

Chapter 1

Introduction

1.1 Subject Matter and Hypothesis

The boom of foreign investments in mining projects over the last 2 decades is only a herald of the global competition for access to mineral resources in the decades to come.

In its report “*The Resource Revolution: Meeting the world’s energy, materials, food and water needs*”, the McKinsey Global Institute estimates that the demand for steel alone will increase by about 80 % from 1270 million tonnes in the year 2010 to 2290 million tonnes in 2030.¹ This development is driven by an increasing demand for mineral resources from a materializing middle class in China, India and other emerging markets.²

Several other minerals, especially critical minerals like rare earths, tin, tungsten, phosphate and potash have already shown high price volatility between 2004 and 2009. Additionally their supply is geographically focused, complicating access for many countries and companies alike.³ This is especially challenging for countries like Germany that require large quantities of minerals for their industries, specifically rare earths for its pronounced “*Green Revolution*” and have little Economic Demonstrated Resources (“EDRs”) of crucial minerals.

This shortage and concentration of supply of minerals creates a field of tension:

One the one hand, countries and companies that do not possess a sufficient amount of minerals aim to secure access to these minerals for their industry, constituents and projects at the best price possible—with the help of foreign investment in mining projects.

One the other hand, resource rich countries have an interest to best use their mineral wealth for their own industry and constituents.

¹ McKinsey Global Institute (2011), p. 42.

² McKinsey Global Institute (2011), p. 36.

³ McKinsey Global Institute (2011), p. 43.

The hypothesis is (i) that the realization of and the investment in international mining projects creates complex legal challenges, (ii) that these challenges are similar wherever the international mining investments take place; and (iii) that these specific legal challenges cannot sufficiently be analyzed by the legal framework provided for by general foreign investment law.

1.2 Purpose of the Study

The aim of this work is to explore the past and the status quo of the current legal framework for foreign direct investments in mining projects as well as possible future developments. The work then intends to understand what these findings mean for the further study of the legal framework for foreign investments in mining projects.

1.3 Scope

Mining can take place in geographic locations that fall under the sovereignty of a nation as well as in other geographic locations such as the Deep Sea Bed or Outer Space.

Under international law, besides the territory on land, nations have the exclusive right to undertake mining activities in deep sea in an exclusive economic zone that stretches 200 nautical miles from the coastal baseline, beyond their territorial waters that stretch up to 12 nautical miles from the coastal baseline.⁴

Article 55 of the United Nations Conventions on the Law of the Sea states: “*In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, (. . .);*”

Investments in mining projects outside of the sovereign territory of nations, whilst not yet common, are also developing and deserve academic interest in the years to come.

Deep-sea bed mining that takes place outside of any exclusive economic zone is governed by United Nations Conventions on the Law of the Sea and is regulated by the International Seabed Authority.⁵

⁴ Hobe (2014), p. 81.

⁵ For a discussion of the current framework see: Oude Elferink (2005) and Harrison (2011).

Mining in Outer Space is yet to be regulated.⁶ Notwithstanding its technical feasibility in the years to come,⁷ commercial interest has already been voiced.⁸

This work focuses on foreign investment in mining projects within the sovereign territory of nations and their exclusive economic zones.

From the legal challenges the realization of an international mining project creates this work discusses the admission of foreign mining investments, the corporate structure requirements of foreign mining investments, mineral ownership and mineral rights ownership, mining licenses, land access for foreign mining investments, performance requirements for foreign mining investments, distribution of profits from foreign mining investments, repatriation of profits from foreign mining investments, resolution of conflicts in relation to foreign mining investments, the question of the Social License to Operate and the Corporate Social Responsibility policy answer of mining companies. The terminology, the specific relevance of each aspect and the reason to select it above other aspects will be discussed in the respective chapter.

1.4 Limitations

In a legal sphere with such complexity as the legal framework for foreign investments there are more questions than answers, and any research is prone to be limited in scope.

The author acknowledges that there are further fields of the law that the legal framework for foreign investments touches upon: Environmental Law is one of these. In all jurisdictions encountered, international and national Environmental Law are present and an environmental license is obligatory in one form or another before commencing mining activities. The complexity and technical nature of international and national environmental law would easily double the volume of this work and International,⁹ Australian,¹⁰ South African¹¹ and Colombian¹² environmental law, also with specific reference to mining projects¹³ has been discussed in depth elsewhere.

Health and safety laws were left to experts with the necessary technical and engineering expertise.¹⁴

⁶ For the discussion of a possible future framework see: Lee (2012), p. 16.

⁷ Sonter (2014).

⁸ National Geographics (2014).

⁹ Beyerlin and Maruhn (2011), Pevato (2003), Kiss and Shelton (2004) and Sands et al. (2012).

¹⁰ Fisher (2010) and Bates (2009).

¹¹ Brauteseth (1995) and McAuslan (2002).

¹² Rey (2010), Galvis (2012), with further references.

¹³ Marcus (1997) and Hester and Harrison (1994).

¹⁴ Gunningham and Sinclair (2012) and Yang (2012).

For those interested in the engineering side of a mining project, the project cycle of a mining project and its technical aspects the Northern Miner provides substantive guidance.¹⁵

Furthermore the legal framework for the financing of mining projects¹⁶ and the question of access to infrastructure such as railways and ports¹⁷ is not being discussed, as each topic has its own compilations.

The research is focused on the time frame between 1992 and 2013, but also includes past and more recent developments where they are helpful for an understanding of the status quo. The laws reflect their state as of June 30, 2013 if not noted otherwise. References such as today, now and current refer to June 30, 2013.

This particular time span was chosen with reference to fluctuations in the development of the commodity prices between 1992 and 2013 as a possible stimulus for investment, without attempting to draw conclusions regarding the impact of the development of the commodity prices on the changes in the law.

The time span furthermore was useful as the *Mabo case* in Australia (see *infra*) the end of Apartheid in South Africa (see *infra*) and the economic liberalization in Colombia (see *infra*) all took place in the early 1990s and strongly influenced how the legal framework for foreign investments in mining projects applicable to the respective countries developed.

Each specific question raised takes into account the status quo as of June 30, 2013. If applicable, it will then show how this status quo was reached by analysing the key legal developments of the past and conclude by analysing current political trends to point towards possible legal developments in the future.

1.5 The Choice of Australia, South Africa and Colombia as Jurisdictions to be Analysed in Depth

Considering the wealth of nations that possess some or substantial reserves of minerals and the limit of this volume a choice had to be made for nations that are so central for the world's mining landscape that developments in their respective jurisdiction have the potential to represent the global legal regime for mining investments.

This first and foremost is based on the Economic Demonstrated Resources (“*EDR*”) of crucial minerals.

At the same time it was crucial to guarantee geographic and economic differentiation to avoid that developments only reflect location specific legal developments or a certain level of industrial development.

¹⁵ Whyte et al. (2012).

¹⁶ Runge (1998), GMF (2014) and Annels (2004).

¹⁷ Livermore (2011).

Furthermore the data and legal material needed to be accessible to the author in respect of language and cooperation of the respective academic, public and private sources for information.

The choice fell for Australia, South Africa and Colombia. The countries, their regulatory regime and the reasons why they became the focus of a work on international mining investments are introduced in the following paragraphs and further detailed in the respective case studies:

1.5.1 Australia

1.5.1.1 Overview Over the Regulatory Regime for Mining in Australia

In various former British colonies on the Australian continent, democratic systems were established over 150 years ago. The Commonwealth of Australia was established in 1901.¹⁸

Today Australia can be described as a national federation of states and territories with representative democracies at national, state and local level.

The Commonwealth of Australia (to be distinguished from the Commonwealth (of formerly British Nations) includes six states (Queensland, Tasmania, Victoria, Western Australia and New South Wales) and several internal (the Australian Capital Territory which includes Canberra, and the Northern Territory) and external (Norfolk Island, Christmas Island and Cocos (Keeling) Islands) territories. The population of Australia is approximately 22 million people.¹⁹

The Australian Constitution provides specific powers to the national government, with the residual power of government retained by the states. Local governments are then creations of the state legislatures.

The states and territories retain jurisdictional power over natural resources such as minerals, onshore petroleum and offshore petroleum up to the three nautical mile limit from the baseline, while the national government shares jurisdictional power with the states and territories in other classes of natural resources and autonomously regulates offshore petroleum outside the three nautical mile limit from the baseline.²⁰

Whilst the regulation of mining activities in the several states and territories differs between the various jurisdictions, the focus of this work will be on the State of Queensland. The reason for choosing Queensland lies in its importance for the mining sector in Australia overall, especially with regard to the production of coal, and the accessibility of data.

¹⁸ For an overview over the history of the Commonwealth of Australia see: Australian History (2014).

¹⁹ PWC (2013), p. 4.

²⁰ Australian Government (2013).

In Queensland, Australia, the State Minister responsible for the legislation governing the management of natural resources is the Minister for Natural Resources and Mines. The Minister is assisted by the Department of Natural Resources and Mines.²¹ Further key departments include the Department of Energy and Water Supply,²² the Department of State Development, Infrastructure and Planning²³ and the Queensland Treasury.

When this report refers to Indigenous Australians, it refers to Aboriginal and Torres Strait Islander Australians.²⁴

1.5.1.2 Importance of Australia in the Global Mining Landscape

Australia has been a global centre for mining for decades: The history of modern mining activities in Australia started when gold was discovered in New South Wales in April 1851.²⁵ Today, Australia is referenced as the No. 3 on the World's Top Mining Countries.²⁶

Whilst Australia is still a key producer and net exporter of gold, today iron ore and coal production and export are even more important.

Australia possesses one of the largest EDR of Iron ore in the world. Of the global EDR of Iron ore that totals 168 billion tonnes, Australia accounts for 28 billion tonnes, or 16.7 %. Russia with 13 % holds the next biggest share of global EDR of Iron ore.²⁷

Australia is also one of the world's largest producers of Iron ore. In 2009 Australia's Iron ore production (including concentrate) was 423 million tonnes, with only China producing more Iron ore.²⁸ In 2009 Australia exported 390 million tonnes of Iron ore, with over two thirds of it being exported to China.²⁹

EDR of Coal in Australia as of 2012 was calculated to be 76,400 million tonnes. Of the world's EDR of Coal totalling 860 billion tonnes, Australia's share is 9 %. Its reserves rank fourth behind the United States, Russia and China.³⁰

Australia is also one of the world's largest producers for Coal. Australia's production in 2012 was 241 million tonnes, with a global share of coal production of 6.3 % and with only China and the United States of America producing more Coal.³¹

²¹ Queensland Government (2014).

²² Queensland Government (2014).

²³ Queensland Government (2014).

²⁴ Australian Government (2014), p. 2.

²⁵ La Croix (1992b).

²⁶ O'Donnell (2014).

²⁷ Geoscience Australia (2014a).

²⁸ Geoscience Australia (2014b).

²⁹ Australian Bureau of Agricultural and Resource Economics and Sciences (2014), p. 23.

³⁰ BP, p. 30.

³¹ BP, p. 32.

Compared to China's vast economic resources of rare earth oxides, the Australian share of the world's economic resources of rare earth oxides is small and estimated at less than 2 %. ³² Considering the quasi monopoly position of China, any substantial production site outside of China is however crucial for the global mining landscape. Australia does have several potential and some realized rare earth projects.

The Mount Weld project already produces rare earths, ³³ the Cummins Range project ³⁴ is under construction in Western Australia and further feasibility studies underway in the Northern Territory and New South Wales. ³⁵

The development of these projects to commercial production would make Australia one of the few countries in the world actually producing rare earth oxides. ³⁶ Fully state-owned mining companies do not exist in Australia.

1.5.2 South Africa

1.5.2.1 Overview Over the Regulatory Regime for Mining in South Africa

South Africa has a hybrid legal system, having incorporated parts of a civil law system through Dutch influence, parts of a common law system through British influence and parts of South African customary law. ³⁷

According to section five, six and seven of the Constitution of South Africa the levels of governmental hierarchy in South Africa are the national (federal) level, the provinces and the local level.

The Minister responsible for governing the management of natural resources is the federal Minister Mineral Resources. The Mission statement of the Department of Mineral Resources reads as follows: “[To] *Promote and Regulate the Minerals and Mining Sector for transformation, growth, development and ensure that all South Africans derive sustainable benefits from the country’s mineral wealth.*” ³⁸

Its mineral policy and promotion branch is responsible for designing and implementing mineral related policies that encourage investments, at the same time it ensures that environmental standards are observed. Its mineral regulation branch deals with regulating the mining industry’s process of post-Apartheid

³² Geoscience Australia (2014b).

³³ Rarus (2014).

³⁴ Navigator Resources Navigator Resources Limited (2014).

³⁵ Geoscience Australia (2014b).

³⁶ Geoscience Australia (2014b).

³⁷ Du Bois (2004), p. 15.

³⁸ Department of Mineral Resources South Africa (2011), p. 4.

transformation. Health and safety legislation is implemented by the mine health and safety inspectorate.³⁹

Further public entities and agencies relevant in the South African mining sector are: the South African Diamond and Precious Metals Regulator, the State Diamond Trader, the Council for Geoscience and the Council for Mineral Technology and Research.

When this work refers to Historically Disadvantaged South Africans (“*HDSAs*”), it refers to “*any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.*”⁴⁰

1.5.2.2 Importance of South Africa in the Global Mining Landscape

In 1867 the discovery of diamonds on the banks of the Orange River close to South Africa’s Northern Cape Region’s capital Kimberley ignited the mining history in South Africa. The discovery of the world’s largest gold deposits in Witwatersrand shortly thereafter in 1886 led to the first gold rush in South Africa. The wealth of the region in part also triggered the Anglo-Boer Wars, which in the end led to the annexation of South Africa by the British Empire by 1910.⁴¹ Today, South Africa is referenced as the No. 1 on the World’s Top Mining Countries.⁴²

Up to today diamonds and gold play a key role in the South African mining industry, but iron ore, coal and platinum also gained importance.

South Africa is probably most renown in the mining industry for its quasi-monopoly on Platinum. South Africa is estimated to possess EDR of Platinum of 63,000 tonnes and therefore about 95 % of the global EDR.⁴³ With a production of 131 tonnes it produces more than five times of the second largest producer Russia—and has an abundant reserve to maintain the production on a similar level for decades to come or even increase it.⁴⁴

South Africa is estimated to possess Economically Developable Resources (EDR) of Iron ore of about 1000 million tonnes of the global EDR of Iron ore. This is about 0.9 % of the global EDR. The importance of South Africa for the global Iron Ore market derives from its high production levels. It currently produces about 72 million tonnes of Iron Ore a year of which is more than the United States.⁴⁵

South Africa’s estimated EDR of coal is about 30,200 million tonnes. With an approximate 3.5 % of the world’s coal reserves of 860,938 million tonnes it is

³⁹ Government of South Africa (2012), p. 370.

⁴⁰ Government of South Africa (2004), p. 2.

⁴¹ Projects IQ (2014).

⁴² O’Donnell (2014).

⁴³ USGS (2014a), p. 121.

⁴⁴ USGS (2014a), p. 121.

⁴⁵ USGS (2014a), p. 85.

therefore ranked 9th on the global scale.⁴⁶ With a production of about 147 million tonnes it produces about 3.8 % of the global market.⁴⁷

South Africa's estimated EDR of gold is about 6 tonnes. This is about 13 % of the global EDR of gold, ranking South Africa as No. 2. It's production is at about 160 tonnes, ranking South Africa fifth on a global production scale.⁴⁸

Being the world leader in rare earth production in the 1950s, South Africa now again has a great potential for rare earth projects.⁴⁹ Construction and small-scale production have already started at Steenkampskraal⁵⁰ and Zandkopsrift⁵¹ and separation plants are being constructed.⁵²

Another key player in the South African mining industry is the chamber of mines. It is an industry employers' organization with the purpose to extract, promote and protect the collective interests of its members.⁵³

There are some state-owned mining companies, such as Alexkor and the newly founded African Exploration Mining & Finance Corporation ("*AEMFC*"), that explore coal and uranium.⁵⁴ Both do not have a major stake in the South African mining industry landscape so far.

1.5.3 Colombia

1.5.3.1 Overview Over the Regulatory Regime for Mining in Colombia

According to article 1 of the Constitution of Colombia of 1991. Colombia is organized as a social State of law, organized as a unitary, decentralized, democratic, participatory and pluralistic Republic with autonomous territorial entities.⁵⁵

⁴⁶ BP (2014), p. 30.

⁴⁷ BP (2014), p. 32.

⁴⁸ USGS (2014a), p. 67.

⁴⁹ Jepson (2014), p. 17.

⁵⁰ Great Western Minerals Group (2014).

⁵¹ Frontier Rare Earths (2014).

⁵² Jepson (2014), p. 10.

⁵³ Chamber of Mines (2014).

⁵⁴ Creamer's Media Mining Weekly (2014).

⁵⁵ Article 1 of the Constitution of Colombia of 1991: Colombia es "(...) *un Estado social de derecho, organizado en forma de República unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la dignidad humana, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general.*" [(...) a social State of law, organized as a unitary, decentralized, democratic, participatory, and pluralistic Republic, with autonomous territorial entities, founded on respect for human dignity, work and the solidarity of the persons composing it, and the prevalence of the general interest.]

According to article 286 of the Constitution of Colombia of 1991, below the federal level the political power is organized in the levels of: “(…) *departamentos, los distritos, los municipios y los territorios indígenas*.” [(...) departments, districts, municipalities, and Indigenous territories.]⁵⁶

In Colombia, mineral resources are generally managed at the federal level. There is one exception however: The government of the departments of Antioquia has the capacity to grant and control mining concession agreements for all minerals in their territory, and the governments of the departments of Cesar, Norte de Santander, Caldas and Boyacá have the capacity to grant and control mining concession agreements for all minerals, except emeralds and coal.⁵⁷ Yet the applicable law remains the same.

The Minister responsible for governing the management of natural resources is the Minister of the (federal) Ministerio de Minas y Energía [Ministry of Mines and Energy]. The Mission statement of the ministry is to create and adopt policies aimed at sustainable utilization of mineral and energy resources and thereby to contribute to economic and social development of the country.⁵⁸

By decree 4134 of 2011 the government has founded the Agencia Nacional de Minería [National Mining Agency]. The Agencia Nacional de Minería become operational May 3rd, 2012 and was established to manage the day-to-day administration of the mineral sector for the government.⁵⁹ The mission statement of the agency states is to manage the mineral resources owned by the State efficiently and effectively to promote productivity and competitiveness of the mining sector and in order to maximize the contribution of the mineral resources to the sustainable development of the country.⁶⁰

Prior to its establishment these tasks, such as awarding mining titles and solving related disputes, had been administrated by “*Ingeominas*”⁶¹ [Colombian Institute of Geology and Mining]—which had received substantial criticism for its management of Colombia’s natural resources.⁶²

⁵⁶ Article 286 of the Constitution of Colombia of 1991 “(…) *departamentos, los distritos, los municipios y los territorios indígenas*.” [(...) departments, districts, municipalities, and Indigenous territories.]

⁵⁷ Law Business Research Ltd (2014), p. 2.

⁵⁸ Agencia Nacional de Minería (2014), *Misión y Visión: “Formular y adoptar políticas dirigidas al aprovechamiento sostenible de los recursos mineros y energéticos para contribuir al desarrollo económico y social del país.”* [To create and adopt policies aimed at sustainable utilization of mineral and energy resources to contribute to economic and social development of the country.]

⁵⁹ Agencia Nacional de Minería (2014).

⁶⁰ Agencia Nacional de Minería (2014), *Misión y Visión: “Administrar en forma eficiente y eficaz los recursos minerales de propiedad del Estado para promover la productividad y competitividad del sector, a fin de maximizar su contribución al desarrollo sostenible del país.”* [To manage the mineral resources owned by the State efficiently and effectively to promote productivity and competitiveness of the sector, in order to maximize their contribution to the sustainable development of the country.]

⁶¹ Amortegui and Jiménez (2013).

⁶² Amortegui and Jiménez (2013).

Other public entities and agencies relevant in the Colombian mining sector are the Servicio Geológico Colombiano [Geological Service Colombia] which aims to perform scientific research to generate geoscientific knowledge of the national territory⁶³ and the “*Unidad de Planeación Minero Energética*” [Mining and Energy Planning Unit] that helps the government to determine economic information for tax/policy choices.⁶⁴

1.5.3.2 Importance of Colombia in the Global Mining Landscape

While between the 1980s and the 2000s foreign direct investors were careful to invest in Colombia because of the security situation,⁶⁵ the higher level of safety in the last years has redrawn interest to Colombia⁶⁶ and several new projects to explore the mineral wealth of Colombia are on their way.⁶⁷ Colombia has become renowned as key mining country in Latin America for its combination of mineral wealth and accessibility for foreign investors.⁶⁸

The mining industry plays a steadily increasing important role in the overall Colombian economy. By 2012 in Colombia the value derived from the exploitation of mines and quarries was about USD 20 billion, which equals 7.7 % of Colombia’s GDP.⁶⁹ Coal, Nickel and Gold play a key role in the Colombian mining market.

Colombia is estimated to possess EDR of coal of about 6746 million tonnes. Of the world’s EDR of Coal totalling 860 billion tonnes, Colombia’s share is 0.6 %.⁷⁰ The specific importance derives from the fact that it possesses the largest reserves in Latin America, making it indispensable for the local industry for accessing Coal without substantial transport costs. With a steadily increasing production of about 59 million tonnes in 2012 it produces about 1.5 % of the global market.⁷¹

Colombia is estimated to possess EDR of Nickel of about 1,100,000 tonnes. With a production of 72,000 tonnes in 2012 it is ranked 11th with request to global production.⁷²

⁶³ Servicio Geológico Colombiano (2014), *Objetivos y Funciones*: “Realizar investigación científica básica para generar conocimiento geocientífico integral del territorio nacional.” [Perform basic scientific research to generate comprehensive geoscientific knowledge of the national territory].

⁶⁴ La Unidad de Planeación Minero Energética UPME (2014).

⁶⁵ For an overview over the historical developments see: Pascuzzi (1994), p. 451; Federal Research Division (2014).

⁶⁶ Germany Trade and Invest (2014).

⁶⁷ Resource Investing News (2014).

⁶⁸ Walther-Meade (2014).

⁶⁹ Wacaster (2014), p. 2.

⁷⁰ BP (2014).

⁷¹ BP (2014).

⁷² USGS (2014b), p. 2.

For Colombia it is difficult to determine a reliable estimate of EDR of gold as to the various illegal and small-scale mining projects. The estimate in regards to the production based on export/sale statistics shows a production of 66 tonnes in 2012.⁷³

There are no major state-owned companies active in the Colombian mining business. Ecopetrol is a major player, but only in the energy business.⁷⁴ The former state-owned mining company Minercol was privatized⁷⁵ and eventually liquidated against strong union-led public protest.⁷⁶

Other key players in the Colombian mining scene are artisanal, local, Indian and Afro-Colombian miners whose role is discussed in detail infra.

1.5.4 *Acknowledged Exemplary Nature of Case Studies*

While results derived from the comparison Australia, South Africa and Colombia will always be of exemplary nature only, the specific combination of Australia, South Africa and Colombia provided additional advantages:

Australia, South Africa and Colombia substantially differ in their geographic location, size, level of industrial development in general and the development of their mining industry, their legal systems and legal history, the number and ethnic background of their citizens, their culture, language and their (non-)colonial history. Any result found to equally exist in these three jurisdictions is therefore more likely to be a result of a global, rather than a region specific development.

⁷³ Wacaster (2014), p. 4.

⁷⁴ Ecopetrol (2014).

⁷⁵ Issued by article 358 Mining Law 2001: “*La Empresa Nacional Minera, Minercol Ltda., debera en un plazo no mayor a seis (6) meses, contados a partir de la expedicion del presente Codigo, reestructurar su organizacion administrativa y su planta de personal, de conformidad con los lineamientos establecidos por el Gobierno Nacional.*”

[The National Mining Company Ltd.- MINERCOL LTDA should in a term not over six (6) months, counted as from the issuing of the present Code, restructure its administrative organization and its staff, according with the guidelines established by the National Government.];

The English translations of Spanish Acts are based on Minminas, *English translation Mining Law 2001*. In the case of the Mining Law 2001 and Colombia Commercial Code on the translation provided by Foreign Tax Law, Inc, *Colombia Commercial Code English* in the case of the Colombian Commercial Code 1971. Further translation and modifications were undertaken were done by the author, if so deemed necessary.

⁷⁶ Labournet (2014).

1.6 Methodology

This work uses a legal science approach regarding the analyses of the status quo and a political science approach regarding the analysis of future political trends. Past developments required a hybrid approach, combining both a legal science and a political science approach for their understanding.

Legal science has been defined as the science:

(...) die sich mit der Lösung von Rechtsfragen im Rahmen und auf der Grundlage einer bestimmten, historisch gewachsenen Rechtsordnung befasst, also die herkömmlicherweise so genannte Jurisprudenz.⁷⁷

[(...) which deals with the resolution of legal issues in the framework and on the basis of a specific, historically developed legal system, conventionally known as jurisprudence.]

For the purpose of this work, the legal science approach includes taking into account the legislated status quo and legislative developments such as past acts as well as executive orders and judgments by the judiciary.

Political science has been defined as:

(...) including studies of political structures, processes and policies in (...) societies, the contemporary ideas, ideologies and theories that determine the framework for political decision making, and the organizational and diplomatic approaches to cooperation and conflict resolution in the international system.⁷⁸

For the purpose of this work, the political science approach includes taking into account political power structures, processes and policies that are likely to impact on the legal framework for foreign investments in mining projects in the future.

The research is based on primary and secondary sources.

Primary sources were gathered whilst living in Brisbane, Queensland, Australia from January 2012 to July 2013, specifically while working at HopgoodGanim's Resources and Energy practice group, as a student of the University of Queensland and as a Visiting Scholar at the Centre for Social Responsibility in Mining of the Sustainable Minerals Institute. Primary sources were furthermore gathered from research field trips to the Ukraine in January 2013, South Africa in February 2013 and Colombia in June 2013.

No formal interviews were conducted, but numerous discussions with and feedback on my writing from professors, lawyers, foreign investors, mining engineers, mining company staff, NGO activists, politicians, public servants and members of local/indigenous populations helped me to frame my thinking and to focus my research on the most pressing issues in the context of International Mining Investments.

Secondary resources were mostly gathered at the International Investment Law Centre at the University of Cologne, Germany, the University of Queensland,

⁷⁷ Larenz and Canaris (1995), p. 7.

⁷⁸ University of Queensland (2014).

Brisbane, Australia, the University of Cape Town, South Africa and the Universidad Nacional in Bogota, Colombia.

1.7 Line of Inquiry and Outline of the Study

This chapter discusses the approach and outlines the theoretical framework of the study. It outlines what the legal challenges of the realization of international mining projects are. From the numerous legal challenges likely to be found it was then necessary to select those that are key challenges and require scholarly attention in this work and beyond.

Chapters 2–11 discuss the key questions to be asked for international mining investments. Each of these chapters introduces the question and its relevance in the context of international mining investments and determines the horizon of the observations. It then presents the results of the research in the three chosen jurisdictions by presenting first the legal status quo and then past legal and likely future political developments that might alter the legal environment in the near future. When analyzing the legal challenges of the realization of international mining projects in different host countries the work then shall analyze the differences and similarities in the answers to the legal challenges posed, focusing on the identification of similarities and common trends.

Chapter 12 summarizes and compares the finding of Chaps. 2–11 and undertakes them a thorough analysis. The question arises what the results mean for the future of the study of the legal framework for foreign investments in international mining projects. The work finds the introduction of a sub-category of foreign investment law to be called “*International Mining Investment Law*” (“*IMIL*”) to be a necessary next step and concludes Chap. 12 and the work by sketching the pillars of such International Mining Investment Law as a framework to capture and resolve the specific legal challenges international mining investments face as of today and in the future.

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