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How to get SA's foreign direct investment in mining right

By Wessel Badenhorst

8 Jun 2021

Foreign direct investment (FDI) in South Africa fell by almost half in 2020, in line with the world-wide downturn caused by the global Covid-19 pandemic, reports the United Nations Conference on Trade and Development (Unctad). However, with many of the business-related sanctions being lifted towards the end of last year, FDI is seeing signs of recovery.

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The mining sector is a particularly strong area for investment in South Africa. It is a major part of the economy, as the country is the world's largest producer of chrome and platinum, and the second largest producer of palladium and zirconium. Our country also exports significant amounts of coal, diamonds, and iron ore. In 2020.

The South African Reserve Bank reported that mining and quarrying was the second largest sector to secure investment during 2018 by 25.5%. The recent increase in demand for commodities has led to a concurrent increase in demand in mining, which will undoubtedly lead to a rise in FDI in mining. Worldwide the need for palladium and platinum is high, given that these materials are key in controlling vehicle emissions, which are becoming more stringent for China and Europe.

Ownershi and equity in FDI transactions

When speaking broadly about foreign direct investment in mining, ministerial approval of the change of control in those businesses is needed. This we usually refer to as Section 11 approvals, which takes an average of nine to 12 months, but can take as long as 18 months. This requirement does not extend to listed entities, however. What does apply to all mining acquisitions in South Africa, however, including FDI, is that the mining company must comply with all of the conditions of its mining right.

Firstly, the business must comply with the Mining Charter in terms of the following – 30% of ownership must be in the hands of historically disadvantaged groups, of which 5% of those shares must be held for the benefit of the mine's host communities and 5% of shares must benefit the company's employees.

These shares usually come in the form of a community trust and an employee benefit trust, while other companies create a share pool. The guiding principle here is that there has to be a very real benefit, which all comes down to dividend flow.

The Department of Mineral Resources and Energy encourages trickle dividends, so the money received by beneficiaries is not only governed by profit but also ensures that there is a regular flow of funds to communities and employees. Equity in transactions is also dealt with as part of broader social and labour plan compliance to ensure that community and employee projects benefit from the company, so that a more sustainable economy is built within the communities that sit around the mining entity.

For example, the company is required to build up small business around the mine, which often fall into the categories of security and logistics, both important for the mining entity. These stipulations do not apply to the rights that were granted under the previous Mining Charter; however they do reflect a real drive by government to try and broaden the equity base of mining companies so that it doesn't benefit just one person. Procurement in mining, for example, is also more specific in the mining industry to meet BEE requirements, such as capital goods and operational expenses being differentiated between. The equity requirement of ownership transfer in the case of a mining entity usually takes nine to 12 months to finalise and, in the case of FDI, can only be implemented once ministerial approval of the transaction has been obtained.

Licence transfers

If the FDI does not involve a change of control, but rather involves buying out assets and putting them into a new entity, then what flows from that is a change of licence or licence holder. This can be a complicated process because of environmental approvals, for example water licences, atmospheric emissions licences and environmental authorisations all have to move across, so there's a part of that project that also has to focus on bringing the regulatory compliance into line, and this is where the right kind of legal advice becomes crucial. A few of the change of licences can be done post implementation of the sale, but it is an ongoing process thereafter.

Some change of licences can take a bit of time. What often happens is that certain mining operations were approved under a certain environmental plan, which the new owner might want to change the scope of slightly. The mine would then have to undergo a formal environmental impact assessment, which can take 12 months to 24 months to get done only after ministerial approval.

Although our economy, and the mining sector, has taken a bit of a knock with Covid-19 and existing hurdles before the pandemic, it is undeniable that now is a good time to invest in mining, given the fact that it is a buyers' market.

ABOUT THE AUTHOR

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