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Update of reforms to the mining sector and investment protection in Africa

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Mining sector reforms & the rise in local content requirements

In the past few years, several African States have implemented wide-ranging reforms to their mining sector, which have resulted in the imposition of increased regulatory requirements on actors as well as, in some instances, upheavals of mining licenses in these countries. In particular, African States are increasingly implementing policies driven by resource nationalism, with a view to increasing local participation in the mining sector.

Some examples of these legislative changes include:

- Most recently, **Cameroon** adopted a new Mining Code on 19 December 2023. This new code significantly strengthens the position of the national mining company (Sonamines) created in 2020. Sonamines has not only been granted the possibility to implement production-sharing schemes but is now permitted to collect mining taxes on behalf of the State. Sonamines also has a right regarding the purchase and commercialisation of diamonds and gold.

In parallel, the new statute also confirms the local content obligations which had been introduced in the 2016 version of the Code, notably including principles of national preference for employment and general procurement, as well as an obligation for foreign companies to set up technology transfer programs.



Mining sector reforms & the rise in local content requirements (cont'd)

- **Mali:** on 8 August 2023, the Malian government promulgated a new Mining Code including increasing local content requirements, such as a maximum 30% participation (including a 10% free equity stake) of the State in mining projects as well as a mandatory participation by local companies (5%). Mali also concurrently adopted a law on local content setting out a principle of national preference for employment and procurement of raw materials in the mining sector.
- **Tanzania:** in 2017, Tanzania implemented a new Mining Act requiring local companies to have a minimum 5% shareholding in mining companies, in addition to the State being granted a free equity stake in all existing mining projects. In connection with this reform to the mining sector, Tanzania also revoked several existing mining licenses, resulting in the introduction of several international arbitration cases against the State.
- Other States such as **Burkina Faso**, **Guinea** and **Madagascar** have also recently implemented or announced their intention to implement changes to their mining codes and laws on local content in the mining sector in order to strengthen local participation.




Potential relevance of rights and protections enshrined in international treaties

Provided that a potential investor is informed about these new legal requirements prior to making an investment, these new regulations and local content requirements may be taken into account by that potential investor in their investment decision, except in specific circumstances (such as where local content requirements are expressly prohibited by international treaties signed by the State in question), these legal requirements are therefore unlikely to be in breach of the State's international obligations.

In contrast, such reforms have the potential to heavily impact the rights of existing investors if they are applied to ongoing projects, i.e. after substantial investments in capital and resources have been made, resulting inter alia in higher operating costs and the substantial reduction of the projected returns of the investment.

Against this background, several remedies can be available to investors to mitigate this political and legal risk, these range from commercial discussions and negotiations with the host State regarding the application of new legal requirements to political risk insurance or potential contractual claims under existing mining concessions (including relying on provisions such as stabilisation clauses or contract adaptation/hardship clauses).





Potential relevance of rights and protections enshrined in international treaties (cont'd)

Alongside these remedies, investors should also be aware of the potential protections offered by bilateral investment treaties (“**BITs**”) and international investment agreements (“**IAs**”) that might be available to them:

- **What are these treaties?** BITs and IAs are international treaties concluded between States which have the unique power to stipulate a series of substantive protections for private investors from one (home) State in the other (host) State, and often include the right for these investors to bring direct arbitration proceedings against the host State in case of breach of these protections.
- **What protections are available?** Typically, treaty provisions forbid unlawful expropriation (i.e. without a public purpose and without adequate compensation being paid), and impose obligations on the host State, such as according fair and equitable treatment (i.e. act transparently and in a non-arbitrary/discriminatory manner), full protection and security (physical protection), national treatment and most-favoured treatment to the investor. Some treaties also contain a clause requiring the State to comply with all the obligations entered into towards investors (such as the implemented mining concessions).
- **How can these protections be enforced?** Crucially, most BITs and IAs contain dispute resolution provisions allowing private investors to start direct arbitration proceedings against the host State to obtain compensation for any breaches of these substantive protections. Investors can therefore seek redress before a neutral international forum. Many of these disputes are administered by the International Centre for the Settlement of Investment Disputes (“**ICSID**”), which ensures the increased enforceability of any awards – these being treated as final court decisions in most States.

It may therefore be crucial for mining companies operating in Africa to ensure they have access to these international protections in light of the current reforms being adopted.

Our expertise at your service

In this regard, we have extensive experience of working with clients operating in the mining industry in Africa, who face a multitude of legal and regulatory challenges across jurisdiction, advising on a wide array of issues relating to the protection of their investments. Upon request, we accompany our clients through all stages, from investment structuring and contract drafting to, negotiations, pre-litigation advice and representation before courts and international arbitral tribunals.

Our clients include private and publicly traded mining companies, mining services companies and lenders to the sector. We also assist clients investing into the continent in their negotiations with host governments, drawing in part upon our experience advising African governments on revisions to their mining laws.

We are at the forefront of mining developments – integrating renewable energy sources, adopting sustainable mining practices, digitalization and related cyber risk, and beyond. We help you think around corners.

You will find a sample of our relevant arbitration experience in Africa in the following slide.

The team offers in-depth knowledge of the markets, **excellent strategic thinking** and truly international coverage”

– *Legal 500 UK 2023*, Mining and Minerals

The team has the "ability to almost problem-solve or **pre-empt and identify issues before they arise**"

– *Chambers Global 2022*, Mining (South Africa)



Consistently ranked
as one of the top
global arbitration
practices
*Global Arbitration
Review 2023*



A selection of our relevant mining experience in Africa



Providing analysis and advice to the **Ministry of Petroleum of a West African country** on investment policy and all investment treaties signed by this country in light of legislative changes, including advice on treaty renegotiation and amendments to its investment policy and a review of their oil and gas exploration contracts.



Advising the **Central Bank of a West African country** in relation to arbitration proceedings relating to a multi-million dollar dispute with a European company arising out of contracts for the refining and certification of gold.



Acting for a **mining company** in an ICC arbitration concerning the ownership / control of a Cypriot SPV holding a concession in Egypt and related international strategy.



Acting for a major metals and mining company in relation to claims against an African state entity following the acquisition of a mining license.



Serious Fraud Office v. Eurasian Natural Resources Corporation Limited (ENRC) - secured, on behalf of **ENRC**, one of the most significant and widely acclaimed Court of Appeal decisions for many years, which has re-established the importance, and applicability, of legal professional privilege, including in the context of internal investigations.



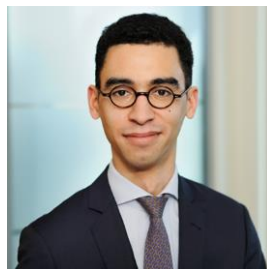
Successfully representing **an African leading mining service company** in an arbitration regarding a major gold mine in West Africa.

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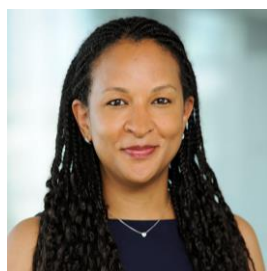
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