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Investor protection: Security of tenure of mining rights in SA

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The South African mining industry has, over the past few months, received a significant amount of bad publicity, inter alia, on the nationalisation of mineral resources, socio-economic concerns and the dangerous labour unrest, which all seems to have added to the fact that South Africa's ranking as an attractive mining investment destination has dropped even further according to the latest report released by the Canada-based Fraser Institute.

The survey by the Fraser Institute has revealed that uncertainty about the South African government's mining policies is hurting the country's image and ranking as an investment destination, despite the South African government's assurance that nationalisation is not on the cards. South Africa's ranking as a mining destination has this year dropped from its 53rd place last year to 64th place in 2013, from 93 mining jurisdictions. As a country with a significant percentage of the world's exploitable mineral resources, and at one stage considered as a very attractive mining destination, something will drastically need to change in order to ensure that South Africa does not end up as one of the least favourite mining destinations.

The release of the Draft Mineral and Petroleum Resources Development Bill, 2012 (the Bill) which intends to amend the Mineral and Petroleum Resources Development Act No. 28 of 2002 (the MPRDA) seems to have added more fuel to the situation as the Bill will, in a number of respects, increase administrative hurdles for mining companies to comply with instead of, "improving the regulatory system and streamlining administrative process", as the Bill purports to do. A number of interested and affected industry groups have submitted comments to the Bill and we trust that the Department of Mineral Resources will take all the comments to heart in order to ensure that the Bill achieves what is stated in the preamble thereof.

Sufficient protection to foreign investors?

In light of the aforesaid, a brief consideration is given in this article as to whether South Africa provides sufficient protection to foreign investors specifically within the mining industry against the expropriation of mining rights. The main concern for any foreign investor who invests in a country is security of tenure for his investment, which is no different in the case of South Africa. Investors generally feel threatened when governments start promoting policy changes that could potentially have an adverse effect on the rights they enjoy.

South Africa, like most other countries, concluded a number of bilateral investment treaties (BIT) with the countries it has trade and investment relationships with. These BITs, inter alia, in most instances contain a provision that prohibits the expropriation of investments made by foreign nationals in South Africa, save if such expropriation is "for a public purpose or in the national interest" accompanied by "immediate, full and effective compensation". Any expropriation of an investment of a foreign national by South Africa would be open to a potential breach of its BIT should such expropriation fail to comply with terms and conditions for expropriation as contained in the relevant BIT.

A form of expropriation

The enactment of the MPRDA on 1 May, 2004, is a prime example of how certain foreign investors (Italian nationals) in the mining industry in South Africa perceived the MPRDA as a form of expropriation of their common law entitlement to exploit and mine minerals. A number of foreign nationals (claimants) initiated arbitration proceedings against South Africa out of the International Centre for the Settlement of Investment Disputes (ICSID), during 2006 alleging that South Africa was in breach of article 5 of its BIT with Italy and Luxembourg, which prohibited expropriation, on two grounds:

- The enactment of the MPRDA on 1 May, 2004, extinguished certain old order mining rights allegedly held by the claimants; and

- The enactment of the MPRDA read with the Mining Charter, which required the compulsory equity divestiture requirement with respect to the claimants' shares in the operating companies in South Africa.

The ICSID did not decide the aforesaid points on the merit as the matter ended due to a jurisdictional point raised by South Africa [i.e. South Africa is not a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States]. However, it seems that the question raised during the ICSID arbitration as to whether the enactment of the MPRDA constituted the expropriation of old order mining rights or unused old order rights has been finally settled by the Constitutional Court in the matter of Afgri South Africa vs Minister for Mineral Resources and other (CC) 2013 (the Afgri SA case).

The majority judgment in the Afgri SA case found that what the MPRDA, in effect, did was to put an end to the:

- Ability to sterilise or not exploit minerals;
- Previously unfettered entitlement to sell, lease or cede the mineral right at any time; and
- Mineral right or unused old order right for which prospecting or mining right could not be acquired in terms of transitional provisions of the MPRDA, which was done within the confines of a law of general application, the MPRDA, which in terms of Schedule II thereof created a process in terms of which holders of old order rights or unused old order rights, as the case may be, could apply for the conversion of such right into rights as contemplated by the MPRDA on compliance with certain legislative requirements in order to preserve the rights and ensure security of tenure.

The Constitutional Court held that the MPRDA effectively did not result in the expropriation of the rights held by the applicant in the Afgri SA case as the MPRDA merely resulted in a deprivation of components of the mineral rights enjoyed by the applicant essentially on the following basis:

- The MPRDA is a law of general application as contemplated by section 25(1) of the Constitution of South Africa, which had the effect of ensuring equitable access to all of the natural resources of South Africa;
- The MPRDA made provision for the holders of old order rights (to apply within five years from the effective date of the MPRDA for conversion of rights) and holders of unused old order rights like the applicant to apply within one year from the effective date of the MPRDA for the conversion of rights;
- The deprivation of the rights of the applicant did not result in the compulsory acquisition of rights in property by the state as the state did not acquire any property, but the state is now merely the custodian of the mineral resources of South Africa and not a co-contender for mineral rights with people and business entities;
- No compensation is payable by the state should there not be an element of actual acquisition of property rights by the state.

It should be noted that item 12 of Schedule II to the MPRDA does make provision for the payment of compensation by the state for expropriation on compliance with the requirements contained therein. The Constitution Court also clearly stated in the Afgri SA case that it would "be inappropriate to decide definitely, that expropriation is in terms of the MPRDA incapable of ever being established. Like the Supreme Court of Appeal, I accept that a case could be properly pleaded and argued,

to demonstrate that expropriation did take place. That is the avenue that must be left open, particularly when regard is had to the express provisions made for expropriation in item 12 of Schedule II to the MPRDA."

The reasoning of the Constitutional Court, as aforesaid, as to why the MPRDA did not result in the expropriation of rights seems sound and is in line with South Africa's BIT obligations. Our courts have recognised that any person, including a foreign national, under a different set of facts could potentially still be able to demonstrate that expropriation took place in terms of the MPRDA.

A new bill

A majority of the BITs South Africa has concluded are coming to an end and the Department of Trade and Industry has reported that it would refrain from entering into any future BITs as the department is currently drafting a new bill, the Foreign Investment Bill, which will replace all the existing BITs. One of the purposes of introducing a Foreign Investment Act would be to, amongst others, regulate how the South African government would compensate foreign investors in the event of expropriation in order to attract investment opportunities and introduce uniform conditions with all trading partners. It will also need to be seen whether the current Expropriation Bill before parliament, which also contains a very wide definition of property capable of expropriation by the state, will not potentially constitute a breach of certain BIT obligations of South Africa.

It would seem that South Africa has sufficient protection for foreign investors as recourse is available to foreign nationals in the event of expropriation without compensation should a proper case for expropriation be pleaded and argued, to demonstrate that expropriation took place.

It is now for the South African government to ensure that the policies and proposed legislative changes for the mining industry do not result in a further deterrence of investment due to overly burdensome and illogical administrative red tape, but that South Africa's attractiveness as a mining investment destination be regained.

ABOUT JACKWELL FERIS

Jackwell Feris is a director in the Dispute Resolution Practice at Cliffe Dekker Hofmeyr. He has experience in mining and petroleum, Oil and Gas law, corporate and commercial law, administrative law and procurement law and arbitrations.

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