International best practice and resource nationalism: the International Bar Association's model mine development agreement[1]

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Introduction

One of the most difficult areas in concession contracts in resource-rich developing countries is achieving an equitable balance between the interests of investors, host states and, increasingly, mine and near mine communities. While some countries in the Andean region have resorted to outright or creeping expropriation of natural resource contracts under the guise of resource nationalism, others such as the Democratic Republic of the Congo (DRC), have claimed international best practice in the review (and setting aside) of important concession contracts.

A key issue in effective mineral resource management in the twenty-first century is ensuring a host country's equitable share of its mineral resources. Recently, this has taken the form of government-led retrospective contract reviews (as in the 2007–2009 review by the DRC), or a state's demands for a greater share of resource rents (for example through windfall profit taxes or renegotiated royalty rates, as attempted in Zambia in 2008)[2]. More recently in Southern Africa, this has led to calls for outright nationalization, indigenization, or state control of strategic minerals.

The resource nationalism trend appears to be gathering pace in Southern Africa. Namibia's mining and energy minister, Isak Katali, recently announced the Namibian government's intention to declare copper, coal, gold, uranium, and zinc as strategic minerals, and thus subject to 'additional national protection'.[3] This means that exclusive exploration and mining rights to all these 'strategic' minerals will in future be held by Namibia's state-owned mining company, Epangelo Mining Company Limited (Epangelo). Investors will in future be required to partner with Epangelo should they wish to acquire any 'strategic' minerals in Namibia.[4]

This comes on top of the publication of Zimbabwe's Indigenization and Economic Empowerment Regulations, on 25 March 2011. Under these regulations, non-indigenous mining companies with an asset value of or above US$1, are required to dispose of at least 51 per cent of their shareholding to designated entities within six months from the date of the publication of the relevant Government Gazette. Zimbabwean Prime Minister, Morgan Tsvangirai, speaking at the recent World Economic Forum on Africa for the first time, clearly voiced support for Zimbabwe's controversial indigenization policy, which he expressed as the development of 'the principle of citizenship empowerment' and further stating that 'indigenization is not about expropriation or nationalization ... it's about setting fair value.'[5]

In South Africa, black economic empowerment (BEE) is rapidly re-shaping the mining industry, while the spectre of mine nationalization remains a real threat to the industry in the run-up to the African National Congress's (ANC's) December 2012 elective conference.

In an attempt to address some of these issues, in early 2009 the mining law committee of the International Bar Association (IBA) embarked on an ambitious two year project to develop a model mine development agreement based on international best practice principles, the final version of which was published on 4 April 2011.

Resource nationalism

Resource nationalism is characterised by the tendency of some states to take (or seek to take) direct and/or increasing control of economic activity in their natural resource sectors.[6] In the 1970s,[7] resource nationalism was understood as an attempt by developing countries, not least in Africa, to address the legacy of inequality bequeathed by their former colonial governments, as well as a reaction to upward commodity price curves. The current trend in resource nationalism is driven by a far more complex and varied set of factors than commodity prices alone. Resource nationalism in the twenty-first century, unlike that of the 1970s, needs to be understood in the context of a global concern for resource security, environmental sustainability, sustainable development, and poverty reduction.[8]

On the one hand, resource nationalism may be viewed as a way to 'undo the evils' of what some describe as 'resource privatism'.[9] This view is fuelled by perceptions that major resource companies, as a result of their financial strength, dominate negotiations with host governments over access to the management of natural resources and thus secure regulatory and investment conditions that favour their commercial interests unfairly. This inequality of bargaining power, it is said, leads such companies to benefit inordinately from developing countries' resource wealth, while the interests of local communities are neglected.

On the other hand, resource nationalism, in its more extreme form of nationalization and expropriation, is inimical to investment in the host country's economy, as it

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places the state at centre stage of the governance of natural resources, while implicating the norms underlying private sector investment in such resources. In this guise, resource nationalism, as a form of statism, is the direct antithesis of the neo-liberal Washington consensus of the 1990s.

Resource nationalism can range from outright nationalization and expropriation of natural resources[10] to merely restrictive measures on the control or use of natural resources by corporations.[11]

The DRC's contract review

Resource nationalism can also take the form of the renegotiation or cancellation of existing natural resource contracts. An example of this type of resource nationalism is the DRC's contract review.

Although one of Africa's most bountiful regions in terms of the scale and abundance of its natural resources, the DRC has one of its least stable mining sectors, owing to the lingering effects of a five year civil war, which only ended in 2003.[12]

In June 2007, newly elected president Joseph Kabila, instituted a sweeping review of all mining contracts granted by the previous government. On 14 April 2007, 61 DRC mining development agreements, the majority of which had been signed during the DRC's 1998 to 2003 civil war, were set aside for review by an inter-ministerial commission, appointed and staffed by the DRC government.[13]

The purpose of the review, according to the DRC government, was to determine the extent to which the agreements were economically feasible, as well as their adherence to international best practice and the DRC's mining legislation.[14]

In the event that any of the agreements failed to meet these criteria, the government required the mining company concerned to modify, renegotiate, or even terminate the agreement, depending on the extent of non-compliance. Essentially, this approach permitted the DRC government to rewrite its existing development agreements with mining companies retrospectively, and to apply new terms to these agreements. One of the criteria with which each mining agreement had to comply was an alleged international best practice standard of a 51 per cent parastatal controlled share of all mineral resources within the borders of the country.[15]

This has led to international arbitration proceedings in the last year between First Quantum Minerals Limited (First Quantum) and the DRC government, arising out of the cancellation of its contract for its Kingamyambo Musonoi Tailings project (KMT project) at Kolwezi and the sale of its Frontier copper mine to Eurasian Natural Resources Corporation plc (ENRC), a Kazakh mining company listed in London.[16] The substantive arbitration proceedings in this case will take place only in early 2012.

Black Economic Empowerment in the South African mining sector

After the transition to democracy in 1994, South Africa's newly elected ANC developed policy of BEE with the intention of addressing the apartheid government's legacy of economic exclusion, which prevented black South Africans from participating in the country's economy, including the mining industry. This policy incorporated equity ownership transfers, skills development, management, and preferential procurement under legislation enacted in 2003.[17]

In the mining sector specifically, the government enacted the Mineral and Petroleum Resources Development Act, 2002 (the MPRDA), which changed the system of privately owned mineral rights to one of 'state custodianship',[18] based on the very United Nations General Assembly resolutions of 1962 and 1974 that mark the apogee of early forms of resource nationalism,[19] and under which the government would in future make the right to mine or prospect subject to new conditions, including the compulsory advancement of BEE[20] through, amongst other things, equity divestiture to black South Africans.

Thus, under section 23(1)(h) of the MPRDA, an application for the grant of a mining right must be in accordance with the Mining Charter.[21] The Mining Charter, like the MPRDA, came into effect on 1 May 2004. It required, among other things, that mining companies demonstrate that 15 per cent and 26 per cent of their assets, whether through equity, attributable units of production, collective schemes, or partnerships, are owned by historically disadvantaged South Africans (HDSAs) by May 2009 and May 2014, respectively. The revised Mining Charter, which was published on 13 September 2010, although different in a number of material respects from the original Mining Charter,[22] has maintained these equity targets.[23]

A combination of the global financial crisis and domestic economic conditions meant that the mining industry struggled to meet the equity targets set by the original Mining Charter. The sector has battled to achieve the transformation objective of 15 per cent ownership by HDSAs, which was meant to be achieved by 1 May 2009. According to a recent government finding, only 8.9 per cent BEE ownership of the mining industry was met by May 2009.[24]

Further, BEE ownership in the mining sector is more often than not narrow in nature, in that only a small elite class of black South Africans have benefited from the equity targets set by the MPRDA, a phenomenon described by South Africa's Congress of South African Trade Unions (COSATU), as 'comprador' capitalism.[25] On top of this, the mining sector has recently been dogged by instances of crony capitalism and opportunism, which hinder the promotion of broad based BEE, as the parties that benefit from such arrangements are generally either politically connected or already successful black entrepreneurs.[26]

The most infamous example of this is ArcelorMittal South Africa Limited's (ArcelorMittal's) as yet unconsummated acquisition of Imperial Crown Trading Limited's (ICT's) entire issued share capital for US$110 million together with its US$1.24 billion BEE transaction.[27] ICT has acquired a prospecting right over the Sishen iron ore mine owned by Kumba Iron Ore Limited (Kumba), in somewhat dubious circumstances. These circumstances, which are currently the subject of judicial review proceedings (to be heard in mid-August 2011) include, in addition to the alleged back-dating of licensing application forms, the grant to ICT of a prospecting right over an active iron ore mine, a notion which is as legally tenuous as it is illogical.[28] ArcelorMittal recently succeeded[29] in its court application to join Kumba in its legal proceedings against the Department of Mineral Resources (the DMR) and ICT. Although it has not said so publicly, it appears that ArcelorMittal is in effect reversing its decision last year to acquire ICT. What effect this will have on ArcelorMittal's related BEE transaction is unclear, as its strategic partners in respect of this transaction include ICT's shareholders.[30]

It is the failure of BEE to address properly the large and historical inequality in the South African economy which has really created the space for recent populist calls for more radical forms of resource nationalism, such as the nationalization of the entire mining sector. This was illustrated recently by a poll among urban black South Africans, which demonstrated 45 per cent support for mine nationalization.[31]

Nationalization debate in South Africa

In July 2009, the head of the African National Congress Youth League (ANCYL), Julius Malema, struck an economically populist chord by advocating the nationalization of the country's entire mining industry.[32] Speaking at the Mining for Change conference, Malema said the reason 'nationalization must happen is simple—the current economy of South Africa remains an apartheid structured economy and the current patterns of ownership are apartheid patterns of ownership'.[33]

What followed in the wake of this suggestion was an intense debate both in the media and eventually within the ANC itself, which has been at pains to emphasise that nationalizing the mining industry is not the policy of the ruling party or of the government.[34] The issue is strongly opposed by many sectors of South African society, including, significantly, the National Union of Mineworkers.[35]

The ANC debated the issue of nationalization last September at its National General Council meeting in Durban. It was decided that the issue of nationalization could not be resolved and that further 'research, study tours and discussions' needed to take place before a 'report to the Policy Conference for decision at National Conference in 2012' can be made. In February this year, the ANC's most important decision-making body, its National Working Committee, appointed a research team to investigate and report back in a year on the feasibility of mine nationalization.

This decision has left a cloud of uncertainty over the industry for the next year as it awaits the recommendations of the ANC's policy conference in June 2012, followed by its elective conference in December 2012. All of this potentially increases the country's sovereign risk profile.

The IBA's mining law committee model mining development agreement ('the MMDA')

As a response to some of these issues, in early 2009 the mining law committee of the IBA embarked on an eighteen month project to develop a model mining development agreement based on international best practice principles. The draft version 1.0 of the MMDA was launched at the IBA's Annual Meeting in Vancouver, Canada, on 4 October 2010, and the final version of MMDA 1.0 was released at the IBA/Rocky Mountain Mineral Law Foundation biennial meeting in Rio de Janeiro on 4 April 2011 (see www.mmdaproject.org).

The need for the MMDA project

The MMDA project was developed in recognition of a number of developments within the global mining industry:

- The fundamental role that foreign investment plays in the mining sector in the growth of many developing economies and, in turn, the improvement of living standards in mine or near mine communities.
- The negative impact, for example, environmental damage, that mines can have on surrounding communities.
- Host governments have developed strong views on the role that mining companies should play in the sustainable development of mine communities.
- There is a need to address the growing resistance of such communities to mining operations that may be of little benefit to them.
- An increased focus by international organizations, non-governmental and civil society organizations on human rights issues related to foreign investment.
- Anti-corruption legislation has become more pervasive under both the law of many developing countries and under international law. This, in turn, has led to a call by international organizations, non-governmental and civil society organizations for increased transparency in international resource extraction agreements.

As a result of these developments, mining companies are increasingly concerned about the need to obtain a 'social licence to operate', which includes obtaining the support of the local community, when commencing mining operations. At the same time, mining companies require certainty in terms of the legal regime governing their mining operations, and stable investment conditions under which to operate in order to ensure the long term security of their investments. It has also become imperative that foreign investment in the mining sector fosters sustainable development, while protecting the interests of the host governments, mine communities, and investors in an equitable way.

Many developing countries, however, do not have developed mining codes which deal with these issues, and the terms of investor–state mining agreements are determined, for the most part, contractually. Further, the MMDA project was conceived in recognition of the fact that there is little consensus as to what constitutes best practice in investor–state mining agreements.

The recognition of these factors requires a paradigm shift in the approach to investor–state agreements in the mining sector.

The content of the MMDA

The MMDA attempts to apply international best practice principles in the mining sector, which should include:

- efficient macro-economic management[36]
- an effective legal and regulatory framework[37]
- security of tenure and regulatory certainty[38]
- objective criteria for the grant of exploration and mining licences[39]
- limited administrative discretion[40]
- a defined role for government[41]
- efficient mining sector institutions and administrative capacity[42]

- infrastructure services[43]
- competitive fiscal and taxation conditions[44]
- effective investment protection[45]
- environmental sustainability[46]
- social responsibility[47]
- transparency[48]

The MMDA aims to give effect to these principles.

The MMDA endeavours to address the concerns that all relevant parties (potential investors, the host government, as well as the communities affected by mines) may have regarding a mining development agreement, in an equitable manner. In other words, the MMDA tries to create an advantageous outcome for all relevant parties. For mining companies, the MMDA seeks to provide a stable economic, social and regulatory environment. For host governments, the MMDA tries to ensure that they receive steady and fair resource rents, while at the same time providing for the social, economic, and environmental development of communities affected by mining. The MMDA aims to encourage an inclusive approach to the negotiation of a mining development agreement, in that all parties affected by the agreement are participants in the negotiation process, reflecting a shift from a rents-based negotiation to a more comprehensive interests-based negotiation.

This attempt to balance the concerns of all the relevant parties is reflected throughout the text of the MMDA and does not merely take the form of social and environmental 'add-on' clauses. As the MMDA is not a prescriptive document, all its key clauses offer alternatives which the parties are free to negotiate as they think best. What follows is accordingly based on one view of the agreement's key provisions as contained in version 1.0 of April 4, 2011.

For example, clause 2.2 of the MMDA provides that the rights granted to a mining company are exclusive and the host government may not grant any rights to any third party concerning the land over which such company holds its mining rights. This would clearly avoid the Kumba/ICT situation referred to earlier. Further, clause 2.3 of the MMDA ensures that mining companies acquire property in and title to the minerals mined, upon their severance from the land. Before the mining company can begin construction of its mining operation, however, clause 2.4 of the MMDA requires that the parties to the agreement, for the life of the operation, commit to eliminate, minimize, or mitigate adverse environmental impacts and avoid unnecessary loss or damage to the country's ecosystems. Mining companies are also required, under clause 2.4, to prepare and submit an environmental management plan and a social impact assessment plan, the minimum requirements of which are set out in clauses 2.4.2 and 2.4.3 respectively.

Further examples of how the MMDA caters for the concerns of mine-affected communities include:

- Clause 10.2, which provides that where the host country's applicable law and regulations regarding environmental and social impact assessment and management, as well as pollution prevention, are less stringent than any applicable international standards, such as the International Finance Corporation's Performance Standards[49] or the 'Equator Principles',[50] the mining company must comply with the international standards.
- Clause 10.3 of the MMDA also requires that all parties to the agreement must commit themselves to the protection and promotion of the human rights of all individuals affected by the agreement.
- Clause 21.0 of the MMDA requires the mining company, when purchasing goods and services needed for its mining operations, to grant first preference, at comparable quality, delivery schedule, and price, to goods produced in the host country, as well as procure services provided by the host country's citizens or businesses.
- Clause 23.0 of the MMDA provides that the mining company should construct, maintain, and operate health programmes and facilities to serve the communities affected by its mining operation.
- Clause 24.0 of the MMDA requires that, when hiring workers, the mining company must give preference to citizens of the host country, as well as conduct comprehensive training, skills development, and education programmes for those of its employees who are host country citizens.
- Clause 25 of the MMDA requires mining companies to adhere to the labour standards set by the host country's domestic laws, Good Industry Practice, and international labour standards.
- Clause 27.1 of the MMDA requires the mining company to establish a grievance mechanism to receive and facilitate the resolution of the affected communities' concerns and grievances in relation to the company's environmental and social performance.

These clauses ensure that the rights and concerns of the relevant mine-affected communities are not ignored.

The format of the MMDA

The MMDA is intended to be used as a non-prescriptive negotiation tool for mining development agreements where:

- 'mature' mining codes are not in place, or
- a mining code requires supplementation by private contract.

It can also serve as a template for agreements with state-owned mining entities.

This design of the MMDA avoids the promotion of a single formula, but rather enables the MMDA to be adaptable and relevant to a broad range of scenarios that mining companies and host governments face in the negotiation of each new mining agreement. This design also allows for easy amendment so that the MMDA may be included in a mining code, or simply be used as a guideline.

The development process of the MMDA

In 2009, the mining law committee established a working group to help draft the MMDA, and an administrative committee to manage the drafting process.[51] The working group compiled a confidential database of more than sixty existing 'tried and tested' mine development agreements from different jurisdictions on which to draw during the drafting process, and subsequently deconstructed these agreements to identify provisions that represent viable best practice alternatives for each specific provision. The working group then undertook the revision of the draft model provisions as legitimate concerns and ideas were raised through the consultation process.

In order to develop the MMDA, and broaden the base of participation, as well as ensure the legitimacy, transparency, and openness of the MMDA project, the working group, together with representatives of key stakeholders, *inter alia*, governments, industry, civil society groups, and universities, undertook a detailed consultation process through 2009 and 2010. The consultation process included a government forum consultation[52] and a civil society forum, which were held in Toronto in March and April 2010 respectively. As a draft of the MMDA emerged, the administrative committee commissioned a number of reviews by experts from diverse backgrounds. The first draft version was made available for public comment on the project website for a three month period after its launch at the October 2010 IBA annual meeting in Vancouver. Members of the administrative committee also undertook additional consultation and organized or attended several specific meetings to obtain further comment and reaction from a variety of sources. These included:

- Participation in a meeting organized by Soros Foundation Kazakhstan and Revenue Watch in Astana, Kazakhstan in August 2010 to discuss mining agreements, transparency and the MMDA.
- Participation in an October 2010 meeting of the African Union and United Nations Economic Commission for Africa in Addis Ababa, Ethiopia, in conjunction with the validation workshop of the International Study Group on African Mining Regimes.
- A discussion of the MMDA project at the John F. Kennedy School of Government at Harvard University on 12 October 2010.
- On December 2, 2010, the MMDA was presented and discussed at a meeting at the China University of Geosciences, and on December 3, 2010, at the Law Centre of the Chinese Ministry of Land and Resources in Beijing.
- On 5 April 2011, the MMDA version 1.0. was presented and discussed at the Rocky Mountain Mineral Law Foundation/IBA biennial meeting in Rio de Janeiro, Brazil.[53]

Conclusion

Concern for the sustainable development of mine communities and their economies as a whole, has led the governments of some resource-rich developing countries to pursue different forms of resource nationalism. While its extreme forms of nationalization and expropriation are clearly antithetical to economic development, resource nationalism in developing countries is more often than not a populist response to a country's—or mine communities'—inability to extract a fair share of resource rents for the benefit of the nation as a whole.

It is clear from the examples of the DRC's contract review, as well as from the problems with the implementation of BEE in South Africa's mining sector, that resource nationalism can make it difficult to achieve an equitable balance between the interests of investors, host governments, and mine-affected communities.

The MMDA project recognises the need to foster sustainable development while protecting the interests of host governments, mine-affected communities, and investors in an equitable way. The MMDA attempts to address this difficult balance through the endorsement of international best practice principles for the mining sector, so as to ensure that mining in developing countries really does become a force for good.

References

1. This article is based on an address by the author to the Centre for Business and Government at the Harvard Kennedy School of Government on 12 October 2010, but has been updated to reflect the latest version of the model mining development agreement (4 April, 2011) as well as related regulatory developments in Southern and Central Africa. The author gratefully acknowledges the assistance of Erin Warmington, associate, Webber Wentzel in the preparation of this article.

2. Leon, P. Creeping expropriation of mining investments: an African perspective. *Journal of Energy and Natural Resources Law*, 597, 2009. pp. 631–636.

3. Namibia's strategic minerals, *Mining Journal*, 28 April 2011.

4. Ibid. The Minister confirmed, in his media statement of 10 May 2011, that existing exploration and mining licences, which includes applications for exploration and mining licences already under consideration, will not be affected by the new 'strategic minerals' classification. Future applications for exploration and mining licences, however, will be affected by the 'strategic mineral' classification. This includes existing licence holders applying for an expansion of their licence, either covering a new area or to include minerals not originally in their existing licence. Such an application for an extension of an existing licence will be considered a new application and so treated in terms of the new 'strategic mineral' policy. This process will be governed by appropriate amendments to the Minerals (Prospecting and Mining) Act, 1992, when this Act is amended. ('Media Statement by Honourable Isak Katali on Public-Private Partnership in the Mining Sector in Namibia', Ministry of Mines and Energy, 10 May 2011).

5. Tsvangirai, M. Earth minerals: the treasure underground. Session at the *World Economic Forum on Africa 2011*, Cape Town, 5 May 2011. Also see Tsvangirai now for indigenisation, *Business Live*, 6 May 2011.

6. Ward, H. Working Paper: Resources nationalism and sustainable development, *The International Institute for Environment and Development*, March 2009. p. 5.

7. After much lobbying by developing countries such as Chile, the United Nations General Assembly adopted Resolution 1803 of 1962 Permanent Sovereignty over Natural Resources (UN Doc A/RES/17/1803, 14 December 1962), which recognised that states have full sovereignty, including possession and disposal, over their natural resources. Principle One of Resolution 1803 provides: '[t]he rights of peoples and nations to permanent sovereignty over their wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.' The principle was again recognized by the United Nations General Assembly in its 1974 Declaration on the Establishment of a New International Economic Order and Resolution No 3281, Charter of Economic Rights and Duties of States (UN Doc A/RES/29/328, 12 December 1974). Article 2, paragraph 2(c) of the Charter of Economic Rights and Duties of States, *inter alia*, confers power on a state to nationalize, expropriate or transfer ownership of foreign property, on payment of appropriate compensation according to the domestic law of the state. This was in line with developing countries' wish to participate in the development of and benefit from the exploitation of their natural resources without paying full market value compensation in the event of an expropriation (Andreas Ziegler and Louis-Philippe Gratton. Investment Insurance. In Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law*. Oxford University Press, 2008. pp. 526–7). Nationalization, indigenization and fidelity to the international economic

order of the cold war thus became the *ordre du jour* of many African mining regimes in the 1970s. The legal status of the principle that states have full sovereignty over their natural resources has not been settled in international investment law (Peter Muchlinski. Policy Issues. In Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), ibid. p. 16). United Nations General Assembly resolutions are not considered as a source of public international law, and thus, are not binding on states. However, the point should be made that the origins of a legal principle in a soft law instrument, such as a non-binding resolution of an international organization, including United Nations General Assembly resolutions, may be insignificant if consensus is reached that the principle would be considered as an obligatory standard as a result of subsequent practice of the principle. In other words, soft law standards can harden into positive law where such standards constitute customary international law (Peter Muchlinski, *ibid*. p. 18), which is recognized as a source of international law under Article 38 of the Statute of the International Court of Justice. Also see Peter Leon, 'A fork in the investor-state road: South Africa's new mineral regulatory regime four years on', *Journal of World Trade*, vol. 42, no. 4, Kluwer Law International, 2008. pp. 671–90, which explains how the Mineral and Petroleum Resources Development Act's emphasis on the state's permanent sovereignty over natural resources echoes the new international economic order of the cold war albeit, unlike the Andean region, without the accompanying nationalization of the commanding heights of the economy (pp. 672–3) and addresses its implications.

8. Ward, *op. cit.* note 1, p. 5, and Peter Muchlinski, *op cit*. pp. 4–5.

9. Ward, *op. cit*. p. 6.

10. According to UNCTAD's Global Investment Policies Monitor, No. 3, 7 October 2010, the recent instances of nationalization and expropriation include the nationalization by the government of Bolivia of several electricity generation companies as well as the Vinto Antimonio smelter, a Swiss foreign subsidiary; the take over of the domestic assets of a Mexican food company by the government of the Bolivarian Republic of Venezuela; the government of Panama announced its decision to assume control of two toll-road concessions awarded to foreign companies in the 1990s, as well as the government of the Kyrgyz Republic nationalisation of one of the country's largest banks, the foreign-controlled AsiaUniversalBank.

11. The UNCTAD Global Investment Policies Monitor, ibid, reports that several countries have recently adopted or prolonged measures, other than outright nationalization and expropriation, that effectively restrict the control of natural resources by companies. Algeria adopted a new measure which increases the preference margin in favour of domestic firms in awarding public contracts, and which requires foreign companies that are selected in the process to enter into a joint venture with national firms. Nigeria adopted the Oil and Gas Industry Development Act 2010, which creates the Nigerian Content Development Agency and demands that 70 per cent of Nigeria's oil and gas production is affected locally by 2010. Australia announced a tightening of the foreign investment rules relating to residential real estate. In Brazil, existing restrictions on the sale of farm land to foreign investors, including domestic companies with more than a 50 per cent stake controlled by foreigners, have been formalized through a new interpretation of an existing law.

12. In the Fraser Institute's 2010/2011 Annual Mining Survey (available at www.fraserinstitute.org/reasearch), the DRC ranked 77 of 79 mining jurisdictions in the policy potential index. The DRC is the lowest ranked of the African countries ranked in the survey. The civil war negatively affected the production output of state-owned copper mining company, La Générale des Carrières et des Mines (Gécamines) and, according to numerous UN reports on the DRC, mining concessions were used not only to finance the war, but to allow corrupt officials to gain dishonest advantages on the grant of such concessions.

13. DRC cancels contract in IFC-backed mining project. *Bank Information Centre*, 4 September 2009.

14. DRC mining contract review near completion, *Mining Weekly*, 17 September 2008.

15. Ibid. and DRC Ministry of Mines contracts review interim status update, *Mineweb*, 16 September 2010.

16. For example, in August 2009, the DRC government cancelled First Quantum's contract for its KMT project at Kolwezi, citing issues such as the alleged non-payment of royalties and a failure to adhere to an agreed commercial exploitation timetable as reasons for the cancellation (Mining Weekly, op. cit. note 9). The DRC government then closed First Quantum's KMT project in September 2009 (Democratic Republic of Congo, *Mining Journal* special publication, March 2010). In February 2010, First Quantum initiated international arbitration proceedings against the DRC government in the International Chamber of Commerce (ICC), in which it was joined by the International Finance Corporation (IFC), a subsidiary of the World Bank, and the Industrial Development Corporation (IDC) of South Africa, as shareholders of Kingaamyambo Musonoi Tailings SARL (KMT). (First Quantum Minerals announces commencement of international arbitration regarding the cancellation of the Kolwezi Project. www.first-quantum.com, 1 February 2010). The arbitral hearing is only scheduled for early 2012. (First Quantum Minerals granted interim measures in international arbitration regarding the Kolwezi Project. www.first-quantum.com, 27 October 2010). First Quantum, through its subsidiary Congo Mineral Development Ltd (CMD), held together with the IFC and IDC, 82.5 per cent of KMT. The remaining 17.5 per cent of KMT was held by Gécamines and the government of the DRC. Early in 2010 the highest civil court in the DRC, the Cour de Cassation, held that the cancellation was valid, annulled First Quantum's rights to its Frontier and Lonshi copper mines, and fined First Quantum US$6 million in damages (DRC mine judgment sends First Quantum shares reeling. Mining Review.com, 26 May 2010 and *Mining Journal* special publication). Despite the ongoing arbitration at the ICC and two procedural orders against the DRC government by the ICC tribunal to desist from any further decisions in relation to the Frontier mine, in August 2010 ENRC announced that the government of the DRC and the state owned mining company Gécamines had sold a majority stake in the Frontier mine to a number of its subsidiaries, the Highwinds Group (First Quantum says ENRC Congo deal violates ruling. *Reuters*, 21 August 2010). The Highwinds Group consists of the following entities: Highwind Properties ltd, Pareas Limited, Interim Holdings Limited, and Blue Narcissus Limited. First Quantum announced in a recent media statement that it had initiated civil proceedings against ENRC in the British Virgin Islands for losses suffered by the company as a result of the conduct of ENRC (First Quantum commences legal proceedings against ENRC subsidiaries. www.first-quantum.com, 15 September 2010). On 1 October 2010, First Quantum announced that it had commenced international arbitration proceedings in the International Centre for the Settlement of Investment Disputes (ICSID) against the DRC government, under ICSID case number ARB/10/21 (First Quantum Minerals launches international arbitration in Washington relating to Frontier and Comisa. www.first-quantum.com, 1 October 2010). The arbitration relates to the withdrawal and reissue of certain mining rights held by First Quantum's subsidiaries, Frontier SPRL (Frontier) and Compagnie Minière de Sakania SPRL (Comisa), by the DRC government. These mining rights authorized Frontier and Comisa to explore, develop, and operate copper mines, particularly at the Lonshi and Frontier deposits. The tribunal for the arbitration was constituted on 25 April 2011. (See http://icsid.worldbank.org/ICSID/Index.jsp).

17. The Broad Based Black Economic Empowerment Act, 2003 and the Broad Based Black Economic Empowerment Codes of Good Practice, 2007.

18. Section 3(1) of the MPRDA states that: 'Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'

19. Section 1.3.6.1(i) of the Minerals and Mining Policy White Paper, the forerunner of the MPRDA, which was published on 1 October 1998, relied on Article 2(1) of the UN Charter of Economic Rights and Duties of States (UN Doc A/RES/29/328, 12 December 1974) (which recognised that states have full sovereignty, including possession and disposal, over their natural resources) to justify the South African government's refusal to accept the previous dual system of public and private ownership of mineral rights under the Minerals Act, 1991 (the Minerals Act).

20. Prior to the MPRDA, South Africa's mining sector was governed by the Minerals Act, a product of the reformist De Klerk administration. The Minerals Act revived the common law principles of mineral rights ownership, which had previously been eviscerated by the apartheid government. Under the common law, the owner of land was the owner of the whole of the land, including the minerals in the soil. The Minerals Act established a system of licensing and statutory authorizations as a pre-requisite for the exercise of all mineral rights. These statutory controls merely regulated the exercise of mineral rights, now referred to as old order (pre-MPRDA) rights, and did not impact on the common law principles of the ownership, acquisition, or substantive content of mineral rights. The MPRDA repealed the Minerals Act and the common law to the extent that either was in conflict with the MPRDA. It abolished the property law based system of the Minerals Act, and introduced a fundamentally different regulatory regime—one of administrative law based on conditional state licences. Accordingly, landowners no longer owned the mineral rights to the mineral resources on their property. These now fall under the public trust doctrine of state custodianship, under which the state, acting through the Minister of Minerals and Energy (now the Minister of Mineral Resources (the Minister)), holds mineral rights in custody for the benefit of all South Africans, and is empowered to grant, issue, refuse, control, administer and manage rights to minerals (Sections 3(1) and 3(2) of the MPRDA) Section 5 of the MPRDA, thus required all mining companies to apply to the DMR for a prospecting or mining right, which is both time limited and conditional in nature, whether the company owns the relevant land or not.

21. The MPRDA, under section 100, made provision for the creation of a Broad-based Socio-Economic Empowerment Charter to give effect to section 2(d) and (f). The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Mining Charter), was signed on 11 October 2002 and came into effect on 1 May 2004. The primary aim of the Mining Charter, together with its annexed Scorecard, is to provide a framework for the promotion of BEE and achieve a globally competitive mining industry for the benefit of all South Africans. Under section 23(1)(h) of the MPRDA, it is required that an application for the grant of a mining right is in accordance with the Mining Charter and thus compliance with it (in particular its equity divestiture requirements). This is generally obligatory for the conversion of old order mining rights, as well as the grant of new order rights.

22. The original mining Charter and the revised Mining Charter differ in a number of material aspects. The revised Mining Charter, unlike the original Mining Charter, explicitly states under clause 3, that non-compliance will amount to a breach of the MPRDA, resulting in the suspension or cancellation of licences granted under section 47 read with sections 98 and 99 of the MPRDA. In addition, clause 4 of the revised Mining Charter states that the Minister may amend the Mining Charter "when the need arises", whereas the original Mining Charter merely required the parties to the original Mining Charter to participate in annual forums, the purpose of which could have been the review of the Mining Charter if required. Many of the soft targets of the original Mining Charter have been hardened. For example, under clause 2.2 Procurement and Enterprise Development, mining companies are now required to procure 40 per cent of their capital goods from HDSA owned suppliers by 2014. The revised Mining Charter imposes some entirely new obligations on mining companies, for example, under clause 2.2 Procurement and Enterprise Development, multinational suppliers of capital goods are required to contribute a minimum of 0.5 per cent of their locally generated annual income towards a social development fund for the benefit of local communities, and under clause 2.8 Sustainable Development and Growth of the Mining Industry, which requires mining companies, having regard to commitment 4 Sustainable Development of the Stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry of 30 June 2010, to improve the industry's environmental management and health and safety performance, as well as to enhance the capacity and skills in relevant South African research and development facilities. The original Mining Charter did not contain any obligations regarding sustainable development. It did, however, deal with migrant labour, regulatory framework and industry amendments, exploration and prospecting, state assets, licensing, and financing agreements, with which the revised Mining Charter does not deal. Although the revised Mining Charter maintains the equity targets set in the original Mining Charter, it also introduces the concept of meaningful economic participation, which requires, *inter alia*, that some of the cash flow of each mining company be distributed to its BEE shareholders throughout the term of the investment and requires that BEE beneficiaries have full shareholder rights. The revised Mining Charter defines the term beneficiation and spells out for the first time that mining companies may offset up to 11 per cent of their HDSA ownership requirements against the value of their beneficiation activities. Further, the revised Mining Charter's Scorecard, unlike that of the original Mining Charter, allocates a weighting to some of the revised Mining Charter requirements.

23. Clause 2.1 of the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 13 September 2010.

24. Speech by the Minister on the occasion of the launch of the Mining Charter review and Scorecard, 13 September 2010. In her speech, the Minister also noted that '[t]he gender and racial distribution of the workforce in the sector is hardly reflective of the workforce diversification we had envisaged. The recent findings of the Commission for Employment Equity confirm that after 10 years of affirmative action being adopted as policy, progress on diversification of management and core-skilled workers remains minimal. White men and women continue to dominate top management and technical positions in the mining industry and earn much more than their black counterparts, regardless of skill and experience. The DMR report further illuminates lack of investment in the development of core and critical skills it requires to underpin its competitiveness and sustainability, while the bulk of mining companies continue to harbour illiterate workers.'

25. Political resolutions of the 19th National Congress of COSATU, 21 September 2006. Available at http://www.cosatu.org.za/show.php?include=docs/resolutions/2006/resolutions.htm.

26. Arcelor deal was money for jam for buddies, *Business Report*, 15 August 2010, and Transformation, what transformation? *Mail & Guardian*, 27 August 2010.

27. On 10 August 2010, ArcelorMittal announced a US$1.24 billion BEE transaction, which was intended to establish a special purpose vehicle (SPV) owned by ArcelorMittal, which would hold all of ArcelorMittal's operating assets: 26 per cent of the shares in this subsidiary would be held by BEE shareholders, 21 per cent would be held by an entity known as the Ayigobi consortium, and the other five per cent would be held under an Employee Share Ownership Plan (ESOP) by another BEE consortium. ArcelorMittal would own the remaining 74 per cent of this SPV. The Ayigobi consortium is led by Sandile Zungu, the chair of President Jacob Zuma's BEE advisory council. The consortium, in turn, is 75 per cent held by strategic partners, including ICT's shareholders and Mabengela Investments. The latter is led by President Jacob Zuma's son, Duduzane Zuma. At the same time, on 10 August 2010, ArcelorMittal announced that it planned to acquire the entire issued share capital of ICT for ZAR800 million (some US$110 million). This acquisition is conditional on, *inter alia*, ICT being awarded a 21.4 per cent partial mining right over the iron ore and manganese ore mined at the Sishen mine, to which it currently holds a prospecting right. This residual share of the Sishen mine was previously subject to an old order mining right held by ArcelorMittal under the Minerals Act. As ArcelorMittal failed to convert it to a new order mining right, that right thus ceased to exist after 30 April 2009, in accordance with item 7 of schedule II of the MPRDA. The award of a prospecting right over the residual share of the Sishen mine to ICT by the DMR is the subject of a judicial review application instigated by Kumba Iron Ore Limited in the High Court of South Africa. ICT will, irrespective of whether or not this condition is fulfilled, benefit from ArcelorMittal's BEE transaction owing to the fact that it will hold shares in the Ayigobi consortium. A number of ArcelorMittal's minority shareholders, including Rand Merchant Bank Asset Management (Pty) Limited, South Africa's Public Investment Corporation Limited, Old Mutual Investment Group of South Africa, and Sanlam Limited, have opposed the BEE transaction as a result of the controversy surrounding it, (RMB division to oppose Mittal deal, *Business Day*, 30 September 2010, and ArcelorMittal S. Africa investor opposes stake sale, *Bloomberg*, 4 October 2010).

28. Under section 16 of the MPRDA: '(2) The Regional Manager must accept an application for a prospecting right if—(a) the requirements contemplated in subsection (1) are met; and (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land…' It is clear that the relevant Regional Manager of the DMR, who is authorized under section 16(1) of the MPRDA to receive applications for the grant of prospecting rights, must refuse to accept an application for a prospecting right if, at the time the application is validly lodged with the office of the Regional Manager, another company holds a mining right in terms of the same mineral and land.

29. Sishen Iron Ore Company (Pty) Limited v Minister of Mineral Resources and Others (Case Nos 28980/10 and 76729/10), North Gauteng High Court, 6 June 2011

30. ArcelorMittal asks to join Kumba in court battle, *BusinessLive*, 1 June 2011. ArcelorMittal is claiming that the MPRDA does not allow for the conversion of only a fraction of an old order mining right (ie the 24.1 per cent residual share in the Sishen mine). Thus Sishen Iron Ore Company (Proprietary) Limited, a subsidiary of Kumba, held 100 per cent of the right upon its conversion, and the DMR should never have granted ICT's prospecting right application over the residual share of the Sishen mine.

31. 38% back mine nationalisation: survey, *IOL*. 12 April 2011.

32. ANCYL President Julius Malema's speaking notes on the opening of the Youth League political school, Croco Lodge, Krugersdorp, July 1 2009 issued by the ANCYL at www.politics.web.za/politicsweb/view/politicsweb/en/page71654?oid=134742&sn=Detail—we should ask whether the time has not arrived for the government of South Africa under President Zuma to make sure that the State owns the Mines and other means of production as called for in the Freedom Charter.

33. At the same conference, Mr Cyril Ramaphosa, executive chairperson of the Shanduka Group and a founder of the National Union of Mineworkers (NUM), stated that, as the goals of the Mining Charter are not being met, there is need for radical change to ensure equitable participation in the mining industry, (Profound change needed to ensure mining sector transformation says Ramaphosa, *Mining Weekly*, 17 September 2010).

34. South Africa make pledge on mines and media. *Financial Times*, 17 September 2010—South Africa's deputy president has offered assurances that his government will resist pressure to nationalise the country's mining industry and will respect media freedom.

35. Statement issued by National Union of Mine Workers, 25 August 2010—[NUM] released its final position paper on Nationalization. In its view, [NUM] does not support blanket or wholesale nationalization of mines but prefers the model based on Strategic fund/Strategic equity. In terms of this model, a state mining company should be operationalized and used as a government vehicle to invest only in strategic minerals (energy minerals - platinum, coal and uranium, and Infrastructure mineral- iron ore and manganese).

36. Efficient macro-economic management is required under clauses 2.4.4 Financing plan, 29.1 Affiliated company assignment, 9.0 Financial records and statements, accounting standards and currencies; 12.0 Inspection of books, records and information, independent audit and 26.2 Guarantees for closure expenses.

37. An effective legal and regulatory framework is required under clauses 13.0 State assurance and obligations, 15.0 Permits, 32.0 Co-operation, dispute resolution and arbitration.

38. Security of tenure is guaranteed through the application of clauses 2.2 Exclusivity, 2.3 Legal title to minerals, 8.5 State guarantees, 37.5 Limitations on Waiver and 32.2 Arbitration

39. Objective criteria for the grant of exploration and mining licences is required under clause 14.0 Fair and economical project operation.

40. Limited administrative discretion is required under clauses 2.4.5 Compliance with law; Requested changes by State, which sets out specific time periods within which decisions must be made; 11.0 State access to project; 31.4 Suspension of operations for market conditions, which requires that the State shall approve the suspension if it finds the reason for the suspension of the mining operation reasonable. The use of such language explicitly limits the discretion of the relevant administrator. Clause 8.1 Security interest requires that government consent and/or approval in regard to these issues must not be unreasonably withheld.

41. A defined government role—this principle is applied in the majority of the MMDA's clauses which clearly set out the government's rights and obligations regarding any given mining operation. Clause 18.0 State obligations re: local governments and landowners, in particular embodies this principle.

42. The clause of an efficient mining sector institutions and administrative capacity is assisted by clause 8.5 State guarantees.

43. The clause of infrastructure services is required under clause 17.0 Infrastructure.

44. Competitive fiscal and taxation conditions are required under clauses 4.0 Royalty, 5.0 Customs duties, 7.0 Taxation, 8.0 Financing and 13.2 Tax stabilisation clause.

45. Effective investment protection is guaranteed under clauses 2.1.1 Grant of mine development rights, 2.2 Exclusivity, 2.3 Legal title to minerals, 14.0 Fair and economic project operation and 38.0 Good faith, which requires all parties to the agreement to act in good faith.

46. Environmental sustainability is required under clauses 2.4 Obligations prior to construction, which requires the mining company to develop an environmental assessment and environmental management plan and a social impact assessment and action plan, and clause 11.1 Mutual obligations—applicability of IFC performance standards and equator principles.

47. Social responsibility is required under clauses 10.3 Mutual obligations—parties' commitment to protecting human rights, 20.0 Development obligations, 21.0 Use of local goods and services, 22.0 Local community development, 23.0 Community health, 24.0 Employment and training of local citizens, 25.0 Labour standards, which includes health and safety requirements.

48. A key objective of the MMDA is the promotion of best practice accountability models and transparency. For this purpose, the MMDA incorporates the requirements of the Extractive Industries Transparency Initiative (EITI), an international organization, that aims to strengthen governance through the incremental improvement of transparency and accountability in the mining or extractive sector. The provisions in the MMDA that incorporate the EITI standards of accountability are the following: the requirements for the publication of financial statements and accounting records; the mutual obligation to prevent corruption; and the obligation to uphold human rights.

49. Since 2006, IFC has applied the Policy and Performance Standards on Social and Environmental Sustainability to all its investment projects to minimize their impact on the environment and on affected communities. Details regarding the IFC's Policy and Performance Standards on Social and Environmental Sustainability are available at http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards.

50. The Equator Principles—a financial industry benchmark for determining, assessing and managing social & environmental risk in project financing, July 2006. Available at http://www.equator-principles.com/documents/Equator_Principles.pdf.

51. The members of the administrative committee are: Robert Bassett (Holland & Hart, Denver), Peter Leon (Webber Wentzel, Johannesburg), Elizabeth Bastida (Centre for Energy Petroleum and Mineral Law and Policy, Dundee), Michael Bourassa (Fasken Martineau, Toronto), Stephane Brabant (Herbert Smith, Paris), Jim Cress Holme (Roberts & Owen, United States), Barry Irwin (Allen & Overy, Sydney), John Grace (Grace Legal Party, Australia), Charles Lawton (Arbitrator, United Kingdom), Rory Moriarty (Clayton Utz, Australia) and Rahmat Soemadipradja (Soemadipradja & Taher, Jakarta), together with Luke Danielson, a principal of the Sustainable Development Strategies Group, and Howard Mann, a senior international law advisor to the International Institute for Sustainable Development.

52. Among the 120 attendees at the Government Forum consultation were identified government representatives from Ecuador, Canada, Uruguay, Albania, and Fiji. Committee members fielded questions from practitioners in Argentina, Colombia, Brazil, West Africa, Bolivia, Madgascar, East Africa, Chile, and the Philippines.

53. A fuller description of MMDA activities is presented on the project website at http://www.mmdaproject.org/?page_id=10. ◆