

THAI MINING LEGISLATION

by

**Albert T. Chandler
Ratana Poonsombudlert
E. T. Hunt Talmage, III**

**Chandler & Thong-ek
Bangkok**

1. Laws Governing Exploration and Mining

The principal law is the Minerals Act (1967), last amended in 2002 by Minerals Act No. 5. The act governs onshore and offshore exploration, mineral production, mineral trading, ore-dressing, transport and export of minerals, other than petroleum. The Department of Primary Industry and Mining (“DPIM”) is empowered to administer the Minerals Act and to issue ministerial regulations. DPIM also provides technical assistance in exploration, mining, mineral processing and metallurgical activities. It is under the Ministry of Industry (“MOI”).

Another law, the Mineral Royalty Rates (1966), prescribes the rates of royalties to be assessed for different kinds of minerals.

The environmental law is administered by ONEP in the Ministry of Natural Resources and Environmental (“MNRE”).

Prior to a ministerial reorganization in 2001, the name of DPIM was Department of Mineral Resources (“DMR”), whose name still appears in legislation and publications concerning the Thai mining industry.

2. Major Features of Mineral Legislation

Ownership of Minerals

Minerals belong to the state. No one can explore for minerals or undertake mining unless a prospecting license or mining lease is first obtained. The government has a policy to promote private sector development of the mineral industry.

Exploration Rights

Before prospecting can be undertaken, a prospecting license (*atchayabat*) must be obtained. There are three kinds of prospecting licenses that mining investors may apply for: the general prospecting license (GPL) the exclusive prospecting license (EPL) and the special prospecting license (SPL).

- A GPL is a nonexclusive, non-renewal license that is issued for one year by the Local Mineral Resources Office (LMRO). The license allows a mining company to conduct exploration of a specific area. There are also other provisions that govern the possession of minerals. No license holder may possess minerals of any type in excess of 2 kilograms without a license from DPIM. Possession of a large quantity of minerals may be permitted for analysis purposes, but the quantity is not to exceed the

stated limit in the GPL. Current practice is to allow 10 kilograms for each type of mineral.

- An EPL contains the same conditions as a GPL, with the exception that an EPL includes an exclusive right to explore for any kind of minerals in the area covered by the EPL. It is also nontransferable and valid for a period of one year, but can be renewed for one year. A holder of an EPL must comply with the following:
 - exploration must begin within 60 days after the EPL is issued;
 - an exploration report must be filed with LMRO within 180 days after the receipt of the EPL; and
 - the final exploration report must be filed 30 days before the expiration date of the EPL.

The maximum exploration area that may be granted to one person is 1,250 rai (two grid blocks) per province. A workplan and a description of exploration methods, must be submitted, each endorsed by a qualified geologist or mining engineer recognized by DPIM. The maximum area that may be granted for offshore exploration under MOI's policy is 20,000 rai. For an area larger than 20,000 rai, it is possible to submit an SPL application, but the applicant must offer "special benefits" to the government.

- An SPL has a duration of three years and is renewable for two years. The exploration area that may be granted under an SPL may not exceed 10,000 rai. An application for an SPL must include a workplan and an estimate of expenses for each year for the whole project, as well as an offer of "special benefits" to the government. The prospector must commence exploration within 90 days of the issuance of the SPL. A progress report to DPIM must be submitted within 120 days of receiving a license. The SPL is suitable for large projects entailing high-value minerals or substantial investment capital, and also when the applicant requires more time or a larger area for exploration. The prospector may relinquish areas he no longer wishes to prospect. Each SPL applicant must propose a "special benefit" to the Thai Government in the application.

The DPIM issued two internal regulations on procedures for EPL, GPL, SPL and ML application, renewal and transfer. These regulations are treated as guidelines and mandates for DPIM officials and the applicants to comply with.

3. Rights to Surface Land

Determining Land Open for Exploration

Mineral rights under the Minerals Act do not include any rights to the surface land.

There are some categories of reserved areas that have been declared closed to exploration/mining activities by cabinet resolutions. These include wildlife reserve areas, national parks areas, forest areas (conservation forests and economic forests) and areas reserved for security purposes. The first three categories are administered by the Royal Forest Department, while the fourth comes under the control of the Ministry of Defense.

Development activities, including mining, are strictly prohibited in conservation forest areas, and restrictions apply to mining activities in economic forest areas. Because the other areas in the country are classified as urban areas, water bodies and areas for settlement programs,

only small, site-specific areas are available for mining. The program to reclassify the country's forest areas will increase the total area of conservation forest and reduce the total area of economic forest.

A government resolution for watershed classification in May 1985 prescribed that with no exception, all development activity would be prohibited in forest areas classified as category 1A; watershed category 1B was subject to government approval on a case-by-case basis; and mining was allowed to operate in reserved forest categories 2 to 5. It became more complicated to obtain permission to operate a mine in any category of reserved forest because of the revocation of forest concessions countrywide in January 1989. The revocation of forest concessions resulted in a reclassification of the country's forests, which are now pending classification as national parks, wildlife reserves, economic forests and land reform zones.

Access to Land: Restrictions of Foreign Ownership of Land

Ownership of land is governed by the Land Code (1954), the Civil and Commercial Code, the Land Reform for Agriculture Act (1975) and regulations as set forth by the Ministry of the Interior. Under Thai law, foreigners may own land only if a treaty has been entered into between Thailand and their country or if permission is granted by the Ministry of the Interior. Presently, there are no such treaties between Thailand and any other country; the Treaty of Amity and Economic Relations between the United States and Thailand does not allow foreign ownership of land.

Generally speaking, the Ministry of Interior will give permission for foreigners to own land on the following conditions: they have received permission from the Board of Investment to own land and carry out promoted activities; they have a factory within the approved government industrial estates; they are in the petroleum business; or they hold not more than 49% of the shares of a company that has a need to own land.

Underground Mining

Minerals Act (No. 5) (2002) introduced a new Chapter 4/1 with provisions applicable to underground mining, a subject which had not been covered in detail.

Acquiring Surface Rights to Land

Before applying for a mining lease, it is necessary for the applicant to acquire the right to use the surface land from the public or private owner, as the case may be. Negotiation with a private landowner is concluded by purchase or lease. A lease agreement may have a duration of up to 30 years and must be registered with the Land Department. In case the land is owned by the government, a permit issued by the concerned government agency is required to be submitted along with the application for a mining lease before a lease is granted.

4. Mining Rights

Upon discovery of a commercial mineral deposit, a prospector must apply for a mining lease (*prathanabat*) in order to mine. Although there is no guarantee of being granted a mining lease, the prospector holding an EPL or SPL has first priority. A mining lease may cover an area of not more than 300 rai onshore and 50,000 rai offshore. There is no limit on the number of mining leases which may be applied for by one person. A mining lease has a duration of not more than 25 years and may not be transferred or subleased without the approval of MOI. Pending the approval of the mining lease, a prospector may apply for a nontransferable temporary mining lease that is valid for one year.

An applicant for a mining lease must provide: a map showing the area to be mined, evidence of financial capital, a workplan, evidence showing acquisition of surface land rights, evidence of technological ability (tools, equipment, machinery) and an environmental impact assessment (EIA).

The DPIM has published guidelines for determining the minimum amount of capital required. Evidence of financial capital may be shown by a letter of confirmation issued by a bank. An applicant who declares that he has his own machinery and equipment necessary for use in mining may produce the evidence of ownership and value thereof for deduction from the amount of money evidence of which the mining lease applicant is required to show as financial capital, provided the deduction does not exceed 50 per cent of the amount designated.

5. Special Rules for Offshore Mining

In August 1978, the cabinet passed two resolutions concerning offshore mining of minerals at depths not exceeding 200 feet. The resolutions can be summarized as follows:

** Known Deposits*

After the expiration of the maximum mining lease period of 25 years, a foreign mining lease-holder may apply for a new mining lease to work an old deposit, provided that it realigns its equity interests so that Thai nationals hold at least 60 per cent of the total equity interest in the venture.

** Unknown Deposits*

A company with foreign shareholders may apply for a mining lease to exploit a new deposit offshore, provided that Thai nationals hold at least 51 per cent of the equity interest initially, to be increased to 60 per cent within 2 years.

The above resolutions constitute administrative guidelines to be followed by DPIM in its consideration of whether or not to grant or renew an offshore mining lease.

6. Other Approvals Required

Purchase of Minerals

Any person who wishes to purchase minerals in the course of business must obtain a license from DPIM. A purchasing license is valid only until 31 December of the year the license was issued. The holder of a purchasing license may not purchase minerals at any place other than the place specified in the purchasing license. Purchasing minerals outside the specified place of purchase requires an external purchasing license, which will be valid for the same period as the purchasing license. A holder of a purchasing license must keep accounts of minerals bought and sold and minerals still on hand.

Transportation and Storage of Minerals

The transportation of a mineral is possible only if the mineral royalty is paid. For most minerals, an ore transport license must accompany the transporting vehicle to the destination stated in the license. However, minerals such as fluorite, barite, gypsum, coal and gemstones require no ore transport license after the royalty is paid. Any person who wishes to store minerals outside the mining area or outside the place of purchase must also obtain a storage license. This license is valid until 31 December of the year of issuance.

Ore Dressing

Except for the holder of a mining lease or of a temporary mining license, no one can undertake ore dressing operations without a license.

7. Export-Import Policies on Minerals

The import of mineral and metal of any kind, with the exception of tin in excess of 2 kilograms, does not come under the provisions of the Minerals Act, regardless of quantity. The Minerals Act, however, governs export of the following minerals: tin ore in excess of 50 grams; gold ore, in any amount; copper ore, zinc ore and iron ore in excess of 2 kg each; and minerals with columbium, tantalum and thorium, or other radioactive contents, in any amount.

8. Foreign Business License

DPIM has a policy not to grant mineral rights to foreigners (including companies in which ownership by foreigners exceeds 49 per cent). However, it is possible that DPIM will grant mineral rights to a foreign company under a special agreement or if the project were promoted by the Board of Investment. In practice, the BOI will not consider an application from a foreign company until it has obtained a foreign business license under Schedule 2(3)(4) of the Foreign Business Operation Act (1999).

9. Mining Council Membership

The Mining Council was established by the Mining Council Act (1983). The council comprises members who are mining operators, including those involved in exploration and trading. At present, any person wishing to apply for a mining right is required to be a member of the Mining Council first.

10. Administrative Efficiency

One characteristic of the Thai bureaucracy that causes it to stand out from other bureaucracies is the divided nature of Thai administration. Government agencies in Thailand are divided into ministries, departments and bureaus, each of which are separate juristic entities having independent contracting powers. Thus, the MOI is a separate legal entity from the DPIM, which answers to it administratively. Even though DPIM is only one among many departments within MOI, it can enter into contracts with a private party independent of the ministry. For example, DPIM can engage contractors to construct or repair buildings, purchase supplies and engage in consulting services. The director general, as the head of the department, is the signatory to contracts. The question of whether the department or the director general has the power to conclude contracts and the parameters within which this power can be exercised is governed by the law on public administration.

Each government agency is only concerned with administering its own law, even though that law may contradict other laws or may be inconsistent with national policy. This fact poses a major problem for the mineral industry in that DPIM is not the agency that has the final say on whether or not an exploration or mining venture can be conducted. The ultimate decision may rest with the OEPP or with the Forestry Department, if it happens to control the land on which the mining is to be conducted.

Foreign investors often believe that once having signed a contract with DPIM and having paid the bonus, they may then proceed with the exploration and development work. In reality, the contract is only a grant of mineral rights, subject to negotiation with the other agencies concerned, and there is no guarantee that investors will be given all necessary approvals in the

end. All acts of parliament have the same standing under the law. The Forestry Act, the Minerals Act and the Environmental Act are equal. Therefore, DPIM, the Forest Department and OEPP are of equal legal status, in the sense that neither can tell the other what to do. There is no “super-agency” to conciliate differences and impose its decision on conflicting agencies.

Policies issued by the heads of various ministries and departments are the real *modus operandi* for the government officials, and the failure of the officers to comply with the policies may result in disciplinary action. These policies are internal directives and are not known to the public. As one looks through the various laws in Thailand, one finds many provisions giving wide discretionary powers to permanent officials responsible for administering the law.

11. Security of Tenure

One factor that is often cited as an impediment to the mining industry’s development is the lack of “security of tenure”. The existing legal system does not expressly guarantee that the holder of an exploration license will be granted a mining lease if he makes a commercial discovery. The government bureaucracy and the limited scope of the mining laws are not the sole causes of the inability to assure a right to mine over prospected land; the conflicts and restrictions from other authorities as well as subsequent land-use conflicts complicate the issuing of rights.

12. The Fiscal Regime

Description of Major Taxes

The major taxes applicable to the mining business are company income tax, mineral royalties and value-added tax.

- *Company Income Tax*

A company earning revenues from the mining business is liable to pay company income tax under the Revenue Code. The present rate is 30 per cent. Dividend payments to overseas shareholders are generally subject to a withholding tax of 10 per cent. Expenses incurred for the sole purpose of carrying on the business may be deducted.

Depreciation of assets may be deducted as a business expense but must be done on an annual basis. Official prescribed rates of depreciation are 5 per cent for permanent buildings, 100 per cent for temporary buildings, 5 per cent for depletable natural resources, 10 per cent for lease rights with no fixed termination date and 20 per cent for other property.

Losses may be carried forward for five consecutive years.

- *Mineral Royalties*

Mining lease-holders must pay royalties to the government according to the Mineral Royalty Rates Act (1966). See Ministerial Regulation published on 17 October 2007 for current royalty rates.

Royalties are paid based on the value of the minerals extracted, except in the case of gem mining, whereby the royalty is based on the size and the value of the land covered in the mining lease.

- *Value-Added Tax*

Mining companies are subject to VAT at the usual rate of 10% (temporarily reduced to 7%). However, a zero VAT rate applies to exports of minerals by mineral traders. VAT payable is calculated from the difference between input tax (VAT paid by the mining trader to suppliers of goods or services) and output tax (VAT collected by the mining trader from persons who purchase goods or services).

Double Tax Treaties with Other Nations

Currently, Thailand has double tax treaties with more than 50 countries.

BOI Promotional Incentives

Under the Investment Promotion Act, the following activities are eligible for promotion:

- 2.1 Mineral ore prospecting
- 2.2 Mining or ore dressing (except tin)
- 2.3 Marble or granite mining

A mining project promoted by the Board of Investment maybe granted benefits including exemptions/reductions of customs duties on imported equipment, an income tax holiday of 3 to 8 years, an exemption from withholding tax on dividends, and other incentives. A condition of promotion for 2.2 and 2.3 is that a ML must be obtained from DPIM prior to issuance of a promotion certificate. Another condition in practice, in the case of a majority foreign owned company, is that a business license has been received under the Foreign Business Operation Act.