



NEW CALEDONIA INVESTMENT GUIDE



One Firm WorldwideSM



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**JONES
DAY** | One Firm WorldwideSM

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Published in 2009 by Jones Day
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In collaboration with



Agence de Développement Economique de la Nouvelle-Calédonie (ADECAL)
www.adecal.nc/

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ISBN 9780980608137

Cover image: Alain Etchegaray.

Produced by Business Advantage International Pty Ltd
www.businessadvantageinternational.com



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1.0 GENERAL INFORMATION ON NEW CALEDONIA



Credit: Tourisme Point Sud

1.1 Overview of mining in New Caledonia

The discovery of various minerals including coal, gold, copper, cobalt, chrome and antimony shortly after New Caledonia became a French colony in 1854, has given New Caledonia not only an industrial advantage over its South Pacific neighbours, but also international political and economic significance far disproportional to its geographical size. Most notably, the discovery of nickel ore by Jules Garnier in 1864 has been the predominant driver of New Caledonia's mining industry and represents an incredible portion of the world's nickel resources (approximately 25–40% depending on various estimates).

The predominance of mining in New Caledonia greatly influences New Caledonia's social development. The complex regulations framing the exploration and exportation of mining, especially nickel, reflects its important status in New Caledonia. In 2006, nickel represented 92.2% of New Caledonia's exports.

Since January 2000, New Caledonia has had independent authority over the regulation of hydrocarbons, nickel, chromium and cobalt. Decisions relating to the implementation of mining legislation are made by the Provinces, which are also responsible for scrutinizing the operations, environment and labour of the mining industry. The organisations responsible for coordinating the Provinces are the Mines Board (*Conseil des Mines*) and the Mines Advisory Committee (*Comité Consultatif des Mines*).

New Caledonia's mining regulation has recently been codified for the most part pursuant to Article 39 of New Caledonia's Organic Law. Congress passed on March 18, 2009 a new Mining Law, establishing a Mining Code (the Mining Code) which entered into force on April 30, 2009. As a result, New Caledonia's mining regulation is less scattered in various texts. However the Mining Code has not yet been translated into English.

The Mining Code is directed towards achieving the following goals:

- gathering and structuring New Caledonia's scattered mining regulation into one cohesive code;
- rationalising and simplifying New Caledonia's foreign investment procedure, including the provision of conducive investment conditions for foreign investors;
- facilitating mechanisms for open dialogue and coordination between mining operators, authorities and local communities;
- establishing an environmental protection framework, including an environmental approval process and rehabilitation obligations; and
- supporting the export of metallurgically transformed products and laterites; and
- preserving resources through the creation of provincial technical reserves.

Along with the Mining Code, New Caledonia passed a mining resources development scheme (*Schéma de mise en valeur des richesses minières*). This scheme provides for global and long term orientations to be implemented in the three Provinces in order to:

- ensure clarity and transparency of administrative procedures with the view of facilitating a sound industrial development;
- make out an inventory of the resources for a better knowledge of New Caledonia's potentials and exploitation perspectives;
- preserve the environment by proposing adequate administrative, technical and financial tools;
- manage on a long term basis economical mining profit.

The Mining Code is the initial legislative implementation of the scheme and further regulation is expected to be passed.

The Direction of the Mines and Energy in New Caledonia (*Direction de l'Industrie, des Mines et de l'Energie de la Nouvelle Calédonie*) (**DIMENC**), is an agency established with the New Caledonian Mines and Geology Department and is responsible for regulation and administration of the mining sector. Since the adoption of the Mining Code, DIMENC has been elevated to being the central body for the implementation of mining regulation, the regulation of mining operations and the usage of mineral resources with regard to environmental protection.



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1.2 Country Information

A) AREA AND POPULATION

Area

New Caledonia is an archipelago in the Pacific Ocean located near the Tropic of Capricorn about 1,500 km off the east coast of Australia, 1,800 km north of New Zealand, 7,500 km from Japan and 18,000 km from metropolitan France.

The Region

The Pacific region is divided into three geographical groups: Micronesia in the North, Polynesia in the East and Melanesia in the West. Melanesia comprises Fiji, Vanuatu, New Caledonia, the Solomon Islands, Papua New Guinea and Irian Jaya. New Caledonia is situated between 19° and 23° latitude south and between 158° and 172° longitude east and is the third largest island in the South Pacific after Papua New Guinea and New Zealand.

The Archipelago

With an area of 18,575 km² the New Caledonian archipelago consists of:

- the Mainland (about 400km long and 40km wide) on a South-East/North-West axis;
- Isle of Pines (150km²), in a South-East alignment of the Mainland;
- the Belep Archipelago (70km²), in the North-West alignment of the Mainland;
- the Loyalty Islands composed of Lifou, Mare, Ouvea and Tiga; and numerous small islands (a total of 1,981 km²) on an axis parallel to the Mainland on the East Coast.

The Exclusive Economic Zone (EEZ) of New Caledonia is estimated at about 1,450,000 sq. km, which is approximately half the size of the Mediterranean sea.

Topography

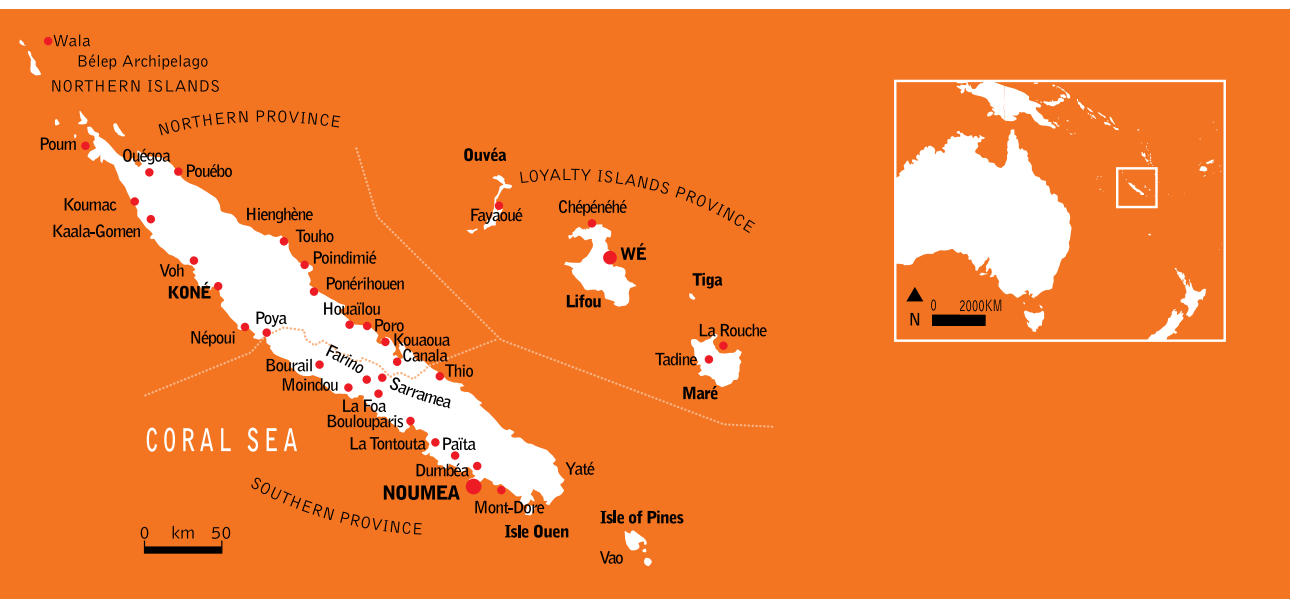
The 'Chaîne' mountain range divides the mainland through the centre. The highest summits are Mt. Panié at 1,628m in the north of the island and Mt. Humbolt at 1,618m in the south of the island. The eastern side of the main island has a high and ragged coastline that drops straight down to the Lagoon (*le Lagon*) and is exposed to the Trade Winds. In contrast, the West Coast is low with several plains. The unique topography caused by the Chaîne mountains means that most cyclones are prevented or weakened before they reach the capital, Nouméa.

The Isle of Pines has a central plateau and coral coastal plain while the Loyalty Islands are flat islands that are formed from coral.

New Caledonia and The World	Distance
Nouméa - Paris:	16,674 km
Nouméa - Los Angeles:	10,095 km
Nouméa - Tokyo:	6,972 km
Nouméa - Auckland:	1,859 km
Nouméa - Brisbane:	1,500 km
Nouméa - Suva:	1,400 km
Nouméa - Port-Vila:	527 km

Source: ISEE, New Caledonia facts and figures, 2007.

Municipalities Of New Caledonia



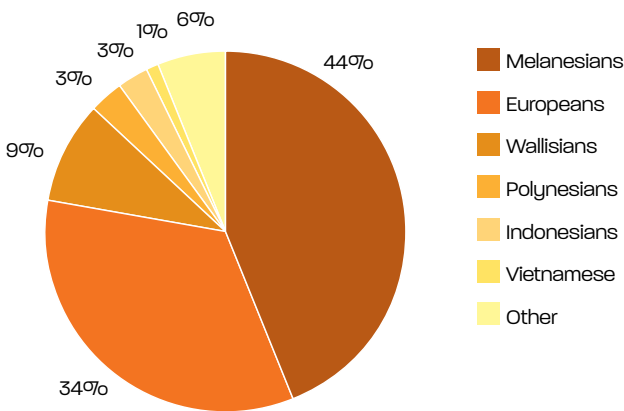
Demography

According to the last census in 2004, New Caledonia's population was 230,789 people. It is currently estimated that New Caledonia's population will exceed 250,000 people in 2009, rising to 300,000 in 2018, and more than double to 500,000 in 36 years.

When New Caledonia became a French colony in the 1850s, the population of the island consisted of approximately 30,000 to 40,000 indigenous 'Kanak' people. By 1900, the number of European settlers was approximately 23,500.

The New Caledonian population is very diverse. The last census in which questions relating to ethnicity were posed (1996), divided the population into the following groups:

Ethnic Diversity in New Caledonia



Source: INSEE-ITSEE, *Images de la population de la Nouvelle-Calédonie/ Principaux résultats du recensement 1996*, INSEE Résultats, série Démographique-société, n55, février 1997

The Melanesian 'Kanak' community represents 44.1% of the entire Caledonian population: being 97.1% of the population in the Loyalty Islands Province, and 77.9% of the population of the Northern Province. The European community represents 34.1% of the population and predominantly resides in the Southern Province. The population spread between the Provinces is: 71.2% in the Southern Province; 19.3% in the Northern Province; and 9.6% in the Loyalty Islands Province.

Of the population shown in the 2004 census (230,789), there were 116,485 men and 114,304 women. Almost all have French citizenship. Foreign nationals were mainly from Asian and Oceanian countries.

In 2004, 44.7% of the population was under 25 years of age, however the category of people under 15 years old was in decline compared to the previous census in 2006. Consequently, the median age in New Caledonia was 30.2 years old, an increase from the median age of 27.8 years old in 1996. Average population density was 12.4 inhabitants per square kilometre: 4.6 in the Northern Province; 11.1 in the Loyalty Islands Province; and 23.4 in the Southern Province. Maximum population density was recorded in Nouméa with 2,000 inhabitants per square kilometre.

B) THE CUSTOMARY ASPECT OF NEW CALEDONIAN SOCIETY

The Melanesian 'Kanak' traditions still exist in New Caledonia. Kanak society is a customary society which is based on clans which then form larger groups of tribes. New Caledonia's civil law acknowledges the existence of the customary society and the customary status of the Kanak people is constitutionally recognised in accordance with Article 75 of the Constitution which provides that people who have Kanak customary civil status can elect to be governed by 'custom' in civil matters.

Specific civil status for native citizens was established by Decree dated 21 June 1934 to encompass customary procedures for certain acts, such as marriage and adoption. Specific civil status was elevated to 'customary civil status' by Deliberation dated 3 April 1967, which has been supplemented by the Organic Law of 19 March 1999 to precisely define and structure customary civil status.

In particular, three elements determine the identity of citizens under customary civil status: paternal surname or family name; Christian name(s); and the individual or Melanesian first name. A person's Melanesian name is of particular importance under customary law, especially in relation to land rights within a clan. With regard to land, the existence of a 'master of the land' clan is generally accepted, from whom the majority of families making up the clans or tribes originally received a concession, being the land they live on and cultivate. Mayors, as registrars, are responsible for keeping customary civil status registers. When dealing with a Kanak person's civil status in the adjudication of a civil claim, a judge will be assisted by two customary assessors.

The tribe itself is an administratively recognised structure within Melanesian society and groups of tribes form customary districts. The Clan Council (*le conseil du clan*) is an integral part of the customary social and modern political system and rules on questions relating to clan property and status. The Clan Council may be consulted, by different institutions such as DIMENC.

Tribal Groups in New Caledonia



Source: Institut de la Statistique et des Études Économiques (ISEE), Panorama des tribus, Notes et Documents No. 78, avril 1998

According to the 1996 census, there were 341 tribes (slightly less than three-quarters on the Mainland and the remaining in the Loyalty islands) living in 160 indigenous reserves. 80,443 Melanesians declared themselves as belonging to a tribe, but not necessarily residing in indigenous reserves, while 28.7% of the population actually lived in a tribe.

The Organic Law affirms the Kanak ties with the land, stipulating in Article 18 that customary lands are inalienable, non-transferable, non-exchangeable and cannot be seized.

C) LANGUAGE

French is the official language of New Caledonia and is the lingua franca used by the natives from different tribes. Despite this, New Caledonia has remarkable linguistic diversity with 29 vernacular languages spoken across the archipelago.

D) CURRENCY

The currency in New Caledonia is the Pacific Franc (XPF or CFP). It has a fixed exchange rate with the Euro (€) of 1€ = 119.3317 XPF. The fixed exchange rate provides for exchange security in international transactions.

The Pacific Franc is issued by the Overseas Issuing Institute (*Institut d'Emission d'Outre Mer*) (**IEOM**).

1.3 Political organisation and administration

A) HISTORY

The archipelago was 'discovered' and named 'New Caledonia' by English Captain, James Cook on 4 September 1774. However, the presence of Lapita pottery dating back to 1300 BC is the earliest proof of Melanesian life in New Caledonia.

For nearly 70 years between 1774 and 1840 little contact with the archipelago was recorded. Initial visitors to New Caledonia were seafarers and pirates who established trading centres in the Pacific during the mid 1800s. These visitors were then followed by British Protestant missionaries and French Catholics.

On 24 September 1853, Rear-Admiral F  bvrier-Despointes officially took possession of New Caledonia by order of Napoleon III in order to establish a penal colony. The first convicts landed in 1864 and the penitentiary administration remained until 1897. In the 1890s, colonials from metropolitan France were encouraged to settle in New Caledonia and were offered land for the cultivation of coffee. However the so-called 'free colonisation policy' was short lived due to the tropical climate and isolation from France. In the 1920s another group of French settlers tried to cultivate cotton but they too were unsuccessful.

The discovery of nickel ore by the engineer Jules Garnier in 1864 is a landmark in New Caledonia's history. Within twenty years, the nickel mining industry had developed so rapidly on the island that it was necessary to import labour, particularly from Asia, to sustain development.

The Second World War is another landmark in New Caledonia's history as it served as a military logistics base for American troops during the war. In 1946, New Caledonia chose to become an overseas territory within the Republic of France. The decolonisation period following the Second World War did not affect New Caledonia until the early 1970s and the independence movement peaked during the 1980s which was characterised by political crisis and violent confrontations between pro-independence Kanaks and descendants of French settlers. A political accord – the 'Matignon Agreement' – was achieved in 1988 which set a date for a referendum to be held in ten years time to determine

New Caledonia's autonomy and civil relations and rights between indigenous people and the European descendants. This referendum law of 9 November 1988 enabled the territory to regain stability for the following decade.

In 1998, the referendum was duly organised in order to approve the 'Noum  a Agreement' which enounced a new statute for New Caledonia that recognised the customary civil status and customary rights of the indigenous community and the Noum  a Agreement provided a framework for government between the indigenous community and descendants of European settlers, as well as conceding greater autonomy for the New Caledonian government.

Pursuant to the Noum  a Accord, the Organic Law, was passed in March 1999. The Organic Law provided for the implementation of New Caledonia's autonomous Government and Congress and a progressive transfer of authority from the French State. In addition, the Noum  a Accord has provided for a public consultation period between 2014 and 2018 to be held in order to decide whether New Caledonia will accede to have independent sovereignty from France.

The self-determination process granted by the Noum  a Accord has served to ensure social stability in New Caledonia.

B) NEW CALEDONIA'S POLITICAL ORGANISATION

Following the Noum  a Agreement, New Caledonia became a territorial collectivity with a specific status within the French State (a '*sui generis*' collectivity). The current political organisation of New Caledonia is derived from the Organic Law, (No. 99-209 dated 19 March 1999), which followed the Matignon Agreement and the Noum  a Agreement and was enacted pursuant to Articles 76 and 77 of the French Constitution. Combined, these laws create a complex system that provides for the allocation of powers between the French State, the New Caledonian institutions and its three Provinces.

(b.1) The French state

The French Republic retains sovereignty in relation to a number of heads of power.

The French State is represented in New Caledonia by the High Commissioner (*le Haut Commissaire de la République*). The High Commissioner checks the legality of the acts taken or passed by local authorities of New Caledonia. As a link between France and the New Caledonian and local authorities, the High Commissioner consults the Congress and/or Government on national undertakings applicable in New Caledonia.

(b.2) New Caledonia as a *sui generis* collectivity

The institutions of New Caledonia include the Congress, the Government, the Economic and Social Council, the Customary Senate and the Customary Councils. The New Caledonian collectivity is subdivided into three Provinces and 33 communes.

(b.2.1) The Congress

The legislative body of New Caledonia is the Congress. It is composed of 54 members from the provincial assemblies called 'Councillors of New Caledonia' (*Conseillers de Nouvelle Calédonie*). Each year the Congress elects the members of its executive, standing committee, and internal committees. The Congress elects the president of the Government and the Government is accountable to the Congress.

The Congress also has the ability to pass local laws in relation to matters for which it has delegated authority pursuant to Article 99 of the Organic Law. Laws passed by Congress come into force upon proclamation by the High Commissioner and publication in the Gazette of New Caledonia (*Le Journal Officiel de la Nouvelle Calédonie*).

(b.2.2) The Government

The executive body of New Caledonia is the Government, whose number of members varies between five and 11, as provided by the Organic Law. The members are elected by Congress by proportional ballot from party lists. The Government's mandate ends when the mandate of the Congress that elected it comes to an end after a term of five years. The president of the New Caledonian government is chosen from and elected by its members. The president represents New Caledonia and is responsible for its administration and the appointment of civil servants in New Caledonia.

The Government prepares and executes Congress' deliberations, and with Congress' authority adopts the regulatory decrees required for the implementation of its decisions. Decrees are signed by the President and countersigned by the member responsible for overseeing its execution. These decisions are made by majority vote. Initiatives for laws and deliberations come from both the Government and members of the Congress.

(b.2.3) The Economic and Social Council

The Economic and Social Council (*Le Conseil Economique et Social*) is a consultative body, composed of 39 members, including 28 representatives from the civil society directly involved in economic, social and cultural activities designated by the Provinces. The Customary Senate appoints two members and the Government appoints nine members. Its members are elected, every five years.

The Economic and Social Council is consulted on bills or local law proposals and on deliberations of Congress of an economic, social or cultural nature. It may also be consulted by the President of the Government and/or the President of Congress, the provincial assemblies or Customary Senate.

(b.2.4) The Customary Senate

The Customary Senate is composed of 16 members. The Customary Councils appoint two members from each of the customary areas. A new president is designated each year, in accordance with a rotation system among the eight customary areas.

The Customary Senate is consulted on bills relating to and impacting on indigenous customary civil status and customary land issues. It can express an opinion on all bills and proposals and consultations in regard to questions pertaining to Kanak identity are mandatory.

(b.3) The three Provinces

The three Provinces of New Caledonia were established by the Referendum dated 9 November 1988: the Northern Province, the Southern Province, and the Loyalty Islands Province. In 1988, the French State agreed to decentralise substantial powers to the Provinces. The Organic Law reinforced this transfer of authority from the French State to the three Provinces.

Essentially, the Provinces have authority on every matter not falling explicitly within the authority of the French State or the authority of New Caledonia. **In particular, decisions relating to the application of mining legislation are made by the Provinces.**

C) THE TRANSFERS OF AUTHORITY FROM THE FRENCH STATE TO NEW CALEDONIA

The Nouméa Agreement of May 1998 and the Organic Law have given the Institutions of New Caledonia new powers in several areas, such as Labour law, Insurance Law, Taxation, Foreign Investments, and Natural Resources. As a consequence, the applicable law in New Caledonia is composed of both French and local laws. This composition has been designed in order to best allow economic and social development of the Island as well as progressive transfer of powers to New Caledonia.

(c.1) Heads of Powers transferred to the authority of New Caledonia

These are listed by Article 21.2 of the Organic Law. They include among others:

- taxation;
- labour law and trade unions law;
- insurance law;
- access to work for foreigners;
- native title; and
- mining regulation.

(c.2) Heads of Powers remaining within the authority of the French State

These are listed by Article 21.1 of the Organic Law. They include mainly mandatory laws in relation to:

- justice;
- education;
- immigration;
- police powers;
- foreign affairs; and
- civil and commercial law.

(c.3) Heads of Powers transferable to the authority of New Caledonia

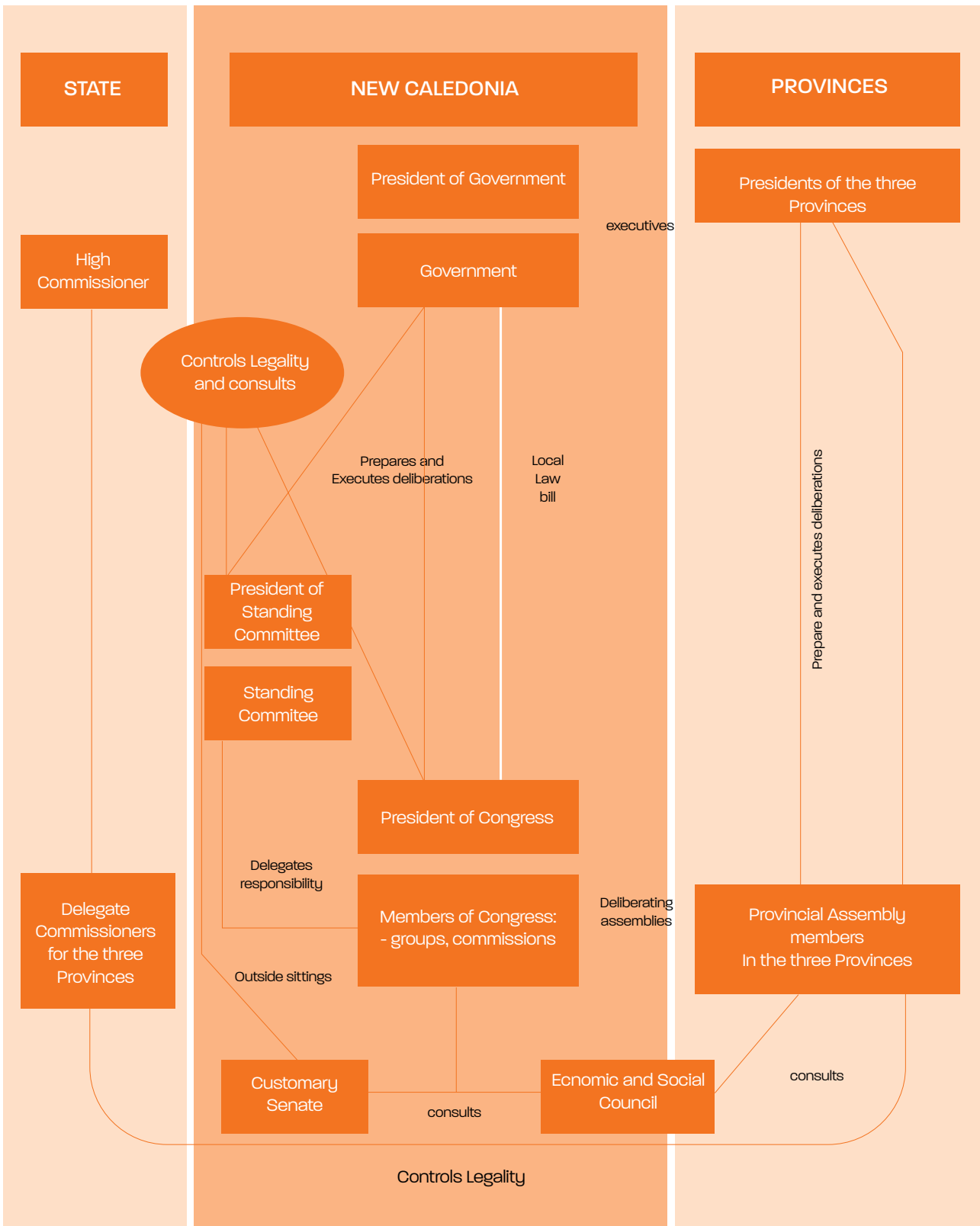
Under Article 26 of the Organic Law, some heads of powers belonging to the French State will be transferred to New Caledonia in 2009 following the new congressional mandate. These are:

- education; and
- civil and commercial law.

The manner and timing of this transfer is yet to be determined.

As provided by the Organic law, from 2014 the New Caledonian government is to begin consultation by way of referendum in order to determine the extent of sovereignty for the territory. If the result of this vote leads to the full sovereignty of New Caledonia, all the remaining heads of powers held by the French State at the time will be transferred to the Territory.

Institutions In New Caledonia



1.4 Courts and jurisdictions

A) FRENCH SOVEREIGNTY

The administration of justice in New Caledonia is a power retained by the French State. Therefore, the judicial system applicable in New Caledonia is largely similar to the French judicial system. Because New Caledonia is a French collectivity, the administration of justice in New Caledonia is governed by the rule of law and the fundamental principles of the separation of powers. The main consequence of the separation of powers is the existence of two types of courts – judicial courts and administrative courts.

The highest administrative court is the *Conseil d'Etat*. Disputes involving administrative law are normally heard at first instance by Administrative courts (*Tribunaux Administratifs*) and at second instance by the Administrative Court of Appeal (*Cours administrative d'Appel*).

Judicial courts have jurisdiction over disputes between private individuals or companies and disputes involving the Government, the French State or a New Caledonian institution when it is acting in a commercial capacity.

B) THE TWO-TIER COURT STRUCTURE

The judicial court system is based on a two-tier court structure. A dispute may be heard first by the relevant Court of the First Instance (*Tribunal de Première Instance*), before possibly reaching the Court of Appeal (*Cour d'Appel*). It is at this stage that a judgment delivered by a court of first instance may be appealed. In principle, therefore, every case may be heard twice in regard to both points of fact and points of law.

There is, however, a third and last level of adjudication, the Civil Supreme Court (*Cour de Cassation*). The *Cour de Cassation* sits in Paris and has jurisdiction over all French territories, including New Caledonia. In principle, any decision delivered by a court from

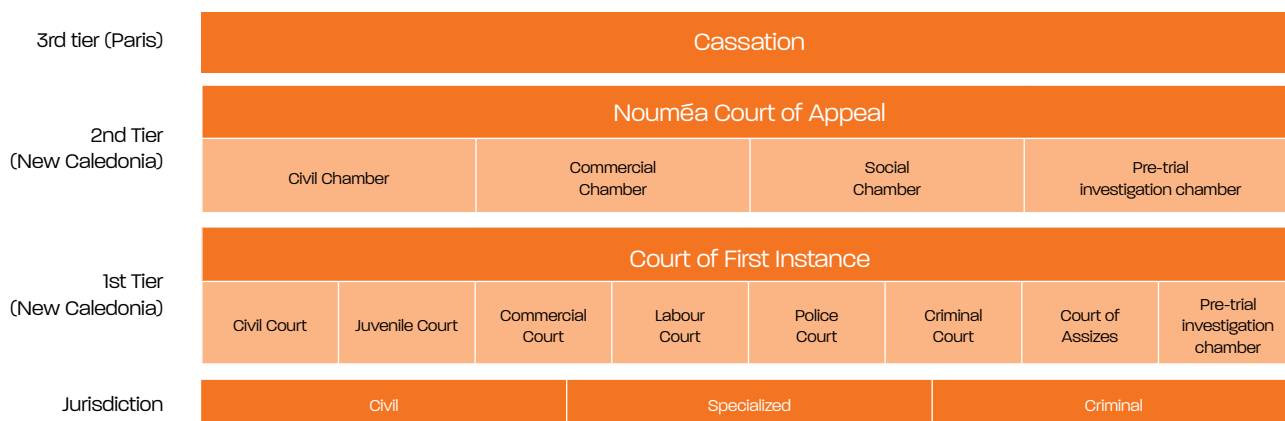
which there can be no further appeal, whether civil or criminal, may be the object of an appeal on a point of law brought by either party to the dispute. The *Cour de Cassation* does not review the facts of the case, but has the final say in the manner in which a particular legal rule should be applied.

The Tribunal of First Instance of Nouméa (*Tribunal de Première Instance de Nouméa*) is jointly managed by the President of the Tribunal (*Président du Tribunal*) and the Prosecutor of the Republic (*Procureur de la République*). Apart from its traditional civil and criminal jurisdictions, the Tribunal of First Instance of Nouméa encompasses the Commercial Court (*Tribunal Mixte de Commerce*), the Labour Court (*Tribunal du Travail*) and the Juvenile Court (*Tribunal des Enfants*). Another particularity of this institution is the two detached sections of this court, one at Koné and the other at Wé (Lifou). The Court also holds sessions in several other local councils around New Caledonia.

C) MIX COURTS

The Commercial Court is composed of one professional judge and two consular judges, who are appointed as representatives of the business community. The Labour Court (*Tribunal du Travail*) is composed of one professional judge, four assessors, two employees and two employers.

The Court of Appeal (*Cour d'Appel*) sits in Nouméa, under the joint responsibility of the first President of the Court and the Public Prosecutor and covers the territories of New Caledonia as well as Wallis and the Futuna islands.



1.5 Economy

A) GDP

In 2007, the estimated Gross Domestic Product (**GDP**) of New Caledonia was 768 billion XPF (€6.437 billion) and 3,167,000 XPF (€26,539) per capita. The GDP per capita is higher than New Zealand's figure and far higher than the other small insular economies of the South Pacific.

The New Caledonian economy has continued to grow at a sustained rate of over 4% per annum for about 20 years. Over the same period, the GDP per capita rose by an annual average of almost 2%. This growth means that New Caledonia's living standards are now commensurate with those of metropolitan France.

Following the mid 1980s, a new economy emerged in New Caledonia. The once dominant agricultural sector (which contributed up to 10% of GDP in the early 1960s) has been displaced by the services sector, the nickel industry and a productive agricultural system.

The services sector of the New Caledonian economy has strengthened significantly since the 1960s (when it represented 54% of GDP). The sector now contributes 70% of New Caledonia's GDP, a level which is comparable to metropolitan France.

New Caledonia is a major player in the world nickel market, currently representing 20 to 25% of the worldwide nickel resources. Although nickel represents the major export resource (90% of all goods exported), the relative weight of the sector has generally tended to decline since the beginning of the 1970s. At the end of the 'nickel boom' in the early 1970s, the industry contributed approximately 30% to New Caledonia's GDP. However, this percentage declined continuously until 1998. Since then, nickel prices have risen steadily, leading to an increase in the relative portion of nickel's contribution to New Caledonia's GDP. According to 2004 estimates, the nickel industry now contributes over 10% of New Caledonia's GDP.

The total value of imports to New Caledonia was €2,046 million in 2007 and €1,539 million of goods and services exports.

The weight of the nickel industry (ore extraction and metallurgy) is dependent on the international economic outlook as well as the demand for nickel. After a poor year in 2000, the nickel market experienced another crisis in 2001, and only contributed 5% to value-added as opposed to 9% in the previous year. Since then, the international nickel market has improved and as a consequence the nickel sector contributed over 10% of GDP in 2004.

The industrial sector (which includes energy but excludes metallurgy) has developed since the beginning of the 1980s. A diverse range of small and medium-sized industries, now make a relatively stable contribution of around 8% to value added, while construction has contributed over 9%.

The agricultural sector, which also encompasses livestock production, forestry, fisheries and aquaculture, contributes approximately 2% of value added.

B) INVESTMENT ENVIRONMENT

In order to best describe the Investment Environment of New Caledonia, this Guide focuses on three relevant aspects of the New Caledonian market:

- the organisations that promote development;
- the job market; and
- the banking system.

b.1) The organisation that promotes development

As a preliminary note, the Southern Province of New Caledonia is the area that is by far the most developed and it is a constant and difficult political issue as to how the other two Provinces can reach a similar level of development. As a result, investment initiatives in the Northern Province and in the Loyalty Islands Province are warmly welcomed and encouraged.

The development agency of New Caledonia (ADECAL)

ADECAL is an economic development agency founded by the public authorities and boasts support from the corporate world (Chamber of Commerce and Industry, Chamber of Agriculture, Guild, financial institutions, corporate organisations). Within its missions, it acts as an interface, a consultative and coordination body to accompany new actions and projects that would be of benefit to New Caledonia. It is mainly funded by the French Government, the Government of New Caledonia and the three Provinces of New Caledonia.

ADECAL's mission is to promote New Caledonia's economic potential and promote inward investment. It is also in charge of external trade and regional cooperation. Last, it manages the exploration programme to the Exclusive Economic Zone called *Zonēco*.

ADECAL's professional team assists in putting projects together successfully, in particular by providing, among other things:

- Economic background data;
- Information on exportable goods and services;
- International investors canvassing and external markets exploration;
- Contact with appropriate local government officials and business partners;
- Project management, facilitating administrative procedures;
- Cooperation activity.

All their services are entirely free of charge.

Investment in New Caledonia's economy is promoted in different ways. The European Union, the French State and the Provinces all support investments by various means. However, there are also other organisations that promote investment in New Caledonia.

European Assistance

New Caledonia has had 'Overseas Countries and Territories' status (*Pays et Territoires d'Outre Mer*) (**PTOM**) within the European Union since the Rome treaty of 1957. The major financial initiatives for European assistance in New Caledonia include issuing lines of credit to fund research on environmental and health issues, the European Investment Bank (BEI) and the establishment of regional programs such as 'Procfish' (open sea fishing program managed by CPS South Pacific Secretariat) and the European students exchange program called ERASMUS.

The European Development Fund (EDF) is also vital in the context of European assistance, as it issues funding on the basis of

periodic discussions and as per need basis. The global budget allocated to New Caledonia for EDF Round IX (2000–2007) amounts to €21.5 million.

The French State

The French State assists New Caledonia in development and wealth redistribution, mainly through the creation of development and urban agglomeration contracts.

Development contracts are agreements that the French State has entered into with New Caledonia and the Provinces since 1990 (and individual municipalities since 2000), for long-term development in accordance with objectives established in an overall improvement and development plan.

Similarly, urban agglomeration contracts are formed between the French State and the municipalities of Greater Nouméa, with priority given to measures for urban development (including habitat, water supply and waste treatment) and social development (including insertion youth programs and training). Ad-hoc contracts between the French State and its collectivities, referred to as 'State-Collectivities Contracts', were also entered into for the 2000–2004 period. Those contracts outlined the financing and implementation of policies between the French State and the Collectivities. French State intervention under these contracts represented €226 million for the 2000–2005 period, with €393 million planned for the ongoing 2006–2010 contracts.

These forms of direct financial intervention from the French State are complemented by other indirect mechanisms, such as tax incentives for its collectivities. Investment undertaken with such tax incentives amounted to approximately €50 million in 2005.

Assistance provided by the Provinces

As a consequence of the Matignon Agreement which handed the Provinces authority in matters of economic development from 1988, the Provinces are a major local investor in New Caledonia.

Each Province has semi-State owned/semi-private companies (*Société d'Economie Mixte*) ('SEMs'), who promote investments and economic development within their respective Province. Each of the three Provinces has a SEM on the Board of Directors on which it sits (these SEMs are listed below). The Province consequently takes part in the decision to finance, pilot or commit to structuring projects, while simultaneously reassuring the confidence of private investors. SEMs aim to consolidate the level of equity capital of a targeted company so that they can partially self-finance their investments and, if necessary, benefit from satisfactory credit conditions.

In the Southern Province: Promo Sud

Promo Sud mainly operates to finance projects for the tourism industry as well as the fishing and aquaculture, innovative technologies and mining industries.

In the Northern Province: Sofinor

Sofinor favours the financing of projects within the mining sector, the hotel industry and aquaculture.

In the Loyalty Islands Province: Sodil

Sodil finances projects in the transport, hotel and fishing and aquaculture industries.

Provincial activities are also undertaken through the corresponding development and/or investment codes, which define the general mechanisms and application of formalities within each assistance regime.

The Southern Province has supplemented its assistance package under Modified Deliberation Number 06-97 of 16 May 1997. Accordingly, it now provides assistance for the creation of micro-enterprises and provides a variety of other mechanisms to encourage economic development.

Businesses can receive various forms of financial assistance, subject to certain eligibility conditions specific to each of the Provinces. For example, €1.8 million worth of subsidies were paid out by the Southern Province in 2005, €3.4 million by the Northern Province and €0.9 million by the Loyalty Islands Province.

Other organisations assisting and promoting investment

Organisations other than the European Union, the French State and the Provinces, contribute to the economic and social development of the territory.

New Caledonian Institute of Participation (Institut Calédonien de Participation – ICAP)

ICAP was created in 1989 by the Central Fund for Cooperation (Caisse Centrale de Coopération Economique) and the three Provinces.

It is a development institution for both the mainland and the islands. Its purpose is to promote projects for the restoration of an economic balance between Nouméa and the rest of the territory.

ICAP mainly operates in the production sector or the service sector (insofar as it is related to production.)

Central Bank of Overseas Territories ('Institut d'Emission d'Outre Mer')(IEOM)

The IEOM plays an important role in development, as the central bank of Overseas Territories. One of the missions of the IEOM is

to direct credit policy. It therefore aims to facilitate investments in priority sectors in order to develop production systems and create jobs. It also seeks to maintain moderate credit rates by issuing a low re-payment discount rate, which contributes to reducing the financial costs of local companies belonging to the priority sectors of economic development.

Rediscountable loans (either short term – 12 months, or long term – up to seven years) may be issued for the following operations:

Short term loan:

Providing overdraft, assignment of receivables, bridging loan, campaign loan and interim financing loan of procurement contracts.

Long-term loan:

Funding production and sales equipment (machinery, tools, transportation, administrative or commercial equipment, purchasing of breeding stock), equipment aimed at protecting the environment and energy-saving, construction of buildings for economic use.

Sofotom

The Company for the Management of Guarantee Funds for Overseas Territories (Société de Gestion des Fonds de Garantie des Territoires d'Outre-Mer) (**SOFOTOM**) regroups the three inter-bank guarantee funds ('FGI's') of French Polynesia, Wallis and Futuna, and New Caledonia, which were created on the initiative of the IEOM. The FGI of New Caledonia was set up in April 1982. Its creation emanated from a desire to facilitate the granting of financial aid by credit institutions in favour of borrowers who do not have sufficient security.

Since 1989, the scope of the New Caledonian FGI has been extended to all branches of industry, provided the project's economic interest has been proven. It includes the hotel industry and tourist activities.

The French Development Agency (Agence Française de Développement – AFD)

The AFD, whose mission is to finance development, is a financial institution that is at the heart of France's Development Assistance policy. The framework for the AFD's New Caledonian intervention for 2007–2009, sets out the following three principle objectives:

- finance, support and advise public collectivities, especially in relation to health and water treatment;
- support the creation of businesses and the development of competition, especially in the field of environmental protection; and
- finance public policies, especially those regarding housing and structural investments.

AFD intervenes through a relatively wide variety of mechanisms including direct lending to the public and private sectors, management of shareholdings in certain companies, funding and management of a property subsidiary and providing guarantee funds.

Association for the Right to Economic Initiative (ADIE)

ADIE was created in 1989. It targets funding for the start-up and development of economic activities, through micro-lending to people who do not have access to bank funding. These loans (solidarity, honorary and progressive solidarity loans) are awarded in addition to assistance from the Provinces.

b.2) The labour market

Assessment

There is no formal assessment of the labour force in New Caledonia according to the criteria for assessment set by the International Labour Organization (ILO). However, according to the last census (2004), the total working population older than 14 years old was 169,065 and the unemployment rate was 16.3%: 11.4% in the Southern Province; 28.4% in the Northern Province; and 38.9% in the Loyalty Islands.

On 31 December 2006, the working labour force was estimated to include 89,576 persons, who fall within the following categories: 73,737 employees (including civil servants); 14,843 workers and liberal professions (the latter of which are those professions that are capable of being conducted individually); 646 apprentices; 88 political representatives; and 80 voluntary civilians.

Employing people in New Caledonia

Pursuant to Article 3.1.1 of the Nouméa Agreement together with Article 22 of the Organic Law, New Caledonia has authority over all matters of Labour Law.

Part 5 of this Guide sets out the framework that applies to employers in New Caledonia.

b.3) The banking system in New Caledonia

At the end of 2006, New Caledonia had 11 credit institutions:

Six banks:

- Banque Calédonienne d'Investissement;
- Banque de Nouvelle-Calédonie;
- Banque Nationale de Paris Paribas – Nouvelle-Calédonie;

- Société Générale Calédonienne de Banque; and
- Caisse D'épargne et de Prévoyance de Nouvelle-Calédonie;
- ANZ (Representative Office)

Five financing companies:

- Crédit Calédonien et Tahitien;
- Oceor Lease Nouméa ex Crédit Commercial de Nouméa;
- Crédit Agricole Mutuel;
- Nouméa Crédit; and
- GE MONEY.

Banking services are also provided by the Nouméa Finance Centre (*Centre Financier de Nouméa*) and the post office (*l'Office des Postes et Télécommunications*) (OPT) which, besides offering checking accounts, also offer insurance products of the *Caisse Nationale de Prévoyance* (CNP) and saving products of *Caisse Nationale d'Epargne* (CNE).

There is no specialised financial institution or mutual banking network established locally.

In addition to the local banking system, seven credit institutions located outside the Pacific franc monetary zone, participate locally. These institutions are:

- the French Agency for Development (*Agence Française de Développement – AFD*);
- the European Investment Bank (BEI);
- Dexia;
- Managing Company of the Overseas Guarantee Funds (*La Société de Gestion des Fonds de Garantie d'Outre-Mer – SOGEFOM*);
- CASDEN Popular Bank (*La CASDEN Banques Populaires* – which is a shareholder of the Societe Generale of New Caledonia);
- Natexis-Banques Populaires;
- Deposit Fund (*La Caisse des Dépôts et Consignations – CDC*).

1.6 Trade

A) IMPORTS

New Caledonian imports have risen consistently over the past thirty years. The annual average in 1970 was €198.8 million which has now increased to €1,430 million in 2005. This sustained growth reflects the constant increase in New Caledonian household consumption, as well as strong levels of investment by local business.

For the 2000–2005 period, four product categories accounted for almost two-thirds of the New Caledonian invoice for purchases: 'Machines, appliances and electrical equipment' (19% of import value), 'Transport equipment' (18%), 'Foodstuffs' and 'Mineral products' (14% each).

The mineral products category was the most significant increase in quantitative terms. These products which are predominantly used in metallurgic activity are dependent on the situation in the metallurgic sector of the New Caledonian economy and their cost is determined by fluctuations in the international raw materials prices.

The tight links between New Caledonia and metropolitan France and the high living standards of the New Caledonian population are evidenced by the fact that France is the major supplier of imports (32% of imports in 2005). The second largest supplier is the European Union (excluding France – 15%) which is equal to Singapore (15%). Singapore's growth in recent years has replaced Australia's supplier position (9%), while New Zealand (6%), the United States (4%) and Japan (3%) all had relatively globally stable market shares. New Caledonia also purchases goods from numerous other countries, in particular those in Asia, whose market shares have risen significantly in the past few years.

B) EXPORTS

New Caledonian exports, being predominantly mining and metallurgy products such as nickel ore, ferro-nickels and mattes, are directly dependent on the world nickel market and in particular their prices on the London Metal Exchange (LME).

New Caledonian exports reached record levels in 2005, exceeding €872 million.

New Caledonian exports remain almost exclusively based on nickel. For example, 91% of all export value between 2000 and 2005 was derived from nickel ore and its fusion products, averaging a total value of €615 million per year.

Other export products are also experiencing strong growth in sales. Sea products are one such example, which have tripled in export value over the past 10 years. Prawns have been the outstanding performer among seafood products, with exports increasing fivefold over 10 years. In 2005, they represented €20 million of export value. Tuna, sea cucumber and troca shell exports have also increased.

Interestingly enough, New Caledonia's major export markets are Japan, the EU (excluding France) and France itself. Products are also sold to South Korea and Taiwan, which (along with China) were nonexistent markets ten years earlier and are now developing into important, strategic customers for New Caledonia.

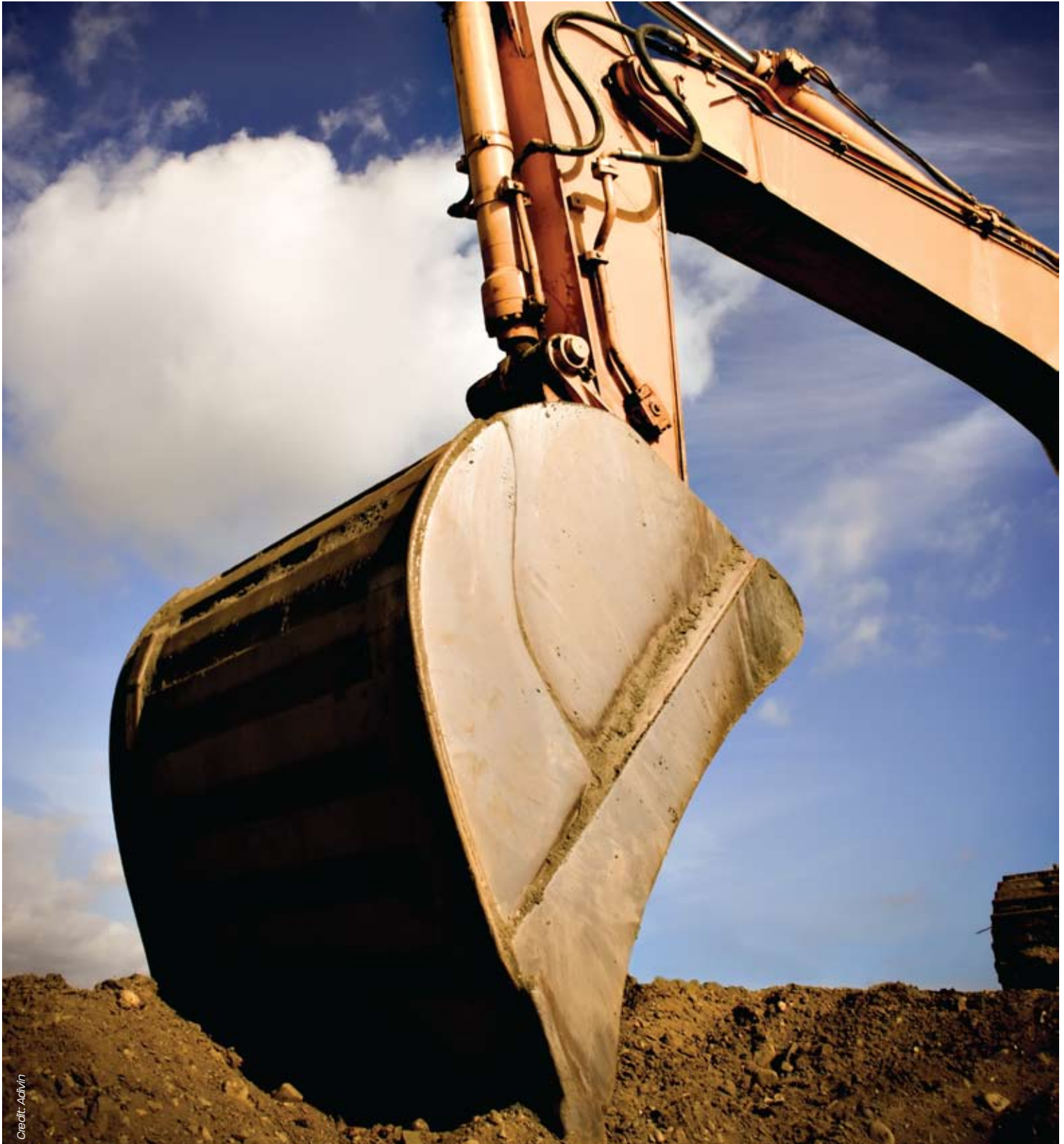
C) TRADE BALANCE

As a result of the strong growth in imports, New Caledonia has a significant balance of trade deficit, which varies according to nickel prices.

Although New Caledonia is unable to achieve an overseas trade balance, export growth has somewhat compensated for rising imports. 2004 and 2005 were exceptional years in terms of the trade balance as the export/import cover rate was higher than 60% the amount of previous years (with the exception of 2000). The New Caledonian export/import cover rate (situated between 40 and 110% since the beginning of the 1970s) remains far superior to the rest of the French overseas territories.

New Caledonia's trade balance remained in deficit with its major trading partners, except for Japan, Taiwan, South Korea and Spain – who are all significant buyers of nickel ore and ferro-nickels.

2.0 MINING LEGAL FRAMEWORK



2.1 Division of powers between the different levels of government in New Caledonia

Pursuant to Article XIII of the French Constitution, New Caledonia possesses its own legal structure and the provincial authorities are granted autonomous powers covering various matters including mining. These autonomous powers have significantly expanded in recent years and this Part 2 of the Guide sets out the current delineation of power between the French State and the New Caledonian government in regard to the regulation and control of mining activities in New Caledonia.

A) SITUATION FROM 13 NOVEMBER 1954 TO 1 JANUARY 2000

Pursuant to Decree No. 54-1110 dated 13 November 1954, the French State had authority to rule on mining activity regarding Nickel, Cobalt, Chromium, Hydrocarbon radioactive substances, Potassic Salt (as listed under Article 19, Decree No. 54-1110 dated 13 November 1954, as amended) and the presidents of each of the three Provincial Assemblies were granted authority regarding all other raw materials in their Province.

During this time the regulatory body for mining in New Caledonia was the Mine and Energy Services Department (*Services des Mines et de l'Energie*). The Mine and Energy Services Department had a mixed mandate as it was established to exercise both the authority of the French State and the Provinces and was delegated State authority by the High Commissioner. Mining matters regarding 'other raw materials' were rare and the Mine and Energy Services Department dealt with them for the Provinces.

B) SITUATION SINCE 1 JANUARY 2000

Following the relinquishment of powers from France to the New Caledonia government and Provinces as a result changes under the Nouméa Accord (1998) and the Organic Law (1999), New Caledonian mining rules and regulations are a complex mix of private and administrative laws. This section sets out the current regulatory framework for mining that is divided between the authority of the French State, the New Caledonian government and the three Provinces.

The French State

The French State's official role in the regulation of mining in New Caledonia has been almost entirely relinquished to New Caledonia. Indeed, on March 18, 2009 the New Caledonian Congress passed a new mining law which established a Mining Code. This code entered into force on April 30, 2009 and contains most part of the New Caledonian mining regulations. The French State only reserved sole authority over substances useful for research into

and development of atomic energy (Article 19 of Decree No. 54-1110 of 13 November 1954 reforming the regulation of mineral substances in overseas territories).

Notwithstanding this, the French State still yields substantial influence in practice because the High Commissioner sits on all mining consultative bodies and is able to exercise latent control in relation to decisions made concerning mining. Furthermore, the French State's tax incentive schemes enable France to influence how the mining sector operates at the state level.

New Caledonian Government and the Mining Institutions

The organisation for regulation of the mining sector in New Caledonia is exercised by the New Caledonian government through the following institutions:

The Congress: upon review of draft regulations passed by the New Caledonian Government, the Congress regulates exploration and mining rights, management and conservation of natural resources in New Caledonia's exclusive economic zone and the mining for hydrocarbons, nickel, chromium and cobalt.

The Government: DIMENC is the government body responsible for regulation of the mining sector. The DIMENC oversees and promotes the mining industry in New Caledonia from a perspective of sustainable development. The French State and the three Provinces have delegated their respective authority to DIMENC to be responsible for the mining sector. DIMENC is the main body for the administrative handling of all mining applications and was heavily involved in the drafting of the Mining Code.

The centralised role of DIMENC provides New Caledonia with a significant benefit through the uniform treatment of applications, even though the Provincial Presidents still make their voices heard in the conduct of mining matters.

Consultative Bodies:

The Consultative Committee on Mines
(Comité consultatif des mines);

The Mines Board (Conseil des mines)

The three Provinces

Since 1 January 2000, the Provinces have regulated and exercised the rights covering exploration, exploitation, management and conservation of biological and non-biological natural resources of inland waterways, including harbours and lagoons including waterways adjacent to the territorial waters. Accordingly, the Provinces are responsible for processing all mining applications relating to their territory, with the exception of cases concerning radioactive substances.

Not wishing to create their own mining departments, the Provinces have delegated their authority to DIMENC to be responsible for processing mining applications and exercising a supervisory and labour inspection role over mining operations.

Mining Municipal Commissions (*Commissions Minières Municipales*)

The Mining Municipal Commissions were created by an Ordinance of 1982 and further defined by Decree 83-885 of 28 September 1983. In exercising their primary purpose of liaising with the population, the Mining Municipal Commissions periodically visit mining sites located in their communes. The purposes of those visits are to: (i) keep the public regularly informed of the progress of the works; and (ii) to check on site the real work accomplished by the miners.

The main concern of the Mining Municipal Commissions is the transparency of mine operators' work towards the population of their communes. The Mining Municipal Commissions have no authority in relation to mining *per se*, rather their role is as an informative body that liaises with the Consultative Committee on Mines and the Mines Board in relation to mining matters that affect their respective commune.

2.2 Applicable law

A) HISTORY OF THE MINING REGULATION

Historically, the rules and regulations governing mining in New Caledonia emanate from Decree 54-1110 of 13 November 1954, '*Reforming the Rules Governing Mineral Substances in the Overseas Territories*' and pursuant to Deliberation No. 128 of 22 August 1959 which sets out the application of the legal regime as it applies to mineral substances in New Caledonia.

Decree 54-1110 of 13 November 2004 has been subsequently amended and complemented by various later texts as a response to the need for stricter government control over mining due to its significance and impact for both the French State and New Caledonia. Decree No. 69-4 of 3 January 1969 and Application Decree No. 69-598 dated 10 June 1969 established the authority of the French State in relation to nickel, chromium and cobalt and Decree No. 73-109 dated 22 July 1973 sets out controls on companies authorised to conduct mining activities.

It is important to note that these former texts did not include any provision for environmental protection and post-mining rehabilitation. Currently, environmental issues relating to mining operations are governed at the provincial level. Legislative provision for environmental protection and rehabilitation is a major component of the new mining legislation.

B) THE MINING CODE

The New Caledonian Congress passed on March 18, 2009 a new Mining Law, which established a Mining Code. The code entered into force on April 30, 2009. The new Mining Code aims, among other things, to homogenise and simplify the laws and principles

regulating the administration of mining matters into one universal and cohesive code that the provincial authorities control over such matters.

Importantly for foreign investors, the Mining Code aims at facilitating a conducive environment for foreign investors and conducive operating and trade environment for mining operators and reduced restrictions on foreign miners. Most notably, one of these facilitations involves the end of the current nationality requirement for directors and boards of foreign companies operating in New Caledonia.

The Mining Code also includes an inventory of New Caledonia's mineral resources, extraction perspectives and an industry overview (regarding logistics mechanisms, infrastructure, etc.) as well as a framework of principles for the export of metallurgical transformed products and laterites.

Other changes adopted by the Mining Code include the facilitating mechanisms for open dialogue and coordination between mining operators, authorities and local communities and establishing an environmental protection framework, including an environmental approval process and rehabilitation obligations.

Regarding the allocation of authorities, the Mining Code contains the following main elements.

Officialisation of DIMENC's role

The DIMENC retains its role as the administrative agency for the regulation of the mining sector and be divested with the delegated authority of the Provinces to be in control of all mining activities.

Modification of the composition of the Mining Municipal Commissions

The practice of the Mining Municipal Commissions has shown the need for an institution that is specifically in charge of the relations between the mine operator, the local population, and the DIMENC. To address this need, the Mining Code introduces the possibility of modifying the Mining Municipal Commission and investing it with certain powers to obtain information from mine operators on the concerned mining project (in particular regarding environmental matters) and advise DIMENC with their findings and recommendations.

2.3 The legal framework applicable to quarries

The law in New Caledonia draws a distinction between quarries and mines. Pursuant to Article 2 of the Decree dated 13 November 1954, quarries includes peatland and all deposits of building or soil improvement material for the cultivation of soil and other analogous material, with the exception of phosphate, nitrate, alkaline salts and other associated salts. Conversely, a mine includes deposits of all other mineral resources.

This legal definition attempts to cover the physical difference between quarries and mines. Because this guide is devoted primarily to the regulation concerning mining operations, the legal framework applicable to quarries is not discussed at length.

2.4 Personal Mining Authorisation and Exploration Permit

A) PERSONAL MINING AUTHORISATION (AUTORISATION PERSONNELLE MINIÈRE) (APM)

This 'ID Card' type of authorisation that can be issued to mining operators was introduced in the 1950s with a view to protecting local resources and local enterprise. Today, APMs are not used for this purpose, rather, they are issued to any applicant provided that they satisfy all regulatory requirements.

The Mining Code (Articles Lp 121-1 to Lp 121-13) does not change the continued use of APMs nor the conditions under which they are granted.

Purpose of an APM

An APM does not confer any intrinsic right to prospect or mine in relation to the minerals covered by it. Merely, once granted, an APM permits its holder to:

- be identified as a mining operator;
- qualify for a right to prospect;
- apply for new exploration permits;

- request either the transfer of existing exploration permits to an Exploitation permit or Mining Concessions;
- lease their Mining Concessions (Amodiation); and export ore.

Term of Validity of an APM

APMs are granted for a term of five years, renewable for one or more periods of five years.

Application Process

DIMENC is responsible for processing APM applications.

In practice, once an APM application has been made, several months delay can be expected (on average six months) before the authorisation is granted.

An applicant for an APM must have adequate financial resources to conduct mining operations on the tenements subject to the APM. Accordingly, the APM application must sufficiently demonstrate that the operator has adequate resources for the proposed mine. The application must also show that it possesses the technical capability to build and operate a mining project.

Limits on APMs

An APM is granted by the President of the Province and is only valid for the Province where the mining tenement is located.

Additionally, a practice has arisen of limiting the geographical area for the validity of an APM. As a result, the authorisation only covers the prospecting zone for a Class A Exploration Permit, meaning a 100 square hectare area. The Mining Code did not modify this practice.

Refusal

Grounds do not need to be provided for refusal of APMs or cancellations of authorisations. However, the reasons for refusal or cancellation can generally be attributed to the operator's failure to meet financial or technical conditions.

Further, refusal, restriction or cancellation of APMs does not give rise to any right to damages or compensation. Cancellation, restriction or expiry of an APM has no effect on the Exploration and Exploitation permits and Mining Concessions already granted.

Once the APM has been obtained, the holder can apply for mining titles, such as an Exploration permit, Exploitation Permit or Mining Concession.

B) EXPLORATION PERMITS

There used to be three types of Exploration Permits that are issued by the Provinces depending on the mineral subject to the Exploration Permit Application. These are:

- Ordinary Exploration Permit (*permis ordinaire de recherche*) (PORs) for manganese, iron, etc.;
- Class A Exploration Permit for chromium, nickel and cobalt; and
- Class B Exploration Permit for gold etc.

No permit has ever been issued in New Caledonia for the minerals covered under the Ordinary and Class B Exploration Permits. Accordingly, the new Mining Code (Articles Lp 122-1 to Lp 122-10) only provides for a single type of permit to be issued, which will be identified by the acronym PR (*Permis de Recherche* – Exploration Permit).

The term of validity for Class A Exploration Permits cannot exceed five years, however, there is no limit on how many times it can be renewed.

After the exploration licence has been obtained and conclusive tests carried out, the holder of the APM can apply for a mining title: an Exploitation Permit (*permis d'exploitation* or 'PEs') or a Mining Concession (**Mining Titles**).

It should be noted that any exploration permit is automatically cancelled upon granting of a mining title.

2.5 Mining Titles

Exploitation Permits (*Permis d'Exploitation*) or Mining Concessions confer to their holders exclusive rights to prospect, explore and mine mineral deposits covered by the Exploration Permit.

Both Exploitation Permits and Mining Concessions fall under the category of 'mining titles' because they are the only instruments that confer the right to the owner of the title to operate a mine in New Caledonia. Both of these instruments give their holder the right to exploit the soil and subsoil, meaning to carry on 'operations consisting in extracting mineral substances for commercial purposes'.

A) EXPLOITATION PERMITS

The Exploitation Permit has been established by a law dated 16 June 1927, however, this law was abolished in regard to its application to metropolitan France by the law No. 94-588 dated 15 July 1994 and the only mining title currently applicable in metropolitan France is the Mining Concession. Despite the fact that Exploitation Permits were technically available in New Caledonia, no Exploitation Permits were granted in New Caledonia after 1999.

Accordingly, this mining title disappeared in the new Mining Code and only Mining Concessions remained as mining titles.

B) MINING CONCESSIONS

Mining Concessions are issued for a maximum term of 50 years, with the shortest term granted being six years. Concessions unlimited in time have been abolished by the Mining Code.

Legal framework

A Mining Concession is a process allowing the administration to grant certain rights to a natural person or legal entity, whether private or state owned (i.e. State or Province owned). It involves a specific procedure and formal requirements.

From a legal point of view, a Mining Concession is a complex legal instrument comprising statutory and contractual elements. In terms of its practical effects, it grants its holder a real property right, guaranteeing him or her the highest property and security right under French civil law.

The right granted to the Mining Concession holder (*le Concessionnaire*) is a mining right specific and different from the real property right affecting the surface of the tenement.

The administrative courts have exclusive jurisdiction to construe the meaning of Mining Concession instruments.

The new Mining Code (Articles Lp 131-1 to Lp 131-14) did not modify this framework. The main contribution concerns the principle of a rent calculated according to the acreage.

Refusal to grant a Concession

After an application is made, DIMENC is under no obligation to provide grounds for refusal to grant a Mining concession. DIMENC can also refuse to allow a transfer of a Mining Concession on public interest grounds. The concept of 'public interest' is narrowly defined in French case law to limit the risk of refusal on this ground in New Caledonia.

2.6 Procedure for granting APMs and Mining Titles

The regulatory section of the Mining Code, passed on 28 April 2009, details the procedure and documentation required for applications for APMs and for Mining Titles. All applications must be in the French language and must be signed by the applicant or in the case where the applicant is a company, by a director of the company. The main aspects of these requirements are detailed below:

A) IDENTIFICATION OF THE APPLICANT

Any application must state:

- the surname, first names, profession, nationality, ordinary domicile and elected domicile of the applicant, or the company name, share capital and registered office of the applicant company; and
- the surname, first names, profession, nationality and ordinary domicile of any agent of the applicant.

B) NATIONALITY OF THE COMPANY, DIRECTORS AND ADDRESS

Legal entities which carry on, directly or indirectly, mining activities in the territories of New Caledonia must be incorporated either under French law or under the laws of another Member State of the European Union, unless an exemption is granted by the President of the Provincial Assemblies.

An APM or a Mining Title may only be granted to a person residing in New Caledonia or to a company which has a registered office or branch in New Caledonia.

The nationality requirement regarding the directors and office holders has been abolished by the Mining Code.

C) APPLICATION PROCEDURE FOR AN APM OR MINING TITLE

The procedure depends on the type of application. Generally, extensive technical and financial documentation will be required for any application. The regulatory section of the Mining Code details the documentation required for each type of application. Some

examples of the exhaustive requirements under the regulatory section of the Mining Code are set out below:

- For an APM, the applicant must provide information such as:
 - geographical details of relevant tenements;
 - CVs of project managers, detailed records of the work undertaken by the company for the three years preceding the application and any other elements justifying the applicant's mining experience, and
 - financial statements.
- For an Exploration Permit, additional aspects will be taken into consideration such as the quality of the feasibility study and assurances made with regard to environmental protection. The application will be considered for 45 days, during which period competing applications and comments may be submitted.
- Applications regarding Mining Concessions are more comprehensive and will require filing of various technical and geological documentation, including a report explaining details of any exploration or mining work carried out on the relevant tenements up to the date of the application.

D) FURTHER DECLARATIONS

All companies holding a Mining Title must declare to the President of the Provincial Assembly any amendment to the company constitution, any change in shareholding, and any change in directorship. Every year, all companies holding a Mining Title must file with the President of the Provincial Assembly a copy of its financial statements as well as a copy of every activity report submitted in shareholders' meetings. All companies holding a Mining Title must keep the President of the Provincial Assembly informed regarding:

- any person or company who, either directly or indirectly, holds a partial or full right to production;
- for any person or company who, either directly or indirectly,

controls the mining company: the identity of its directors and, in the case of a company, distribution of the shareholding amongst the principal shareholders of the company;

- any information which may affect the technical or financial details which formed the basis of the granting of the Mining Title to the company.

In particular, companies may have to declare details of any acquisition of shares resulting in one shareholder holding more than 10% of the share capital, or if a person who is neither French nor an EU citizen is appointed as a member of the Board of Directors, Managing Director, auditor or representative of the company.

2.7 Lease of Mining Titles ('Amodiation Contract')

A) DEFINITION OF THE AMODIATION CONTRACT

Amodiation is the process by which the holder of a mining title leases their title to a third party. It exclusively concerns Exploitation Permits and Mining Concessions, not Exploration Permits.

Amodiation encompasses the whole surface area and all the substances concerned by the title. This unique characteristic of an amodiation contract compared to other leasing arrangements is the value of the leased asset diminished over its terms due to the extraction of minerals from the title.

B) NEED FOR ADMINISTRATIVE AUTHORISATION

Amodiation is subject to a prior administrative authorisation and the holder of the mining title is the only person entitled to amodiate it. Sub-amodiations are prohibited. Approval for amodiation is not concerned with the financial terms of the amodiation contract between the title holder and lessee as these terms are to be settled by the parties according to their contractual negotiation. Likewise, approval of the amodiation contract is not concerned with the mine(s) subject to the amodiation contract.

Authorisation is granted by the Competent Public Authority (which is either the Government's Representative, President of the Province Assembly or the President of the Provincial Assembly's Bureau) and, if approved, notification is published in the *Journal Officiel de la Nouvelle-Calédonie* (Legal Gazette of New Caledonia).

The application must be a joint application by the holder of the titles and the beneficiary under the amodiation contract and contain the following supporting documentation:

- an up-to-date copy of its constitution and its last balance sheet;
- a list of managers, directors and associates in office at the date of application, specifying their name, nationality, occupation and domicile; and
- a properly executed and valid amodiation contract.

At the end of the enquiry held by the Competent Public Authority, the Competent Public Authority will request an opinion from Mines Board and the Mines Advisory Committee. These opinions are

relayed to the applicant who has an 8-day period to present, if need be, any comments on points of request from the Mines Board and/or Mines Advisory Committee.

The authorisation procedure and the renewal procedure (see below) is quite long and typically takes up to 10 months from the date the application is filed until authorisation is granted or rejected. After authorisation is obtained, the beneficiary under the amodiation contract must inform the provincial government's representative of any changes concerning the beneficiary company's constitution, share capital and any changes to its directorship or management.

Refusal of authorisation can be contested by the applicant and the holder of the title before the Administrative Court of New Caledonia within a 3-month period.

C) DURATION OF THE AMODIATION CONTRACT

An authorisation is valid for three years, however, an amodiation contract itself is typically concluded for a duration of about 10 years. An authorisation can be renewed every three years and the number of times a renewal can be made is not limited.

D) PROCEDURE AND CONSEQUENCES OF THE RENEWAL

Renewal of authorisation is applied for and granted according to the same forms as the first authorisation. If the application for renewal is filed before expiry of the previous authorisation, the duration of amodiation is extended until a decision is made by the Competent Authority. Renewal of authorisation has no effect on the rent paid under the amodiation contract as this is to be determined by the commercial agreements reached by the parties to the amodiation contract. Most commonly, amodiation contracts will stipulate that rent review and other commercial terms are to be renegotiated every time renewal is applied for.

E) RIGHTS OF THE ORIGINAL MINING TITLE HOLDER IN THE EVENT OF AMODIATION

The holder of the amodiated exploitation permit or the amodiated concession must fulfil their contractual obligations and, specifically, must not disturb the beneficiary's enjoyment of the amodiated surface area. In the case of a breach of this exclusivity, the

beneficiary of the amodiation contract is entitled to litigate (even by summary proceeding) in order to put an end to this disturbance.

The holder of the titles can, upon prior administrative authorisation, sell these titles to a third party providing it does not interfere with the terms of the amodiation contract and the beneficiaries rights thereunder. In this case, in order to assure the beneficiary's legal security, it is advisable to provide in the amodiation contract that any mining title transfer would not question the beneficiary's rights.

Payment of the rent can be guaranteed following the usual means (pledge or mortgage).

Usually, the holder of the mining title(s) provides in the amodiation contract that any renewal of amodiation is subject to their prior consent. In that case, they will be entitled to object to the application by the beneficiary for a renewal or administrative authorisation. Accordingly, it is advisable to clearly specify in the amodiation contract the duration of the contract's and the renewal's conditions.

2.8 Export control and procedures

A) THE MINING CODE

Prior to the Mining Code, every transaction related to nickel ore in New Caledonia required an authorisation process, regardless of whether the ore was for export or for sale between domestic parties. One of the purposes of the new mining legislation is to simplify transactions within New Caledonia in order to allow local miners efficient and fast ore grouping and exchange. Consequently, the Mining Code only requires an authorisation to export and not for domestic transactions.

The procedure is as follows:

- The main requested document is a draft export contract including a condition precedent of obtaining the authorisation.
- Lodgement of the authorisation application to the DIMENC.
- Review by the DIMENC and then by the Advisory Mining Committee. This committee will give a recommendation regarding the application.

The Mining Board will give a second recommendation (which typically supports the recommendation made by the Advisory Mining Committee).

Taking into consideration the recommendations previously given, the Government will approve or reject the authorisation.

Under the current legislation, the total timeframe to obtain a Personal Mining Authorisation is approximately nine months.

B) LIMITATION OF ORE EXPORT

Like most other mining countries, New Caledonia encourages local transformation of mineral resources in order to localise the added value within the territory. This aspect is not directly treated in the New Mining Law, but the Congress will probably legislate on ore export limitation in the future in order to favour local mining activity and encourage export of blended ore.

2.9 Provincial technical reserve

The 'provincial technical reserve' is a new feature provided by the Mining Code aimed at preserving resources.

Any area not subject to a mining permit or to a concession can be listed as a provincial technical area by the Provincial Assembly for a maximum period of 15 years, renewable once for a period of 10 years (Articles Lp 123-1 and Lp 123-2).

As a consequence, no search permit or any concession may be granted on a technical reserve (Article Lp 123-3).

During that period, the Provincial Assembly can issue in relation to the provincial technical reserve, an invitation to tender for projects of direct operation or projects of ore supply to metallurgical plants based in New Caledonia. Depending on the results of the tender process, the Provincial Assembly can either confirm the listing or issue a search permit once the project and the bidder have been selected and approved (Article Lp 123-5).

In addition, the Provincial Assembly can, at any time, un-list an area that is subject to an application for an exploration permit for direct operation projects, or for a project of ore supply to metallurgical plants based in New Caledonia.

Once the bidder is selected and approved, he can enter into an agreement with the Province for completion of the project. Such an agreement will set out the conditions under which the project is to be carried out. This agreement shall provide for, among other things:

- the stakes and guarantees required from the approved bidder and the terms and conditions of the Province's support;
- an agenda for operations;
- the number of jobs created, and
- environmental undertakings (Article Lp 123-7).

2.10 Environmental legal framework

A) DIVISION OF LEGISLATIVE AND REGULATORY POWERS IN ENVIRONMENTAL LAW MATTERS

The Organic Law provides for a division of legislative and regulatory powers between the French State, the institutions of New Caledonia, and the three Provinces of New Caledonia.

Still under construction, environmental law rests upon a complex distribution of legislative and regulatory competence between the French State, the institutions of New Caledonia and the Provinces.

A Consultative Committee was created in January 2006 in order to advise New Caledonia and its Provinces on sustainable development and environmental matters as well as to monitor, as far as possible, the harmonisation of the environmental policies carried out by the New Caledonian Provinces in this field.

Competence of the French State

The Organic Law does not directly assign any environmental matters to the French State. The competence of the French State is to be found in general environmental texts, such as the French environmental Code of which some provisions apply to New Caledonia.

Competence of New Caledonia

Pursuant to Article 22, 39 and 211 of the Organic Law, the institutions of New Caledonia have competence with respect to the following environmental matters:

- Regulation of health and safety issues;
- Regulation and exercise of exploration, operation, management and conservation rights of natural, biologic and non-biologic resources in the exclusive economic zone;
- Regulation of hydrocarbons, nickel, chromium and cobalt;
- Guiding principles of urban planning and land registry rights;
- Zoosanitary and phytosanitary regulations, slaughter house;
- The settlement of a mining resources development scheme which includes the elaboration of guiding principles in environmental protection and the orientations of industrial development required for a rational operation of mining in a perspective of sustainable development;
- The settlement of an urban planning and development scheme in New Caledonia conveying the fundamental orientations in

infrastructure, environment, equipment, services of territorial interest and economic, social and cultural development, currently under consideration in participative commission gathering members of the public and elective representatives.

Competence of the Provinces

Pursuant to Article 20 of the Organic Law, the Provinces of New Caledonia have general competence in all the matters that are not specifically assigned to the French State or to the government of New Caledonia by the Organic Law or to the Municipalities by the applicable law in New Caledonia.

In consequence, as competence in environmental law matters is not explicitly assigned in the Organic Law, except for the aforementioned areas, it is generally considered that the Provinces have general competence in environmental matters pursuant to Article 20 of the Organic Law.

Notwithstanding a number of uncertainties related to the extent of such exclusiveness, under the case law of the Council of State (*Conseil d'Etat*), the competence of the Provinces is generally extended, under the rationale that the Provinces may make decisions in matters other than those comprised in their attributions so long as the content of their decision falls within one of their competences (Opinion of the *Conseil d'Etat*, 30 August 2005).

B) ENVIRONMENTAL LEGISLATION

Legal framework

The Environmental legal regime in New Caledonia finds its origin in international law, French law, New Caledonian law and the laws of each Province. No New Caledonian environmental code has been adopted yet. However, the Northern Province of New Caledonia has adopted its own environmental code and a code specific to the Southern Province has been adopted on March 20, 2009 (*Deliberation nb 25-2009/APS du 20 mars 2009 relative au code de l'environnement de la Province Sud*). Certain provisions of the code of the Northern Province may have an indirect impact on mining activities, such as protected areas and natural spaces which may ban or limit the implementation of certain mining activities.

International law

New Caledonia applies the International and Regional Conventions on Environmental Law to which it is a party and which are likely to concern mining activities or environmental matters such as the:

- Convention for the protection of the natural resources and environment of South Pacific, signed in Nouméa on 24 November 1986;
- Convention on long-range transboundary air pollution, signed in Geneva on 13 November 1979.

French law

The Environmental Charter, inserted in the French Constitution provides a general framework and guiding principles that are also applicable to New Caledonia such as the precautionary principle.

Furthermore, the French Environmental Code contains specific provisions applicable in New Caledonia. These provisions are pertaining to the following subjects:

- (i) Authorisation for legal action for environmental protection associations and rights to legal action;
- (ii) Marine waters and waterways open to shipping, subject to the competences assigned to New Caledonia and the Provinces in the territorial waters;
- (iii) Implementation of the Protocol on environmental protection to the Antarctic Treaty signed in Madrid on 4 October 1991;
- (iv) Struggle against Greenhouse effect as a national priority.

New Caledonian law

Classified installations

The industrial installations that are likely to present dangers or inconveniences for the well-being, safety or health of local residents, public health, agriculture, the preservation and conservation of the environment, sites and monuments are subject to an authorisation or a declaration, depending on the seriousness of the hazards or inconveniences they can create.

Installations subject to such regulation are listed in nomenclatures specific to each Province ('Classified Installations').

Mining activities do not belong to these nomenclatures. However, certain installations related to mining activities, such as the treatment of non-ferrous minerals, grinding of stone, pebbles, ores and other natural or artificial products are subject to authorisation or declaration depending on the power of the machines used on site.

The responsibility for the implementation of the classified installation's regulations is divided between DIMENC and the Provinces.

Authorisation or declaration

The operation of installations presenting serious hazards or inconveniences for health or the environment, as listed in the nomenclature of classified installation, is subject to the obtaining of a prior authorisation (operating permit) from the President of the Provincial Assembly.

The operator of installations subject to declaration must file a declaration file and must comply with general prescriptions promulgated by the relevant Province.

DIMENC ensures the instruction and the follow up of the authorisation and declaration applications.

The authorisation procedure

The procedure for the authorisation of a classified installation subject to authorisation is regulated by each Province in almost similar terms. In order to operate an installation subject to authorisation, the operator must submit an application to the President of the Provincial Assembly, containing the following information:

- the identification of the applicant;
- the location of the installation;
- the nature and volume of the activities and the process which will be used as well as the rubric of the nomenclatures in which the installation shall be classified;
- several maps showing the surroundings and the location of the installation;
- An Environmental Impact Assessment containing;
 - an analysis of the initial state of the site land and its surroundings;
 - an analysis of the predictable effects of the installation on its surroundings and the measures envisaged by the applicant to suppress, limit and compensate for the inconveniences of the installation and for the conditions of restoration of the installation after operation.
- A Danger Risk Assessment indicating;
 - the dangers that the installation can present in case of an accident, the appropriate measures that are contemplated to reduce its probability and its effects;
 - the emergency measures the applicant intends to set up in case of an accident.

The application is also subject to a public inquiry in the town where the installation will be operated. The application is transmitted to DIMENC and other relevant public authorities for their opinion. The authorisation is then delivered by the President of the Provincial Assembly in view of all the above elements.

In order to operate an installation subject to declaration, the applicant must file with the President of the Provincial Assembly an application containing his identity, the location of the installation and the nature and the volume of activities the operator intends to carry out.

The functioning of a classified installation

Once the authorisation has been obtained or the declaration acknowledged by the competent authority, the operator must observe technical rules in order to prevent pollution and to protect health and the environment.

DIMENC is the competent authority for the control of classified installations and can:

- visit or inspect the installations which can lead to a warning or a formal notice of violation depending on the seriousness of the breaches established;
- process complaints;
- make inquiries in case of incidents or potential accidents.

The installations are also subject to additional regulations set by each Province related to, for instance, disposal of used oils, used batteries, or noise pollution.

The closure of a classified installation

In the three Provinces, the operator must inform the President of the Provincial Assembly when the installation is definitively stopped and must rehabilitate the site in such a condition that it presents no danger or inconvenience for the protection of the environment.

The closure of the classified installation, as well as the remediation procedure are instructed and controlled by DIMENC.

In the Northern Province, in the event of the sale of a site on which classified installations have been operated, the seller has an obligation to inform the purchaser of the dangers resulting from the past operations.

Waste disposal

Transboundary movements of hazardous wastes

Transboundary movements of wastes that might present hazards for human health and the environment are regulated by the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. The Basel Convention is

directly applicable in New Caledonia pursuant to a New Caledonian Decree dated 25 November 2003.

The Basel Convention provides in particular the following obligations:

- to ensure that the generation of hazardous wastes within the signatory states is reduced to a minimum;
- to ensure the availability of adequate disposal facilities for the management of hazardous wastes; and
- to cooperate in activities with other states and organisations in order to improve the environmentally sound management of such wastes and to prevent illegal traffic.

The regulation of waste disposal

The Northern and the Southern Provinces have adopted a general regime designed to prevent and reduce the production and dangers of waste as well as to promote recycling in order to protect the environment.

The general regime provides that any person producing or holding hazardous waste likely to damage the environment has to ensure its management in order to avoid any hazardous effects on the environment.

In addition to the general regulation of hazardous waste, several regulations adopted by each Province provide specific rules, in particular concerning used oils or used batteries. The producers of such hazardous products are responsible for their management in order to ensure the protection of the environment.

Management structures of waste disposal

Provinces establish management structures of waste disposal within their territory. Actions against pollution organised within the framework of such management structures of waste disposal can be eligible for funding from a fund supporting actions against pollution.

The fund is financed by a supporting tax for actions against pollution deducted from imported products such as pneumatics, storage batteries, lubricating oil which are likely to generate strong environmental nuisance and risks for public health.

Water

The prevention of water pollution

The Government of New Caledonia has also adopted legislation designed to prevent water pollution in order to satisfy and conciliate drinking water uses for the local population with other uses, such as industrial uses, agricultural uses, or mining activities, etc.

The discharge of waste in water is forbidden, in particular industrial waste likely to endanger public health, fauna and flora and likely to call into question the economic and tourist development of coastal regions.

Air

There is no specific regulation on the discharge of pollutants in the air, but the regulation of classified installations may include specific rules in order to prevent air contamination.

Under the environmental code of the Northern Province, the environmental impact assessment which must be prepared by the applicant for the operation of a classified installation, must indicate, when necessary, the origin, the volume and the seriousness of

air pollution. Furthermore, the regulation on waste management provides that the obligation to manage wastes potentially hazardous to the environment also applies to wastes which are likely to cause air pollution.

DIMENC is also in charge of monitoring the air quality.

Biological diversity

The Government of New Caledonia and the Provinces have established a number of protected areas to protect biological diversity and to prevent any activity, occupation or settlement that could be incompatible with this objective, such as mining and quarrying activities as well as classified installations.

2.11 Mine police

The "Mine Police" is another major feature newly established under the Mining Code. The purpose of this new institution is to reinforce the monitoring of mining projects from an environmental perspective.

The Mine Police is invested with a broad scope of jurisdiction: mining operations, environment protection, rehabilitation of zones damaged by mining operations and administrative control (Article Lp 142-1). In addition, it is also empowered with administrative and penal prerogatives. The essential provisions of the Mining Code establish the following:

- The opening of a plant must be preceded by an impact study and the opening of a research center by an impact notice.
- The applicant wishing to start a research or operation project must now be authorized to do so by the President of the Provincial Assembly (Article Lp 142-9). The preceding declaratory system is abolished.
- The mining company must rehabilitate the site damaged by its activity, taking into account the fundamental characteristics of the surrounding environment.
- In case of failure to rehabilitate, the President of the Provincial Assembly can order rehabilitation him/herself at the mining company's expense. A financial guarantee is required to secure this rehabilitation of the site. This financial guarantee

can be constituted either by way of a bank guarantee or by contributions made by the mining company during operation (Article Lp 142-13). Rehabilitation work, if unsatisfactorily executed, can be stopped.

The "polluter pays principle" is enshrined in article Lp 142-12.

Violators will be prosecuted and will incur administrative (Article Lp 151-1) and criminal (Article Lp 151-2) penalties.

Violators can be convicted to a two years' imprisonment and to pay a fine of XPF 3,579,000 if they, inter alia: operate a mine without the proper authorizations, commit an infringement of occupational health and safety regulations or do not follow Mine Police's prescriptions. A person who stands in the way of a Mine Police's agent, proceeds to search without authorization, refuses to communicate geological data or samples to the administration will be condemned to one year's imprisonment and a fine of XPF 1,789,000.

In addition, violators' personal mining authorizations can be withdrawn and they can be banned from any application for a mining title for a period of three years.

The President of the relevant Province Assembly exercises the Mining Police.

2.12 Native Titles and Declaration on Rights of Indigenous Peoples

A) NATIVE TITLES

In New Caledonia, customary law exists alongside the French civil law. There is a distinction between property located in customary land which is governed by the rules of customary law, and property located outside customary land, which is governed by the rules of French civil law. Under the mandate of the Nouméa Accord, the ordinary law courts of New Caledonia are able to hear disputes in relation to customary land with the assistance of customary assessors. The courts can impose sanctions and penalties, as well as interrupt or suspend production or use of mining sites.

As a consequence, three land tenures coexist in New Caledonia: private property, public domain and customary land. If customary lands are inalienable, private property and public domain are permeable categories.

Land claims to New Caledonia have been rare in the past few years and they were not even related to customary land but had agricultural or industrial purposes. In 2005, only 136 were yielded to private entities or individuals.

B) DECLARATION ON RIGHTS OF INDIGENOUS PEOPLE

On 13 September 2007 the declaration on rights of indigenous peoples was adopted by the United Nations General Assembly.

This declaration has been adopted by 144 States including France, four States voted against (USA, Australia, New Zealand and

Canada), 14 States abstained (Azerbaijan, Bangladesh, Bhoutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

The declaration affirms that indigenous peoples' ancestral lands and territories constitute the basis of their collective existence, of their cultures, of their spirituality and to some extent of their resources.

Article 32 of the declaration asserts that:

'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'.

'States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact'.

Subject to the necessary Legislative change in New Caledonia this international declaration may affect the authorisation process for mining projects and the relation with native communities.

3.0 COMPANY LAW REQUIREMENTS

Credit: Tourisme point sud



3.1 Overview

The first choice to be made when deciding to conduct business in New Caledonia is between establishing a presence through the creation of a company or establishing a branch or representative office. In any case, it is necessary to be aware of the particularities of the complex system of French business law that is applicable in New Caledonia. In addition, it will be necessary that a company's statutory documents will need to be translated into French in accordance with local legal requirements.

Companies are deemed to be either of a civil or commercial nature. Civil companies are partnerships whose activity is restricted either to professional or real estate related activities. Commercial companies are those which are engaged in a trade or business. Commercial companies are the most common type of entities and are subject to the provisions of the law dated 24 July 1966 and all

subsequent modifications, as applicable to New Caledonia.

Commercial companies are traditionally divided between limited liability companies (*sociétés de capitaux*) and unlimited liability companies (*sociétés de personnes*). When deciding to create a company in New Caledonia it is highly recommended to any foreign investor to opt for a limited liability company.

Distribution of dividends to an overseas parent company is not limited by law, however the absence of tax treaties between New Caledonia and all other countries except France may create tax issues and an alternative legal solution or tax route may need to be taken into consideration. Alternatively, a presence in New Caledonia can also be set up through a branch or a representative office.

3.2 Limited Liability Companies (*Sociétés de Capitaux*)

There are three types of limited liability companies under French law: Société Anonyme (**SA**); Société par action Simplifiée (**SAS**); and Société à Responsabilité Limitée (**SARL**). These companies are the most common type of company formation that are characterised by the existence of a minimum capital divided into transferable shares, and by the fact that they confer limitation of liability onto their shareholders to the extent of their shareholding. There are various filing requirements for limited liability companies with the Register of Trade and Companies (*Registre du Commerce et des Sociétés*).

A) FORMATION OF SA, SAS, SARL

The formation of these limited liability companies can be divided into three steps: 1) the drafting of the Constitution; 2) the completion of all legal formalities and registration (see below); and 3) the making of contributions to the company by the shareholders.

B) DRAFTING OF THE CONSTITUTION OF THE COMPANY

The Articles of Constitution of the company shall describe in detail the following items:

- the company's structure;
- the name and address of the company's registered office;
- the purpose and the activities of the company;
- the amount of its issued capital;
- the value of in-kind contributions;
- limitations as to the transferability of shares;
- limitations as to the powers of the legal representatives of the company; and
- method of allocation of profits and losses.

Officers and representatives of the company are generally appointed at the time the statutes of the company are signed.

C) LEGAL FORMALITIES

The formation of the company is effective only upon publication of a legal notice announcing the creation of the company, in a New Caledonian newspaper and upon registration at the Register of Trade and Companies (*Registre du Commerce et des Sociétés*).

The Commercial Court (*Tribunal Mixte de Commerce*) also requires certain documents concerning the directors and managers such as: the birth certificate, police clearance, up-to-date civil status and overseas residential address.

Further, a non-French national can normally perform a management activity in a New Caledonian company if they have obtained a business permit (*carte de commerçant*). However, European Union nationals and individuals holding a residence permit are not required in New Caledonia to obtain this document. These business immigration matters are complicated and are subject to change.

Finally, additional formalities will have to be fulfilled for tax and social security purposes.

D) CONTRIBUTIONS

Contributions can be paid either in cash or in kind. Contributions in cash must be deposited in a bank or in a notary's office in a blocked account in the name of the company. They can be released only after the final completion of registration (from one to six months).

Valuation of in-kind contributions must be confirmed by an auditor appointed by the Commercial Court.

E) REGISTERED CAPITAL

The amount of the share capital has to be mentioned in the statute of the company. The minimum amount of such capital varies depending on the type of company:

- for the SARL, no minimum amount;
- for the SA and SAS, the minimum amount is €37,000; and
- In an SA and an SAS, at least 50% of the capital shall be fully paid at the incorporation stage (whereas for an SARL, the capital must be entirely paid up).

Any modification of the share capital requires a certain number of formalities and notices to lodge with the Register of Trade and Companies and the Commercial Court.

F) MANAGEMENT OF SA, SAS AND SARL COMPANIES

SA Companies

The governance of an SA can be structured in two different ways: through a Board of Directors (*Conseil d'Administration*) and a Chief

Executive Officer (*Président Directeur Général*) or by having a Directing Board (*Directoire*) and Supervisory Board (*Conseil de Surveillance*)

SA with a Conseil d'Administration and a Président Directeur Général

The Board of Directors must be composed of three to 24 members as appointed by General Assembly of shareholders (*Assemblée Générale*) for a maximum of six years. It has the broadest powers to act on behalf of the company. The Board of Directors appoints a Chief Executive Officer (*Président Directeur Général*). The Président is responsible for the company's management. He can be assisted by general managers (*Directeurs Généraux*) and is revocable at will.

SA with a Directoire and a Conseil de Surveillance

The Directing Board must have a maximum of five members. Their members are called 'Directeurs' and there can be only one member if the share capital of the SA is less than 11,000,000 XPF. The members of the Directing Board are appointed by the Supervisory Board. There are stringent limitations on any remuneration which either Directors or members of the Supervisory Board may receive.

The Chief Executive Officer, the Executive Officer as well as Directors are treated as employees for tax and social security purposes. However, with regard to Labour Law, the Chief Executive Officer does not benefit from the protection against dismissal, and remains revocable at will.

SAS companies

SAS Companies have a lot of flexibility to adjust their governance. The company can be governed by one or several Presidents, and with or without a board of directors. The President can be a foreign based company, even a shareholder, and can be represented by any person they find suitable. Such person need not be a New Caledonian resident.

However, certain decisions defined by the shareholders, may require the approval of a majority of all the shareholders. Therefore the powers of the President may be very strictly limited depending on the Company's statutes. Accordingly, statutes of SAS companies can be extensively tailored to suit the requirements of multinational groups, whereas SA and SARL companies are not so flexible.

SARL companies

In a SARL, the managing director is called a '**Gérant**'. There can be several Gérants. Gérants do not have to be shareholders of the company, however, they are appointed by the shareholders and their remuneration is set at the company's general meeting. The Gérant is normally empowered to carry out all activities regarding the management of the company and the company's constitution will set out any limits to their powers. However, such limitations of

powers of the Gérants in the statutes do not bind third parties who have no knowledge of the statutes. If there are several Gérants, each of them has full power to act jointly and separately on behalf of the company unless otherwise provided by the statutes. For tax and social security purposes Gérants are regarded as employees if they do not hold directly or indirectly, 50 per cent of the capital of the company. For all other purposes, Gérants are not regarded as employees and are not entitled to the protection of New Caledonian Labour Law regarding dismissal.

3.3 Branch of a foreign company

The opening of a branch of a foreign company is subject to prior approval if the investor is not a resident of one of the EU countries. The ultimate approval is given by the Province in which the office is registered.

The formalities for opening the branch consist of providing the Commercial Court with two certified translations of the foreign company status and details related to the branch Manager.

The choice between a branch and a subsidiary is, however, not neutral from a taxation standpoint. This is because net income of a branch is deemed to be fully distributed and therefore is subject to withholding tax.

3.4 Accounting

A) ANNUAL ACCOUNTS

The financial year of a company is normally 12 months. This period, however, may be either extended or shortened, especially during the first financial period. The closing date is determined by the Company's constitution.

Each company is required to prepare a yearly balance sheet and a profit and loss account, which must give a true and fair view of the company's situation. These accounts should be filed with the Tax Authorities within four months of the closing date. The annual general meeting which is to approve these accounts should be held within six months after close of the financial year.

Two copies of the approved accounts must be filed with the Commercial Court within the month following their approval. The director of a company is responsible for the preparation of these accounts in respect of the content and their compliance with local regulations.

B) ACCOUNTING RECORDS AND AUDIT REQUIREMENTS

(b.1) Accounting records

According to French company law, every company is required to keep a certain number of accounting books. These consist of:

(b.2) 'Journal Général'

The General Journal (*Journal Général*) which should have pre-numbered pages initialled by a judge of the Commercial Court. This book should be used to record all operations performed by the company on a daily basis or reconcile the accounts on a monthly basis, provided that there are other documents supporting the monthly figures.

(b.3) A balance sheet book (*Livre d'inventaire*)

The balance sheet book (*Livre d'inventaire*) should have pre-numbered pages and be initialled by a judge of the Commercial Court.

(b.4) A payroll book

All these books should be kept by the company for at least 10 years. Operations can be recorded in foreign languages, but in such a case, the company may be obliged to provide a certified translation.

A SA and SAS must have a statutory auditor (*Commissaire aux Comptes*). The nomination of an auditor is imposed on a SARL if, at the end of any financial year, the company exceeds at least two of the following three limits:

- total assets of more than FCPF 180 million;
- total sales of more than FCPF 360 million;
- headcount of more than 50 employees.

C) STATUTORY AUDITOR

The Statutory Auditor (*Commissaire aux Comptes*) is appointed at the General Meeting (*Assemblée Générale*) of the shareholders for a six year period. At the end of this period, he may be reappointed.

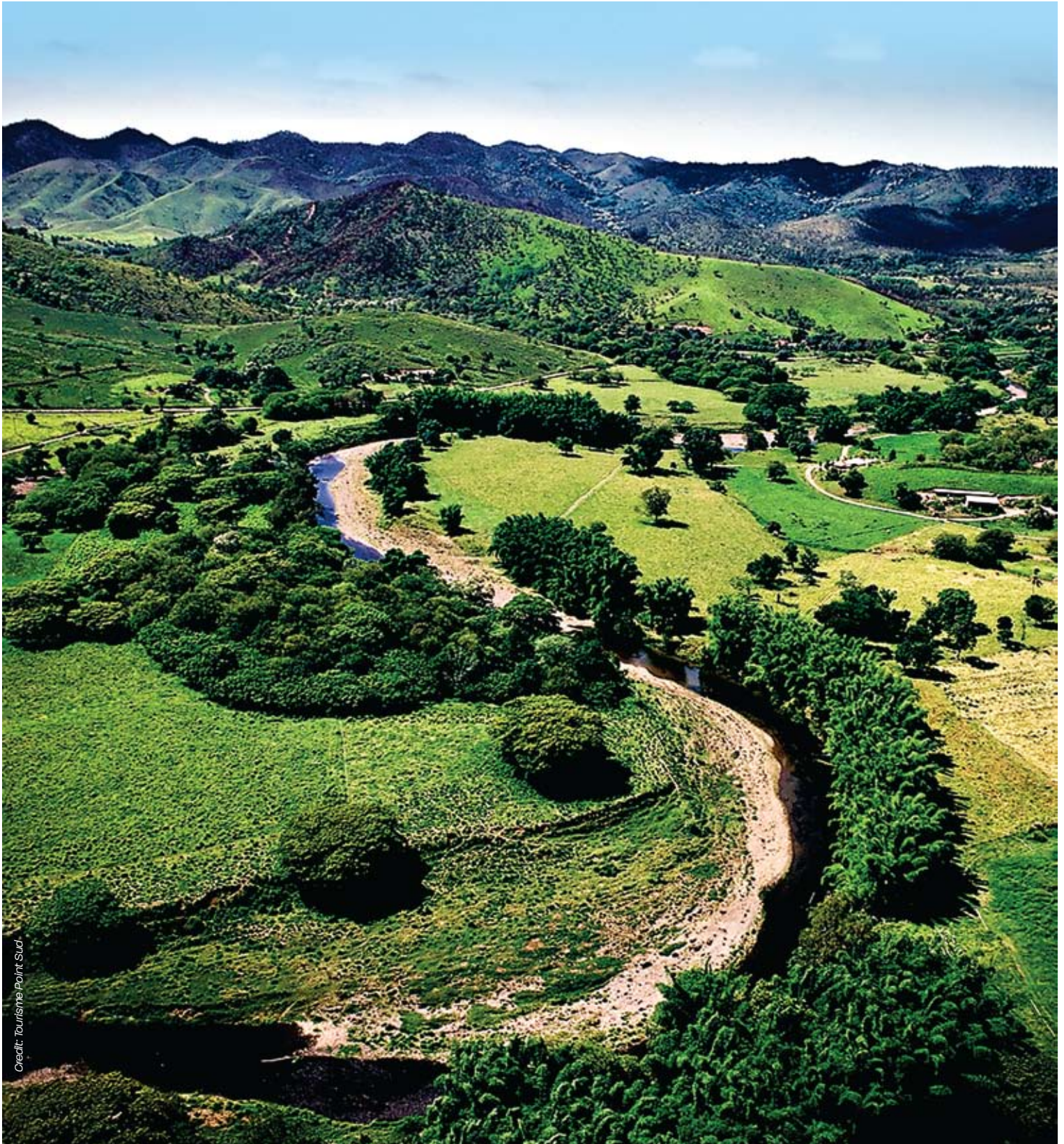
The duties of the Statutory Auditor are to check the accounting books, and after exercising due diligence, to state their opinion

concerning the fairness and accuracy of the accounts. They should also give their opinion concerning the various statements which are included in the report which is prepared at the year-end by the board of directors (*Conseil d'Administration*) concerning the operations of the last year accounting period and the prospects for the new financial year.

If transactions have been conducted between the company and some of its Directors or main shareholders, the Statutory Auditor should receive notice from the *Conseil d'Administration* and issue a special report. They should ensure that the respective rights among shareholders are maintained. The Statutory Auditor may also have to make reports in the case of activities such as mergers, an increase or decrease of share capital, and change of company type. This report is to be made available to the shareholders for comment before being submitted to the General Meeting for approval.

The Statutory Auditor should be a member of the National Auditors Company (*Compagnie Nationale des Commissaires aux Comptes*). As a rule, they should be qualified as Chartered Accountants (*Experts-Comptables*) or have equivalent professional qualifications. They work under the supervision of the Ministry of Justice and have a duty to report to the Public Prosecutor any infraction which they may become aware of in the completion of their duties.

4.0 IMMIGRATION



4.1 Business immigration legislation

Business immigration in New Caledonia is a shared power between the French State and the New Caledonian Government. French regulations predominantly deal with immigration issues and New Caledonian regulations deal with the protection of local employment and work permits. The Industrial Department of the New Caledonian government controls the enforcement of these regulations.

Due to a chronic skills shortage in various industries in New Caledonia, foreign skilled people can readily obtain temporary Short

Stay Business visas with or without work permit provided they meet the New Caledonian and French State legal requirements. Nevertheless the procedures remain lengthy and complex.

The most commonly used visas for New Caledonia are:

- Short Stay Business visa (up to 30 days or 90 days depending on the applicant's citizenship) without work permit;
- Short Stay Business (up to 90 days) visa with work permit; and
- Long Stay (more than 90 days) visa with work permit.

4.2 Procedure

Obtaining the necessary New Caledonian visa with or without work permit is a complex process involving the interaction between the New Caledonian Government, the French State Administration in New Caledonia (*Haut Commissariat – 'DIRAG'*) and the French General Consulate in the country of residence of the applicant.

Obtaining a visa requires the careful and rigorous completion of filling out forms in French, providing accurate documentation and appropriate translation into French, when required.

Due to the number of documents and the various administrative processes involved, the processing time is approximately:

- Short Stay Business visa without work permit: depending on the applicant's citizenship, one month minimum from filing of the application;
- Short Stay Business visa with work permit: one month minimum from filing of the application;
- Long Stay visa with work permit: two months minimum from filing of the application.

At the end of the process, the applicant will be granted a visa and in the case of a visa with work permit for stays of more than six months in New Caledonia, the applicant will have to apply to DIRAG for their resident permit (*carte de séjour*) as well as their work permit (*carte de travail*) within eight days upon the applicant's arrival in New Caledonia.

It is important to note that these permits need to be renewed annually. The renewal process requires lodging an application with the DIRAG at least two months prior to the expiry date of the permit. The applicant can stay in the territory during the renewal application.

Citizens of most developed countries linked with France through immigration bilateral treaties such as Canada and the USA are exempt from the above procedure for a Short Stay Business visa without work permit.

For example, Canadian citizens are entitled to enter into New Caledonia for a maximum period of 30 days over a period of six months.

Please note that Australian citizens are no longer exempt and will have to follow the procedure to apply for a Short Stay Business visa without work permit.

A) SHORT STAY BUSINESS VISA WITHOUT WORK PERMIT

A Short Stay Business visa without work permit entitles its holder to visit New Caledonia for business purposes such as attendance of meetings and visiting clients. However, 'work' itself is prohibited. Business trips are to be limited to a very short period of time.

The Industrial Department of the New Caledonian government is the competent authority to determine the nature of the visit (whether business trip or work).

B) VISAS WITH WORK PERMIT

The New Caledonian and French administrations are particularly cautious of people attempting to conduct activities in New Caledonia that would otherwise require a work permit when they just hold a Short Stay Business visa without work permit.

In relation to the mining and metallurgical project, the lengths of stay for visas with work permit are determined by Local Statute Law 2002-021 dated 20 September 2002. They depend on the position of the applicant; three years for a Manager position renewable for one year and one year for a non-Manager position renewable for six months.

On-site controls and audits are undertaken by the Industrial Department. Severe penalties including criminal penalties may apply for a breach of immigration regulations.

5.0 EMPLOYING PEOPLE IN NEW CALEDONIA



5.1 Overview

Pursuant to Article 3.1.1 of the Nouméa Accord together with Article 22 of the Organic Law, New Caledonia has authority over all matters concerning Labour law in the territory.

The legislation applicable in New Caledonia differs depending on whether the employer is a New Caledonian company employing

staff locally or a foreign company (registered outside New Caledonia) which assigns its own staff to New Caledonia in relation to mining or metallurgical projects.

5.2 New Caledonian company employing staff locally

A) THE LEGAL FRAMEWORK

The legal framework applicable to employing staff locally is provided under the Industrial Code (*Code du Travail de la Nouvelle Calédonie*) which consolidates in one cohesive document all Labour regulations applicable in New Caledonia. The *Code du Travail de la Nouvelle Calédonie* was published 1 May 2008.

In addition to the above new Industrial Code, various territorial, industry, company and site awards apply to New Caledonia and may affect workplace relations.

B) SUMMARY OF NEW CALEDONIAN LABOUR LAW RULES, CONDITIONS AND OBLIGATIONS

Most of the provisions of the New Industrial Code are mandatory and all contractual arrangements must be compliant with these provisions.

The following is a summary of the conditions and obligations that employers must comply with under New Caledonian Labour Law:

- comply with maximum daily, weekly and monthly working hours length. This is set at a maximum of 10 hours daily, 40 hours weekly and 169 hours monthly. It is possible to seek overtime exemption from the Industrial Department.
- prohibit all discriminatory actions based on sex, race, religion and pregnancy. Any employment contracts that include discriminatory provisions will be considered void.
- prohibit fines and pecuniary sanctions in employment contracts. Any financial penalty provision applicable to an employee is void and might expose the employer to criminal prosecution.
- comply with equality between men and women;
- comply with the minimum wage and payment of overtime hours (this does not apply to senior executive positions). Specifically, hours worked above 39 hours per week must be paid at a rate of 1.25 of normal hourly rate; hours worked

beyond 47 hours per week are to be paid at a rate of 1.5 the normal hourly rate.

- prohibit work for people under 16 years of age, night work for youth under 18 years of age;
- comply with the rights of pregnant women;
- comply with weekly rest day;
- provide annual leave, which accrues at 2.5 days per month for a total of five weeks per year;
- comply with the Labour Day public holiday which falls on 1 May;
- comply with occupational, health and safety rules and regulations;
- comply with the exercise of union law and of the right to strike;
- comply with termination notice; and
- comply with mandatory termination procedures.

C) COMPETENT ADMINISTRATIVE BODIES

In New Caledonia, the Industrial Department (*Direction du Travail et de l'Emploi*) is the administrative body, which supervises the making of Labour Law and administers its application.

Notwithstanding this, with regard to the mining sector, the Industrial Department delegates some of its control to the DIMENC.

The Ordinance of 13 November 1985 and the decree of the *Conseil d'Etat* of 28 January 1986 relating to the control of the labour legislation and rules in New Caledonia (integrated in Articles LP 711-1 *et seq* of the New Labour Code of New Caledonia) provides for role of Labour Department inspectors with powers relating to, among other matters, inspection and access to the work place.

5.3 Foreign company registered outside New Caledonia assigning their own staff to New Caledonia

The Local Statute Law 2002-021 dated 20 September 2002 and with the Deliberation 307 dated 27 August 2002 (integrated in Articles LP 621-1 *et seq* of the New Labour Code) set up specific employment regulations which dealt expressly with companies registered outside New Caledonia which contract or provide services to the mining or metallurgical sectors and which assign their own staff to New Caledonia.

These employment regulations are mandatory and companies which contract or sub-contract in New Caledonia must ensure that they comply with them. This is the case regardless of the terms and conditions and the applicable law governing the employment agreements.

These regulations deal with:

- working hours;
- discrimination;
- prohibition of financial penalty to employees;
- wages;
- working condition for women, children, and youth;

- weekly day off;
- public holidays and annual leave;
- occupation health and safety; and
- unions.

This specific regulation, was put in force at the beginning of the development of the international mining projects in New Caledonia (2002). Despite the absence of case law and administrative notes in relation to this recent piece of legislation, we can consider these provisions slightly more favourable for employers, than the general legal framework applicable to New Caledonian companies (registered in New Caledonia) employing staff locally.

Foreign companies that are registered outside New Caledonia which contract or provide services to the mining sector in New Caledonia and which employ their own staff are generally not subject to the Territorial or Industrial awards that apply in New Caledonia, unless they are a signatory to such an award or a member of an organisation which is a signatory to such an award.

5.4 Different types of employment contracts

Usually, companies hire employees by signing a Permanent Employment Contract (*Contrat a Duree Indeterminee*) known as a 'CDI'. This usual employment agreement can only be terminated in restricted situations and in accordance with mandatory law and procedure.

In the scope of mining and construction projects, a more adapted type of employment contract has been devised, the Permanent Project Contract (*'Contrat a duree indeterminee de Chantier'*). This type of contract has a specific status where the employee is hired for a permanent period limited to a phase of a particular project or the project duration. Indeed these Permanent Project Contracts need to be appropriately drafted to allow more flexibility in relation to termination at the end of the project or at the end of a phase of the project.

In exceptional and specific circumstances and conditions, companies are permitted to use a fixed term contract (*'Contrat a Duree Determinee'*) (**CDD**), or temporary employment contract known as a (*'Contrat de travail temporaire'*) (**CTT**) to hire employees.

Industrial regulations in New Caledonia are generally more stringent for the employer than in Common Law jurisdictions such as Australia, USA or Canada. Because of this legal protection employees will not hesitate to seek damages before the Labour Courts (*Tribunal du Travail*) in case of irregular or unfair dismissal.

5.5 Industrial or site awards and the New Caledonian union environment

A) INDUSTRIAL AWARDS

The Congress Deliberation No. 277 of 23 and 24 February 1988 relating to industrial awards sets out the legal framework of industrial or site awards (site agreements, professional or inter-professional awards) by completing Ordinance No.85-1181 (integrated in Articles LP331-1 *et seq* of the New Labour Code). This text provides a framework for negotiations, application and extension of industrial awards.

It is important to note that in New Caledonia, as is the case in France, industrial awards and industrial agreements signed between unions, workers and employers are part of labour law. It is therefore important to check the applicability of such awards and agreements to foreign companies sending their employees to work in New Caledonia.

B) UNION ACTIVITY

The New Caledonian union scene has become quite active in recent years. There are approximately 10 unions of significant influence. These unions are predominantly composed of local unions (a number being branches of French metropolitan unions).

The following unions are the most developed in New Caledonia, those highlighted in bold are unions well established in the mining sector:

- **CONFEDERATION SYNDICALE DES TRAVAILLEURS DE NOUVELLE CALEDONIE;**
- (FSU-NC) FEDERATION SYNDICALE UNITAIRE DE NOUVELLE CALEDONIE;
- (CGT FO) FORCE OUVRIERE;
- (UCR FO) FORCE OUVRIERE;
- (SAOEP) SYNDICAT AGENTS OUVRIERS ENSEIGNEMENT PRIVE;
- SYNDICAT NATIONAL DE L'ENSEIGNEMENT TECHNIQUE AUTONOME ET ACTION;

- SYNDICAT DES COMMERCANTS NEGOCIANTS NC;
- SYNDICAT DES FONCTIONNAIRES;
- SYNDICAT DES ENSEIGNANTS PUBLICS DE NOUVELLE CALEDONIE;
- **(SLUA) SYNDICAT LIBRE UNITE ACTION;**
- **SYNDICATS DES TRAVAILLEURS DE DEMAIN;**
- **(USOENC) UNION SYNDICALE DES OUVRIERS ET EMPLOYES DE NOUVELLE CALEDONIE;** and
- **(USTKE) UNION SYNDICALE DES TRAVAILLEURS KANAKS ET DES EXPLOITES.**

Employee unions can create union sections, and name representatives in companies of more than fifty employees.

C) INDUSTRIAL DISPUTES AND STRIKES

Article 78 of the French Constitution and Ordonnance No. 85-1181 entrench the right of employees to strike (integrated in Articles LP 371-1 *et seq* of the New Labour Code).

Employees wishing to start a strike must apply for a formal notice (*préavis*) of at least five days before any industrial dispute. The New Labour Code provides a conciliation and mediation procedure in the area of industrial disputes. In the event of a particularly hostile dispute such as the obstruction of a work site, employers can use expulsion summary proceedings by referring to the Tribunal of First Instance. In such a case, if the blocking situation is recorded by the Judge, the court will be able to authorise the use of public force in order to expulse strikers.

6.0 OVERVIEW OF THE NEW CALEDONIAN TAX SYSTEM



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Article 22 of the Organic Act dated 19 March 1999 reserves taxation for the New Caledonian territory. In this matter the Congress has full legislative power. Personal income tax was introduced in New Caledonia in 1982 and corporate income tax was introduced in 1979.

6.1 Personal income tax (*impôt sur le revenu des personnes physiques*)

A) LIABILITY TO INCOME TAX

'Individual Tax Residents' in New Caledonia, whether of French or foreign nationality, are liable to New Caledonia income tax on their worldwide income except when double tax treaties are applicable.

'New Caledonian Tax Non-Residents' are subject to tax on taxable income derived from within New Caledonia only.

The following are considered as 'New Caledonian Tax Resident':

- Individuals having their household or their main living place in New Caledonia;
- Individuals carrying on their main profession in New Caledonia; and
- Individuals having their main financial/economic interests in New Caledonia.

Personal income tax is based on the income of the family group including husband, wife and dependent children (*foyer fiscal*) for each financial year (1 January to 31 December).

B) TAXABLE INCOME

The taxable income includes the worldwide income of a New Caledonian Tax Resident. However, some foreign sources revenues already taxed abroad may create tax credit in New Caledonia. The total taxable income is the total of taxable income in each category as defined below.

C) WAGES, SALARIES AND PENSIONS (*TRAITEMENTS, SALAIRES ET PENSIONS*)

This category includes the wages, the salaries and the benefits in respect of housing and motor vehicles provided by an employer and the pensions. A deduction of 10% for professional expenses is available but is limited to 800 000 XPF per year. Furthermore, a deduction of 20% is computed after the 10 % deduction (limited to 1 900 000 XPF).

D) REAL ESTATE INCOME (*REVENUS FONCIERS*)

The real estate income includes rents received for lands and buildings minus related expenses such as interest charges, work expenses. In addition, a nominal deduction of 15% of gross rents received on urban real estate and 10% on rural real estate is allowed to cover administrative expenses, insurance and depreciation.

E) COMMERCIAL AND INDUSTRIAL INCOME (*BÉNÉFICES INDUSTRIELS ET COMMERCIAUX*)

Revenues arising from a business or industrial undertaking carried on by an individual or a registered company such as a *Société en Nom Collectif* which is taxed as partnerships are taxable in the commercial and industrial income category.

F) AGRICULTURAL INCOME (*BÉNÉFICES AGRICOLES*)

Taxable income is determined on a national basis, equal to 1/16 of the revenues of these activities. However, farmers can always elect for a system based on actual taxable income, as determined for companies.

G) NON-COMMERCIAL INCOME (*BÉNÉFICES NON COMMERCIAUX*)

The non-commercial income relates to fees received by people who, under the French law, are not carrying on a commercial activity (for example, doctors, accountants, architects etc). Under this category, income can be determined either on a forfeit basis of 2/3 of fees when under 7 500 000 XPF, or an actual income basis, when above this limit.

H) DIVIDENDS AND INTEREST (*REVENUS DE CAPITAUX MOBILIERS*)

Residents

Dividends received from resident companies and interests received from bank deposits are not included in taxable income. They are only subject to a withholding tax of 13.25% for dividends and 8% for interest on deposit accounts which is paid directly by the company or the bank.

Dividends and interest received by a resident from non-resident companies are included in taxable income net of overseas withholding tax.

Non-residents

Interest paid to non-residents by New Caledonian companies are, at present, not subject to any local withholding tax.

Dividends paid to non-residents are subject to a withholding tax of 13.25%.

The taxable income is the sum of each taxable income category after the deduction of specific expenses borne by New-Caledonian residents such as share investments, loan interests, wages for house employees, retirement plans, life insurance premiums, donations to charity, to a certain extent.

I) CALCULATION OF INCOME TAX LIABILITY

In order to calculate the income tax liability, a number of shares ('parts') are established for the family. For example, a single person is entitled to one share, a married couple to two shares and a dependent child gives the right to a half share.

Then, the progressive scale (five rates for five tax brackets) of the income tax is applied to the global net income divided by the number of the family shares. Therefore, the number of the family's members is taken into account for assessing the final tax liability. The final tax liability equals the total of the tax liability applicable to each share. The result is, therefore, to significantly limit the impact of the graduated taxation rates.

6.2 Corporate tax (*impôt sur les sociétés*)

A) SCOPE

The corporate income tax concerns:

- the public limited company ('Société Anonyme');
- the simplified joint stock company ('Société par Actions Simplifiée');
- the limited liability company ('Société à Responsabilité Limitée');
- professionals such as lawyers, doctors or accountants who carry on their activity within a commercial company;
- the partnerships which carry on a commercial activity; and
- any companies which carry on a metallurgical or a mining activity.

B) CORPORATE TAX LIABILITY

The taxable profits are those earned during the financial year of 12 months. It is generally from 1 January to 31 December, although the taxpayer might choose another year end, when it is more appropriate to his business.

The corporate tax rate is 30%, except for metallurgical and mining activities which are subject to a 35% rate. A reduced rate is applicable for companies with a turnover of less than 200 million

XPF and whose capital is entirely paid for and at least 75% is held by natural people. In this case a reduced rate of 15% will be applied to the first instalment of 5 million XPF of the taxable income for each 12-month period.

There is an additional solidarity contribution (*Contribution Additionnelle de Solidarité*) (**CSA**) payable for any profits above 200 million XPF as follow:

- Between 200 and 300 million XPF: 5%;
- Between 300 and 400 million XPF: 10%;
- Above 400 million XPF: 15%.

The CSA is due at the same time as the Corporate Tax.

The tax code imposes a minimum annual tax on corporate taxpayers which is distinct from company tax and payable before 31 May.

C) DIVIDENDS TAXATION (*IMPÔT SUR LE REVENU DES VALEURS MOBILIÈRES OR IRVM*)

The distribution to shareholders is subject to withholding tax at the rate of 13.25%. This withholding tax applies to dividends distributed by all types of companies. This tax applies on all profits

distributed, whether to individuals or companies, or whether to residents or non-residents (with the exception of a France-based company, where the double taxation treaty states that a rate of 5% is applicable for dividends paid to another French company). Where the shareholder is a company, and the company makes its own distribution of dividends, this tax may be not payable for the portion of profits which corresponds to dividends initially received by the company and where withholding tax has already been paid once.

A withholding tax declaration will need to be sent by the company to the New Caledonian tax office after the board meeting deciding

the distribution of the dividends. The withholding tax must be paid by the company to the New Caledonian tax office no later than 30 days after the distribution of dividends. However, the shareholders can pay the withholding tax directly to the tax office.

As this stage, a double taxation treaty has only been signed between New Caledonia and France. However, the withholding tax declaration may allow the shareholder in certain jurisdiction to claim a Foreign Tax Credit ('FTC') and offset this FTC from its corporate income tax.

6.3 Tax incentives

The mining companies may benefit from various tax incentives for mining/metallurgical investment projects in New Caledonia on the basis of the New Caledonian Tax Code and the French Metropolitan Tax Code. The most tax efficient schemes are:

the specific Metropolitan Tax Code provisions focus on investments in French overseas territories. For instance, the provisions resulting from the Loi Girardin No 2003 - 660 of 21 July 2003 provide for tax deductions from taxable income for companies investing in certain industrial sectors in New Caledonia; and

the Law (*Loi du Pays*) No 001-009 of 17 July 2001, which relates to certain metallurgical investments and has introduced new tax incentives in the first Part of the Tax Code of New Caledonia.

Other tax incentives (mainly direct tax exemptions and a tax stabilisation regime) concern both the creation of new metallurgical processing plants and the creation of additional equipment needed to operate the plants by non-metallurgical companies. The Law also provides specific tax incentives for metallurgical processing plants. Under certain circumstances full tax exemption may be granted for a period of up to 10 years, and may in some cases increase to 15 years.

About Jones Day



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Tracing its origin back to 1893, Jones Day is an international law firm with 32 locations throughout the world. With more than 2,400 lawyers, including nearly 400 in Europe and 250 in the Asia/Pacific, Jones Day ranks among the world's largest and most geographically diverse law firms.

Jones Day has a dedicated team of French-qualified lawyers based in Sydney, using their in-depth knowledge of New Caledonia jointly with the Jones Day Paris Office to best serve clients involved in New Caledonia projects.

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About ADECAL



ADECAL is the economic development agency of New Caledonia. It acts as an interface, and a consultative and coordination body, to accompany new action and projects of benefit to New Caledonia. It is mainly funded by the French Government, the Government of New Caledonia and the three Provinces of New Caledonia.

ADECAL's mission is to promote New Caledonia's economic potential and promote inward investment. It is also in charge of external trade and regional cooperation. Lastly, it manages the exploration programme for New Caledonia's Exclusive Economic Zone, Zonéco.

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