



The Middle Eastern and African Arbitration Review

2023

Mining Arbitrations in Africa

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Mining Arbitrations in Africa

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Clifford Chance

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In summary

The mining sector presents inherent risks that make it naturally predisposed to disputes. International arbitration is often the most appropriate means to resolve those, particularly for actors in the mining sector in Africa. Most of the recent (known) disputes that have arisen involve commodities constituting a significant portion of African exports, namely iron ore, technology metals and oil and gas. Further, the push towards achieving net zero emissions by states and global majors, the Russia–Ukraine war and associated consequences and the transition to green energy have presented challenges, and will continue to do so, in the mining sector across Africa.

Discussion points

- Trends in African mining arbitrations
 - Impact of the Russia–Ukraine war on African mining disputes
 - Environmental, social and governance (ESG) and climate change
 - Impact of Chinese investments on African mining disputes
 - Resource nationalism
 - Managing political risk beyond investment treaties
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Referenced in this article

- *Sundance Resources Limited and Cam Iron SA v Republic of Cameroon*
 - *Process and Industrial Developments Ltd v Nigeria*
 - *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria*
 - *AECI Mauritius Ltd v Burkina Faso*
 - *The Carlyle Group LP and others v Kingdom of Morocco*
 - *AGEM Ltd v Republic of Mali*
 - *Menankoto SARL v Republic of Mali*
 - *Gerald International Limited v Republic of Sierra Leone*
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This article aims to provide a concise overview of the characteristics and risks of mining disputes in Africa in the context of the current investment, economic and political climate, in addition to an update on Africa-related mining arbitrations that have unfolded over the past year.

The year 2022 saw unprecedented disruption to the global markets, especially in the energy and resources sector, partly owing to the Russia–Ukraine war. In 2020, Russia was the second largest exporter of mineral products in the world, exporting US\$166 billion in value, mainly to China (US\$32.3 billion), the Netherlands (US\$17.5 billion), Germany (US\$9.72 billion), Italy (US\$9.6 billion) and South Korea (US\$9.22 billion).^[1] The wide-ranging international sanctions against Russia implemented throughout 2022 have triggered severe disruption in the raw commodities markets.^[2] Further, with supply chain disruption felt during the covid-19 pandemic, and further exacerbated in the wake of the Russia–Ukraine war, governments and the natural resources industry more generally are turning to other supply chain sources to improve security, thus shifting away from reliance on Russian raw materials.

These geopolitical tensions over natural resources, including on the African continent, have been compounded by soaring global demand for green transition minerals (such as cobalt, copper, rare earths, nickel and lithium). While this climate presents an opportunity for foreign investments and economic growth across many African states, it is likely to increase, at the same time, the potential for disputes.

The likelihood of resource-related disputes is also heightened owing to certain factors that – without being Africa-specific – are often prevalent in resource-rich African countries. Mining investments and projects in Africa are sensitive to political risk, which commonly manifests itself in the form of government interference owing to a climate of political instability (at times resulting in military coups), lack of consistent governance, and limited infrastructure and public services. A corollary to Africa's structural and political challenges is exposure to security threats, ranging from trespass by artisanal miners to attacks by military or paramilitary groups.

This article outlines several options available to investors operating in the African mining sector to mitigate these investment risks, including the use of stabilisation and investment protection provisions in long-term host state agreements.

Trends in African mining arbitrations in 2022

The past year saw a significant number of international arbitrations commencing at the World Bank's International Centre for Settlement of Investment Disputes (ICSID): ICSID recorded 41 new cases in 2022.^[3] At ICSID, the proportion of new cases involving sub-Saharan Africa remained steady at 14 per cent of the centre's overall caseload, while the oil, gas and mining sector remained the largest sector, accounting for 24 per cent of new cases. The new ICSID cases in the sub-Saharan Africa region (two in total) involved Cameroon^[4] (concerning an oil and gas enterprise) and Senegal^[5] (concerning a coal power plant). In North Africa, one new ICSID case involving Morocco^[6] was commenced concerning urban development projects.

The 2022 edition of this article reported a wave of new mining arbitration cases in Central Africa. The four mining arbitrations commenced against the Republic of Congo in 2021 are still in progress, with two cases at the ICC^[7] and two cases at ICSID.^[8] In Cameroon, a mining arbitration was also commenced in 2021 at the ICC, *Sundance Resources Limited and Cam Iron SA v Republic of Cameroon*. In that case, the claimant successfully sought an interim order from an ICC emergency arbitrator in 2022, preventing Cameroon 'from taking any measures, directly or indirectly, that disturb' the claimant's rights in respect of its tenement.-

^[9] As reported by the claimant, Cameroon nonetheless proceeded to issue an exploitation permit in relation to the subject tenement.^[10] To the best of the authors' knowledge, this was one of the only publicly recorded interim measures orders issued by an international arbitrator against an African government in 2022.

In March 2022, Rwanda successfully defended a mining arbitration commenced in 2018.^[11] The claimant-investors in this case claimed US\$95 million in damages on the ground that Rwanda had allegedly breached certain articles of the Rwanda–United States bilateral investment treaty (BIT) (2008). The tribunal dismissed the first claimant's claims on the basis that it had no material investment in Rwanda, entailing the tribunal's lack of jurisdiction. The tribunal also dismissed the second claimant's claims on the merits, finding that there was no prospect of the investor demonstrating that it was a satisfactory candidate for the grant of a mining licence, and Rwanda therefore did not breach the BIT.^[12] The claimants were ordered to pay Rwanda's costs, and the parties were ordered to split the costs of the arbitration.^[13]

In January 2023, the trial concerning Nigeria's bid to overturn P&ID v Nigeria^[14] commenced in the London courts, with an expected trial duration of eight weeks.^[15] Nigeria will claim that the investor obtained the original contract through bribery.^[16] The US\$6.6 billion award in favour of the investor delivered in 2017 has grown to over US\$11 billion arising from interest owed since the award date.

Finally, with debt levels already at crippling heights for many African states, the prospect of an award ordering the payment of damages to an investor may be leading some states towards faster settlement of their disputes. For example, in 2022, a number of mining and natural resource-related arbitrations were discontinued under ICSID Rule 43(1) and ICSID Rule 44. Relevantly, four of the six ICSID natural resource-related arbitrations discontinued in 2022 in Africa had only been commenced in 2021. These six arbitrations included:

- *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/21/7): discontinued on 13 October 2022 pursuant to ICSID Arbitration Rule 43(1);
- *AECI Mauritius Ltd v Burkina Faso* (ICSID Case No. ARB/21/18): discontinued 23 September 2022 pursuant to ICSID Arbitration Rule 43(1);
- *The Carlyle Group LP and others v Kingdom of Morocco* (ICSID Case No. ARB/18/29): discontinued 14 September 2022 pursuant to ICSID Arbitration Rule 43(1);
- *AGEM Ltd v Republic of Mali* (ICSID Case No. ARB/21/62): discontinued 17 April 2022 pursuant to ICSID Arbitration Rule 44;
- *Menankoto SARL v Republic of Mali* (ICSID Case No. ARB/21/38): discontinued 28 January 2022 pursuant to ICSID Arbitration Rule 44; and
- *Gerald International Limited v Republic of Sierra Leone* (ICSID Case No. ARB/19/31): discontinued 28 January 2022 pursuant to ICSID Arbitration Rule 43(1).

Such a high number of cases discontinued early (presumably as a result of settlement) denotes the appetite of many African governments for negotiated and mediated settlement outcomes, which is at odds with the hard line often taken by investor-state dispute settlement respondent states in other parts of the world.

Impact of the Russia–Ukraine war on African mining disputes

The Russia–Ukraine war has had major consequences on the global economy. Outside of the mining sector, food security has been identified as the major threat to African countries in 2022, particularly the supply and cost of wheat and sunflowers. Prior to the Russia–Ukraine war, Russia was the largest supplier of wheat to Africa, while Ukraine was the third. Wheat prices are said to have increased by 64 per cent in Africa, with surging food prices having triggered protests in Niger and Mozambique.^[17] It is anticipated that other countries, such as Cameroon, the Ivory Coast and Senegal, could also see internal turmoil as a result of food price hikes.^[18] As such, local unrest in response to food price hikes and increases in the cost of living could see general political risk increase in some countries and disruption to operations, each impacting existing and future mining projects.

Additionally, with Russia being the third-largest oil producer in the world, the disruption of oil prices in the global market has increased fuel prices and the cost of food production.^[19] However, Africa as a continent is generally less reliant on Russian fuel imports than other parts of the world: in 2019, only 2.9 per cent of all African imported fuel was sourced from Russia.^[20]

On the political front, the response from African countries to the UN Resolution on Ukraine of 2 March 2022 was divided. In the resolution, 28 countries voted in favour, 26 voted not in favour and 17 countries^[21] abstained.^[22] The next Russia–Africa summit was due to be held in Addis Abbaba, Ethiopia, in November 2022; however, it was postponed until mid-2023. Russian Foreign Minister Sergey Lavrov indicated that the agenda for the next summit will include trade, the development of natural resources, energy and security, among other issues.^[23] Thus, there will likely be further developments in Russia's mid- to long-term plans for the development of natural resources in Africa.

In addition to the Russia–Ukraine war's general impact on inflation, mining projects in Africa are bound to see operations and transportation input costs dramatically increase as a result of higher energy prices.^[24] This will likely have the most impact on ore transportation. High energy costs, coupled with political instability, will likely disrupt exploration and early-stage projects, impacting their economic feasibility and delaying development.^[25] For some commodities, this will be counterbalanced with high commodity prices as a result of supply issues. These developments could well lead to a new wave of disputes between foreign companies and their host governments.

More generally, long-term implications of the Russia–Ukraine war in Africa may include geopolitical realignment, social and economic instability, and debt unsustainability as many countries and populations in Africa try to cope with rising costs of living. There are justifiable concerns that the ongoing Russia–Ukraine war will continue to create further instability across the continent.

ESG and climate change

Held in Sharm el-Sheikh, Egypt, in November 2022, the United Nations Climate Change Conference 2022 (COP 27) saw further developments on climate change action. For the first time, a historic decision was taken to establish an international fund for responding

to loss and damage suffered by vulnerable countries arising from the consequences of climate change. Other areas of concern for developing states were discussed and advanced, including stranded assets, desertification and access to climate finance.^[26]

Conversely, the conference did not agree on phasing out coal and other fossil fuels or setting emission peaking periods.^[27] We expect there will be continued pressure to agree on this at COP 28 and future conferences. Further, COP 28 will likely see focus on climate change action implementation. Outcomes such as agreements to phase out the use of coal and other fossil fuels, or setting emission peaking periods, would seem to be in tension with mining operations in developing markets, particularly extraction and beneficiation of technology metals required for renewable energy. The technological revolution required to address climate change presents significant opportunities, particularly for states endowed with the natural resources used in the production of these technologies, including cobalt, copper, rare earths, graphite, nickel bauxite and lithium.

Various African states have significant potential in relation to these commodities: the Democratic Republic of Congo (DRC) is home to the largest reserves of cobalt; Guinea has the world's largest reserves of high-grade bauxite; while Zimbabwe, Namibia, Ghana, the DRC and Mali have some of the largest reserves of lithium. Significant copper reserves are located in the DRC, Zambia, South Africa and Namibia; and rare earth deposits have considerable potential in Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi. However, the race for these resources must be tempered by growing consideration of the social and human rights impact of undertaking new mining operations as well as closing existing fossil fuel operations, including for the purpose of advancing the green transition – hence the holistic approach to ESG.

All companies, not just those operating in Africa, are being required to show that they comply with high standards of ESG. This broad and encompassing term has risen fast to the top of boardroom agendas, requiring policies and frameworks to address all aspects of ESG in companies' operations, including climate change, sustainability and human rights-related risks.

This is particularly the case in the context of mining investments in Africa, in part because of the specific risks and characteristics outlined in this article. Stakeholders increasingly demand effective actions and heightened levels of transparency in relation to ESG issues, and mining investors seeking finance are increasingly required to demonstrate their ESG credentials. The mining industry is arguably the most exposed to ESG risks, with shareholder activism and NGO participation placing the sector under intensive focus. Particular emphasis is being placed on mining operations in Africa because of a poor historical track record by some foreign companies. For many African states, the harmful actions of some foreign investors in the past justify a focus on compliance with local laws and, increasingly, ESG issues, including international environmental and human rights standards. A failure to comply with these laws and standards may result in claims flowing from the termination of contracts or exploitation of rights by states, as well as in counterclaims being made by states against investors. Mining investors need to be ready to demonstrate their efforts in compliance with local laws and regulations, socio-environmental standards and business human rights principles. This is particularly true in the context of investor–state disputes concerning natural resources projects located in emerging economies, where respondent states and sometimes third parties, through *amicus curiae* submissions, will increasingly question claimants' compliance with their legal obligations on an ESG front. Similarly, many

new generation BITs and free trade agreements (FTAs) contain express provisions reserving states' rights to regulate in order to protect public welfare objectives, such as public health, safety and the environment – much akin to similar carveouts in the context of World Trade Organization (WTO) agreements.

Thus, it is likely that ESG-related issues will be an increasingly prominent feature in mining arbitrations in Africa, driven by increasing references to the protection of environmental, social and public health objectives in both contractual arrangements and investment treaties. Foreign investors are usually obliged to comply with local laws as a condition of their concession, as a term in a host state agreement (where there is one), or even as a gateway requirement to qualify as a covered investment under some investment treaties. Breaches of these obligations may result in claims against the investor or counterclaims by the state. In the context of investment treaty arbitration, the plea of illegality, namely that the investor has failed to comply with local laws, is often pleaded by states 'as a question of admissibility or a question on the merits of the case'.^[28]

Security issues, international humanitarian law and the impact on mining disputes

Security and international humanitarian law (IHL) are other issues relevant to the African mining sector. There were two coups in Africa in 2022 (each in Burkina Faso), and four other coup attempts across Africa (in Guinea Bissau, Mali, São Tomé and Príncipe, and the Gambia). In 2021, there were four coups in Africa (in Mali, Tunisia, Guinea and Sudan), along with a previous coup attempt in Sudan earlier in the year. This is consistent with the on-average four coups per year across the Africa continent.^[29] The year 2023 is not expected to be any quieter on the political front, with no less than 17 elections set to occur across African states in 2023, for heads of state, governments and national legislatures.^[30] These elections and their results may well prove to be sources of unrest: Madagascar, Nigeria and Zimbabwe in particular have been identified as states where tensions are likely to occur.^[31]

Compounding on the political instability, the economic disruption caused by covid-19, estimated to have caused a loss of output of US\$37 billion to US\$79 billion in Africa alone, appears to have increased tensions in many African states as more people have been plunged into poverty than ever before.^[32] The emergence of the Russian–Ukraine war in 2022 has hindered economic recovery from the pandemic worldwide. As discussed above, the war has had significant consequences in Africa, including regarding food security and energy prices. As a consequence, some African states have already seen unrest, including Niger and Mozambique.^[33] Further unrest is expected over the coming year in other African states, which may disrupt operations of producing mines and may increase political risk for projects seeking development finance.

From an arbitration perspective, in countries where there is armed conflict, host states generally have a duty to protect the physical integrity and private property of their residents and investors, although this may be difficult to achieve in remote or dangerous areas. Mining companies may rely on relevant provisions of their mining concessions or conventions to secure the unimpeded enjoyment of their mining rights. Foreign investors may also rely on the application of the fair and equitable treatment and full protection and security standards, which are present in most international investment agreements currently in force.

Full protection and security has been interpreted to mean that the state is obliged to take '*active measures to protect the investment from adverse effects that may stem from private parties*', including demonstrators and armed forces.^[34] States have been held liable for failing to protect investors and their investments against private violence, for example through the failure of police to protect an investor's property from occupation and to respond adequately to violent incidents. A series of arbitral awards illustrates the application of 'full protection and security' of investments in Africa.^[35]

Another recurring security issue for large-scale mining companies concerns increasing encounters with unauthorised artisanal and small-scale miners in areas where they hold exclusive mining or access rights. While artisanal mining can help create employment in underdeveloped areas and finance development infrastructure in local communities, it is often associated with poor health and safety conditions and may entail negative environmental and social consequences. Thus, artisanal mining may create direct safety risks for local populations and large-scale mining companies, which run the risk of being blamed for the damage done by these unlicensed operators.

The presence of unauthorised (and often inadequately equipped) artisanal miners on a large-scale mining site creates a substantial risk of injury for the trespassers, as well as for the legitimate site users. Moreover, the activity of artisanal miners may interfere with ongoing exploration and production works, in part by creating hazardous excavations or using inefficient processes that prevent the future recovery of valuable minerals left behind. In addition, artisanal miners often use toxic substances and processes to extract and treat minerals without taking adequate protection measures. The resulting environmental contamination may endanger local populations, impair large-scale mining operations and result in substantial liability for the large-scale mining company holding mineral rights over the area.

Finally, artisanal mining activity results in the production of non-renewable mineral resources by a third party who is not the rightful permit holder, thus depriving the permit holder of its economic rights over these resources. This competition over the same resources – and the large-scale miners' efforts to keep artisanal miners from trespassing – may result in conflicts between the large-scale operators and artisanal miners (who may be armed or supported by armed groups). This risk is particularly high in areas where government presence and economic opportunities are limited.

Continuous impact of Chinese investments on African mining disputes

In the background of these recent developments, China's presence in Africa remains another source of influence on African mining projects and the disputes arising therefrom.

For some time now, China has been Africa's largest trading partner, with Chinese foreign direct investment (FDI) to Africa increasing markedly from around US\$75 million in 2003 to US\$4.2 billion in 2020.^[36] According to the Center for Global Development, China's development banks (Exim Bank of China and China Development Bank) provided US\$23 billion in financing for infrastructure projects in sub-Saharan Africa between 2007 and 2020, which is double the amount lent by banks in the US, Germany, Japan and France combined.^[37] Interestingly, for the first time, China's investment in renewables infrastructure (including

thermal solar, hydro, wind, biomass, geothermal and energy storage) has exceeded its investment in fossil fuel infrastructure.^[38] Reports indicate that, in recent years, project lending from Chinese policy banks, such as Export-Import Bank of China and China Development Bank, has tailed off, with increased lending from commercial Chinese banks.^[39]

While the West has lagged significantly behind China with respect to new investments in Africa in recent years, the US may be looking to reinvigorate its commitment to the continent, with President Biden's election statement that he will 'renew the United States' mutually respectful engagement toward Africa', including by 'restoring and reinvigorating diplomatic relations with African governments and regional institutions, including the African Union'.^[40] However, the extent to which the US re-engagement will have any impact on China's standing as the largest investor in Africa remains to be seen.

For low- and middle-income African countries, repayment of the vast loans provided by China are becoming a significant problem. Chinese debt repayment issues have arisen in Ethiopia, Kenya, Uganda and Zambia.^[41] In these circumstances, governments may be forced to turn to alternative ways to repay their debts, such as through granting rights and concessions over valuable resource assets – possibly including those already committed to foreign investors. The inability to repay debt will likely reinforce China's economic influence and control over vast reserves of key mineral resources on the African continent. This will likely include securing access to minerals and metals necessary for the transition to renewable energy, including cobalt, copper, rare earths, graphite, nickel, bauxite and lithium. The desire to shore up supply of these critical resources will undoubtedly lead to significant investment competition in states endowed with them, which in turn will likely drive disputes both among private investors and between investors and the host state (especially in circumstances where the host state would grant foreign-owned mining projects on their territory to China-affiliated entities by way of debt repayment in kind).

One notable characteristic of Sino-African mining contracts over the past decade is the inclusion of commitments to develop or contribute to infrastructure development, as some agreements between African states and China or Chinese state-owned companies contemplate the provision of infrastructure as a means of payment for the resource. These arrangements increase the potential for disputes between foreign investors and host states that can arise not only from the development and operation of mining projects but also from the construction and operation of large-scale infrastructure projects. The interconnection between access to mineral resources and infrastructure investments could also result in situations where host governments decide to terminate mining rights as a result of an investor's failure to deliver on its infrastructure commitments.

Resource nationalism

Finally, and as already mentioned above, political risk remains another great challenge faced by investors in the mining industry. As is evident from the most recent trends and developments reported above, this is particularly the case in African countries where political instability, the lack of strong governance and political structures, as well as more limited administration and public services may adversely impact the development and operation of mining projects.

Political risk most often manifests itself in executive and legislative measures aimed at increasing government control over the development of natural resources in a manner that disregards the rights of existing concession holders – a policy phenomenon often described as ‘resource nationalism’. This is not to be confused with the legitimate aims of states seeking to achieve the highest return from their natural resources so the people for which governments are responsible can enjoy the greatest benefit from their nation’s natural endowment. Rather, disputes arise when measures are taken against investors that are unlawful, in that they are discriminatory, not in the public interest, not carried out under the due process of law and not accompanied by fair compensation (*ie*, the cumulative conditions of lawful expropriation under public international law).

Resource nationalism in sub-Saharan Africa is arguably closely connected to its history of colonisation and decolonisation. While Western powers wished to retain control of natural resources post-decolonisation, buoyed by their access to specialised workforces and their ownership of hydrocarbons and mining projects, the newly independent former colonies wished to regain control of their own resources. In 1962, the United Nations General Assembly adopted Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (Resolution 1803). Resolution 1803 consecrates many of the host government’s rights (including nationalisation rights and rights regarding the expropriation of natural resources on its territory) while also providing guarantees and compensation for foreign investors owning natural resource projects that are affected by state measures. In this sense, some commentators consider Resolution 1803 to be a key predecessor to the system of investment protection based on international investment agreements in force today.

A resurgence of resource nationalism may be driven by increases in commodity prices, fuelled by a combination of continued increase in demand for raw materials and further disruption in global raw mineral supply over the past few years, particularly in respect of gold and iron ore. The increasing demand for green minerals is also bound to drive up the prices for these commodities, prompting states to take measures designed to enhance the state’s share. One significant method by which this can be achieved is the enactment of fiscal legislation increasing the amounts payable to the state (in the form of taxes and royalties). Mining laws enacted over the past few years by Mozambique, Zambia, and Ghana all contain a series of measures in furtherance of that objective.

In this climate of increasing resource nationalism, the financial pressure is being felt by (or transferred to) investors, as an increasing number of new state measures affect the profitability and operability of mining projects. From an investor perspective, unforeseen restrictive measures imposed by governments may result in a desire to suspend projects, restrict production or find some other way to protect their investments. Further, given mining companies’ general reliance on debt financing, investors may increasingly be forced to take whatever measures they can to meet their repayment obligations. In this context, impacted investors are likely to challenge state measures that they view as confiscatory, punitive, or arbitrarily or discriminatorily imposed. Challenges may be based on contracts or national legislation providing for arbitration as the dispute mechanism or on investor–state dispute settlement provisions in international investment agreements, such as BITs, linking African host states with partner states around the globe. There are now many examples of African states having taken these measures over the past few years, including the DRC, Sierra Leone, Mali, Madagascar and the Ivory Coast. Many of these measures are also aimed at increasing the amount of taxes and royalties accruing to the state from mining projects, and these fiscal measures have also been the source of disputes. Although these risks may seem remote at

times, in the beginning of 2023, Ghana's tax agency levied large tax bills against a number of key companies, including (among others) MTN Group,^[42] Tullow Oil^[43] and Gold Fields.^[44] Ghana's actions demonstrate the real risk of changes in fiscal regimes, particularly in circumstances of tough economic times.

Host governments may also impose other measures on mining projects, such as imposing levies in the export of raw ore or mandating in-country beneficiation. In late 2022, Zimbabwe announced a prohibition on exports of raw lithium from its mines.^[45] According to the Zimbabwean Mining Minister, Winston Chitando: '[n]o lithium-bearing ores, or unbeneficiated lithium whatsoever, shall be exported from Zimbabwe to another country except under the written permit of the minister'.^[46] The Minister also said, '[i]f we continue exporting raw lithium we will go nowhere. We want to see lithium batteries being developed in the country'.^[47] It is expected that similar measures requiring local beneficiation or requirements to develop local industries will be taken by other African governments in coming years, particularly as the demand for technology metals such as lithium continues.

Managing political risk beyond investment treaties: host-government and development agreements

Stabilisation of the applicable legal and regulatory framework is increasingly seen as essential for large-scale mining projects, given the often-lengthy time frames involved from resource definition to exploitation. In this respect, mining companies are drawing on the experience of the international oil and gas industry, where businesses have long sought to manage the risks of adverse legislative change by including stabilisation clauses and choices of international law in their long-term agreements with host governments. In the African mining industry, they usually take the form of mining licences and conventions required by law. However, these agreements may also be concluded on an *ad hoc* – and even *sui generis* – basis, in which case they are often referred to (officially or unofficially) as host government or state agreements, or development agreements.

Besides the stabilisation of laws, investors should seek to build into these agreements the substantive (and substantial) protections typically found in investment treaties, including protection against expropriation, fair and equitable treatment, full protection and security, and most-favoured nation treatment. These fundamental protections, coupled with an effective international arbitration clause, can help protect a mining project from adverse and unlawful measures.

During the negotiation of a host government or state or development agreement, securing the most favourable fiscal terms needs to be balanced against securing sufficient investment protection and international arbitration. This trade-off is even more relevant in countries that do not have a wide-ranging BIT programme. Acquiring these investment protections and the right to resolve disputes in international arbitration can be the difference between life and death for a company when things go wrong. For countries with applicable BIT protection, companies may – and, to the extent possible, should strive to – couple a host state agreement with any bilateral investment treaty available to provide a multilayered investment protection structure. This is because, no matter how flexible and protective, host-government or state and development agreements remain contracts that are almost

invariably subject to the vagaries of domestic law, which the host-state has the unilateral power to amend, including in such a way as to render the agreement illegal or null and void.

As discussed above, there are 17 elections due to be held across Africa in 2023. Companies with mining projects looking at the next stage of development should consider negotiating a host state or development agreement with their host government that is balanced and fair. Obtaining investment protection that is balanced, fair and transparent can significantly improve these investors' chance of withstanding political swings and election cycles.

*

A previous version of this chapter was published in 2021 by Audley Sheppard KC, Amanda Murphy and Karolina Rozycka. As this chapter is a revised updated version of the 2021 chapter, the authors acknowledge and thank Amanda Murphy for her prior contributions.

Footnotes

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[4] *Cameroon Oil Transportation Company SA and others v Republic of Cameroon* (ICSID Case No. ARB/22/27), registered on 11 November 2022.

[5] *Louis Claude Norland Suzor and SBEC Systems Limited v Republic of Senegal* (ICSID Case No. ARB/22/1), registered on 5 January 2022.

[6] *Comercializadora Mediterránea de Viviendas SL v Kingdom of Morocco* (ICSID Case No. ARB/22/17), registered 27 June 2022.

[7] *Congo Iron SA and Sundance Resources Limited v Republic of the Congo; Avima Iron v Republic of the Congo*.

[8] *EEPL Holdings v Republic of the Congo*, which was commenced at ICSID pursuant to the Congo–Mauritius BIT; *Midus Holdings Limited and Congo Mining Ltd SARLU v the Republic of the Congo*, which was commenced at ICSID under the UK–Congo BIT.

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[11] *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21).

[12] *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, Award (ICSID Case No. ARB/18/21), paragraphs 507, 508, 517 & 522.

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IN SUMMARY

The mining sector presents inherent risks that make it naturally predisposed to disputes. International arbitration is often the most appropriate means to resolve those, particularly for actors in the mining sector in Africa. Most of the recent (known) disputes that have arisen involve commodities constituting a significant portion of African exports, namely iron ore, technology metals and oil and gas. Further, the push towards achieving net zero emissions by states and global majors, the Russia–Ukraine war and associated consequences and the transition to green energy have presented challenges, and will continue to do so, in the mining sector across Africa.

DISCUSSION POINTS

- Trends in African mining arbitrations
- Impact of the Russia–Ukraine war on African mining disputes
- Environmental, social and governance (ESG) and climate change
- Impact of Chinese investments on African mining disputes
- Resource nationalism
- Managing political risk beyond investment treaties

REFERENCED IN THIS ARTICLE

- *Sundance Resources Limited and Cam Iron SA v Republic of Cameroon*
- *Process and Industrial Developments Ltd v Nigeria*
-

Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria

- *AECI Mauritius Ltd v Burkina Faso*
- *The Carlyle Group LP and others v Kingdom of Morocco*
- *AGEM Ltd v Republic of Mali*
- *Menankoto SARL v Republic of Mali*
- *Gerald International Limited v Republic of Sierra Leone*

This article aims to provide a concise overview of the characteristics and risks of mining disputes in Africa in the context of the current investment, economic and political climate, in addition to an update on Africa-related mining arbitrations that have unfolded over the past year.

The year 2022 saw unprecedented disruption to the global markets, especially in the energy and resources sector, partly owing to the Russia–Ukraine war. In 2020, Russia was the second largest exporter of mineral products in the world, exporting US\$166 billion in value, mainly to China (US\$32.3 billion), the Netherlands (US\$17.5 billion), Germany (US\$9.72 billion), Italy (US\$9.6 billion) and South Korea (US\$9.22 billion).^[1] The wide-ranging international sanctions against Russia implemented throughout 2022 have triggered severe disruption in the raw commodities markets.^[2] Further, with supply chain disruption felt during the covid-19 pandemic, and further exacerbated in the wake of the Russia–Ukraine war, governments and the natural resources industry more generally are turning to other supply chain sources to improve security, thus shifting away from reliance on Russian raw materials.

These geopolitical tensions over natural resources, including on the African continent, have been compounded by soaring global demand for green transition minerals (such as cobalt, copper, rare earths, nickel and lithium). While this climate presents an opportunity for foreign investments and economic growth across many African states, it is likely to increase, at the same time, the potential for disputes.

The likelihood of resource-related disputes is also heightened owing to certain factors that – without being Africa-specific – are often prevalent in resource-rich African countries. Mining investments and projects in Africa are sensitive to political risk, which commonly manifests itself in the form of government interference owing to a climate of political instability (at times resulting in military coups), lack of consistent governance, and limited infrastructure and public services. A corollary to Africa’s structural and political challenges is exposure to security threats, ranging from trespass by artisanal miners to attacks by military or paramilitary groups.

This article outlines several options available to investors operating in the African mining sector to mitigate these investment risks, including the use of stabilisation and investment protection provisions in long-term host state agreements.

TRENDS IN AFRICAN MINING ARBITRATIONS IN 2022

The past year saw a significant number of international arbitrations commencing at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID): ICSID recorded 41 new cases in 2022.^[3] At ICSID, the proportion of new cases involving sub-Saharan Africa remained steady at 14 per cent of the centre’s overall caseload, while

the oil, gas and mining sector remained the largest sector, accounting for 24 per cent of new cases. The new ICSID cases in the sub-Saharan Africa region (two in total) involved Cameroon^[4] (concerning an oil and gas enterprise) and Senegal^[5] (concerning a coal power plant). In North Africa, one new ICSID case involving Morocco^[6] was commenced concerning urban development projects.

The 2022 edition of this article reported a wave of new mining arbitration cases in Central Africa. The four mining arbitrations commenced against the Republic of Congo in 2021 are still in progress, with two cases at the ICC^[7] and two cases at ICSID.^[8] In Cameroon, a mining arbitration was also commenced in 2021 at the ICC, *Sundance Resources Limited and Cam Iron SA v Republic of Cameroon*. In that case, the claimant successfully sought an interim order from an ICC emergency arbitrator in 2022, preventing Cameroon ‘*from taking any measures, directly or indirectly, that disturb*’ the claimant’s rights in respect of its tenement.^[9] As reported by the claimant, Cameroon nonetheless proceeded to issue an exploitation permit in relation to the subject tenement.^[10] To the best of the authors’ knowledge, this was one of the only publicly recorded interim measures orders issued by an international arbitrator against an African government in 2022.

In March 2022, Rwanda successfully defended a mining arbitration commenced in 2018.^[11] The claimant-investors in this case claimed US\$95 million in damages on the ground that Rwanda had allegedly breached certain articles of the Rwanda–United States bilateral investment treaty (BIT) (2008). The tribunal dismissed the first claimant’s claims on the basis that it had no material investment in Rwanda, entailing the tribunal’s lack of jurisdiction. The tribunal also dismissed the second claimant’s claims on the merits, finding that there was no prospect of the investor demonstrating that it was a satisfactory candidate for the grant of a mining licence, and Rwanda therefore did not breach the BIT.^[12] The claimants were ordered to pay Rwanda’s costs, and the parties were ordered to split the costs of the arbitration.^[13]

In January 2023, the trial concerning Nigeria’s bid to overturn P&ID v Nigeria^[14] commenced in the London courts, with an expected trial duration of eight weeks.^[15] Nigeria will claim that the investor obtained the original contract through bribery.^[16] The US\$6.6 billion award in favour of the investor delivered in 2017 has grown to over US\$11 billion arising from interest owed since the award date.

Finally, with debt levels already at crippling heights for many African states, the prospect of an award ordering the payment of damages to an investor may be leading some states towards faster settlement of their disputes. For example, in 2022, a number of mining and natural resource-related arbitrations were discontinued under ICSID Rule 43(1) and ICSID Rule 44. Relevantly, four of the six ICSID natural resource-related arbitrations discontinued in 2022 in Africa had only been commenced in 2021. These six arbitrations included:

- *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/21/7): discontinued on 13 October 2022 pursuant to ICSID Arbitration Rule 43(1);
- *AECI Mauritius Ltd v Burkina Faso* (ICSID Case No. ARB/21/18): discontinued 23 September 2022 pursuant to ICSID Arbitration Rule 43(1);
- *The Carlyle Group LP and others v Kingdom of Morocco* (ICSID Case No. ARB/18/29): discontinued 14 September 2022 pursuant to ICSID Arbitration Rule 43(1);

- *AGEM Ltd v Republic of Mali* (ICSID Case No. ARB/21/62): discontinued 17 April 2022 pursuant to ICSID Arbitration Rule 44;
- *Menankoto SARL v Republic of Mali* (ICSID Case No. ARB/21/38): discontinued 28 January 2022 pursuant to ICSID Arbitration Rule 44; and
- *Gerald International Limited v Republic of Sierra Leone* (ICSID Case No. ARB/19/31): discontinued 28 January 2022 pursuant to ICSID Arbitration Rule 43(1).

Such a high number of cases discontinued early (presumably as a result of settlement) denotes the appetite of many African governments for negotiated and mediated settlement outcomes, which is at odds with the hard line often taken by investor-state dispute settlement respondent states in other parts of the world.

IMPACT OF THE RUSSIA–UKRAINE WAR ON AFRICAN MINING DISPUTES

The Russia–Ukraine war has had major consequences on the global economy. Outside of the mining sector, food security has been identified as the major threat to African countries in 2022, particularly the supply and cost of wheat and sunflowers. Prior to the Russia–Ukraine war, Russia was the largest supplier of wheat to Africa, while Ukraine was the third. Wheat prices are said to have increased by 64 per cent in Africa, with surging food prices having triggered protests in Niger and Mozambique.^[17] It is anticipated that other countries, such as Cameroon, the Ivory Coast and Senegal, could also see internal turmoil as a result of food price hikes.^[18] As such, local unrest in response to food price hikes and increases in the cost of living could see general political risk increase in some countries and disruption to operations, each impacting existing and future mining projects.

Additionally, with Russia being the third-largest oil producer in the world, the disruption of oil prices in the global market has increased fuel prices and the cost of food production.^[19] However, Africa as a continent is generally less reliant on Russian fuel imports than other parts of the world: in 2019, only 2.9 per cent of all African imported fuel was sourced from Russia.^[20]

On the political front, the response from African countries to the UN Resolution on Ukraine of 2 March 2022 was divided. In the resolution, 28 countries voted in favour, 26 voted not in favour and 17 countries^[21] abstained.^[22] The next Russia–Africa summit was due to be held in Addis Abbaba, Ethiopia, in November 2022; however, it was postponed until mid-2023. Russian Foreign Minister Sergey Lavrov indicated that the agenda for the next summit will include trade, the development of natural resources, energy and security, among other issues.^[23] Thus, there will likely be further developments in Russia’s mid- to long-term plans for the development of natural resources in Africa.

In addition to the Russia–Ukraine war’s general impact on inflation, mining projects in Africa are bound to see operations and transportation input costs dramatically increase as a result of higher energy prices.^[24] This will likely have the most impact on ore transportation. High energy costs, coupled with political instability, will likely disrupt exploration and early-stage projects, impacting their economic feasibility and delaying development.^[25] For some commodities, this will be counterbalanced with high commodity prices as a result of supply issues. These developments could well lead to a new wave of disputes between foreign companies and their host governments.

More generally, long-term implications of the Russia–Ukraine war in Africa may include geopolitical realignment, social and economic instability, and debt unsustainability as many

countries and populations in Africa try to cope with rising costs of living. There are justifiable concerns that the ongoing Russia–Ukraine war will continue to create further instability across the continent.

ESG AND CLIMATE CHANGE

Held in Sharm el-Sheikh, Egypt, in November 2022, the United Nations Climate Change Conference 2022 (COP 27) saw further developments on climate change action. For the first time, a historic decision was taken to establish an international fund for responding to loss and damage suffered by vulnerable countries arising from the consequences of climate change. Other areas of concern for developing states were discussed and advanced, including stranded assets, desertification and access to climate finance.^[26]

Conversely, the conference did not agree on phasing out coal and other fossil fuels or setting emission peaking periods.^[27] We expect there will be continued pressure to agree on this at COP 28 and future conferences. Further, COP 28 will likely see focus on climate change action implementation. Outcomes such as agreements to phase out the use of coal and other fossil fuels, or setting emission peaking periods, would seem to be in tension with mining operations in developing markets, particularly extraction and beneficiation of technology metals required for renewable energy. The technological revolution required to address climate change presents significant opportunities, particularly for states endowed with the natural resources used in the production of these technologies, including cobalt, copper, rare earths, graphite, nickel bauxite and lithium.

Various African states have significant potential in relation to these commodities: the Democratic Republic of Congo (DRC) is home to the largest reserves of cobalt; Guinea has the world's largest reserves of high-grade bauxite; while Zimbabwe, Namibia, Ghana, the DRC and Mali have some of the largest reserves of lithium. Significant copper reserves are located in the DRC, Zambia, South Africa and Namibia; and rare earth deposits have considerable potential in Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi. However, the race for these resources must be tempered by growing consideration of the social and human rights impact of undertaking new mining operations as well as closing existing fossil fuel operations, including for the purpose of advancing the green transition – hence the holistic approach to ESG.

All companies, not just those operating in Africa, are being required to show that they comply with high standards of ESG. This broad and encompassing term has risen fast to the top of boardroom agendas, requiring policies and frameworks to address all aspects of ESG in companies' operations, including climate change, sustainability and human rights-related risks.

This is particularly the case in the context of mining investments in Africa, in part because of the specific risks and characteristics outlined in this article. Stakeholders increasingly demand effective actions and heightened levels of transparency in relation to ESG issues, and mining investors seeking finance are increasingly required to demonstrate their ESG credentials. The mining industry is arguably the most exposed to ESG risks, with shareholder activism and NGO participation placing the sector under intensive focus. Particular emphasis is being placed on mining operations in Africa because of a poor historical track record by some foreign companies. For many African states, the harmful actions of some foreign investors in the past justify a focus on compliance with local laws and, increasingly, ESG issues, including international environmental and human rights standards. A failure to

comply with these laws and standards may result in claims flowing from the termination of contracts or exploitation of rights by states, as well as in counterclaims being made by states against investors. Mining investors need to be ready to demonstrate their efforts in compliance with local laws and regulations, socio-environmental standards and business human rights principles. This is particularly true in the context of investor–state disputes concerning natural resources projects located in emerging economies, where respondent states and sometimes third parties, through *amicus curiae* submissions, will increasingly question claimants’ compliance with their legal obligations on an ESG front. Similarly, many new generation BITs and free trade agreements (FTAs) contain express provisions reserving states’ rights to regulate in order to protect public welfare objectives, such as public health, safety and the environment – much akin to similar carveouts in the context of World Trade Organization (WTO) agreements.

Thus, it is likely that ESG-related issues will be an increasingly prominent feature in mining arbitrations in Africa, driven by increasing references to the protection of environmental, social and public health objectives in both contractual arrangements and investment treaties. Foreign investors are usually obliged to comply with local laws as a condition of their concession, as a term in a host state agreement (where there is one), or even as a gateway requirement to qualify as a covered investment under some investment treaties. Breaches of these obligations may result in claims against the investor or counterclaims by the state. In the context of investment treaty arbitration, the plea of illegality, namely that the investor has failed to comply with local laws, is often pleaded by states ‘as a question of admissibility or a question on the merits of the case’.^[28]

SECURITY ISSUES, INTERNATIONAL HUMANITARIAN LAW AND THE IMPACT ON MINING DISPUTES

Security and international humanitarian law (IHL) are other issues relevant to the African mining sector. There were two coups in Africa in 2022 (each in Burkina Faso), and four other coup attempts across Africa (in Guinea Bissau, Mali, São Tomé and Príncipe, and the Gambia). In 2021, there were four coups in Africa (in Mali, Tunisia, Guinea and Sudan), along with a previous coup attempt in Sudan earlier in the year. This is consistent with the on-average four coups per year across the Africa continent.^[29] The year 2023 is not expected to be any quieter on the political front, with no less than 17 elections set to occur across African states in 2023, for heads of state, governments and national legislatures.^[30] These elections and their results may well prove to be sources of unrest: Madagascar, Nigeria and Zimbabwe in particular have been identified as states where tensions are likely to occur.^[31]

Compounding on the political instability, the economic disruption caused by covid-19, estimated to have caused a loss of output of US\$37 billion to US\$79 billion in Africa alone, appears to have increased tensions in many African states as more people have been plunged into poverty than ever before.^[32] The emergence of the Russian–Ukraine war in 2022 has hindered economic recovery from the pandemic worldwide. As discussed above, the war has had significant consequences in Africa, including regarding food security and energy prices. As a consequence, some African states have already seen unrest, including Niger and Mozambique.^[33] Further unrest is expected over the coming year in other African states, which may disrupt operations of producing mines and may increase political risk for projects seeking development finance.

From an arbitration perspective, in countries where there is armed conflict, host states generally have a duty to protect the physical integrity and private property of their residents

and investors, although this may be difficult to achieve in remote or dangerous areas. Mining companies may rely on relevant provisions of their mining concessions or conventions to secure the unimpeded enjoyment of their mining rights. Foreign investors may also rely on the application of the fair and equitable treatment and full protection and security standards, which are present in most international investment agreements currently in force. Full protection and security has been interpreted to mean that the state is obliged to take *'active measures to protect the investment from adverse effects' that 'may stem from private parties'*, including demonstrators and armed forces.^[34] States have been held liable for failing to protect investors and their investments against private violence, for example through the failure of police to protect an investor's property from occupation and to respond adequately to violent incidents. A series of arbitral awards illustrates the application of 'full protection and security' of investments in Africa.^[35]

Another recurring security issue for large-scale mining companies concerns increasing encounters with unauthorised artisanal and small-scale miners in areas where they hold exclusive mining or access rights. While artisanal mining can help create employment in underdeveloped areas and finance development infrastructure in local communities, it is often associated with poor health and safety conditions and may entail negative environmental and social consequences. Thus, artisanal mining may create direct safety risks for local populations and large-scale mining companies, which run the risk of being blamed for the damage done by these unlicensed operators.

The presence of unauthorised (and often inadequately equipped) artisanal miners on a large-scale mining site creates a substantial risk of injury for the trespassers, as well as for the legitimate site users. Moreover, the activity of artisanal miners may interfere with ongoing exploration and production works, in part by creating hazardous excavations or using inefficient processes that prevent the future recovery of valuable minerals left behind. In addition, artisanal miners often use toxic substances and processes to extract and treat minerals without taking adequate protection measures. The resulting environmental contamination may endanger local populations, impair large-scale mining operations and result in substantial liability for the large-scale mining company holding mineral rights over the area.

Finally, artisanal mining activity results in the production of non-renewable mineral resources by a third party who is not the rightful permit holder, thus depriving the permit holder of its economic rights over these resources. This competition over the same resources – and the large-scale miners' efforts to keep artisanal miners from trespassing – may result in conflicts between the large-scale operators and artisanal miners (who may be armed or supported by armed groups). This risk is particularly high in areas where government presence and economic opportunities are limited.

CONTINUOUS IMPACT OF CHINESE INVESTMENTS ON AFRICAN MINING DISPUTES

In the background of these recent developments, China's presence in Africa remains another source of influence on African mining projects and the disputes arising therefrom.

For some time now, China has been Africa's largest trading partner, with Chinese foreign direct investment (FDI) to Africa increasing markedly from around US\$75 million in 2003 to US\$4.2 billion in 2020.^[36] According to the Center for Global Development, China's development banks (Exim Bank of China and China Development Bank) provided US\$23 billion in financing for infrastructure projects in sub-Saharan Africa between 2007 and 2020,

which is double the amount lent by banks in the US, Germany, Japan and France combined.^[37] Interestingly, for the first time, China's investment in renewables infrastructure (including thermal solar, hydro, wind, biomass, geothermal and energy storage) has exceeded its investment in fossil fuel infrastructure.^[38] Reports indicate that, in recent years, project lending from Chinese policy banks, such as Export-Import Bank of China and China Development Bank, has tailed off, with increased lending from commercial Chinese banks.^[39]

While the West has lagged significantly behind China with respect to new investments in Africa in recent years, the US may be looking to reinvigorate its commitment to the continent, with President Biden's election statement that he will 'renew the United States' mutually respectful engagement toward Africa', including by 'restoring and reinvigorating diplomatic relations with African governments and regional institutions, including the African Union'.^[40] However, the extent to which the US re-engagement will have any impact on China's standing as the largest investor in Africa remains to be seen.

For low- and middle-income African countries, repayment of the vast loans provided by China are becoming a significant problem. Chinese debt repayment issues have arisen in Ethiopia, Kenya, Uganda and Zambia.^[41] In these circumstances, governments may be forced to turn to alternative ways to repay their debts, such as through granting rights and concessions over valuable resource assets – possibly including those already committed to foreign investors. The inability to repay debt will likely reinforce China's economic influence and control over vast reserves of key mineral resources on the African continent. This will likely include securing access to minerals and metals necessary for the transition to renewable energy, including cobalt, copper, rare earths, graphite, nickel, bauxite and lithium. The desire to shore up supply of these critical resources will undoubtedly lead to significant investment competition in states endowed with them, which in turn will likely drive disputes both among private investors and between investors and the host state (especially in circumstances where the host state would grant foreign-owned mining projects on their territory to China-affiliated entities by way of debt repayment in kind).

One notable characteristic of Sino-African mining contracts over the past decade is the inclusion of commitments to develop or contribute to infrastructure development, as some agreements between African states and China or Chinese state-owned companies contemplate the provision of infrastructure as a means of payment for the resource. These arrangements increase the potential for disputes between foreign investors and host states that can arise not only from the development and operation of mining projects but also from the construction and operation of large-scale infrastructure projects. The interconnection between access to mineral resources and infrastructure investments could also result in situations where host governments decide to terminate mining rights as a result of an investor's failure to deliver on its infrastructure commitments.

RESOURCE NATIONALISM

Finally, and as already mentioned above, political risk remains another great challenge faced by investors in the mining industry. As is evident from the most recent trends and developments reported above, this is particularly the case in African countries where political instability, the lack of strong governance and political structures, as well as more limited administration and public services may adversely impact the development and operation of mining projects.

Political risk most often manifests itself in executive and legislative measures aimed at increasing government control over the development of natural resources in a manner that disregards the rights of existing concession holders – a policy phenomenon often described as ‘resource nationalism’. This is not to be confused with the legitimate aims of states seeking to achieve the highest return from their natural resources so the people for which governments are responsible can enjoy the greatest benefit from their nation’s natural endowment. Rather, disputes arise when measures are taken against investors that are unlawful, in that they are discriminatory, not in the public interest, not carried out under the due process of law and not accompanied by fair compensation (*ie*, the cumulative conditions of lawful expropriation under public international law).

Resource nationalism in sub-Saharan Africa is arguably closely connected to its history of colonisation and decolonisation. While Western powers wished to retain control of natural resources post-decolonisation, buoyed by their access to specialised workforces and their ownership of hydrocarbons and mining projects, the newly independent former colonies wished to regain control of their own resources. In 1962, the United Nations General Assembly adopted Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (Resolution 1803). Resolution 1803 consecrates many of the host government’s rights (including nationalisation rights and rights regarding the expropriation of natural resources on its territory) while also providing guarantees and compensation for foreign investors owning natural resource projects that are affected by state measures. In this sense, some commentators consider Resolution 1803 to be a key predecessor to the system of investment protection based on international investment agreements in force today.

A resurgence of resource nationalism may be driven by increases in commodity prices, fuelled by a combination of continued increase in demand for raw materials and further disruption in global raw mineral supply over the past few years, particularly in respect of gold and iron ore. The increasing demand for green minerals is also bound to drive up the prices for these commodities, prompting states to take measures designed to enhance the state’s share. One significant method by which this can be achieved is the enactment of fiscal legislation increasing the amounts payable to the state (in the form of taxes and royalties). Mining laws enacted over the past few years by Mozambique, Zambia, and Ghana all contain a series of measures in furtherance of that objective.

In this climate of increasing resource nationalism, the financial pressure is being felt by (or transferred to) investors, as an increasing number of new state measures affect the profitability and operability of mining projects. From an investor perspective, unforeseen restrictive measures imposed by governments may result in a desire to suspend projects, restrict production or find some other way to protect their investments. Further, given mining companies’ general reliance on debt financing, investors may increasingly be forced to take whatever measures they can to meet their repayment obligations. In this context, impacted investors are likely to challenge state measures that they view as confiscatory, punitive, or arbitrarily or discriminatorily imposed. Challenges may be based on contracts or national legislation providing for arbitration as the dispute mechanism or on investor–state dispute settlement provisions in international investment agreements, such as BITs, linking African host states with partner states around the globe. There are now many examples of African states having taken these measures over the past few years, including the DRC, Sierra Leone, Mali, Madagascar and the Ivory Coast. Many of these measures are also aimed at increasing the amount of taxes and royalties accruing to the state from mining projects, and these fiscal measures have also been the source of disputes. Although these risks may seem remote at

times, in the beginning of 2023, Ghana's tax agency levied large tax bills against a number of key companies, including (among others) MTN Group,^[42] Tullow Oil^[43] and Gold Fields.^[44] Ghana's actions demonstrate the real risk of changes in fiscal regimes, particularly in circumstances of tough economic times.

Host governments may also impose other measures on mining projects, such as imposing levies in the export of raw ore or mandating in-country beneficiation. In late 2022, Zimbabwe announced a prohibition on exports of raw lithium from its mines.^[45] According to the Zimbabwean Mining Minister, Winston Chitando: '[n]o lithium-bearing ores, or unbeneficiated lithium whatsoever, shall be exported from Zimbabwe to another country except under the written permit of the minister'.^[46] The Minister also said, '[i]f we continue exporting raw lithium we will go nowhere. We want to see lithium batteries being developed in the country'.^[47] It is expected that similar measures requiring local beneficiation or requirements to develop local industries will be taken by other African governments in coming years, particularly as the demand for technology metals such as lithium continues.

MANAGING POLITICAL RISK BEYOND INVESTMENT TREATIES: HOST-GOVERNMENT AND DEVELOPMENT AGREEMENTS

Stabilisation of the applicable legal and regulatory framework is increasingly seen as essential for large-scale mining projects, given the often-lengthy time frames involved from resource definition to exploitation. In this respect, mining companies are drawing on the experience of the international oil and gas industry, where businesses have long sought to manage the risks of adverse legislative change by including stabilisation clauses and choices of international law in their long-term agreements with host governments. In the African mining industry, they usually take the form of mining licences and conventions required by law. However, these agreements may also be concluded on an *ad hoc* – and even *sui generis* – basis, in which case they are often referred to (officially or unofficially) as host government or state agreements, or development agreements.

Besides the stabilisation of laws, investors should seek to build into these agreements the substantive (and substantial) protections typically found in investment treaties, including protection against expropriation, fair and equitable treatment, full protection and security, and most-favoured nation treatment. These fundamental protections, coupled with an effective international arbitration clause, can help protect a mining project from adverse and unlawful measures.

During the negotiation of a host government or state or development agreement, securing the most favourable fiscal terms needs to be balanced against securing sufficient investment protection and international arbitration. This trade-off is even more relevant in countries that do not have a wide-ranging BIT programme. Acquiring these investment protections and the right to resolve disputes in international arbitration can be the difference between life and death for a company when things go wrong. For countries with applicable BIT protection, companies may – and, to the extent possible, should strive to – couple a host state agreement with any bilateral investment treaty available to provide a multilayered investment protection structure. This is because, no matter how flexible and protective, host-government or state and development agreements remain contracts that are almost invariably subject to the vagaries of domestic law, which the host-state has the unilateral power to amend, including in such a way as to render the agreement illegal or null and void.

As discussed above, there are 17 elections due to be held across Africa in 2023. Companies with mining projects looking at the next stage of development should consider negotiating a host state or development agreement with their host government that is balanced and fair. Obtaining investment protection that is balanced, fair and transparent can significantly improve these investors' chance of withstanding political swings and election cycles.

*

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