

# Mining

*Contributing editors*

**Michael Bourassa and John Turner**



2016

GETTING THE  
DEAL THROUGH

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# Mining 2016

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## CONTENTS

<b>Global overview</b>	<b>5</b>	<b>Indonesia</b>	<b>113</b>
Paul Fornazzari and Solange Gonzalez Fasken Martineau		Rahmat S S Soemadipradja, Robert Reid and Rachel Situmorang Soemadipradja & Taher	
<b>Latin America overview</b>	<b>8</b>	<b>Kazakhstan</b>	<b>122</b>
Florencia Heredia HOLT Abogados		Azamat Kuatbekov and Nurgul Abdreyeva Baker & McKenzie	
<b>Angola</b>	<b>11</b>	<b>Mexico</b>	<b>128</b>
Diogo Xavier da Cunha and Hugo Moreira Miranda & Associados - Sociedade de Advogados, RL		Enrique Rodríguez del Bosque RB Abogados	
<b>Argentina</b>	<b>18</b>	<b>Mozambique</b>	<b>135</b>
Florencia Heredia, María Laura Lede Pizzurno and Matías Olcese HOLT Abogados		Nuno Cabeçadas Miranda & Associados - Sociedade de Advogados, RL	
<b>Australia</b>	<b>25</b>	<b>Myanmar</b>	<b>142</b>
Simon Fraser and Tanya Denning Ashurst Australia		Daw Khin Cho Kyi, Daw Nwe Nwe Kyaw Myint and Daw Thawdar Sein Myanmar Legal Services	
<b>Bolivia</b>	<b>39</b>	<b>Nigeria</b>	<b>148</b>
Fernando Aguirre B Bufete Aguirre Soc Civ		Sina Sipasi and Oluwaseun Philip-Idiok ÆLEX	
<b>Brazil</b>	<b>45</b>	<b>Peru</b>	<b>155</b>
Bruno Dario Werneck and Eugênia Maria Menezes Pedroso Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		Fernando Pickmann Gallo Barrios Pickmann Abogados	
<b>Canada</b>	<b>55</b>	<b>Philippines</b>	<b>161</b>
Michael Bourassa and John Turner Fasken Martineau		Patricia A O Bunye Cruz Marcelo & Tenefrancia	
<b>Chile</b>	<b>63</b>	<b>South Africa</b>	<b>168</b>
Rodrigo Muñoz U Núñez, Muñoz & Cía Ltda		Claire Tucker and Wandisile Mandlana Bowman Gilfillan	
<b>Colombia</b>	<b>69</b>	<b>Sweden</b>	<b>178</b>
Ignacio Santamaría, Ángela María Salazar and Daniela Palacio Lloreda Camacho & Co		Peter Dyer and Pia Pehrson Foyen Advokatfirma	
<b>Dominican Republic</b>	<b>77</b>	<b>Tanzania</b>	<b>184</b>
Nathalie Santos, Leticia Caminero and Brooke Macdonald Distinctive Law		Tabitha Maro ENSafrica Tanzania	
<b>Ecuador</b>	<b>84</b>	<b>Thailand</b>	<b>190</b>
Cesar Zumarraga and Juan Fernando Larrea Tobar ZVS Spingarn		Albert T Chandler, Chantima Limpananda and Christopher Kalis Chandler & Thong-ek Law Offices	
<b>Finland</b>	<b>91</b>	<b>United States</b>	<b>198</b>
Pekka Holopainen and Panu Skogström Kallioliaw Asianajotoimisto Oy - Attorneys at Law		John D Fognani, Michael T Hegarty, Kenneth D Hubbard and Christopher J Reagen Haynes and Boone, LLP	
<b>Ghana</b>	<b>100</b>	<b>Uzbekistan</b>	<b>205</b>
Michael Edem Akafia and Kimathi Kuenyehia Sr Kimathi & Partners, Corporate Attorneys		Bakhodir Jabborov Grata Law Firm	
<b>Greenland</b>	<b>107</b>	<b>Zambia</b>	<b>211</b>
Peter Schriver Nuna Law Firm		Charles Mkokweza Corpus Legal Practitioners	

# South Africa

Claire Tucker and Wandisile Mandlana

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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 75 per cent of platinum metals, 75 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. Its valuable minerals are estimated to be worth close to 30 trillion South African rand.

The South African mining industry is resilient. Despite the challenging times, the mining industry in South Africa still adds significant value to the South African economy with regards to gross domestic product contribution, employment, tax and export revenues. 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, labour unrest, some degree of regulatory uncertainties and 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 Cape 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 No. 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? Were there any major amendments in the past year?

The principal law that regulates the mining industry is the MPRDA. Other related environmental legislation includes:

- the National Environmental Management Act No. 107 of 1998 (NEMA);
- the National Water Act No. 36 of 1998;
- the National Environmental Management: Air Quality Act No. 39 of 2004; and
- the National Environmental Management: Waste Act No. 59 of 2008.

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

Other than the introduction of the new regulations regulating the manner in which the holders of rights should make financial provision for rehabilitation, there were no major amendments in 2015–16. The past year also marked the first year of implementation of the 'one environmental system' for the mining industry in South Africa.

### 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 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.

The South African Mineral Resource Committee 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).

The amended Code was launched on 19 May 2016 and will come into effect in January 2017. The current Code continues to apply until the amended Code comes into effect. The sections of the Code that are the subject of revision include the adoption of the Committee for Mineral Reserves International Reporting Standards definitions, greater emphasis on economics, transparency and materiality, revision of sections relating to coal, a more comprehensive diamond and gemstone section and the introduction of a section on industrial minerals.

### 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 the following:

- contravening the MPRDA while conducting mining-related operations;
- breaching any material term or condition of a mineral right;
- contravening an approved environmental management programme; 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 No. 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 No. 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 the following:

- an environmental authorisation issued in terms of NEMA and other applicable licences required in terms of the other relevant laws (for example, water use licence);
- 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 minister 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, previously 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, which has recently been sold to other operators.

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 are 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 No. 2 of 2000 (PAIA). Under the PAIA a person requesting public documents does not need to provide 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](http://www.geoscience.org.za)). Access to information not publicly available is subject to the PAIA and the Geoscience Act No. 100 of 1993, which regulates the functions of the CGS.

The South African Mineral Resources Administration portal, which is a DMR online application portal, is designed to indicate to an applicant whether the area of interest is not already subject of another right. The spatial area results are, however, only made available once the applicant has entered the details of its applications.

**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 proposed amendments to the MPRDA in terms of the Mining and Petroleum Resources Development Amendment Bill (the Bill) that remove the first come, first served provision in terms of the MPRDA. In terms of the proposed amendments, the minister must, by notice in the government gazette, invite applications for, among 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 that 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 that 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. 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, among 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 No. 29 of 1996, the applicant is not in contravention of any provision of the MPRDA and the granting 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. There are, however, proposed amendments to the MPRDA, which will remove this exception.

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 that are not yet effective, ministerial consent will be required for any change in shareholding in such companies. The amendments (that 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 that 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 carried out 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 met.

#### **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 No. 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 holder of mining rights 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 both the statute and 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 or she 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 sections 25(2) and (3) of the Constitution of the Republic of South Africa, 1996 (the Constitution) 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 No. 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 No. 28 of 2008 (the Royalty Act) commenced on 1 May 2010. Mining royalties are payable when mineral resources that 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  $0.5 + \text{earnings before interest and taxes (gross sales in respect of refined mineral resources} \times 12.5) \times 100$ .

The formula to be used to determine the percentage for unrefined mineral resources is  $0.5 + \text{earnings before interest and taxes (gross sales in respect of unrefined mineral resources} \times 9) \times 100$ .

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 9 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 No. 28 of 2008 makes provision for fiscal stability agreements to be entered into between the minister of finance and 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. The proposed amendments to the MPRDA in terms of the Bill would 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 No. 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 No. 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 paragraph 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 No. 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' are 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 any intellectual property or the imparting of any scientific, technical, industrial or commercial knowledge or information as defined in section 49A of the ITA). South Africa proposes a withholding tax of 12 per cent on royalties, as defined in the ITA, payable to non-residents. The withholding tax was increased 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 or the Department of Trade and Industry (DTI). The rate of this withholding tax may be reduced by an applicable DTA.

From 1 March 2015, a 15 per cent withholding tax on any interest was 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 was previously proposed to come into effect on 1 January 2016, which was then deferred to January 2017. However, recent indications from the National Treasury are that the withholding tax on service fees is not likely to be implemented due to unforeseen issues.

Similarly to the dividends' withholding tax, the rate of the withholding tax on interest 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.

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## 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 1 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 Belgium, Germany, Luxembourg, Spain and Switzerland. Cancellation of other BITs is, therefore, a foreseeable future possibility.

Briefly, the Bill diminishes the rights afforded to investors in current BITs in several 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 that 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 with 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 [www.unctad.org](http://www.unctad.org).

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.

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## 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 'historically disadvantaged individual' 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 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Subject to lending or public finance management requirements, a number of government agencies do provide funding to mining projects. For example, the Industrial Development Corporation (IDC) of South Africa, which is a wholly owned state corporation, offers a wide range of products from debt equity to providing working capital in various sectors including funding of mining projects. IDC is currently funding various mining projects including phosphate mining and a ferrochrome project. Among others, IDC takes into account development or social objectives of a project before deciding to fund the project. The Public Investment Corporation, which invests on behalf of public sector entities (eg, the government employees' pension fund) is also a major investor in the mining industry and has a similar approach to IDC (ie, invest in projects with a development or social objective).

### 29 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 Banks Act No. 94 of 1990 or any other financial institution approved for that purpose by the registrar of banks referred to in the Banks Act, 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

### 30 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 No. 71 of 2002 (ITAC Act) controls importation, through the International Trade Administration Commission (ITAC).

The Customs and Excise Act No. 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.

### 31 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 empower the minister to initiate or promote beneficiation of minerals in South Africa. In this regard, a policy document entitled '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 No. 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 beneficiaries. 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.

The proposed amendments to the MPRDA in terms of the Bill would give the minister wide discretion to determine what percentage of specified minerals must be made available to local beneficiaries as well as specifying the mineral this is applicable to. Further, the minister's consent will be required to export such minerals. The minister will be empowered to do the following:

- 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; and
- 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 beneficiaries 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 beneficiary. 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 that 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 that the government has 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.

### 32 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 or the shares, or both, 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

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

The 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 the NEMA or any legislation relating to the environment. Prior to 8 December 2014, the MPRDA regulated environmental management in the mining industry. However, following the implementation of the 'one environmental system', the NEMA is the primary environmental legislation across all industries including the mining industry. In respect of the mining industry, the competent authority is now the DMR (ie, the DMR is the authority responsible for issuing environmental authorisations and waste management licences in terms of the NEMA and the National Environmental Management: Waste Act, 2008, respectively, for mining and related activities while the Minister of Environmental Affairs will be the appeal authority for these authorisations). NEMA now regulates the environmental impact assessment requirements and environmental rehabilitation obligations including in the mining sector and the mineral rights holder must give effect to integrated environmental management objectives found in the NEMA. 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.

In principle, a mineral rights holder is responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water and the management and sustainable closure of the mine until issued with a closure certificate. It must, however, be noted that, notwithstanding being issued with a closure certificate, a mining right holder remains responsible for any latent or residual environmental liabilities.

#### **34 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 applies for a mining right must obtain an environmental authorisation including submitting the relevant environmental reports, as required in terms of NEMA, and to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party. The entire process (application to decision) should take approximately 12 months excluding internal appeals and any other dispute resolution related timelines. Previously, only certain activities that were 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 have required an environmental authorisation. However, with effect from 8 December 2014, an environmental authorisation is required for issuing a mining and prospecting right and undertaking activities relating to prospecting or mining.

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 environmental authorisation will be approved.

#### **35 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 issued following an application to the minister. The requirement to maintain the financial provision remains in force, notwithstanding the issuing of a closure certificate, and the minister may retain a portion of the financial provision to rehabilitate any latent or residual environmental effects from the closed mine.

In principle, the mineral rights holder remains responsible for any environmental liability, pollution or ecological degradation until issued with a closure certificate by the minister. However, due to recent amendments to the law, the mineral rights holder remains responsible for any latent or residual environmental liabilities even if issued with a closure certificate.

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

- 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**

#### **36 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 No. 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 of 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 of 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 of 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 that ensure that employees from specific demographic groups have equal employment opportunities and are equitably represented in the workplace).

The Unemployment Insurance Act of 2001 establishes the Unemployment Insurance Fund (UIF). The Unemployment Contributions Act of 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.

#### **37 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?**

For the purposes of title and right to explore waste products in tailings ponds and waste piles, the South African mining law distinguishes between tailings and waste piles produced prior to 1 May 2004 when the MPRDA commenced and those produced in terms of a right granted in terms of the MPRDA. The right to exploit the former (ie, tailings ponds and waste piles produced prior to the commencement of the MPRDA) is vested in the person who produced the waste piles or third party who acquired the waste pile if it has not acceded to land. There are proposed legislative amendments that will require that the holders of these rights obtain a right or permit in terms of the MPRDA to exploit the waste piles. The right to exploit minerals in tailings ponds and waste produced in terms of a right granted by the MPRDA, grants the holder of the right with the right to exploit the minerals in the ponds.

Despite the foregoing, the DMR often grants rights to third parties to exploit mineral in tailings ponds and waste piles. This is often a source of litigation.

The management and recycling waste products may also be subject to the National Environmental Management (Waste Act) requirements. The Waste Act in general applies to non-mineral waste (eg, waste tyres from the mine fleet, waste oils, remediation of contaminated soils).

The recycling or management of other mining waste products (eg, waste tyres, used oils) is subject to the requirements of the Waste Act and may require a waste management licence if certain trigger thresholds are met.

#### **38 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 No. 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 falling outside 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 foreign nationals who can be employed with such work permit).

Domestic employees should be employed in accordance with BEE requirements.

### Social and community issues

#### 39 What are the principal community engagement or CSR 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 the following:

- 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, and 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 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 is in the process of being revised. Until the final updated Mining Charter is published, the current Mining Charter applies.

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

#### 40 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.

#### 41 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 39.

### Anti-bribery and corrupt practices

#### 42 Describe any local legislation governing anti-bribery and corrupt practices.

The Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (the Corruption Act) is the main South African legislation governing or prohibiting fraud and corruption. The Corruption Act is designed to give effect to South Africa's obligations under the United Nations Convention against Corruption. South Africa is also party to the African Union Convention on Preventing and Combating Corruption. The Corruption Act inter alia provides for the strengthening of measures to prevent and combat corruption and corrupt activities and provides for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities (eg, gratification).

The Corruption Act applies equally to natural and juristic persons in both the public and private sectors and does not distinguish between different types of gratification. The term 'gratification' is defined broadly to include money, any donation, gift, reward, property or valuable consideration of any kind as well as less tangible benefits such as any office, honour, employment, right or privilege, vote, consent, influence, benefit of any kind or avoidance of loss.

Another key legislation governing anti-bribery and corrupt practices in South Africa is the Prevention of Organised Crime Act No. 121 of 1998, which criminalises racketeering, bribery, money laundering and gang related offences. It also provides generally for the confiscation of the proceeds of unlawful activities.

#### 43 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

As mentioned, the Corruption Act is designed to give effect to South Africa's obligations under the United Nations Convention against Corruption and has thus taken into account international principles. In addition, a number of South African mining companies are multinationals or have dual listing. These companies also apply foreign legislation governing anti-bribery and foreign corrupt practices. For example, one multinational was recently investigated by the US Securities & Exchange Commission in terms of the Foreign Corrupt Practices Act of 1977 for alleged corruption and bribery in its empowerment transaction. The investigation was later dropped. The prospectuses and annual reports of companies operating in South Africa often indicate that they are bound by the UK Bribery Act.

#### 44 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

South Africa has not yet signed up to the EITI as it believes its corporate governance and prevention of corruption legislation has a number of provisions aimed at fostering transparency and accountability. The South African mining companies have expressed willingness to implement EITI and some voluntarily implement EITI measures.

### Update and trends

A draft revised Mining Charter was published for public comment in April 2016. The draft revised Charter is aimed at strengthening the efficacy of the Mining Charter as one of the tools for effecting meaningful transformation of the mining and minerals industry. The draft revised Charter introduces new definitions, terms and targets for the transformation of the mining industry. The contents of the revised Charter are subject to ongoing debate and further revision following the public comment period. The final version of the revised Charter is expected later this year.

The state looks set to play an increasing role in the mining sector in future and we have seen some indication of this interest by the state in transactions we have advised on. A further step aimed at increasing the state participation in the industry has been the publication of the draft African Exploration Mining and Finance Corporation (AEMFC) Bill (the Bill) on 22 January 2016. The Bill, inter alia, seeks to provide for the establishment of AEMFC (an existing state-owned company) as the company to acquire and develop permits, rights (prospecting and mining) and any other interest granted to the company in terms of the MPRDA on behalf of the state. The Bill is light on detail. It largely provides for the institutional arrangements.

The Marikana Commission of Inquiry (the Commission) completed its work in 2015 and the report was released to the public in June 2015. The Commission's mandate was to investigate matters of public, national and international concern arising out of the tragic incidents at a South African mine, which led to the deaths of approximately 44 people, with more than 70 people injured and approximately 250 people arrested ([www.marikanacomm.org.za/#sthash.tKrQkH1N.dpuf](http://www.marikanacomm.org.za/#sthash.tKrQkH1N.dpuf)). The Commission's recommendations are wide ranging but make it clear that for the long term prosperity of the mining industry as well as the benefit of its stakeholders there has to be a change in the existing approach to local community development.

The Bill intended to amend various provisions of the MPRDA was passed by both houses of parliament in 2014 and the president referred it back to Parliament for reconsideration. It is still before Parliament and various public announcements by the minister of mineral resources indicate that the finalisation of the Bill is a priority. The delay in finalising the Bill creates regulatory uncertainties that need to be addressed as soon as possible.

### Foreign investment

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

### International treaties

#### 46 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 EU 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 BITs 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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## Getting the Deal Through

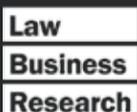
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