all the corresponding invoices and customs receipts justifying the amount of deductible VAT for the last three months, and of the customs export declarations for the same period. Furthermore, Art. 9 of the same regulation provides that the import VAT is deductible only if the taxable person can provide a customs receipt issued by the customs authorities and the corresponding declaration of release for consumption, and if the tax identification number of the taxpayer is mentioned on these documents.

    In **Mauritania**, the regulations issued by the tax administration provide that exporters must provide with the VAT refund claim a copy of the last VAT return and all purchase invoices justifying that the VAT for which a refund is asked for has been paid by the taxable person and all export customs documents proving that an export has been made ('*Arrêté R 979 fixant les conditions et modalités de remboursement de la TVA*' et '*Circulaire portant application de l'arrêté R 979 du 31 décembre 2001 relatif au remboursement de la TVA*').
49. For instance, in **Burkina Faso**, the customs regime that applies to the owner of the mining title during the research phase is extended to the geo-services companies acting as its subcontractors (Art. 85 of the 2003 Mining Code); and the customs regime that applies to the owner of the

Some others extend to subcontractors the same customs and tax regime granted to the holder of the mining right.[50] This makes it difficult to determine the exact scope of the tax and customs benefits granted to the holder of a mining claim. The extension of benefits to subcontractors may make the control of tax and customs preferential regimes even more difficult. Some countries require therefore that the subcontractors fill in as well their own mining list.[51]

The rationale for extending these benefits to subcontractors is that they provide supplies essential to the operation of the mine (e.g., the rental of drilling equipment, the management of catering and accommodation services at the mine base camp, which can be in a very remote location, etc.). A few mining codes even extend theseadvantages not only to direct subcontractors but also to affiliates[52] or sub-subcontractors.[53]

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mining title during the building and exploitation phase is extended to its subcontractors (Arts 87 and 91 of the 2003 mining code).

In **Cameroon**, Art. 94 of the 2010 Mining Law provides that the preferential customs regime also applies to the subcontractors and suppliers of the holders of a research permit.

50. Some codes extend to subcontractors the same advantages granted to the holder of the mining title in the exploration, development, or production phase.

For instance, according to Art. 34 of the 2003 **WAEMU** Mining Regulation, any subcontractor, who is providing services to the holder of a mining title, enjoys the same tax and customs advantages granted to the holder of the mining title.

In **Côte d'Ivoire**, the new 2014 Mining Law, the VAT and customs exemptions that apply to the holder of the exploration permit (Art. 162) also apply to the subcontractors of the holder of the mining title (provided they are approved by the Ministry of Mines). However, the new mining code does not mention that these subcontractors benefit from the VAT and customs exemptions granted to the holder of a production permit during the development phase. Nevertheless, the provisions of Art. 156 provide that subcontractors approved by the Ministry of Mines can import under temporary admission materials, machinery, and equipment that can be re-exported or disposed after use (although the Statistical Fee ('*Redevance Statistique*' – RS) must be paid). In the production phase, Art. 166 provides that companies affiliated with the holder of the production permit and its subcontractors approved by the Ministry of Mines benefit from the same VAT and customs regime granted to the holder of the production permit. Therefore, these affiliated companies and subcontractors also benefit from the temporary admission regime for a three-year period as from the date of the first commercial production. They are also exempt during the exploitation of the mine from VAT and customs duties on their purchases of fuel, lubricants, and chemical or organic products used for processing ore. These provisions are an important difference with the 1995 Mining Law where no tax or custom benefit was explicitly granted to subcontractors.

In **Guinea**, Art. 181 of the 2013 Mining Law provides that the direct subcontractors benefit on their imports of goods from the preferential customs and VAT regime granted to the holder of the mining title.

In **Mali**, according to Art. 131 of the 2012 Mining Law, every subcontractor that supplies services in Mali to a holder of a mining title benefits from the same tax and customs advantages.

51. For instance, in **Guinea**, according to Art. 181 of the 2013 Mining Law, the subcontractor benefits on its import of goods from the preferential customs and VAT regime granted to the holder of the mining title provided that he has filled in his own mining list. The mining list of the subcontractor must be approved and certified by the holder of the mining title who is jointly and severally liable for the payment of any customs duties or tax due.

52. In the **Democratic Republic of the Congo**, Arts 219 and 223 of the 2002 Mining Law provide that the specific customs and tax regime that applies to the owner of the mining title is extended to its subcontractors as well as its affiliates. According to Art. 1 of the 2002 Mining Law, an affiliate means any company which holds directly or indirectly more than 50% of the voting rights of the holder of the mining title or any company the voting rights of which are held directly or indirectly by the holder of the mining title. This includes also all companies that have more than 50% of

From a VAT perspective, the issue is twofold. This raises the question of the VAT treatment of the supplies of goods or services provided by subcontractors and the question of the VAT treatment of the supplies of goods and services provided to subcontractors.

The VAT exemption on the supplies of goods and services provided *by* subcontractors to the holder of the mining right during the exploration and development-phases prevents a build-up of VAT credits that the holder of the mining right might not be entitled to reclaim (when the legislation does not recognize that he qualifies as a taxable person during the exploration or development phase; or if the legislation only opens the VAT refund claim procedure to exporters – see *sub-section* §*9.02[B][1]*).

When the holder of the mining right starts production, this exemption is no longer justified. Mining companies are in a credit position because they export most of their production (which is zero-rated). Being exporters, they are normally entitled to claim a refund of that VAT credit. Therefore, this input VAT should not be a cost. However, as explained in the previous section (see *sub-section* §*9.03[B]*), the refund mechanism procedure of some developing countries does not always work well.

As a result, companies may require that the exemption from VAT on their imports and on their purchases from their subcontractors be extended during the production phase as well. The fact that this exemption (in the production phase) is generally not provided by the law is not an obstacle per se: the practice in many sub-Saharan countries is to conclude *mining conventions* between the State and the company. These agreements allow derogating from the ordinary law (see *sub-section* §*9.03[D]*). They are normally enacted by the Parliament and thus have the status of a law.

The extension of the exemption on the imports and purchases by the mining company during the production phase as well will '*push*' the question of the VAT refund to the level of the subcontractors. Mining codes often require that these subcontractors work exclusively for a mining company. If the supplies made by these subcontractors are exempt with credit, these subcontractors end up mechanically in a VAT credit position. However, since these subcontractors are not exporters, many VAT laws do not allow them to claim the refund of this credit.

This creates an incentive for mining companies to require from the State that the supplies made *to* these subcontractors as well are VAT exempt. Otherwise, it is likely that the irrecoverable VAT cost borne at the level of the subcontractors would be charged to the mining company. The subcontractor would simply increase its prices by the same amount (i.e., the amount of the irrecoverable VAT). If – to avoid that – the supplies made to the subcontractors are exempt, the problem of the VAT refund issue

their voting rights held directly or indirectly by a company, which holds, directly or indirectly, 50% of the voting rights of the holder of the mining title.

53. In **Mauritania**, these advantages are granted not only to contractors but also subcontractors of these subcontractors. According to Art. 112 of the 2008 Mining Law amended in 2009 and 2012, direct subcontractors and sub-subcontractors benefit from the preferential VAT regime granted to the holder of the mining title, as long as the subcontractors provide supplies exclusively to the holder of a mining title and that the sub-subcontractors provide supplies exclusively to the direct subcontractors.

will be '*pushed*' further away at the level of the sub-subcontractors, that is at a stage where the value added to the supply is anyway less significant.

This process would exempt a whole part of the industry from VAT and in the long run place the VAT system at risk. The risk is to create an '*exemption plague*' that could spread to other industries as well. This may encourage other industries providing VAT exempt supplies and not being allowed or having difficulties to be refunded for their VAT credits to lobby the government to obtain VAT exemptions on their purchases as well.

It is true that exemptions do not create a risk per se of a loss of revenues for the State because the VAT paid on inputs purchased by mining companies (capital goods, equipment, consumables, services, etc.) should in principle be deductible (except if these inputs are excluded from the right to deduct). However, exemptions will adversely affect the formalizing effect of VAT on the economy because they break the staged payment mechanism of VAT.[54] When supplies are exempt, this does not create a strong incentive for suppliers to issue regular invoices nor for their clients to require them to issue such invoices. And the lack of formalization of the economy will have an adverse effect on direct taxes such as income taxes. VAT is the cornerstone and the safeguard of the tax system here.

[D] The Misuse of Mining Conventions as a Tool to Provide a Legal Basis to Further Exemptions

As mentioned in the previous section the extension of the VAT exemption to supplies and purchases made by the subcontractors of mining companies may exempt a whole sector of the economy, and spread VAT exemptions. This may in the long run significantly damage the VAT system whereas the mining industry is generally perceived as a way to drive structural transformation.[55]

This cannot be done without a legal basis. In that respect, mining conventions that have in most countries a legal status comparable to laws allow derogation from the provisions of the mining code.

A *mining convention* is an agreement concluded between the State and a mining company. It is usually attached to the production permit held by the mining company.

54. VAT is traditionally defined as a non-cumulative, multi-stage turnover tax that normally covers all business transactions. Successive taxpayers are entitled to deduct input VAT on their purchases and have to account for output VAT on their sales. As the final consumer is unable to recover the tax, the amount of tax actually collected through the staged collection process should be equal to the amount of VAT charged by the last vendor in the supply chain (see OECD, '*Consumption Tax Trends 2012*', Stéphane Buydens, OECD Publishing).
55. OECD, African Economic Outlook 2013, Chapter 6: Structural transformation and natural resources in Africa, OECD Publishing, page 177: '*Several countries around the globe have shown that natural resource sectors can drive structural transformation when governments put in place the right conditions and policies and focus on managing their resource wealth for the common good.*'; and '*The key message* […] *is that structural transformation towards more productive activities and better jobs is closely linked with a strong natural resource sector.*'

It is a contract that defines the rights and obligations of the parties.[56] A mining convention model is sometimes put in an annex to the mining code or is defined by a separate law. The duration of the agreement coincides in principle with that of the mining right.

In theory, the convention should only refer to or recall the applicable legal and tax provisions of the mining and tax codes and clarify how the exploitation of the mining concession will be done and how the site must return to the state it was before the mine started operating (e.g., list the technical and environmental obligations of the mining company, the waste management, the restoration and re-vegetation of the site on completion of mining operations, etc.).[57]

In fact, the negotiation of these agreements is often an opportunity to haggle over the application of ordinary laws and leads to an '*à la carte*' taxation, which is a function of the bargaining power of both parties. For States rich in natural resources but structurally poor, the establishment of a mining company is a promise of substantial resources. This windfall can help meet the basic needs of the population and this may lead governments to accept a very unfavourable tax and customs regime. The purpose is to encourage mining companies to invest but this is perhaps illusory insofar as natural resources are not particularly susceptible to tax competition since they cannot be relocated. The granting of excessive tax concessions is even more regrettable in the case of non-renewable resources.

56. In **Côte d'Ivoire**, Art. 1 of the 2014 Mining Code defines the mining convention as an agreement between the applicant for a production permit and the State of Côte d'Ivoire that sets the specific operating conditions.

In **Guinea**, Arts 1 and 37 of the 2013 Mining Code describe the mining agreement as a contract defining the rights and obligations of the holder of the mining concession and of the State regarding the tax, legal, financial, technical, administrative, environmental, and social conditions applicable to a mining concession.

In **Mauritania**, Art. 1 of the 2008 Mining Code as amended in 2009 and 2012 defines the mining agreement as the agreement between the holder of a mining title and the State.

In **Burkina Faso**, Art. 30 of the 2003 Mining Code provides that any exploration or production permit is accompanied by a mining agreement concluded between the State and the holder of the permit. This agreement is valid for a maximum period of twenty-five years. It can be renewed for further periods of ten years. The code explicitly states that the mining convention adds to the provisions of the Mining Code. It specifies the rights and obligations of the parties and can guarantee to the holder of the permit the stability of the tax regime provided.

To the contrary, in the **Democratic Republic of the Congo**, the 2002 Mining Code (unlike the former mining code) has removed any conventional system. The explanatory memorandum of the law denounces the '*haggling climate*' ('*climat de marchandage*') and the '*possibilities of blackmail that could color the negotiation of the mining agreements*' ('*les possibilités de chantage qui pouvaient émailler la négociation des conventions minières*') However, Art. 340 provides that pre-existing conventions remain in force except that holders may opt for the application of the provisions of the 2002 Mining Code.

57. In **Mauritania**, the model Mining Convention ('*Loi n°2012.012 réglementant les conventions minières et approuvant la convention minière type*') adds to the provisions of the 2008 Mining Code. For example, while Art. 105 of the Mining Code refers to only one type of mining list, the model Mining Convention creates the concept of additional mining list that does not exist in the Mining Code. Thus, Art. 40 of the Mining Convention model provides that, if the '*ordinary*' mining list is insufficient – according to the opinion of the holder of a mining right – to take into account the specificities of the mining project, an additional mining list (of movable goods, equipment, vehicles, and other inputs) may be submitted for the approval of the Minister of Mines.

Thus, the tax and customs provisions of the mining codes already very favourable to investors are even more strongly alleviated by mining conventions signed with mining companies, whereas, it is a general principle of law that a law has to be applied as it is and cannot be negotiated.

A better practice would be to strictly limit the scope of the mining conventions to what is not defined by the law.[58] In that respect, from a drafting point of view, it would be advisable not to repeat in the mining convention the tax provisions of the mining or tax acts because this gives the wrong impression that these may be discussed and negotiated.

From a legal standpoint, the renegotiation of these conventions may be difficult. These agreements are generally ratified by the national parliament and have the force of law. They are also generally covered by an arbitration clause according to which national courts must decline jurisdiction of any dispute they may know in favour of the arbitral tribunal.

In addition, mining conventions usually include a *stability clause* that guarantees the holder of a mining convention that the tax and customs arrangements applicable at the time when the convention was signed will be warranted for a certain number of years. That means that the tax rate of existing taxes (including VAT and customs duties) will be frozen (and exemptions as well) and that no new taxes can be applied during that period of time. The stabilization period is sometimes defined by the law or by the mining convention itself.[59] In practice, some mining conventions benefit from stabilization periods that can last up to thirty years or more.[60]

As such, a stability clause is not a bad thing. Rather, it protects the mining company, preparing to make large investments and which has scheduled a return on

58. In **Côte d'Ivoire**, Art. 13 of the 2014 Mining Code provides that the mining agreement cannot derogate from the provisions of this Act.

 In **Guinea**, Art. 18 of the 2013 Mining Code provides that the mining convention adds to the provisions of the mining code but does not derogate from it. The convention specifies the rights and obligations of the parties to the convention. It may guarantee to the holder of the mining title that the conditions offered to him – especially regarding taxation – will be stabilized.

59. In **Côte d'Ivoire**, Art. 12 of the 2014 Mining Code provides that the holder of a production permit has to sign with the State a mining convention within sixty business days of the granting of the production permit. The purpose of the mining convention is amongst other things to stabilize the tax and customs regime. The mining agreement has an initial validity period of twelve years. It is renewable for periods not exceeding ten years, under the conditions defined by decree.

 In **Guinea**, Art. 182 of the 2013 Mining Code provides that tax and customs arrangements may be stabilized for a maximum of fifteen years. Stability is guaranteed to the holders of a production permit who have signed a mining convention. The period runs from the granting date of the production permit. During this period, the rates of taxes and customs duties are not subject to any increase or decrease. They remain as they were at the date of granting of the mining title. Furthermore, no new taxes can be applied.

 In the **Democratic Republic of the Congo**, Art. 276 of the 2002 Mining Code provides that the tax and customs system is stabilized for a period of ten years from the granting date of the production permit.

60. In **Burkina Faso**, the length of the clause is quite long: stabilization is ensured during the duration of the production permit (Art. 93 of the 2003 Mining Code). Given that Art. 21 provides that the industrial exploitation of a large mine permit is valid for a period of twenty years and is renewable for successive periods of five years until the deposit is exhausted, the stabilization period is in fact, guaranteed to the mining company during the entire duration of the operation of the mine.

investment on the basis of the current tax and customs regime, against any change of that regime. Fiscal certainty is important especially if countries have experienced some degree of political instability. However, stability clauses can have a perverse effect when their duration is out of proportion with the time required to get a proper return on investment. Moreover, they cause to coexist within the same State different tax and customs regimes (which significantly increases the burden of the tax administration – and this would multiply the VAT rates if, for instance, there has been an increase since the signature of the convention). Finally, it is not uncommon that stability clauses are asymmetric: they freeze the tax and customs arrangements applicable to the holder of the mining convention while recognizing his right to immediate application of more favourable tax or customs provisions issued by subsequent laws.[61]

In practice, it might be desirable to limit the stability clause to a reasonable duration and to narrow its scope to the tax base and rate of certain taxes only, such as – amongst others – the income tax, and to exclude VAT and customs duties.[62] A too long and too wide stability clause combined with too generous mining conventions could create political discontent, which may encourage a State to challenge its validity if the opportunity arises with, for instance, a change of government.

[E] Control of the Scope of VAT and Customs Exemptions: The Mining List and Ring-Fencing Issues

Another issue that puts the VAT and customs system at risk is control of the application of the mining code and particularly of the exemptions.

First, the use of a mining list does not appear to be in practice a very efficient tool to control these exemptions. The mining list is normally filed with the application for a mining title. Only the goods figuring on the mining list of the holder of the mining title should be eligible for exemption *(*see *sub-section* §*9.02[B][1])*. These should normally be limited to the goods useful for exploring or operating the mine. However, not all countries define precisely the categories of goods that could figure on the mining list.[63]

61. In **Mauritania**, Art. 141 of the 2008 Mining Code guarantees the stability of the legal, tax, customs, and environmental conditions attached to mining titles. Art. 58 of the Mining Convention stipulates that the stabilization is guaranteed from the time of granting of the research permit until the expiration of the production permit (‘*Loi n°2012.012 réglementant les conventions minières et approuvant la convention minière type*’). The stability clause contained in the Mauritanian mining conventions is asymmetric: the second paragraph of Art. 141 of the Mining Code and Art. 67 of the model Mining Convention indicate that the signatory of a mining convention may benefit from any more favourable rule enacted after his signature.

In the **Democratic Republic of the Congo**, the mining code contains also a general provision that guarantees that any more favourable tax or customs provision applies immediately (Art. 222 of the 2002 Mining Code).

62. In **Guinea**, Art. 182 of the 2013 Mining Code states that only the following are covered by the stabilization: the rates of the income tax, of the contribution to local development, and of the right of single entry and the rates and tax bases of the proportional mining royalties.

63. In **Guinea**, Arts 166 and 167 of the 2013 Mining Code provide that the holder of the mining title must have with respect to each phase of activity a mining list that lists the goods that can be imported under temporary admission or VAT exemption. Article 167 defines the three categories of goods that can figure on the mining list: Category 1: equipment, materials, heavy machinery

In addition, when goods are imported under temporary admission, it is not clear whether the customs administration is keeping an up-to-date listing of these goods and requires the taxpayer to account for any customs duties due when the goods cannot benefit anymore from the suspension and are released for consumption (for instance when the holder of the mining right starts producing).[64] Finally, many developing country revenue authorities face annual revenue targets. Employee remuneration may come from a percentage of revenue collected.[65] As a result, customs authorities have an incentive to neglect companies making exempt imports or under temporary admission.

This explains why a few countries do not have a mining list.[66] In fact, one may wonder if a better practice would be to implement a lower tariff on imports of capital goods and simply abolish the mining list.[67] This would also free some human resources that might be better allocated for control. From a VAT perspective, however, a mining list – maybe more restricted – might be needed to control the imports and purchases under VAT exemption; although this might be replaced by an annual VAT free purchase quota or – and this would be more transparent – by a strictly limited list, included in the tax code, of the purchases of goods and/or of services that holders of a mining right may import or purchase under VAT exemption during the exploration and development phases of the mine.[68]

Second, the scope of the VAT exemptions that apply to each different phase needs to be clearly defined to ensure that a company who may have both an exploration permit and a production permit covering part of the same perimeter may not continue to benefit from VAT exploration exemptions when starting to produce. Indeed, the

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and tools, vehicles except passenger cars; Category 2: consumables used for extraction, including heavy fuel oil but excluding lubricants and petroleum products; Category 3: consumables used for local processing of minerals into semi-finished or finished products, including heavy fuel oil but excluding lubricants and petroleum products.

64. For instance, in **Guinea**, the goods imported under temporary admission during the exploration and development phases must be subject to customs duties if they are released for consumption in Guinea when these phases are over (Arts 171 A and 174 of the 2013 Mining Code).

    In **Mauritania**, during the thirty-six-month tax holiday period of the production phase, the import of equipment is made under temporary admission. When this tax holiday period is over, the import of equipment – or the equipment previously imported and still in the country – becomes subject to a 5% customs duty (Table 9.1 of the 2008 Mining Code, amended in 2009 and 2012).
65. IMF, '*Fiscal Regimes for Extractive Industries: Design and Implementation*', Prepared by the Fiscal Affairs Department, 15 Aug. 2012, http://www.imf.org/external/np/pp/eng/2012/081512.pdf.
66. See Table A.1 in Annex.
67. The common external tariff (CET) of the WAEMU (provided by the 'Règlement n°02/97/CM/UEMOA du 28 novembre 1997, portant adoption du tarif extérieur commun' and amended by the 'Règlement n° 08/2007/CM/UEMOA portant adoption de la nomenclature tarifaire et statistique du tarif extérieur commun') is already not particularly high. **Category 1**'s products (basic necessities, raw materials and capital goods) are subject to a 5% customs duties rate to which is added the community levies: the 1% Statistical Fee ('Redevance Statistique' – RS) and the 1% Community solidarity Levy ('Prélèvement Communautaire de Solidarité' – PCS).
68. See **sub-section** §*9.02[B][2]*: for instance, in **Tanzania**, according to s. 11 of the VAT Act and to the Third Schedule of the VAT Act, the importation by or supply to a registered licensed drilling, mining, exploration, or prospecting company of equipment to be used solely for drilling, mining, exploration, or prospecting activities is relieved from VAT.

temptation might be great for one taxpayer to combine several mining titles corresponding to different mining phases in order to extend its tax and customs benefits (by purchasing for instance under the mining list of its exploration permit equipment that is used in practice for the production on another site).[69]

This is the reason why some mining codes limit the number of mining permits or licences that can be attributed to the same company and/or require that the exploration permits are automatically transformed into production permits when the development phase begins.[70] A best practice might be to limit the granting of a mining title to a single company in order to ease the administration of taxes and customs duties.

When the mining code allows a single entity to own several mining titles relating to various mines, the IMF '*Guide on Resource Revenue Transparency (2007)*' suggests to implement ring-fencing measures,[71] that is to say, to consider that each mine has a separate tax personality[72] even though these mines belong to the same legal entity.[73] However, in practice, ring-fencing may be difficult to manage. Indeed, the recognition

69. The level of fraud might be even higher with respect to quarriable permits because equipment that can be used for quarries can similarly be used for construction works.
70. In **Guinea**, the same person cannot own more than three exploration permits for bauxite and iron and more than five research permits for other substances (Art. 20 of the 2013 Mining Code). Furthermore, the granting of a production permit automatically cancels the corresponding exploration permit granted for the same area (Art. 30 of the 2013 Mining Code).

    In **Mauritania**, Art. 17 of the 2008 Mining Code, as amended in 2009 and 2012, does not allow the overlap of production permits but allows the overlap between other types of mining rights provided that they relate to different groups of mineral substances. Article 21 provides that a person cannot simultaneously hold more than 20 or 10 exploration permits depending on the group of mineral substances concerned. Article 38 provides that the granting of a production permit cancels the exploration permit for the same area; however, the exploration permit remains valid for the area that is outside the production permit.

    In **Burkina Faso**, Art. 17 of the 2003 Mining Code provides that the granting of an industrial production permit cancels the exploration permit that is within the perimeter of the production permit.

    In the **Democratic Republic of the Congo**, Art. 50 of the 2002 Mining Code provides that, where a perimeter has been subject to an exploration permit, no further application for a mining title can be examined, with the exception of the application for a production permit. The exploration permit confers to the holder the right to obtain a production permit within the same perimeter. Similarly, when a perimeter has been subject to a production permit, no further application for a mining title can be examined (Art. 64). However, the mining code is generous regarding the number of permits it is possible to hold. Indeed, Arts 53 and 68 provide that a person and its affiliates cannot hold more than fifty exploration permits and more than fifty production permits.
71. IMF, 'Guide on Resource Revenue Transparency (2007)', § 20 of Box 2.
72. Ring-fencing also avoids income tax compensation between loss-making and profit-making mines.
73. In **Guinea**, Art. 181-IV of the 2013 Mining Code provides that the holder of a mining title may not benefit, at a given moment, and for a same title, from tax advantages corresponding to different phases of activity. However, this article recognizes that a single legal entity may hold several mining titles and may be authorized to obtain tax benefits with respect to each of these mining titles.

    Therefore, there is a risk that this person imports, within the mining list of one of its mines in development phase, under VAT exemption (Art. 173) and under temporary admission (Art. 174) capital goods that it will actually use for one of its mines that is already in the production phase.

    In order to avoid this, the Guinean Code provides that such person is deemed to have a separate tax personality for each of its mining titles. If that person also exercises an activity other of a separate tax personality implies that each mine must have its own tax identification number and keep a separate accounting.

Furthermore, from a VAT perspective, this raises the question whether transactions between two tax identification numbers within the same legal entity should be recognized as '*supplies*'. In other words, if, for instance, equipment moved from one mine to another, should be considered as a supply of goods and taxed accordingly? Same question if the accounting of the entity is managed from the offices of a particular mine. In theory, the ring-fencing approach would recommend to do so. One mine will charge VAT to the other with respect to the supply and issue a pro-forma invoice and the other should in principle be allowed to offset this input VAT in its VAT return. In theory, the transaction as a whole should be neutral. In practice, this might simply add another level of complexity and this raises as well the question of the valuation of the inter-branch transactions, particularly if some of them are excluded from the right to deduct or if the recipient does not have a full VAT recovery ratio. It is worth noting that there is no international consensus regarding the VAT treatment of inter-branch transactions, and particularly of cross-border inter-branch transactions. Some countries consider that transactions can happen within a same legal entity whereas some others do not.[74]

The ring-fencing approach is not totally unknown in some domestic VAT laws. VAT laws generally require a taxable person to make a self-supply when producing goods by itself or when changing the allocation of goods or assets.[75] Strictly speaking,

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than an activity for which a mining title is required, it is also deemed to have a distinct tax personality for this activity.

Each activity must be identified by a separate tax identification number and must have a separate accounting. Consequently, no compensation is allowed between activities identified by a different tax identification number. In particular, expenses incurred under a mining title may not be deducted from the taxable income of another mining title.

74. For a broader discussion about this topic, see Alain Charlet, Dimitra Koulouri, '*Relations between head offices and permanent establishments: VAT/GST vs. direct taxation: the two faces of Janus*', available as a chapter in a book published by the IBFD in November 2009: '*Value Added Tax and Direct Taxation – Similarities and Differences*': http://www.ibfd.org/portal/Product_ValueAddedTax.html; and Alain Charlet, David Holmes, '*Determining the Place of Taxation of Transactions under VAT/GST: Can Transfer Pricing Principles Help?*', International VAT Monitor, November 2010, also available on the OECD website: http://www.oecd.org/dataoecd/26/36/46604282.pdf.

    The Court of Justice of the European Union decided that a '*fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State and to which the company supplies services, should not be treated as a taxable person by reasons of the costs imputed to it in respect of those supplies*' (CJEU, 23 Mar. 2006, Case C-210/04, Ministero dell'Economia e delle Finanze, *Agenzia delle Entrate v. FCE Bank plc.*). In other words, the court does not recognize the existence of supplies between different branches of a legal entity because, precisely, they belong to the same legal entity. The rationale is that a legal entity cannot contract with itself. Outside the European Union, others jurisdictions have a different approach, such as, for instance, Canada which treats cross-border inter-branch transactions as a supply (see ss 123(1), 132 and 217 of the Canadian Excise Tax Act (ETA)).

75. For instance, within the European Union (VAT Directive / Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax), when a business produces goods by itself instead of buying them from third parties, it must generally proceed to a self-supply (Arts 16 and 18 of the VAT Directive). It is exactly as if this business were providing a transaction to itself. It must therefore account for the VAT on the supply and it will in principle be allowed to deduct this VAT according to the standard rules. This means that, if the business is carrying out an

the difference between the ring-fencing approach and the self-supply rule is that self-supplies occur within the same tax entity whereas the ring-fencing approach considers that each mine is deemed to be a separate tax entity.

In practice, ring-fencing should have little incidence as far as VAT is concerned when the deemed supply is made to a taxable mine (for instance from the tax identification number of an exploration permit to the tax identification number of a production permit) because the mine already producing should be allowed to deduct any VAT charged on the deemed transaction (and to get a refund of potential VAT credits if the refund procedure works correctly). The incidence is stronger, however, with respect to customs duties because the customs duties exemptions or suspensions normally fully or partly cease to apply when the production phase starts (see *sub-section* §*9.02[B][2]*). This could create an incentive therefore to import - under the mining list of an exploration permit - equipment or goods used by the same company for the purpose of one of its mines already in production. In that case, implementing the ring-fencing approach would entail the application of customs duties on the equipment or goods when they are transferred to the tax identification number of the mine already in production.

[F] Possible Conflict between National VAT and Customs Treatment of Extractive Industries and Regional Norms

Another difficulty regarding the control and application of the mining codes and of their VAT and customs provisions is related to the possible discrepancies that may exist between national acts and the rules issued by African regional organizations. Africa has a mosaic of supra-state organizations that sometimes enact regional instruments with which their members are expected to comply. It is not uncommon for these organizations to have overlapping membership.

For instance, in West Africa, the two major regional organizations are the WAEMU (West African Economic and Monetary Union – called '*Union Economique et Monétaire Ouest Africaine*', UEMOA in French)[76] and ECOWAS (Economic Community of West African States). In central Africa, the main organization is the Central African

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exempt activity, it may not be able to deduct all or part of the VAT charged on the self-supply. Businesses must also proceed to a self-supply when they change the allocation of movable goods from an activity to another. Similar rules also apply when a business is changing the allocation of immovable goods from a taxable activity to an exempt activity, or the other way around. In this latter case, however, this is not per se a self-supply but a regularization of the previous input VAT that has to be done (Arts 184-192 of the VAT Directive). The rationale behind self-supply rules is to avoid creating an incentive for taxable persons (providing exempt supplies and potentially incurring an irrecoverable input VAT cost) to internalize their production.

Similar rules also exist in African codes. For instance, Arts 10 and 38 of the **WAEMU** VAT Directive ('*Directive n° 02/98/CM/UEMOA du 22 décembre 1998 portant harmonisation des legislations des Etats membres en matière de TVA, modifiée par la Directive n° 02/2009/CM/UEMOA du 27 mars 2009*'), Arts 321 and 331 quinquiès of the Tax Code of **Burkina Faso** ('*Loi n°6/65/AN du 26 mai 1965 portant création du code des impôts directs et indirects*') and Arts 357 and 381 of the Tax Code of **Guinea** provide similar rules.

76. The WAEMU was created by the Treaty signed at Dakar on 10 Jan. 1994 by the countries of West Africa. These share the use of a common currency, the CFA Franc. WAEMU members are: Benin,

Economic and Monetary Community (CAEMC – called '*Communauté Economique et Monétaire de l'Afrique Centrale*', CEMAC in French).[77]

The WAEMU, in particular, has developed an approach that is to some extent similar to that of the European Union.[78] Pursuant to Articles 42 and 43 of the WAEMU Treaty, the Council may enact Regulations and Directives to accomplish the objectives of the Union. As in the European Union, a Regulation has general application; it is binding in its entirety and directly applicable in all Member States. A Directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods (national authorities have to adapt their laws to meet these goals, but are free to decide how to do so). The WAEMU also has a Court of Justice. It is supposed to ensure that Member States comply with their obligations. It may – in theory at least – launch infringement actions against Member States at the initiative of the Commission or a Member State.[79] Also, the Court may be called upon to give its interpretation of Community law.

With respect to mining law, the WAEMU broke new ground when it enacted a Community Mining Code regulation in 2003.[80] The ECOWAS also issued its own mining directive in 2009;[81] however, the tax provisions of the ECOWAS directive are very vague and are not prescriptive. They will not be discussed here. The CAEMC has not yet issued any mining regulations.[82]

Title 3 of the WAEMU mining regulation lists the tax and customs advantages that Member States grant to the holder of a mining right. The regulation provides very broad

Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo. All are French-speaking countries, with the exception of Guinea Bissau whose official language is Portuguese. The purpose of the WAEMU is notably to create a common market based on free movement of persons, goods, services, and capital, the right of establishment of persons, a common external tariff, and a common trade policy (Art. 4 of the Treaty). In order to achieve this, WAEMU aims at harmonizing the tax laws of the Member States.

77. The Central African Economic and Customs Union ('*Union Douanière et Economique de l'Afrique Centrale*', UDEAC) was founded on 8 Dec. 1964 by the Brazzaville Treaty of 1964 (revised in 1974) and became operational on 1 Jan. 1966. In March 1994 the six UDEAC leaders signed a treaty for the establishment of a Central African Economic and Monetary Community, which was to promote the process of sub-regional integration within the framework of an economic union and a monetary union. The CAEMC includes six countries: Cameroon, Congo (Brazzaville), Gabon, Equatorial Guinea, the Central African Republic and Chad. All countries share a common currency, the Central African CFA Franc. The CAEMC aims at promoting the establishment of a true common market.
78. Mario Mansour, Grégoire Rota-Graziosi, '*Tax Coordination, Tax Competition, and Revenue Mobilization in the West African Economic and Monetary Union*', IMF Working Paper, WP/13/163, July 2013, http://www.imf.org/external/pubs/ft/wp/2013/wp13163.pdf.
79. Article 15 of the '*Règlement n°1/96/CM portant règlement des procédures de la Cour de justice de l'UEMOA*'.
80. '*Règlement n°18/2003/CM/UEMOA du 23 décembre 2003 portant Code Minier*'.
81. Directive C/DIR.3/05/09 on the Harmonisation of Guiding Principles and Policies in the Mining Sector, 27 May 2009.
82. The integration process is less advanced in the CAEMC than in the WAEMU. However, both organizations follow a similar approach and have similar institutions. The CAEMC also issues regulations and directives.

customs duties exemptions and suspensions during the exploration[83] and developmentphases.[84] Some of them also apply during the production phase either permanently[85] or temporarily during a tax holiday period.[86]

With respect to VAT, the holder of the mining title is exempt from VAT on its domestic and cross-border purchases of goods and services during the research and development phase (Articles 27 and 33 of the mining regulation). This exemption applies until the date of first production. All tax and customs advantages granted to the holder of the mining right apply as well to its subcontractors (Article 34 of the mining regulation).

Normally, the WAEMU Member States have to comply with the regulations. Member States should have abolished their mining codes since a higher norm of law is in place, is legally binding and is directly applicable, that is the 2003 WAEMU mining regulation. However, this is not the case. Up to now, WAEMU Member States have kept their national mining codes. They generally do not fully comply with the WAEMU mining regulation. VAT and customs exemptions provided under the domestic laws tend to be narrower. VAT exemptions in some countries do not apply to all purchases of goods and services and are sometimes limited in time during the development phase.[87] The list of imports exempt from customs duties during the exploration and

83. According to Art. 26 of the Mining Regulation, during the exploration phase, capital goods for exploration are imported under **temporary admission**; and materials, spare parts, fuel, and lubricants necessary to the operation of capital goods used for exploration works are **exempt** from customs duties and taxes with the exception of the Statistical Fee ('*Redevance Statistique*' – RS) and the Community solidarity Levy ('*Prélèvement Communautaire de Solidarité*' – PCS).

84. During the development phase, according to Art. 29 of the Mining Regulation, the holder of a mining title is **exempt** from duties and taxes (with the exception of the RS) on petroleum products used for energy production, extraction, transportation, ore processing, and for the operation and maintenance of social and health infrastructure. Capital goods listed on the mining list are imported under **temporary admission.**

    According to Art. 30 of the Mining Regulation, tools, spare parts (excluding those for passenger cars), materials, and equipment to be integrated permanently into the works are **exempt** from customs duties until the first production date. Chemicals, reactants, oils, and greases are **exempt** from customs duties.

85. During both the development and production phases, the holder of a mining title is **exempt** from duties and taxes (with the exception of the RS) on petroleum products used for energy production, extraction, transportation, and ore processing and for the operation and maintenance of social and health infrastructure (Art. 29 of the Mining Regulation).

    According to Art. 30, chemicals, reactants, oils, and greases are **exempt** from customs duties during the development and production phases.

86. According to Art. 29 of the Mining Regulation, capital goods listed on the mining list are imported under **temporary admission until the end of the third year of production**. At of the end of this period the owners are liable to pay the customs duties. However, the equipment used for exploitation works remains exempt.

87. For instance, the mining codes of **Burkina Faso** and of **Côte d'Ivoire** provide for limited VAT exemptions during the exploration and development phases. These codes do not provide for any exemption during the production phase.

    In **Burkina Faso**, during the exploration phase, Art. 84 of the 2003 Mining Code provides for a VAT exemption on imports and purchase of goods necessary for the realization of geological or mining activities, except those excluded from the right to deduct according to the provisions of the Tax Code; and services provided by geo-services companies and the like. During the development phase, Art. 86 of the Mining Code provides for a VAT exemption on equipment, except those excluded from the right to deduct according to the provisions of the Tax Code; and services provided by geo-services companies and the like. However, this VAT development phases is generally less generous and sometimes the duration of the exemptions is also limited in time during the development phase.[88] The production phase is generally not exempt from customs duties.[89] Furthermore, not all codes apply to subcontractors the same tax and customs regime granted to the holder of the mining right.[90] Some do not grant subcontractors any specific VAT or customs exemptions.[91]

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exemption in the development phase cannot last more than two years. This may be extended to a total of three years when the investment carried out at the end of the two-year period reached at least 50% of the planned investment.

In **Côte d'Ivoire**, during the exploration phase, Art. 162 of the recent 2014 Mining Code provides that imports of equipment, materials, and machines necessary for the implementation of the research program made by the holder of an exploration permit are exempt from VAT and customs duties. The exemption on imports also applies to the imports of spare parts for machines and research facilities. During the development phase of the mine, Art. 165 of the recent 2014 Mining Code provides that the imports of equipment, materials, machines, and spare parts intended to be used for mining operations made by the holder of a production permit are exempt from VAT and customs duties.

However, the following imports are not exempt from VAT and customs duties during the exploration and development phases: vehicles used to transport people and goods other than extracted mineral products; equipment, materials, and machines the equivalent of which can be made in Côte d'Ivoire or which are available in Côte d'Ivoire at prices, quality, and warranties equal to those of the same goods of foreign origin; furniture and other household effects; goods for which VAT is not deductible pursuant to the provisions of the Tax Code.

88. For instance, in **Burkina Faso**, Art. 85 of the Mining Code provides that equipment, raw materials, and materials for exploration whose importation is necessary to carry out the exploration program fall within category 1 of the Customs Tariff rate and are subject to a 5% customs duty. Machines may be imported under the temporary admission customs regime, except passenger vehicles. During the development phase, Art. 87 of the Mining Code provides that the owner of the mining title is exempt from all customs duties when importing equipment, raw materials, fuel, and lubricants as well as spare parts. However, this exemption is limited to three years.

    In **Côte d'Ivoire**, Art. 165 of the recent 2014 Mining Code, which replaced the 1995 Mining Code, provides that, during the development phase of the mine, the imports of equipment, materials, machines, and spare parts intended to be used for mining operations made by the holder of a production permit are exempt from VAT and customs duties. However, the duration of the exemption period on imports cannot exceed the duration of the development phase provided for in the decree granting the exploitation permit. This duration may be extended under the conditions set by the decree. Nevertheless, Art. 168 provides that the holder of a production permit is exempt from VAT (but not customs duties) until the date of the first commercial production on its imports of goods and purchase of foreign services, on its purchases of goods and services in Côte d'Ivoire, and with respect to its sales related to mining operations.

89. In **Burkina Faso**, Art. 91 of the Mining Code provides that, during the production phase, the owner of a mining title is liable to pay the cumulative rate of 7.5% that applies to Category 1 products under the WAEMU tariff nomenclature (5% of customs duties + 2.5% of community fees) on the import of equipment, materials, fuel, lubricants, and spare parts.

    In **Côte d'Ivoire**, Art. 166 of the recent 2014 Mining Code provides that the holder of a production permit benefits from a temporary admission regime for a three-year period as from the date of the first commercial production. However, after that, ordinary customs rules apply.

90. In **Burkina Faso**, the specific customs regime that applies to the owner of the mining title during the research phase is only extended to geo-services companies acting as its subcontractors (Art. 85 of the Mining Code). During the development and production phases, only the specific customs regime that applies to the owner of the mining title is extended to its subcontractors (Arts 87 and 91 of the Mining Code).

91. In **Niger**, no provision of the 2006 Mining Code extends these provisions to subcontractors.

    In **Côte d'Ivoire**, the 1995 Mining Code only applied the exemptions provided by Arts 86 and 87 of the 1995 Mining Code to the holder of a mining title. However, the new 2014 Mining Code applies most of these tax and customs exemptions or suspensions to the subcontractors

Generally speaking, it seems that the mining codes adopted after 2003, such as the 2014 Mining Code of Côte d'Ivoire,[92] the 2012 Mining Code of Mali, and the 2006 Mining Code of Niger, comply to a greater extent with the WAEMU regulation. In theory, the non-compliance of national law with the WAEMU regulation could be challenged before a national court. That court could ask the Court of Justice of the WAEMU for a preliminary ruling as regards the compatibility of national law with the regulation.[93]

[G] The VAT Treatment of the Transfers of Mining Rights or of an Interest in an Entity Holding a Mining Right

The transferability of exploration licences or permits varies. Some mining codes consider them transferable whereas some others do not. Whereas, production licenses or permits are usually transferable.

From a direct tax perspective, the transfer of a mining right entails important issues because the principal asset of a company particularly in the exploration phase is its mining right.[94] The taxation of the gain is usually included in the corporate income tax base of the selling company and taxed as such (or exempt if the company is exempt as it is often the case during the exploration and development phases).[95] In some other countries, it is subject to a specific tax, such as a capital gain tax.[96]

However, there are generally no provisions in the mining codes determining how the transfer of the mining right should be taxed from a VAT point of view. As a result, it should be treated according to the general VAT rules. If they are not clear enough, this may create an area of uncertainty.

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and sometimes to the affiliated companies of the holder of the mining title (Arts 156, 162, and 166 of the 2014 Mining Code).

92. For instance, in **Côte d'Ivoire**, one of the big differences between the new 2014 Mining Code and the former one from 1995 is that subcontractors generally benefit now from the VAT and customs exemptions granted to the holder of the mining title. In addition, VAT exemptions are extended until the date of first production.
93. Article 15, 6) of the '*Règlement n°1/96/CM portant règlement des procédures de la Cour de justice de l'UEMOA*'.
94. For a more detailed analysis of these issues, see Charlet et al. *supra* n. 2, and Lee Burns, Honoré Le Leuch, and Emil Sunley, '*Taxation of transfer of an interest in a mining or petroleum right*' (forthcoming 2015).
95. See for instance Art. 91-III of the 2013 Mining Code of **Guinea** or Art. 253 of the 2002 Mining Code of the **Democratic Republic of the Congo**.
96. For instance, in **Burkina Faso**, gains on sales of mining titles are exempt from the tax on real estate gains according to Art. 182 of the Tax Code ('*Code des Impôts Directs et Indirects*') but are liable pursuant to Art. 186 of the same code, to a specific 20% tax called '*Taxe spécifique sur les revenus de transaction de titres miniers*'.

    In **Mauritania**, new Art. 43 (amended in 2012) of the Mining Code provides that any gain on disposal of a production permit is taxed at the 10% IRCM (i.e., the tax on investment income). According to Art. 52 of the Finance Law 2013 n°2013-009 dated 23 Jan. 2013, this gain is now subject to an annual tax on property income at the rate of 10% when it is not included in the base of the income tax.

The sales of the shares of a company holding a mining right should also follow the ordinary VAT rules.

[1] The VAT Treatment of the Transfer of a Mining Right

In principle, from a VAT perspective, a transfer of a mining right should qualify as a normal supply and be subject to VAT provided it is made for consideration by a taxable person acting as such.[97]

As mentioned in *sub-section §9.02[B][1]*, a company in the exploration phase would normally not qualify as a taxable person under African codes because it does not carry out any effective economic activity. If it does not have the status of a taxable person, it should therefore not charge VAT on its supplies – even if these supplies are taxable. However, the very fact that the company sells its exploration permit should be sufficient as a matter of principle to characterize an economic activity (exploration for the purpose of reselling exploration permits) at the time of sale of the permit and grant to the company the status of a taxable person. In fact, the economic purpose of junior mining companies is to explore for new deposits of mineral resources. Their purpose therefore is not to build mines and dig but to advance properties from prospects to audited reserves.

Is the transfer of a mining right a supply of goods or a supply of services? Generally, West and Central Africa's VAT laws which are strongly influenced by the European Union rules consider that a supply of a right should be regarded as a supply of services because it cannot be considered as a supply of goods.[98]

97. According to Art. 3 of the **WAEMU** VAT Directive ('Directive n° 02/98/CM/UEMOA du 22 décembre 1998 portant harmonisation des legislations des Etats membres en matière de TVA, modifiée par la Directive n° 02/2009/CM/UEMOA du 27 mars 2009'), the supplies of goods and of services for consideration by a taxable acting as such and the imports are subject to VAT. The definition of the **CAEMC** VAT Directive differs slightly ('Directive n°1/99/CEMAC-028-CM-03 du 17 Décembre 1999 portant Harmonisation des Législations des Etats Membres en matière de T.V.A et de Droit d'accises'). Article 1 of the CAEMC VAT Directive provides that the transactions made by individuals or legal persons, which belong to an economic activity, are subject to VAT.

98. According to Art. 9 of the **WAEMU** VAT Directive ('*Directive n° 02/98/CM/UEMOA du 22 décembre 1998 portant harmonisation des legislations des Etats membres en matière de TVA, modifiée par la Directive n° 02/2009/CM/UEMOA du 27 mars 2009*'), a supply of services is any transaction which does not constitute a supply of goods. According to Art. 8 of the WAEMU VAT Directive, a supply of goods is the transfer of the right to dispose of tangible property as owner. Article 2 of **CAEMC** VAT Directive uses the same definition ('*Directive n°1/99/CEMAC-028-CM-03 du 17 Décembre 1999 portant Harmonisation des Législations des Etats Membres en matière de T.V.A et de Droit d'accises*').

    This replicates the definition provided by Arts 24 and 14 of the European Union VAT Directive (Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax).

These supplies are normally taxed if they are not on the list of exempt supplies.[99] Some countries expressly tax to VAT the transfer of a mining right.[100] The place of taxation of the supply is normally not an issue since generally mining companies have to incorporate in the country where the field is located. Therefore, the supply has to happen between two local companies.

Is the input VAT deductible for the purchaser? This goes back to the issue previously discussed in *sub-section §9.02[B][1]*. If the transaction happened between two explorers, the buyer may not be able to offset the input VAT on the purchase of the mining right if the tax code does not consider that he qualifies as a VAT taxable person. If – as is more likely – a junior company specialized in exploration activity sells the title to a buyer who purchases the field to develop it, the purchaser may be able to offset the tax as input VAT (on the basis that it intends to carry out a taxable activity) but may not be able to reclaim it as long as it does not export its production.

However, when mining codes provide very broad VAT exemptions on all purchases made by the holder of a mining right,[101] it must exempt as well the purchase of a mining right (see *Table A.1 in Annex*).[102] However, if the purchaser does not have yet a mining right, then these specific provisions would normally not apply.

When the transfer of a mining right is made as part of a transfer of a going concern (i.e., not only the mining right is transferred but also part of the capital goods and/or

99. Article 21 of the **WAEMU** VAT Directive and Art. 6 of the **CAEMC** VAT Directive list the supplies that are exempt. In both cases, the supply of a mining right is not on the list. Article 6 of the CAEMC Directive lists amongst the exemptions the sales of products by the extractive industries: these are exempt provided that they are subject to a specific tax that is exclusive of VAT. However, mining royalties are generally not exclusive of any other taxation so that this specific provision is unlikely to activate.

100. For instance, in **Burkina Faso**, a Note N°2012/000621/MEF/SG/DGI/DLC/sl dated 22 Aug. 2012 on the '*Détermination de la taxe spécifique sur les plus-values de cessions de titres miniers*' provides explicitly that the sale of a mining right is taxed to VAT.

101. For instance, Arts 27 and 33 of the **WAEMU** 2003 mining regulation exempt from VAT all purchases made by the holder of a mining right until the date of first production.

Articles 95 of the **Cameroon** 2001 Mining Code used to exempt from VAT all purchases made by the holder of an exploration permit although this was changed by the 2010 amending law which now exempts only the imports and domestic purchases of materials and equipment.

In **Mali**, all purchases made by the holder of a mining right are exempt from VAT until three years after the date of first production (Arts 125, 126 and 127 of the 2012 Mining Code). Actually, the way Art. 125 is drafted could imply that the holder of an exploration permit is also exempt from VAT as well on all the supplies he makes – although the intent of the legislator was probably only to exempt from VAT the purchases made by the holder of a mining right and not his supplies (in French: '*Les titulaires d'autorisation de prospection ou de permis de recherche sont exonérés de tous impôts (y compris la Taxe sur la Valeur Ajoutée (T.V.A.))* […] *qu'ils auraient à acquitter personnellement ou dont ils auraient à supporter la charge*')

In **Niger**, Arts 92 and 93 of the 2006 Mining Code exempts from VAT all purchases made by the holder of a mining right until the date of first production.

102. It is interesting to note that, in Canada, a supply of a right to explore for or exploit a mineral deposit is deemed not to be a supply for VAT purposes and any consideration paid or due, or any fee or royalty charged or reserved, in respect of the right is deemed not to be consideration for the right (GST/HST Policy Statement, P-110R, Amounts paid for supplies of minerals, peat, or forestry, water, or fishery products, 7 Sep. 2004, http://www.cra-arc.gc.ca/E/pub/gl/p-110r/README.html).

of the goodwill), a special rule for such transfers may apply. Often countries regard the transfer of a going concern as a non-supply when the buyer agrees to continue the transferor's activity.[103,104] However, some countries in sub-Saharan Africa consider-that a transfer of a going concern is a supply and should be subject to VAT.[105] Some others exempt the transfer of a going concern.[106]

[2] The VAT Treatment of the Transfer of an Interest in a Mining Right

Under mining law, there are also specific types of agreements that do not qualify as sales per se. In civil law countries, they are referred to as '*contrat d'amodiation*', which is a specific type of lease agreement according to which the holder of a mining right rents the mine to a third party against the payment of a royalty or some other consideration that may be in kind.[107] This is not regarded as an ordinary rental because the use is slowly destroying the property rented (since the minerals which are extracted and sold will of course not be replaced at the end of the rental period).

In common law countries, this type of contract is often defined as an '*overriding royalty agreement*' where a person holding an exploration right chooses to dispose of

103. This is a general VAT principle found in the legislation of many OECD member countries. For instance, Art. 19 of the VAT Directive of the European Union provides that: '*In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor*' (Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax).

    For instance, Art. 257*bis* of the French Tax Code disregards the contribution to a company or the transfer of a going concern between two taxable persons when the person to whom the goods are transferred is deemed to be the successor to the transferor.
104. For instance, s. 61 of the VAT Act of **Tanzania** provides that: '*Where a business or part of a business is assigned* [...] *No tax shall be charged or input tax claimed in respect of the transfer where the transferee is registered*'.
105. For instance, Art. 356 of the Tax Code of **Guinea** considers that the contributions to a company are deemed to be supplies of goods.

    Article 6 of the VAT Act of the **Democratic Republic of the Congo** contains a similar provision ('*Ordonnance-loi n° 001/2012 du 21 septembre 2012 modifiant et complétant certaines dispositions de l'ordonnance-loi n° 10/ 001 du 20 août 2010 portant institution de la TVA'*).
106. For instance, Art. 128 of the Tax Code of **Cameroon** exempts from VAT the transfer of goodwill when it is subject to registration duties.

    In **Ghana**, s. 14 and Schedule 1 of the VAT Act exempt from VAT the transfer of a going concern, that is '*the supply of goods as part of the transfer of a business as a going concern by one taxable person to another taxable person*'.

    Article 177 Quinquies of the Tax Code of **Mauritania** exempts the transfer of ownership or usufruct of goodwill or clientele when it is subject to registration duties.
107. This is the definition retained for example by Art. 1 of the 2002 Mining Code of the Democratic Republic of the Congo: '*Amodiation: un louage pour une durée déterminée ou indéterminée, sans faculté de sous-louage, de tout ou partie des droits attachés à un droit minier ou une autorisation de carrières moyennant une rémunération fixée par accord entre l'amodiant et l'amodiataire*'. Article 1 of the 2013 Guinean Mining Code provides a similar definition: '*Amodiation: un louage pour une durée déterminée ou indéterminée sans faculté de sous-louage, de tout ou partie des droits attachés à une autorisation d'exploitation de carrière, à un permis d'exploitation minière industrielle ou semi-industrielle, ou à une concession minière moyennant une rémunération fixée par accord entre l'amodiant et l'amodiataire* '.

the right for a nominal cash consideration and a periodic amount based on the revenues realized from any commercial discovery.[108] The cash consideration is referred to as an '*overriding royalty*'. A royalty interest is therefore limited in its duration to the life of the lease under which it is created.

Another variant of contract is the '*farm-out agreement*' ('*contrat d'affermage*' in French) when the consideration is the commitment to perform future work (although it may comprise an up front cash payment as well). In a typical farm-out agreement in the mining sector, the farmee (i.e., the '*lessee*') may agree with the farmor (i.e., the '*lessor*' who owns the mining right) to perform a specified amount of exploration and/or development work on the contracted property (such as operating exploration blocks, funding expenditures, testing or drilling, etc.).[109] Immediately or upon completion of the work the farmee acquires an agreed-upon percentage working interest in the mine. A working interest is an economic interest that may consist in the right to explore for, produce and own a mineral and all real and tangible personal property, bought or built, in order to explore for or exploit that mineral deposit. This consists basically in the assignment of part of the mineral interest. Income generated from the farmee's activities will partly go to the farmor and partly go to the farmee in percentages determined by the agreement. This replicates the logic behind farm-out agreements in the agricultural sector. This type of agreement allows spreading the risk when exploring for or exploiting a mineral deposit.

Whether the transaction is called a '*contrat d'amodiation*' or overriding royalty agreement or a farm-out agreement, it is from a legal point of view a disposal of an asset in return for an income stream (a royalty interest) or a consideration in kind, normally for a limited amount of time. From a VAT perspective, this supply should be taxed under the VAT (except if it is exempt by a specific provision of the mining code – see the discussion in *sub-section §9.03[G][1]* regarding the sale of a mining right),[110] either because it qualifies as a supply of rental services or as a supply of – or more likely connected with – tangible or real property. It should be noted, however, that supplies of real property are often exempt by the tax codes of sub-Saharan countries when they are subject to registration duties.[111] Regarding the question of the right to deduct of the lessee or farmee when the supply is taxed, please refer to the discussion under the previous *sub-section §9.03[G][1]*: if the lessee or farmee qualifies as a VAT taxable

108. See Burns et al. *supra* n. 94.
109. Definition from the GST/HST Policy Statement, P-128R2, Tax treatment of a supply of an undivided working interest in the assets of a mine or an oil or gas well, 5 Jan. 2006).
110. It is interesting to note that in Canada a supply of a mineral right itself is deemed not to be a supply (and is therefore not subject to VAT) whereas the supply of a working interest in the assets of a mine is regarded as a multiple supply: the supply of real property (e.g., mine office, refinery, etc.) and of tangible personal property (e.g., mining equipment for personnel, crushers, vehicles, etc.) is taxable whereas the supply of a mineral right (e.g., mining permits) is not taxed. However, when the supply of the working interest is made under a farm-out agreement, the value of all or a part of the consideration is normally deemed to be nil. As a result, VAT will generally not apply in a typical farm-out transaction unless there is some monetary consideration. (GST/HST Policy Statement, P-128R2, Tax treatment of a supply of an undivided working interest in the assets of a mine or an oil or gas well, 5 Jan. 2006, http://www.cra-arc.gc.ca/E/pub/gl/p-128r2/README.html).
111. Article 21 of the WAEMU VAT Directive and Art. 6 of the CAEMC VAT Directive.

person – which is likely if he is exploiting the field – he will have the right to deduct any input VAT charged. He would normally be allowed to claim a VAT refund under most VAT laws if he is exporting the extracted minerals.

The place of taxation of the supply should normally not be an issue since generally mining companies have to incorporate in the country where the field is located. Therefore, the supply has to happen between two local companies (in any case, it could be argued that the place of supply of the service is connected with immovable property and should be taxed where the immovable property is located – although sub-Saharan place of taxation rules may follow a different approach: see *sub-section* §*9.03[G][3]*).

[3] The VAT Treatment of the Disposal of an Interest in an Entity Holding a Mining Right

This is the question of the sale of shares of companies holding a mining right. The sale of shares or securities is in most countries exempt from VAT,[112] and this should also be the case in sub-Saharan countries, although this is not always clear under their laws.[113]

The question of the place of taxation of the supply is more relevant for the disposal of shares than for the sale of a mining right because the company selling the shares of the company holding the mining right is likely to be located abroad (often in a low-taxed jurisdiction).

Under the destination principle as applied in the VAT laws of most countries,[114] such a supply normally would have a place of taxation at the place where the recipient

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112. OECD, '*Consumption* Tax Trends 2012', Stéphane Buydens, OECD Publishing; see '*Table 3.11. VAT/GST Exemptions*'.Typically, for instance, Art. 135 of the European Union VAT Directive exempts transactions in shares, interests in companies or associations, debentures, and other securities (Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax).
113. For instance, Arts 21 of the **WAEMU** VAT Directive and 6 of the **CAEMC** VAT Directive exempt banking transactions which are subject to a specific tax but do not list the sales of shares among the list of the exemptions. The WAEMU Directive on stocks is not much clearer although it could be inferred from Art. 12 of this Directive that the sale of shares or securities is exempt ('*Directive n°02/2010/CM/UEMOA portant harmonisation de la fiscalité applicable aux valeurs mobilières dans les Etats Membres de l'UEMOA en date du 30 mars 2010*'). Traditionally, in many countries, the disposal of shares or securities belong to the category of banking transactions.

    The VAT provisions of the WAEMU members are clearer. For instance, Art. 331 Septies of the **Burkinabe** Tax Code (Code des Impôts Directs et Indirects) clearly exempts the disposal of bonds and other securities and bonds.

    Outside the WAEMU or CAEMC, in **South Africa** for instance, the supply of shares is exempt from VAT according to the South-African VAT act. In **Tanzania**, s. 10 and the Second Schedule of the VAT Act exempt from VAT the transfer of ownership of equity or securities such as shares in companies and members interest in corporations and in participatory securities such as unit trusts.
114. For an overview of the international practice on this topic, see OECD, '*Consumption Tax Trends 2012*', Stéphane Buydens, OECD Publishing, Chapters 1 and 2; and at the OECD International VAT/GST Guidelines available on the OECD website.

of the supply is established,[115] which means in practice outside of the country where the company holding the mining title is established. In sub-Saharan Africa however, place of taxation rules are usually not so developed and this may lead in some instances to possible double taxation.[116] Nevertheless, this should be rather theoretical insofar as the disposal of shares is usually regarded as an exempt supply.

§9.04 CONCLUSION

Mining-related VAT and customs issues are complex and delicate. Governments of developing countries want to attract investors. They are ready to grant a number of exemptions and sometimes to enlarge the broad scope of the existing ones by signing mining conventions derogating from the already generous mining code.

From a customs perspective, exemptions might be justified in the exploration and especially in the development phases of the mine because this is the period of time where mining companies are proceeding to most of the investments, i.e., when the discovery is brought to extraction. However, the control of the exempted goods requires a mining list that is sometimes difficult to manage. Tariffs are already relatively low with respect to capital goods (at least in the WAEMU where they are classified at Category 1 products subject to a 5% customs duty) and one may wonder if it would not be a better practice to apply the existing tariff or lower it a bit rather than exempting a list of specific goods. The lack of control of the mining lists may lead in practice to exempt all imports made by mining companies, even the ones having no direct link with the operation of the mine. However, a mining list – maybe more restricted – might be needed at least to control the imports and purchases under VAT exemption although, in practice, this might be replaced by an annual VAT free purchase quota. Another option would be that the tax code provides a prescriptive list of supplies that are exempt from VAT when provided to the holder of a mining right in its exploration or development phase only.

115. For an example of the international practice: in the European Union, Art. 44 of the VAT Directive provides that the place of taxation of services provided to a taxable person is the place where that person has established his business, except if those services are provided to the fixed establishment of that taxable person (Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax).

116. For instance, according to Art. 13 of the WAEMU Directive, the place of taxation of a supply of services is the place where this service is performed. However, when the service supplied is used at a place different than where the service is performed, taxation occurs where the service is used. According to Art. 9 of the CAEMC VAT Directive, the place of taxation of a service is the place where the service rendered, the right transferred or the thing leased are used or operated.

The difficulty of having a proxy based on the place of performance or on the place of use and enjoyment is that it might be difficult to identify that particular place, especially with respect to intangible services such as the disposal of shares. In addition, when the VAT act provides for a double criterion (such as in the WAEMU Directive: i.e., the place of performance or the place of use if the service is used at another location than where it is performed), the danger is that this might allow a country to tax most transactions inside its territory whereas other countries may consider on the basis of other rules (such as the place of the recipient) that these supplies should be taxed elsewhere, thus ending up with double taxation.

From a VAT perspective, exemptions do not entail a loss of tax revenues (at least in theory) because the taxpayer is normally allowed to offset the input VAT on its purchases. However, they affect the ordinary functioning of the VAT system and the formalizing effect of VAT on the economy whereas the mining industry is generally perceived as a way to drive structural transformation. In theory, the best practice would be to remove these exemptions and to implement a fully efficient VAT refund mechanism. However, this might be difficult in countries facing huge budget constraints and having already relatively limited administrative means. Exemptions are a lesser evil in that they allow avoiding the build-up of excessive input tax credits. However, they should be strictly limited.

The problem with these exemptions is that they put the VAT system at risk, especially when they are extended during the production phase to the purchases made by mining companies and sometimes by their subcontractors as well. The pressure of lobbies may force a VAT exemption to apply on the whole VAT chain when the VAT refund mechanism is not working well in the production phase. This may lead to exemption of a significant proportion of industry in terms of GDP and create an incentive for the other sectors of industry to claim the same tax regime.

As often there is no good or bad rule; no one size-fits-all approach. A model that is performing well in one country may not be relevant in other jurisdictions because of its historical, political and legal traditions. Implementing exemptions might be needed at one point in time when countries have difficulties to cope with VAT refunds. The situation may change when the means of the tax and customs administrations of these countries increases and their economy becomes more integrated.

ANNEX

Table A.1 *VAT and Customs Treatment of Extractive Industries in a Selection of Sub-Saharan African Countries**

Countries	*Mining laws and regulations (quotes are in the original language)*	*Exploration / Research phase*		*Development / Building phase*		*Production / Exploitation phase*		*Mining list*	*Extension of the VAT and customs preferential regime to subcontractors*	*VAT refunds*	*Petroleum products*	*Statute of limitation of the input tax deduction*
		VAT treatment	*Customs treatment*	*VAT treatment*	*Customs treatment*	*VAT treatment*	*Customs treatment*					
UEMOA (Union Economique et Monétaire Ouest-Africaine) – West African Economic and Monetary Union (**WAEMU**)	Règlement n°18/2003/CM/UEMOA du 23 décembre 2003 portant Code Minier Communautaire Directive n°02/98/CM/UEMOA du 22 décembre 1998 portant harmonization des législations des Etats membres en matière de TVA Modifiée par la directive n°02/2009/CM/UEMOA du 27 mars 2009	According to Article 27 of the Mining Regulation, the holder of a mining title is **exempt** from VAT on its (**domestic and cross-border**) purchases of goods and services during the research phase.	ulation, capital **n** during the operation of capital ties and taxes with – RS) and the de Solidarité' –	According to Article 33 of the Mining Regulation, the holder of a mining title is **exempt** from VAT on its (domestic and cross-border) purchases of goods and services.	According to Article 29 of the Mining Regulation, the holder of a mining title is **exempt** from duties and taxes (with the exception of the RS) on petroleum products used for energy production, extraction, transportation, ore processing and for the operation and maintenance of social and health infrastructures. Capital goods listed on the mining list are imported under **temporary admission**. According to Article 30 of the Mining Regulation, tools, spare parts (excluding those for passenger cars), materials and equipment to be integrated permanently into the works are **exempt** from customs duties until the first production date. According to Article 30 of the Mining Regulation, chemicals, reagents, oils and greases are **exempt** from customs duties.	**Standard rules apply.** According to Article 33 of the Mining Regulation, the holder of a mining title is exempt from VAT until the date of first production.	According to Article 29 of the Mining Regulation, the holder of a mining title is **exempt** from duties and taxes (with the exception of the RS) on petroleum products used for energy production, extraction, transportation, ore processing and for the operation and maintenance of social and health infrastructures. Capital goods listed on the mining list are imported under **temporary admission** until the end of the third year of production. At of the end of this period the owners are liable to pay the customs duties. However, the equipment used for exploitation works remains exempt. According to Article 30, chemicals, reagents, oils and greases are **exempt** from customs duties.	**YES**. Article 1 of the Mining Regulation provides that the mining list is the list of capital goods and consumables established according to the WAEMU Tariff nomenclature normally used for mining activities and for which duties and taxes at import are suspended, moderated or exempted.	**YES**. According to Article 34 of the Mining Regulation, any subcontractor, who is providing services to the holder of a mining title, enjoys the same tax and customs advantages granted to the holder of the mining title.	According to Article 39 of the VAT Directive, a taxable person (other than one reselling goods without transformation) may obtain, upon request, the refund of the VAT credits it has at the end of each half-year.	According to Article 34 of the VAT Directive, is **excluded from the right to deduct** fuel costs for vehicles.	The VAT Directive does not provide any statute of limitation. Article 37 of the VAT Directive simply provides that, when the amount of the VAT deduction allowed is greater than the amount of VAT payable, the difference is a VAT credit in favour of the taxpayer.
Burkina-Faso	Loi n°031-2003/AN du 8 mai 2003 Décret n°2005-048/PRES du 3 février 2005 Décret n°2005-	Article 84 of the mining law provides for a **VAT exemption** on: **– imports and purchase of goods** necessary for the	Article 85 of the mining law provides that the equipment, raw materials and materials for research whose	Article 86 of the mining law provides for a **VAT exemption** on: - **imported equipment and**	Article 87 of the mining law provides that the owner of the mining title is **exempt from all customs duties**	**Standard rules apply.**	Article 91 of the mining law provides that the owner of a mining title is liable to pay the **cumulative rate of 7,5%** that	**YES**. Articles 85 and 86 of the mining code provide that a list of the equipment, materials, machinery as well	**YES**. **-** The specific customs regime that applies to the owner of the mining title during the research phase	Article 331bis of the Tax Code ('Loi n°6/65/AN du 26 mai 1965 portant création du code des impôts directs et indirects')	Article 329bis of the Tax Code provides that aviation gasoline, gasoline for motor vehicles, diesel and bio-fuel are	The Tax Code does not provide any statute of limitation of the input tax deduction. Article 331 bis of the Tax

Note: This spreadsheet has been completed on the basis of a literal reading of the mining codes or acts. Sometimes, it has been necessary to interpret the provisions and to operate a free translation in order to ease the reading. It is worth noting however that the practice in some sub-Saharan countries may differ to some extent from the texts themselves. For instance, some administrations may allow sometimes subcontractors to import under the mining list of the holder of the mining right when they are not required to constitute their own mining list.

	682/PRES/PM/MCE/MFB du 30 décembre 2005	realization of geological and/or mining activities, except those excluded from the right to deduct according to the provisions of the tax code; **- services provided by geo-services companies and the like**.	importation is necessary to carry out the research programme fall within category 1 of the Customs Tariff rate and are subject to a **5% customs duty**. Machines may be imported under temporary admission customs regime, except passenger vehicles. However, equipment and materials which equivalent can be manufactured locally and are available at commercial conditions at least equal to those imported cannot benefit from the preferential customs duty rate. Same for personal and family vehicles.	**those manufactured locally**, except those excluded from the right to deduct according to the provisions of the tax code; **- services provided by geo-services companies and the like**. However, this VAT exemption cannot last more than two years. This may be extended to a total of **three years** when the investment carried out at the end of the two years period reached at least 50% of the planned investment.	when importing equipment, raw materials, fuel and lubricants as well as spare parts. However, he remains liable of all community fees such as the 1% Statistical Fee ('Redevance Statistique'), the 1% Community solidarity Levy ('Prélèvement Communautaire de Solidarité' – PCS), and the 0,5% Community Levy ('Prélèvement Communautaire' – PC). The exemption is limited to **three years**.		applies to Category 1 products under the WAEMU tariff nomenclature (5% of customs duties + 2,5% of community fees) on the import of equipment, materials, fuel, lubricants and spare parts.	as parts and components eligible for the exemption must be attached to the mining tittle.	is extended to the geo-services companies acting as its subcontractors (Article 85 of the mining code). - The specific customs regime that applies to the owner of the mining title during the building and exploitation phase is extended to its subcontractors (Articles 87 and 91 of the mining code).	provides that no VAT refund is granted except, amongst others, if the taxable person exports goods, supplies services which are exploited or used outside Burkina Faso or does not meet anymore the criteria to qualify as a taxable person.	**excluded from the right to deduct**.	Code only provides that, if, for a given period, the amount of input VAT deductions exceeds the amount of output VAT due on transactions, the excess can be offset on the next VAT returns.
Cameroon	Loi n°2010/011 du 29 juillet 2010 Loi n°001-2001 du 16 avril 2001 Décret N°2002/648/PM du 26 mars 2002	Article 95 of the 2001 mining law provides that the (**domestic and cross-border**) purchases of goods and services made by the holder of a research permit are **exempt from VAT**. However, new Article 97 of the 2010 law amending the 2001 mining law provides that the **imports and domestic purchases of materials and equipment** made by the holder of a research permit in relation with its mining activity are exempt from VAT provided they are listed on a mining list and that a VAT exemption certificate is	Article 94 of the mining law provides that the holder of a research permit may import under **temporary admission** materials used for the research as well as professional equipment, machinery, construction vehicles, and spare parts. Materials and spare parts necessary for the operation of machinery and equipment professionals are **exempt** from customs duties. The specific lubricants necessary for operation of equipment and	Article 97 of the 2001 mining law provides that the holder of a production permit benefits from a **VAT exemption** on the **import** of: - equipment, materials, inputs and capital goods needed for production as well as the first batch of spare parts, with the exception of passenger vehicles and office supplies. - equipment replacement and equipment used for an extension; - inputs; - materials and equipment necessary for the construction of buildings; - specific lubricants.	Article 96 of the mining law provides for a **customs duties exemption** during the building phase of the mine**:** - on equipment, materials, inputs and capital goods needed for production as well as the first batch of spare parts, with the exception of passenger vehicles and office supplies. - on equipment replacement and equipment used for an extension; - on imported inputs; - on the import of materials and equipment necessary for the construction of buildings; - on specific lubricants.	**Standard rules apply.** Article 97 of the mining law provides that any VAT exemption stops to apply at the date of first commercial production.	**Standard rules apply.**	**YES**. According to new Article 97 of the 2010 law amending the 2001 mining law, imports and domestic purchases of materials and equipment made by the holder of a research permit in relation with its mining activity are exempt from VAT provided they are listed on a mining list and that a VAT exemption certificate is provided to the suppliers.	**YES**. Article 94 of the mining law provides that the preferential customs regime also applies to the subcontractors and suppliers of the holders of a research permit.	According to Article 149 of the Tax Code, VAT credits are refundable: - within three months to businesses in a structural credit position due to zero-rating; - within three months to industrial and leasing institutions having made investments; - at the end of each quarter, to diplomatic or consular missions and international organizations, provided there is a formal reciprocity agreement; - at the end of the year, to non-for-profit organizations; - within two months to exporters.	**Standard VAT rules apply.** According to Article 127 of the Tax Code, the sales of petroleum products imported or produced in Cameroon are taxable to VAT in Cameroun. Article 128 of the Tax Code provides that only the sales of petroleum products for fuelling the aircrafts of companies having their registered office in Cameroon are exempt from VAT.	The Tax Code does not provide any statute of limitation of the input tax deduction. To the contrary, Article 149 of the Tax Code provides that VAT credits can be offset against the VAT due for the subsequent periods until exhaustion, and without any limitation of time. Deductions on the VAT reverse-charged are only admitted upon presentation of the repayment receipts. The VAT credits that cannot be offset can be compensated against excise and customs duties

		provided to the suppliers.	material research are **exempt** from customs duties.							However, the VAT refund is limited to an amount equal to the amount of exports multiplied by the applicable VAT rate.		upon agreement of the Director General of Taxation, and provided that the taxpayer justifies an uninterrupted economic activity of more than two years at the time of the application, and that he is not audited by the tax authorities.
Democratic Republic of the Congo	Loi de finances n°14/002 du 31 janvier 2014 pour l'exercice 2014 Loi n°007/2002 du 11 juillet 2002 portant code minier Décret n°038/2003 du 26 mars 2003 Arrêté interministériel n°3154/CAB.MIN/ MINES/01/2007 et n°031/CAB.MIN/F INANCES/2007 du 09 août 2007 Arrêté interministériel n°0003/CAB/MIN. MINES/01/2007 et n°006/CAB/MIN/ FINANCES/2007 du 09 janvier 2008 portant modification de l'Arrêté interministériel n°3154/CAB. MIN/MINES/01/20 07 et n°031/CAB/MIN/ FINANCES/2007 du 09 août 2007 **Please note that a revision of the current code is being discussed.**	The mining law provides specific provisions with respect to the former 'Contribution sur le Chiffre d'Affaires' now abrogated. According to the new VAT rules publicly released the 20 January 2012, standard VAT rules should apply since Article 3 of the VAT regulation ('Décret n°011/42 du 22 novembre 2011 portant mesures d'exécution de l'Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA') provides explicitly that extractive activities are within the scope of VAT. However, Article 15, §10 of the VAT Act ('Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA'), also released the 20 January 2012, provides that the imports and purchases of equipment,	Article 232 provides that goods imported for a mining purpose by the holder of the mining title, its affiliates or subcontractors are subject to **2%** customs duty, provided that the goods are listed on the mining list. However, fuels, lubricants, reagents and consumables for mining activities are subject to a **3%** customs duty throughout the entire duration of the project.	The mining law provides specific provisions with respect to the former 'Contribution sur le Chiffre d'Affaires' now abrogated. According to the new VAT rules publicly released the 20 January 2012, standard VAT rules should apply since Article 3 of the VAT regulation ('Décret n°011/42 du 22 novembre 2011 portant mesures d'exécution de l'Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA') provides explicitly that extractive activities are within the scope of VAT.	Article 232 provides that goods imported for a mining purpose by the holder of the mining title, its affiliates or subcontractors are subject to **2%** customs duty, provided that the goods are listed on the mining list. However, fuels, lubricants, reagents and consumables for mining activities are subject to a **3%** customs duty throughout the entire duration of the project.	The mining law provides specific provisions with respect to the former 'Contribution sur le Chiffre d'Affaires' now abrogated. According to the new VAT rules publicly released the 20 January 2012, standard VAT rules should apply since Article 3 of the VAT regulation ('Décret n°011/42 (du 22 novembre 2011 portant mesures d'exécution de l'Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA') provides explicitly that extractive activities are within the scope of VAT.	When the exploitation effectively starts, Article 232 of the mining law provides that goods imported for a mining purpose by the holder of the mining title, its affiliates or subcontractors are subject to **5%** customs duty, provided that the goods are listed on the mining list. However, fuels, lubricants, reactants and consumables for mining activities are subject to a **3%** customs duty throughout the entire duration of the project. This rate would be increased to 5% in the draft of the new mining code date 6 February 2014. The draft of the new mining code dated 6 February 2014 also provides that the preferential 5% customs duties rate would only apply during the three first years of production as from	**YES**. Article 225 of the mining law provides that the holder of the mining title must provide a list with the number and value of the movable goods, equipment, vehicles, mining substances and other inputs eligible to the specific customs regime.	**YES**. Articles 219 and 223 of the mining law provide that the specific customs and tax regime that applies to the owner of the mining title is extended to its subcontractors and its affiliates. According to Article 1 of the mining law, an affiliate means any company which holds directly or indirectly more than 50% of the voting rights of the holder of the mining title or any company which voting rights are held directly or indirectly by the holder of the mining title. This includes also all companies that have more than 50% of their voting rights held directly or indirectly by a company which holds, directly or indirectly, 50% of the voting rights of the holder of the mining title.	Articles 63 and 64 of the VAT act ('Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA') provide that a VAT credit is not refundable except if the taxable person is an exporter or has stopped its economic activity. However the refund is limited to the VAT borne on the purchase of movable goods or services. Furthermore, the VAT refund open to exporters is limited to an amount equal to the amount of exports multiplied by the applicable VAT rate. However, Article 14 of the Finance Law for 2014 (Loi de finances n°14/002) provides that exporters, undertakings making large investments, mining and oil undertakings that are in the exploration or development phases, and undertakings who	According to Article 41 of the VAT act ('Ordonnance-loi n° 001/2012 du 21 septembre 2012 modifiant et complétant certaines dispositions de l'ordonnance-loi n° 10/ 001 du 20 août 2010 portant institution de la TVA'), are excluded from the right to deduct petroleum products. However, VAT on the fuel for resale by wholesalers or acquired for producing electricity to be sold or acquired to be used by fixed devices of industrial undertakings is deductible. Therefore, the VAT on the fuel purchased by mining companies for power generators in order to produce electricity is deductible	Article 63 of the VAT act ('Ordonnance-loi n°10/001 du 20 août 2010 portant institution de la TVA') provides that a VAT credit may be offset against the next VAT returns. According to Article 37, the right to deduct must be exercised before the 31 December of the year following the year in which the tax became chargeable. Otherwise, the tax not deducted at the expiration of this period is definitively acquired to the Treasury.

		materials, reactants and other chemical products used exclusively for mining or oil exploration and research are exempt from VAT.		the date of first production.			stopped their activity may introduce a claim for obtaining the refund of their VAT credits resulting from VAT incurred on purchase of movable goods and services.		
Côte d'Ivoire	Loi n' 2014-138 du 24 mars 2014 portant code minier, which abrogates the previous law (Loi n°95-553 du 17 juillet 1995 Ordonnance n°96-600 du 9 août 1996) and its regulations (Décret n°96-634 du 09 août 1996)	Article 162 of the recent 2014 mining law provides that the **imports** of equipment, materials and machines necessary for the implementation of the research programme made by the holder of an exploration permit are **exempt from VAT and customs duties**. The exemption on imports also applies to the imports of spare parts for machines and research facilities. **However, are not exempt** from VAT and customs duties the imports of: - equipment, materials and machines the equivalent of which can be made in Côte d'Ivoire or which are available in Côte d'Ivoire at prices, quality, and warranties equal to those of the same goods of foreign origin; - vehicles used to transport people and goods; - furniture and other household effects; - equipment for which an agreement was not granted by the Mining Administration and the Customs Administration; - goods for which VAT is not deductible pursuant to the provisions of the Tax Code. Article 156 provides that the materials, machinery and equipment imported by the holder of a research permit, which can be re-exported or disposed after use, benefit from the temporary admission regime (although the Statistical Fee ('Redevance Statistique' – RS) must be paid).	Article 165 of the recent 2014 mining law provides that, during the development phase of the mine, the **imports** of equipment, materials, machines and spare parts intended to be used for mining operations made by the holder of a production permit are **exempt from VAT and customs duties**. **However, are not exempt** from VAT and customs duties the imports of: - vehicles used to transport people and goods other than extracted mineral products; - equipment, materials and machines the equivalent of which can be made in Côte d'Ivoire or which are available in Côte d'Ivoire at prices, quality, and warranties equal to those of the same goods of foreign origin; - furniture and other household effects; - goods for which VAT is not deductible pursuant to the provisions of the Tax Code. The holder of the production permit has the right to sell in Côte d'Ivoire equipment, materials and machines imported provided he pays the customs duties and taxes due at the time of the transaction on the sale value and comply with all the formalities prescribed by the regulations. The duration of the exemption period on imports cannot exceed the duration of the development phase provided for in the decree granting the exploitation permit. This duration may be extended under the conditions set by the decree. Article 156 provides that the materials, machinery and equipment imported by the holder of a production permit, which can be re-exported or disposed after use, benefit from the temporary admission regime (although the Statistical Fee ('Redevance Statistique' – RS) must be paid).	Article 168 provides that the holder of a production permit is exempt from VAT until the date of the first commercial production on its imports of goods and purchase of foreign services, on its purchases of goods and services in Côte d'Ivoire and with respect to its sales related to mining operations. Article 166 of the recent 2014 mining law provides that the holder of a production permit benefits from the temporary admission regime for a three years period as from the date of the first commercial production. **Otherwise, standard rules apply.**	**YES** Article 162 of the 2014 mining law provides that a list of equipment, materials and machines eligible for the exemption from VAT and customs duties on imports made during the research phase has to be submitted with the exploration permit and to be attached to it. Article 164 provides that a list of equipment, materials, machines and spare parts that can benefit from exemptions during the development phase is attached to the production permit.	**YES** The provisions of Article 162 regarding the imports made during the exploration phase also apply to the subcontractors of the holder of the mining title provided they are approved by the Ministry of Mines. The provisions of Article 156 also apply to the subcontractors approved by the Ministry of Mines. They can import under temporary admission materials, machinery and equipment that can be re-exported or disposed after use (although the Statistical Fee ('Redevance Statistique' – RS) must be paid). Article 166 provides that provides that the companies affiliated with the holder of the production permit and its subcontractors approved by the Ministry of Mines: - also benefit from the temporary admission regime for a three years period as from the date of the first commercial production. - are also exempt during the exploitation of the mine from VAT	Article 382 of the Tax Code provides that a VAT credit is not refundable except, amongst others, if the claimant exports goods, has stopped its economic activity, or is an industrial company that carries out investments.	Article 166 of the recent 2014 mining law provides that the holder of a production permit is exempt during the exploitation of the mine from VAT and customs duties on its purchases of fuel, lubricants and chemical or organic products for processing ore. According to Article 346 of the Tax Code, the resellers of petroleum products are not regarded as taxable persons. Only the distribution companies are regarded as taxable persons. According to Article 365 of the Tax Code, only the VAT paid on petroleum products used for the operation of factories and the VAT paid on black products is **deductible**. According to the paragraph 8 of Article 372 of the Tax Code, petroleum products used as fuel for transport vehicles are excluded from the right to deduct. According to paragraph 26 of Article 355 of the Tax Code, are exempt from VAT the Heavy Vacuum Oil petroleum	According to Article 381 of the Tax Code, VAT deductions that have not been made on the taxpayer's VAT return may be performed within one year as from the date of invoicing.

									and customs duties on their purchases of fuel, lubricants and chemical or organic products used for processing ore.		products (HVO), the fuel oil 380 and the natural gas for thermal power plants. Otherwise, according to Article 359 of the Tax Code, petroleum products are subject to a reduced VAT rate of 9%.	
		Article 86 of the former 1995 mining law provided that **imports** of equipment, materials, machinesand equipment for research activities were **exempt from VAT and customs duties**. This exemption also applied to spare parts for machinery and research equipment. **However, were not exempt**: - the equipment and materials the equivalent of which could be manufactured in Côte d'Ivoire and which are available at similar commercial conditions; - vehicles used to transport people and goods; - furniture and other household effects.		Article 87 of the former 1995 mining law provided that, during the realization of investments or the start of a new exploitation or the expansion of the production capacity, **imports** of equipment and materials as well as components and spare parts intended to be used directly and permanently to the mining operationswere **exempt from VAT and customs duties**. **However, were not exempt**: - the equipment and materials the equivalent of which could be manufactured in Côte d'Ivoire or which are available at similar commercial conditions; - vehicles used to transport people and goods (other than mining products); - furniture and other household effects. The period of realization of investments could not exceed: - **Four years** as from the date of the production permit; - **Two years** as from the date of commencement of work for an extension of mining operations.		**Standard rules apply.**		**YES**. Former Article 86 of the 1995 mining law provided that the list of equipment, materials and machinery eligible for exemption from duties and taxes on imports had to be submitted with the research permit. Article 87 of the mining law provided that a list of equipment, materials and machinery as well as components and spare parts eligible for exemption must be attached to the exploitation permit. The list attached to the exploitation permit must include the equipment, materials and machinery used during the research phase.	**NO**. The exemptions provided by Articles 86 and 87 of the mining law only apply to the holder of a mining title.			
Guinea (Conakry)	Loi L/2013/N°.../CNT du 08 avril 2013 portant amendement de certaines dispositions de la loi L/2011/006/CNT Loi L/2011/006/CNT du 09 septembre 2011	Article 171 of the mining law provides that the holders of a research permit can **import** under **VAT exemption** equipment, materials, machines and consumables listed in the mining list submitted before the start of the research phase. However, are not exempt from VAT the imports of	Article 171 A of the mining law provides that the holders of a research permit can import under **temporary admission** equipment, materials, machinery, raw materials and consumables listed in the mining list of the research phase.	Article 173 of the mining law provides that the holders of an exploitation permit can **import** under **VAT exemption**, during the building phase, equipment, materials, machines, raw materials and consumables listed in the mining list submitted before the start of the construction phase. However, are not exempt	Article 174 of the mining law provides that, during the construction phase of the mine, the holders of a mining title can import under **temporary admission** goods in the category 1 of their mining list, that is to say fixed assets.	Article 176 of the mining law provides that **standard VAT rules apply** except that the imports of fixed assets listed in category 1 of the mining list remain **VAT exempt**.	Article 178 of the mining law provides that **regular customs duties** apply when the holder of the mining title enters into the exploitation phase. However, Article 179 provides that the imports of fixed assets and consumables used for local processing of mineral substances into semi-finished	**YES**. Articles 166 and 167 of the mining law provide that the holder of the mining title must have with respect to each phase of activity a mining list that lists the goods that can be imported under temporary admission or VAT exemption.	**YES**. Article 181 of the mining law provides that the direct subcontractors benefit on their imports of goods from the preferential customs and VAT regime granted to the holder of the mining title. The subcontractor must build his own mining list that must be approved and	Article 387 of the Tax Code provides that a VAT credit is not refundable except if the taxable person is exclusively carrying out export operations. The VAT refund is then limited to an amount equal to the amount of exports multiplied by the applicable VAT rate. However, Article 388 of the Tax	According to Article 376 of the Tax Code, petroleum products (with the exception of those fuelling fixed appliances or those used as processing agents by industrial undertakings) are **excluded form the right to deduct**. Article 168 of the Mining Code makes it clear that the holder of a	The Tax Code does not provide any statute of limitation of the input tax deduction. Article 387 of the Tax Code only provides that, when the amount of input VAT is higher than the amount of output tax for a given month, the difference is a VAT credit that can be carried over on the next VAT return.

		goods which are excluded from the right to deduct by the Tax Code.		from VAT (with the exception of heavy fuel oil) the imports of goods which are excluded from the right to deduct by the Tax Code.			or finished products are subject to a specific **5%** customs duty. Article 180 provides that the imports of extraction equipment and its consumables are subject to a specific **6,5%** customs duty. Heavy fuel oil is **exempt**.		certified by the holder of the mining title. The holder of the mining title is jointly and severally liable for the payment of any tax or customs duty due.	Code provides for an exception. VAT taxable persons can ask for a limited refund of their VAT credit. The amount of the refund is limited to the amount of the deductible VAT charged on the fixed assets which were acquired or imported by the taxable person during the last calendar quarter.	mining title is not exempted from VAT on its purchase of petroleum products in the research, building or exploitation phase, the reason being that petroleum products are excluded from the right to deduct (an exception is the purchase of **heavy fuel oil** that is **exempt** because it is widely used in Guinea by power generators). However, Articles 171, 173 and 176 of the Mining Code indicate that the VAT on these petroleum products is refundable, although only within the limits of the annual quotas set by the Minister in charge of the budget.	
Mali	Loi 2012-015 du 27 février 2012 Décret N°2012-311/P-RM du 21 juin 2012	According to Article 125 of the mining law, the holders of a research permit are **exempt** from VAT on their (**domestic and cross-border**) purchases of goods and services.	According to Article 133 of the mining law, equipment, machines, vehicles, generators can be imported by the holder of the research permit under **temporary admission**. Materials, consumables, spare parts and tools necessary for the research activity and which are listed on the mining list are **exempt** from customs duties (with the exception of community fees such as the 'Prélèvement Communautaire de Solidarité' – PCS and the 'Prélèvement Communautaire' – PC).	According to Article 126 of the mining law, the holders of an exploitation permit are **exempt** from VAT on their (**domestic and cross-border**) purchases of goods or services during the building phase.	According to Article 134 of the mining law, the holder of an exploitation permit can import under customs duties **exemption** the petroleum products used for the production of energy needed to extract, transport and process ore and to operate the social and health infrastructures created by the company for its employees. However, it remains liable of the PCS and PC. In addition, the holder of the mining title: - can import under **temporary admission** the equipment, machines, vehicles listed on the mining list;	According to Article 127 of the mining law, the holders of an exploitation permit are **exempt** from VAT on their purchases of goods or services during **three years** as from the start of the production phase.	According to Article 134 of the mining law, the holder of an exploitation permit can import under customs duties exemption the petroleum products used for the production of energy needed to extract, transport and process ore and to operate the social and health infrastructures created by the company for its employees. However, it remains liable of the PCS and PC. In addition, the holder of the mining title: - can import under temporary admission the equipment, machines, vehicles listed on the mining list; - is exempt from	**YES**. Articles 133 and 134 of the mining law require that the products eligible for the customs duties exemption in the exploration and development phases figure on a mining list in order to benefit from the exemption.	**YES**. According to Article 131 of the mining law, every subcontractor that supplies services in Mali to a holder of a mining title benefits from the same tax and customs advantages.	According to Article 226 of the Tax Code, a VAT credit is not refundable except if the claimant is an exporter or no longer carries out an economic activity. With respect to the exporters, the VAT refund is limited to an amount equal to 60% of the amount of exports multiplied by the applicable VAT rate.	According to Article 195 of the Tax Code, are **exempt** from VAT the sales of petroleum products which are subject to a domestic excise tax (i.e., petrol, diesel, gas oil, fuel oil, heavy fuel, etc.). When they are subject to VAT, Article 212 of the Tax Code provides that the VAT incurred on the purchase of petroleum products is **not deductible**.	Article 226 of the Tax Code provides that a VAT credit may be offset against the next VAT returns. According to Article 224 of the Tax Code, the right of deduction arises at the time the deductible tax becomes chargeable. The deduction of the VAT is done by offsetting this input VAT against any VAT due by the company. If the taxpayer has omitted to offset this VAT, he may still do so no later than the 15 May of the following year.

					- is exempt from the customs duties on the tools, chemical products, reactants, petroleum products, oils and greases for machines and spare parts listed on the mining list. Passenger vehicles follow the normal customs treatment.		the customs duties on the tools, chemical products, reactants, petroleum products, oils and greases for machines and spare parts listed on the mining list. Passenger vehicles follow the normal customs treatment.					
Mauritania	Loi n°2012-014 du 22 février 2012 Loi n°2012.012 réglementant les conventions minières et approuvant la Convention Minière Type du 12 février 2012 Loi n°2009-026 du 7 avril 2009 Loi n°2008-011 du 27 avril 2008 Décret n°99.160 PM/MMI du 30 décembre 1999	According to Article 112 and to Table 2 of the mining law, the imports of passenger cars and of equipment are made under temporary admission. The import of spare parts and industrial inputs is exempt from VAT. The import of petroleum products is exempt from VAT	According to Article 104 and to Table 1 of the mining law, the import of passenger cars and of equipment is made under temporary admission. The import of spare parts and industrial inputs is exempt from customs duties. The import of petroleum products is exempt from customs duties.	According to Article 112 and to Table 2 of the mining law, the import of passenger cars is subject to VAT. The import of equipment is made under temporary admission. The import of spare parts and industrial inputs is exempt from VAT. The import of petroleum products is exempt from VAT	According to Article 104 and to Table 1 of the mining law, the import of passenger cars is subject to a 5% customs duty. The import of equipment is made under temporary admission. The import of spare parts and industrial inputs is exempt from customs duties. The import of petroleum products is exempt from customs duties.	According to Article 112 and to Table 2 of the mining law, the import of passenger cars is subject to VAT. The import of equipment is made under temporary admission during the tax holiday period and then exempt after that. According to Article 103 of the mining law, the tax holiday period lasts thirty-six months as from the date of first production. The import of spare parts is exempt from VAT. The import of industrial inputs is subject to VAT. The import of petroleum products is subject to VAT. However, the fuel for heavy equipment used for mining activities is imported under VAT suspension during the exploitation phase.	According to Article 104 and to Table 1 of the mining law, the import of passenger cars is subject to a 5% customs duty. During the thirty-six months tax holiday period, the import of equipment is made under temporary admission and the import of spare parts, industrial inputs and petroleum products is exempt from customs duties. Once the tax holiday period is over, the import of equipment, spare parts, industrial inputs and petroleum products is subject to a 5% customs duty.	YES. According to Article 105, the holder of the mining title must provide to the Minister of Mines a mining list. This is a list of the items it wishes to import under the preferential customs regime. The list of goods to be acquired during the building phase must be established by reference to the assets described in the feasibility study introduced to obtain the mining permit.	YES. According to Article 112 of the mining law, direct subcontractors and sub-sub-contractors benefit from the preferential VAT regime granted to the holder of the mining title, as long as the subcontractors provide supplies exclusively to the holder of a mining title and that the sub-subcontractors provide supplies exclusively to the direct subcontractors.	Article 182ter of the Tax Code provides that a VAT credit is not refundable except if the taxable person is an exporter or does not qualify anymore as a taxable person. Article 112 of the mining law makes it clear that VAT credits are refundable as long as the mining production is exported. It states that the Tax Administration automatically audits the company after the introduction of the claim. If the claim is justified, the taxable person will be refunded within three months.	VAT on petroleum products is deductible. According to Articles 181ter to 181 nonies of the Tax Code, fuel expenditures are not listed amongst the products excluded from the right to deduct. According to Article 183 of the Tax Code, petroleum oils, bituminous minerals oils, petroleum gases and other gaseous hydrocarbons are subject to VAT at their release for consumption. Subsequent transactions on the domestic market are exempt from VAT. They do not confer any right to deduct. According to Article 112 and Table 2 of the mining law, the import of petroleum products is exempt from VAT during the research and building phases, but not during the exploitation phase. However, the fuel for heavy equipment used for mining activities can be imported under VAT suspension during the exploitation phase. This VAT treatment applies as well to the	According to Article 182bis of the Tax Code, VAT credits cannot be carried over for more than twelve months.

											imports of petroleum products made by subcontractors and sub-sub-contractors.	
Niger	Loi n°2006-26 du 9 août 2006 Décret n°2006-265/PRN/MM/E du 18 août 2006 Ordonnance n°99-48 du 5 novembre 1999 Ordonnance n°93-16 du 2 mars 1993	According to Article 92 of the mining law, the holders of a research permit are **exempt** from VAT on their (**domestic and cross-border**) purchases of goods and services.	According to Articles 86 and 92 of the mining law, in the research phase, the holder of a mining title can import: - under customs duties **exemption** capital goods, equipment, spare parts, fuels and lubricants required for operating machines, equipment and vehicles. However, he remains liable of the community fees such as the Statistical Fee ('Redevance Statistique' – RS), the Community solidarity Levy ('Prélèvement Communautaire de Solidarité'- PCS), and the Community Levy ('Prélèvement Communautaire' – PC). - under **temporary admission** the capital goods used for research.	According to Article 93 of the mining law, the holders of an exploitation permit are **exempt** from VAT on their (**domestic and cross-border**) purchases of goods or services during the building phase.	According to Article 93 of the mining law, the holder of an exploitation permit benefits from: - during the validity of the permit, an **exemption** of custom duties on the imports of petroleum products for energy production, extraction, transportation, processing of ore and the operation and maintenance of social and health infrastructures. However, he remains liable of the RS. - for a period ending at the date of first production, an **exemption** of customs duties due on tools and spare parts (excluding those for passenger vehicles), materials and equipment to be integrated permanently in the structures. However, the PCS, PC and RS remain due. - during the validity of the permit, an **exnemption** of customs duties on chemical products, reactants, oils and greases. - for a three years period starting as from the first production, a **temporary admission** of the capital goods used for the exploitation.	**Standard VA rules apply.** According to Article 93 of the mining law, the VAT exemption on the (domestic and cross-border) purchases of goods and services by the holder of an exploitation permit is over at the date of the first production.	According to Article 93 of the mining law, the holder of an exploitation permit benefits: - during the validity of the permit, from an **exemption** of custom duties on the imports of petroleum products for energy production, extraction, transportation, processing of ore and the operation and maintenance of social and health infrastructures. However, he remains liable of the RS. - during the validity of the permit, from an **exemption** of customs duties on chemical products, reagents, oils and greases. - for a three years period starting as from the first production, from a **temporary admission** of the capital goods used for the exploitation.	**YES.** Article 93 of the mining law makes reference to a mining list but its content is unclear.	NO.	According to Article 245 of the Tax Code, undertakings may claim a refund of a VAT credit on a quarterly basis. The refund has to be introduced no later than the last day of the month following the quarter. If not, the right to be refunded is lost for that period. With respect to exporters, the VAT refund is limited to an amount equal to the amount of exports recorded by the Customs Administration during the quarter multiplied by the applicable VAT rate (at which the goods would be imposed if sold within the country).	According to Article 247 of the Tax Code, petroleum oils, bituminous minerals oils, petroleum gases and other gaseous hydrocarbons are subject to VAT at their release for consumption. Subsequent transactions on the domestic market are exempt from VAT. They do not confer any right to deduct.	The Tax Code does not seem to provide a statute of limitation of the input tax deduction.

Ghana	The Mineral and Mining Act of 2006 (Act 703) amended in 2012 The Minerals and Mining Law of 1986 (PNDCL 153), as amended by the Minerals and Mining (Amendment) Act of 1994 (Act 475) and the minerals and mining bill of 2005 (law No. 703) Value Added Tax Act, 1998 (Act 546) duly amended, the Value Added Tax regulations (L.I. 1646)	**Standard VAT rules apply.** However, according to section 14 and Schedule 1 of the VAT Act, is **exempt** from VAT the supply of machinery, apparatus, appliances and part thereof designed for use in mining as specified in the mining list.	According to section 29 of the mining law, the holder of a mineral right is **exempt** from payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations.	**Standard VAT rules apply.** However, according to section 14 and Schedule 1 of the VAT Act, is **exempt** from VAT the supply of machinery, apparatus, appliances and part thereof designed for use in mining as specified in the mining list.	According to section 29 of the mining law, the holder of a mineral right is **exempt** from payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations.	**Standard VAT rules apply.** However, according to section 14 and Schedule 1 of the VAT Act, is **exempt** from VAT the supply of machinery, apparatus, appliances and part thereof designed for use in mining as specified in the mining list.	According to section 29 of the mining law, the holder of a mineral right is **exempt** from payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations.	**YES**. section 14 and Schedule 1 of the VAT Act make reference to a mining list of goods exempt from VAT.	**NO**.	According to section 25 of the VAT Act, where the amount of input tax which is deductible exceeds the amount of output tax due in respect of the accounting period, the excess amount will be credited by the Commissioner to the taxable person; except that in the case of **exports** the Commissioner may refund the excess credit to the taxable person where his exports exceed 70% of the total supplies within the accounting period. Other exporters will be credited with the excess, unless they remain in a credit situation for three consecutive months, in which case they will also be entitled to a refund on submission of a refund claim.	According to section 14 and Schedule 1 of the VAT Act, is **exempt** from VAT the supply of crude oil and hydrocarbon products (i.e., to say, petrol, diesel, liquefied petroleum gas, kerosene and residual fuel oil).	According to section 24 of the VAT Act, no input tax deduction can be taken after the expiration of a period of three years from the date the deduction accrued.
Nigeria	The Nigerian Minerals and Mining Act, 2007 Value Added Tax Act, 1993 amended by the Value Added Tax (Amendment) Act, 2007	**Standard VAT rules apply.**	According to section 25 of the mining law, all operators in the mining industry are **exempt** from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations.	**Standard VAT rules apply.**	According to section 25 of the mining law, all operators in the mining industry are **exempt** from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations.	**Standard VAT rules apply.**	According to section 25 of the mining law, all operators in the mining industry are **exempt** from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations.	**NO**.	**NO**.	According to section 16 of the VAT act, a taxable person is **entitled to a refund** if the input tax exceeds the output tax.	**Standard VAT rules apply.**	The Tax Code does not seem to provide a statute of limitation of the input tax deduction.
South Africa	Mineral and Petroleum Resources Royalty Act, 2008 Mineral and Petroleum Resources Development Act, 2002 Value Added Tax	**Standard VAT rules apply.**	**Standard rules apply.**	**Standard VAT rules apply.**	**Standard rules apply.**	**Standard VAT rules apply.**	**Standard rules apply.**	**NO.**	**NO.**	According to section 44 of the VAT law, any amount of tax that has not been set off against unpaid tax is **refunded** to the vendor by the Commissioner.	According to section 11 of the VAT law, goods consisting of petroleum oil and subject to the fuel levy are **zero-rated**.	The Tax Code does not seem to provide a statute of limitation of the input tax deduction.

	Act, 1991 (Act 89 of 1991)											
Tanzania	The Mining Act, 2010 Value Added Tax Act, 2006	**Standard VAT rules apply.** According to section 11 and to the Third Schedule of the VAT Act, is **relieved** from VAT the importation by or supply to a registered licensed drilling, mining, exploration or prospecting company of equipment to be used solely for drilling, mining, exploration or prospecting activities.	**Standard rules apply.**	**Standard VAT rules apply.** According to section 11 and to the Third Schedule of the VAT Act, is **relieved** from VAT the importation by or supply to a registered licensed drilling, mining, exploration or prospecting company of equipment to be used solely for drilling, mining, exploration or prospecting activities.	**Standard rules apply.**	**Standard VAT rules apply.** According to section 11 of the VAT Act and to the Third Schedule of the VAT Act, is **relieved** from VAT the importation by or supply to a registered licensed drilling, mining, exploration or prospecting company of equipment to be used solely for drilling, mining, exploration or prospecting activities.	**Standard rules apply.**	**NO**.	**NO**.	According to section 17 of the VAT Act, where a taxable person submits returns which would regularly result in excess credits, he may apply to the Commissioner for refunds to be made on a monthly basis.	According to section 10 and the Second Schedule of the VAT Act, are **exempt** from VAT the petroleum products (aviation spirit, spirit type jet fuel and kerosene type Jet fuel, LPG gas and LPG cylinders, Petrol, diesel, kerosene, heavy furnace oil, industrial diesel oil and AVGAS).	According to section 16 of the VAT Act, input tax may not be deducted or credited after a period of one year from the date of the relevant tax invoice or other evidence. Further to section 17, where, in respect of a particular prescribed accounting period, a taxable person's allowable credits exceed the tax on supplies he has made for the period, the Commissioner will, within thirty days remit to him the amount to which he stands in credit. However, any repayment claim lodged covering the period beyond three years from the date of its lodgements will not be remitted.