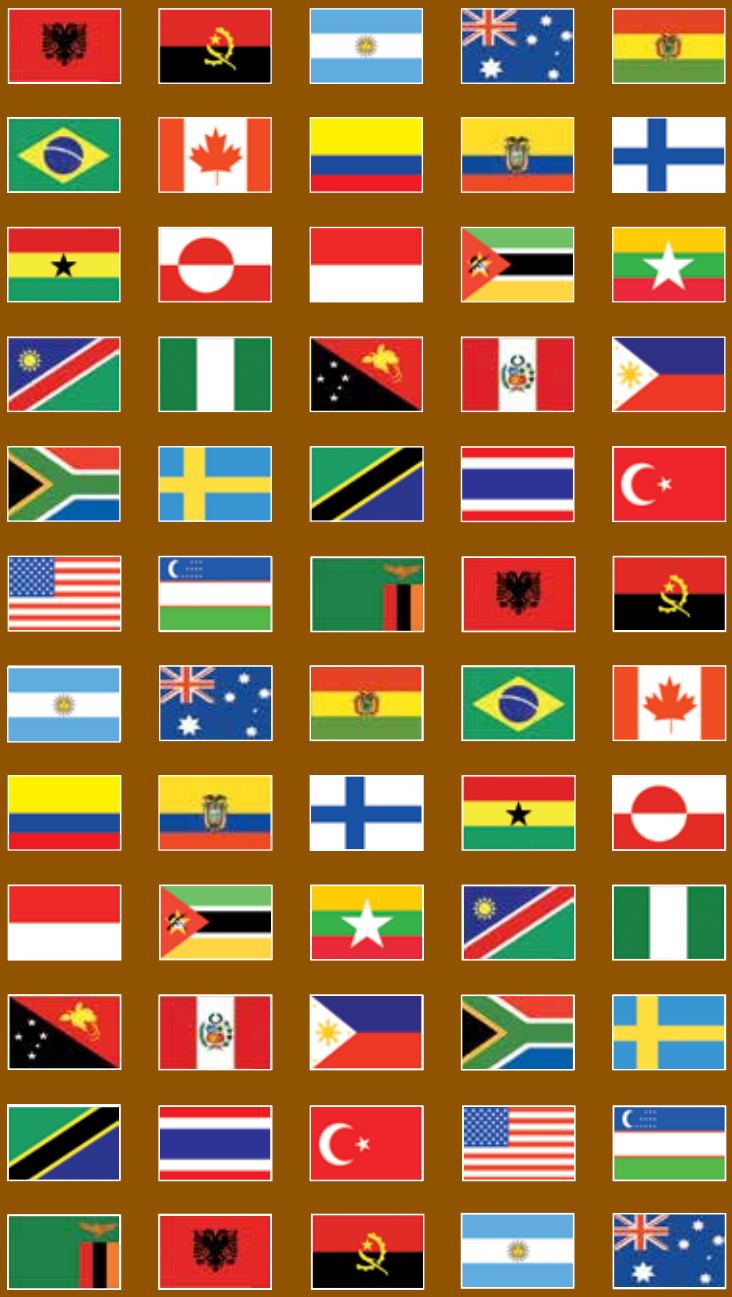
GETTING THE DEAL THROUGH

Mining

in 28 jurisdictions worldwide

2014

Contributing editors: Michael Bourassa and John Turner



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Getting the Deal Through is delighted to publish the fully revised and updated tenth edition of *Mining*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 28 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen on the basis of their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editors Michael Bourassa and John Turner of Fasken Martineau for their assistance with this volume.

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South Africa

Claire Tucker
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Mining industry

1 What is the nature and importance of the mining industry in your country?

South Africa is renowned for being a mineral treasure trove with an abundance of resources. It owns and produces a significant proportion of the world's minerals: nearly 90 per cent of platinum metals, 80 per cent of manganese, 73 per cent of chrome, 45 per cent of vanadium and 41 per cent of gold are located in South Africa. A substantial variety of other minerals are extracted, including iron ore, copper, nickel, diamonds, coal, building materials and other non-metallic minerals.

South Africa's wealth has been built on its vast resources and the mining industry is therefore crucial. South Africa's valuable minerals are estimated to be worth close to 30 trillion South African rand.

The mining industry is also South Africa's biggest employer, with over 510,000 employees and another 400,000 employed by suppliers of goods and services to the industry. South Africa's mining industry is probably the world's most highly developed. With a strong background as a major mining country, its strengths include high levels of technical and production expertise, as well as comprehensive research and development activities.

The country has some of the most highly developed primary processing facilities worldwide, covering the carbon steel, stainless steel, and aluminium industries, in addition to gold and platinum. It is also a world leader of new technologies.

The industry suffers, however, from price fluctuations due to shifts in world demand for mining products and, presently, the absence of mineral beneficiation before export.

2 What are the target minerals?

Several minerals are mined in South Africa, including platinum metals, manganese, chrome, vanadium, gold, coal, diamonds, iron ore, copper, nickel, building materials and other non-metallic metals.

3 Which regions are most active?

Mining occurs throughout South Africa, particularly in the Mpumalanga Province, North West Province, KwaZulu Natal Province, Limpopo Province and Northern Province.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Mineral resource exploitation in South Africa is regulated by both statute and common law. The Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) is the primary regulatory framework legislation. The MPRDA specifically directs that where there is a conflict between the MPRDA and common law, the MPRDA will prevail. However, the MPRDA does not nullify the common law. Accordingly, the common law principles must be considered in interpreting the MPRDA where there is no conflict between the MPRDA and common law. The principles must especially be considered where the MPRDA does not contain provisions on mineral resource issues.

5 How is the mining industry regulated?

The MPRDA established the state as the custodian of all mineral resources in South Africa, through the Minister of Mineral Resources. The mining industry is regulated by the MPRDA, through the national and regional offices of the Department of Mineral Resources (DMR).

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

The principal law that regulates the mining industry is the MPRDA.

Other related environmental legislation includes: the National Environmental Management Act 107 of 1998 (NEMA); the National Water Act 36 of 1998; the National Environmental Management: Air Quality Act 39 of 2004; and the National Environmental Management: Waste Act 59 of 2008.

The DMR is the principal regulatory body in the mining industry.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The South African Code for Reporting of Mineral Resources and Mineral Reserves (the SAMREC Code) sets out the classification system for reporting mineral resources' and mineral reserves' required minimum standards, recommendations and guidelines for public reporting of exploration results, mineral resources and mineral reserves in South Africa.

Public reports are prepared to inform investors or potential investors and their advisers according to the Code. They include but are not limited to company annual reports, quarterly reports and other reports incorporated in the Johannesburg Stock Exchange (JSE) circulars, or as required by the Companies Act. In certain instances the Code also applies to environmental statements, information memoranda, expert reports, technical papers, website postings and public presentations.

SAMREC was established in 1998 and modelled its Code on the Australasian Code for Reporting of Mineral Resources and Ore Reserves.

The Code has been adopted by the Southern African Institute of Mining and Metallurgy, The Geological Society of South Africa, South African Council for Natural Specific Professions, the Engineering Council of South Africa and the South African Council for Professional and Technical Surveyors and is binding on members of these organisations. It is also incorporated in the JSE Rules regarding listing requirements and continuing obligations.

The Code classifies mineral resources into three subdivisions in order of increasing confidence of geoscientific evidence: inferred, indicated and measured resources. Mineral reserves are a modified subset of the indicated and measured mineral resources. Public reports must use one of the terms in respect of proved or probable mineral reserves; measured, indicated and inferred mineral resources; and exploration results.

These terms are defined in the 2007 edition (as amended, July 2009) of the Code, as follows:

- mineral resource – a concentration or occurrence of material of economic interest in or on the earth's crust in such form, quality and quantity that there are reasonable and realistic prospects for eventual economic extraction. The location, quantity, grade, continuity and other geological characteristics of a mineral resource are known, or estimated from specific geological evidence, sampling and knowledge, interpreted from an appropriately constrained and portrayed geological model;
- inferred mineral resource – that part of a mineral resource for which volume or tonnage (or both), grade and mineral content can be estimated with a low level of confidence. It is inferred from geological evidence and sampling, and assumed but not verified geologically or through analysis of grade continuity. It is based on information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes that may be limited in scope or of uncertain quality and reliability;
- indicated mineral resource – that part of a mineral resource for which tonnage, densities, shape, physical characteristics, grade and mineral content can be estimated with a reasonable level of confidence. It is based on exploration, sampling and testing information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes. The locations are too widely or inappropriately spaced to confirm geological or grade continuity but spaced closely enough for continuity to be assumed;
- probable mineral reserve – the economically mineable material derived from a measured or indicated mineral resource or both, which is estimated with a lower level of confidence than a proved mineral reserve. It includes diluting and contaminating materials and allows for losses expected to occur when the material is mined. Appropriate assessments to a minimum of a pre-feasibility study for a project, or a life-of-mine plan for an operation, must have been carried out, including consideration of, and modification by, realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. Such modifying factors must be disclosed;
- proved mineral reserve – the economically mineable material derived from a measured mineral resource that is estimated with a high level of confidence. It includes diluting and contaminating materials and allows for losses expected to occur when the material is mined. Appropriate assessments to a minimum of a pre-feasibility study for a project, or a life-of-mine plan for an operation, must have been carried out, including consideration of, and modification by, realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. Such modifying factors must be disclosed; and
- measured mineral resource: that part of a mineral resource for which tonnage, densities, shape, physical characteristics, grade and mineral content can be estimated with a high level of confidence. It is based on detailed and reliable exploration, sampling and testing information gathered through appropriate techniques from material at locations such as outcrops, trenches, pits, workings and drill holes. The locations are spaced closely enough to confirm geological and grade continuity.

Modifying factors will include considerations of mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

As the custodian of mineral rights, only the state can authorise exploitation of mineral resources and grant these rights through the minister.

The minister has the right to cancel or suspend a mineral right in specified circumstances. These include: contravening the MPRDA while conducting mining-related operations; breaching any material term or condition of a mineral right; contravening an approved environmental management programme (EMP); or submitting inaccurate or misleading information to the DMR. The minister must, however, first give written notice to the holder, indicating the intention to suspend or cancel the mineral right and giving reasons. The holder must also be given a reasonable opportunity to show why the right should not be suspended or cancelled.

Owners of surface rights do not hold the mineral rights, unless they make application to the state for such rights.

Mineral rights are commonly granted to private parties. A mineral right is a limited real right with various related rights attaching to it. A holder and its employees may:

- enter the land to which a right relates;
- bring onto such land any equipment and construct any infrastructure required for the operations;
- prospect, mine, explore or produce for its own account on or under the land for the mineral for which a right has been granted;
- remove and dispose of any mineral found during operations;
- subject to section 59B of the Diamonds Act 56 of 1986 (in the case of diamonds) remove and dispose of any diamonds found during the course of mining operations;
- subject to the National Water Act 36 of 1998, use water on the land; and
- carry out any other activity incidental to the operations, if it does not contravene the MPRDA's provisions.

No person may prospect for or remove or mine, any mineral or commence with any work incidental thereto on any area without:

- an environmental authorisation issued in terms of the MPRDA (this provision is not yet operative and will come into effect on 7 December 2014) ;
- a prospecting right or mining right; and
- giving the landowner or lawful occupier of the land in question at least 21 days' written notice.

The MPRDA provides that the ,inister must, within 30 days of receipt of the application from the regional manager, refuse to grant a prospecting right if the granting of such right will result in the concentration of the mineral resources in question under the control of the application and their associated companies with the possible limitation of equitable access to mineral resources. This provision may therefore be used to prevent one private entity holding a monopoly over rights to a specific mineral across large areas. Some private entities have however acquired mineral rights over large areas prior to the MPRDA's commencement, such as the De Beers Namaqualand Mine on the West Coast of South Africa.

Third parties cannot obtain mineral rights in the same area where rights have already been granted to another party for the same minerals. Nothing, however, precludes a third party from submitting an application for a right to a different mineral, in respect of the same land, that is not included in a holder's existing right.

9 What information and data is publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The Mineral and Petroleum Titles Registration office, which is regulated by the Mining Titles Registration Act, is the office for the registration of all mineral and petroleum titles and all other related rights, deeds and documents. Documents that are registered at this office are not publicly available and an application to access them must be made under the Promotion of Access to Information Act 2 of 2000 (PAIA). Under the PAIA a person requesting public documents does not need to furnish reasons for their disclosure.

The MPRDA contains obligations for mineral rights holders to submit reports to the DMR, although these are not generally available to the public.

The Council for Geoscience (CGS) is a public entity that collects geoscience data (particularly geological, geophysical, mineral, geochemical and engineering–geological) in maps and documents. This information includes data received from mining companies, universities and research institutions worldwide. It maintains several mineral databases, some of which are accessible at its library, such as the COREDATA and COAL databases. One of the requirements in terms of the MPRDA is that an application for the renewal of a prospecting right must contain a certificate issued by the CGS that all prospecting information as prescribed has been submitted. The South African Mineral Deposits Database is an online database (www.geoscience.org.za). Access to information not publicly available is subject to the PAIA and the Geoscience Act 100 of 1993, which regulates the functions of the CGS.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

A private party may acquire a permit for reconnaissance, technical cooperation, mining and retention. Rights for prospecting, exploration and mining may also be acquired.

The application procedure to acquire mineral rights from the state is set out in the MPRDA. The minister can grant, issue, refuse, control, manage or administer any of these rights. If the prospecting or mining right application relates to land occupied by a community, the minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

Rights are acquired on a first come, first served basis. There are amendments to the MPRDA which are not yet effective that remove the 'first come, first served' provision in terms of the MPRDA. In terms of the amendments when they become effective the minister must by notice in the Government Gazette invite applications for, amongst other things, prospecting or mining rights in respect of any area of land and may prescribe in such notice the period within which any application may be lodged with the regional manager and the procedures which must apply in respect of such lodgement. Currently an application for a prospecting right, mining right or mining permit must be accepted where no other person holds such right for the same mineral and land and no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused.

In relation to mining rights, the minister may also publish invitations for applications for mining rights and set out the terms and conditions on which these rights will be granted (this provision is not yet operative and will come into effect on 7 December 2014). Holders of prospecting or retention rights have the exclusive right to be granted a mining right for the land in question. Similarly, holders of an exploration right have the exclusive right to be granted a production right for the petroleum and exploration area in question. Prospecting, mining and exploration right holders have an exclusive right to be granted a renewal of their respective rights. In order for the minister to be able to renew such rights the holders, amongst other things, must have complied with the requirements set out in the MPRDA for applying for the right to be renewed, the terms and conditions of such right and not be in contravention of the MPRDA. A reconnaissance permit holder does not have any exclusive right to be granted a prospecting right or mining right and is also not automatically entitled to conduct any prospecting or mining operations.

Various limitations on the periods for exploitation of mineral resources are provided in the MPRDA for the different mineral rights. Limitations on the number of renewals are also specified.

The rights holder's obligations depend on the nature of the right or permit. The extent of the activities that the holder of a right or permit is entitled to undertake is clearly set out in the MPRDA. The obligations include rehabilitation obligations, obligations to employees, obligations to the surrounding community, etc.

In terms of the MPRDA, the rights holder has an obligation to ensure optimal exploitation of the mineral resource. A person is only entitled to a mining, prospecting, exploration or production right to the extent that they actively exploit these rights. Holders of such rights therefore have an obligation to continuously conduct their operations within the period of the right.

A retention permit may only be issued if the applicant has, among other things, completed prospecting activities and market studies have revealed that mining of the mineral will be uneconomical owing to prevailing market conditions.

To ensure optimal exploitation a planned mining, prospecting, exploration or production work programme must be followed. There are specified periods for rights holders to commence such operations. Corrective measures may be taken against a holder if minerals are not mined optimally.

A mineral rights holder is obliged to consult with interested and affected parties, landowners and lawful occupiers in respect of their operations and activities.

Any person other than the mining right holder only has the right to mine as a contractor or service provider, by agreement with the holder.

Mining permits and mining, prospecting, exploration and production rights may only be transferred, ceded, let, sublet, alienated, disposed of or encumbered by mortgage with ministerial consent and on just cause. Consent to both the transfer of a right and substitution of the holder should be requested for the purposes of the MPRDA.

The person to whom the right will be alienated or disposed must show that they are capable of complying with the obligations, terms and conditions of the right in question and satisfy the requirements of an applicant.

A contravention or failure to comply with the MPRDA is an offence, for which penalties are stipulated in the Act.

A holder of a prospecting right has an exclusive right (while its prospecting right is still valid) to apply for its prospecting right to be converted into a mining right. An applicant for a mining right has to comply with the requirements of the MPRDA. An applicant must, among other things, demonstrate financial and technical ability, that

the mineral can be mined optimally in accordance with the mining work programme, how it will contribute to the social upliftment of the surrounding community and to make the necessary financial provision, that its operations will not result in unacceptable pollution and ecological degradation, it has the ability to comply with the Mine Health and Safety Act 29 of 1996, the applicant is not in contravention of any provision of the MPRDA and the grant of the mining right will further the socio-economic objectives of South Africa.

11 What is the regime for the renewal and transfer of mineral licences?

In terms of the MPRDA the minister must grant a renewal of an exploration, prospecting and mining right if the applicant complies with the requirements of the MPRDA and the holder, among other things, has complied with the terms and conditions of the respective right and is not in contravention of any relevant provision of the MPRDA. An exploration right may be renewed for a maximum of three periods not exceeding two years each. A prospecting right may be renewed once for a period not exceeding three years. A mining right may be renewed for further periods, each of which may not exceed 30 years at a time.

A mining right or prospecting right or any interest in such a right or a controlling interest (directly or indirectly) in a company that holds a mining or prospecting right may not be transferred, ceded, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the minister. Such written consent is, however, not required in the case of a change in the controlling interest in a listed company.

For non-listed companies, which hold mining rights or are in the chain of control of such holders, only a change of control currently triggers the need for ministerial consent; however, in terms of amendments to the MPRDA which are not yet effective, ministerial consent will be required for any change in shareholding in such companies. The amendments (which are not yet effective) have also inserted a narrow definition of 'controlling interest' which is defined as; in relation to a company the majority of the voting rights attaching to all classes of shares in the company; or in relation to any other business other than a company any interest which enables the holder to exercise directly or indirectly any control whatsoever over the activities or assets of the business. As such, only a 51 per cent change seems to be covered for listed companies.

Transactions that are done in contravention of this section will be void in terms of section 11 (5) of the MPRDA and also place the prospecting or mining right at risk of being cancelled or suspended by the minister (this provision is not yet operative).

A reconnaissance permission is only valid for a period of two years and may not be renewed. Similarly, it may also not be transferred, ceded, let, sublet, alienated, disposed of or encumbered by mortgage.

A mining permit may not be issued for a period exceeding two years and may thereafter be renewed for three periods each of which may not exceed one year. A mining permit may not be transferred, ceded, let, sublet, alienated or disposed of, in any way whatsoever.

In the event that a mining or prospecting right is ceded to another entity, such entity needs to demonstrate to the minister that it has the ability to comply with the terms and conditions of the mining or prospecting right and the requirements of the MPRDA to be granted a mining or prospecting right, if such entity was to apply for the right in its name (ie, that the entity has access to the technical and financial ability to conduct the activities, not to be in contravention of the provisions of the MPRDA, has the ability to comply with the mine health and safety requirements and will further the socio-economic objectives of South Africa).

In respect of the change of a controlling interest (directly or indirectly) in the holder of the mining or prospecting right, the requirements for ministerial consent are similar to that of the cession of the right. The holder of the mining or prospecting right, when requesting ministerial consent for the change of the controlling interest, needs to satisfy the minister that it will continue to be capable of complying with the provisions of the MPRDA and the terms and conditions of the mining or prospecting right.

The requirements to renew or transfer the respective rights are set out in the MPRDA. The DMR would of course have to consider any application within the requirements of administrative justice and would have to take a decision fairly and reasonably (among other things). The DMR would however have a degree of discretion in deciding whether the requirements for the renewal or the transfer of the respective rights have been meet.

12 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There are no restrictions in the MPRDA or in practice on a foreign party acquiring mining rights in South Africa.

Owing to legislation providing for advancement of historically disadvantaged people, however, there are benefits in a domestic partner having some form of interest in the foreign party's mining activities. The foreign party should give careful consideration to the most appropriate business entity utilised to acquire mining rights and take note of South Africa's exchange control restrictions.

13 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

A mining right is a limited real right that may be enforced against third parties and once granted the state has a limited power to interfere in the right. Failure to respect a right could give rise to criminal liability, a civil claim for damages or an administrative justice action.

When a party's rights or legitimate expectations have been materially and adversely affected or that party has been aggrieved by any administrative decision taken under the MPRDA, the MPRDA allows for an appeal against such decision.

Once the person has exhausted the remedies provided for by the MPRDA, they may apply to the High Court for a review of the administrative decision, according to the provisions of the Promotion of Administrative Justice Act 3 of 2000.

Foreign arbitration awards are enforceable in South Africa, provided that local requirements for enforcement are met.

14 What surface rights may private parties acquire? How are these rights acquired?

A mining rights holder may seek to purchase the surface rights and South Africa has a free market in such property purchases.

If the surface rights are not purchased, the MPRDA grants a limited real right to the mining rights holder over the land as well as the minerals. In accordance with common law, the landowner is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of the holder's rights. The mineral rights holder must, however, exercise his or her rights with due regard to the landowner's rights and interests and with the least possible inconvenience to the property and its owner.

The mineral rights holder is not specifically required to conclude an agreement with the landowner or land occupier regarding the surface use, but he must notify and consult with the landowner or occupier before undertaking prospecting or mining operations.

Any person who intends to use the land surface in any way that may be contrary to the MPRDA's objectives must apply for ministerial approval. The minister may also investigate allegations that a person is using their property in a manner that may detrimentally affect a mining operation. A rectification notice can then be served and enforced.

The DMR will investigate a conflict between a mineral rights holder and a landowner. The parties may be requested to conclude an agreement for payment of compensation for the landowner's loss or damage. If no agreement is reached, the compensation will be determined by arbitration or a competent court. Alternatively, the DMR can recommend expropriation to the minister, in accordance with the relevant legislation, should it further the MPRDA objectives.

15 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

In terms of the MPRDA, state-owned enterprises may apply to the Minister for prospecting or mining rights but they still have to comply with the requirements of the MPRDA. The Minister may exempt organs of state from the provisions of applying for a prospecting or mining right in respect of any activity to remove any mineral for road construction, building of dams or other purposes identified.

In terms of the MPRDA there is no local listing requirement in respect of the project company that a state-owned enterprise may have a participation interest in.

16 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

In terms of the MPRDA, if it is necessary for the achievement of the objectives referred to in the MPRDA, the Minister may, in accordance with section 25(2) and (3) of the Constitution of the Republic of South Africa expropriate any land or any right therein and pay compensation in respect thereof. The reference to 'any right therein' arguably includes reference to prospecting or mining rights. Section 25(2) of the Constitution provides that property may be expropriated only in terms of law of general application, for a public purpose or in the public interest, and subject to compensation the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. In accordance with section 25(3) of the Constitution, the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

- the current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- the purpose of the expropriation.

As regards section 25(3) of the Constitution, property is not only limited to land.

17 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There is certain national and provincial legislation, under which properties may be declared a particular protected status.

The MPRDA stipulates that no mineral rights may be issued over any land 'reserved under any other law'. This section is not an absolute restriction and mineral rights may be issued in a protected area if the minister is satisfied that a specified exclusion applies.

If these exclusions are not applicable, the MPRDA prohibits the issuing of mineral rights over land that is reserved under another law, which includes legislation declaring land a particular protected status. But the condition 'in terms of any other law' requires that the legislation, either national or provincial, which forms the basis for properties being given a particular protected status, be considered, to establish what restrictions are contained for such protected areas. For example, the National Environmental Management Protected Areas Act 57 of 2003 does not prohibit the grant of mineral rights over a protected area, but only the actual prospecting and mining on the area.

Duties, royalties and taxes

18 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Minerals and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act) commenced on 1 May 2010. Mining royalties are payable when mineral resources which were extracted from within the Republic, are transferred. The 'transfer' of the mineral resources (which were extracted from within the Republic) is the trigger for the imposition of the royalty.

Mining royalties are calculated by a formula – there is a prescribed mining royalty rate for refined mineral resources and for unrefined mineral resources. The mining royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources. The Royalty Act uses two variables to calculate the royalty liability: the value of the minerals (the tax base) and the royalty percentage rate that is applied to the base.

The formula to be used to determine the percentage rate for refined mineral resources is: 0.5 + [earnings before interest and taxes/(gross sales in respect of refined mineral resources x 12.5)] x 100.

The formula to be used to determine the percentage mentioned in section 3(2) of the MPRDA for unrefined mineral resources is: 0.5 + [earnings before interest and taxes/(gross sales in respect of unrefined mineral resources x 9)] x 100.

The only difference between the formulae to be used for refined as opposed to unrefined mineral resources, is that a constant of 12.5 is used in respect of refined mineral resources and a constant of nine applies in respect of unrefined mineral resources.

Relief will be given to small businesses. Such relief comes in the form of an exemption from the mining royalty subject to certain conditions being met. In addition to mining royalties, taxes imposed in South Africa include income tax (corporate and individual); capital gains tax; and transactional taxes for example as VAT, securities transfer tax and transfer duty.

19 What tax advantages and incentives are available to private parties carrying on mining activities?

Gold mining companies are taxed according to a formula. This formula takes into account the marginal tax rate, the portion of tax free revenue, and the ratio of taxable income to total income. Capital allowances are provided for gold mines due to the high capital investments incurred. Diamond and other non-gold mining companies are taxed at the same rate of normal taxes applying to other companies.

20 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Mineral and Petroleum Resources Royalty Act 28 of 2008 makes provision for fiscal stability agreements to be entered into between the Minister of Finance with an extractor in respect of an extractor's mineral resource right or in anticipation of the extractor acquiring a mineral resource right. Binding fiscal stability agreements may be assigned by the extractor to another person who is acquiring the prospecting right or exploration right from the extractor. Fiscal stability agreements relating to such prospecting or exploration rights can be freely assigned. Fiscal stability protection for MPRDA mining or production rights can only be assigned in limited circumstances, namely, where intra-group transactions occur.

21 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The MPRDA does not make provision that the government or state-owned enterprises are entitled to a free carried interest in mining projects. Amendments to the MPRDA that are not yet effective entitle the state to a 20 per cent free carried interest in new exploration and production rights. 'Free carried interest' is defined as 'interest allocated to the State in exploration or production operations without any financial obligation on the State'. In terms of the amendments also over and above the 20 per cent free carried interest, the state is entitled to an unlimited participation interest in any exploration or production right. This entitlement may be exercised either through a production sharing agreement or through acquisition of the interest in the right at an agreed price.

22 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Capital gains tax and taxes on the disposal of an asset are regulated in terms of the Eighth Schedule to the Income Tax Act 58 of 1962. Capital gains taxes are levied on the disposal of an asset. An asset is defined to include a right or interest of whatever nature to or in property. A mineral right is a limited real right in property and could therefore fall within the ambit of this schedule. However, the conversion of old mineral, mining, prospecting, exploration and production rights held before the introduction of the Mineral and Petroleum Resources Development Act 28 of 2002, to new rights under that Act will not give rise to a capital gain or loss, as roll-over relief is granted by para 67C of the Eighth Schedule.

However, we note that the transition period for the conversion of old mining rights into new rights expired on 30 April 2009.

23 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

South Africa taxes South African residents on all income received or accrued irrespective of where it is earned and taxes non-residents only on income that is derived from a South African source or that is deemed to have been derived from a South African source. The Income Tax Act, 58 of 1962 (the ITA) defines a 'resident', in relation to juristic or legal entities, to mean any person that is incorporated, established or formed in South Africa or that has a place of effective management in South Africa. Any person that is deemed to be exclusively a resident of another country for the purposes of the application of any tax treaty between South Africa and that other country is specifically excluded from the definition of resident.

Resident companies are taxed on their worldwide income while non–residents are taxed on South African sourced income (subject to the provisions of any double taxation agreement (DTA)). Certain withholding taxes also apply to non-residents. Non-residents are also taxed (subject to the provisions of any DTA) on capital gains arising from their disposal of the following:

- immovable property situated in South Africa, held by the non-resident;
- an interest of at least 20 per cent in a South African company, trust or other entity if 80 per cent or more of the market value of the company consists of immovable property situated in South Africa; and
- any asset that is attributable to a permanent establishment of that foreign party in South Africa.

With effect from 1 April 2012 any dividend paid by a South African company to its shareholders (both resident and non-resident) is subject to a withholding tax of 15 per cent. The rate of 15 per cent may be reduced by a DTA between South Africa and the non-resident shareholder's country of residence, if one exists. Dividends payable to non-residents receiving dividends from foreign companies listed on the JSE could be exempt from dividend tax (provided the required 'declaration' and 'undertaking' is submitted to the company or withholding agent in time).

A distinction should be made between 'mining royalties' and royalties in terms of the ITA (the latter being paid in respect of, generally speaking, the use or right of use of nay intellectual property or the imparting of any scientific, technical, industrial or commercial knowledge or information as defined in terms of section 49A of the ITA). South Africa currently imposes a withholding tax of 12 per cent on royalties, as defined in the ITA, payable to non-residents. This withholding tax will increase to 15 per cent on 1 January 2015. Agreements by South African companies to pay royalties to non-residents require the approval of the Exchange Control Department of the South African Reserve Bank and/or the Department of Trade and Industry (DTI). The rate of this withholding tax may be reduced by an applicable DTA.

From 1 January 2015 a 15 per cent withholding tax on any interest will be imposed on interest accruing to a non-resident on or after that date. A withholding tax on service fees paid to any non-resident at a rate of 15 per cent will also come into effect on 1 January 2016. Similarly to the dividends withholding tax, the rate of the withholding tax on interest and on service fees may be reduced by a DTA. Foreign companies carrying on business in South Africa through a branch must be registered as 'external companies' and as taxpayers. South African branches of foreign companies were previously taxed at 33 per cent and are currently taxed at 28 per cent. There are no withholding taxes on the remittance of branch profits.

A subsidiary company registered in South Africa will be treated as a separate legal entity and subject to the same tax provisions as domestic companies.

Business structures

24 What are the principal business structures used by private parties carrying on mining activities?

South African law provides for two kinds of companies, which are the most common business vehicles for all private-party business. Both a public limited liability company and a private limited liability company must have at least one shareholder. The restrictions in the previous Companies Act that a public limited liability company must have a minimum of seven shareholders and a private limited company a maximum of 50 shareholders is no longer applicable. There is no requirement that either shareholders or directors be South African citizens or residents.

A branch office may be set up by the investor. Any time that a foreign company carries on a range of listed business activities in South Africa, including as a branch office, it qualifies as an external company and must be registered as an external company with the South African Companies Commission. Branch offices do not have a separate legal personality from the head office. However, for taxation and exchange control regulation purposes, an external company is treated as having a separate personality. Further, under the Companies Act, only certain specified sections of the Companies Act apply to external companies, including, for example, the obligation to maintain at least one office in South Africa and the duty to file an annual return in the prescribed form. This varies from the previous Companies Act, which applied in its entirety generally to every company including external companies.

A joint venture can be formed with a South African entity, either through a South African subsidiary or directly in partnership; this is commonly used in the mining sector.

If a black economic empowerment (BEE) partner is to be taken into the South African business the most appropriate business entity would be a South African company, as this would allow the South African operations to be ring-fenced.

25 Is there a requirement that a local entity be a party to the transaction

There is no requirement that either shareholders or directors in a company registered in South Africa are South African citizens or residents. Under the MPRDA there is, however, a requirement that a mining right holder must have 26 per cent BEE ownership by 2014. South African entities and parties will therefore need to be involved in any company that holds mining rights.

26 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Since the end of the Apartheid period South Africa has negotiated more than 40 bilateral investment treaties (BITS) designed to promote and protect foreign investment.

However, South Africa recently embarked on a review aimed at creating an investment regime that strikes a balance between the interests of foreign investors and the need for the government to implement measures in the public interest such as promotion of economic opportunities for the previously disadvantaged South Africans. The DTI made a recommendation to restructure the existing BITs that South Africa has concluded to ensure that the BITs are in line with South Africa's broader social and economic policies.

To this end the DTI published the first draft of the Promotion and Protection of Investment Bill for public comment on 01 November 2013 (the Bill). The Bill, which, on the face of it, aims to replace existing BITs when it becomes law, is still in a draft format and must still go through the Parliamentary process before it is passed into law. In line with this policy shift, South Africa has recently cancelled BITS with Switzerland, Luxembourg, Spain, Germany and Belgium. Cancellation of other BITs is therefore a foreseeable future possibility.

Briefly, the Bill diminishes the rights afforded to investors in current BITs in the following ways:

In the event of expropriation, investors are no longer assured of compensation at full market value. The Bill provides that compensation will be in line with the Constitution of the Republic of South Africa, which provides for compensation which must be 'fair and equitable'.

The Bill removes the obligation on the South African government to enter into international arbitration in the event of a dispute. The DTI would facilitate mediation or South African courts may be approached for relief.

The Bill does not contain the provision that currently exists in most BITs which entitles investors to 'fair and equitable treatment'.

Another significant difference between the Bill and impending law as compared to the existing BITs is that the Bill and eventual law could be changed unilaterally by the South African Parliament whereas the BITs offer protected investment for a fixed term, thereby assuring investors of security and stability.

A full list of all BITs to which South Africa is a party, whether they are in force or not can be found at: http://unctad.org/Sections/dite_pcbb/docs/bits_south_africa.pdf.

Please note that this list reflects the BITs as at 1 June 2013. Some of the BITs, as referred to above, have been terminated since then.

Financing

27 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

South Africa has a well-developed financial infrastructure, including active money, capital and financial markets. There are many well-established commercial, merchant and investment banks, both domestic and international.

Financial assistance may be obtained by non-residents in South Africa for bona fide foreign direct investments into South Africa, without restrictions.

For BEE participation in a foreign business venture, there are several governmental and non-governmental organisations that assist HDI new business establishments. These include the Industrial Development Corporation, Small Business Development Corporation, the Development Bank of Southern Africa and the National Business Initiative.

Non-resident companies can be listed on the JSE. The South African financial market is therefore open to foreign companies to raise capital. South African residents are entitled to invest, without restriction, in inward-listed investments on the JSE. South African institutions are permitted to invest in such listing using their existing foreign investment allowances plus an additional 5 per cent of their total retail assets in African inward-listed equity and debt securities. The Bond Exchange of South Africa no longer exists, as it was acquired by the JSE.

28 Please describe the regime for taking security over mining interests.

The MPRDA does not prevent the registration of a mortgage over the prospecting or mining right. However no security can be registered over the prospecting or mining right at the Mineral and Petroleum Titles Registration Office until the registration of the prospecting or mining right itself has been effected.

Under the MPRDA a prospecting right or mining right or an interest in any such right, or controlling interest in a company that holds such rights, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the minister, except in the case of a change of controlling interest in listed companies.

The consent contemplated above is not required in respect of the encumbrance by mortgage of the rights mentioned or interest as security to obtain a loan or guarantee for the purpose of funding or financing a prospecting or mining project by:

- any bank, as defined in the Bank Act 94 of 1990; or
- any other financial institution approved for that purpose by the registrar of banks referred to in the Bank Act 94 of 1990, on request by the minister, if the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to the consent of the minister.

Any encumbrance by mortgage of a prospecting or mining right must be lodged for registration at the Mineral and Petroleum Titles Registration Office.

Restrictions

29 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Imports into South Africa are comparatively unrestricted and currency is generally available to pay for imports. The International Trade Administration Act 71 of 2002 (ITAC Act) controls importation, through the International Trade Administration Commission (ITAC).

The Customs and Excise Act 91 of 1964 governs the imposition of customs and excise duties, as well as various other charges imposed by the state on goods imported into the country. These charges are contained in the schedules to the Act. Part 1 of the schedule has been constructed in accordance with the Harmonised Commodity Description and Coding System, developed by the World Customs Organization (WCO). South Africa has substantially reduced its import tariff levels, pursuant to WCO commitments, cutting back

from 80 different levels to six different levels. All quantitative control and formula duties have been replaced with ad valorem duties.

There are no restrictions on the importation of services, provided an appropriate visa is obtained by the foreign contractor or employee.

30 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

South Africa actively encourages exports and few restrictions are imposed.

The government has, however, committed to promotion of local beneficiation through legislation, to ensure equitable access to the country's mineral resources and, in turn, create employment. The MPRDA includes provisions that the minister must promote initiatives or promote the beneficiation of minerals in the Republic. In this regard, a policy document titled: 'A Beneficiation Strategy for South Africa' (June 2011) was approved by Cabinet.

Should any party intend to beneficiate any mineral mined in South Africa outside its borders it must first furnish written notice and consult with the minister.

The Mining Charter (as amended) and Mining Code specifically stipulate that mining companies will be able to offset up to 11 per cent of their 'historically disadvantaged South African' (HDSA) ownership requirements against the value of their beneficiation activities from 2012.

Amendments to the Diamonds Act 56 of 1986 facilitated the beneficiation of diamonds in South Africa, by making diamonds more accessible for local cutters and polishers. The South African Diamond and Precious Metals Regulator was established to issue authorisations for dealing, beneficiation, trading and possessing, selling, exporting or importing unpolished diamonds. When considering applications, the Regulator must consider the promotion of equitable access to and local beneficiation of South Africa's diamonds. South Africa also has a State Diamond Trader, whose functions are to maintain a client base of local diamond beneficiators. The objectives of the Trader are similarly to promote equitable access to and local beneficiation of South Africa's diamonds. The Regulator has established a Diamond Exchange and Export Centre. All unpolished diamonds intended for export purposes must first be offered for sale to this centre as an export condition of unpolished diamonds.

Restrictions are imposed on the export of individual minerals in legislation. For example, the ITAC Act requires an export permit for the export of certain minerals. The export of gold, certain precious metals and diamonds is regulated and approval is required. There is no restriction per se on the export of commodities such as coal; although rail transport and port allocation may be required, which imposes restrictions on the capacity of the commodity transported. This indirectly affects the possible export quotas for such commodities.

Amendments to the MPRDA that are not yet effective give the minister a wide discretion to determine what percentage of specified minerals must be made available to local beneficiators as well as specifying the mineral this is applicable to. Furthermore, the minister's consent will be required to export such minerals. The minister will be empowered to:

- in consultation with a minister of the relevant national departments designate any mineral for local beneficiation;
- after taking into consideration the national development imperatives such as macro-economic stability, energy security, industrialisation, food security and infrastructure development;
- after considering the advice of the relevant council, publish such conditions required to ensure security of supply for local beneficiation in the prescribed manner.

Every producer of designated minerals will be required to offer to local beneficiators a prescribed percentage of its production of minerals in prescribed quantities, qualities and timelines at the mine gate price or agreed price. 'Mine gate price' is, the fair value price (excluding VAT) of the mineral at the time that the mineral leaves the area of the mine and excludes transport and delivery charges from the mine area to the local beneficiator. The amendments also provide that no person, other than a producer (or an associated company of such producer), as defined, in respect of its own production and who has complied with the applicable requirements, may export designated minerals without the minister's prior written approval. 'Designated minerals' mean such minerals which constitute input into local beneficiation programmes in line with the national development imperative. What is clear is that the provisions that the amendments are in respect of in relation to beneficiation are aimed at taking forward the policy of the government that they have been pushing for some time regarding local production and beneficiation. The provisions however remain unclear and need a clear regulatory framework to create certainty for mining companies.

31 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Where funds for mining activities are introduced into South Africa by a non-resident as a loan to a South African entity or as the subscription price for the acquisition of shares in a South African company, the South African Reserve Bank has to be informed, approval has to be obtained in respect of the terms of the loan and/or the shares have to be endorsed as being held by a non-resident shareholder. If these approvals or endorsements have been granted, dividends or interest can flow back to the non-resident investor.

Environment

32 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The DMR presently regulates environmental management in prospecting, mining and operations. Legislative amendments are in place, which provide that the Department of Environmental Affairs will become the regulating authority. The date of commencement of these amendments into law is uncertain.

NEMA is the framework environmental legislation. All organs of state must, at all times, have regard for the principles of the NEMA in the interpretation, implementation and administration of NEMA or any legislation relating to the environment. The NEMA applies to all mineral operations; however the MPRDA is presently the primary source of environmental impact assessment requirements and environmental rehabilitation obligations in the mining sector. In terms of the MPRDA, a mineral rights holder must give effect to integrated environmental management objectives. The holder is obliged to consider, investigate, assess and communicate the effects of the environmental impact of a mining activity to the DMR. All environmental impacts must be managed. As far as reasonably possible, the environment must be rehabilitated after the operation to its natural state or a land use conforming to accepted principles of sustainable development.

A mineral rights holder is responsible for any environmental damage, pollution or ecological degradation and the management thereof as a result of his or her operations until the minister has issued a closure certificate to the holder concerned.

33 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Every person who has applied for a mining right must conduct an environmental impact assessment and submit an EMP within 180 days of receiving notice to do so. An EMP must be submitted in applications for a reconnaissance permission, prospecting right or mining permit. Certain activities related to mine development such as the construction of a fuel storage facility, construction of a road or construction of a water pipeline network may be listed activities that trigger the need for environmental authorisation under the NEMA.

In any application for a mining or related right, the applicant must make the prescribed financial provision for rehabilitation or management of negative environmental impacts before the EMP will be approved.

34 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

A mining rights holder has an obligation to rehabilitate or manage negative environmental impacts. If the mining rights holder does not comply with this obligation, the minister may use all or part of the financial provision made by the mining right holder to undertake such rehabilitation. The mining right holder must annually assesses his or her environmental liability and increase his or her financial provision, with ministerial approval.

A closure certificate is made on application to the minister. The requirement to maintain the financial provision remains in force until a closure certificate has been issued. The minister may retain a portion of the financial provision to rehabilitate any latent or residual environmental effects from the closed mine.

The mineral rights holder remains responsible for any environmental liability, pollution or ecological degradation until the minister has issued a closure certificate.

The holder of a prospecting right, mining right, retention permit or mining permit must apply for a closure certificate upon:

- the lapsing, abandonment or cancellation of the right or permit in question;
- cessation of the prospecting or mining operation;
- the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relates; or
- completion of the prescribed closing plan to which a right, permit or permission relates.

Closure certificates are notoriously difficult to obtain in South Africa and no time frames on this can be given.

Health & safety, and labour issues

35 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mine Health and Safety Act 29 of 1996 (MHSA) is the principal health and safety legislation applicable to the mining industry. The Mine Health and Safety Council regulates matters relating to the MHSA.

Employment in South Africa is regulated by statute, common law and contract. Legislation, such as the Labour Relations Act 1995, grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern.

Most contracts of employment are subject to the Basic Conditions of Employment Act 1997 (BCEA). Parties can agree different terms to those set out in the BCEA, provided these are not less favourable to the employee than what the BCEA provides. The BCEA regulates working hours, leave, payment of remuneration, and notice and payments on termination of employment.

The Employment Equity Act 1998 prohibits unfair discrimination in any employment policy or practice on grounds such as race, gender, sex, age and religion and regulates the implementation of affirmative action measures (namely, measures which ensure that employees from specific demographic groups have equal employment opportunities and are equitably represented in the workplace).

The Unemployment Insurance Act 2001 establishes the Unemployment Insurance Fund (UIF). The Unemployment Contributions Act 2002 requires employers and their employees to make contributions to the UIF. In the event of job loss, an employee is entitled to benefits from the UIF.

36 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

No foreign person may enter South Africa on a temporary or permanent basis, without the necessary permit. The Immigration Act 13 of 2002 provides for the issuing of the following categories of temporary residence permits to foreign nationals:

- business permits – a foreign national must intend to establish or invest in a business in South Africa in which he or she may be employed. This permit is subject to the foreign national investing a prescribed minimum capital contribution in the business. The permit holder may only conduct work in South Africa related to the business for which the permit has been issued;
- work permits, in the form of:
  - quota work permits – a foreign national must fall within a category determined annually by the Minister of Home Affairs. This is subject to the number of work permits issued not exceeding the determined quota;
  - general work permits – provided that the prospective employer satisfies the Director-General of the Department of Home Affairs that, despite a diligent search, the employer has been unable to employ a person in South Africa with the equivalent skills or qualifications. These permits may be issued to a foreign national not falling within the quota categories;
  - exceptional skills transfer work permit – should an individual have exceptional skills or qualifications, as determined in the Department of Home Affairs discretion; and
  - intra-company transfer work permit – if a foreign national is employed abroad by a business operating in South Africa in a branch, subsidiary, or affiliate entity and who by reason of employment is required to conduct work in South Africa for a period not exceeding two years; and
- corporate permits – these may be issued to a corporate applicant to employ foreign nationals who are required to perform work for the applicant. The Department of Home Affairs, in conjunction with the DTI, will determine the maximum number of foreigners who can be employed with such work permit.

Domestic employees should be employed in accordance with BEE requirements.

Social and community issues

37 What are the principal community engagement or CSR (corporate social responsibility) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The MPRDA has detailed requirements for social responsibility that are imposed on mining companies. The DMR regulates these provisions of the MPRDA.

The MPRDA's objectives include promoting employment and advancing the socio-economic welfare of all South Africans; and

ensuring mining rights holders contribute towards the socio-economic development of the areas in which they are operating.

As part of an application for a mining right an applicant must submit a Social and Labour Plan for approval by the DMR. Mining right holders must undertake to invest sizeable amounts in various programmes and projects for the upliftment of its employees and the local community. These include:

- a human resources development programme (which must include plans for skills development; career progression; mentorship; and internships and bursaries);
- a local economic development programme (which must include, inter alia, infrastructure and poverty eradication projects; measures to address housing; nutrition and living conditions of employees);
- a procurement progression plan and its implementation for HDSA companies (in terms of capital goods, services and consumables); and
- processes for managing downscaling and retrenchment.

The Codes of Good Practice for the Mining Industry has also recently been published under the MPRDA, to enhance the Mining Charter's implementation. It has provisions relating to human resource development and housing and living conditions of employees.

The Mining Charter also expressly recognises that BEE ownership can be in the form of economic participation by employees and the community.

38 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Compliance with BEE requirements is essential when acquiring mineral rights. The MPRDA's objectives include substantially and meaningfully expanding opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and benefit from the exploitation of South Africa's mineral and petroleum resources.

The Mining Charter specifies that ownership is indicated by both 'meaningful economic participation' of 26 per cent and 'full shareholder rights' of 26 per cent. 'Effective ownership' is defined as meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities. Based on past practice of the DMR, management control is generally used to distinguish HDSA investors who are active in business rather than institutional investors, broad-based and employee participants.

Most mining rights are endorsed with an obligation to adhere to the BEE structure contained in the mining right application. Should the BEE structure be varied, an amendment to the mining right would be required.

The MPRDA further provides that if two applications for mineral rights are received on the same day, preference will be given to applications from historically disadvantaged persons.

Update and trends

The Mineral and Petroleum Resources Development Amendment Bill 2013 (the MPRDA Bill) was approved by the National Assembly and by the National Council of Provinces (NCOP) on 27 March 2014.

Now that the MPRDA Bill has been approved by the NCOP it will be sent to the President to sign and when the MPRDA Bill has been signed by the President the date for the commencement of the amendments will be published in the Government Gazette.

The purpose of the MPRDA Bill is to amend the MPRDA so as to remove ambiguities that exist within the Act; to provide for the regulation of associated minerals, partitioning of rights and enhance provisions relating to the regulating of the mining industry through beneficiation of minerals or mineral products; to promote national energy security; to streamline administrative processes; to align the MPRDA with the Geoscience Act No. 100 of 1993, as amended; to provide for enhanced sanctions; to improve the regulatory system; and to provide for matter connected therewith.

When the MPRDA Bill is enacted the minister will have to also enact the necessary regulations and these regulations will provide more clarity for the amendments introduced by the MPRDA Bill.

It is not clear when the MPRDA Bill will be enacted.

39 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

South Africa is a signatory to certain relevant international conventions, none of which are directly domesticated in its law.

These issues are regulated extensively in South African domestic legislation, as set out in question 37.

Foreign investment

40 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no restrictions in the MPRDA or in practice on a foreign party acquiring mining rights in South Africa.

Due to legislation providing for advancement of historically disadvantaged people, however, there are benefits in a domestic partner having some form of interest in the foreign party's mining activities. The foreign party should give careful consideration to the most

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appropriate business entity utilised to acquire mining rights and take note of South Africa's exchange control restrictions.

International treaties

41 What international treaties apply to the mining industry or an investment in the mining industry?

South Africa is a member of the World Trade Organization (WTO) and is a signatory to all the WTO agreements dealing with a range of specific trade issues.

In 2000 South Africa and the European Union concluded the South Africa–EU Free Trade Agreement, which aims to promote trade and cooperation. The bilateral treaty affords favourable treatment to South African exports to EU countries. It is structured to remove tariffs on 85 per cent of imports from the EU by 2012. The agreement equally provides for the abolition of EU import tariffs on a large majority of South African imports, within the same period but at an accelerated rate.

South Africa has signed 42 bilateral investment protection treaties with various countries.

The Safety and Health in Mines Convention was ratified by South Africa in 1995.

South Africa was one of the initiating countries and is an active participant of the Kimberley Process Certification Scheme. This scheme aims to combat the link between illicit international trade in rough diamonds and armed conflict.

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