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# GRANTING MINERAL RIGHTS

# A GOOD PRACTICE NOTE

# WORLD BANK PROJECT – EXTRACTIVE INDUSTRIES SOURCE BOOK PROGRAM

FOR THE UNIVERSITY OF DUNDEE

FINAL REPORT

DECEMBER 2010

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# 1. Introduction

Most countries in the developing world have established regulatory regimes which govern the minerals and mining sector. The regimes may be inferred from their constitutions, number of laws affecting the industry, specific mining legislation, model mineral development agreements and ad hoc agreements[1]. In almost all instances, the mineral resources are either directly owned by the State or held in trust by the respective Government on behalf of its citizens. It should be borne in mind that mineral law or the mineral regulatory system is not merely a legal technicality but an expression of the host country's policy towards the exploration and exploitation of the country's mineral wealth. Therefore, the mining and mineral legal framework exists to guide both the host Government's and the investor's actions in relation to mineral development. The regulatory systems set out the boundaries of acceptable conduct in relation to exploration and exploitation.

It should be noted that mining legal frameworks are guided by the legal systems (civil law, Islamic law,and common law or hybrid legal systems) of those countries. In this regard, it is also incumbent upon the investor to know the legal system within which it is operating and not impose legal principles which are foreign to the host country's legal system.

The process for the allocation of mineral rights is based on either a non-competitive (free-entry system) or a competitive (tender) process. In some countries the mining legislation makes provision for both non-competitive and a competitive bidding process, but these processes are not used simultaneously. Whether a non-competitive or competitive system is used often depends on the following factors:

- Where less geological information is available to the government, the greater the risk and therefore the obvious use of the non-competitive system; and
- Where more assured information is available, the lower the risk and therefore the easier for bidders to make informed decisions and hence be amenable to an auction system.

[1] Otto, J. M., 2002, Mineral Policy, legislation and regulation

Both the non-competitive and competitive mineral rights allocations should not be treated as a methodology for allocation but as processes that govern the allocation of mineral rights. The next section identifies some of the leading practices in respect of allocation principles of law and policy.

In today's regulatory environment, the success or attractiveness of a regulatory framework should not only be judged based on the extent to which investors are satisfied with it but also on the degree to which the host Government and its citizens derive tangible benefits from the investment. It should be emphasised that, in a non-competitive or competitive process only the application process should differ, not the regulatory framework per se. In other words, the difference should only be on the route followed to acquire the mineral right. The eligibility criteria and the terms and conditions must apply similarly. The law must apply equally to all irrespective of whether one investor acquired its mineral rights through a competitive bid process while the other acquired it through a non-competitive process.

## 2. Principlesgoverning allocation of rights

The following principles apply to both the competitive and non-competitive mineral right application/administrative processes. They are:

**2.1.** ***Equality before the law***– this refers to a system which is non-discriminatory, that is, the mineral rights administrative/regulatory framework applies equally to all applicants without fear or favour, whether local or foreign. This should contain:

2.1.1. *First-come-first-served* system- applications in a non-competitive grant of mineral rights isto be treated on first-come-first-served basis. However, no applicant should be allowed to lodge an incomplete application so as to maintain its position in the queue. This means that the *first-come-first-served* principle only applies to compliant applications which have been lodged and accepted;

2.1.2. *The competitive bidding system* - this is an alternative regulatory process for the allocation and acquisition of mineral rights. This process may be employed in instances where:

2.1.2.1. *Extinction/lapsing of mineral right* - Application may potentially be lodged in cases where mineral rights have expired, have been revoked or relinquished;

2.1.2.2. *New discoveries* - A new mineral deposit or areas of potential mineral wealth which has been discovered by the State;

2.1.2.3. *Existence of strategic mineral* – where the presence of mineral classified by the host country exists

2.1.2.4. *Privatisation* – Where the state wishes to divest from active participation in extractive activities;

2.1.3. *Predefined eligibility criteria* - acceptance and grantingmineral rights must be dependent on explicit, simplified and detailed requirements and procedures. This criteria should amongst other things include technical and financial ability, environmental management and protection, health and safety, etc.;

2.1.4. *Compliance requirements and titleholder obligation* – explicit identification of all material terms and conditions must be specified and complied with in order for a title holder tomaintain its titles. This should, amongst others, include compliance with work obligation, environmental management, contribution to socio-economic development, etc.;

2.1.5. *Public disclosure of application* – all applicants should be required by law to consult with interested and affected parties, specially landowners and hosting communities;

2.1.6. *Written notification* - All legally binding decisions, instructions and directives should be in writing and subject to written reason for decision;

2.1.7. *Suspension or cancellation of mineral rights* – in such cases the title holder must be informed with specific reference to conditions under which the rights may be suspended or cancelled, the procedures to be followed before suspension or cancellation, and description of the legal recourse available to the titleholder in line with administrative justice principles. For example failure to comply with specific provisions of the law, the terms and conditions of the model agreement, etc.;

2.1.8. *Timeframe for actions* – this should be clearly specified in the law. Hitherto, all actionsin terms of the law must be taken by the regulatory authority and the applicant, within the prescribed timeframes. Also, consequences for not taking the required actions within the prescribed timeframe should be indicated in the law;

2.1.9. *Standard terms and conditions* – terms and conditions of mineral rights should be standardised as far as possible and included in the legislation or in subordinate legislation in accordance with the existing laws of the host country. These terms and conditions which must be stipulated in legislation should address the following:

2.1.9.1. *Duration of the mineral rights* holding;

2.1.9.2. *Mortgagebility of title* - the ability or inability of a title holder to use its mineral rights as collateral for bank loans or mortgages;

2.1.9.3. *Transferability of title* - Transfer rights with or without prior state authorization, whereby in the earlier case it is argued by host governments that this authorization requirement is to ensure that the transferee is a fit and proper person to hold the mineral rights. In this case, the transferee is treated like any other new applicant for mineral rights – the transferee is acquiring a mineral right which it did not have. This is to promote the principle of equality before the law;

2.1.9.4. *Transparent fiscal and royalty regime* - If allowed in terms of the law, all fiscal terms should be contained either in the relevant mining legislation or the host country fiscal legislation; (for example in terms of section 77 of the South African Constitution,legislation which appropriates money is classified as a money bill and falls within the purview of the Minister of Finance. The Constitution further stipulates that money bills may not deal with any other matters except those stipulated in the Constitution. Therefore, if the mining legislation purports to include provisions dealing with fiscal terms, it would be classified as a money bill and as such it would not pass constitutional muster). A fiscal regime that is not open to negotiation also improves transparency and good governance;

2.1.9.5. *Discouragement of hoarding*–this can be achieved by encouraging active use of mineral rights through:

2.1.9.5.1. Escalating rental fees (prospecting or exploration fees) per unit area, for unusedareas;

2.1.9.5.2. Enforcing a mandatory relinquishment criteria to decrease passive speculation practices; and/or

2.1.9.5.3. Enforcing a minimum investment requirement and minimum work obligation. These obligations give allowance for the applicant to determine the minimum investment and work obligation in line with the exploration and mining plans and the period for which the mineral right is sought. Therefore, enforcing these obligations will ensure that the applicant will not have an excuse if the minimum investment and work obligations are not complied with. The adoption of these principles should be guided by capital and human resource availability within the host country's regulatory authority; and

**2.2.** ***Stability and certainty*** - Within the context of the established legal framework and in order to create stability and certainty in the regulatory system,the allocation processshould be guided by the following*:*

2.2.1. *Difference in allocation procedures* - It is important to note that the difference between the "free-entry-system" and the "competitive bidding system" lies in process for the allocation of mineral rights and not in the eligibility criteria and the contents of the mineral rights. In this regard, the following should be taken into consideration:

2.2.1.1. *No parallel regulatory system* - This means that upon allocation of the mineral rights to the winning bidder, the provisions of the mineral law must apply equally to all titleholders. In this regard, the law should not allow for a differentiated compliance regime.

2.2.1.2. *Similar eligibility criteria* – in line with the principle of equality before the law, the eligibility criteria must be similar to those required in a "free-entry system"

2.2.1.3. *Application of the law* – save for the process followed for acquisition of the mineral rights, mining legislation must apply equally to both the participants in the non-competitive process and the competitive process. Therefore, all the legal principles enumerated above which are applicable to the non-competitive must also apply to the competitive process.

2.2.1.4. *Details of bidding process* – the law should set out the details of the bidding process.

## *2.3. Good governance*

2.3.1. It is common knowledge that the concept of the rule of law is fundamental for the effective and efficient governance of the minerals and mining sector. This implies the concept of "the rule of law" should apply to both the host Government and the investor. The concept of good governance includes the adherence to the principles of transparency;

2.3.2. *Administrative justice and procedural fairness* –– applicants should be given the opportunity to address any short coming in their application prior to decisions being taken on;

2.3.3. *Consistency in the application of the law* – laws should be applied consistently so as to create a predictable regulatory environment. This would remove the perception of bias and discrimination in the administration of the regulatory framework;

2.3.4. *Clarity of administrative procedures* – administrative procedures in terms of the law should be clear and unambiguous. Applicants must be made aware of the prescribed administrative procedures (transparent and non-discretionary procedures);

2.3.5. *Guided discretionary powers* - the concept of "no subjectivity in decision making" is 'much easier said than done'. Therefore, the regulatory system should guarantee equal terms and conditions for all applicants without discrimination;

2.3.6. *Security of Tenure*- this must be subject to titleholder compliance with its statutory and contractual obligations. Security of tenure should also provide for the following:

2.3.6.1. *Discoverer's rights* – the discoverer should have exclusive right to any mineral (covered in the exploration right) discovered in the license area and be further eligible to apply for and be granted an exploitation right;

2.3.6.2. *Exclusivity of exploration/prospecting and exploitation titles*- exploration and exploitation titles should be exclusive to a single title holder in any given area. However, if mineral for which the title holder is exploiting isnot contained within the existing title, the title holder must declare such mineral so that it is lawfully included in such title;

2.3.6.3. *Duration of exploration and exploitation titles* - It is important that the investor is given sufficient time to explore and exploit the mineral resources concerned, but also that the investor is precluded from hoarding mineral resources. In this regard an exploration and exploitation title should be given a sufficiently long period and be allowed to renew titles. It is not uncommon to have exploration rights granted for five years and renewed for further period of three years, whilst mining titles are granted for between 25 to 50 years and renewable once or several times, subject to compliance with investor's statutory and contractual obligations;

2.3.6.4. *Renewal of mineral rights* – subject to compliance with the terms of the exploration and mining rights, the titleholder should be entitled to apply for and be granted renewal of its mineral rights;

2.3.7. *Compliance with the law* - both the host Government and the investor must give effect to and comply with the regulatory framework as prescribed in the law. This includes reporting of information and activities;

2.3.8. *In the context of rule of law*, all applicants and titleholders should be required to comply and give effect to the legislation of the host country by:

2.3.8.1. *Respecting the law* - titleholders must respect the regulatory system and institutional integrity of the host country;

2.3.8.2. *Complying with applicable legislation* - applicants and titleholders must, once titles have been granted, comply with the

regulatory requirements and give effect to its statutory and contractual obligation;

2.3.8.3. *Good faith and honesty* – in the spirit of good corporate governance, titleholders should deal with the host government with integrity and honesty.

2.3.9. *Access to courts* – titleholders should be guarantee access to administrative and judicial review of any decision taken by a regulatory authority. Investors must demonstrate their confidence in the host country's dispute resolution mechanisms in the same way that they show confidence in their own judiciary. Therefore, unless local laws allow otherwise, investors should only have access to domestic dispute resolution mechanisms. A provision in any mining legislation for international dispute resolution should be seen as a vote of no confidence in the host country judiciary and not as a mechanism to guarantee security of tenure for the investor.

## *2.4. Socialand Environmental protection*

It is now common practice that host countries require the compilation of Environmental and Social Impact Assessments. Having regard to the environmental and social importance of these instruments, it would be prudent to require their submission and adjudication prior to the award of the mineral right. This is the basis of society's licence to permit exploration and mining activities.

2.4.1. *Good labour practice* –this requires theimplementation and observance of health and safety Acts with subsidiary legislation. This would also include the observance of the necessary International Labour Organisation's provisions.

**2.5. *Equitable distribution of benefits***- fiscal terms that serve both the interests of the investor and that of the host country equitably; employment equity and charters that ensure benefits filter to society in general.

# Good Practice Note/Score-Card

## Table 1: Suggested best practice for guiding the mineral rights granting system

| ***Description*** | ***Recommended practice*** |
|---|---|
| State Agency | Licensing and registration authorities must be clearly stated (Ministry in charge of Minerals) |
| Mode of granting licences | First-come, first-served and/or auctioning bases |
| Eligibility criteria | Must be specified in each country's mineral legislation. Investors must familiarise themselves with these criteria and Licensing authority must ensure strict compliance |
| Consultation with affected parties | Obligatory |
| Notification of action regards application/mineral rights status | Decisions, instructions and directives affecting applications or obtained rights must be in writing addressed to the titleholder |
| Compliance to timeframes for actions | Obligatory |
| Mineral fiscal terms and conditions | Fiscal terms and conditions which serve the interests of both the investor and host country (citizens) equitably must be instituted and clearly stipulated in legislation |
| Exploration Permit/ Prospecting licence | Yes |
| Exploration fee | Issuing/ Renewal/Transfer/Assignment/ annual mineral right fees are to stipulated |
| Maximum size | Should be specified |
| Renewal | Yes, which is conditional on compliance with specified terms and requirements of the licence |
| Relinquish areas | 50% of area (should be mandatory in order to decrease speculative and passive practices) |
| Minimum investment spending | Prescribed obligatory minimum expenditure |
| Work to program | Yes (obligatory) |
| Environmental plan | Yes (obligatory) |
| Social requirement | Yes (obligatory) |

| | |
|---|---|
| Reporting requirement | Yes (obligatory) |
| Rights of holder | Exclusive/ Conversion/ Extension/rights to erect temporary buildings |
| Other information | Right is transferable, assignable and tradable after the prior written approval of the Minister/ can be used as a pledge/ liable to mortgage/ Sustainable development /Government participation |
| Mining Concession/ Lease | Yes |
| Mining fee | Application/Issuing/ Renewal/ Modification/ Transfer/ Assignment/Annual mineral right fees are prescribed |
| Maximum size | Should be specified |
| Duration (years) | 25 – 50/ according to life of deposit |
| Renewal | Yes, according to the estimated life of deposit reserves but it is conditional on compliance with specified terms and requirements of the licence |
| Minimum spending | Prescribed fixed annual obligatory investment |
| Work to program | Yes (obligatory) |
| Environmental plan | Yes (obligatory) |
| Social requirement | Yes (obligatory) |
| Reporting requirement | Yes (obligatory) |
| Rights of holder | Exclusive/Large-scale exploitation/ rights of occupancy of land/market and transform exploited minerals/erect necessary infrastructures/Extension |
| Other information | Right is transferable, assignable, tradable after prior written consent of the granting authority/leasable or used as collateral or can be mortgaged/ Sustainable development/ Government interest is allowable |

Table 1 above seeks to highlight best practice principles which can serve to guide the overall mineral rights administrative system (granting of mineral rights) in developing countries. The information populated in the table is drawn from lessons realised from the comparative analysis of the mineral rights administrative systems of the case studies that were assessed.

## 3. Institutional Framework for Implementation

A well-resourced regulatory institution is the foundation for an effective and efficient regulatory environment. In this regard, the institution should adhere to the following principles:

**3.1.** *Well-defined institutional responsibility* - Regulatory clarity and certainty – single sector regulatory authority (lead agent regulates the sector), which is supported by other regulatory bodies i.e. environmental management. Avoid duplication – one-stop shop approach, single regulatory authority. Other Government institutions with regulatory powers should exercise their powers in conjunction with or in support for the leading agency.

**3.2.** *Separation of responsibilities* - Separation between the licensing authority (management system for accessing and monitoring sector performance) and title registration authority (public register of mineral rights). In order to avoid interference with the registration of titles process and unnecessary operational interaction, the registration authority should be hierarchically independent from the licensing authority. This promotes transparency regarding the licensing process and guarantees security of tenure of registered titles. For example, in South Africa the mineral rights registrationfunction of the Ministry of Mineral Resources is handled by the Mining Titles Office, which is independent from the licensing functions (which is handled by the Mineral Regulation and Administration office). Both offices fall within the same Ministry, but maintain operational autonomy.

**3.3.** *Mineral Resources Management* – as custodian of a nation's mineral resources, the state needs to implement an effective mineral resources management system that embodies the whole mineral value chain, both horizontally and vertically. This will also include elements of national planning, security of supply and the role of the state in mining amongst others. The application of good and pragmatic management principles will lead to maximisation of the value of a nation's mineral endowment. Down the line, the adoption of good and effective planning will assist in the implementation of both the non-competitive and competitive systems. For example, it is only good planning that will ensure that once the "tendering process" is open, the respective Government officials will be ready and

prepared to receive the potentially sizable number of applications that may be received through this process. A failure to plan, may lead to disaster. Planning will also ensure that whilst some officials are dealing with the applications received through the tendering process, the normal non-competitive applications should not be disadvantaged.

**3.4.** *Measurement system* – measuring elements of targets is useful to determine whether the nation achieves its overall objectives of mineral resources development. Scorecards, charters and any other tools would show gaps where appropriate actions are necessary for adjustment in processes to achieve the desired outcomes.

**3.5.** *Computerised cadastre system* – both the non-competitive and competitive process of allocation of mineral rights should, in addition to a paper base system, be supported by a computerised cadastre system.

## 4. Conclusion

An effective programme for the allocation of mineral rights, as evidenced by the case studies, is reflected in the flow chart in Figure 1 below (Framework for the allocation of mining rights). This flow chart highlights the major components for allocating mineral rights. It commences with the granting of mineral rights by the host government in terms of their specific legal regime. This is done within the chosen process (be it competitive or non-competitive) with due regard to certain immutable principles. This process is a dynamic one, subject to continuous review and assessment which will influence the granting of the mineral rights.

Regardless of whether a competitive or non-competitive system is adopted, certain immutable principles would need to be adhered to for a country to obtain the maximum benefit from its mineral wealth. These immutable principles reflect a country's attempt to effectively exercise sovereignty over its natural mineral wealth. In so doing, the rule of law is paramount and impacts both the host countries and investors.

It must be emphasised that the mineral legal regimes reflect the government's mineral policy on the exploitation of the country's mineral resources, and with social and environmental protection, health and safety of employees becoming more prevalent in these regimes; companies would do well to familiarise themselves and comply therewith. Furthermore, the attempts by countries to ensure that the principles are certain and conducive to investment in their mining industries must be matched by mining companies who should conduct their businesses to ensure operations continue with the blessing of the government and communities.

## Summary of Mineral rights administration process

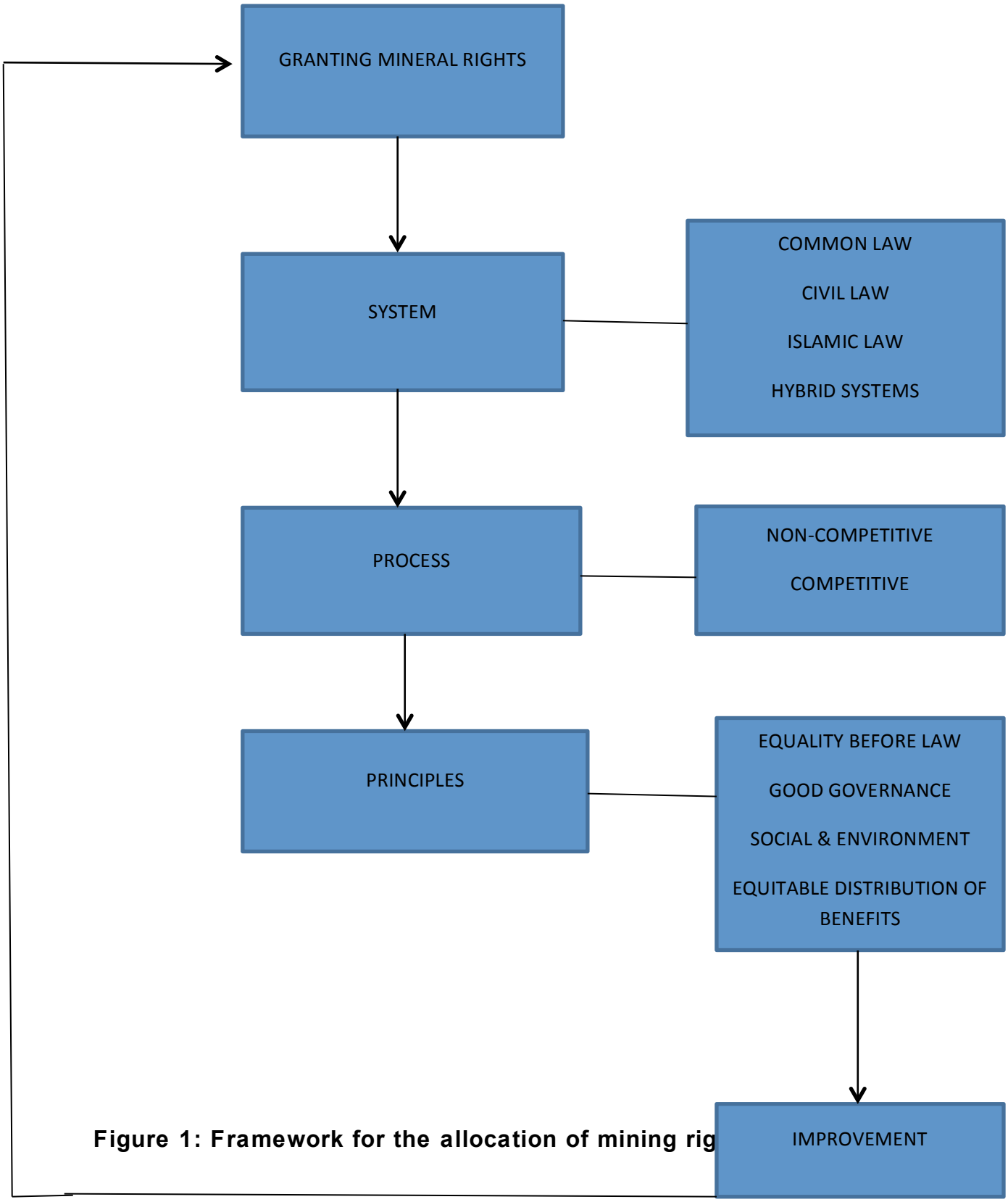


**Figure 1: Framework for the allocation of mining rig**

## 5. Case studies

The report is a description of the mineral rights licensing regimes of a selected nine developing countries. The selection of countries was based on those countries that the World Bank has used as case examples as indicated in their report entitled "Mineral Rights Cadastre". The countries are Algeria, Argentina, Madagascar, Chile, Democratic Republic of Congo (DRC), Ghana, Mongolia, Tanzania and Zambia. All these are low income countries as required in the terms of reference. The provisions of the mining codes were compiled based on a template to gather similar information in dealing with pertinent issues and ease of comparison. The table is a combined summary of individual data in the annex.

**Table 2: Typical Mineral Administration Systems in selected low income countries**

| **Mineral Administration Issues** | **Provision range** |
|---|---|
| State agency for administration | Ministry, through appropriate government department or agency |
| Mode of grant of licence | First come first serve/auction (both) |
| Retention licence | No |
| Reconnaissance licence | Yes/No |
| Exploration licence | Yes |
| • Exploration fee | Prescribed |
| • Maximum size (ha) | 1 000 – 2 000 000/negotiable |
| • Duration (months) | 24 – 60/negotiable |
| • Renewal (months) | 24 – 48/negotiable |
| • Relinquish areas | Yes/No |
| • Minimum spending | Yes |

| | |
|---|---|
| • Work to programme | Yes |
| • Environmental plan | Yes |
| • Social requirement | Yes |
| • Reporting requirement | Yes |
| • Rights of holders | Conversion/Registration |
| Mining licence | Yes |
| • Mining fee | Prescribed |
| • Duration (years) | 25 – 40/Negotiable |
| • Renewal (years) | 15 – 30/Negotiable |
| • Minimum spending | Yes/No |
| • Work to programme | Yes |
| • Environmental plan | Yes |
| • Social requirement | Yes |
| • Reporting requirement | Yes |
| • Rights of holder | Exclusive |
| • Other | Transferability/Assignable/Sustainable Development/Development Agreement |

The table and annex show a number of common trends. There is a lead ministry, generally a Ministry of Mines, with an appropriate institution that is responsible for the grant of mineral rights. Such appropriate institutions may be government department (Department of Mines or Geology, Office of Mining Cadastre) or Commission.

Almost all countries have traditionally granted licences using a first come first served basis. Over time many have adopted both the traditional process as well as the auction system, depending upon conditions availing themselves. Algeria uses the auction process where a deposit has been surveyed with public funds or the exploitation area has been released to government. In this case the Mining Patrimony National Agency auctions such deposits to interested investors. In Mongolia, auctioning is used where exploration was undertaken by the government or where the licence holder has forfeited the rights. In some cases the state reserves the right to participate up to 50 percent in such ventures. In other cases where government deems the mineral deposit is of strategic importance, the state may participate up to 34 percent in the venture. In Zambia, auctioning is undertaken in the case of identified areas of mineral resources. The Mining Advisory Committee evaluates the bids in accordance to the requirements and advises the Minister on the successful bid. In the case of Tanzania, government may consider and designate any vacant area to be in the public interest and invite tenders for prospecting or mining. The successful bidder is chosen on the proposal likely to promote expeditious and beneficial development of the mineral resources of the area. In the DRC, auctioning is undertaken whena deposit has been studied, documented or worked on by the State or its entities and which is considered as an asset with considerable known value. Bids are invited on prescribed conditions and considered by an Inter-ministerial Commission. In all cases where competitive bidding or auctioning is applied, once the right is granted, compliance with the requirements of the provisions of the regulations comes into effect. The auctioning system applies in the cases where government had acquired geological information through its investment, through surrender of rights by title holders or by privatisation. The continuous use of this system will depend on the occurrence of these factors, particularly the increased investments of public funds in risky grassroots (initial exploration) activities to acquire geological knowledge.

The retention licence does not seem to be common among these selected countries. Only Tanzania has a retention licence, which has a validity of 5 years, renewable once for another equal period. The holder can apply for a special mining licence when he deems fit to proceed with mining operations. The lack of popularity of this

licence may be a reflection of increasing demand for mineral commodities and a deliberate action to reduce speculative tendencies.

The reconnaissance licence is provided for only in two countries, namely Ghana and Zambia. In Ghana, a reconnaissance licence is issued for a period of 12 months and may be renewed for further 12-months periods. In Zambia, a reconnaissance licence is issued for ninety days and is not renewable. Again, the lack of interest in this licence may be a reflection of the fact that basic knowledge of mineralised areas is strong enough to warrant the next phase as demonstrated by the award of prospecting licences over large areas.

Prospecting licences are issued for a period ranging between 24 and 60 months, renewable for 28 to 48 months. Even though the licences are issued over large areas, they are subject to stringent rules which discourage speculation. These rules include relinquishing at renewal, predetermined minimum expenditure on licence areas, demonstration of work according to plans, adhering to environmental and social plans, and periodic reports on the results of prospecting. In return, the title holder has the right to apply for and be granted an exploitation licence subject to satisfactorily meeting the relevant legal requirements.

A mining licence is a key permit for exploitation and is issued for periods varying between 25 and 40 years, renewable for 15 to 30 years. The periods can be negotiated depending upon the estimated life of the mine. Three out of the eight countries prescribe minimum spending. In Algeria, there is specified a fixed annual obligatory investment, which may be reviewed in cases of adverse economic conditions. In Madagascar, the minimum spending is prescribed. In Tanzania, the minimum spending on capital investment for a large-scale operation is prescribed at USD 100 million or its equivalent in Tanzanian Shillings. Chile has set a minimum spending of USD 10,000 under Foreign Exchange Regulations and USD 5 million under Foreign Investment Statute.

All countries make strong requirements for work programmes, environmental plans, social issues and reporting progress. In exchange, title holders have exclusive rights to specified minerals in the designated areas. All have the right to transfer and assign the rights with prior approval.