DENTONS

Madagascar's New Mining Code

Supporting Local and Global Sustainable Development

Grow | Protect | Operate | Finance

May 2024

In an attempt to attract foreign investment, streamline regulatory processes and ensure sustainable development in its promising mining industry, Madagascar has enacted its New Mining Code ('**New Code**'). Madagascar is rich in mineral resources crucial in supporting the green transition like cobalt and graphite and the New Code represents a foundational step in creating a conducive environment for mining activities and investment.

In supporting the green transition, the New Code also reflects a commitment to promoting responsible and sustainable mining practices while attracting investment and fostering economic growth.

Market for Malagasy Minerals

Graphite and lithium are required for greener energy technologies and the demand for these commodities is projected to increase by nearly 500% in coming years. Madagascar is particularly well positioned to assist in satisfying this demand due to its deposits of graphite and cobalt.

Illustrating the growth in demand, graphite's production in Madagascar has grown from 12 582 tonnes to 53 400 tonnes over four years as the role of the mineral has developed from an industrial mineral used for refractory products in steel manufacturing to being used in lithium-ion rechargeable batteries.

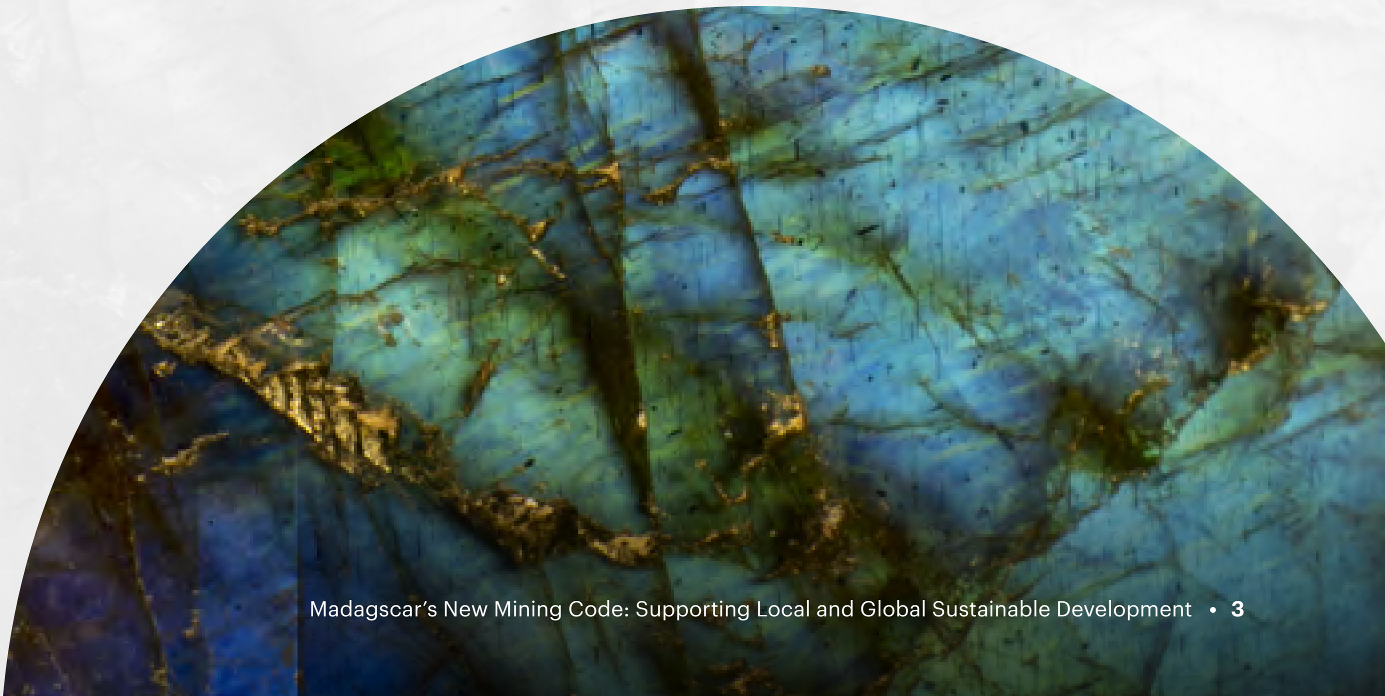
In addition to graphite, Madagascar is home to 120 000 tonnes of cobalt reserves which has attracted the country's largest foreign direct investment opportunity. For 2023, Madagascar was the world's eighth largest producer of cobalt and is second only to the Democratic Republic of Congo ('**DRC**') on the African continent in terms of production. Cobalt is essential to the production and durability of Lithium-ion batteries.

Content of the Act

As interest in cobalt and graphite continues to grow, so has interest in ensuring that these commodities are ethically sourced, minimising harm to the people who mine the minerals and the environment from which the minerals are removed. Increasingly, end-users and retailers are demanding that key inputs into their supply chains be sourced ethically.

The overhaul of Madagascar's Mining Code seeks to not only ensure that key extractive commodities are sourced ethically, but also endeavours to achieve mutually advantageous solutions. As such, the New Code is anchored on the following:

- strengthening the role of the State and Decentralised Territorial Communities ('**CTDs**') in decentralised sector governance;
- the establishment of a fair mining tax regime;
- securing mining rights and investments;
- harmonising mining projects and local communities;
- reformulating the link between mining activities and environmental, social and governance standards;
- establishing a Mining Fund for Social and Community Investment; and
- restructuring the institutional framework.



Mining Administration

Madagascar's mining permits, and the granting thereof, are all managed by the Madagascar Mining Cadastre Office or Bureau du Cadastre Minier Madagascar ('**BCMM**'). This is a Public Industrial and Commercial Establishment under the technical supervision of the Ministry of Mines. The New Code has moved towards strengthening institutional governance to improve efficiency and credibility by redefining the mandate and structure of the National Mines Committee (**'CNM**'). The CNM has been granted oversight powers on activities of large mines and supports the BCMM by conducting periodic assessments of the local market value of mineral commodities.

The BCMM manages all mining permits, which in terms of the New Code covers Research Permits ('**PR**'), Exploitation Permits ('**PE**'), and Permits Reserved for Artisanal Exploiters ('**PREA**'). A PR confers on its holder the exclusive right to carry out prospecting and research, a PE confers on its holder the exclusive right to undertake exploitation, prospecting and research with a defined perimeter whereas a PREA gives its holder the right to undertake prospecting, research and exploitation with a defined perimeter.

Any natural person of Malagasy nationality and any legal entity under Malagasy law, may acquire and hold mining permits, approvals and authorisations and these are awarded on a first come, first served basis. Legal entities, as an extended requirement for eligibility, must have at least one representative resident in Madagascar. Additionally, the New Code, read together with the Investment Law ('**Law 2007-036**'), does allow foreign companies to hold mining rights.

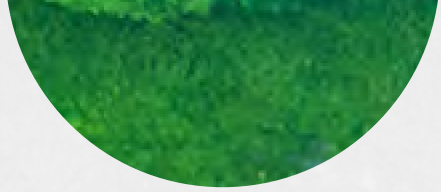
When applying for a mining permit, the applicant must attach a Work Program accompanied by a Financing Plan and the applicable fees. The Work Program and the Financing Plan will inform the BCMM of the technical and financial capabilities of the applicant.

Local Community Involvement

To include local communities, the New Code establishes the Mining Fund for Social and Community Investment ('**the Fund**'). The New Code also requires permit holders to formulate a Corporate Social Responsibility Plan ('**PRSE**'), the New Code also calls for greater community engagement and the protection of the rights of the local communities. The purpose of the Fund is to ensure that sustainable development programs that benefit local communities are advanced through the proceeds from mining activities. A total of 3% of the value of the direct investment amount will be the capital used to set up the Fund. In addition, the Fund is financed by contributions paid by applicants seeking mining permits, a share of mining royalties, and a share from the proceeds of mining transactions.

For increased transparency, the Fund is managed through a partnership between local communities and decentralised authorities. This is to guarantee that proceeds from the Fund are channelled towards initiatives such as education, healthcare and infrastructure or any other programs designed to promote community development.

The PRSE is a tripartite agreement between the host community, the CTD authorities and the mining permit holder and affords local communities an opportunity to meaningfully chart thresholds. It places obligations on mining permit holders to make social investments, build basic infrastructure relating to health, education, transport, communication, energy, irrigation and promote local content.



Royalties and Taxes

The New Code defines 'Mining Royalty' as a "share of special duties and taxes on mining products levied for the benefit of the State and its sectoral divisions due to the value of sales of mining, quarrying or fossil products", and, ultimately, outlines that all proceeds from Madagascar's mineral deposits will be utilised to promote the development of the Malagasy economy.

To that end, the royalty rate has been revised upwards from 2% to 5% with a reduction of 30% applicable to the 5% royalty rate if the products are locally transformed. The composition of the 5% royalty rate comprises a 2% mining rebate for the benefit of the CTDs and a 3% mining royalty rate for the benefit of the State.

Notably, the term 'transformed' is not defined and its application is not explicitly outlined in the New Code, however, it can be inferred that the 30% reduction of the 5% royalty rate will be applicable to mining entities that advance the local beneficiation of the mineral commodities prior to the export of said commodities.

Environmental Protection

The New Code requires holders of permits, authorisations and artisanal mining companies to comply with rules aimed at environmental protection. There are several laws that govern environmental protection in Madagascar but what is key to note is that article 253 of the New Code echoes provisions contained in the Malagasy Environment Charter ('**MEC**'). The MEC stipulates that the investment projects must undergo an Environmental Impact Assessment ('**EIA**'). The EIA is a study that consists of the scientific and preliminary analyses of the potential foreseeable impacts of a given activity on the environment, and the examination of the acceptability of their level and of the mitigation measures to ensure the integrity of the environment within the limits of available technologies at an economically acceptable cost.

Beyond the EIA, the New Code governs the entire lifecycle of a mine. A Pre-feasibility Study Report is required when applying for mining permits whereas an updated Feasibility Study Report must be submitted when renewing the permits. When concluding operations, the New Code includes provisions for the responsible closure and rehabilitation of mining sites to ensure that post-mining landscapes are restored to their previous states.

Investment Protection

Regarding investors and the protection of their investments, the New Code contains provisions relating to a '**Stability Guarantee**' for investors. Thereby, the Malagasy government attempts to allay investor fears of any reneging of agreements by guaranteeing returns on their investments through guaranteed maintenance of the legal and regulatory regimes in force at the time of request and upon the completion of the necessary formalities. A Stability Guarantee is granted to any holder of a mining permit and is valid for a renewable period of up to 5 years. Mining permit holders have the option to request for more favourable measures that would have come about after the date of exercising the stability option.

While there seems to be a concerted effort by the Malagasy government to protect investor interests, especially investments that are made in the mining sector, there is a caveat accompanying the Stability Guarantee. Mining permit holders will not be allowed to derive benefits from the Stability Guarantee if they fail to fulfil any of the obligations or terms outlined in its Mining Specifications. Also, any renewals of the Stability Guarantee beyond the 5-year threshold will carry terms and conditions set out by regulation depending on the type of mining permit.

Concluding Remarks

Madagascar's sustainable resources hold great promise, with ample opportunities for growth and development in the country's mining sector. The New Code promotes Madagascar as a mining friendly jurisdiction that is open and welcoming of foreign business and seeks to balance the implementation of policies that attract foreign capital and expertise against the safeguarding of the interests of local communities. While several progressive measures have been introduced, this is not without its challenges. The effective implementation of the Code will require both robust monitoring and enforcement mechanisms to ensure compliance and protect investors.

As such, the need for proper management and sound legal advice has never been greater. It is imperative that investors are equipped with the necessary support to navigate the provisions of the New Code to safe-guard their interests.

Key Contacts

Brandon Irsigler
Partner
South Africa
D +27 81 441 3457
brandon.irsigler@dentons.com

Davin Olen
Associate
South Africa
D +27 11 326 6257
davin.olen@dentons.com

Mthabisi Khumalo
Candidate Attorney
South Africa
D +27 72 022 5163
mthabisi.khumalo@dentons.com

ABOUT DENTONS

Across over 80 countries, Dentons helps you grow, protect, operate and finance your organization by providing uniquely global and deeply local legal solutions. Polycentric, purpose-driven and committed to inclusion, diversity, equity and sustainability, we focus on what matters most to you.

www.dentons.com

CSBrand-142299-Brochure Mining Opportunities - Madagascar_05 — 10/05/2024