Creeping Expropriation of Mining Investments: an African Perspective[†]

By Peter Leon*

Indirect or creeping expropriation in international investment law is the incremental encroachment of an investor's ownership rights by a host state, which effectively neutralises such investor's rights. This article seeks to extract principles of creeping expropriation from various investment arbitration decisions, particularly those relating to Argentina's 2001/2 financial crisis, and apply these to assess the potential of creeping expropriation claims in five African mining jurisdictions, all of which have recently embarked on significant reforms to their mineral regulatory regimes. All these countries have signed and ratified bilateral investment treaties, principally with developed countries, which provide, in substantially similar terms, for protection against indirect expropriation. The countries reviewed in this article show signs, to a greater or lesser extent, of the creeping expropriation of their mining investments. The article considers the impact of the recent global recession, which, paradoxically, has limited the appetite of some African governments for more radical regulatory reform.

Indirect and creeping expropriation in international investment law

An expropriation of property is the most severe form of interference with property rights, as it destroys an investor's legitimate expectations relating to its investment.[1]

A creeping expropriation 'may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor's rights of use of the property are diminished as a result of the interference by the state'.[2]

This article accordingly considers the extent to which recent mineral law reforms in Africa may potentially give rise to claims of creeping or indirect expropriation in the context of a particular country's bilateral investment treaties (BITs). It does not consider other key protections found in BITs, such as fair and equitable treatment (FET), full protection and security, most favoured nation (MFN), national treatment and free transferability of funds.

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1 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 89–92.

2 August Reinisch, 'Expropriation', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), 427. Other definitions for creeping expropriation include 'the negative effect of government measures on the investor's property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property'. *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, available at **http://ita.law.uvic.ca/documents/Pakerings.pdf.** And 'use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state'. *Metalclad Corporation v Mexico*, ICSID Case No ARB (AF)/97/1, Award, 30 August 2000; (2001) 16 ICSID Rev – FILJ 168; (2001) 40 ILM 36. Similarly, see *Siemens AG v Argentina*, ICSID Case No ARB/02/08, Award, 6 February 2007, para 263.

A key part of this analysis examines South Africa, Africa's largest economy and its biggest mineral producer.[3] The election of South Africa's first democratic government in April 1994 inevitably led to demands for mineral law reform from the newly elected African National Congress (ANC) government, then in a government of national unity (GNU) with the former New National Party (NNP) government (which controlled the Ministry of Minerals and Energy). Following the withdrawal of the NNP from the GNU in June 1996, and an ANC-led consultative process of green and white papers in 1998, the South African Parliament eventually enacted the Mineral and Petroleum Resources Development Act in June 2002 (the MPRDA or the 'Act').[4] While this Act is considered in greater detail below, it is important to note that it was conceived and enacted almost contemporaneously with the signing of South Africa's BITs with many EU members.[5] It is clear, in retrospect, that South Africa entered into these BITs without appreciating the ability of such instruments to constrain – significantly – a new government's

3 South Africa is one of the world's and Africa's most important mining countries in terms of the variety and quantity of minerals produced. It boasts the world's largest reserves of chrome, gold, vanadium, manganese and platinum group metals (PGMs). South Africa is the leading producer for nearly all of Africa's metals and minerals production apart from diamonds (Botswana and the DRC), uranium (Niger), copper and cobalt (Zambia and the DRC) and phosphates (Morocco) (**www.mbendi.com/indy/ming/af/sa/p0005.htm**). The South African mining industry was not, however, unaffected by the recent global recession. Gross domestic product (GDP) results for the first quarter of 2009 saw the seasonally adjusted real value added by the mining and quarrying industry decrease at an annualised rate of -32.8 per cent. This figure, however, saw a substantial increase in the second quarter of 2009 to 5.5 per cent. 'The increase in the seasonally adjusted real value added by the mining and quarrying industry was mainly due to increased mining of other metal ores (including platinum) and other mining and quarrying (including diamonds).' The GDP report for the second quarter of 2009 (P0441), released on 18 August 2009, can be accessed at www.statssa.gov.za/keyindicators/gdp.asp.

4 In the successive Green and White Papers on minerals, the government declared that the existing dual system of public and private ownership of mineral rights, under which some two-thirds of South African mineral rights were privately owned (*A Minerals and Mining Policy for South Africa* (Pretoria: Department of Minerals and Energy, October 1998), para 1.3.1.2), would be abolished and replaced by a system of state custodianship of mineral resources 'for the benefit of all'. It was said that this would be effected with as 'little disruption as possible' to mining operations (ibid, para 1.3.2). Significantly, the Green Paper attempted to assure investors that the transition to a new system of state custodianship of mineral rights would have to be done 'on an incremental basis', under 'guaranteed' security of tenure and within a regulatory system, which applied objective criteria rather than discretionary powers (*A Minerals and Mining Policy for South Africa* (Pretoria: Department of Minerals and Energy, February 1998), paras 1.3.6.1–1.3.6.2).

5 See n 9 below. These EU countries include Austria, Belgium-Luxembourg, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the United Kingdom.

sweeping programme of socio-economic reform. Indeed, a recent discussion paper by South Africa's Department of Trade and Industry (DTI) remarkably described the government of the day as displaying 'a lack of understanding' of the 'dangers inherent in BITs' as a result of 'no legal or economic analysis of (their) risk'.[6] Moreover, according to the discussion paper, BITs could have a 'severe impact… on both constitutional imperatives and government's policy space…'.[7] 'Unequal and exploitative investment agreements', according to the DTI, have led to a review of South Africa's current BIT commitments as 'an exercise (in) damage control'.[8]

The speed with which a newly democratic South Africa initially entered into BITs with members of the European Union is evident, for example, in

6 DTI, 'Bilateral Investment Treaty Policy Framework Review' (Pretoria: June, 2009) (the document can be accessed at **www.thedti.gov.za/ads/bi-lateral.htm**), see executive summary and para 3.1.

7 DTI, n 6 above, at 24.

8 DTI, n 6 above, at 55.

the UK–SA BIT,[9] signed by former President Mandela and then UK Prime Minister, John Major, on 20 September 1994, less than five months after South Africa's first democratic election. Article 5 of this BIT is a typical no expropriation without compensation provision:

'Article 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or *subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation")* in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective

9 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments, 20 September 1994, entered into force 27 May 1998. The following are examples of South Africa's BITs with members of the European Union, which contain expropriation clauses that are substantially the same as, or similar to, Art 5 of the SA–UK BIT in that they include references to effective expropriation (the variances of which will be highlighted) and make provision for compensation to be payable to the expropriated investor (market value):

(a) Article 4 of the Germany–South Africa Treaty concerning Reciprocal Encouragement and Protection of Investment signed on 11 September 1995 and ratified on 10 April 1998. Article 4 (2) provides for 'any other measure the effects of which would be tantamount to expropriation'.

(b) Article 5 of the France–South Africa Agreement on the Reciprocal Promotion and Protection of Investments signed on 11 October 1995 and ratified on 22 June 1997, specifically provides for 'any other measure having the effect of [expropriation], direct of indirect' (Art 5(2)).

(c) Article 5 of the Italy–South Africa Agreement on the Promotion and Protection of Investments signed on 9 June 1997 and ratified on 16 March 1999, which specifically provides that 'investments of investors of a Contracting Party shall not be *de jure* or *de facto,* directly or indirectly, … expropriated' (Art 5(2)).

(d) Article 5 of the Czech Republic–South Africa Agreement on the Promotion and Reciprocal Protection of Investments signed on 14 December 1998 and ratified on 17 September 1999, provides for 'measures having effect equivalent to … expropriation' (Art 5(1)).

(e) Article V of the Spain–South Africa Agreement on the Promotion and Reciprocal Protection of Investments signed on 30 September 1998 and ratified on 23 December 1999, provides for 'measures having an equivalent effect to … expropriation' (Art V(1)).

(f) Article 5 of the Austria–South Africa Agreement on the Promotion and Reciprocal Protection of Investments signed on 28 November 1996 and ratified on 1 January 1998, provides for measures 'having equivalent effect' to expropriation (Art 5(1), read with definition of expropriation in Art 1(4)).

(g) Article 4 of the Greece–South Africa Agreement on the Promotion and Reciprocal Protection of Investments signed on 19 November 1998 and ratified on 5 September 2001, provides for 'any other measure the effects of which would be tantamount to expropriation' (Art 4(1)).

> compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier….shall be made without delay, be effectively realizable and be freely transferable….'

(The emphasis is added; the relevant provisions of Article 5(1) mirror Article 1110(1) of the North American Free Trade Agreement (NAFTA))[10]

This article explores the extent to which recent mineral law reform in Africa may be said to bring about an indirect, or creeping, expropriation of a protected investor's investments within the context of a particular country's BITs, focusing first on South Africa and then on other important African mining jurisdictions: the Democratic Republic of Congo (DRC), Zambia, Tanzania and Zimbabwe.

In order to undertake this exercise, it is first necessary to set out the general principles of indirect or creeping expropriation as they have developed in BIT jurisprudence. Two initial observations need to be made. The first is that in an increasingly globalised world, dependent as it is on inter-country investment flows, direct expropriations, outside the Andean region, are the exception, not the norm.[11] Consequently, developing countries embarking on extensive programmes of socio-economic reform, which potentially implicate their BIT obligations, are, more likely than not, to deny that these bring about an expropriation of protected investments (and thus avoid having to pay market-related compensation). Secondly, for policy reasons, arbitral tribunals are much more likely to find a breach of the FET standard than one of indirect expropriation, particularly where the investor remains in control of its investments and where it has not undergone a substantial or total deprivation of those investments.[12]

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10 See below, 'Effects doctrine' and 'Investor's expectations' in article text.

11 For example 'Venezuela Mining Report 2009', *Business Monitor International*, 22 July 2009: 'The Venezuelan government has continued to nationalise companies across the extractive sector through 2008–09, with the gold mining and iron production sectors particularly affected. The operating environment in Venezuela for international companies focused on the extractive industries has also continued to deteriorate, with government policies serving to drive out foreign miners and investment.' 'Ecuador says key sectors must be nationalised', *Reuters*, 27 May 2009 (www.minesandcommunities.org/article.php?a=9270). 'Bolivia's Morales threatens to nationalise gas fields', *Thomson Financial News*, 19 May 2008 (**www.forbes.com/markets/feeds/afx/2008/05/19/afx5023423.html**).

12 See, for example, *Pope & Talbot, Inc v Government of Canada*, 7 ICSID Reports 69, para 102 ('*Pope & Talbot*'); *Metalclad Corp v United Mexican States*, 5 ICSID Reports 212, at para 103; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/08, Award 12 May 2005, para 262 ('*CMS*').

The latter point was recently brought home in *National Grid plc v Argentine Republic* ('*National Grid*'),[13] one of a plethora of cases following Argentina's 2001/2 currency crisis, which led to the abandonment of the country's US dollar currency peg and the compulsory 'pesification' of all its utility and infrastructure contracts.[14] National Grid had invested in the former state-owned electricity transmission company, Transener, in 1993, in the wake of a privatisation and infrastructure concession boom under former President Menem (following Argentina's 1989 financial crisis). Foreign investors at the time had two advantages. First, a currency board compulsorily pegged the Argentina peso to the US dollar on a one-to-one basis. Secondly, infrastructure investors, such as National Grid, could calculate their US inflation-linked tariffs in US dollars. Argentina's new financial crisis extinguished all these privileges: a combination of a collapsed peso, frozen utility rates and the 'pesification' of all utility contracts left investors such as National Grid substantially worse off. Suing Argentina under Article 5(1) of the UK–Argentina BIT,[15] National Grid claimed that its investments in Argentina had been directly and indirectly expropriated as a result of the country's regulatory measures. Finding that there had been no direct expropriation of National Grid's investments in Transener, as there had been no deprivation of title, the arbitral tribunal went on to consider whether Argentina's regulatory measures constituted an indirect expropriation.

Holding that intent was not a requirement for an indirect expropriation, the tribunal examined what was meant by 'effect equivalent to' expropriation or nationalisation. Following *Pope & Talbot*,[16] in a case where the investor

13 UNCITRAL Case No 1:09-cv-00248-RBW, Award, 3 November 2008.

14 Argentina currently faces 34 arbitral proceedings before the World Bank's International Centre for Settlement of Investment Disputes (ICSID), out of a total of 48 international arbitral proceedings in the wake of its 2001–2 financial crisis, which has led in turn to damages awards to claimants in the region of US$1.05 billion (of which some US$670 million emanates from ICSID proceedings). Twenty-eight of these proceedings are ongoing, while six are subject to annulment or revision proceedings. See further Luke Eric Peterson, *Investment Arbitration Reporter*, 17 December 2008 and UNCTAD, *IIA Monitor No 1* (2009).

15 Agreement between the Government of the United Kingdom of Great Britain and the Government of the Argentine Republic for the Promotion and Protection of Investments, 11 December 1990, entered into force on 19 February 1993.

16 *Pope & Talbot*, n 12 above, at para 100. '(T)he investor remains in control of the Investment, it directs the day-to-day operations of the Investment … . Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.'

remained in control of its investment and directed its day-to-day operations, the tribunal found:

> 'the claimant continued to own shares and could exercise its rights as a shareholder and disposed of its investment by its own decision. The value of its investment was diminished but not to the extent that it could be considered worthless. For these reasons, the Tribunal finds that (Argentina) did not expropriate indirectly the investment of (National Grid).'[17]

All was not lost for National Grid, however, as the tribunal went on to hold that Argentina had breached its BIT obligations to provide 'fair and equitable' treatment as well as 'protection and constant security'. In awarding US$53.5 million damages to National Grid, the tribunal found that Argentina had breached its regulatory representations to the claimant in relation to the electricity sector.

A similar approach was taken in an UNCITRAL arbitral tribunal's decision in *BG Group Plc v The Republic of Argentina*[18] ('*BG Group*') in which the claimants raised, as one of their contentions, that Argentina had likewise breached Article 5 of the Argentina–United Kingdom BIT[19] by allegedly expropriating their Argentine investments, held through MetroGAS, without compensation. The tribunal examined whether or not the 'measures adopted by Argentina … had the effect of "interfering with" or "neutralizing" the benefit of BG's property'[20] (ie BG's shareholding in MetroGAS), and concluded that Argentina had not violated Article 5:

> 'the impact of Argentina's measures has not been permanent on the value of BG's shareholding in MetroGAS. It might well be that the measures adopted by Argentina were severe causing a fluctuation of BG's investment … However, MetroGAS's business never halted, continues to operate, and has an asset base which is recovering'.[21]

The tribunal did, however, find that Argentina had breached its BIT obligations to the BG Group in respect of the 'standard of fair and equitable treatment' and by 'adopting unreasonable measures',[22] and awarded damages, as well as costs, against Argentina.[23]

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17 *National Grid*, n 13 above, at para 154.

18 UNCITRAL Case No 1:08-cv-00485-RBW. Award, 24 December 2007.

19 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, and ratified on 19 February 1993.

20 *BG Group*, n 18 above, at para 267.

21 *BG Group*, n 18 above, at para 270.

22 *BG Group*, n 18 above, at para 413.

23 *BG Group*, n 18 above, at para 467.

Key principles of indirect expropriation

Writing in 2003, two years before any of the numerous arbitral proceedings against Argentina had been decided, Professors Reisman and Sloane observed:

> 'tribunals have increasingly accepted that the expropriation must be analyzed in *consequential* rather than in formal terms. What matters is the *effect* of governmental conduct – whether malfeasance, misfeasance, or nonfeasance, or some combination of the three – on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its *intent* to expropriate. For the purposes of state responsibility and the obligation to make adequate reparation, international law does not distinguish between direct and indirect expropriations'[24] (Emphasis added).

Outside the Argentine cases, this is seen in the decisions of a number of arbitral tribunals. The revocation of a free trade zone in Burundi, without a formal taking of the investor's property, was found by the arbitral tribunal to be a 'measure having similar effect to' expropriation for the purposes of the Belgium–Burundi BIT and thus an indirect expropriation.[25] Similarly, where the Egyptian Government prohibited the import of cement, which was essential to the investor's cement distribution business in Egypt, an International Centre for Settlement of Investment Disputes (ICSID) tribunal had little difficulty in finding that this was an indirect expropriation of the investor's investment: '[a]s a matter of fact, the investor is deprived by such measures of parts of the value of his investment.'[26] So too where the Czech Media Council facilitated the cancellation of an investor's contract with its local partner, without formally expropriating the claimant's investments, an UNCITRAL arbitral tribunal, constituted under the Czech–Netherlands BIT, found that the Media Council's actions caused the 'destruction of CNTS's operations, leaving CNTS as a company with assets, but without business. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty'.[27] Finally, in an important

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24 W M Reisman and R D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 *British Yearbook of International Law* 115 at 121.

25 *Goetz v Burundi*, Award 10 February 1999, 6 ICSID Reports 5 at para 124 ('*Goetz*').

26 *Middle East Cement Shipping and Handling Co v Arab Republic of Egypt*, Award 12 April 2002, 7 ICSID Reports 178 at para 107 ('*Middle East Cement Shipping and Handling Co*').

27 *CME Czech Republic BV v The Czech Republic*, Partial Award 13 September 2001, 9 ICSID Reports 121 at para 591 ('*CME*'). Somewhat bizarrely an ICSID tribunal, constituted under the Czech–United States BIT, came to a different conclusion on the same facts: *Ronald Lauder v Czech Republic*, Final Award, 3 September 2001, 9 ICSID Reports 66.

case against Mexico under Article 1110 of NAFTA,[28] Mexico was found to have indirectly expropriated a US investor's investments through a local authority's refusal to grant it a construction permit and a state government's decision to create a conservation area in the very area in which it had been granted a permit by the federal government to build and operate a hazardous waste landfill. Noting that the investor had relied on assurances by the federal government that it would be granted the necessary construction permit by the local authority 'and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit',[29] in finding that there was an indirect expropriation of the claimant's investment, the tribunal observed:

> 'expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title… but also *covert* or incidental interference with the use of property which has the *effect* of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected *economic benefit* of property …'[30] (Emphasis added).

Effects doctrine

As seen above, a number of arbitral tribunals have examined the effect of government action in order to determine whether or not an indirect expropriation has taken place: 'The government's intention is less important than the effects of the measures on the owner of the assets or the benefits arising from such assets affected by the measures.'[31]

This is particularly seen in claims of indirect expropriation against Argentina arising out of its last financial crisis. Where a US investor had been given tariff adjustment guarantees for the transport of natural gas by the Argentine Government, which were suspended and then terminated by Argentina's emergency law enacted to deal with its financial crisis, an

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28 Article 1110(1) of NAFTA provides: 'No party may directly or *indirectly* nationalize or expropriate an investment of an investor of another Party in its territory, or *take a measure tantamount to* nationalization or expropriation of such investment ("expropriation"), except:
(a) for a public purpose;
(b) on a nondiscriminatory basis;
(c) in accordance with due process of law and Article 1105(1);
(d) in payment of compensation …' (Emphasis added.)

29 *Metaclad Corp v Mexico*, Award 30 August 2000, 5 ICSID Reports 209, at para 107 ('*Metalclad*').

30 *Metalclad*, n 29 above, at para 103.

31 *Tecnicas Medioambientales Tecmed SA v United Mexican States*, Award of 29 May 2003, Case No ARB(AF)/00/2, at para 116 ('*Tecmed*').

ICSID tribunal found that this did not effect an indirect expropriation of the US investor's investments in accordance with the US–Argentina BIT,[32] as the question was one of: 'whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation.'[33]

As the investor remained in control of its investment, as Argentina did not manage the company's day-to-day operations and as it continued to own and control the company, there was no indirect expropriation of the investment.[34] A directly opposite approach was taken by an ICSID tribunal constituted under the Germany–Argentina BIT where Siemens successfully sued Argentina for the indirect expropriation of its Argentine investments, held through a wholly owned Argentine subsidiary, SITS. Siemens, through SITS, had competitively bid for and won a six-year, renewable, informatics services contract (for the provision of immigration control, personal identification and electoral information technology systems). Argentina first requested Siemens to suspend some of the services required under the contract (prior to an election held in late 1999) and further services were suspended following that election. It then required Siemens to renegotiate the contract. Siemens thought it had reached agreement with Argentina on the terms of a new contract, but this was never signed. After a new emergency law was passed in late 2000 allowing the President to renegotiate public sector contracts, Siemens was presented with a non-negotiable 'proposal' by the government. A few months later, the contract was cancelled by presidential decree as Siemens had refused to sign the 'proposal'. The tribunal examined the effect of Argentina's actions rather than its intent to expropriate in finding that there was an indirect expropriation of the claimant's investments.[35] In order to amount to an expropriation of the investor's contractual rights, however, there must be 'interference in the contract execution through governmental action'.[36]

The tribunal's decision in *Siemens* is important for a number of reasons. First, the tribunal made the point that 'for the State to incur international responsibility it must act as such, it must use its public authority. The actions

32 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, and entered into force 20 October 1994.

33 *CMS*, n 12 above, at para 262.

34 Ibid, at 263.

35 *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/08, Award 6 February 2007, at para 270 ('*Siemens*').

36 Ibid, at 253.

of the State have to be based on its "superior governmental power"'.[37] Next, the tribunal found that Argentina had acted 'in use of its police powers rather than as a contracting party'[38] and that by acting pursuant to such powers it had expropriated Siemens' contract as an 'investment' under the BIT.[39] The presidential decree was accordingly in and of itself an expropriatory act.[40] Rather than evidencing any public purpose, the decree was 'an exercise of public authority to reduce the costs to Argentina of the Contract … and as part of a change of policy by a new Administration eager to distance itself from its predecessor'.[41] Notwithstanding a substantial award of damages to Siemens, the matter has recently been settled.[42]

Importance (or absence) of control

Following the decision in *CMS*,[43] an investor's continued ability to control its business has generally been found, not least in the context of the Argentine litigation, to deny a claim of indirect expropriation. Thus, where an investor in a water and sewage concession in the province of Buenos Aires claimed that its investment, held through a subsidiary, had been indirectly expropriated by the province while it remained in control of its investment, an ICSID tribunal found: 'Azurix did not lose the attributes of ownership, at all times continued to control ABA and its ownership of 90% of the shares was unaffected. No doubt the management of ABA was affected by the Province's actions, but not sufficiently for the Tribunal to find that Azurix's investment was expropriated.'[44]

Exactly the same approach was taken by the arbitral tribunal in a second gas concession arbitration against Argentina. Where Argentina had severely violated a gas concession contract, an ICSID tribunal found that as long as the claimant remained in control of its Argentine subsidiary, which continued to operate, albeit on a less profitable basis, there was no 'neutralisation' or expropriation of the claimant's investment.[45]

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37 *Loc cit.*

38 Ibid, at 260.

39 Ibid, at 267.

40 Ibid, at 271.

41 Ibid, at 273.

42 The tribunal awarded US$217 million to Siemens for various breaches of the Germany–Argentina BIT; on 12 August 2009, Siemens announced that it had settled the matter with Argentina and had withdrawn its ICSID proceedings against it (see Dow Jones report in www.tradingmarkets.com/print/news/Stock%20News/2476931/).

43 *CMS*, n 12 above, at para 262.

44 *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award 14 July 2006, at para 322 ('*Azurix*').

45 *LG&E Energy Corp and Others v Argentine Republic*, ICSID Case No ARB/01/1, Decision on Liability of 3 October 2006, at para 188 ('*LG&E*').

Investor's expectations

Undertakings by a host state to an investor either in contract or through its legal system at the time of an investment may create legitimate expectations for the investor, breach of which may give rise to an indirect expropriation. This is seen in the *Metalclad* case discussed above,[46] as it is in the similar case of *Tecmed*, where a tribunal constituted under the Mexico–Spain BIT considered whether the replacement of a permanent licence to operate a landfill, with one which was temporary, constituted an indirect expropriation of the claimant's investment. In finding that it did, the tribunal held that the claimant had 'legitimate reasons to believe that the operations of the Landfill would extend over the long term' as it had assumed, based on Mexico's representations that it was a 'long-term investment'.[47] In *Azurix*, discussed above, although the tribunal found that Argentina had created legitimate expectations, either on the basis of 'explicit or implicit' assurances or on 'representations made by (it) which the investor took into account in making the investment', as the claimant remained in control of its investment, there was no indirect expropriation.[48]

Police powers

In *Pope & Talbot*,[49] a NAFTA tribunal was faced with a claim by the Canadian Government that its imposition of export controls on the Canadian subsidiary of a US corporation under the US–Canada Softwood Lumber Agreement (SLA) constituted an exercise of 'police powers' of government regulation, which, if non-discriminatory, were beyond the reach of NAFTA Article 1110. Although the tribunal did not find an indirect expropriation, it rejected Canada's contention:

> 'Regulations can indeed be exercised in a way that would constitute creeping expropriation … Indeed much creeping expropriation could be conducted by regulation and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.'[50]

While this reasoning was followed in *Feldman*,[51] the tribunal observed

46 *Metalclad*, n 29 above, at para 107.

47 *Tecmed*, n 31 above, at para 149.

48 *Azurix*, n 44 above, at paras 316–322; a finding criticised as remarkable by Dolzer and Schreuer (Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p 106).

49 *Pope & Talbot*, n 12 above, at para 99.

50 *Pope & Talbot*, n 12 above.

51 *Marvin Feldman v Mexico*, Award 16 December 2002, 7 ICSID Reports 341 ('*Feldman*').

that 'governments must be free to act in the *broader public interest* through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies … *Reasonable* governmental regulation of this type cannot be achieved if business that is adversely affected may seek compensation …'[52] (emphasis added). In finding that there was no indirect expropriation of the Mexican business owned by a US citizen under NAFTA Article 1110 pursuant to Mexico's refusal to rebate excise taxes on cigarettes exported by the business, the tribunal found that as the business remained under the investor's control and it could lawfully produce products other than cigarettes (which were a 'grey market').[53] This approach has been followed in a number of cases both under NAFTA and particular BITs.[54]

At the same time, tribunals have cautioned that if regulatory measures are, in fact, expropriatory, however laudable or beneficial their aims, these will be compensable.[55] In a recent decision under the Cyprus–Hungary BIT involving a concession contract to construct a terminal at Budapest airport, the tribunal found that Hungary had indirectly expropriated the claimants' investment despite Hungary's claim that this was merely an exercise of its sovereign regulatory powers. The tribunal observed:

> 'when a State enters into bilateral investment treaty obligation like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honored rather than ignored by a later argument of the State's power to regulate'.[56]

The tribunal similarly rejected Hungary's argument that by investing in the host state, the investor assumed the 'risk' of its regulatory regime. Observing that it was one thing to require an investor to conduct its business in compliance with the host state's laws, 'it is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it'.[57]

Likewise, in *Siemens*, the arbitral tribunal rejected the contention by Argentina that where the state expropriated an investment for important socio-economic reasons, less than fair market value compensation should be paid as this would otherwise inhibit necessary social reforms by a developing country.[58] At the same time, some tribunals have relied on European Court of Human Rights (ECHR)

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52 *Feldman*, n 51 above, at para 103.

53 *Feldman*, n 51 above, at para 111.

54 See, for example, *SD Myers v Canada*, First Partial Award, 13 November 2000 at para 281; *Methanex v United States*, Award 3 August 2005; *Saluka Investments v Czech Republic*, Partial Award 17 March 2006, at para 262.

55 *Santa Elena v Costa Rica*, Award 17 February 2000, at para 72.

56 *ADC Affiliate Limited and ADC and ADC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award 2 October 2006, para 423 ('*ADC*').

57 *ADC*, n 56 above.

58 *Siemens*, n 35 above, at para 354.

proportionality analysis in determining whether a state's regulatory actions were expropriatory. In doing so, arbitral tribunals have followed the ECHR in requiring there to be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[59]

The difficulty in striking a balance between indirect expropriation and a state's legitimate power to regulate is seen in the decision in *Continental Casualty,*[60] another case arising out of Argentina's financial crisis. Here, a US investor sued Argentina under the US–Argentina BIT as a consequence of the emergency measures introduced by Argentina to address the crisis. Through its Argentine subsidiary, CNA ART (CNA), Continental provided workmen's compensation insurance in Argentina. Continental claimed that CNA's investment portfolio of cash deposits, treasury bills and government bonds was, inter alia, indirectly expropriated owing to Argentina's decision to restrict the rescheduling of cash deposits, the pesification of US dollar deposits, restrictions on external transfers, as well as the restructuring of Argentina's treasury bill obligations.[61] A key aspect of the decision turned on the tribunal's acceptance of Argentina's necessity defence in the face of its financial crisis[62] (following the decision in *LG&E*[63]). But here the tribunal (contrary to the decisions in *Siemens*[64] and *Sempra*[65]) ultimately found that there was no indirect expropriation of Continental's investment. However, the tribunal did observe that legitimate governmental regulation would cross the line where it affected an investment in an 'intolerable, discriminatory or disproportionate manner'.[66] At the same time, the tribunal recognised that it was often difficult to draw the line:

> 'in different historical and social contexts the line has been drawn differently and that different international tribunals, including arbitration tribunals under various BIT, have relied on different criteria and have given different weight to them, such as those recognizing public interest on the one side and those protecting the integrity of property rights on the other.'[67]

59 *Azurix*, n 44 above, at para 311; see also *Tecmed*, n 31 above, at paras 116–122 and *LG&E*, n 45 above, at para 195.

60 *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award 5 September 2008 ('*Continental Casualty*').

61 Article IV(I) of the United States of America–Argentina BIT is in similar terms to Art 5(1) of the UK–SA BIT: 'Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation … .'

62 Note 60 above, at para 180.

63 *LG &E Energy Corp*, n 45 above, at para 234.

64 *Siemens*, n 35 above, at para 354.

65 *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/o2/16, Award 28 September 2007, para 331 ('*Sempra*').

66 *Continental Casualty*, n 60 above, at para 276.

67 *Continental Casualty*, n 60 above, at para 277.

Application of these principles

It is clear from this discussion that the identification of indirect expropriation cannot be assessed on the basis of abstract legal principles but requires a case-by-case analysis of the specific facts.[68] In *Tecmed*, the arbitral tribunal observed that 'a broad number of actions have to be examined on a case-by-case basis to conclude' that creeping expropriation has taken place.[69] The intensity of the measures taken by a state to interfere with an investor's investments in the host state generally determines whether an indirect expropriation has occurred.[70]

An analysis of the extent to which recent mineral law reform in Africa may potentially give rise to claims of creeping or indirect expropriation will now be undertaken, commencing with South Africa.

South Africa

This section contrasts South African mineral and mining law before and after 2004, in order to illustrate the statutory evolution of mineral rights from absolute rights of property to a conditional system of state licences.

South African mining law prior to 2004

Prior to 2004, the holding and exercise of mineral rights in South Africa were regulated by a combination of common law and legislation, principally the Minerals Act 1991 (the 'Minerals Act'), which came into force on 1 January 1992.[71] Under the Minerals Act, ownership of minerals vested in the owner of the surface[72] until severance from the ground.[73] Holders of mineral rights[74] had the right to exploit

68 Reinisch, n 2 above, at 438.

69 *Tecmed*, n 31 above, at para 114.

70 See, for example, *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007 and *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007 ('*Vivendi*').

71 The Minerals Act repealed and consolidated a number of previous mining statutes; it therefore regulated the exploitation of various minerals (especially precious minerals and base minerals) on various types of land on a broadly uniform basis. Kaplan and Dale, *A Guide to the Minerals Act* (1991), para 1.5.1.

72 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at para 16.

73 *Trojan Exploration Co (Pty) Ltd v Rustenberg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509 and 528I–529B. On such severance the ownership thereof vested in the holder of the rights to minerals, or in the lessee under a mineral lease if the severance had been effected by the latter. M O Dale et al, *South African Mineral and Petroleum Law*, para 7.2.2, note 27.

74 Either the owner of the surface (where the mineral rights had not been severed from the land), or a successor in title to the surface owner.

the minerals on the land, which included the right to assign or transfer their mineral rights for value.[75] Mineral rights were real rights of indefinite duration and did not require the holder to exercise the rights in order to keep them.[76] If mineral right holders, however, chose to exercise their common law right to prospect or mine, it was necessary to obtain authorisation under the Minerals Act.[77] In such cases, the relevant official was obliged to issue the necessary authorisation provided that the relevant statutory requirements were fulfilled.[78] Finally, common law rights to minerals were not subject to termination by a public authority for non-compliance with the Minerals Act or on any other grounds.[79]

Outline of the South African mineral law regime after 2004

Introduction

The MPRDA came into force on 1 May 2004.[80] This Act is the cornerstone of the mineral rights policy introduced by the democratic South African Government in the post-1994 era. At the same time, as will be shown below, it is also the underlying cause of the diminished value of mineral rights in South Africa.[81] The key changes effected by the MPRDA will be discussed in conjunction with other fundamental legislative developments.

MPRDA

The Act gives effect to section 25(4)(a) of the South African Constitution,[82] which, given South Africa's history of colonialism and Apartheid, requires that reform measures be implemented to bring about equitable access to all South

75 *Trojan*, n 73 above, at 509H.

76 *Ex parte Marchini* 1964 (1) SA 147 (T) at 150–151.

77 Dale et al, n 73 above, at para 92.2.2: 'the control by the state under [the Minerals Act] was a system whereby the exercise of mineral rights was controlled through permits, authorizations, licences and permissions which created a framework within which common-law mineral rights as elements or derivatives of ownership of land, could be exercised.'

78 For example, s 9 of the Minerals Act provided for the issuing of mining authorisation. Subsection (1) stated: 'The Director: Mineral Development shall, subject to the provisions of the Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization.' The requirements for a successful application included satisfying the Director: Mining Development as to the optimal mining and proper rehabilitation of the surface, health and safety issues and the proposed environmental management programme: ss 9(3), (5) and 39.

79 Kaplan and Dale, n 71 above, at 49.

80 GG 26264, GN 25 of 23 April 2004.

81 H M van den Berg, 'Ownership of minerals under the new legislative framework for mineral resources' (2009) 1 *Stell LR* 139 at 149–157.

82 Constitution of the Republic of South Africa, Act 108 of 1996.

Africa's natural resources. In this regard, the MPDRA abolished the existing dual system of public and private ownership of mineral rights and replaced it with a system of *state custodianship* of mineral resources 'for the benefit of all'.[83] The enactment of the MPRDA brought an end to the old order mineral regime by repealing the common law to the extent that its principles were in conflict with the MPRDA,[84] while also repealing the Minerals Act and related statutes.[85] As discussed below, the MPRDA introduced a fundamentally different system of mineral resource ownership and regulation from that which had previously existed, while making provision for the conditional conversion of certain existing rights into prospecting and mining rights under the MPRDA. With the state as custodian, mineral resource owners were deprived of their basic right of control, which they previously enjoyed.[86] The Act essentially replaced the principles of private law, based on rights of ownership, with principles of administrative law based on conditional state licences. In this regard, the MPRDA provided the initial impetus for the encroachment on the ownership rights of mining investors.

The MPRDA must be seen in the context of two other important regulatory measures: the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry 2002 (the 'Mining Charter') and the Mineral and Petroleum Resources Royalty Act 2008 (the 'Royalty Act').

Mining Charter

The Mining Charter[87] was promulgated pursuant to the broad-based black

83 *A Minerals and Mining Policy for South Africa* (Department of Minerals and Energy, 1998), para 1.3.1.2. Section 3(2) states: '[a]s the custodian of the nation's mineral and petroleum resources, the state, acting through the Minister, may –
  (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
  (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.'

84 Section 4(2) of the MPRDA.

85 Section 110 of the MPRDA.

86 Peter Leon, 'A Fork in the Investor-State Road: South Africa's New Mineral Regulatory Regime Four Years On' (2008) 42(4) *Journal of World Trade* 679.

87 The Mining Charter was released in final form on 11 October 2002.

economic empowerment provisions of the MPRDA.[88] The Mining Charter was signed by key stakeholders[89] in the South African mining industry on 11 October 2002 but only took effect with the promulgation of the MPRDA on 1 May 2004.[90] The purpose of the Mining Charter is to provide the framework for the promotion of black economic empowerment (BEE) in the South African mining industry.[91] Together with its annexed Scorecard for the Broad Based Socio-Economic Charter for the South African Mining Industry (the 'Scorecard'), the Mining Charter outlines nine social upliftment objectives,[92] designed to address the entry of historically disadvantaged South Africans (HDSAs) into the mining industry at both management and equity levels, as well as advancing the social and economic welfare of all South Africans.[93] Importantly, under the Mining Charter's ownership provisions, mining companies must transfer 15 per cent of their assets or equity to BEE groups or individuals by May 2009[94] and 26 per cent by May 2014.[95] The Mining Charter also requires that companies publish employment equity plans directed towards achieving a baseline 40 per cent HDSA participation in management and ten per cent women participation in mining by May 2009.[96]

Equity divesture must take place 'in a transparent manner, for fair market

88 Section 100 of the MPRDA:
'Transformation of minerals industry
(2) (a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry and allow such South Africans to benefit from the exploitation of mining and mineral resources.'

89 South African Chamber of Mines, the National Union of Mineworkers, small-scale miners and the South African Government.

90 This is in accordance with s 100(2)(a) of the MPRDA, that being the enabling section of the MPRDA, which essentially creates the Mining Charter, although the Mining Charter was formulated prior to the promulgation of the MPRDA it could not take effect until 1 May 2004 as there would be no enabling legislation to empower it.

91 The purpose of BEE is to redress social and historical inequalities that arose during the Apartheid era. These goals are to be achieved by, inter alia, the promotion of economic transformation through preferential procurement, skills transfer, employment promotion and BEE equity participation to enable meaningful participation of black people in the economy.

92 Objectives include, inter alia, BEE ownership, human resource development (eg, literacy, numeracy and mentoring programmes), employment equity and beneficiation activities.

93 Item 7 of Schedule II to the MPRDA, read with ss 2(d) and 2(f) of the MPRDA.

94 Scorecard, item 9.

95 Mining Charter, para 4.7.

96 Mining Charter, para 4.2.

value'.[97] Stakeholders agreed to meet after five years to determine what further steps, if any, needed to be taken to achieve the 26 per cent target.[98]

The review, as contemplated in the Mining Charter, should have commenced in May 2009.[99] The Minister announced, on 23 June 2009, that an independent service provider had been appointed to conduct an assessment of compliance with the Mining Charter.[100] The company's mandate is to undertake an independent assessment of the cumulative progress (by the mining industry) against the Mining Charter's targets. The company is due to submit a report to Department of Mineral Resources by the end of September 2009.[101] At the same time, there is increasing concern articulated by some members of the mining sector that the 'government might look to increase the black ownership component or make changes that will make operating in the country – already perceived as investor-unfriendly – more difficult'.[102]

As will be explained, the significance of the Mining Charter is that while ostensibly no more than an agreement between the state and the organised mining industry, compliance with it – and in particular its equity divestiture requirements – is generally obligatory for the conversion of old-order mining rights, as well as the grant of new order rights.

Royalty Act

The second measure is the Royalty Act, which was assented to on 17 November 2008. Although the commencement date for the Royalty Act was originally

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97 The Mining Charter appears to assume that a relevant market exists, which would result in a 'fair market value' for equity transfers required to achieve compliance with the Charter. The Mining Charter does not provide for any exemption from its requirements where transfers cannot be made at 'fair market value', with the consequence that transfers may have to be made below market value in order to achieve compliance.

98 Mining Charter, para 4.2.

99 Jacinto Rocha, Deputy Director General of the DME, speaking at the 'Mineral Rights Compliance and Reporting Conference', Johannesburg, 17 August 2009. No indication was given by the DME as to when the review process would be completed.

100 Department of Minerals and Energy Budget Vote Speech by Ms Susan Shabangu, MP, Minister of Mineral Resources delivered on 23 June 2009.

101 See response to question asked by Adv H Schmidt MP, of the Minister of Mineral Resources in the National Assembly Question No 1189 Internal question paper number 16 published on 11 September 2009.

102 Allan Seccombe, 'Mining Charter minefield', MiningMX, 2 March 2009. The Director General of the Department of Minerals and Energy, Sandile Nogxina, has been quoted as saying that the review of the Mining Charter will be 'before October [2009] or so'. Nogxina has explained that the South African Government is dissatisfied with the progress of empowerment in the mining industry. David McKay, 'SA govt to call charter review', MiningMX, 9 February 2009.

set for 1 May 2009, this date has recently been postponed for a period of ten months by South Africa's Finance Minister.[103] The Royalty Act dovetails with sections 19(2)(g)[104] and 25(2)(g)[105] of the MPRDA, which provide for the payment of royalties to the state by holders of, inter alia, prospecting and mining rights.

Under the Royalty Act, any person who wins or recovers mineral resources within South Africa will become liable, in respect of all transfers[106] on or after 1 March 2010, to pay an annual royalty in respect of all mineral resources transferred by that person. Under section 3 of the Royalty Act, in accordance with the South African Government's policy of minerals beneficiation, a distinction is drawn between the transfer of a 'refined mineral resource'[107] and an 'unrefined mineral resource'.[108] There are separate royalty rates for each of these categories. In each instance, the royalty is determined by multiplying the 'gross sales' of the 'extractor' in respect of the mineral resource during the year of assessment, by the relevant royalty rate.[109]

While the Act imposes a formula-based royalty scheme with different formulas for refined and unrefined minerals, which mining right holders will have to pay the state, its significance lies in the fact that holders of mining rights, who held rights under the Minerals Act 1991, will, in future, have to pay the state royalties on rights that they previously owned.

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103 Charlotte Matthews, 'Get set for royalty act, miners urged', *Business Day*, 6 March 2009. See also Julius Cobbett, 'Mining Royalty Act delayed', *Moneyweb*, 11 February 2009.

104 The holder of a prospecting right must 'pay the state royalties in respect of any mineral removed and disposed of during the course of prospecting operations'.

105 The holder of a mining right must 'pay the state royalties'.

106 Section 1 of the Royalty Act defines transfer as:
  (a) the disposal of a mineral resource;
  (b) the export of a mineral resource; or
  (c) the consumption, theft, destruction or loss of a mineral resource, other than by way of flaring or other liberation into the atmosphere during exploration or production, if that mineral resource has not previously been disposed of, exported, consumed, stolen, destroyed or lost.

107 Section 1 of the Royalty Act defines 'refined mineral resource' as a mineral resource:
  (a) listed solely in Schedule 1; or
  (b) listed in Schedule 1 and Schedule 2 that has been refined to or beyond the condition specified in Schedule 1 for that mineral resource.

108 Section 1 of the Royalty Act defines 'unrefined mineral resource' as a mineral resource:
  (a) listed solely in Schedule 2; or
  (b) listed in Schedule 1 and Schedule 2 that has not been refined to or beyond the condition specified in Schedule 1 for that mineral resource.

109 Section 3, under s 1, read with s 2, of the Royalty Act, provides that an extractor is 'a person that wins or recovers a mineral resource from within South Africa'.

Purpose and objects of the MPRDA

The purpose of the MPRDA is to 'make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources'. Section 2 contains the objects of the Act, which include, inter alia, giving effect to the principle of state custodianship,[110] expanding opportunities for HDSAs to enter and benefit from the mining industry,[111] and promoting employment and advancing the social and economic welfare of all South Africans.[112]

The Act broadly gives effect to these objectives as follows: Chapter 4 outlines the substantive and procedural requirements that need to be met to acquire prospecting and mining rights in South Africa with effect from 1 May 2004. The acquisition of new rights is, however, subject to the transitional arrangements relating to old-order rights, which are set out in Schedule II to the Act. The transitional arrangements distinguish between those prospecting and mining rights that were actively utilised immediately before the MPRDA took effect, and those that were not. Under the transitional arrangements, the holders of the former category of rights (termed old-order prospecting rights[113] and old-order mining rights[114]) are afforded two[115] and five years[116] respectively to apply for a conversion of their rights into rights under the MPRDA. Holders of unused old order rights[117] were afforded one year from 1 May 2004 to apply for prospecting or mining rights under the MPRDA.[118] At the end of these periods, or on the earlier successful conversion or grant of rights under the MPRDA, the old-order rights ceased to exist.[119]

Conversion procedure for old-order prospecting and mining rights

This procedure is set out in Schedule II (transitional arrangements), which, among other things, set out the requirements that must be met in order to convert old-order prospecting and mining rights.

Item 6(3) of Schedule II provides that the Minister of Minerals and

110 Section 2(b) of the MPRDA.
111 Section 2(d) of the MPRDA.
112 Section 2(f) of the MPRDA.
113 Item 6 of Schedule II to the MPRDA.
114 Item 7 of Schedule II to the MPRDA.
115 Item 6(1) of Schedule II to the MPRDA.
116 Item 7(1) of Schedule II to the MPRDA.
117 Item 8 of Schedule II to the MPRDA.
118 Item 8(1) of Schedule II to the MPRDA.
119 Item 8(4) of Schedule II to the MPRDA.

Energy (now the Minister of Mineral Resources)[120] (the 'Minister') must convert an old-order prospecting right if the holder meets certain specific requirements. These requirements include lodging prescribed particulars of the holder,[121] an affidavit verifying that the holder was using the old order prospecting right before the MPRDA took effect[122] and an original or certified copy of the old-order right.[123] Additional requirements, such as obtaining an approved environmental management programme and paying the prescribed conversion fee, must also be adhered to.[124]

The requirements for the conversion of an old-order mining right are similar to those of the old-order prospecting right, apart from certain more onerous provisions. Additional documents that need to be lodged by these holders include a prescribed social and labour plan,[125] and an undertaking that, and the manner in which, the holder will give effect to the objects of expanding opportunities and benefits for HDSAs as well as promoting employment for all South Africans.[126] Although this is not expressed directly, holders of old-order mining rights seeking conversion of their rights have to comply with the Mining Charter and thus have to transfer 15 per cent of their assets or equity to BEE groups or individuals by 2009 and 26 per cent by 2014.[127]

Application procedure for holders of unused old order rights

Holders of unused old-order rights are obliged to follow a substantially different procedure in order to obtain prospecting and mining rights under the MPRDA as they have to meet the substantive and procedural requirements outlined in Chapter 4 of the Act. These requirements are qualitatively more burdensome; for example, the holder of an unused old-order mining right would have to

120 In President Jacob Zuma's inaugural address on 9 May 2009, he announced that, as part of the national reorganisation of the state, the DME would be split into two separate entities. On 6 July 2009 the President signed the amendment of Schedule 1 to the Public Service Act 1994 with respect to the national departments and heads of the departments. As a result of this, the DME was split into the Department of Mineral Resources, and the Department of Energy, respectively. The DME's intention is to be ready to begin the process of resourcing these new departments by the end of September 2009. See the DME website (**www.dme.gov.za**/).

121 Item 6(2)(a) of Schedule II to the MPRDA.

122 Item 6(2)(d) of Schedule II to the MPRDA.

123 Item 6(2)(i) of Schedule II to the MPRDA.

124 Item 6(3)(d) and (e) of Schedule II to the MPRDA.

125 Item 7(2)(f) of Schedule II to the MPRDA.

126 Item 7(2)(k) of Schedule II to the MPRDA.

127 Section 100(2)(b) of the MPRDA, 'The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved'.

fulfil the section 23(1) requirements in an application for a mining right under the MPRDA. These requirements include proving that the mineral can be mined optimally in accordance with a mining work programme,[128] showing adequate financial resources and technical ability to conduct the proposed mining operation optimally,[129] as well as complying with the Mine Health and Safety Act 1996.[130] The application process is also subject to the Minister's broad discretionary powers in granting a mining right. Such discretion extends to an assessment of whether the applicant has furthered the objects of the MPRDA, in particular creating opportunities for HDSAs and employment creation, has adhered to the Mining Charter and has provided financially or otherwise for a social and labour plan.[131] Item 8(2) of Schedule II, however, provides that the 'holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right'.[132]

Recently, the holders of unused old-order rights who failed to meet the Act's one-year conversion application brought an expropriation claim before a South African court. The applicant (a commercial farmers' union) in this case claimed that the enactment of the MPRDA resulted in a compensable expropriation of their unused old-order coal rights.[133] The Minister raised exceptions[134] to the applicant's claim, which the court rejected, finding that the Act brought about a generalised expropriation of all unused old-order rights, thus endorsing the possibility of a claim for compensation under section 25 of the Constitution.[135] The court observed that before the MPRDA, a mineral rights holder was under no obligation to exploit its rights, which could be kept indefinitely and sold at a

128 Section 23(1)(a) of the MPRDA.

129 Section 23(1)(b) of the MPRDA.

130 Section 23(1)(f) of the MPRDA.

131 For example, s 23(1)(h) read with s 23(3) of the MPRDA.

132 This by-passes the s 9 rule that provides for a 'first come first served' basis for the order within which applications are processed under Chapter 4.

133 *Agri South Africa (association incorporated under section 21) v The Minister of Minerals and Energy* (Case No 55896/2007) and *Annis Mohr van Rooyen v The Minister of Minerals and Energy* (Case No 10235/2008), published 6 March 2009 in the High Court of South Africa (North and South Gauteng High Court, Pretoria), paras 19 and 22 ('*Agri SA*').

134 An exception is raised when the excipient alleges that a pleading to which it takes exception is inherently defective. Rule 23(1) of the South African Uniform Rules of Court provides that an exception in the High Court may be raised on the following grounds: that a pleading is vague and embarrassing and that the particulars of claim do not disclose a cause of action or that the plea does not disclose a defence. In the *Agri SA* case, the Minister took the view that the particulars of claim of both plaintiffs (which were substantially similar) were vague and embarrassing. Except in the case of an exception to the jurisdiction of a court, a dismissed exception is not appealable except with leave of the trail court. *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA).

135 Peter Leon, 'State objection to mining rights falls into AgriSA's lap', *Business Day*, 26 March 2009.

profit. The Act dramatically changed this by requiring holders of unused old-order rights to apply for new-order rights within one year.[136] Although the court observed that the one-year window afforded to such holders enabled them to mitigate their damages, this opportunity was 'more apparent than real', especially in the case of a farmer who may not have the financial resources to comply with the Act's application provisions.[137] As the pleadings stage of this action is now complete and the high court has held that the plaintiffs may proceed with their claim, the merits of the case will now have to be examined at trial.[138] The high court's initial findings are, however, potentially troubling for the South African Government:

> 'First, the government's position that the act did not cause an expropriation of privately owned common law mineral rights has been found legally wanting. Second, the door has been opened judicially for substantial expropriation claims against the state by farmers and other holders of unused old order rights. Third, the act's institution of a system of state custodianship for mineral rights does not appear to have let the government off the expropriation hook.'[139]

Security of tenure if conversion (old-order prospecting or mining rights) or application (unused old-order right) is successful

The duration of a prospecting right or mining right under the MPRDA is not indefinite. Prospecting rights endure for a maximum period of five years, and may be renewed once for a period not exceeding three years,[140] while mining rights may not exceed 30 years and are renewable for further periods, each of which may not exceed 30 years.[141]

Under section 11 of the MPRDA, 'a prospecting or mining right or an interest in any such right, or a controlling interest in a company or close corporation, 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 change of controlling interest in listed companies'.[142]

Furthermore, section 47 of the MPRDA confers the power on the Minister to suspend or cancel rights, permits or permissions. This section entitles the Minister to suspend or cancel, inter alia, any prospecting or mining right if

136 Peter Leon, *ibid.*

137 *Agri SA*, n 131 above, at para 17.

138 The Centre for Applied Legal Studies has recently applied to be admitted as *amicus curiae* in the proceedings (in terms of Rule 16A of the Uniform Rules of Court). The application can be accessed at **http://ita.law.uvic.ca/documents/AgriSAPetitionofCALS.pdf.**

139 Peter Leon, n 133 above.

140 Sections 17(6) and 18(4) of the MPRDA.

141 Sections 23(6) and 24(4) of the MPRDA.

142 Section 11(1) of the MPRDA.

the holder is conducting a prospecting or mining operation in breach of the MPRDA, or breaches any material term or condition of such right. Sections 19 and 25 set out the rights and obligations of the holder of a prospecting or a mining right, respectively. Prospecting right holders are obliged, for example, to commence prospecting activities within 120 days from the date the prospecting right becomes effective,[143] continuously and actively conduct prospecting operations[144] and comply with the terms and conditions of the prospecting right, relevant provisions of the MPRDA and any other relevant law.[145] Obligations imposed on the holder of a mining right are similar,[146] except that provision is made for compliance with the requirements of the prescribed social and labour plan[147] and the submission of a prescribed annual report detailing the extent of the holder's compliance with section 2(d) and (f), the Mining Charter and its social and labour plan.[148] It must also be noted that obligations are placed on both the holders of prospecting rights[149] and mining rights[150] to pay royalties. Holders of the respective rights run the risk of forfeiting their rights if they do not adhere to the obligations imposed by the Act.

Mineral and Petroleum Resources Development Amendment Act 2008 (the 'Amendment Act')[151]

Key provisions of the MPRDA have been substantially amended by the Amendment Act, which, while assented to by the President, on 21 April 2009, still awaits presidential proclamation and a commencement date, which will be gazetted.[152] Although the Amendment Act's primary aim is to consolidate the MPRDA with South Africa's environmental management legislation in order to create a single environmental management system,[153]

143 Section 19(2)(b) of the MPRDA, the time may be extended for a period as authorised by the Minister.

144 Section 19(2)(c) of the MPRDA.

145 Section 19(2)(d) of the MPRDA.

146 Section 25(2)(b) of the MPRDA, however, stipulates that mining operations much commence within one year from the date on which the mining right becomes effective, or such extended period as the Minister may authorise.

147 Section 25(2)(f) of the MPRDA.

148 Section 25(2)(h) of the MPRDA.

149 Section 19(2)(g) of the MPRDA, in respect of any mineral removed and disposed of during the course of prospecting operations.

150 Section 25(2)(g) of the MPRDA.

151 Act 49 of 2008, GG 32151, GN 437 of 21 April 2009.

152 Section 94(4) of the Amendment Act, however, stipulates that the amendments to Schedule II to the MPRDA are deemed to have come into operation on 1 May 2004 and thus Schedule II applies retrospectively.

153 Preamble to the Amendment Act.

the amendments have many significant implications.

The Amendment Act aims to expand the opportunities of HDSAs in section 2(d) of the MPRDA, to include 'communities' as well as women, not only to enter, but to 'actively participate' in the mining industry.[154] The impact of this amendment is only fully appreciated when read with the substantive requirements for the application of a prospecting and mining right, and the relevant amendments, respectively.

In terms of prospecting rights, the Amendment Act creates a new substantive requirement, which provides that the Minister *must* only grant a prospecting right if the applicant 'has given effect to the objects referred to in section 2(d)'.[155] Under the amended section 2(d), prospecting right applicants must now prove, as an absolute requirement, that they have expanded the opportunities of HDSAs (including communities) to participate actively in the mining industry. In other words, the Amendment Act has made BEE compliance mandatory for all prospecting rights, a requirement that was previously discretionary. Although applicants for mining rights were always obliged to indicate how the objects referred to in section 2(d) would be furthered should the right be granted, this obligation has now been extended under the amended section 2(d).[156]

Under the Amendment Act, the Minister is now empowered to refuse conversion of an 'old order mining right', if the applicant does not provide 'documentary proof'[157] as to how it intends to give effect to the MPRDA's

154 Section 2 of the Amendment Act, which amends s 2 of the MPRDA. In section 1 of the Amendment Act, 'community' is defined as a 'group of historically disadvantaged persons with interests or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community'.

155 This provision varies the current section 17(4) of the MPRDA, which provides that the Minister *may* request the applicant to give effect to s 2(d).

156 Furthermore, s 19 of the Amendment Act inserts subs 23(2A) into the MPRDA, which provides that '[i]f the application relates to the 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'. The effect of this amendment is that the Minister can impose, by edict, further 'conditions' on an applicant, which is mining on land occupied (not necessarily owned) by a community to 'promote (their) rights and interests including conditions that require the participation of the community'. Such conditions will go beyond the requirements of the prescribed social and labour plan, as well as the equity divestiture requirements contained in the Mining Charter.

157 Amendment to Item 7(2)(k) of Schedule II to the MPRDA.

empowerment and social and labour objectives.[158]

Furthermore, section 11 of the MPRDA has been amended to require the Minister's prior written approval for the cession or sale of any mining or prospecting right, or *any* interest in such a right, however small, or in a company or close corporation.[159] This amendment will now require that even the sale of a one per cent interest in a company or close corporation will require the Minister's prior written approval. In addition, subsection (5) has been inserted into section 11, which provides that '[a]ny cession, transfer, letting, subletting, assignment, alienation or disposal' in contravention of section 11 is void. While the MPRDA eroded the transferability and thus the bankability of prospecting and mining rights in comparison with the Minerals Act, the Amendment Act appears to create further legislative restrictions on an issue of fundamental importance to the mining industry.

State-owned mining company

At its quinquennial National Conference in December 2007, the ANC passed a resolution proposing the creation of a state-owned mining company. This proposal was subsequently debated by the Minerals and Mining Development Board established under section 57 of the MPRDA.[160] The DME responded in October 2008 by reviving a dormant, rather than creating a new, state-owned mining company, known as 'African Exploration Mining and Finance

158 Insertion to Item 7(2)(d) of Schedule II to the MPRDA:
'3A. If the applicant does not comply with the requirements of the subitem (2) and (3), the Regional
Manager must in writing request the applicant to comply within 60 days of such request.
3B. If the applicant does not comply with subitem 3A, the Minister must refuse to convert the right and must notify the applicant in writing of the decision within 30 days with reasons.
3C. If the application relates to land occupied by the 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.'

159 Section 8 of the Amendment Act.

160 In addition, the National Union of Metalworkers of South Africa (NUMSA) president Senzeni Zokwana (the new NUMSA president is Cedric Gina) likewise called for the formation of a state-owned mining company at a mining summit in September 2008. According to NUMSA, the rationale for such a company was, ostensibly, to aid BEE in the mining sector and to influence mining companies to be more proactive and sensitive to their workforce's grievances. (Martin Creamer, 'No plans for state-owned mining company "at the moment" says SA mining industry', *Mining Weekly*, September 2008.)

Corporation' ('African Mining').[161]

Simultaneously with this, on 10 October 2008, the Minister published a notice under section 106(1) of the MPRDA[162] purporting to exempt African Mining from: 'the provisions of sections 16, 20, 22 and 27 of the MPRDA in so far as it relates to any activity to prospect, mine and the removal of any mineral for accumulating and stockpiling for purposes of security of supply and purposes incidental thereto'.[163]

At the time, the DME indicated that African Mining would not compete with mining sector companies, but would rather become involved in the industry on a commercial basis.[164] The proposed minerals of choice of African Mining would be coal, uranium, platinum, gold, diamonds and base metals. Coal and uranium have been identified as strategic minerals by the government and the security of supply of such minerals is thus of great concern to African Mining.[165] When questioned as to why African Mining would also pursue the other metals that are of commercial and industrial, rather than strategic, value, the DME responded that it would be in the government's best interests to be involved in their production, as South Africa is one of the largest sources of these metals.[166]

The effect of the exemption as provided in the gazetted notice is that African Mining will be allowed to prospect and mine without having to apply to the DME for a right to do so.[167] In addition, the exemption potentially excludes African Mining from being BEE compliant under the MPRDA and thus the Mining Charter.[168] This notice, however, may be legally impeachable as the Minister may have acted outside the scope of her powers in gazetting

161 The Companies and Intellectual Property Registration Office (CIPRO) reveals that African Exploration Mining and Finance Corporation (Pty) Ltd, registration number 1944/018010/07, was established in 1944. It is a wholly owned subsidiary of the Strategic Fuel Fund Association, which is, in turn, a wholly owned subsidiary of the state-owned Central Energy Fund (Pty) Ltd. Both the company, as well as its registration number, are described inaccurately in the notice.

162 The Minister may, by notice in the *Gazette*, exempt any organ of state from the provisions of ss 16, 20, 22 and 27 in respect of any activity to remove any mineral for road construction, building of dams or other purpose that may be identified in such notice.

163 Notice 1081 in Government Gazette 31485 of 10 October 2008. The sections of the MPRDA referred to deal with applications for prospecting rights, permissions to remove and dispose of minerals, applications for mining rights and applications for the issuing and duration of mining permits.

164 One of the proposed ways of such involvement is by funding BEE mining ventures.

165 Allan Seccombe, 'Govt-owned mine plans revealed', *MiningMx*, October 2008.

166 Ibid.

167 Ibid.

168 Matthew Hill, 'A stake for the state?' *Financial Mail*, 19 February 2009. The Director General of the Department of Minerals and Energy, Sandile Nogxina, has asked 'Why should a public company have to have BEE ownership?'

this exemption. Through the application of the *eiusdem generis* rule of statutory interpretation,[169] it may be argued that the Minister's power to exempt state entities from the provisions of the MPRDA is limited to the building of infrastructure as indicated in section 106(1) of the MPRDA.[170]

In essence, African Mining could in future be granted old-order prospecting and mining rights that have lapsed, without having to comply with the MPRDA, simply because the erstwhile holders of such rights failed to meet the very same requirements of the Act. At this stage it is also unclear how African Mining will operate and, more importantly, how it will be capitalised, but it has been observed that '[t]he state holds mining rights taken from smaller mining companies that have been unable to exploit them'.[171]

On 1 July 2009, at the opening of the ANC Youth League Political School, the president of the Youth League, Julius Malema, called for the nationalisation of South Africa's mining industry.[172] This call sparked a fierce debate within the ANC with certain proponents advocating nationalisation or at least the possibility of nationalisation,[173] with others vehemently opposed to this.[174] These developments have left the mining industry somewhat perplexed as to the ANC's intentions. A combination, however, of the establishment of a state-owned mining company a year ago, and the very recent calls for the nationalisation of the mining industry, have raised real concerns about the future of the South African mining industry.

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169 Under this rule, when a provision of a law is stated to be of general application, but is preceded by a class of words that have a limited or a particular meaning, then the meaning of the general phrase is restricted to the narrower meaning of the words that precede it. For example, in *S v Buthelezi* 1979 (3) SA 1349 (N) at 1350 the court observed that the statute referred to 'any place of entertainment, café, eating-house, race course or other premises or place to which the public are granted or have access', the general phrase 'or other premises or place to which the public are granted or have access' was held not to refer to a court or police station.

170 Webber Wentzel, 'Minister of Minerals and Energy exempts state-owned mining company from MPRDA's key licensing rules', 15 October 2008 (**www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=5055**).

171 *Ibid.*

172 Statement issued by Julius Malema, 'Why we need to nationalise the mines', *Politicsweb*, 6 July 2009.

173 Aki Wilhelm, 'The see-saw of nationalisation', *Inside Mining*, July 2009, 3. Possible proponents include Sandile Nogxina (Director General of the DME), who said 'that he had always warned the industry that transformation should be accelerated and that he saw no problem with a policy debate on nationalisation', and Fred Gona (chairman of the parliamentary portfolio committee on mineral resources).

174 Wilhelm *ibid*, Gwede Mantashe (ANC Secretary General), Mzolisi Diliza (CEO of the South African Chamber of Mines) and Susan Shabangu (new Minister of Mineral Resources) have denied the call to nationalise South Africa's mines.

Legal effect of the MPRDA and associated legislation: is this a case of creeping expropriation?

The cumulative impact of these post-2004 legislative developments on the rights of mineral rights holders will be discussed and contrasted with their pre-2004 rights in order to assess the incremental encroachment of the ownership rights of such holders.

MPRDA in general

Apart from the Act's transitional arrangements, the MPRDA's abrogation of the common law rights to minerals and the introduction of the notion of state custodianship have conferred extensive new public law powers of control on the Minister.[175] As the court observed in *Sechaba v Kotze and Others*,[176] '[t]he MPRDA introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa', including 'the prevalence of state power of control over the mineral resources of the Republic and the concomitant ousting of the mining rights of the landowner and/or the holder of mining rights'.

Part of these powers includes the vesting of considerable discretionary regulatory powers in the Minister, principally with a view to attaining the Act's broad socio-economic objectives, even where the applicants for prospecting rights or mining rights are the pre-MPRDA holders of the rights to minerals. It follows that applications for prospecting or mining rights will fail if these requirements are not satisfied, and that the satisfaction of these requirements is, in any event, likely to entail a substantial commercial cost.

The content of the rights obtained under the MPRDA is substantively different from those obtained under the Minerals Act. Rights are no longer of indefinite duration; they are time bound, in that they must be exercised,[177] they can no longer be freely sold or mortgaged and are subject to termination by a public authority for non-compliance with the MPRDA.

Holders of new order prospecting and mining rights are, in addition, liable to pay the state royalties on rights that they may well previously have owned, a factor that clearly is at variance with the previous dispensation

175 Dale, n 73 above, at para 92.2.1-3.

176 [2007] 4 All SA 811 (NC) para 8. This case considered the rights of a holder of prospecting rights to access a land owner's land over which the prospecting rights were granted in order to commence prospecting. The court held that the MPRDA sets out preliminary requirements that need to be complied with before access is to be obtained and as these requirements were not adhered to in this case, access was therefore denied.

177 Whatever the prevailing economic and commercial conditions.

under the Minerals Act.[178]

Finally, the legal nature of prospecting and mining rights granted under the common law has changed from real rights to limited real rights granted by statute (the MPRDA).[179]

It must also be noted that once the Amendment Act is promulgated, further encroachments onto the rights of holders of rights granted under the MPRDA will occur. Notable examples of this include further restrictions on the transferability of prospecting and mining rights under the amended section 11 as well as the Minister's ability to impose unspecified conditions of community participation as a prerequisite for the grant of such rights.

MPRDA's transitional arrangements

If one considers the legal effect of the Act's transitional arrangements, it will be appreciated that the MPRDA abolished the common law rights of holders of old-order mineral rights and replaced them with a right to apply for an administrative licence in the form of a prospecting right or mining right, by following the 'conversion' procedure or the 'application' procedure as may be relevant. The grant of such a licence is not automatic, and is dependent on the applicant satisfying a number of requirements, in particular requirements of a discretionary nature. It is therefore inherent in the new dispensation that an application may fail for non-compliance with these requirements, in which event the remnants of the pre-2004 rights would also terminate. It is possible then that these rights could be granted to the state-owned mining company, African Mining, which, as observed earlier, is now exempt from complying with certain provisions of the MPRDA.[180]

Even where an application is successful, compliance with the Act's requirements, particularly those relating to empowerment and the social and labour plan, is likely to entail a substantial commercial cost. Furthermore, the substantive rights conferred by any administrative licence to prospect or mine have a diminished content in comparison with the common law rights, as discussed above, and are therefore likely to have a lesser inherent value.

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178 However, prior to 1991, royalties were payable to the state in consideration for the grant of a mining lease in respect of precious minerals under s 25 of the Mineral Rights Act 1967.

179 Section 5(1): 'A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.'

180 See 'State-owned mining company', in article text.

Creeping expropriation under South Africa's BITs?

On the basis of a simple definition of creeping expropriation, there can be little doubt that the post-2004 mineral law reforms in South Africa may be described as the 'slow and incremental encroachment' on 'ownership rights of investors' that has resulted in value attrition to such investments.[181]

It is, however, a more complex question to assess whether South Africa's mineral law reforms have had an *effect equivalent to* expropriation, thereby breaching its BIT obligations.

International investment law decisions show that a state's *intention* when effecting changes to its regulatory regime is of little importance; what is important are the *effects* of such measures on the investor.[182] These effects must, however, be substantial to the extent that the investor's benefits in its property would be neutralised.[183] When assessing the severity of such effects, arbitral tribunals, following *CMS*, normally assess the level of control that an investor is left with following such governmental interference. If an investor is still able to manage the day-to-day operations of its business, which it is able to own and control, it is unlikely an indirect expropriation will be found to have occurred.[184] An important exception to this rule is shown by the *Siemens* decision, where, despite the fact that Siemens continued to manage its subsidiary's affairs, the nullification of its contract with the Argentine Government meant that, in substance, its continued control of its day-to-day operations was of little importance.[185] In determining whether or not an indirect expropriation has occurred, a breach of an investor's legitimate expectations is another factor that may be taken into account[186]; so too is the extent to which governmental regulation constitutes an unreasonable exercise of 'police powers'.[187]

While post-2004 mineral law reform in South Africa has had a substantial and dramatic effect on investors' rights in the mining industry, the question remains whether or not these effects are *substantial*, a question that can only be answered on a case-by-case basis.

Although investors in the South African mining industry apparently remain in day-to-day control of their investments, which, facially, have not been 'neutralised', there are strong indications that, as a matter of international investment law, the core of these investments has either been indirectly

181 See n 2 above.

182 *Metalclad*, n 29 above, at para 103 and *Tecmed*, n 31 above, at para 116.

183 *CMS*, n 12 above, at para 262 and *BG Group*, n 18 above, at para 267.

184 *CMS*, n 12 above, at para 263, *Azurix*, n 44 above, at para 322 and *LG&E*, n 45 above, at para 188.

185 *Siemens*, n 35 above, at para 253.

186 *Metalclad*, n 29 above, at para 107, *Tecmed*, n 31 above, at para 149 and *Azurix*, n 44 above, at paras 316–322.

187 *Pope & Talbot*, n 12 above, at para 99.

expropriated or is undergoing a process of creeping expropriation, which is still ongoing. Factors that support this are: the MPRDA's extinction of all privately owned common law mineral rights (most visible in the statutory extinction of all unused old-order rights), the statutory removal of the erstwhile owner's right of control, the replacement of absolute rights of ownership with conditional and time-bound state licences, which cannot be transferred without ministerial consent and are likewise subject to ministerial suspension or cancellation.

Conclusion

As discussed above, indirect expropriations must be assessed on a case-by-case basis taking into account a broad array of factors in which the intensity of the measures interference with the underlying investment is a key determinant of its expropriatory effect. South Africa's post-2004 mineral regulatory regime displays many characteristics that may well have an expropriatory effect in international investment law.

The vesting of custodianship of South Africa's mineral resources in the state has resulted in a loss of control that holders of rights once enjoyed, although this loss of control is not absolute. Although the MPRDA provides for transitional arrangements to enable holders of old-order rights to obtain new-order rights, compliance with the new regulatory requirements is onerous and costly, especially the compulsory divestiture of equity under the Mining Charter, which is obligatory for new-order mining rights and currently discretionary for prospecting rights. If successful, holders obtain an administrative licence for a new order right that is substantially diminished in value, and holders are not able to exercise or dispose freely of such right without ministerial permission. Finally, mining right holders are now obliged to pay royalties to the state for the very rights that they may once have owned.

The cumulative effect of these post-2004 factors in the South African mining industry has been an incremental encroachment on the ownership rights that holders once enjoyed under the previous dispensation.

Other African experiences

This section will analyse recent legislative and other developments in four important African mining jurisdictions: the DRC, Zambia, Tanzania and Zimbabwe, providing arguments for and against creeping expropriation in terms of each country's BITs.

DRC

Although the DRC boasts great potential in its diverse and extensive mineral resources, holding the world's largest deposits of copper and cobalt, as well as other key mineral resources (gold, diamonds, zinc),[188] the mining industry has been stunted in its development by political strife and civil war in the country.

A leading international mining law expert describes the regulation of the DRC's mining industry as being 'through national legislation and regulations issued by the DRC Parliament and the DRC executive branch and mainly by the new Mining Code adopted in 2002[189] and its ancillary Mining Regulation,[190] adopted in 2003'.[191] This legal framework provides that the state is the owner of the DRC's mineral resources, which it may grant investors the right to use and exploit through mining titles.[192]

The DRC has signed BITs with 13 countries, four of which have been ratified: France, Germany, Switzerland and the United States. Interestingly, only the United States and French BITs make provision for indirect expropriation.[193]

In June 2007, newly elected President Joseph Kabila instituted a sweeping review of all mining contracts granted by the previous government. The

188 Hubert André-Dumont and Gilles Carbonez, 'Democratic Republic of Congo', in Sean Farrell, Robert McDermott and Jeffery Snow (eds), *Getting the deal through: Mining 2009* (July 2009), 44.

189 The Mining Code was enacted by Law No 007/2002 of 11 July 2002. The Mining Code can be accessed at **www.unites.uqam.ca/grama/pdf/DRC2002.pdf.**

190 The Mining Regulation was enacted by Decree No 038/2003 of 26 March 2003.

191 André-Dumont and Carbonez, n 186 above, at 44.

192 André-Dumont and Carbonez, n 186 above, at 44. The application process is described, *ibid*, at 45, as 'The granting of mining titles is based on a "first-come, first-served" principle: the applications for mining rights for a given "perimeter" (demarcated surface area with indefinite depth) composed of quadrangles or "squares" are registered in the chronological order of their filing. In exceptional cases, the minister of mines may submit to tender, open or by invitation, mining rights relating to a specific deposit. To maintain the validity of his or her mining rights, the holder must: commence exploration within six months (research permit) or commence development and construction works within three years (exploitation permit) as of the date the title evidencing his right is issued; and pay the surface duty per square relating to his title at the counter of the Ministry Registry. If he fails to fulfil any of these obligations, the holder may be deprived of his right. A title holder must also comply with specific rules relating to, among others, protection of the environment, cultural heritage, health and safety or construction and planning of infrastructure'.

193 Article III of the United States of America-Republic of Zaire, 'Treaty concerning the Reciprocal Encouragement and Protection of Investment' signed on 3 August 1984 and ratified on 28 July 1989 provides that 'no investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the Other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation, unless the expropriation (a) is done for a public purpose' (Art III(1)). Article 3 of the France–Democratic Republic of Congo Agreement on the Protection of Investments, signed on 5 October 1972 and ratified on 1 March 1975 makes provision for both direct and indirect expropriations.

purpose of the review was, ostensibly, to maximise benefits for the government as well as local communities.[194]

After an initial classification by a contract review panel, appointed and staffed by the DRC Government, mining contracts were labelled as 'green light' (acceptable terms), 'orange light' (requiring further negotiation on certain terms) or 'red light' contracts (which are susceptible to cancellation).[195]

Once a contract has been cancelled owing to its 'red light' status, a new contract with the government and the erstwhile concessionaire must be renegotiated. In effect, this allows the government to negotiate new contractual terms, retrospectively, which grants the government greater economic benefit from, and a greater stake in, mining investments. In addition, the government has indicated that it will, in future, require that all new mineral discoveries be state controlled through a mandatory 51 per cent equity holding by a state-owned entity. At the same time, the government has claimed that the state's compulsory ownership stake is in accordance with international best practice.[196] Under Article 71 of the DRC's Mining Code, the state must be granted five per cent of the shares of companies undertaking exploration activities free of charge and on a non-dilutable basis.[197] Article 234 of the Mining Code provides that the 'holder [of a mining title] is completely exempted from all customs duties and other taxes, regardless of their nature, for his exports in relation to the mining project' and that the 'royalties and fees paid as remuneration for services rendered in connection with the export of commercial products … may not exceed one per cent of their value'. Despite this maximum limit as provided for in the Mining Code, the government has indicated that the taxes on mining exports will in future double to two per cent.[198] Global Witness, an NGO that monitors corruption in natural resources and international trade, has raised concerns in a report[199] over the lack of transparency in and clarity of the DRC's contract review process, as well as insufficient safeguards in

194 Esmarie Swanepoel, 'DRC mining contract review nearing completion', *Mining Weekly*, 17 September 2008.

195 See n 192 above.

196 See n 192 above and 'DRC briefs mining executives on review terms', *Mineweb*, 5 September 2008. It is unclear from the 'Terms of Reference for the Mining Contracts Review' document, presented in September 2008 by Deputy Minister of Mines, Victor Kasongo, whether this proposed ownership split is a 'free-carry' or will be for value.

197 Craig Andrews, Boubacar Bocoum and Delphin Tshimena et al, Report no 43402-ZR compiled by the World Bank, 'Democratic Republic of Congo Growth with Governance if the Mining Sector', May 2008. The document can be accessed at **http://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf.**

198 André-Dumont and Carbonez, n 186 above, at 47.

199 'The Congolese Mining Sector in balance', *Global Witness*, 1 October 2007. This report can be accessed at **www.globalwitness.org/media_library_detail.php/576/en/the_congolese_mining_sector_in_the_balance.**

the protection of the DRC contract review panel's independence.[200] Global Witness has questioned the autonomy of the review panel as not only was it appointed by the DRC's Minister of Mines, but it is entirely composed of representatives from government ministries. For this reason, such a review panel is unlikely to inspire confidence in its independence and impartiality.

The DRC initially rejected contract revisions proposed by six of the DRC's major mining companies (AngloGold Ashanti, Banro, Gold Fields, First Quantum, Freeport McMoran and Lundin Mining[201] and Mwana Africa) and extended the review process by six months.[202] The review process has now finally been completed and four of these contracts have now been approved.[203] Controversially, however, a contract for the Tenke copper and cobalt project[204] involving Freeport McMoran and Lundin Mining has not been approved. While the DRC has afforded the companies two months to complete the review of their mining contract, the latter have opposed 'the rewriting of the contract in accordance with new legislation, extra royalties on additional production, and the integration of the state company into management structures'.[205]

Zambia

The Zambian mining industry is primarily regulated by the newly enacted Mines and Minerals Development Act 2008 (the 'Zambian Mines Act'),[206] which repealed previous mining legislation.[207] Section 3(1) of the Zambian Mines Act provides that 'all rights of ownership in, searching for, mining and disposing of, minerals wheresoever located in the Republic are hereby vested in the President on behalf of the Republic'. This legislation, much like its predecessor, establishes a licensing regime under which qualified

200 Roderick Mukumbira, 'DRC mining contract review process credibility questioned', *Mineweb*, 3 October 2007.

201 The Tenke mining project is a partnership led by Freeport-McMoRan Copper and Gold, the Lundin Mining Corporation and the Government of the Democratic Republic of Congo.

202 'Congo rejects proposals by 6 big mining firms', *Reuters*, 16 April 2009.

203 'Four firms clear Congo mining review', *Reuters*, 6 August 2009. AngloGold Ashanti, Banro, Mwana Africa and Gold Fields, provided the latter completes a feasibility study at its Kisenge project.

204 A large-scale copper and cobalt project with Tenke Furgurume Mining, backed by Freeport McMoran and Lundin Mining.

205 See n 201 above.

206 The Zambian Mines Act was assented to on 27 March 2008 and came into operation on 1 April 2008. This legislation may be accessed at **www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=275**.

207 Mines and Minerals Act No 166 of 1995. This legislation can be accessed at **http://faolex.fao.org/docs/pdf/zam46304.pdf**.

applicants may apply for a prospecting licence, large-scale mining licence or a large-scale gemstone licence in order to commence mining activities.[208] The Zambian Mines Act 'requires all holders of mining rights whose rights were granted in accordance with the repealed Act to make fresh applications with respect to the mining rights so held within two years of its coming into effect. All mining and non-mining rights granted under the [Zambian Mines Act] will cease to be valid after the expiration of this period'.[209]

Zambia has a ratified BIT with Switzerland, which makes provision for indirect expropriation of protected investments, which must be accompanied by market-related compensation.[210] Zambia also has a ratified BIT with Germany but this does not provide for indirect expropriation.

The global financial crisis has had a direct effect on the Zambian mining industry, which is dominated by copper and cobalt.[211] In December 2008, there was a 60 per cent decline in copper prices when compared with the record high of US$8,940/tonne in July 2008.[212] Zambia is highly dependent on its mining industry, especially the copper sector. The mining and quarrying sector is a significant contributor to the Zambian economy. It is a major employer and contributes 63 per cent to the country's export earnings.[213] Mining and quarrying contributed an estimated nine per cent of Zambia's gross domestic product in 2008.[214]

Prior to the last quarter of 2008, when the commodity boom began to implode, the Zambian Government sought to receive a greater fiscal benefit from its mining industry. To this end, the government quintupled the state royalty payable on minerals from 0.6 per cent to three per cent of revenue,[215] increased company tax from 25 per cent to 30 per cent and introduced a windfall tax above certain profit levels.[216]

Zambia's aggressive increase in mineral resource taxes last year illustrates the government's intention to take a greater share of resource rents in an

208 Part III of the Zambian Mines Act.

209 Elias Chipimo Jr and Arthur Sike, 'Zambia', in Sean Farrell, Robert McDermott and Jeffery Snow (eds), *Getting the deal through: Mining 2009* (July 2009), 156.

210 Article 5 of the Switzerland–Zambia Agreement on the Promotion and Reciprocal Protection of Investments, signed on 3 August 1994 and ratified on 7 March 1995.

211 Business Monitor International, 'Zambia mining report 2009', 19 March 2009, executive summary: 'Globally, the country ranks seventh in the production of copper and second in cobalt.'

212 'Zambia copper mines struggling with taxes-official', *Mining Weekly*, 3 December 2008.

213 'Zambia', *MiningMX*, 8 January 2009.

214 Yvonne Mhango, 'Zambia: annual economic outlook', *Standard Bank*, 5 March 2009 (**www.scribd.com/doc/13152380/Standard-Bank-Zambia-Annual-Economic-Outlook**).

215 This is calculated on the market value of the mineral on the international commodity market.

216 Craig Andrews, 'Creeping nationalisation and contract renegotiation: experience of the last five years', *Rocky Mountain Mineral Foundation*, presented on 21 April 2009 in Buenos Aires.

era of high commodity prices. It may be argued that the cumulative effect of these, and any future increases, could seriously erode the enjoyment of an investor's property,[217] thus ultimately leading to the expropriation of its underlying investments.

Foreign mining companies reacted to last year's fiscal increase by threatening international arbitration. In particular, First Quantum Minerals, a Canadian-based mining company, argued that such increases would amount to a breach of the stability clause in their mineral development agreement with Zambia, which guaranteed that agreed tax rates would not change and no new taxes would be introduced for 15 years.[218] The Zambian Government, in an attempt to avoid such litigation, initially offered to limit the windfall tax at a fixed rate until negotiations with the mining companies were complete.[219]

The current financial crisis has now compelled the Zambian Government to reconsider its position completely. The Zambian Minister of Mines and Minerals observed recently[220] that measures were being introduced in Zambia's 2009 budget 'in an effort to enhance the profitability of the mining industry and maintain its competitiveness'.[221] Implementation included the abolition of the highly unpopular windfall tax on mining profits,[222] and it is expected that further measures will be put in place to increase capital cost allowance to 100 per cent and to remove the customs duty on key raw materials for copper production.[223]

The spectre of indirect expropriation has not, however, completely disappeared. Powerful mine workers' unions, such as the Mine Workers Union of Zambia, have called on the government to assume management and control of mines that have been closed owing to the global financial crisis. The unions claim that this would merely be a temporary measure to safeguard employment until new investors can be found. Zambia's mines minister has responded by indicating that the government plans to raise its equity stake in copper mining companies to 'a maximum of 35 per cent shareholding so that [they] can have [an] influence in decision making'.[224] In order to achieve this target, the government has suggested that where any debts (presumably fiscal) are owed to it by copper mining companies, these should be converted

217 *CMS*, n 12 above, at para 262.

218 'FAST NEWS', *mineweb*, February 2008 (**www.mineweb.com/mineweb/view/mineweb/en/page504?oid=46672&sn=display**).

219 Alistair Frazer,' Has Zambia blinked first in tax battle?' *Mine Watch Zambia*, August 2008 (**www.minewatchzambia.com/2008/08/has-zambia-blinked-first-in-tax-battle.html**).

220 At the Livingstone African Mining Congress at the beginning of February 2009.

221 Brendan Ryan, 'Zambia dismantles windfall tax', *MiningMX*, 8 February 2009.

222 Shapi Shacinda, 'Zambia abolishes 25 pct windfall mining tax', *Reuters*, 30 January 2009.

223 Brendan Ryan, 'Zambia dismantles windfall tax', *MiningMX*, 8 February 2009.

224 Reuters, 'Zambia to raise stakes in copper mines', *Mining Weekly*, 30 March 2009.

into equity. Negotiations between government and the copper mining sector are still proceeding and, consequently, there is no time frame set, as yet, as to how, and on what basis, the government will achieve its target of 25 per cent to 35 per cent shareholding[225] in copper mining companies.[226]

In a very recent development, Zambia has indicated that it will not refund foreign mining companies, including First Quantum Minerals, for any windfall taxes they paid last year. The Zambian Government has indicated that although these companies had signed mineral development agreements giving them the right to compensation if the government failed to comply with agreed tax stability guarantees, these agreements will become 'null and void' under the Zambian Mines Act.[227]

These developments have resulted in a plea from mining companies with the President of the Chamber of Mines of Zambia recently stating that mining companies required 'stable and long-term policies that would reduce the risk to their investments'.[228]

Tanzania

Tanzania is Africa's third-largest gold producer (behind South Africa and Ghana). It is also ranked as an important diamond producer and has recently discovered substantial uranium deposits, which it expects to begin mining by 2011.[229]

The legislative regime that governs the mining industry in Tanzania is currently regulated by the Mining Act 1998 (the 'Tanzanian Act'),[230] which provides in section 5 that the 'entire mineral property and control over minerals on, in or under the land … is vested in the United Republic'. A variety of licences may be granted under the Tanzanian Act, which include, but are not limited to, a prospecting licence, a retention licence, a special mining licence and mining licence. These licences are subject to broad ministerial discretion in that the Minister may grant, renew, suspend or

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225 It is uncertain at this stage whether the equity stake will be a 'free-carry' or a purchase for value by government. The government's proposed debt-to-equity conversion makes one lean towards the side that the increase in government's stake will be for value.

226 Ibid.

227 Chipimo and Sike, 'Zambia', n 207 above, at 156. See also 'Zambia won't refund controversial mine tax payments', *Reuters*, 12 August 2009.

228 'Top African copper producer urged to draw up mining policy to boost investment', *Reuters*, 19 August 2009.

229 Lindsay Carlson, 'Tanzanian Mining Reforms Follow Amendments to Mining Act', *Tanzania Invest*, 18 May 2009.

230 Act 15 of 1998. The Tanzanian Act can be accessed at **http://knowledge.uneca.org/community-of-practice/nepad-regional-integration-and-trade/natural-resources-managment/international-study-group-isg-to-review-africas-mining-codes/mining-codes-in-african-countries/tanzania-mining-code/Mining_act_Of_Tanzania_1998.pdf**.

cancel any licence (subject to due process).[231] In addition to the Tanzanian Act, 'large-scale mining companies may enter into agreements with the government that guarantee the fiscal stability of a long-term mining project with respect to the range and applicable rates of royalties, taxes, duties, fees and other fiscal taxes and the manner in which liability thereof is calculated (development agreements). The development agreements acquire legislative effect upon execution and any tax concessions contained therein will take effect as the law itself without any further requirement'.[232]

In 2008, following a report by the Business and Human Rights Resources Centre, which claimed that owing to 'low royalty rates, unpaid corporation taxes, and tax evasion by major gold mines' Tanzania had lost an estimated US$400 million in seven years, public anger erupted towards the mining industry.[233]

Owing to public pressure and as the Tanzanian Act had not been reviewed since its enactment, in 2007 President Jakaya Kikwete established a 12-member review panel to investigate the Tanzanian mining industry and recommend ways to increase the industry's revenues and decrease its environmental and social impact. The review panel recommended in July 2008 that the government should own a ten per cent stake in all Tanzanian mining companies, royalties on gold should increase from three per cent to five per cent, and tax relief on fuel imports for miners should be replaced with a levy.[234]

These recommendations have now been adopted in a bill to amend the Tanzanian Act. The bill was originally scheduled to be introduced to the Tanzanian Parliament by the Minister of Energy and Minerals, at the end of April 2009; this has since been extended to October 2009.[235] The short legislative time frame has, however, created concern among Tanzanian mining companies who have complained about insufficient consultation on the new regulatory regime.[236] These companies[237] claim that they have

231 Alex Thomas Nguluma, 'Tanzania', in Sean Farrell, Robert McDermott and Jeffery Snow (eds), *Getting the deal through: Mining 2009* (July 2009), 132–133.

232 Nguluma, 'Tanzania', *ibid*, at 132.

233 'Tanzania Mining Report', Q3, 2009, *Business Monitor International*.

234 Carlson, n 227 above, further findings included that, 'royalties on rough diamonds and gemstones, such as tanzanite, should increase from five per cent to seven per cent while, at the same time, royalties for cut and polished stones should rise from zero to three per cent; mining companies should be charged a fuel tax, the profits of which would be spent on road building; and royalties from the mining sector should be calculated on gross value, rather than a net back value'.

235 Ray Naluyaga, 'Tanzania to table mining laws in October, take stakes in mines', *Bloomberg*, 11 August 2009.

236 'Tanzania yet to consult COS over mines law revision – official', *Dowjones newswires*, 23 February 2009.

237 *Ibid*, where Anglo Gold Ashanti and Barrick Gold Tanzania Ltd (a unit of Canada-based Barrick Gold Corp) allege they have only learnt about the revision through the media.

had no formal communication from the government on the new bill, which reflects the government's pursuit of greater influence in, as well as a share of, the mining sector.

The Tanzanian Act, formulated with the assistance of the World Bank, followed international best practice and is generally investor friendly. It thus contained attractive regulatory benefits such as low royalty rates of three per cent[238] and the unrestricted right to repatriate profits and capital.[239] The effect of the proposed fiscal amendments in the bill, coupled with a ten per cent government equity stake in all mining companies, could well amount to an erosion of investors' economic enjoyment of their Tanzanian mining investments. Furthermore, the Tanzanian Government has recently indicated that it 'plans to include a clause in its new mining law allowing the government to own shares in firms extracting what it considers strategic minerals'.[240]

The Tanzanian Government likewise plans to renegotiate mining contracts, essentially nullifying the mineral development agreements it had previously signed with mining companies.[241]

Tanzania has ratified BITs with a number of countries including, inter alia, the United Kingdom, Sweden, Italy and Finland. The United Kingdom–United Republic of Tanzania BIT provides, in Article 5, that 'investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to *measures having the effect equivalent to* nationalisation or *expropriation* … in the territory of the other Contracting Party *except for a public purpose* related to the internal needs of that Party on a non-discriminatory basis and a*gainst prompt, adequate and*

238 The royalty rate is calculated as a proportion of the market value of the minerals less cost of transport, smelting and refining.

239 Bonnie Campbell, 'African Mining Codes Questioned', Pascale Hatcher, Ariane Lafortune and Bruno Sarrasin of Groupe de Recherche sur les Activités Minières en Afrique (GRAMA) at the Faculté de Science Politique et de Droit, Université du Québec à Montréal', 2003.

240 'Tanzania seeks govt shareholding in new mines law', *Reuters*, 11 August 2009. The government has indicated that the move will not apply retrospectively to existing companies, and that government would decide on a case-by-case basis what minerals it considered to be strategic.

241 Nguluma, *Tanzania*, n 229 above, at 132.

effective compensation'[242] (emphasis added).

Zimbabwe

Zimbabwe is the worst-performing African country in terms of its mineral potential and policy potential[243] in the Fraser Institute's Annual Survey of Mining Companies for 2008/2009. Zimbabwe, however, is richly endowed with gold, platinum and chrome, and boasts the second-largest platinum reserves in the world.[244]

In 2008, the Zimbabwe Parliament passed the Indigenisation and Economic Empowerment Act 2008.[245] The Act requires identified businesses and public companies (including mining companies) to be 51 per cent owned by indigenous Zimbabweans.[246] This has imposed a greater strain on an already suffering mining sector, which contributes more than one-third of the country's foreign currency inflows.

The Zimbabwe Government's attitude towards indigenisation has not, it seems, materially changed with the creation of a new unity government in February 2009. As President Mugabe remarked at his 85th birthday celebrations this year:

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242 United Kingdom–United Republic of Tanzania, Agreement for the Promotion and Protection of Investments, signed on 7 January 1994 and ratified on 2 August 1996. Some examples of the other ratified BITs that provide for substantially the same, or similar, agreements as to indirect expropriation include:
   (a) Article 4 of the Kingdom of Sweden–United Republic of Tanzania Agreement on the Promotion and Reciprocal Protect ion of Investments, signed on 1 September 1999 and ratified on 1 March 2002, which provides specifically for 'indirect' expropriation (Art 4(1)).
   (b) Article 5 of the Italy–United Republic of Tanzania Agreement on the Promotion and Protection of Investments, signed on 21 August 2001 and ratified on 25 April 2003, which provides for 'measures having effect equivalent to … expropriation' (Art 4(1)).
   (c) Article 5 of the Finland–United Republic of Tanzania Agreement on the Promotion and Protection of Investments, signed on 19 June 2001 and ratified on 30 October 2002, which provides specifically for 'indirect' expropriation (Art 5(1)).

243 The policy potential index is a composite index that measures the effects on exploration of government policies including uncertainty concerning the administration, interpretation and enforcement of existing regulations; environmental regulations; regulatory duplication and inconsistencies; taxation; uncertainty concerning native land claims and protected areas; infrastructure; socio-economic agreements; political stability; labour issues; geological database and security (**www.fraserinstitute.org/commerce.web/product_files/MiningSurvey20082009_Cdn.pdf**).

244 'The Zimbabwe mining report 2009', *Business Monitor International*, 22 December 2008.

245 Act 14 of 2007. The Act can be accessed at **www.indigenisation.gov.zw/indigenisationact.pdf**.

246 'Mugabe OKs nationalisation law', *news 24*, 9 March 2008 (**www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_2284787,00.html**).

> 'a systematic identification of areas in which the state and indigenous entrepreneurs can participate, is being carried out, in line with the Indigenisation and Empowerment Act. We would want to see a greater participation of our people in them, not less than 51% in certain companies ...'[247]

Zimbabwe's indigenisation policy, it may be argued, is discriminatory in terms of race as it focuses on firms held, predominantly, by non-indigenous investors. In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* ('*Campbell*'),[248] a majority of the Southern African Development Community (SADC) Tribunal,[249] in its first substantive decision, held when examining Zimbabwe's land reform policy, that:

> 'Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes

247 'Mugabe says government to push for control of firms', E*ngineering News*, 2 March 2009.

248 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008], Southern African Development Community (SADC) Tribunal Windhoek, Namibia, (**www.saflii.org/sa/cases/SADCT/2008/2.pdf**).

249 The SADC was originally established in 1980 as a loose alliance of majority-ruled countries in Southern Africa as a means of coordinating development and lessening reliance on then apartheid-ruled South Africa. Its founding members were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. On 17 August 1992, the SADC transformed itself into a development community of Southern African states when the SADC Declaration and Treaty were signed in Windhoek, Namibia by its then member states. The SADC's vision is to create a regional economic community, which will ultimately permit the free movement of capital, labour, goods and services. An SADC free trade area was launched in Johannesburg on 17 August 2008 and is due to be followed by the establishment of a customs union by 2010, a common market by 2015, monetary union by 2016 and a single currency by 2018. Current members of SADC are Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC secretariat is based in Gaborone, Botswana. The SADC Tribunal was established in terms of Art 9 of the SADC Treaty as one of the institutions of SADC. The Tribunal itself was only appointed on 18 August 2005 by the Summit of Heads of State under Art 4(4) of the Protocol on the Tribunal. The seat of the tribunal is in Windhoek, Namibia (see www.sadc.int/index). The SADC has jurisdiction over controversies involving the interpretation or application of the SADC Treaty, the interpretation, application or validity of Protocols and other Community documents and actions of the Community institutions. In addition, the SADC's jurisdiction covers disputes under any other agreements of the Member States that specify use of the tribunal. The tribunal has jurisdiction over disputes between states and between natural or legal persons and states. No natural or legal person shall bring an action against a state unless all domestic legal remedies have been exhausted. In the case of *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others* (09/08) [2008] SADCT 1 (17 September 2008) at 4 it was decided that the 'Tribunal has no jurisdiction to hear' applications between two natural persons.

indirect discrimination or de facto or substantive inequality.'

In another case, an ICSID tribunal found that Zimbabwe's policy of state-sponsored land invasions violated the 'just compensation' provisions of the Netherlands–Zimbabwe BIT; the tribunal similarly rejected Zimbabwe's plea of necessity that there should be a discount from fair market value in the case of large-scale nationalisations for public policy reasons.[250]

Zimbabwe has also ratified BITs with other nations, including, inter alia, Germany[251] and Switzerland.[252]

Zimbabwe's economic travails, including a 50 per cent reduction in gold production in 2008, have created resistance to the government's indigenisation policy. The governor of the Reserve Bank of Zimbabwe, Gideon Gono, recently urged the government to modify its empowerment laws by stating that 'Zimbabwe needs to pronounce itself vividly that ... we will do the needful [*sic*] when it comes to amending untenable clauses or sections pertaining to our investment and indigenisation laws'.[253]

The Zimbabwe legislature, it seems, is belatedly paying attention to the concerns of mining companies. Parliament allowed the Mines and Minerals Amendment Bill to lapse in January 2009, which means that it will have to be reintroduced at a later stage. Under the bill, foreign-owned mining companies, operating in the country, would be compelled to cede an equity stake of up to 51 per cent to the state or local black citizens. The lapsing of the bill has allowed for more consultation on its contents. The bill is currently being reformulated taking into account the suggestions of the industry through, inter alia, the Zimbabwean Chamber of Mines.[254] A mines ministry official has stated that the government will no longer compel foreign mining companies to surrender a majority stake to the government.[255] In early August, 2009 Zimbabwe's Mines and Mining Development Minister indicated that the review of the bill would be finalised in the near future and would be presented to parliament within its current session. The Minister, however, did not indicate whether or not the 51 per cent requirement would

250 *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/06, Award, 22 April 2009.

251 Article 4 of the Germany–Zimbabwe Agreement on the Encouragement and Reciprocal Protection of Investments, signed on 29 September 1995 and ratified on 14 April 2000, which provides for 'measures having the effect of expropriation' (Art 4(2)).

252 Article 6 of the Switzerland–Zimbabwe Agreement on the Encouragement and Reciprocal Protection of Investments, signed on 15 August 1996 and ratified on 9 February 2001, which provides for 'measures that have the effect equivalent to that of expropriation' (Art 6(1)).

253 'Zimbabwe frees up gold trade as output falls', *Reuters*, 2 February 2009.

254 Through their president, Jack Murehwa.

255 Tawanda Karombo, 'Zimbabwe government backtracking on mining indigenisation bill', *Mineweb*, 15 February 2008.

be removed or not, saying simply that 'there is a consultation process on this by all the key stakeholders'.[256]

The Zimbabwean Government has further eroded investor confidence with its recent plans to 're-evaluate all mining contracts and introduce a "use it or lose it" policy for its mining industry'.[257] It seems as if Zimbabwe may be following in the DRC's footsteps, a move that could have substantial implications.

Arguments for and against creeping expropriation in these African countries

Based on an overall analysis of recent legislative developments in these African mining countries, certain general observations can be made. First, it is clear that the spectre of creeping expropriation is more likely to appear during commodity boom periods; this is particularly evident in Zambia and Zimbabwe. Secondly, all of the countries in question have recently embarked on some form of contract or legislative review, under which contractually agreed terms and conditions may be unilaterally altered by government. Finally, it seems as if the spectre of nationalisation is a strong possibility in some of these countries, particularly in Tanzania and Zimbabwe.

In *CME*,[258] the arbitral tribunal held that: 'De facto expropriations or indirect expropriations, ie measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.'[259]

The DRC's contract review process may not in and of itself constitute an expropriation of investors' investments as a matter of international investment law (unless the contract is deemed red). If, however, the DRC follows its current course of demanding an increasingly greater share of control in, and benefit from, investors' assets, it is possible that in the future an investor may be deprived of the 'benefit of the property' referred to in *CME* or the 'significant part, of the use or reasonably-to-be-expected economic benefit of property' referred to in *Metalclad*.[260] This argument remains strong in light of Zimbabwe's new 'use-it or lose-it' policy, as well as both Tanzania's and Zambia's plans to renegotiate unilaterally the mineral development agreements that these governments entered into with mining companies.

256 James Macharia, 'Zimbabwe reviewing legislation bill in attempt to boost mining investment', *Mineweb*, 6 August, 2009.

257 Nelson Banya, 'New Zimbabwe mining law lead to re-evaluation of all mining contracts', *Mineweb*, 3 July 2009.

258 *CME Czech Republic BV v The Czech Republic*, n 27 above.

259 Ibid, at para 604.

260 *Metalclad*, n 29 above, at para 103.

In *Feldman*[261] the arbitral tribunal held:

> 'the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions'.

There are a number of expropriation warning lights in these African mining jurisdictions. First, the extent to which the DRC, Tanzania and Zambia unilaterally renegotiate and potentially terminate existing mineral development agreements may expose these countries to claims of indirect expropriation, either under the terms of these agreements or under their ratified BITs. This would follow from the decision in *Siemens*, as it would be an exercise of 'superior governmental power', where the superimposed law would 'in and of itself amount to an expropriatory act'.[262] Secondly, should Zimbabwe revive and subsequently enact the Mines and Minerals Amendment Act under which foreign investors in the mining industry would be compulsorily divested of the control of their Zimbabwe subsidiaries, this would likewise expose Zimbabwe to expropriation claims under its ratified BITs.

Conclusion

The current global financial crisis has had a profound effect on the world's mining industry, particularly in Africa. Until the commodity boom evaporated in the last quarter of 2008, many African mining jurisdictions sought a greater stake in a country's resource rents, either through fiscal or equity divestiture measures, or both. Not all the examples mentioned in this article, may, at this stage, be immediately identified as classic cases of creeping expropriation. As indicated in *Tecmed*, creeping expropriation, by its nature, requires a case-by-case factual analysis. At the same time, the intensity of a measure's interference on the underlying investment may well give rise to an indirect expropriation. Country case studies in South Africa, the DRC, Zambia, Zimbabwe and Tanzania show how some African governments have increasingly interfered with the use and enjoyment of mining investors' investments, thus raising the creeping expropriation spectre. Ironically, the current global financial crisis indicates how the expropriation pendulum can rapidly swing in the other direction. Host governments in these countries have recently had to re-evaluate their

261 *Feldman*, n 51 above, at para 488.
262 *Siemens*, n 35 above, at para 253.

policies and, in order to alleviate the worst effects of the crisis, to allow mining companies to retain a more equitable share of the economic benefits of their investments. While the DRC and Zimbabwe haltingly, and Zambia directly, show signs of this, at this stage of the financial crisis, South Africa and Tanzania, appear to remain on the statist side of the pendulum and committed to their respective reform agendas.[263]

263 *Azurix*, n 44 above, at paras 316–322; a finding criticised as remarkable by Dolzer and Schreuer (Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 106).