PART I : THE LEGISLATIVE FRAMEWORK
by Roland Brown

The legislation relating to minerals covered by this Survey in most cases has its origin in a period when the countries in question were still under colonial administration.[1] Amendments have of course been made from time to time both before and since the coming of independence, but generally speaking the basic framework of the principal act has remained unchanged. The colonial governments plainly treated prospecting for, and mining of, minerals as a subject of considerable importance which required careful, and in some respects meticulous, regulation by statute. The laws which were enacted naturally reflect certain assumptions about the development of mineral resources which at the time were no doubt taken largely for granted. Looking at this body of legislation as a whole it is possible to identify two such assumptions which appear to have had an important influence in determining the broad scheme of the legislative instruments.

(i) Subject to appropriate controls it was seen as desirable that a colonial territory should, so far as possible, be open for prospecting and mining. Provision was generally made for the preservation of customary rights sanctioned by long user,[2] but subject to that, the legislation does not normally distinguish between the indigenous entrepreneur and the foreign or expatriate operator. Nor does the legislation proceed on the assumption that the foreign or expatriate operator will be a large concern with substantial resources and wide experience of mining. On the contrary the regulatory provisions included in most of the statutes clearly envisage that prospecting and mining may be carried out by individuals or small companies without access to advanced technology and of limited or dubious financial standing.[3]

(ii) The role of the state in the development of mineral resources was seen almost exclusively in regulatory terms. The legislation provides for the government and its officers to exercise control over the activities of others, but does not envisage that the state itself may wish to participate in the exploitation of minerals or to initiate a strategy for their development in terms of its overall planning objectives.

Neither of these two assumptions will necessarily accord with contemporary thinking in developing countries about an appropriate policy for prospecting and mining. In the post-colonial period an "open" policy, even if it were modified to take account of the increasing cost and complexity of mining technology, is unlikely to have much appeal. Most developing countries either directly or indirectly have been influenced in their thinking by the work of the United Nations Permanent Commission On Sovereignty Over Natural Resources which eventually found expression in the now famous General Assembly Resolution 1803 of 1962.[4] The countries whose legislation is covered by this survey do not belong to a single ideological bloc and their governments have widely differing views about the role which the State should play in the economy and about the rights and obligations of the owners of private property. However it would be safe to say that in connection with the exploitation of mineral resources there would be a wide measure of agreement in rejecting a role for the State which was purely regulatory, i.e. a matter of controlling actual or potential abuses in the context of a free competitive system. The desire of the developing countries to play a more active part, to be participants in the development of major projects,is now an established feature of the climate of business and is no longer seen by the mining companies as something likely to threaten the integrity of their investments. Commenting on this situation the Chairman of the Anglo American Corporation, Mr. Harry Oppenheimer, has given some indication of the thinking in his group. In the course of his statement to shareholders at the 1974 Annual General Meeting he said "No government likes its basic industries to be entirely foreign owned and yet in many developing countries individual members of the public either do not have the resources to invest in industry or, for ideological reasons are prevented from doing so. The only alternative in such cases to full foreign ownership is for government to take a direct interest. In these circumstances we willingly accept a partnership between the government as owners of the mineral rights and private companies that can provide the necessary financial resources and technical knowhow."

Most developing countries which have inherited legislation on mining from the Colonial period are conscious of the need, at the appropriate time to make substantial changes. However there would appear to be considerable uncertainty about the direction which such changes should take. It may therefore be useful to examine some of the salient features of the existing legislation in the context of changed or changing assumptions about the exploitation of natural resources.

I Title to Minerals in the Ground

All the legislative instruments covered by the Survey assert in one form or another the basic principle that the State has title to minerals in the ground.[5] The title asserted on behalf of the state takes effect irrespective of the existence of private rights over the surface whether freehold, leasehold or customary.

It should, however, be noted that this principle was not established as one of universal application until the latter part of the Colonial period. In the earlier period particularly in Southern Africa the Chartered Companies obtained valuable concessions from traditional rulers sometimes in circumstances which must now appear dubious. These concessions gave them title to minerals in the ground and enabled them to licence others to prospect for and exploit deposits in return for the payment of royalties.[6]

In some cases these rights still continue in favour of the successors in title of the original grantee and in certain of the enactments covered by this Survey it has been necessary to qualify the title of the State by a saving provision in respect of privately owned mineral rights subsisting at the time the legislation was enacted.[7] It should however be noted that where this situation still exists it is open to the State to levy taxes on these rights and in this connection attention is drawn to the Mineral Rights Tax Act 1972 of Botswana a summary of which is included in the Survey.[8]

Generally speaking privately owned mineral rights may now be regarded as an anachronism, and where they still exist it is reasonable to anticipate that Governments will seek in one way or another to extinguish them. However there may continue to be issues in some countries concerned with the extent to which traditional tribal authorities or regional subdivisions should share in the control over minerals or be entitled to receive in whole or in part royalty payments.

II The Grant of Prospecting and Mining Rights

Although title to minerals in the ground is now usually vested in the State very few of the developing countries have at present either the financial resources or the technical knowledge to conduct large scale prospecting or mining operations. If mineral resources are to be developed prospecting and mining rights must generally be granted to foreign or foreign controlled companies, acting either alone, or in partnership with Government in a joint enterprise.

The various laws covered by this Survey make statutory provision for the grant of such rights. There are many differences in point of detail between one country and another, and basic similarities where they exist are sometimes concealed by arbitrary differences in terminology. However it is possible to discern in most of these statutes the elements of a common scheme which may be taken to reflect the basic requirements of mining practice. Broadly speaking the legislation envisages the grant of rights in three stages.

(i) An initial grant of the right to "prospect" or "explore" for minerals. A wide area may be covered in a grant of this type particularly if the licence is not "exclusive". There may be no statutory limitation on the extent of the area which may be covered by such a grant and no statutory provision for the imposition of minimum work obligations.[9]

(ii) A second grant of prospecting rights on an exclusive basis over a smaller area within the scope of the original grant. Normally there would be a statutory limitation on the extent of the area which could be covered by a licence of this type and at least in general terms some provision relating to work obligations.[10]

(iii) The grant of mining rights. In the legislation which originated in the colonial period there is generally a distinction between long term rights conferred by the grant of a lease and more informal arrangements where the right to mine can be obtained by pegging claims or by some analogous procedure.[11]

The Mines and Minerals Act of Zambia, which reached the statute book in 1969 some five years after independence, follows the general scheme set out above. However it is largely free from distortions present in the Colonial statutes which derive from the "open" policy concept previously referred to. In this respect the scheme of the Zambian Act is as follows:

(a) The initial grant is called a "prospecting licence" and prospecting means "intentionally to search for minerals".

It should be noted:-

(i) There is no limit on the area which may be covered by a prospecting licence, but a prospecting licence confers exclusive rights in respect of the minerals to which it relates;

(ii) The maximum duration is four years;

(iii) The applicant is required by the Act to describe in his application a programme of intended prospecting operations and their estimated cost, and if he obtains a licence to carry out that programme;

(iv) There is a minimum expenditure requirement i.e. not less than the amount which would result if a sum of twenty five Kwacha per square mile, or part thereof, of the prospecting area were expended annually during the currency of the licence;

(v) The grant of a prospecting licence may be made subject to conditions and an application for a prospecting right must be refused if the applicant does not have adequate financial resources or the technical competence and experience to carry on effective prospecting operations.[12]

(b) The second grant in the Zambian scheme is called an "exploration licence" and explore means "to define the extent and determine the economic value of a mineral deposit". It should be noted:-

(i) An exploration licence cannot be granted to any person unless he is the holder of a prospecting licence covering the area. However the holder of a prospecting licence is entitled to an exploration licence unless it is refused on specified grounds set out in the statute;

(ii) The maximum area is 10 square miles and the duration is three years with limited provision for renewal;

(iii) An applicant for an exploration licence must describe a programme of intended exploration operations and if his application is granted must carry out that programme;

(iv) There are minimum expenditure provisions i.e. during the initial period of the grant for each square mile not less than amounts of two thousand Kwacha in the first year, four thousand in the second, and six thousand in the last. During any period of renewal the minimum is not less than the amount which would result if a sum of ten thousand Kwacha per square mile of the exploration area were expended annually.

(v) An application for an exploration licence must be rejected if the Government Mining Engineer considers that the programme of intended exploration is inadequate or if he is not satisfied that the mineralization which the proposed exploration licence would cover exists in the area.[13]

(c) The third stage in the Zambian scheme is the grant of a "mining licence". No mining other than in the course of prospecting and exploration can take place unless a mining licence has been granted. Except in respect of building and industrial minerals a single set of provisions governs all applications. It should be noted:-

(i) A mining licence may only be granted to a person who is the holder of a prospecting licence or an exploration licence. However the holder of a prospecting licence or an exploration licence is entitled to the grant of a mining licence unless it is refused on specified grounds set out in the statute;

(ii) The maximum period of a mining licence is twenty five years but there is statutory provision giving a limited right of renewal;

(iii) The applicant for a mining licence must describe a programme of intended development and mining operations and provide a technological report on mining and treatment possibilities and the intention of the applicant in relation to these;

(iv) The Minister (who is responsible for the grant of mining licences) must reject an application if he considers that the programme of intended development and mining operations will not ensure the proper conservation and use of the mineral resources of the proposed mining area.[14]

From the foregoing account it will be seen that the Zambian scheme follows a three stage concept which in one form or another is a feature of the colonial statutes. However the provisions of the Act are designed to ensure that the Government remains in substantial control of the situation at each stage. The right to prospect, explore and mine is granted in return for specific obligations which can be quantified, assessed and monitored. In a recent study describing the scheme of the Zambian Act the former Director of the Geological Survey, Lusaka, has underlined the significance of these provisions: "Strong emphasis is placed on the requirement that any applicant for any form of licence shall submit a programme of his intended operations. This programme is one of the more important criteria used in assessing applications and in effect the issue of licences means that the programme is approved. The licence holder must then proceed to prospect or mine in accordance with his programme or any approved amendments; if he fails to do so, he will be in default and liable to forfeiture."[15]

Any developing country concerned to bring about a rapid development of its mineral resources will want to ensure that the companies licensed to prospect do not hold rights over extensive areas which they do not require, and do not hold their rights for longer than is necessary to carry out effective prospecting operations. In a three stage system where at the second stage the statute lays down a maximum area over which rights may be granted there is a built-in concept of relinquishment. A similar result in practice may also be achieved by providing either at the first or second stage for the grant of rights which are initially of comparatively short duration, but subject to renewal where Government is satisfied that effective prospecting operations are being carried out. It will be noted that under the Zambian scheme exploration licences (the second stage) are limited to 10 square miles but in the case of prospecting licences (the first stage) there is no limit. However in practice the size of the area over which a company will seek to have prospecting rights will be limited by the existence of minimum expenditure obligations and, of course, by the requirement that an applicant for prospecting rights must satisfy the Government Mining Engineer that he has the financial resources and technical staff to carry out his proposed programme of prospecting operations.

In general it may well be the case that minimum expenditure provisions written into legislation are more effective in limiting the size of the area over which rights are sought than as a method of ensuring that licensees carry out intensive operations. If minimum expenditure obligations are part of a statutory scheme they must necessarily be set at fairly modest levels if an appropriate degree of flexibility is to be maintained.

It is evident that in the Zambian scheme it is the requirement that a programme of prospecting or exploration must be submitted for approval that guarantees for Government a genuine quid pro quo in return for the grant of licences.

III The Concept of Vested Rights

A concept of vested rights is a characteristic feature of the Zambian legislation and to a greater or lesser extent of most of the statutes which originated in the Colonial period. It will be noted that under the Zambian scheme the holder of a prospecting licence who has fulfilled the statutory requirements is entitled as of right to the grant of an exploration licence. Again the holder of an exploration licence who has fulfilled the statutory requirements is entitled as of right to the grant of a mining licence. If an exploration licence or a mining licence is refused on grounds other than those set out in the relevant sections of the Act a justiciable issue arises between the applicant and the Government which falls within the jurisdiction of the Mining Affairs Appeal Tribunal.[16] In this way the Government has limited its discretion in the grant or withholding of exploration and mining licences. In the older statutes the extent to which the concept of vested rights is incorporated in specific provisions varies from case to case. For example in the Botswana legislation the holder of prospecting rights is not entitled as of right to the grant of a mining lease. However, he is entitled as of right to peg claims, and having pegged claims, has a statutory right to carry on mining operations. Similar distinctions can be found in other statutes.[17] However in one form or another a concept of vested rights is present in all of the laws originating in the Colonial period.

The rationale behind the concept of vested rights is clear enough. Developing countries which do not have the financial resources or technical knowledge to do their own prospecting must invite or permit others to to do it for them. No mining company will be prepared to spend substantial sums on exploration or prospecting unless in the event of a significant discovery being made it has some assurance that it will be able to undertake or at least to participate in profitable mining operations. Legislative provisions embodying the concept of vested rights are an attempt to meet this requirement. Logically of course where legislation relating to exploration or prospecting imposes on licensees substantial obligations the need to provide adequate assurances is correspondingly increased.

While the logic of vested rights is therefore largely a matter of commonsense, it is open to question whether in practice appropriate assurances either can, or should, be provided by legislative provisions. Two interrelated factors come into play here. First, important mining ventures are capital intensive and involve the investment of very large sums of money for prospecting and mining and for related infrastructure. The Selebi Pikwe copper nickel mine in Botswana (the Shashe Project) is a good example. Investment in mining amounted to Rand 120 million, of which Rand 54.6 million was borrowed from a consortium of banks in the Federal Republic of Germany. Infrastructure amounted to a further Rand 55.102 million. In this case the provision of the basic infrastructure was the responsibility of Government but finance borrowed for this purpose from International lending agencies was guaranteed by the private investors. Secondly modern Governments concerned with the management of the economy deploy a wide range of weapons in order to secure the objectives of their policy. In this respect taxation and exchange control are clearly of critical importance for the foreign investor, but other areas in which the Governments may choose to intervene must also be considered by the prospective investor - e.g. dividend limitation, quantitative restrictions on exports or imports, price control and manpower planning. It is clear that a government of radical disposition or a government facing an imminent economic crisis, if not constrained by contractual obligations, may use any or all of these weapons in a way which could severely restrict profits, inhibit loan repayments or reduce the capital value of assets. It follows that a foreign investor contemplating a major mining project will seek to negotiate a complex set of guarantees going far beyond the limited assurances provided in any of the laws covered by this Survey. In the case of the Shashe Project the relationships between the various parties was governed by a Master Agreement of some 46 clauses and in addition no less than forty "Scheduled Agreements". In the context of a complex transaction of this kind the fact that the operating company B.C.L. had a statutory right to peg claims in the event that the grant of a mining lease was refused was not a matter to which any of the parties can have attached the least significance. The Shashe Project may perhaps be regarded as an extreme case, but where any major investment is under consideration the mining company, and its financial backers in the capital market, will seek to negotiate contractual assurances transcending in importance the concept of vested rights in whatever form it may be embodied in the legislative instruments of general application.

Although falling largely outside the scope of the legislative framework this situation raises for developing countries a difficult issue of timing. If a major project is in contemplation it may be evident that the end result must be a somewhat complex agreement or set of agreements which define in connection with a number of separate issues the respective rights and obligations of the Government and the private investor. At what stage should the terms of this package be worked out. From the point of view of the mining company there may well be a reluctance to spend substantial sums on exploration or prospecting without first having reached agreement on the fiscal regime which could determine the profitability of mining operations. On the other hand there must be a measure of uncertainty in the Government's bargaining position particularly in connection with the fiscal regime until the size, character and precise location of the ore body have been determined by prospecting operations.

It is doubtful whether there can be any simple answer to this problem which is inherent in the nature of mining business. However it would appear that in recent years there has been an increased willingness on the part of some of the major companies to recognise the reluctance of governments to commit themselves to a final package in the absence of the information necessary to make a proper assessment of the project. In one of the countries covered by this Survey an agreement has recently been concluded with a major oil company granting prospecting rights for coal. Under the terms of the licence the Company has accepted substantial work obligations, but there is no undertaking by the Government to grant a mining lease and no agreement on a fiscal regime should mining operations result. Instead the Company has the right on expiration of the licence to negotiate on an exclusive basis with the Government for a period of one year. Ideally, of course, developing countries should be in a position to finance their own prospecting operations and in this connection it is encouraging to note that the United Nations has established a Revolving Fund for this purpose to which the developing countries now have access.[18]

IV. The Duration of Mining Leases and their Termination

Where a foreign investor is contemplating a major capital investment in new mining operations the duration of the company's title under a lease or licence to mine will inevitably be a matter of considerable significance. The foreign investor will generally seek rights which will subsist during the estimated life of the mine, or where this cannot be achieved will attach importance to the terms on which a lease or mining licence may be renewed.

Broadly speaking the realities of this situation are reflected in the laws covered by this Survey. The Zambian Act provides for the grant of mining licences which in the first instance have a maximum duration of 25 years.[19] There is a right of renewal for a period not exceeding a further 25 years. However the statute provides that the Minister must reject an application for renewal if he considers that:-

(i) development of the mining area has not proceeded with reasonable diligence,

(ii) minerals in workable quantities do not remain to be produced, or

(iii) the programme of intended mining operations will not ensure the proper conservation and use of the mineral resources of the mining area.[20]

A number of the statutes provide for the grant of a lease for an initial period of 21 years with a right of renewal for a further 21 years.[21] The most generous provisions are those contained in the Sierra Leone Act - an initial grant for a maximum period of 99 years.[22] However it should be noted that in contrast with the Zambian Act all these provisions establish the maximum duration of a lease but retain for the Government a discretion to grant a lease for a shorter period. In the Zambian case an applicant for a mining licence who has fulfilled the requirements of the statute is entitled if he applies for it to obtain the maximum (25 years) both in respect of the initial grant and on renewal.

While it is no doubt perfectly reasonable for mining companies contemplating heavy expenditure on mining operations, much of it in fixed assets, to seek a secure title over an extended period it does not necessarily follow that the entire package agreed between the investor and the Government of the host country should be established in immutable provisions coterminous with the lease.

Government may be willing in the case of a significant deposit to grant a lease with an initial duration of say 25 years, but reluctant to commit itself to a fiscal regime, exchange control guarantees and other collateral matters over such an extended period. Ideally where wide ranging contractual obligations are assumed by the Government there should be a corresponding willingness on the part of the foreign investor to agree to a periodical review of specific provisions, either generally or by reference to particular criteria set out in the contractual documents. Unfortunately such provisions for renegotiation are the exception rather than the rule. The "Group of Eminent Persons" appointed by the United Nations to study the impact of multinational Corporations on development have adverted to this issue in the following passage in their Report:-

> "While a clear understanding on various issues at the time of entry is vital, it has to be recognised that conditions change, and what may seem to have been adequate and fair at the time of entry may prove unsatisfactory to either party over time.
>
> A large number of agreements made in the past lack comprehensiveness and contain no provision for renegotiation. Developing countries have, of course, the power, through legislation, to modify the terms of agreements. But sometimes such actions, if carried out unilaterally, entail disproportionally high costs in terms of the future flow of investments. A willingness on both sides to renegotiate agreements which have been in force for more than, say, 10 years could help to avoid recourse to extreme measures. The Group recommends that in the initial agreement with multinational corporations host countries should consider making provision for the review, at the request of either side, after suitable intervals, of various clauses of the agreement."[23]

Express provision in contractual documents for periodical renegotiation must generally entail some understanding between the parties about what should happen in the event that agreement cannot be reached on an appropriate modification of existing obligations. Where the host country is willing to submit disputes to international arbitration a solution to this difficulty might be found by making provision for reference to arbitration where renegotiation had led to a disagreement. In contrast with the situation in Latin America where the jurisprudence associated with the "Calvo Clause"[24] is an important factor, most of the countries covered by this Survey appear to be willing in principle to accept international arbitration as a reasonable method of settling disputes with foreign investors. If reference is made to the Survey it will be seen that in a number of agreements recently concluded the parties have undertaken to submit their differences to arbitration by the International Centre for the Settlement of Investment Disputes set up under the auspices of the World Bank.[25] If in the context of contractual provisions for periodical renegotiation, arbitration by ICSID were able to attract a sufficient measure of confidence amongst both foreign investors and host countries in the developing world, a major difficulty in implementing the recommendation of the Group of Eminent Persons would be overcome.[26]

The circumstances in which a right to mine may be terminated at the instance of Government determines in effect the nature of the title conferred by a lease or licence and is as much a matter of consequence to a potential investor as the duration of the rights which he seeks to obtain. It may also be of significance to his financial backers. Where a mining company has raised loan finance which is secured by a charge on fixed assets located within the area of the mining lease or licence the security would be dubious, if not worthless, unless the circumstances in which the title of the company was defeasible were limited by statute or contract. Even where loan finance is secured otherwise than by a charge on fixed assets the title of the mining company is likely to be a matter of critical importance.

The laws covered by the Survey to a large extent follow a common scheme in dealing with the issue of termination. The circumstances in which a mining lease (or licence) may be terminated or forfeited at the instance of Government are set out in the statutes. Although there are minor differences in the content of these provisions the Uganda Act may be taken as typical of the older statutes. It provides for revocation of a lease at the discretion of the Minister if the lessee: -

(a) contravenes the provisions of the Act,

(b) contravenes the terms or conditions of the lease,

(c) contravenes the law relating to explosives or the employment of labour, or

(d) is convicted of an offence involving dishonesty.

However, before the lease is revoked the lessee must be given an opportunity to remedy the breach or to show cause why his mining right should not be revoked.[27] The Zambian Act follows a similar scheme but includes in the list of matters which may lead to a termination of the mining licence failure to develop and mine the mineral deposits in accordance with the programme of development and mining operations submitted for approval at the time the licence was granted.[28]

The only law covered by the survey which leaves the Government with a large measure of discretion is Tanzania's Mining Ordinance as amended by an Act passed in 1969. The statute in its original form provided that a lease might be terminated if the lessee was in breach of the Ordinance, the regulations or any of the conditions of the lease or where for a continuous period of six months the lessee ceased to carry on work. The amending Act provides in addition that the President may cancel a mining lease during the continuation of the period of its validity if "he considers it desirable in the national interest to do so." The amending Act further provides that an order made by the President under this provision is final and "shall not be questioned in any court."[29]

V. Possession and Marketing of Minerals

Most of the statutes covered by the Survey contain some provisions regulating the possession of minerals and prohibiting unauthorised persons from dealing in them.[30] In the case of gold, diamonds,[31] precious and semiprecious stones, these provisions may be of considerable practical importance in preventing a loss of revenue resulting from illicit transactions. However, they are essentially an exercise of police powers and are largely unrelated to problems of marketing in the context of large scale foreign investment. However, some of the mining laws do contain certain provisions more directly related to marketing and attention should perhaps be drawn in particular to the following:

(i) Uganda and Swaziland have provisions in substantially similar terms which provide that the lessee under a mining lease may not enter into any agreement with any person outside Uganda/Swaziland for the joint control of the price, output or sale of the minerals mined without the consent of the Government.[32]

(ii) The Mines and Minerals Act of Zambia provides in section 56 that the "President may, if in his opinion it is in the national interest to do so, order the holder of a mining licence to curtail the production of any mineral in any mine to such extent as he may specify." The powers conferred on the President by this section have not yet been invoked. However Zambia is a member of the Intergovernmental Council of Copper Exporting Countries (CIPEC) and it will be appreciated that, should the members of CIPEC seek an upward adjustment of copper prices by curtailing supplies to the market, in the absence of agreement with the mining companies, an overriding statutory power of this kind might prove necessary if effect were to be given to their decision.

(iii) In Ghana the Minerals Act 1962 gives to the Government a right of pre-emption in respect of minerals won or gotten by the holder of a licence and in respect of products derived from the refining or treatment of such minerals. The price to be paid for minerals taken in exercise of this power is:

(a) Where it is provided for in any written agreement the specified price.

(b) Where not so provided for, the publicly quoted market rate ruling for such minerals or products as delivered at the mine or plant, as the case may be, at which the right of pre-emption was exercised.

(c) In the absence of such written agreement or such rate, as decided upon by an arbitrator appointed under the enactment relating to arbitration.[33]

VI Government Participation

The Mines and Minerals Act of Zambia is the only Act covered by this Survey which makes express provision for Government participation in mining ventures. Section 20 of the Act provides that an application for a prospecting licence may be granted subject to conditions including in particular

> "a condition requiring the applicant to agree to the Republic, or any person nominated on behalf of the Republic, having an option to acquire an interest in any mining venture which might be carried on by the applicant or by any person to whom he transfers his mining right, in the proposed prospecting area".

Part VII of the Act which deals with the grant of mining licences lays down the procedure to be followed where a condition of this kind has been included in a prospecting licence or carried over into an exploration licence. In the first instance the Act provides for the contingency that the holder of the option has neither exercised the option nor informed the holder of the licence that he does not intend to do so. In such a case, prior to applying for a mining licence, the holder of a prospecting licence or an exploration licence must notify the Minister and the holder of the option that he intends to apply for a mining licence and require the holder to exercise his option.[34]

The Act then provides that application for a mining licence may be made if and only if the holder of the option:

(a) exercises the option;

(b) informs the holder of the licence in writing that the option will not be exercised; or

(c) fails to so act within six months of being required to exercise his option.[35]

It will be appreciated that if these provisions are to be implemented according to their tenor it would be necessary before the issue of a prospecting licence to determine the extent to which Government or its nominee is to have the option of participating in a mining venture, the price to be paid for that share, and the manner of payment. This is, of course, consistent with the general scheme of the Zambian Act. The concept of vested rights which, as already pointed out, is an essential element in that scheme would be eroded if negotiations relating to participation by Government or its nominee were to take place after the issue of prospecting or exploration licences. However it does have the disadvantage of introducing an element of formality which requires the Government to consider matters relevant to the fiscal regime for the mining company before the results of prospecting and exploration are available.

While the mining legislation of the other countries covered by this Survey does not make express provision for government participation in mining ventures the statutory provisions do not generally represent any impediment to a negotiated agreement ensuring for Government or its nominee in the parastatal sector a share in the equity capital of the mining company. In some cases outside the legislative framework foreign investors in the mining sector have been put on notice by the issue of policy statements that Government participation must now be regarded as an essential element in any new ventures.[36]

FOOTNOTES

1. In certain cases however, the legislation covered by this Survey was enacted after the attainment of independence. The Mines and Minerals Act 1967 of Botswana and the Mining Rights Act 1967 of Lesotho were enacted one year, and the Mines and Minerals Act 1969 of Zambia and the Minerals Act 1962 of Ghana five years, after independence.

2. See for example Section 8 of the Mining Ordinance of Kenya which provides as follows:

   "Nothing in this Ordinance shall be deemed to prevent any citizen of Kenya from taking, subject to such conditions as may be prescribed, iron, salt or soda from lands (other than lands within the area of a mining lease or location) from which it has been the custom of the members of the community to which that citizen belongs to take the same."

3. e.g. The Minerals Ordinance of Nigeria provides that "a prospecting right shall not be granted -

   (i) to any person who in the opinion of the prescribed officer is not able to read and understand this Ordinance in such a way as to form a reasonable guide to and restriction on his actions;

   (ii) to any person who is under twenty-one years of age;

   (iii) except with the consent of the (Governor-General), to any person who or whose present employer or partner has been convicted of an offence under this Ordinance, or who or whose present employer or partner has previously held any right, licence, or lease granted under this Ordinance or under any previous enactment relating to minerals which has been revoked by reason of a breach of the terms or conditions of the same: Provided that, if such consent has once been given after such conviction or revocation, it shall not be necessary in respect of any subsequent application;

   (iv) to any person who is unable to give satisfactory proof that he possesses sufficient money or credit to enable him to pay any expenses which may be incurred by prospecting in an adequate manner and any compensation which may be payable by him in the exercise of the rights conferred by a prospecting right;

(v) to any person who is not in possession of a copy of this Ordinance and the regulations thereunder."

4. The Resolution declares, inter alia, as follows :

"1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties

concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution."

See also General Assembly resolutions 2158 (XXI) of 25th November 1966, 2692 (XXV) of 11th December 1970 and 3016 (XXVII) of 18th December 1972.

5. Section 3 of the Minerals Ordinance of Sierra Leone is typical. It provides, <u>inter alia</u>, that "The entire property in and control of all minerals and mineral oils, in, under or upon any lands in Sierra Leone, and of all rivers, streams and watercourses throughout Sierra Leone is hereby declared to reside in the (Crown), save in so far as such control may in any case have been limited by any express grant made by the (Crown) before the commencement of this Ordinance."

6. The most remarkable example of this situation is the case of the British South Africa Company in Zambia. For an

account of the nature of the rights held by the Company and the circumstances in which there were eventually extinguished on the eve of independence see "Economic Independence and Zambian Copper" (edited) by Mark Bostock and Charles Harvey, pages 23-52 and "Towards Economic Independence" by M.L.O. Faber and J.G.Potter, pages 40-62.

7. Section 3 of the Mines and Minerals Act of Botswana is a good example. The section provides, inter alia,

   (1) "Subject to the provisions of subsection (2) and save as is otherwise provided in this Act the right of taking, prospecting for, mining and disposing of minerals on any land is vested in the State.

   (2) Save as is otherwise provided in this Act where mineral rights over any land are held by a person other than the State, the right of taking, prospecting for, mining and disposing of minerals on that land is vested in the holder of the mineral rights: Provided that the onus of establishing that mineral rights are vested in a person other than the State shall rest on the person alleging such vesting."

8. It now appears, however, that the remaining privately held mineral rights in existence at the time the Mineral Rights Tax Act 1972 was enacted have since been surrendered to the Government.

9. e.g., in Sierra Leone the Minerals Ordinance makes no provision for minimum expenditure to be incurred by a person holding a "prospecting right" or for any limitation on the area over which the right may be granted.

10. See for example Sections 18 (4) and 24 of the Mining Ordinance of Tanzania which provide respectively as follows :

> "An exclusive prospecting licence shall not be granted in respect of any area exceeding eight square miles, provided that in special circumstances the (Governor) may at his sole discretion grant exclusive prospecting licences over areas exceeding eight square miles upon such terms and conditions as he may think fit."

"The holder of an exclusive prospecting licence shall during the continuance of the licence adequately carry on to the satisfaction of the Commissioner bona fide prospecting operations on the lands included in the area in respect of which the licence has been granted:

Provided that the Commissioner may on the application of the holder and for good cause shown by writing under his hand suspend the obligation imposed by this section in respect of any licence for such time as to the Commissioner may seem proper."

11. e.g. The Kenyan Ordinance has provisions for the pegging of "locations" giving the holder of the location the right to mine apart from the right to mine that may be obtained under a mining lease. Similarly the Tanzanian Ordinance provides for the pegging of "claims". See also the Botswana Act.

12. See Sections 18, 19, 20 and 26 of the Act.

13. See Sections 27, 29, 30, 31, 33 and 37 of the Act.

14. See Sections 45, 46, 47, 48, 49 and 51 of the Act.

15. See "Economic Independence and Zambian Copper" (eds) Mark Bostock and Charles Harvey. Pages 53-88.

16. See Sections 119-124 of the Zambian Act.

17. e.g. The Kenyan legislation under which the grant of a mining lease to the holder of a location or a prospecting right is discretionary. However the Act provides that the holder of a prospecting right or an exclusive prospecting licence is entitled as of right to peg locations.

18. The United Nations Revolving Fund for Natural Resources Exploration has been established as a trust fund by the General Assembly and placed in the charge of the Secretary General to be administered on his behalf by the Administrator of UNDP. (See General Assembly resolution 3167 (XXVII) and Economic and Social Council resolution 1762 (LIV).

    The Fund, at least in its early stages, will concentrate its activities on solid minerals and projects will generally fall within the following categories.

(a) Preliminary activities to verify and evaluate geological and related data provided by the applicant country and limited field checking within the area or areas said to possess good potential for mineral development.

(b) Technical reconnaissance within the chosen area or areas using photogeological, geochemical, geophysical and other techniques to define more precisely targets for detailed prospecting.

(c) Detailed evaluation including large scale mapping of of the targets, detailed geochemical and geophysical investigation, trenching, pitting and prospect drilling to limited depths to outline geological structure in depth, and as far as possible to obtain information on the order of magnitude of tonnages and grades of possible ore bodies. Additionally, limited benefication tests and preliminary studies of infrastructure, marketing, profitability, etc. may be included.

The Fund's operations may therefore be seen as covering work commencing after the completion of an adequate geological survey and ending when the pre-feasibility phase is complete.

Developing countries having recourse to the Fund will be required to make what is called a "replenishment contribution." Replenishment Contributions from user countries will be levied at the uniform rate of 2 per cent of the annual value of produced commodities and will be payable at this rate for a period of 15 years from the start of commercial production or until a ceiling has been reached. The basis on which a ceiling is to be established appears not to have been finally determined. However at present it is envisaged that the ceiling will be in the region of 15 times the original investment by the trust fund. (Operational Procedures and Administrative Arrangements D.P./142 24th October 1975).

19. See Section 51 (Zambia)

20. See Section 51 (Zambia)

21. The Tanzanian and Ugandan legislation provides for an

initial period of not less than five years and not more than twenty-one years with a right of renewal for a further twenty-one years.

22. See Section 31 (Sierra Leone)

23. "Report of the Group of Eminent persons to study the Impact of Multinational Corporations on Development and on International Relations". Document E/5500/Rev. 1 ST/ESA/6 of 1974. Page 38.

24. The report of the Department of Economic and Social Affairs of the United Nations Secretariat "Multinational Corporations in World Development" (Document ST/ECA/190) contains an illuminating explanatory note on this concept. It reads as follows:

> "The Calvo doctrine was named after a distinguished Argentine jurist of the 19th century. Calvo argued that a state could not accept responsibility for losses suffered by foreigners as the result of civil war or insurrection, on the ground that to admit responsibility in such cases would be to threaten the independence of weaker states and would "establish an unjustificable inequality between nationals and foreigners".
>
> To prevent appeals by aliens to their home governments for diplomatic intervention on behalf of their contract rights, a number of Latin American states, during the latter part of the 19th century, adopted a policy of writing into their contracts with aliens a clause, known as the "Calvo Clause", the general tenor of which was that the alien agreed that any disputes that might arise out of the contract were to be decided by the national courts in accordance with national law and were not to give rise to any international reclamation.
>
> The decisions of international arbitration tribunals and of mixed claims commissions upon the subject have been conflicting, some upholding the Calvo Clause as a bar to the interposition of the alien's government, others rejecting it on the ground that the act of the alien can not restrict the rights of his government under international law. As Latin American governments generally interpret the Calvo Clause, they

would deny all local rights and remedies to any foreign owned subsidiary if the subsidiary called on a foreign government in a dispute with its host government."

Reference may also be made to the eighth edition of Oppenheim's International Law (ed.) Lauterpacht (Vol.1) pages 344-5 and other materials on this subject cited therein.

25. See for example clause 42 of the Master Agreement between the Republic of Botswana and Bamangwato Concessions Limited and Botswana R.S.T. Limited and B.C.L. (Sales) Limited dated 7.3.72 and, also schedule "E" to Diminco Agreement (1970) Ratification Act 1970 of Sierra Leone.

26. It must, however, be recognised that the image of ICSID in the Third World is impaired by its close association with the World Bank. The weighted voting system in IBRD and IDA, inevitable in present circumstances, places ultimate control over decisions in the hands of the capital exporting countries on which the Bank is dependant for its finance. This makes it difficult for the developing countries to see the Bank, or any institution sponsored by it as disinterested or objective in the context of a dispute between one of the multinational corporations and a host government in the Third World. These reservations may not be a wholly rational response to the institutional framework within which ICSID has been established, but in practice they may prove to be of overriding importance. While many developing countries have subscribed to the Convention which established ICSID, and many investment agreements provide for reference to the Centre in the event of a dispute it is significant that at the time of the latest annual report 1975/76 there were only five cases in which disputes had been submitted to the Centre for arbitration. In three out of the five, Alcoa Minerals v. Government of Jamaica, Kaiser Bauxite v. Government of Jamaica, Reynolds Jamaica and Reynolds Metals v. Government of Jamaica. The Government concerned is not participating in the proceedings.

Apart from the institutional problems associated with ICSID recourse to international arbitration in the context of a clause which provides for re-negotiation assumes that a reasonable man of good will and impartiality can be relied upon to do justice between the competing claims for a developing country and a transnational corporation. This assumption does not perhaps pay sufficient attention to the increasing disparity between the thinking of developed and developing countries as exemplified by controversies surrounding the concept of the New International Economic Order. (See the Declaration and Programme of Action on the Establishment of a New International Economic Order adopted by the United Nations General Assembly in its Sixth Special Session 9th April - 2nd May 1974 and the Charter of Economic Rights and Duties of States adopted by the Assembly on 12th December 1974 (Resolution 3281 (XXXIX)).

For a general discussion of periodic revision in concession contracts - see "Negotiating Third World Mineral Agreements" David Smith and Louis Wells Ballinger Publishing Co. Cambridge Mass.pages 138-140.

27. See Section 29 (Uganda)

28. See Section 89 (Zambia)

29. See Section 65 A (Tanzania)

30. e.g. Sections 68 and 69 of the Nigerian Ordinance provide respectively as follows :

"No person other than a Government servant acting in the execution of his duty shall possess any controlled mineral unless -

(a) such mineral has been won from ground held under a mining lease or temporary mining lease of which he is the lessee and which entitled him to mine that mineral, or

(b) such mineral has been won from ground held under a mining right or temporary mining right of which he is the holder and which entitled him to mine that mineral or obtained in the course of prospecting under a prospecting right or exclusive prospecting licence of which he is the holder and which entitled him to prospect for that mineral, or

(c) he holds a licence issued under section 70 in respect of that mineral, or

(d) he is in respect of that mineral within the meaning of the regulations a duly authorised agent or employee of a person permitted by paragraphs (a), (b) and (c) of this section to possess that mineral."

"No person shall purchase any controlled mineral unless he holds a licence to purchase it issued under section 70."

31. In the case of diamonds in countries where diamond mining is undertaken on a substantial scale separate statutory provision is normally made for policing the marketing of diamonds, e.g.,

Lesotho	-	The Precious Stones Order 1970.
Tanzania	-	The Diamonds Industry Protection Ordinance
Ghana	-	Diamonds Decree 1972.

32. See Section 54 of the Uganda and the Swaziland legislation.

33. See Sections 5 and 6 (Ghana)

34. See Section 46 (Zambia)

35. See Section 46 (Zambia)

36. e.g. The Sierra Leone Government policy statement issued in 1970 which reads as follows:

A NEW MINING POLICY FOR SIERRA LEONE - PARTNERSHIP FOR THE FUTURE

"The Sovereign State of Sierra Leone hereby declares its intentions to enter into a full, just and freely negotiated partnership agreement with each of the mining companies operating within its borders.

Notwithstanding the individual differences which distinguish these companies from one another all have in common with the Government and people of Sierra Leone a dependence upon this country's diminishing mineral wealth which in turn inextricably binds the fate and future of each company and the fate and future of this nation. The time has come to make explicit in law, with an appropriate sharing of responsibilities and information as well as revenues, what is already implicit in fact: that mining is a joint venture between the Government of Sierra Leone and the owners of each company, and can succeed only if they act in concert for the long-run interests of all.

Ignoring tired ideological labels, it is the intention of the Government to achieve, through voluntary negotiations with each mining company, a hopeful example of government-business co-operation which will assure economic justice to all our people and a healthy climate to prospective investors. The Government's goal is the peaceful avoidance of both foreign domination and domestic confiscation through mutual agreement of fair participation.

In order to assure the people of Sierra Leone that each of the mining companies operating within this country's borders:-

(a) is providing the Government of Sierra Leone with a reasonable share of the profits and an informed voice in each company's future; and

(b) is providing for the betterment and long-range development of the Sierra Leone economy and labour force as well as the localities in which each company operates;

the Government of Sierra Leone hereby promulgates the following basic principles as part of its fundamental policy on mines and minerals:

I OWNERSHIP

The Government shall ultimately purchase for fair value a majority ownership interest in each mining company. Payment shall be made out of future dividends, the valuation of each share of stock acquired to approximate its book value in the light of the company's profitability, capital investment in Sierra Leone and depreciation of assets. The Government will appoint a majority number of the directors of each company and day to day managerial operations shall be a subject for negotiations. The Government's shares shall be held by a new Government owned Corporation.

Government expects to hold preliminary discussions with the Mining Companies affected and to finalize all arrangement within the first quarter of 1970.

II PROFITS

The Government shall, by means of taxation and dividends, share in all profits directly or indirectly generated to the fullest extent required by a careful evaluation of profitability, fair return, past and future investment decisions, and foreign tax credits. Existing tax rates on mining companies in Sierra Leone have been below those applied by other governments and shall be increased for those companies making great profits. Accurate reporting of income and expenses shall be required; and the Government shall seek the maximum simplification and consolidation of tax statutes. The Government shall, once its stock in a company has been paid for, adjust downward the effective tax rate applicable to each company to offset the revenues realized through its ownership interest. When any mining operation approaches exhaustion, a lower scale of tax rates may be considered to extend the profitable life of the mines.

III ECONOMIC DEVELOPMENT

The Government shall formulate, with each mining company an explicit plan and fund for the co-ordinated long-range development of the Sierra Leone economy.

Such a plan should include :

- the establishment of new industrial and agricultural enterprises to offer viable alternative employment to those now engaged in illicit mining and in the future to those now extracting minerals that will someday be depleted;

- the training and retraining of Sierra Leone citizens, and each mining company shall adopt guidelines for reducing the proportion of expatriate staff and increasing the pace at which Sierra Leoneans are now trained for managerial, technical and professional positions by the mining companies;

- the improvement of schools, hospitals, road, electric power and water supplies and other facilities in the localities in which each mining company operates; and the rehabilitation of those abandoned lands from which all mineral wealth has been extracted.

IV RECIPROCAL OBLIGATIONS

The Government recognizes that implementation of the foregoing principles will demand much from mining companies in the way of understanding and resources; but it is convinced that such efforts will produce a mutually profitable long-term atmosphere of co-operation and confidence. The situation in diamond mining offers the most dramatic example. It has been difficult as a practical matter for the Government to take the necessary police measures required in this situation against its own citizens on behalf of an expatriate company. But any government owning a majority interest in a depleting-asset venture would be derelict in its responsibilities to its own citizens if it did not take whatever measures were required to protect the profitability of that interest. This Government intends to meet its responsibilities.

CONCLUSION

This Government welcomes private foreign investment in Sierra Leone as a part of its programme to increase the rate of per capita economic growth. The policies outlined above are consistent with the findings of the recent business-government Panel on Foreign Investment in Developing Countries sponsored by the Economic and Social Council of the United Nations. The people of Sierra Leone, proud of their political and economic independence, hereby reaffirm their commitment to work co-operatively with all those, foreign or domestic, profit-making or public, who share their economic development objectives. It is in that spirit of partnership that we set forth these principles and seek a new era of both profits and progress."

See also the "White Paper On State Participation In Mining Industry" issued by the Government of Ghana in 1972.