INTO AFRICA

A publication from Capital Markets in Africa

JULY 2018

BACK ON TRACK
AFRICAN MINING

REVISION OF THE DEMOCRATIC REPUBLIC OF CONGO MINING CODE

NIGERIAN MINING SECTOR: A LEGAL REVIEW AND THE POTENTIALS

ZAMBIA MINING SECTOR: REGULATIONS AND LAWS SNAPSHOT

GLOBAL MINING INDUSTRY TRENDS AND IMPLICATIONS FOR AFRICA

MINING IN AFRICA: REGULATIONS, POLITICS AND OPPORTUNITIES

AFRICA'S CONTRASTS: (RE)EMERGING TRENDS OF MINING IN AFRICA

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Welcome to the July 2018 edition of INTO AFRICA, a publication with fresh insight into Africa's emerging capital markets. This month's edition, titled: ***Back on Track: African Mining*** explores emerging mining laws and regulations as well as opportunities across African countries as well financing options for mining projects in Africa.

Africa is rich in natural resources. It boasts of over 10% of world reserves of oil, about 40% of gold, 90% of chromium and the platinum group of minerals, extensive fisheries, forests, and vast tourism resources. Explorations in the last decade across many African countries have led to discoveries of more natural resources, such as oil deposits in Ghana, Kenya and Uganda, and natural gas in Mozambique and Tanzania, among others. According to the IMF, about 32 countries in Africa are resource-rich, of which 28 are in Sub- Saharan Africa (SSA) and four are in North Africa. In SSA, resource-rich countries account for more than 80% of the region's GDP, while more than a quarter have at least 50% of total export earnings derived from minerals. Natural resource rents account for more than 40% of GDP in countries such as Libya, Congo Republic, Equatorial Guinea, Angola, and Liberia.

ANDRIES ROSSOUW (Partner, PricewaterhouseCoopers South Africa) opens the edition with a discourse on global mining trends and implications for Africa. In parallel, **SEEDWELL HOVE** (Senior Macroeconomist, Quantum Global Research Lab Switzerland) looks at how to leverage natural resources to drive sustainable economic development in Africa. In the same vein, **ALEXANDER KEEPIN** (Partner, Bryan Cave Leighton Paisner LLP London) explores the emergence of private equity fund as a potential source of capital for mining companies.

From mining law and regulation angles, **OLIVIER BUSTIN** (Attorney, Vieira de Almeida & Associados Portugal) and **PIERRICK FERRERO** (Vieira de Almeida & Associados Portugal) diagnose the recently reformed mining code in the Democratic Republic of Congo (DRC). Likewise, **GODEFROY LE MINTIER** (Lawyer, Norton Rose Fulbright Morocco) and **PAULINE COULON** (Trainee Lawyer, Norton Rose Fulbright Morocco) dissect Moroccan mining sector laws and regulations as well as emerging opportunities. Similarly, **AYODELE KUSAMOTU** (Chairman, Kusamotu & Kusamotu Nigeria) and **RIDWANULAHI OLANITE** (Associate, Kusamotu & Kusamotu Nigeria) review the Nigerian mining laws and regulations as well as emerging trends.

Still, on laws and regulation, **GODFREY MALESA** (Partner, Fasken South Africa) features in *"Changes looming for the South African Sector"* and **THOMAS SIPEMBA** (Partner, East African Law Chambers Tanzania) in *"Tanzania Mining Sector: Changing the Rules of the Game"*. In parallel, **JOSEPH ALEXANDER JALASI** (Senior Partner, Eric Silwamba, Jalasi & Linyama Zambia) explores Zambian mining regulations as well as emerging risks and opportunities. At the same time, **FARAI NYABEREKA** (Senior Associate, Manokore Attorneys Zimbabwe) looks at the Zimbabwean mining sector laws and emerging incentives.

We also bring you features from **ROGER BAXTER** (Chief Executive Officer, Minerals Council South Africa) and WARREN BEECH (Partner, Hogan Lovells South Africa) in *"South African Mining: Emerging Trends and Restoring the Dream"* and *"Mining in Africa: Regulations, Politics, and Opportunities"* respectively. As well as a write-up *"African's Contrasts: (Re)Emerging Trends of Mining in Africa"* by **DEEPA VALLABH** (Head of Cross-Border M&A: Africa and Asia, CDH South Africa), MAUD HILL (Associate, Corporate and Commercial, CDH South Africa) and **MAMELLO THULARE** (Candidate Attorney, Corporate and Commercial, CDH South Africa). Also, **DR. MARKUS BURIANSKI** (Partner, White Case Frankfurt) and **DR. FEDERICO PARISE KUHNLE** (Associate, White & Cass Frankfurt) feature in *"Dispute Resolution in Africa Mining Assets: Exploring the Arbitration Route"*.

Still more, we bring you special features by **ZWELAKHE GILA** (Energy Economist DMWA Resources South Africa), **CAMILO ATAMPUGRE** (Natural Resources, Absa Corporate and Investment Banking), SOPHIE PIGNON (Partner, Bird & Bird Paris) as well as **THOMAS MAHL** (Managing Director, SFR Consulting Germany) and **FRANZ KARMANN** (Managing Director, SFR Consulting Germany) and also **LAUREN DAVISION** (Economist, Chamber of Mines Namibia). Last but the least, is the exclusive interview with **RITA ADIANI** (Director, NRG Capital Partners).

As usual, we provide you with timely updates on African Capital Markets and commodity updates.

Tunde Akodu
Editor

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GLOBAL MINING INDUSTRY TRENDS AND IMPLICATIONS FOR AFRICA

By **Andries Rossouw,** Partner, PricewaterhouseCoopers South Africa

Global position in 2017

PwC's Mine 2018 report finds that the world's 40 largest mining companies have taken advantage of the upswing in the mining cycle to deliver an impressive financial performance in 2017.

Revenue increased by 23% on the back of rising global economic growth and a recovery in commodity prices. Margins and cash-generating ability was much improved, helped by the cost-saving strategies of the past few years, leading to a 126% jump in net profits.

Estimates indicate that the Top 40's improved financial performance will continue in 2018 as companies benefit from upward momentum in the mining cycle.

It is clear that the big miners have executed their strategies in a measured and deliberate manner in 2017, and it has paid off handsomely.

The biggest risk now is giving in to the temptation to meet rising demand by splashing their newly - acquired cash balances on deals, projects or assets 'at any price', as some have done in previous cycles. To deliver value on a sustainable basis, miners must remain disciplined and transparent in the allocation of capital, and stay focused on the goal of mining for profit, not for tonnes.

Balance sheets in good shape

The world's top-40 miners continued to focus on strengthening their balance sheets in 2017, with $25 billion being allocated to the repayment of debt, and capital expenditure at a record low of $48 billion. As a result, gearing has fallen from 41% to 31%, which is back in line with the Top 40's 15-year average.

With the liquidity concerns that were still lingering in 2016 now largely resolved, balance sheets are strong, and companies have the flexibility to act.

Capital expenditure at 10-year lows

Capital expenditure remained at 10-year lows in 2017. However, companies are realising the value of the significant investment they made in production capacity during the boom years. It looks like copper is the first commodity that is receiving substantial investments to increase capacity and to deliver supply into the optimistic future growth environment. There is likely to have been an underinvestment in sustaining capital investment in recent years as a number of companies were merely harvesting during the survival-mode years. This backlog of capital investment should be addressed in 2018.

Record high tax contributions

Tax expenses increased 81% in 2017, with cash taxes paid to governments rising by 67%, despite the fact that corporate tax rates remained relatively stable across most key markets. Resource dependent economies and governments will be relieved. However, there are already signs that a number of governments are tempted to increase taxes for short-term gain, which could come at the expense of long-term viability of mining in their countries, as investment dollars and resultant economic benefits flow elsewhere.

Returns to shareholders

Returns to shareholders more than doubled over the year, up from $16 billion in 2016 to $36 billion in 2017. Based on current levels of performance, we expect dividends will likely reach record highs in 2018.

Shareholders who endured the boom cycles of 2008 and 2012 will be looking for a reward for their patience now that optimism and profits are back. But the immediate temptation for larger returns – be they to shareholders or other stakeholders – must also be balanced against the ongoing need to invest for sustainable long-term value.

Political uncertainty

The global landscape is dynamic with innumerable political uncertainties and shifts to long-standing trade relations grabbing the headlines.

A number of governments are reassessing their tax regimes in an attempt to maximise value from

mining. For some it means increases in tax and royalty rates and for others decreases in rates to incentivise development. The USA's changed approach to trade relations and recent sanctions will also impact commodity market dynamics.

A larger focus on safety and environmental requirements is also apparent. The Top 40 is exposed to this global volatility on the demand and supply side.

New entrants staking their claim

A range of new entrants became active in the mining sector in 2017. Among them, private equity (PE) investors took a keen interest in mining investment opportunities, with PE firms active participants in almost every quality coal deal brought to market in Australia during the year.

There were also examples of non-mining companies partnering or merging with miners to secure access to commodities. For example, Agrium, a Canadian fertiliser and chemical wholesale and retail company merged with the world's largest potash producer, PotashCorp, while Tesla continued to invest in lithium supplies, including their recent transaction with Kidman Resources in Australia.

We expect that interest from non-traditional players will increase in 2018 and beyond, particularly as operating conditions continue to improve. While some incumbent miners will see these new entrants as a threat, others will look to take advantage of their new ideas, new capital and new ways of delivering value.

Safety better, but the job is never done

In 2017 there was a 36% reduction in the number of fatalities among the 28 companies (in the Top 40) that disclose safety statistics. Of the 22 companies that disclose injury statistics, 15 reported that the number of injuries had either fallen or remained consistent compared to the previous year.

While an improvement in the safety record of the Top40 is welcome news, the focus on a safe working environment for employees and local communities will always remain a priority.

What does the improved mining environment hold for Africa?

According to S&P Global Market intelligence, Africa received 14% of global exploration expenditure in 2017. Half of the exploration was focussed on West Africa with meaningful expenditure also in Tanzania, DRC and South Africa. Equity raised in Toronto, Australia and the UK, mainly for early-stage development and exploration showed a positive uptick in the first quarter of 2018 and will hopefully support additional exploration and development investment into Africa

The lack of capital investment in recent years is likely to turn and should have a positive impact on project development in Africa. However, there has been negative publicity recently about tax regime changes in some jurisdictions, which might make miners think twice before investing in long-term projects in a potentially uncertain environment.

From a commodity point of view Africa is endowed with a high concentration of certain metals. For example, the copper belt in the DRC and Zambia holds 62% of global cobalt reserves. New battery technologies and applications such as those used in electric vehicles resulted in significant demand increases for metals such as lithium and cobalt. Since 2016, there have been continued cobalt price increases. Glencore's copper and cobalt acquisition of Mutanda Mining in the DRC was the second-largest transaction in 2017.

Bulk commodities such as coal, copper, iron ore, zinc, manganese and chrome also showed remarkable price increases over the last two years. Miners of these commodities in Africa will reflect similar trends to those explained for the global mining industry.

Unfortunately, precious metals haven't done as well. The US-dollar gold price has remained relatively flat and platinum prices are at extreme lows. With higher input costs driven by input cost inflation, miners of these commodities are not experiencing the same growth as other commodities. They are still faced with the challenges of the bottom of the commodity cycle and job losses and mine closures are real risks.

The future

There is a definite, measured and patient approach being taken by mining companies to execute on their strategies to position themselves to deliver long-term value. Merger and acquisition activity is picking up as companies complete their disposal of non-core assets and others are positioning themselves with regards to specific commodities with a view to future growth.

Perhaps the biggest risk experienced in the previous cycle was the temptation to expect instant gratification. This influenced all stakeholder groupings, including shareholders, management, governments, workers and host communities, who wanted immediate benefits instead of sustainable value. Companies need to avoid repeating the mistakes of the past by executing their strategies with a long-term vision in mind.

Although strategies among the big miners may differ, they have a shared desire to responsibly create value for all stakeholders on a sustainable basis. In the risk environment, this is by no means an easy task. Success will require determination and an unwavering commitment to achieving long-term goals.

Contributor's Profile

Andries Rossouw is a partner in PwC's Energy, Utilities and Resources division and has been employed with the firm for 21 years. He has cross commodity expertise in the auditing of various listed and private mining and construction clients. His passion for mining is reflected in his involvement in various PwC global mining industry initiatives.

AS COMMODITIES ROAR, AFRICA WANTS BIGGER SLICE OF THE MINING PIE

One by one, the biggest names in African mining are getting squeezed. The tactics might be blunt, but the message is clear: the countries where they operate want a bigger share of the proceeds.

The collapse in commodities through 2015 hobbled some of Africa's biggest resource economies, stunting growth and leaving budgets short. Since then a recovery in prices has sent the continent's biggest miners soaring, boosted profits and rewarded shareholders with bumper payouts. But a lack of returns to governments is drawing a backlash from Mali in the Sahara to Tanzania on the Indian Ocean.

Zambia is the latest flash point. Africa's second-biggest copper producer slapped a $7.9 billion tax assessment on First Quantum Minerals Limited and said it's planning an audit of other miners in the country. Companies operating in Zambia include units of Glencore Plc and Vedanta Resources Plc.

Next door in the Democratic Republic of Congo, Glencore, the world's biggest commodity trader, is dealing with a dispute over a new mining code that dramatically boosts taxes, while major gold producer Mali has reportedly said it might follow Congo's example. Tanzania has all but crippled its biggest gold miner Acacia Mining Plc, a unit of Barrick Gold Corp., with export bans and a whopping $190 billion tax bill.

Seize a Slice

Barrick also has a copper mine in Zambia, though it says it hasn't received any notifications from Zambian authorities about a potential audit or tax reassessment, according to spokesman Andy Lloyd.

Countries "want a larger share of the rent," Hunter Hillcoat, an analyst at Investec Securities Ltd. in London, said by phone. "The mining companies are doing extremely well and governments are taking the opportunity to seize a slice of that."

Part of the governments' motivation is pecuniary. Zambia's economy, for example, grew in 2016 at the weakest pace since the start of the millennium and the government is struggling with a budget deficit. In Congo, economic growth has also slowed and the country's foreign exchange reserves have plunged.

There's a wider dissatisfaction than just money. Many governments feel the companies that operate on their territory haven't delivered on their promises, either through operational setbacks or the use of legal tax planning to transfer profits offshore.

Aggressive Rhetoric

In Tanzania, President John Magufuli accused Acacia of under-declaring export revenue and hit it with a record $190 billion tax bill. In Congo, the state-owned copper miner has accused its joint-venture partners, including Glencore's Katanga Mining Ltd., of using inter-company loans to reduce the profits that are declared in the country and promised to investigate.

The aggressive rhetoric has been contagious, according to Charles Robertson, London-based global chief economist at Renaissance Capital.

"The approach taken by Magufuli did not deliver what was initially demanded, but it did see the company pay more tax," Robertson said by phone. "That relative success looks like it has encouraged similar moves elsewhere."

In a world where statements are transmitted around the globe instantly, African governments have also seen that their threats can give them leverage. First Quantum tumbled 12 percent Tuesday and didn't fully recover even after the company refuted the tax assessment Wednesday. Acacia lost 47 percent of its value last year and another 26 percent so far this year as its dispute with Tanzania drags on.

The share prices of Glencore and Randgold Resources Ltd., which both mine in the Congo, have been relatively more resilient despite the uncertainty there. Still, chief executive officers Ivan Glasenberg and Mark Bristow flew to Kinshasa this month with other mining executives to negotiate directly with President Joseph Kabila — a sign that the balance of power may be shifting from foreign investor to African government.

"The governments don't care if they're discouraging foreign investment in the future," Investec's Hillcoat said. "This is an opportunity right now to boost revenues."

LEVERAGING NATURAL RESOURCES FOR SUSTAINABLE DEVELOPMENT IN AFRICA

By **Seedwell Hove,** Senior Macroeconomist, Quantum Global Research Lab, Switzerland

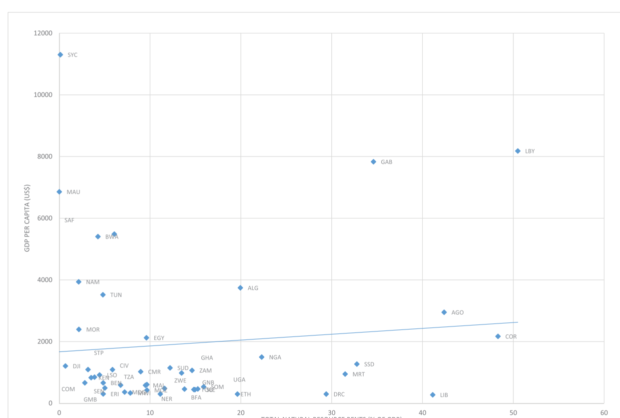
Africa is rich in natural resources. It boasts of over 10% of world reserves of oil, about 40% of gold, 90% of chromium and the platinum group of minerals, extensive fisheries, forests, and vast tourism resources. Explorations in the last decade across many African countries have led to discoveries of more natural resources, such as oil deposits in Ghana, Kenya and Uganda, and natural gas in Mozambique and Tanzania, among others. According to the IMF, about 32 countries in Africa are resource rich, of which 28 are in Sub- Saharan Africa (SSA) and four are in North Africa[1]. In SSA, resource-rich countries account for more than 80% of the region's GDP, while more than a quarter have at least 50% of total export earnings derived from minerals. Natural resource rents account for more than 40% of GDP in countries such as Libya, Congo Republic, Equatorial Guinea, Angola, and Liberia (Figure 1).

While some resource-rich countries have succeeded, others have not reaped the full benefits of natural resources. For many African countries, the benefits from natural resources have remained below potential, and strong growth rates have not been sustained for long periods. This has raised questions about the role natural resources in Africa's quest for development and what can be done to maximise the benefits of natural resources. Natural resources have the potential to drive Africa's economic development if right strategies and policies are implemented throughout their development value chain that is from discovery of natural resources, extraction, and management and utilisation of resource rents.

Role of natural resources in driving economic development in Africa

Resource-rich African countries have benefited immensely from abundant natural resources due to rising demand for natural resources (especially from China and India), and firming commodity prices since 2000. Rising commodity prices have catalyzed significant investments in resource exploration, which has helped to increase output and boost national incomes. While the benefits from natural resources are visible, they have remained rather below potential, with many resource-rich countries failing to sustain higher growth rates for longer durations, especially when commodity prices decline. For instance, the recent slump in commodity prices since 2014 has reversed some of the gains achieved during the commodity super-cycle boom, leaving some large African economies like South Africa, Egypt, Angola, and Nigeria growing at sluggish paces or in recession in 2016. Reaping the benefits of natural resources is not straightforward.

The "resource curse vs blessing" literature highlights a number of challenges that resource-rich countries encounter in trying to maximize the potential of natural resources for development. These include the Dutch Disease effects (where a natural resource boom appreciates the real exchange rate, which reduces the competitiveness of the other tradable sectors such as manufacturing), volatility of natural resource revenues, and management of resource rents, failure to diversify their economies, corruption, and rent seeking by political elites as well as civil conflicts.



1. The classification is based on a threshold of at least 25% of the value of its total exports derived from non-renewable natural resources such as oil, minerals and metals, or natural resources account for least 20% to the country's GDP.
2. World Development Indicators, World Bank, 2017

Strategies to Optimise the Benefits of Natural Resources

According to the World Bank[3] , the wealth of a nation – composed of natural capital, produced capital, and intangible capital (e.g human capital and social capital) – only increases if resources are discovered, and their extraction produces a rent used to create above ground assets. The sustainable economic development from natural resources requires the expansion of total wealth and improving the composition of wealth (transforming natural capital into produced and intangible capital). African countries should develop institutions that support effective discovery, extraction and capturing of natural resource rents. The extraction of resources and the capturing of resource rents (through taxes and royalties) should make other economic sectors competitive by promoting investment, sectoral linkages, supporting local development and not raising costs to other sectors. In fact, governments should set robust fiscal regimes with fiscal rules that help them to smooth their expenditures and avert pro-cyclical spending, while shifting their mindsets from consumption to investment.

Resource-rich African countries should also establish natural resource funds such as Sovereign Wealth Funds (SWFs). According to the Hartwick rule[4], if natural resources are exhaustible, the best way of sustaining development from their use is to reinvest resource rents into some forms of capital that can generate returns in future. About 19 African countries have established sovereign wealth funds, with collective assets estimated at US$159 billion as at 2015. Sovereign wealth funds helps to buffer economies from the volatility of natural resources prices, limit Dutch Disease effects, support domestic and infrastructure development, while ensuring savings for future generations and wealth diversification.

By investing a portion of their resource revenues at home in infrastructure, human capital and other key development areas, it is possible for resource - rich countries to transform underground wealth to aboveground assets. Resource-rich African countries can also leverage natural resources for industrial development and structural transformation by developing and strengthening linkages to other economic sectors. The building of strong institutional frameworks is critical in managing rents and shifting from short-term rent extraction mindset to rent management focused on long-term development.

Lessons from International Experience

Several resource-rich countries – such as Norway, Malaysia, Indonesia, Chile and Botswana – have successfully leveraged natural resources (especially hydrocarbons and minerals) for economic development. **Norway**, which discovered oil in 1970 took important policy steps to integrate the oil sector into the rest of the economy. It established a SWF to effectively manage natural resource rents and established a robust fiscal management framework, supported by fiscal rules to limit discretion. This played an important role in stabilizing and developing the economy. **Malaysia** started with diversified resource endowment, including oil, natural gas, rubber, tin and forests. The development of resource sectors helped to boost and sustain high levels of savings, which were used to support investments in agriculture, manufacturing, infrastructure and technology. **Indonesia** used its endowments in oil resources to develop agriculture and manufacturing sectors, and to bring down domestic costs, which further encouraged diversification of exports. **Chile** developed into a dynamic and more diversified commodity exporter largely from its large copper endowments, timber, nitrate, and fish. Chile's prudent fiscal policy, tax incentives, and favorable business climate helped to attract foreign direct investment. **Botswana** used mineral rents to support rapid economic development, propelling it one of the prosperous countries in Africa with GDP per capita of $15, 839 in 2015, almost three times higher than that of Nigeria and the SSA average.

Many lessons can be learnt from these countries. Most of these countries instituted coherent counter-cyclical policies (fiscal, monetary and exchange rate policies) to build resilience against boom-bust cycles associated with commodity markets. These countries also benefited from flexible and competitive product markets, high degree of trade openness, flexible labor markets, adequate financing and provision of education and training, low levels of taxation, and significant public spending on research and development from natural resource funds. Investments in high - quality human capital and infrastructure helped to

3. World Bank (2011). The changing wealth of nations. Measuring sustainable development in the new millennium, World Bank, Washington DC.
4. Hartwick, J.M., (1977), Intergenerational Equity and the Investing of Rents from Exhaustible Resources," American Economic Review, 66, 972–74.

sustain higher growth rates, reduce costs of doing business and enhanced competitiveness. These countries also paid attention to linkages and comparative advantages, which helped to boost economies of scale, speed up industrial production and structural transformation. Moreover, natural resource rents boosted savings and financed other sectors of the economy, which catalyzed economic diversification. The establishment of SWFs added prudence to the management of natural resource rents, helped to stabilize economies, and unlocked resources for developing other sectors of the economy, while providing savings for future generations. The development of strong institutions significantly improved governance of resource sectors and helped to limit corruption and rent-seeking behavior by political elites.

African countries have the potential to develop from its natural resources. They should develop institutions that support efficient discovery, extraction, capturing and management of natural resource rents and transform underground wealth into above ground assets. Policies supporting economic development in Africa should take into account the rich presence of natural resources.

Contributor's Profile

Seedwell Hove is Senior Macroeconomist at Quantum Global Research Lab in Switzerland. He is a former Economist at the World Bank and former Senior Treasury Analyst at the Reserve Bank of Zimbabwe. He holds a Bsc Honors and MSc in Economics Degree from the University of Zimbabwe, and a PhD in Economics Degree from the University of Cape Town, South Africa.

SOMALIA TO IMPLEMENT OIL, MINING FRAMEWORK

The Ministry of Petroleum and Mineral Resources of the Federal Republic of Somalia has drafted regulations to manage the country's petroleum and mineral resources sectors, especially in regard to ownership and revenue sharing. The agreement was made by the federal government and the federal member states of the National Security Council and facilitated and assisted by the World Bank and the Council for Inter-State Cooperation.

The agreement, established in the interim capital of Baidoa on June 5, wraps up a three-year process led by the ministry to create a framework for the development of the oil industry, and it authorizes the ministry to issue permits and manage the petroleum and mining activities in Somalia.

The Council for Inter-state Cooperation, a technical committee from the Federal Member States and the Federal Government led an intensive and inclusive consultation process with all industry stakeholders. The President of Somalia, H.E. Mohamed Abdullahi Mohamed, as well as Prime Minister H.E. Hassan Ali Khayre and the Heads of the Federal Member States and the Mayor of Mogadishu also secured high-level political agreement on the principles that will guide the management of the sectors.

"The finalization of this agreement marks a new chapter in the progress and development of the Federal Republic of Somalia," said H.E. Abdirashid Mohamed Ahmed, the Minister of Petroleum and Mineral Resources. "The Ministry will work in close collaboration with the federal member states in swiftly implementing all legislations and policies, monitoring and following up on all licenses issued prior to this agreement."

The agreement is based on the Provisional Constitution of the Federal Republic of Somalia, which states the allocation of natural resources should be agreed by both the federal government and the federal member states; and that land shall be used in an "equitable, efficient, productive and sustainable manner."

The objectives of the agreement are to gain a common vision between the government and the states on the management of the petroleum and mining sectors in Somalia; to clarify the management and administration of petroleum and mineral resources in Somalia; to provide a framework through with both the government and the states can participate in the exploration and production of resources; to obtain revenue from the exploration and production of these resources; and to reduce economic inequality between the federal member states of Somalia.

"It is indeed a great day for Somalia to agree that the Somali people own their petroleum and mineral resources and the federal government of Somalia and federal member states are the representative of the people, and are responsible for the fair distribution of petroleum and mineral resources," said H.E. Abdirashid Mohamed Ahmed. "This agreement will enable Somalia to avoid conflicts over resources and embark on a route to sustainable development."

"The Ministry of Petroleum and Mineral Resources appreciates the efforts of His Excellency the president of the Federal Republic of Somalia, Mohamed Abdullahi Farmajo, Excellency the Prime Minister, Hassan Ali Kheyre, the Heads of the Federal Member States, and the Mayor of Mogadishu to have shared in the vision in the petroleum and mineral sector and entered this momentous agreement," said H.E. Abdirashid Mohamed Ahmed. "Likewise, the Ministry appreciates the Council for Inter-State Cooperation (CIC) for their extreme competency and industrious technical participation in the development of the agreement. The Ministry is also deeply indebted to the World Bank for their support and facilitation in developing this agreement."

PRIVATE EQUITY FUNDS IN THE AFRICAN MINING SECTOR: EMERGING TRENDS AND OPPORTUNITIES

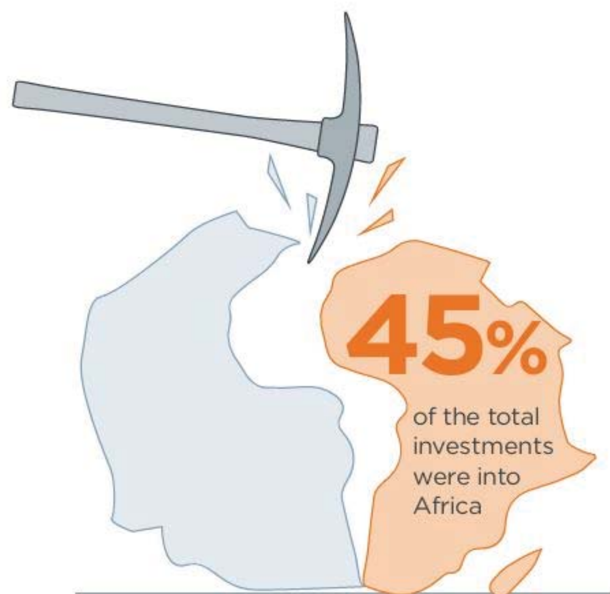
By **Alexander Keepin,** Partner, Bryan Cave Leighton Paisner LLP London (BCLP)

Private Equity has become an important source of funds for mining companies, particularly in the commodities downturn. As other providers of debt and equity funding have sought to reduce their exposure to the sector and with reduced levels of M&A activity, a number of private equity funds have been created and additional funds raised, aimed at taking advantage of the downturn in the sector.

Bryan Cave Leighton Paisner LLP have been tracking the activity in the Mining Private Equity sector since 2014, when a number of the mining private equity funds emerged to join the traditional mining private equity firms such as RCF and Orion, who are active in the sector.

In 2014, an estimated $302m was invested into African mining projects by private equity funds, across twelve investments. In 2015 this activity increased significantly to $367m invested across 22 deals, during a year in which there was increased activity with an estimated $3.2bn invested by the mining private equity firms into mining projects. This peak activity in 2015 was due, in part, to a significant number of investments being made by way of increasing stakes, which is often associated with making further investment to protect an existing investments. In other years more money has been invested by way of new investments in projects. 2016 saw a strengthening of commodity prices which led to a decrease in the amount invested generally, which fell to $1.75bn and, in line with that, mining private equity investments into Africa fell to $104m across 8 transactions.

Last year, 2017, saw a marked increase in private equity investments into Africa with over $1bn being invested in 13 mining projects in Africa. The investments into African mining projects represented 45% of the amount invested globally, a significant increase from 6% in 2016 and the 12% and 15% in 2014/2015.



So what is the reason for African project's recent success?

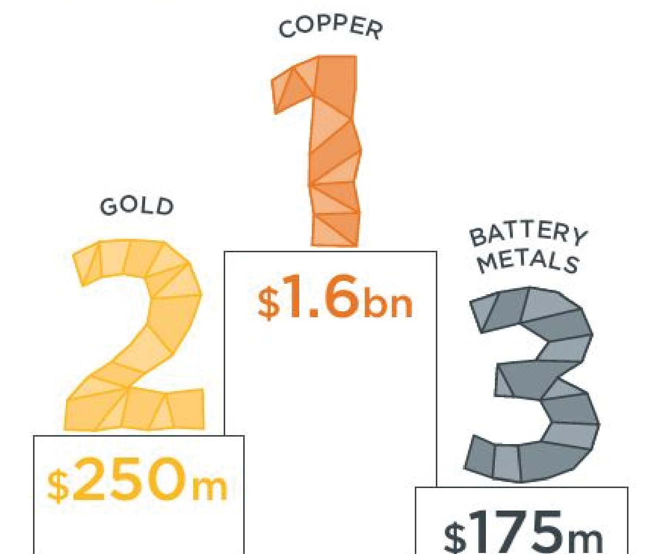
Commodities

Commodity prices have to a large extent rebounded and for some commodities there are significant opportunities. 2017 saw a significant shift in the commodities which private equity investors were seeking to invest in. For the first time in the last four years, investments in copper projects outweighed investments in gold projects. Investments into gold projects fell to $250m from over $1bn in the year before. Copper was the standout commodity in 2017 with over $1.6bn invested by mining private equity in copper projects. This had a huge benefit for African mining projects as Africa is relatively resource rich in copper. It is the mining private equity firms desire for exposure to particular commodities which has driven the increased investment activity into African projects.

In 2017 the three most popular commodities with mining private equity firms were copper, with $1.6bn invested, gold with $250m invested and battery metals with $175m invested. Investments

in coal projects and potash/fertiliser projects both fell out of the top 3 commodities in 2017. Mining private equity investors also sought out projects with exposure to zinc in 2017, although this often occurred with other minerals and so is more difficult to track.

This trend of activity in particular jurisdictions being driven by mining private equity seeking investments in certain minerals is set to continue.



Country Risk
The other key theme developing in 2018 is the continued move to what is seen as an equitable sharing of resources rents and other benefits by host countries. However, when viewed from the investors perspective, this trend introduces an element of uncertainty and risk which then needs to be considered by mining private equity as part of the investment decision.

Whilst this trend may have gains for host countries in the short term, such as the payments to the Tanazanian Government by Acacia, the political uncertainty in a number of countries is likely to impact the mining private equity investors' appetite to pursue investments in those countries, or at the very least the price at which they are willing to do so.
Other examples have been reported across Africa in the last 12 months, such as the Mauritanian government asking Kinross for discussions about all of the company's activities in Mauritania. In addition, in Ghana, there have been calls for an overhauling the mining code and tax policies for the mining industry. The DRC has also overhauled its mining code, in the face of much opposition from the international mining companies active there, many of whom have very significant investments in the country. Zambia has also moved to enforce the rule that mining companies transport 30% of their product by rail, notwithstanding the industry's concern regarding the rail capacity and state of the infrastructure.

Where such moves do not make a country uninvestable for a mining private equity fund, it will be priced into the returns expected by these funds. This country risk may also, in part, explain the current shift from investors preferring single assets, single jurisdiction investments to seeking more diversified investments.

Opportunities
The real opportunities in the coming year will be for those African projects in favoured commodities in relatively stable jurisdictions. These projects will be the most attractive for mining private equity funds. Gold remains a popular investment and this is expected to continue into 2018/19 with copper, zinc and other battery metals also being popular.

"Private Equity has become an important source of funds for mining companies, particularly in the commodities downturn. As other providers of debt and equity funding have sought to reduce their exposure to the sector."

Contributor's Profile
Alexander Keepin is Partner and Head of Mining in global law firm Bryan Cave Leighton Paisner's Energy and Natural Resources team. His international practice includes a wealth of experience advising on listings by energy and natural resources companies, particularly in Africa, Russia and the former CIS.

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REVISION OF THE DEMOCRATIC REPUBLIC OF CONGO MINING CODE*

By **Olivier Bustin,** Attorney, Vieira de Almeida & Associados Portugal
Pierrick Ferrero, Vieira de Almeida & Associados Portugal

Following the actions taken by the Ivory Coast in 2014, as well as Burkina Faso, Cameroon and Senegal in 2016, who adopted a new mining code, the Democratic Republic of Congo (hereinafter "the DRC") has recently revised its mining code enacted in 2002 (hereinafter "the Mining Code"). The bill was adopted by the Parliament in January 2018 and signed by the President on March 9th, 2018. The law no18/001 (hereinafter "the Law") reforming the Mining Code was immediately enforceable and will have a significant impact on foreign investments in the mining sector. The mining regulation enacted by Decree no 038/2003, of March 26th, 2003 (hereinafter "the Mining Regulation"), is currently under revision and should clarify the newly - amended Mining Code. The new text of the Mining Regulation is expected soon.

Due to the reforms of the Mining Code, the tax provisions applicable to mining companies have undergone significant changes, and State and local participation have increased. However, these changes may interfere not only with the Constitution of the DRC but also with international agreements of investment security, and the COMESA Treaty (hereinafter "the Treaty").

First of all, this reform leads to a very important overhaul of the tax regime. One of the major changes is the increase of the rate of the mining royalty. For example, the royalty rate for precious stones will increase from 4 to 6%, for iron and ferrous metals from 0.5 to 1%, for non-ferrous metals from 2 to 3.5%, and for precious metals from 2.5 to 3.5%. The royalty rate will remain at 1% for industrial minerals. A new category has also been created for strategic substances, adding a royalty rate of 10% for these substances.

The crucial concern with regards to what should be classified as a strategic substance, is about Cobalt. Cobalt is a rare and useful substance which is an essential component of batteries for both phones and electric cars. The DRC owns two thirds of the world's established reserves of Cobalt. The price of this metal has jumped more than 70% in 2017. The rate of the mining royalty could increase from 2% to 10 % if this metal is qualified as a strategic substance. Otherwise, if Cobalt remains classified as a non-ferrous metal, this rate will be raised only from 2 to 3.5%.

Furthermore, a special tax on «super profits» has been included in the Mining Code and can be defined as income earned when commodity prices increase to 25% above the levels included in a project's feasibility study. However, despite these tax increases, the corporate tax applicable to mining companies will remain at 30% (instead of the 35% corporate tax rate that applies to other sectors).

That being said, the reform is also characterized by heightened participation of the Congolese State as a shareholder and as a regulator in the mining process.

Firstly, as a regulator, the export or sale of minerals is subject to the State's right to determine the production quotas to be exported according to the needs of local industry. This point is a slightly change to the version from 2002, which had no provision on the issue, even if it was intermittently addressed by temporary moratorium. Moreover, any direct or indirect change in control of a mining company is now subject to the prior approval of the Congolese State.

Secondly, the State increases participation as a shareholder, because mining companies wishing to acquire a production permit must transfer 10% of their share capital to the State for free. The rate was equal to 5% in the 2002 version. Furthermore, an additional 5% of the mining company's share capital must also be transferred to the State for free at each renewal of the production permit.

Alongside these changes, which may be judged as reasonable, some new points of the reform may be deemed more questionable. A key point of the reform is the obligation of the mining companies to have 10% of their share capital held by Congolese citizens. This amendment creates a distinction in treatment between Congolese citizens and

foreigners that did not exist previously. Therefore, this amendment may raise an issue with respect to the DRC Constitution, as seen in Article 50, paragraph 2, which states that "all foreigners who find themselves legally on the national territory may benefit from the same rights and liberties as the Congolese, excepting political rights."

Plus, this local content requirement may interfere with some provisions set out in international agreements of investment security. For instance, as per article 1 of the USA-Congolese Convention on Reciprocal Encouragement and Protection of Investment (hereinafter the "Convention"), each contracting State must undertake to «accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies». Once again, the new Law may give the impression that Congolese investors receive somehow better treatment than American ones. It is noteworthy that any litigation related to the interpretation of the Convention must be submitted to an arbitration court. Thus, arbitration could be an option for US mining companies and their subcontractors to protect their share capital (The same kind of rule exists in other international agreements of investment security, like the Franco-Congolese Convention or the Swiss-Congolese Convention).

Besides not complying with the Constitution of the DRC and with some international conventions on mutual investment, this new local content obligation could be seen as inconsistent with some provisions of the COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (hereinafter "the Protocol"), which is an integral part of the Treaty. Indeed, Article 2 of the Protocol asserts a non-discrimination principle between the COMESA citizens, which means that a Congolese citizen should have the same right and not be better treated than another citizen of the COMESA community. The Mining Code reform also changes the stabilization clause included in the 2002 mining legislation. This clause previously provided a ten-year warranty of no parliamentary amendments to any rule applicable to mining projects, and now provides only a five-year guarantee of no such parliamentary amendments. This amendment to the stabilization clause may not comply with the objective of the Treaty, as shown in Article 159, which provides that the Member States shall, among other things, "create and maintain a predictable, transparent and secure investment climate in the Member States". Given that mining projects are often very long-term (i.e. a production permit is granted for up to twenty-five years, renewable for multiple fifteen-year periods), the change in the stabilization clause reduces the visibility that is required for investment in mining projects. Taking a legal action on the ground of the Treaty could be an option to contest some new provisions of the Law although it is only when internal proceedings have been exhausted, that an appeal to the COMESA Court of justice may be lodged.

To conclude, the Law includes legitimate provisions as the mining royalty tax increases, as well as some much more questionable provisions. Either way, the Mining Regulation is eagerly awaited as it may clarify the impact of the law for investors, and will make necessary adjustments and specifications.

Contributor's Profile

Olivier Bustin, a French and Portuguese qualified attorney. He joined Vieira de Almeida & Associados (VdA) in 2015 and is currently managing international adviser of the Oil & Gas and Projects-Infrastructure practice groups. He has been assisting clients on Production Sharing Contract Negotiations, M&A transactions, Public-Private Partnerships and Infrastructure Projects, mainly in connection with the Energy and Natural Resources Sector in Francophone Africa. Olivier has been a visiting professor for postgraduate study at OHADA Law, jointly organised by the Paris 2 and Paris 13 Universities, where he has been providing courses on various supranational legal frameworks applicable in Africa, such as the Central African Economic and Monetary Community (CEMAC) Law, the West African Economic and Monetary Union (UEMOA) Law, the Common Market for Eastern and Southern Africa (COMESA) Law, the Economic Community of West African States (ECOWAS) Law, the Inter-African Conference on Insurance Markets (CIMA) Law and the African Intellectual Property Organization (OAPI) Law. He has also been a visiting professor at the Bel Campus University in Kinshasa, where he has been teaching debt recovery and enforcement procedures.

* The authors would like to acknowledge **Lyric Perot's** invaluable assistance in preparing this article.

* Please note that the article was written before the adoption of the Mining Regulation on 8th June 2018.

MOROCCO MINING SECTOR: EMERGING LAWS, REGULATIONS AND OPPORTUNITIES

With more than 70% of the world's estimated phosphate reserves, Morocco is the world's second largest producer of phosphate behind China[1], making the mining industry of particular importance to the national economy.

In order to make the mining sector more attractive and improve the development of exploration and mining research while ensuring a sustainable development of the national mining industry, a new Moroccan mining code has recently been adopted.

Scope of the mining titles over state-owned minerals

The former Moroccan mining laws dating back to 1951 were no longer well-suited to the modern needs and challenges faced by the mining sector.

The 1951 Mining Code provided for mining titles relating to eight specific categories of mineral substances expressly contemplated by law.

Under the new Moroccan legislation, mining titles can now be granted for all categories of minerals that can be used for industrial purposes, except for construction and civil engineering materials such as sand which are excluded from the mining legislation[2].

The extension of the scope of the mining titles to all minerals implies that titles regarding calcite, feldspar, manganese and perlite can now be granted.

New mining legislation

In terms of the legislative and regulatory framework, a new Law n°33-13 relating to mines was adopted by the Moroccan Parliament on July 2015 and published in the Official Bulletin n°6384 on 6 August 2015.
Law n°33-13 aims at modernizing the mining sector and repeals the former mining regulations. Before the introduction of Law n°33-13, the mining sector in Morocco was regulated by the Dahir dated 16 April 1951 completed by decree n°2.57.1647 dated 17 December 1957 and an "arrêté viziriel" dated 21 April 1951, together often referred to as the "**1951 Mining Code**".

The new legislation incorporated some of the principles contained in former legislation but also introduced new provisions, including amongst other:

- Extension of the provisions of the 1951 Mining Code to all mineral substances used for industrial purposes with the exception of construction and civil engineering purposes(as mentioned above);
- Introduction of new categories of mining titles;
- Introduction of new measures for environmental management;

1. Wordatlas.com, Countries With The Largest Phosphate Reserves (last updated on March 23, 2018)
2. Construction and civil engineering materials remain governed by laws relating to quarries

- Extension of the coverage by the mining legislation to offshore areas.

Mining titles

Mining titles are limited real estate rights which are distinct from the ownership of the land.
As in the 1951 Mining Code, Law n°33-13 provides for three different categories of mining titles.
Two of these are new: the “exploration authorization” and the “mining licence”. The “research permit” is the only title to be maintained while “operating permits” and “mining concessions” no longer exist under Law n°33-13.

Exploration authorization

Exploration authorizations are granted for two years and renewable once for one year over areas of 100 to 600 km2.

This authorisation confers to its holder, who must be a legal entity, the exclusive right to search the mineral substances for a given category within the relevant area and the right to obtain one or more research permits within the said area and for all mining products, provided that an application is submitted during the period of validity of the exploration authorization.

Research permit

Research permits confer on their holder, who must be a legal entity, the exclusive right to search for the mining products contained in the area covered by the permit

Research permits are granted for three years over an area measuring 4 km by 4 km. They are renewable once for four years, subject to the realisation of a minimum work program and to incurring the corresponding expenditure during the initial period.

Both the exploration authorization and the research permits are transferable, provided that the transferee satisfies the conditions required by Law n°33-13 and its implementing decree n°2-15-807.

Mining licence

Mining licences are granted for ten-year terms and renewable for successive periods of ten years until the corresponding reserves are exhausted. They give an exclusive right to extract and develop mineral substances for a given category within a given area.

A mining licence results from one or more contiguous research permits held by the same holder. It can only be granted to the holder who has demonstrated the existence of deposits within the perimeter covered by his research permit(s).

It should also be noted that in addition to these three main mining titles, Law n°33-13 provides for specific titles:

- Research permit for cavities;
- Mining license for cavities;
- Exploitation authorization for waste rock piles and mine-waste tips.

Transitional provisions

As mining concessions can no longer be awarded under Law n°33-13, the new regulation provides that valid mining concessions granted under the 1951 Mining Code shall remain governed by the legal provisions in force at the date of their granting, but cannot be renewed.

As a result, one year before the expiry of the mining concession, the holder has to submit an application for a mining licence, in accordance with the provision of the new law. Failure to do so will result in the concession being revoked, meaning that the relevant areas become available for research.

Regarding holders of research permits and operating permits granted under the 1951 Mining Code, they had one year following the entry into force of Law n°33-13 to apply for the renewal of their research permit or their conversion into a mining licence, meaning they could do so until 23 May 2017, otherwise resulting in the revocation of their permit.

Right of foreign investors

Mining licenses can only be held by Moroccan legal entities, however there is no reference in Law n°33-13 to restrictions on the Moroccan entity having foreign shareholders.

Such condition of nationality is not envisaged by Law n°33-13 for the exploration authorization and the research permit, although the implementing decree requires that legal entities applying for any mining title have their registered office in Morocco or elect domicile there.

Through the Moroccan investment charter set forth

3. Kingdom of Morocco Office National des Hydrocarbures et des Mines, Mining overview brochure 2016

by law n°18-95 dated 3 October 1995 currently undergoing reform projects, foreign investors may benefit from tax and regulatory advantages, in particular if the investment meet certain requirements (size, number of workers etc.).

Fees, taxes, duties and tax incentives

Several incentives may apply to mining activities to promote investment[3], such as:

- A reduced corporate tax of 17.5% for exporting mining companies and mining companies selling their products to companies which export them after valorization;
- The exemption from import duty and VAT applicable for imported equipment for investment equal or greater than MAD 200,000,000;
- A contribution from the Moroccan State to infrastructure requirements such as roads, water supply and electricity, within the limit of 5% of the total value of the investment when the investment exceeds MAD 200,000,000.

Beside these provisions, the granting and renewal of mining titles are subject to the payment of fees. The fees applicable for the granting, renewal and exceptional extension of mining titles are provided for by the implementing decree[4].

Financial capacity of the investors

The award of a mining title is subject to justification of technical capabilities and financial resources for all operations related to such title. The holder of a mining permit must achieve a program for works to be carried out.

Such program must also include the minimum technical and financial means that the applicant undertakes to deploy, a minimum amount of financial investment being required for exploration authorizations and research permits.

Protection of the environment

Environmental regulation in Morocco is provided in particular by Law n°11-03 related to the protection and the upgrading of the environment dated 12 May 2003 which main purpose is to protect the environment against any kind of pollution and degradation and to implement a liability legal framework guaranteeing compensation for any damages caused to the environment.

Law n°33-13 provides that mining operations must be carried out in accordance with environmental legislation.

Mining title holders must provide the administration with information on their mining activities and prepare an environmental impact assessment comprising geological reports, mining statistics, work programs, budgets and information on products extracted.

In the event of an incident, mining titles holders must take immediate measures to ensure the protection of people and the environment.

Sanctions

The administration may suspend mining operations carried out in contravention with Law n°33-13 and revoke without indemnities the corresponding mining title.

The act of carrying out exploration, research or exploitation of mining products without holding a mining title exposes the offender from six months to two years' imprisonment and a fine from MAD 50,000 to MAD 500,000.

Contributors' Profiles

Godefroy Le Mintier is a corporate and project lawyer and a member of the Middle East and francophone Africa team. Godefroy practices mainly in the fields of mergers and acquisitions, privatisations, tender offer processes and international joint ventures. Godefroy graduated from the Ecole des Hautes Etudes Commerciales (HEC) and masters in law from the University of Paris XI (Sceaux). He joined us in 1999 after having spent more than a year in Morocco (Casablanca) as chargé de mission junior in Proparco, the private sector arm of Agence Française de Développement, the French state-owned public aid and development corporation. Godefroy is a member of the Paris Bar. He speaks French and English.

Pauline Coulon is a trainee lawyer, member of Norton Rose Fulbright Middle East and francophone Africa team. Pauline graduated from Nancy II University in European and International Business Law and studied corporate law at the University of Edinburgh.

4. For instance, as of today, applying for an exploration authorization costs MAD 50/km2 while applying for a renewal of an exploration authorization costs MAD 100/km2.

NIGERIAN MINING SECTOR: A LEGAL REVIEW AND THE POTENTIALS

By **Ayodele Kusamotu,** Chairman, Kusamotu & Kusamotu Nigeria
Ridwanulahi Olanite, Associate, Kusamotu & Kusamotu Nigeria

Despite a history of substantial mining operations during the colonial occupation of Nigeria, the potential inherent in the wealthy caches of untapped mineral resources across the country, did not form part of the focal point in post-colonial discussions towards the development of Nigeria for a very long time. However, these opportunities are receiving increasing attention from the government which is looking to diversify its economy from an oil revenue dependent one.

What makes the Nigerian solid minerals industry alluring is the relative underdevelopment of mining operations from prospecting, to the exploitation and reclamation stages of the Mining life cycle. Especially because the prior position of inhibited development translated into providing viable prospects for both local and foreign investors.

Considering the increased interest in the Sector and the prevalence of unindustrialized, small-scale mining activities and practices, the government has considered it important to join other long-term players in the global mining economy in a bid to grow the local mining industry.

Legal Regulatory Framework:

The primary legislations governing the mining industry are the Nigerian Minerals and Mining Act 2007 (NM&M Act)[1] and the Minerals and Mining Regulations of 2011[2].

In terms of International instruments regulating Mining, Nigeria is a signatory to treaties like the Multilateral Investment Guarantee Agency Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which provide protection for foreign investments.

Adminstrative Regulatory Framework:

While the ownership of subterraneous mineral rights is constitutionally vested in the Federal Government[3], State Governments have been lobbying to change the ownership structure of mineral rights[4]. However, the Federal Government continues to hold strongly to its control of mineral resources, consequentially providing the sectoral administrative regime.

The primary authority on mining operations is the office of the Minister of Mines and Steel Development[5] which has general oversight functions and develops policies and programmes for the growth of mineral resources. The NM&M Act also established the Mining Cadastre Office, which administers mineral titles and maintains a cadastre registry for collation of registers of all Mining related permits and licences which have been granted. It is also responsible for interfacing with investors to grant and process mineral titles.

Other key departments include; the Mines Inspectorate Department (responsible for enforcing mining laws and revenue collection as well as ensuring safety in mining operations) and the Mines Environmental Compliance Department (establishes, reviews and monitors compliance with environmental obligations and best practices in Nigerian mining).[6] The Artisanal and Small-Scale Mining Department provides support and extension services to small scale mining operations including entrepreneurial training, environmental management and improving sustainable livelihood in Artisanal mining communities. These amongst other bodies like the National Environmental Standards and Regulation Enforcement Agency (NESREA)[7] are some of the administrative bodies, agencies, departments and organisations which regulate the industry.

Mining Rights and Licensing Regime

Applications for mining titles are made to the Mining Ministry through the Mining Cadastre Office in the Federal Capital Territory, Abuja. These titles are to be granted after competitive bidding or on a first-come first-served basis.

1. NM&M Act repealed the Minerals and Mining Act No 34 of 1999
2. Other significant pieces of legislation that affect the sector include: the Mines and Quarries (Control of Building etc.) Act, Land Use Act, Environmental Impact Assessment Act, National Environmental Standards Regulations Enforcement Agency (Establishment) Act, Companies and Allied Matters Act, Companies Income Tax Act, Explosives Act, Labour Act, Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Immigration Act, Nuclear Safety and Radiation Protection Act, and Water Resource Act.
3. Section 44(3) of the Constitution of Federal Republic of Nigeria 1999 and further entrenched under the provisions of Section 1(1) of the Nigerian Minerals & Mining Act 2007.
4. Association opposes removal of mining from exclusive legislative list. Published by The Nigerian Expression on December 28, 2017. Available Online at http://thenigerianexpression.com/2017/12/28/association-opposes-removal-of-mining-from-exclusive-legislative-list/ last accessed 24/05/2018 14:28
5. See Section 4 of the Nigerian Minerals & Mining Act 2007
6. See sections 16-18 of the Nigerian Minerals & Mining Act 2007
7. Established by the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act

Where the mining right is to be granted through the bidding process, the Minister of Mining and Steel Development defines which areas can be set aside for the bidding process. However, due to the current realities arising out of the 'underpopulation' of the Nigerian solid minerals sector, mineral rights are generally granted on a priority basis.

There are no major barriers preventing local and foreign investors from acquiring mining rights. Nevertheless, there is usually the need to incorporate a company under the subsistent Nigerian company laws. Such a company may be fully foreign owned, however, there will be a need to acquire a Business Permit from the Nigerian Investment Promotion Commission (NIPC). The fully foreign owned or Nigerian company would be obliged to comply with all relevant Nigerian laws with no discrimination. Once incorporated, mining rights which can be granted to the mining operator include: Reconnaissance Permits[8], Exploration licenses[9], Mining Leases[10], Small scale mining leases[11]. (See Table 1 below)

Except for Reconnaissance Permits, Mining rights are transferable and assignable, subject to the requirements of the law and the Mining Cadastre Office. This allows for the acquisition of financing for mining operations. Except for the purpose of acquiring financing for mining operations, an encumbrance cannot be charged against a mining title or facility which forms part of the mining operations and even where this is permitted, it can only be done after the status of the mining title has been confirmed by the Mining Cadastre Office.

Environmental and Social Impact Regulations

Separate from the NM&M Act and the Mining Regulations, the principal laws regulating the environmental and social impact of mining operations include the Environmental Impact Assessment Act, NESREA Act,[13] the National Environmental (Mining and Processing of Coal Ores and Industrial Minerals) Regulations 2009 and the National Environmental (Permitting and Licencing System) Regulations 2009 among others.

One of the key requirements before the grant of mining rights to operators is the submission of an Environmental Protection and Rehabilitation Programme which must be approved by the Ministry before any mining title is issued. It must also provide for specific reclamation and rehabilitation actions, and an estimation of the cost and timeframe required.

Often, mining title holders will have to deal with the host communities due to their attachment to the land. This means that a good relationship with the host community must be maintained.[14] This becomes even more vital because lawful occupiers of land affected by mining titles usually reserve grazing and farming rights where these do not hamper mining activities.[15]

Incentivised Mining Operations

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act[16] allows foreign investors import their operating funds through the Forex market, allowing for easy export of the profits to their country. The Nigerian Investment Promotion

Table 1[12]

Licence Type	Purpose	Duration
Reconnaisance Permit (RP)	The holder has the right to obtain access info, enter on or fly over any land within the territory of Nigeria available for mining purpose to search for mineral resources on a non-exclusive basis. Drilling and other subsurface activities are not permitted. Allows the holder of the right permission to obtain and remove surface samples in small quantities.	1 Year (Renewable annually)
Exploration Licence (EL)	To conduct exploration on the land within the area of the licence. The mining activity is restricted to specified minerals The holder is allowed to remove, conduct bulk sampling and testing export and sell mineral resources not exceeding established limits and the mining area is not more than 200sqkm.	3 years initially (Renewable two further periods of 2 years each)
Mining Lease (ML)	Granted to the holder of an exploration licence or small scale mining lease, which has fulfilled the obligation of the licence and has applied for a mining lease for the purpose of the explored area.	25 years initally renewable every 24 years
Quarry Lease (QL)	Quarrying under the Minnig Act applies to all naturally occuring quarriable minerals, such as asbestos, clay, fuller's earth, gypsum, marble, limestone, slate sand, stone, gavel, etc. All of which may also be mined under the Mining Lease.	5 years, unless renewed
Small Scale Mining Lease (SSML)	The holder of the lease has the exclusive right to carry out small-scale minnig operations. The mining area is greater than 5 acres but less than 3 sqkm.	5 years initially Renewable for further period however not exceeding 5years

8. See Sections 47, 55,56 and, 57 and 58 of the Nigerian Minerals & Mining Act 2007
9. See Sections 48, 59,60,61,62 and 63 of the Nigerian Minerals & Mining Act 2007
10. See Sections 50 and 65-74 of the Nigerian Minerals & Mining Act 2007
11. See Sections 49, 90 and 91 of the Nigerian Minerals & Mining Act 2007
12. Nigeria's Mining and Metal Sector Investment Promotion Brochure, August 2016,Ministry of Solid Minerals Development, Page 20
13. The National Environmental Standards and Regulation Enforcement Agency (Establishment) Act supra
14. Oladotun Alokolaro and George Ukwuoma on Nigeria in The Mining Law Review Edited by Erik Richer La Fleche, 5thed, Law Business Research Ltd, 2016 pp156-167 particularly at page 164
15. See Section 72 of the Nigerian Minerals & Mining Act 2007
16. See Section 29(1) of the Nigerian Minerals & Mining Act 2007

Commission Act also guarantees this protection of foreign investment, returns on investment and the right to repatriate same.[17]

Mining operators enjoy various tax advantages, incentives and reliefs under the NM&M Act and the Companies Income Tax Act. These include Capital allowances,[18] investment allowances on qualifying plants and machinery, exemption from customs and import duties on approved plants, machinery and equipment,[19] tax holidays for initial 3 years from commencement of operations extendable to 5 years through renewal[20] amongst others.

Upon the expiration of the tax holiday, mining operators are assessed to tax under various tax legislations including: 30% Companies Income Tax, 2% Tertiary Education Tax, 5% VAT, 10% Capital Gains Tax, Withholding Tax on Dividends and Rent. This does not exclude the payment of (3-5%) Royalties[21] which the Mining Regulations provide for, as well as requisite fees paid in relation to various Licence applications.

Mining companies can also benefit from the Export Expansion Grant (EEG) scheme regulated by the Nigerian Export Promotion Council (NEPC). The EEG scheme is a post-shipment export incentive designed to improve the competitiveness of Nigerian products and commodities and expand the country's volume and value of non-oil exports[22]. The scheme which was previously suspended for the purpose of reviewing same so as to prevent abuse, now provides with its re-introduction, for the issuance of an Export Credit Certificate (ECC) which can be used to defray federal government taxes such as VAT, WHT, companies income tax as well as to procure government bonds and repay government credit facilities amongst others in so far as the applicant meets the requisite obligations.

Recent Developments

Dr. Kayode Fayemi, who recently resigned as the Minister of Mines and Steel Development was quoted as saying:

"The solid minerals sector is definitely a frontier of opportunity, some would say, the frontier of opportunity in the new economic reality in which we find ourselves"[23]

This statement shows that the government is working towards making Nigeria an investor friendly environment in its bid to solve the problems facing the mining sector.

Also, several funding opportunities are being established for the sector especially as it relates to the Artisanal and Small-Scale miners. For instance, Nigeria's Vice-President stated that the Government is working with the Nigerian Stock Exchange (NSE) and others to assemble a $600m investment fund for the sector.[24] The goal of this fund is to "provide technical assistance for the restructuring and operationalisation of the Solid Minerals Development Fund (SMDF), which will make finance available to the artisanal and small mining operators through micro finance and leasing institutions with the long term goal of the administration being to grow the contribution of the mining sector to the GDP by $27b in 2025 which is roughly about 3 per cent of the current GDP".[25]

One of the benefits of the government's policy to revamp its mining sector is the re-examination of its instant regulatory framework. This has led to increased training programmes aimed at improving technical skills in a country which currently has no strict local content requirement, due to the scarcity of the technical know-how required in the sector.
In an attempt to revitalise the sector the government has been working assiduously towards resolving host community challenges, infrastructural imbalance, security challenges, clarifying surface rights and mineral rights as well as eradicating illegal mining. The government also recently promoted collaboration between the Nigerian Geological Survey Agency (NGSA) and the British Geological Survey (BGS) with the aim of establishing a Nigerian National Geo-data Archiving System as data banks of this nature are of immense importance in developing a viable mining sector.[26]
The above measures, coupled with the ease of doing business initiatives of the Government of Nigeria[27] which has seen to significant improvement in the World Bank Ease of Doing Business Rankings[28], present a rare opportunity to break into unexploited prospects in the Nigerian mining sector.

Notwithstanding the panglossian outlook, our experience in the sector as well as feedback

17. See Section 29(2) of the Nigerian Minerals & Mining Act 2007
18. See Section 24 of the Nigerian Minerals & Mining Act 2007
19. See section 25 of the Nigerian Minerals & Mining Act 2007
20. See Section 28 of the Nigerian Minerals & Mining Act 2007
21. Depending on which particular mineral is being mined.
22. Under the Export (Incentives and Miscellaneous Provisions) Act, No. 18 of 1986 as amended by the Export (Incentives and Miscellaneous Provisions) Act, No. 65 of 1992, Cap. E19, Laws of the Federation of Nigeria (LFN)
23. Nigeria's Mining and Metal Sector Investment Promotion Brochure, Ministry of Mines and Steel Development, August 2016 Pg 9
24. Statement credited to Nigeria's the Acting President Professor Yemi Osinbajo in an Article by Grace Obike titled Fed Govt, NSE seek $600m investment fund for mining available at http://thenationonlineng.net/fed-govt-nse-seek-600m-investment-fund-mining/amp/, Online Newspaper Article, accessed 23/05/2018
25. ibid
26. FG Collaborates with British Survey Deo-Data Archiving System, April 18, 2018 available online at www.minesandsteel.gov.ng/2018/04/18/fg-collaborates-with-british -survey-geo-data-archiving-system/accessed 23/05/2018

received from industry practitioners show that things are not yet all rosy in the Nigerian mining sector. Security challenges arising out of conflicts between the farmers/community and dangerous herdsmen often undermine operations especially in the Northern part of the country. This creates a need for mining companies to forge strong relationships, not only with their host communities but with the security agencies within the area. The mining company would also need to put in place its own security strategy in order to secure its operations.

Another critical example of defects in the current regime lies in the lack of clarity between the surface rights of host communities and the mineral rights being acquired by the operators. The regime anticipates a system where local communities recognise the powers of the government to grant a reconnaissance permit over their ancestral lands without recourse to them. In reality, this system is bound to fail as more often than not, operators are compelled to make payments to the host communities before any reconnaissance can be done. These payments often extend until after the community grants a written consent which is required for the completion of an application for an Exploration Licence. The result of this clash between the statutory powers of the government over land and the traditional rights arising out of ancient customary land tenure systems is usually an increase in transactional costs even before the operator has been able to access the land in the first instance

Furthermore, bureaucratic and administrative bottlenecks clutter the compliance regime. An example can be found in the multiple licensing requirements by various agencies which create duplicated obligations for mining operators. For instance, before one can be granted an exemption from customs and import duties on approved plants, machinery and equipment,[29] one would go through laborious processes at the ministry to get the approval of the imported machinery. Getting these approvals is harder than passing through the eye of a needle. It would be wiser for a mining company to factor these import duties into its financial planning rather than assuming that Government's promise in black and white will be upheld. This ought not to be so, as the possession of a valid mining title should automatically grant the importer the required waiver. These problems are also faced at the point of exporting the minerals as exporters are required to go through two separate export licensing applications under the NEPC and the Mining Ministry.

The resolution of these barriers should see to the unshackling of the Nigerian Mining Sector and the creation of access to new frontiers for the Nigerian Mining Industry to successfully transcend. Even though Nigeria is not a natural mining destination, it does have potential if the Government is sincere and puts the right people in position to fanatically reform this sector. It is a sector where Nigeria can create indigenous billionaires day in, day out.

Contributors' Profiles

Kusamotu, Ayodele Musibau obtained his LL.B. (Hons.) in 1997 from the University of Lagos and was called to the Nigerian Bar in 1998. He is currently a LL.M. student at the University of London. His expertise spans the disparate yet connected fields of litigation and transactional work, and has over 20 years' experience in international trade, project finance, capital markets, power, infrastructure, M&A, energy and natural resources, dispute resolution and Mining. He represents a wide range of clients and is trusted advisor to several multinationals. He is a Fellow of the National Centre for Technology and Dispute Resolution of the University of Massachusettes, Amherst, United States of America and a Director at the Internetbar.org. He is also a Fellow of INSOL International. Recently, he attended a course on Mergers & Acquisition at the prestigious London Business School (LBS). He is equally an Associate of the Chartered Institute of Arbitrators (UK) Nigeria Branch, a member of the International Bar Association and a member of Nigerian Bar Association. He is the Chairman of the Firm of Kusamotu & Kusamotu and heads the China Practice of the Firm.

Olanite, Ridwanulahi obtained his LL.B. (Hons.) in 2012 from the University of Lagos, was called to the Nigerian Bar in 2013 and is currently an LL.M. candidate at the University of Lagos. He is a consummate lawyer with a keen eye for detail. He has painstakingly developed his experience which spans the Extractive Industries (Mining and Oil & Gas Law), Corporate Law, International Trade, Energy Resources Law, Agricultural Law and Litigation. He is a key member of Kusamotu & Kusamotu's Mining Law Practice & Insolvency team. Ridwan is a member of the Nigerian Bar Association and the International Bar Association.

27. See the recent Executive Orders on ease of doing business signed on 18th May,2017 by then Acting President, Yemi Osinbajo (SAN).
28. Nigeria moves up 24 points on World Bank Ease of Doing Business, Vanguard Online Newspaper, October 31, 2017, 5:48 pm. Available at https://www.vanguardngr.com/2017/10/nigeria-moves-24-points-world-bank-ease-business/
29. See section 25 of the Nigerian Minerals & Mining Act 2007

CHANGES LOOMING FOR THE SOUTH AFRICAN MINING SECTOR

By **Godfrey Malesa,** Partner, Fasken South Africa

2017 was a challenging year for the South African mining sector. Despite the improved financial performance of the mining sector in 2017 compared to the year 2016, the sector was unsettled by changes and uncertainties. Although the mining sector no longer dominates the economy of South Africa, it continues to make a valuable contribution to the country's economy, most notably in terms of foreign exchange earnings, employment and economic activity.[1]

The South African mining industry has for the last few years been plagued by policy and regulatory uncertainty. Political and regulatory uncertainty has proved to be a deterrent to investment in the South African mining industry. This has had the effect of driving investment elsewhere - investment does not like uncertainty.

South Africa's consistent drop in the Fraser Institute's rankings, illustrates the adverse effects that the lack of policy and regulatory certainty in the mining industry is having on investor confidence. The Fraser Institute ranks jurisdictions around the world based on geologic attractiveness and the extent to which government policies encourage or deter mining and investment.[2]

Furthermore, the recent sharp decline in foreign direct investment to the country is clear evidence that foreign investors are losing confidence in the South African economy. According to the UN Conference on Trade and Development (UNCTAD) World Investment Report 2017, South Africa continues to underperform, with foreign direct investment into country remaining well below past averages.

Despite South Africa's vast mineral wealth, its mining industry has performed well below its potential for the past 17 years. During the longest sustained commodities boom in history between 2001 and 2008, South Africa's mining industry shrank by an average of 1% per year, compared with an average growth of 5% per year in the world's top twenty mineral exporting countries. The South African National Development Plan (NDP) recognised this as 'an opportunity lost'. The NDP identified central constraints as, amongst others, uncertainty in the regulatory framework and property rights and proposes main interventions which include ensuring certainty in respect of property rights, passing amendments to the the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) to ensure a predictable, competitive and stable mining regulatory framework.

Since the endorsement of the NDP in 2012 by the ruling party - the African National Congress, not much has been done by government to implement the NDP's recommendations. If South Africa has the geology but no prospecting or mine development is taking place, then is it not the fault of the regulatory environment?

Policy and regulatory uncertainty in South Africa

At the heart of the legal uncertainty, is the delay in finalising the Mineral and Petroleum Resources Development Bill [B15D-2013] (the Amendment Bill). Moreover the year 2017, saw the publication of the Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, on 15 June 2017 (the New Mining Charter).

In 2013 the Amendment Bill was introduced to Parliament. In January 2015, the then President of the country referred the Amendment Bill back to the National Assembly to consider his reservations around the constitutionality of the Amendment Bill. It has been over four years since the introduction of the Amendment Bill and it is yet to be finalised.

The MPRDA seeks amongst others, to expand opportunities for historically disadvantaged South Africans to enter the mineral industry and obtain benefits from the exploitation of mineral resources. The mining charter is the policy instrument to effect transformation of the South African mining industry. The scheme of the current mining charter requires every holder of a mining right to, among other things have at least 26% historically disadvantaged South African ownership.

Furthermore, an important judgment was handed down on 4 April 2018, by the High Court of South Africa, in the matter of Chamber of Mines of South Africa v Minister of Mineral Resources and Others[3] regarding the applicability of the so-called principle of 'once empowered, always empowered'. The once empowered, always empowered principle relates to mining companies being able to claim recognition for

1 Department of Mineral Resources of South Africa, Contribution of Industrial Minerals to South Africa's Economic Growth Report, 2017, http://www.dmr.gov.za/LinkClick.aspx?fileticket=j01VskVV2o8%3D&portalid=0, accessed on 23 May 2018.
2 Fraser Institute 2018, Fraser Institute Annual Survey of Mining Companies 2017, https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017, accessed on 22 May 2018.
3 Chamber of Mines of South Africa v Minister of Mineral Resources and Others (41661/2015) [2018] ZAGPPHC 8; [2018] 2 All SA 391 (GP) (4 April 2018)

previous Black Economic Empowerment (BEE) transactions, notwithstanding that the BEE entities involved have since sold their interests or shares, thereby bringing such mining companies below the 26% BEE ownership threshold. A declaratory order was sought regarding whether past empowerment deals could be claimed by mining companies even after the disposal or dilution of the 'historically disadvantaged South Africa' ownership. In its majority judgment, the Court declared in favor of the once empowered, always empowered principle, which entitles a company to keep its BEE empowerment status even if an empowerment partner exits its stake in the mining company. The Minister of Mineral Resources has since applied for leave to appeal the judgment, which of course has the effect of prolonging the policy and legal uncertainty in the mining industry.

While geologic and economic evaluations are always requirements for exploration, in today's globally competitive economy where mining companies may be examining properties located on different continents, a region's policy climate has taken on increased importance in attracting and winning investment[4].

Winds of change sweeping through South Africa's mining sector

The year 2018 has brought with it a period of political change in South Africa. The election of the new African National Congress' leadership has brought with it optimism in the mining industry, particularly the election of Cyril Ramaphosa as the new president of the ruling party and president of the country.

Following the intervention by President Cyril Ramaphosa, the Chamber of Mines agreed with the Department of Mineral Resources to postpone the Court application for the judicial review and the setting aside of the New Mining Charter in order to allow the parties the space to engage and find an amicable solution. On 15 June 2018, the Minister of Mineral Resources, Gwede Mantashe gazetted the 'Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018', for public comment. The public has 30 days from the date of publication of the mining charter to submit their comments. Moreover, the new Minister of Mineral Resources, Gwede Mantashe has committed to expediting the promulgation of the Amendment Bill.

It is important that the Amendment Bill and New Mining Charter bring policy and regulatory certainty to the industry. The Amendment Bill and the New Mining Charter once finalised, must balance the need for meaningful transformation in the mining sector with the need to ensure that mining is productive and profitable and increases investment, employment and sustainability, as well as being fair to investors and affected local communities. Mining is an international business and South Africa has to compete against developed and developing countries to attract both foreign and local investment.

The mining stakeholders are optimistic that the winds of change sweeping through the mining sector in South Africa, driven by a sweep of political change will bring about policy and legal certainty that is urgently needed and necessary to encourage and improve investment in the mining sector. Mining in South Africa is an industry well positioned for a new lease of life despite all the challenges.

Conclusion

The South African mining industry has the capacity to continue to generate wealth for the country on a large scale. If South Africa is to fully benefit from its vast mineral wealth, it must heed the recommendations of the NDP and priorities the creation of a certain and attractive legal and regulatory environment in the mining sector that will be conducive for investment and which exemplifies international best practice principles.

The positive and decisive steps taken by the South African government must be applauded and have clearly inspired some optimism that South Africa's mining industry is heading in the right direction.

It is pleasing that government has committed itself to bring about policy and legal certainty in the mining sector, thus strengthening and enhancing the country's competitiveness to attract local and foreign investment and creating a climate conducive for investment. South Africa's mining sector can look forward to a prosperous future, now that the winds of change sweeping through the mining sector, will bring about policy and legal certainty.

Contributor's Profile

Godfrey Malesa is a mining lawyer in Fasken's Johannesburg office and a member of the Global Mining Group. Leveraging his in-depth knowledge of the Mineral and Petroleum Resources Development Act, Godfrey ably advises clients on mining regulatory and transactional issues, including compliance, prospecting and mining right applications, appeals, judicial reviews, surface use issues and the structuring of Black Economic Empowerment transactions.
He also has experience in traditional leadership legislation, which includes the law applicable to traditional communities.

4 Fraser Institute Annual Survey of Mining Companies 2017

TANZANIA MINING SECTOR: CHANGING THE RULES OF THE GAME

By **Thomas Sipemba,** Partner, East African Law Chambers Tanzania

Tanzania is currently under the fifth phase Government, led by Dr. John Joseph Pombe Magufuli, and as has now become the norm, this Government has come up with some amendments to the legislation relating to the mining industry. This time around, though, the rules of the game have significantly changed in certain respects, as opposed to the normal minor tinkering with the legislation.

One significant change relates to the administration and supervision of minerals in Tanzania. The new legislation framework has introduced the Mining Commission ("Commission"), which generally takes over the licensing functions of the Minister responsible for Minerals ("Minister") and the Commissioner for Minerals ("Commissioner"). The Commission has several functions including issuance, suspension and cancellation of exploration and exploitation licenses, auditing capital investment and operations expenditure as well as source, assessing minerals produced and issuing indicative prices of minerals, dispute resolution, conducting investigations and advising the Government on health and safety issues, and examining and monitoring feasibility reports, mining programs and plans.

Whilst it has always been the case that by law minerals are public property, the Government now has permanent sovereignty over minerals. The law currently proclaims sovereignty over natural resources and wealth to the people of Tanzania. The Government will exercise ownership and control of natural resources on behalf of the people, and the President will hold the natural wealth and resources in trust on behalf of all Tanzanians. It is prohibited to export raw mineral resources for beneficiation outside Tanzania, and this proclaimed sovereignty cannot be questioned by any foreign court or tribunal. Disputes arising from exploration, exploitation or acquisition and use of natural resources will have to be adjudicated by Tanzanian judicial bodies and in accordance with Tanzanian laws. Whether there are adequate resources to carry out beneficiation in-country is a different story altogether, but the next big thing appears to be investment in local beneficiation facilities.

In addition, the National Assembly is allowed to review any contract made by the Government relating to natural resources and wealth. The National Assembly is empowered to direct the Government to re-negotiate any previous agreements if it considers that such agreements are prejudicial to the interests of the people of Tanzania, and for future agreements, the Government will be required to report to the National Assembly any agreement that it enters into. If the National Assembly finds that there are any unconscionable terms in such agreement, it may direct the Government to re-negotiate the terms of such agreement. In other words, do not celebrate having signed a contract with the Government unless and until the National Assembly gives the contract a green light.

One of the very interesting amendments is that the legislative framework introduced a free carried Government interest, whereby the Government will automatically hold not less than 16% non-dilutable free carried interest in the capital of every mining company conducting large and medium scale mining operations in Tanzania. In addition, the Government is entitled to acquire up to 50% of the shares of such mining company calculated based on the total tax that may be due from such companies. We are not sure whether shares already owned by some shareholders would need to be transferred to the Government, how the shareholders should select which shareholder is to be diluted, or whether it will be a pro-rated dilution, whether such transfers will attract Capital Gains Tax, or whether transfers should basically be avoided and new shares are instead created for issuance to the Government. It is currently a "wait-and-see" game.

Additionally, participation of Tanzanians in mining ventures is now a compulsory requirement. Local companies are now to be given first preference in granting of mining licenses. Foreign companies may qualify for grant of a mining license, provided there is at least 5% equity participation by a local company. We expect that only licensees who meet this local company participation test will be granted licenses.

Mining houses are no longer able to store minerals for extended periods as was previously the case. All mining companies are required to construct secure storage facilities on site for storing won raw minerals. Stored minerals can be kept on the storage facility for a maximum period of 5 days after which they must be moved to the Government Minerals Warehouse to await beneficiation or, where the Government so permits, export. Minerals will not be dealt with in any way until they are beneficiated, a process that should ideally be done within Tanzania. Transportation of minerals from the Government warehouse will only be done upon authorization from the Government. Resident Mines Officers will be appointed and placed in every mining site and their functions will include monitoring production processes and verifying records and information pertaining to production reports. These officers will also be responsible for authorizing entry into minerals storage facilities within the mine site and will have oversight of removal and transportation of minerals to Government warehouses. This entire storage process is largely expected to increase transparency in terms of revenues realised by the mining companies, now that it has emerged that there is suspicion of under-stated revenues in the back years.

Further, the Government will have a lien over mineral concentrates, which must be stored in a secure yard within the mines in line with procedures and conditions that will be prescribed. There is also prohibition for disposal of concentrates once they have been valued, with such concentrates only being made available as a trading commodity for mineral processing within Tanzania.

The manner of payment of royalties has also been reviewed to allow for payment of part of royalties by way of physical deposit of minerals. Thus, one third of the payable royalties will have to be paid by way of deposit of refined minerals equivalent to the ascertained value to the National Gold and Gemstone Reserve. It indeed would interesting to see how these mineral reserves will be handled further down the line, say with Governments changing hands, or with pressure from citizens. At what point the reserves can be disposed of, and to what use the funds therefrom will be put will come to light in due course, we expect. In addition, royalties payable for metallic minerals, gemstones and diamonds have been increased from 4% and 5% to 6%.

The changes to the mining legislative framework also have the effect of restricting transferability of mineral rights. Consent to transfer mineral rights with respect to large and medium scale operations will not be given unless the holder thereof can show proof of substantial developments that have been made on the licenced area. The days of merely holding a license and offloading it after carrying out some exploration activities therefore appear to be gone, in which case most licensees will most probably be in search of strategic partners who can assist them in carrying out development. These consent to transfer amendments do not, however, apply to assignments of licences to a licence co-holder, affiliate or a financial institution.

The time for conducting exploration programs has been reduced from 9 to 7 years. This is because prospecting licences are now issued for an initial period of 4 years with the right to renew limited to a once-off renewal of 3 years only. Lapsed prospecting areas will revert to the Government and will be granted to a local mining company that will be designated by the Minister after approval by the Cabinet. Any person intending to carry out prospecting activities in such areas must conclude an agreement with the local company and such arrangements are to be approved by the Cabinet. In addition to this, retention of commercially significant prospecting areas after expiry of prospecting licences is no longer possible because the retention licence regime has been done away with and retention licenses will no longer be issued. Existing retention licences have been cancelled, and the respective areas have reverted to the Government.

Mining companies are now required to participate in the growth of the Tanzanian economy by investing portions of their returns. Companies are required to file annual returns showing how they have invested in the local economy and when a licence becomes due for renewal, considerations will be made in respect of the investment efforts made before licences are renewed. Whether or not such local investment efforts will count towards the free carried Government interest is left to our imagination, but our expectation is that the Government can possibly consider this element as part of the free carried interest, if taxes are also to be considered in such light. Mining companies will also be required to give preference to goods and services produced or available in Tanzania. Where goods are not available in Tanzania the supply must be made by a company that has entered into a joint venture with a local company, with the local

company having at least 20% stake in the venture.

Over and above the local investment efforts, mining companies are also required to prepare a corporate social responsibility plan jointly agreed upon with the local government and in consultation with the Minister in charge of environmental, social, economic and cultural activities. The local governments will be required to prepare guidelines regarding the corporate and social responsibility plans, consider each and every plan prepared by the mining companies, and oversee implementation of the plans. Additionally, the mining companies will be required to comply with environmental principles and safeguards, as provided for under the environmental legislation and other laws relating to the environment. License holders will be responsible for pollution without regard to fault.

Finally, the mining companies will be required to provide and comply with an integrity pledge under which the companies undertake to conduct mining operations with utmost integrity and not to engage in arrangements that undermine or prejudice the country's financial or monetary systems, the tax system, economic objectives, and national security. As the industry embarks on implementation of all these new requirements, our expectation is that investors, the affected companies will seek advice on measures to put in place so as to ensure high levels of compliance, and avoid falling foul of the legal requirements. Interesting days ahead as the rules of the game have now significantly changed!

Contributor's Profile

Thomas Sipemba is a Partner and heads the Energy and Natural Resources practice in East African Law Chambers. Thomas is one of the leading mining lawyers in Tanzania having gained his experience as an In-house Counsel in the largest mining company in Tanzania. He later joined one of the largest commercial law firms in Tanzania as a Senior Associate rising to partner level before joining East African Law Chambers. He specializes in corporate and commercial laws, mining laws, natural resources laws and environmental laws. Thomas has advised in high value and complex transactions in the market, and is a recommended lawyer by one of the leading legal directories. Thomas holds a Masters of Laws (LL.M) degree and a Bachelor of Laws (Hons.) degree from the University of Dar es Salaam.

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ZAMBIA MINING SECTOR: REGULATIONS AND LAWS SNAPSHOT

By **Joseph Alexander Jalasi,** Senior Partner, Eric Silwamba, Jalasi & Linyama Zambia

Regulations

The Mines and Minerals Development Act No 11 of 2015 (MMDA) is the primary source of Law regarding mines and minerals in Zambia. This Act is read together with the Mines and Minerals Development (Amendment) Act No. 14 of 2016. The MMDA repealed and replaced the Mines and Minerals Development Act No. 7 of 2008. The MMDA deals with mining rights, licenses, large-scale mining in Zambia, gemstone mining, health and safety, environmental protection, and geological services on analysis, royalties and charges. Other pieces of legislation, other than the Mines and Minerals Development Act, include: Mines Acquisition (Special Provisions) Act, Chapter 218, Volume 13 of the Laws of Zambia and the Mines Acquisition (Special Provisions) (No. 2) Act Chapter 219, Volume 13 of the Laws of Zambia, and the Zambia Development Agency Act No. 11 of 2006.

Types of Licenses

Part III of the MMDA in Section 12 prohibits the exploration, mining or mineral processing without a license or Environmental Impact Assessment in Zambia. Further, part III provides for the types of licenses that can be applied for in Zambia.

Division 2 provides for Exploration license
Division 3 provides for mining license
Division 4 provides for mineral processing license,
Division 5 provides for gold panning certificate,
Division 6 provides for mineral trading permit,
Division 7 provides for mineral import and mineral export permits and
Division 8 provides for authorization for radioactive minerals and minerals analysis.

Foreign Ownership

As regards foreign ownership, in this case dealing with foreign investment in the mining sector, the Zambia Development Agency Act No. 11 of 2006 provides for regulations to promote foreign investment, as well as protect foreign investors from compulsory acquisition. Section 17 of the ZDA Act provides for measures implemented by the Board of the Zambia Development Agency to promote investment in Zambia. This section provides for measures such as the creation and maintenance of a predictable and secure investment climate and encouraging sector investment so as to promote foreign investment. Section 19 of the ZDA Act provides for the protection from compulsory acquisition, it prohibits the compulsory acquisition of an investor's property except for public purposes under an Act of Parliament and such Act should provide for payment of compensation for such acquisition. Section 20 of the ZDA Act provides for the transfer of funds out of Zambia by an investor in a foreign currency, provided all relevant taxes are paid. As regards settlement of disputes in relation to investment in Zambia, the ZDA Act provides in section 21 that all disputes arising as a consequence of investment in Zambia shall be settled in accordance with the Arbitration Act.

Further, Part X of the ZDA Act provides for Licenses, Permits and Certificates of Registration. This part deals with the application for a license, the consideration before the approving an application of a license and the period of validity of license and renewal of the license. Further in dealing with foreign ownership, section 14 of the MMDA provides for disqualification from holding mining rights. The entities disqualified from acquiring mining rights include;

i) A company in liquidation
ii) A company not incorporated under the companies Act cap 388 of the laws of Zambia
iii) A company not having its registered office in Zambia, or
iv) Has among its directors or shareholders holding more than ten percent of the issued equity of the company.

Transfers And Encumbrances

With regard to transfers and encumbrances, there are regulations that restrict the transfer of exploration and mining rights in Zambia. The MMDA provides for restrictions on the ability to transfer reconnaissance, exploration and mining rights. The transfer of these rights requires the prior consent of

the Minister of Mines and the production of a tax clearance certificate. Upon satisfaction of the provided criteria in Section 66, the Minister is obliged to grant such consent unless the transferee is disqualified from holding a mining right or a non-mining right under the general provisions of the MMDA.

Furthermore, this restriction can be found in the ZDA Act in section 75 which requires prior approval of the board of the Zambia Development Agency for an investor to assign, cede or otherwise transfer the investor's license, permit or certificate of registration.

Rights To Surface Land

The holder of an exploration or mining right does not automatically own the right to use the surface of land. However, the holder may have the following rights to use the surface of land:

i) To enter the mining area and take reason able measures on or under the surface for the purpose of mining operations.
ii) To carry on mining operations and to do all such other acts and things as are necessary for carrying on of those operations.
iii) To dispose of any mineral products recov ered.
iv) To stack or dump any mineral or waste product.
v) To erect the necessary equipment, plant and buildings for the purpose of mining, trans porting, dressing or treating the minerals recovered in the course of the mining opera tions.

In addition, we would also like to note that under the Zambia Development Agency Act, it is important that an entity wishing to apply for mining and exploration rights in Zambia need apply for an investment license under this Act so as to enable a foreign company incorporated in Zambia to have land rights.

The Constitution

The Zambian Constitution has an impact upon the rights to do with exploration and mining. Article 16 of the Bill of Rights of the Constitution provides for the protection of property from being deprived without just cause. Property includes prospecting rights or mining rights. In addition, the recent amendments to the Constitution in Article 10 (3) has made special provision reconfirming the protection of investment in Zambia to promote foreign investment and to protect and guarantee such investments through agreement with investors and other countries and any compulsory acquirement of an investment such only be done under customary international law and subject to Article 16(1) of the Constitution (Bill of Rights) of 1996 Constitution Amendment.

Investment Treaties Applicable

There is a provision for treaties and for bilateral agreements to be signed and Zambia has entered into a number of multilateral and bilateral treaties. Zambia entered into a number of bilateral and multilateral treaties which include: The Convention on the Settlement of Investment Disputes between states and nationals (multinationals) of other states, the SADC Protocol on Finance and Investment and the COMESA treaty and the investment agreement for the COMESA Common Investment Area (CCIA) Agreement. Zambia has bilateral investment treaties with United Kingdom (2009), Mauritius (2015), Netherlands (2003), Belgium-Luxembourg Economic Union (2001), China (1996), France (2002), Germany (1996), Egypt (2000), Cuba (2000), and Switzerland (1994).

Taxes and Royalties

The Mines and Minerals Development (Amendment) Act provides for mineral royalties and charges. Section 89 provides the rate at which a holder of mining license shall pay mineral royalties at, being;

i) 5% of the norm value of the base metals recoverable or produced under the license except copper.
ii) 5% of the gross value of the energy and industrial materials recoverable or produced under the license.
iii) 6% of the gross value of the gemstones recoverable or produced under the license
iv) 6% of the norm value of the precious stones produced or recoverable under the license.

Further according to Section 89 of the Act, where the base metal produced or recoverable under the act is copper, mineral royalties shall be payable at the rate of;

i) Four percent of the norm value when the norm price of copper is less than four thou sand five hundred United States dollars per tonne
ii) Five percent of the norm value when the norm price of copper is four thousand five

hundred United States dollars per tonne or greater, but less than six thousand United States dollars per tonne, and

iii) Six percent of the norm value when the norm price of copper is six thousand United States dollars per tonne or greater.

The act goes on to define “gross value” as, the realized price for a sale, free on board, at the point of export from Zambia or point of delivery within Zambia. the act also act also defines “norm value as”, the monthly average London Metal Exchange cash price per tonne, Metal Bulletin cash price per tonne and any other exchange market approved by the Commissioner General.

Under the Income Tax Act, the corporate income tax rate applicable to companies carrying out mining operations will be 30%. Variable profits tax of up to 15% no longer applies; however, there is a limitation on the deduction of losses to 50% of taxable income. Withholding tax on dividends declared by a company carrying out mining operations is charged at the rate of 0%.

Contributor’s Profile

Joseph Alexander Jalasi is a Senior Partner at Eric Silwamba, Jalasi & Linyama Legal Practitioners. The Firm is one of the top Firms in Zambia and it is listed on the renowned Chambers and Partners and the Legal 500 Directory. The Firm is also a member of the prestigious NextLaw Referral Network by Dentons. The Firm represents top Mining houses in the Country and it has written numerous literatures on the legislative Mining regime in Zambia.

Mr. Jalasi is the Head of Tax, Mining and Corporate Department. He worked as State Advocate on the initial privatisation of Mines. He served as Registrar at the Tax Appeals Tribunals. Mr. Jalasi also served as legal advisor to the late President Levy Mwanawasa and the former President Rupiah Bwezani Banda

EXCLUSIVE Q&A WITH RITA ADIANI, DIRECTOR NRG CAPITAL PARTNERS

CAPMARKETSAFRICA: *Financing mine development and construction – what are the options, sources and where is the money coming from?*

RITA ADIANI: Miners looking to build projects have a wide variety of funding options. These range from traditional bank debt and equity capital raised through the listed markets to development bank financing and hybrid sources of financing such as royalties, streams, offtake/prepays, structured credit/mezzanine financing and high yield bonds.

The landscape for funding sources has changed significantly in the last 12-18 months.

During the downturn, key funding sources largely comprised of private capital funding and some equity capital markets funding.

As commodity prices have buoyed and base metals and gold in particular continue to hold strong with a good forward curves, funding of development and construction projects is coming from a broad variety of sources. These sources comprise private capital (private equity or private credit), royalties and streams and structured credit. There have also been a few recent successful mining IPOs and this demonstrates inflow of public equity markets funding into the sector. Commercial and project financing banks continue to have appetite for good base metals and gold projects providing competitive lending packages.

Appetite for early stage project funding however still remains constrained - although good projects with good management teams continue to have a wide range of options.

There are various funding options available and a holistic package should be considered by any developer bearing in mind the cost of capital, future flexibility required for the project and most importantly return to shareholders.

CAPMARKETSAFRICA: *Tapping into Africa’s mining sector – What are the risks and how to tap into the market and navigate the challenges as well as which mining sectors are providing the most resilience and where do the future opportunities lie, please?*

RITA ADIANI: Investment into the African mining sector is subject to various challenges but also comes with significant opportunities.

Country risk (including amongst others political and sovereign risk) remains a key area of sensitivity. A changed approach to resource management (ie changes in mining codes and fiscal frameworks) on the continent, pose challenges for investors and prevent them from accurately projecting long term stable returns.

Infrastructure also remains important and less capital intensive projects are more attractive than large capex builds.

Solid projects comprising of good geology, robust development plan and returns, led by experienced management teams are still extremely attractive for investors.

Gold remains a solid investment proposition and continues to attract international and African investment. Copper and cobalt continue to be of interest together with DSO bauxite.

It would be good to see investors interested in earlier stage projects as there are some outstanding opportunities available.

Projects in a country with a stable government, which provide sustainable cash flow within 12-18 months remain within investors sweet spots.

ZIMBABWE MINING SECTOR: EMERGING REGULATORY PARADIGM

By **Farai Nyabereka,** Senior Associate, Manokore Attorneys, Zimbabwe

Mining has always played a pivotal and topical role in Zimbabwe's political and economic spheres. Now, with renewed international focus on Zimbabwe as an investment destination, the mining sector has another opportunity to re-position itself as a major driver and facilitator to Zimbabwe's economic revival and growth.

The Previous Position vs Current Regime

With significant amendments to the indigenisation laws announced in late 2017, there has been an almost seismic shift on the mining investment landscape, as well as the public and private sector rhetoric around what kind of opportunities this presents. To date, since that policy pronouncement, there has been a plethora of sizeable government deals reported, particularly in the lithium and platinum sectors. The indigenisation laws (an empowerment policy that previously required that companies in the mining sector be owned at least 51% by 'indigenous Zimbabweans') had long been viewed as a constraint to badly needed investment in the sector. This, whilst not problematic in terms of its socio-economic objectives for local empowerment, was a curtailment to foreign direct investment as the policy was badly implemented and shrouded in inconsistency in its application.

The current position is that the indigenisation policy has been significantly amended and will now only apply to the platinum and diamond sectors which have been classified as ''designated extractive sectors.'' Even so, there remains continued lobbying efforts by stakeholders for that policy to be minimised even within those sectors, and it is anticipated that Government will not apply a hard and fast rule. This is especially so in light of a proposed robust beneficiation and value addition policy that is likely to come into force in the later part of 2018.

Whilst this shift in approach is most welcome in respect to drawing foreign capital, certain critical key interventions will be necessary in order to build on and drive the mining sector.

The Mines and Minerals Amendment Bill: Key Regulatory Changes

In the first instance, there is a need to finalise and adopt the Mines and Minerals Amendment Bill. The Bill, which proposes several amendments to Zimbabwe's principal mining legislation, the Mines and Minerals Act [Chapter 21:05] has been on the cards since 2014. The Bill has reportedly been motivated by guiding imperatives including: investment considerations; a sustainable fiscal mining regime; corporate governance and new mineral resource management and administrative measures. This is with a view to optimising mining production underpinned by a modernised legal and policy mining framework. The key proposed changes to Zimbabwe's Mines and Minerals Act include:

The introduction of ''strategic minerals'' which is inclusive of a range of minerals including platinum group metals, natural gas or coal bed methane, coking coal, iron ore, chrome, et cetera. This classification of strategic minerals was to have the effect of unique conditions being provided for with regards to the exploration, ownership, beneficiation, marketing and development of those specific minerals. This provision was later mooted in Parliamentary debates, and reference to ''strategic minerals'' has now been removed in the latest version of the Bill. Instead, the Bill makes reference to the fact that the Minister of Mines may from time to time determine the country's strategic minerals, which is a principal of law borrowed from South Africa's mining law.

Another contemplated provision was the requirement that all public mining companies were required to ensure that a majority of its shares are listed on a securities exchange in Zimbabwe. Mining companies which are holders of mining titles or rights are also required to report any changes in shareholding to the Minister of Mines within fourteen days, and any transactions involving transfer or disposal of such shares to foreigners without such prior notification would be rendered void. Further, all holders of mining rights are required to make use of local financial institutions.

These reporting provisions have been widely challenged given the administrative challenges of monitoring shares that are traded daily, as well as taking into account the prevailing liquidity crisis in Zimbabwe with regards to raising and accessing capital locally.

Another key highlighted aspect of the Bill relates to the ‘use it or lose it’ policy which will entail the cancellation or forfeiture of a mining right on the following grounds:

i. Where a miner fails to commence mining operations within a reasonable period;
ii. Where the miner has not declared output within a reasonable period after commencing operations;
iii. Where a false return or declaration regard ing output from a mining location has been made;
iv. Where certain provisions of the Gold Trade Act, the Precious Stones Trade Act and the Minerals Marketing Corporation of Zimbabwe Act have been contravened.

However, the Bill does not define ‘’a reasonable period’’ and does not take into account that what constitutes ‘’mining operations’’ may vary in terms of scale and activity, depending on the mineral and the type of mining right or title in question.

A long awaited change that is on the cards is the introduction of a cadastre system which is defined in the Bill as “the system for a manual and electronic management and recording of processes that create mining rights and titles”. Therefore, there will be a dualized system of recording mining titles, validity, location as well as compliance status of holders of mining titles. This presents a departure of the outdated manual system which required intense paperwork and heavy decentralisation in the different mining districts. This will also effectively create a centralised mining registry system and diminishes the potential for mining right disputes whilst providing for speedy and accurate registration systems and processes. In addition, this will also facilitate easier collection on mining fees for Government and prevent illicit leakages.

A prospecting license is valid for 12 months, whilst an exploration licence is valid for 3 years and this may be extended for a further period (not exceeding three years). The term and renewal periods are restrictive given the sheer magnitude and capital-intensive nature of exploration, and recommendations before Parliament are to rather develop and introduce an escalating fee structure.

Zimbabwe: A New Mining Boon?

Enhanced accountability and transparency, both in respect of registration and management of mineral resources will be key to building on investor confidence. I attempt to highlight other key interventions which may be necessary in order to build on and drive this sector. This includes alignment of the indigenisation policy to other key pieces of legislation; renewed impetus and commitment to prioritising and adoption of the Mines and Minerals Amendment Bill; creating a synchronised platform for all regulatory agencies involved in the various stages of mining, and linked to this-; creation of a minerals exchange platform to help address issues of illicit leakages and enhance small scale miners’ participation in the sector.

Important aspects for consideration with regards to the re-emergence of Zimbabwe’s mining sector dominance within the region must accordingly focus on creation of a conducive legal and regulatory regime. This must focus on and create emphasis on capital raising, establishing an enabling exploration framework, a sound fiscal regime and a holistic beneficiation policy, as well as capacity utilisation (underpinned by a robust infrastructure of adequate power and transport networks).

As can be ascertained from the foregoing, Zimbabwe is on the cusp of a sweeping regulatory change with regards to its mining policies once the Bill is passed into law. Mining remains a key economy catalyst, and one of the most attractive sectors to foreign investment. Given the added impetus from Government, a modernised and progressive legal framework will help to underscore its importance to Zimbabwe’s economic revival.

Contributor’s Profile

Farai Nyabereka is a Senior Associate in the Mining Practice, and she heads up the Regulatory & Compliance Department at Manokore Attorneys, a commercial law firm in Zimbabwe. In her role, Farai specialises in providing legal advice and expertise on a wide range of transactions for both local and international Clients in different sectors, with a key focus on licensing and compliance matters. Farai is an admitted attorney of the Law Society of Zimbabwe, as well as a member of Secretariat of the Compliance Society of Zimbabwe.

*At time of publication, the Mine and Minerals Amendment Bill had passed through Parliament and was awaiting Presidential assent

SOUTH AFRICAN MINING: EMERGING TRENDS AND RESTORING THE DREAM

By **Roger Baxter,** Chief Executive Officer, Minerals Council South Africa

It is well known that the mining industry was the foundation of South Africa's modern economy, since the discovery of diamonds in 1866 and gold in 1886. It was the reason for the development of most other economic sectors, from the steel industry to construction, forestry, financial services and almost everything else.

The country's economy has diversified over the decades, as one would expect and hope. But the industry remains a central part of the economy, its contribution being well over 15% through direct inputs and through its supply chain.

In 2017, the mining industry:

- contributed R312 billion to GDP
- contributed R93 billion to fixed investment
- paid R16 billion in taxes and R5.8 billion in royalties
- employed 465,000 employees who supported some 4.5 million dependents
- paid employee wages of R126 billion
- accounted for 1.4 million indirect jobs
- spent R663.4 billion on goods and services

Yet these numbers should be significantly higher. The international economic slowdown which began in 2008 has obviously had a dampening effect on the mining industry the world over. And local economic issues, such as rapid increases in mining input prices, particularly electrical power, labour, steel and transport in the same period have exacerbated those trends.

In addition to these factors, a combination of policy and regulatory uncertainty, as well as a period of serious corruption in the implementation of mining regulations during the presidency of former President Jacob Zuma largely froze new investment. Net investment has declined by 57% since 2008.

Much of the regulatory uncertainty relates to policy debates on how to advance what we South Africans term "transformation". This is the process of addressing and redressing the inequities that were, and remain, legacies of the country's and the industry's apartheid history.

Transformation in the industry is regulated mainly through the Mining Charter, a social agreement negotiated between government, organised labour and the industry. The first version came into effect in 2004, it was revised in 2010 and a third version is currently under discussion.

To illustrate the kind of progress made under the different "pillars" of the charter, a Minerals Council survey of members to assess progress on 2010 Mining Charter's targets at end of 2016 showed, for example, that:

- With a target of 40% of "historically disadvantaged South Africans" (black people and women) occupying senior positions, they occupied 49.3% of top management positions, 48.3% of senior management, and 84.4% of core and critical skills. This is off a bases of close to zero when South Africa became a democracy in 1994.
- With an original target of 10% of women in employment in the sector, by 2016 women make up 13% of the mining workforce.
- One of the ways to enhance job advancement for previously disadvantaged South Africans is through skills training. The charter has a target of 5% of payroll to be spent on this. By 2016 the industry spent 5.5% of annual payroll (R7.74 billion) on human resource development, plus payments of the statutory skills levy of R1.46 billion.
- In order to improve the quality of life in mining regions and areas from which employees are traditionally recruited, the 28 companies surveyed contributed R1.14 billion towards community development in 2016. This was despite 16 of the 66 operations managed by these companies being loss-making that year.
- And we have seen the sale of mining assets and share transactions to historically disadvantaged South Africans amounting to 39% of the value of companies' South African asset base, significantly above the 26% target. It has involved the transfer of more than R200bn in value.

Over and above this progress, the industry is committed to further transformation efforts. The challenge, however, is to avoid new transformation targets that are so intense that they act as an obstacle to new investment.

The well known Fraser Institute Investment Attrac-

tiveness Index ranks South Africa in top quartile for mineral potential due to the country's still extensive resource base. Yet, South Africa is ranked way below that level by the same Institute when the quality of the policy, legislation, regulation and operating environment is measured. This helps explain the mismatch between potential and current outcomes.

In 2017 the Minerals Council carried out another survey of its members to better understand this situation. We asked: What could happen if the policy, regulatory and governance environment improved substantially?

Sixteen companies representing the overwhelming bulk of mining production in South Africa across various sectors participated in the survey.

As the accompanying graphics show, the survey found that an improved policy, regulatory and governance environment would lead to these companies increasing their current planned capital of spending of R145 billion by another R122 billion, or by 84%. This would lead to the creation of another 48,000 direct jobs, and a total of 150,000 more jobs taking into account indirect employment.

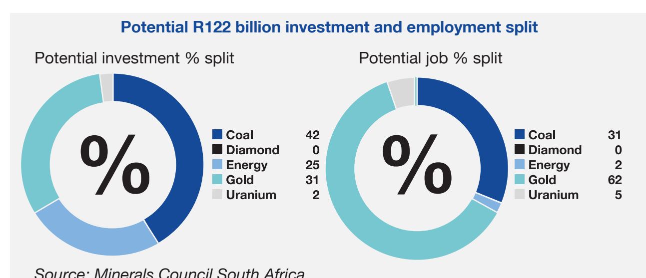
As the graphic shows, the bulk of the employment gains would be in the gold and coal sectors. South Africa is, in many respects, in a critical phase of its development, not least where the mining industry is concerned. President Cyril Ramaphosa's accession to power in February has led to a number of important steps to address the corrupt governance and economic stagnation of the Zuma era. We have seen changes in the leaderships at the important state-owned enterprises which were being impoverished by corruption. We have seen important cabinet changes, particularly in the portfolios important to the economy and to the rehabilitation of the rule of law. There is again hope of an ethical political leadership It is too early to tell, however, whether this will translate into a policy approach that will satisfy both the economic growth imperative and our society's demands for more effective addressing of the country's historical legacies.

Potential Investment and employment per commodity

Sector	Potential Investment	Potential jobs
Coal	R51,400,000,000	14,540
Diamond	R40,000,000	25
Energy	R30,000,000,000	1,100
Gold	R37,476,000,000	29,450
Uranium	R31,100,000,000	2,500
Total	**R122,016,000,000**	**47,615**

** 25 additional jobs per annum* *Source: Minerals Council South Africa survey*

Potential R122 billion investment and employment split



Source: Minerals Council South Africa

What the mining industry needs in order to meet the promise that our 2017 survey highlighted is:

1. A more nurturing environment to stimulate long-term investment.
2. Greater policy and legislative certainty, based on the right kinds of policies.
3. Improved governance in the Department of Mineral Resources, including an end to political interference in the awarding of prospecting and mining rights and improved departmental capacity (both of which the new Minister Gwede Mantashe has promised).
4. The addressing of infrastructure constraints that have been curtailing competitiveness and investment.
5. Addressing the inefficiencies of local authorities, whose shortcomings in mining regions have contributed to a prevailing lack of trust between companies and mining communities.

The country's new political leadership has offered hope that these goals are achievable, even though there is a long way to go after the political setbacks of the last several years. The mining industry and its representative, the Minerals Council South Africa, is committed to playing a constructive part on this journey.

Contributor's Profile

Roger Baxter joined the Minerals Council in 1992 and was appointed CEO in 2015. He has 27 years of high level advocacy and strategy experience in the business and mining sectors. He was involved in the first mineral policy discussions with the ANC in 1992 and has participated (and often led) discussions on all aspects of mining, economic, investment, transformation and tax policy with government. He previously chaired the BUSA Econpol and Growth Task Team. Roger has played a key leadership role in rejuvenating the Minerals Council brand and brings material leadership, governance, strategy, investment and transformation skills to the table. He is a member of the Minerals Council Board, the BUSA Board, and the TEBA Trust; and chairs the World Platinum Investment Council. He is vice-chairman of both the international Associations Working Group and MIASA..

MINING IN AFRICA: REGULATIONS, POLITICS AND OPPORTUNITIES

By **Warren Beech,** Partner, Hogan Lovells South Africa

2017 was a complex year for many African countries, including South Africa, with every single aspect of both personal and business life being disrupted by political, socio-economic and regulatory change and uncertainty. Change and uncertainty has been particularly prevalent in the African mining and natural resources sector, a key barometer for the state of business, which remains critical to many African economies and which, if managed properly, can continue to contribute significantly to growth and development. The mining and natural resources sector's position as a key contributor and as a potential significant driver for growth and development has been hampered by significant challenges faced by the sector. In 2017 there was a strong, consistent focus on thermal and coking coal, gold, copper and the platinum group metals. Interest in chrome, iron-ore and manganese picked up, particularly in the last half of 2017. The strongest emphasis has however been in the so-called "battery metals" which is driven a new demands for these metals used in the manufacture of batteries for the ever-increasing production of electric vehicles. The trends and patterns seen in 2017 are likely to remain the same in 2018.

As a result of recent political and regulatory developments in South Africa, Tanzania, Zimbabwe, and the Democratic Republic of the Congo, the question is posed whether Africa has become uninvestable. It is frequently said that Africa is a continent of endless opportunities, that the continent has significant natural and human resources, and that the investability of many African countries, including South Africa, has improved. The reasons for the improved investability include the mature banking, finance and legal institutions, investment-friendly policies and regulatory frameworks, and the national development plans which demonstrate governmental support for sustainable infrastructure and development.

There are probably two main reasons for this question being asked. Firstly, positive views of investment in Africa don't always extend to the mining and natural resources sector. Secondly there remains significant concern about policy and regulatory uncertainty and the growing perception that investors are at the mercy of the politicians.

The recent mining legislative changes in Tanzania and South Africa brought into sharp focus the fragility of investment decisions relating to the so-called "frontier markets" such as Tanzania, and emerging markets, such as South Africa.

Tanzanian President John Magufuli signed into law the natural Wealth and Resources Bill 2017, and the Natural Wealth and Resources Contracts Bill, 2017, on 3 July 2017. These laws, which were fast tracked through the Tanzanian Parliament, in a matter of weeks, have far-reaching consequences for foreign companies with investment in Tanzania. Tanzania is one of Africa's largest gold producers.

On 15 June 2017 the then South African Minister of Minerals, Mosebenzi Zwane published the "Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016". The response was immediate, dramatic and far-reaching. It is estimated that mining stocks lost approximately R50 billion in value, following the announcement. The Chamber of Mines (now known as the Minerals Council of South Africa), representing more than 90% of the miners in South Africa, challenged Mr Zwane through a court process. What was notable, is that it was not only the Chamber of Mines, but a range of other stakeholders that also raised their concerns including the Centre for Applied Legal Studies and Lawyers for Human Rights. Communication between Mr Zwane and the Chamber of Mines reached its low point, when the parties refused to engage with one another. Fortunately for South Africa, political change, through the appointment of President Cyril Ramaphosa, and a new Minister of Minerals, Gwede Mantashe, has removed the roadblock, and the stakeholders are making good progress towards a resolution of key aspects impacting on the South African mining industry.

The publication of the Draft Broad-Based Socio Economic Empowerment Charter for the Mining and Minerals Industry 2018 ("Draft Mining Charter 2018") on Friday 15 June 2018 came in the wake of the widely criticised Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry on 15 June

2017 ("Mining Charter 2017") and the commitment of both President Ramaphosa and the newly appointed Minister of Mineral Resources, Mr Gwede Mantashe, to seek solutions to the impasse brought about by Mining Charter 2017.

As with most situations that require compromise, not all stakeholders are happy with Draft Mining Charter 2018, and publicly-available comments span the spectrum from support, through to criticism. Despite an extensive public consultation process prior to the publication of Draft Mining Charter 2018, stakeholders have been given a further opportunity to comment on Draft Mining Charter 2018, by 27 July 2017. Key aspects currently under further scrutiny include the onerous ownership provisions for new rights, and the procurement of goods and services. Draft Mining Charter 2018 does address one of the most controversial aspects which was at the heart of the impasse between the mining industry and the erstwhile Minister, Mr Zwane, namely the "once empowered always empowered" principle, and where historical holders of mining rights had reached the 26% ownership requirement, during the currency of the mining right, this historical ownership is recognised, despite the Black Economic Empowerment Partners, having exited, but there is a limited "top up" requirement, of 4%, to 30%, (the new ownership requirement under Draft Mining Charter 2018) within five years.

The recent changes in the Democratic Republic of Congo are encouraging, and lessons can be learnt, by South African (and other African countries). The government of the Democratic Republic of Congo reviewed its Mining Code, which resulted in the promulgation of Mining Code Amending Act on 9 March 2018. One of the most notable amendments is Article 276 which provides Guarantee of Stability, aimed at protecting both, the interests of government, other beneficiaries, promoters of mining projects, and investors. The pledge of stability for investment forecast within the context of a constantly changing environment, is absolutely critical to investment decisions. The ten year stability period provides mine owners and investors with a significant timeline of stability.

The continued impacts of economic downturn continue to be felt in the South African mining industry. In addition to these impacts, and of extreme concern, is the higher number of fatal accidents in the South Africa mining industry, this year, in comparison to the same time, in 2017. This has prompted intervention by the Mine Health and Safety Inspectorate, and unless all stakeholders in the South African mining industry can achieve meaningful change, disruption caused by intervention by the Mine Health and Safety Inspectorate, is likely to continue in the foreseeable future.

The commodities that are likely to be most affected in 2018 fall into two categories, namely the commodities that are driven by economic and other development, such as the commodities that are used for the production of steel and related products, and those commodities which will be driven by broader global developments such as the fourth industrial revolution, more commonly referred to as Industry 4.0, the Internet of Things, and Artificial Intelligence. The so-called "battery metals" are integral to this latter category of commodities.

Commodities, such as gold, that are now extracted from ever-increasing depths, will need to progress levels of mechanisation, and move towards full automation, for various reasons, including costs, and health and safety.

Contributor’s Profile

Warren Beech is a well-known figure in the mining industry, Warren Beech is the Global Head of Mining. His advice is sought by mining companies, suppliers and government alike, and he is frequently seen on TV and quoted in the media on issues facing the mining industry in South Africa. Warren provides multi-disciplinary legal and related services, primarily to the mining, construction and engineering industries. This includes health and safety, environmental, commercial, litigation, criminal and employment law advice, as well as training, auditing and consulting services. arren consults locally and internationally, and has represented mining and non-mining companies in more than 2500 fatal inquiries and inquests arising out of incidents and accidents. He has conducted inquiries in terms of the Mine Health and Safety Act and the Occupational Health and Safety Act for clients. Recognised for his contribution to the mining industry by several industry bodies, including associations affiliated to the Chamber of Mines, he has participated in various industry-specific bodies on developments, including legislative amendments, at the request of the regulators. Warren is a frequent speaker at local and international seminars and conferences. Legal 500 considers Warren “a recognised leader in health and safety”. Chambers Global says about his health and safety practice: "He is an expert in his field, always available and a pleasure to work with".

AFRICA'S CONTRASTS: (RE)EMERGING TRENDS OF MINING IN AFRICA

By **Deepa Vallabh,** Head of Cross-Border M&A: Africa and Asia, CDH South Africa
Maud Hill, Associate, Corporate and Commercial, CDH South Africa
Mamello Thulare, Candidate Attorney, Corporate and Commercial, CDH South Africa

It has been said that "the greater the contrast, the greater the potential. Great energy only comes from a corresponding great tension of opposites" (Carl Jung). While this was not said in connection with Africa, it certainly finds apt application in the African mining industry, given that the majority of African countries' exports and gross domestic product ("**GDP**") indicators relate to their natural resources; contrasted with various factors that results in untapped potential. In this article we wish to highlight the trends in the mining industry that have been developing through-out Africa and the impact that this can have on M&A deals in this industry.

Increases in international commodity prices have been noted as a sign for potential improving profit margins and as a consequence a predicted rise in M&A deals in this industry in Africa.

The rise in commodity prices has, amongst social, economic and political uncertainty, been identified as a trigger for many governments on the continent to attempt to appease voters and to claim a larger portion of the revenues generated from the exploitation of natural resources. Notably, this has resulted in the (re)emergence of controversial nationalisation measures as trends in Africa. In this regard, the Democratic Republic of Congo has implemented amendments to raise the taxes, royalties and other obligations of mining companies. Tanzania has also recently implemented restrictions on foreign banking, legal and insurance entities from working in the mining industry such that, amongst others, the foreign held mining companies will be forced to offer shares to qualifying local persons (with heavily punitive fines being imposed for non-compliance). A further interesting development is, that due to the implemented restrictions, mining companies will be required to retain legal services in relation to their activities and transactions from a firm whose principal office is in Tanzania.

South Africa is no exception to the nationalisation trend. On 15 June 2018, the draft Mining Charter III ("**Draft Charter**") was released for public comment. The Draft Charter which, if implemented, will apply to both existing and new mining rights, calls for an increase in local ownership to a 30% shareholding by Broad-Based Black Economic Empowerment qualifying persons as well as a hike in the social contribution and tax obligations of mining companies. This increase in local ownership requirements and obligations has not been met with overwhelming support, in that the Draft Charter is viewed as a document which does not balance local initiatives and sustainability of the industry. The increased costs obligations of mining companies in South Africa will result in a consequential increase in overheads and thus a potential for investment withdrawal (and deterrent) and the shutting down or scaling down of mines. The closing of mines or at the very least certain shafts will likely hugely impact the economic landscape of the country and such impact will be felt more heavily by the mine workers and mining communities whom the legislation is seeking to uplift, with negative implications for the long-term growth of the mining industry.

This trend is accompanied by either increased discussions between large mining companies and African governments (leading to investor uncertainty) or disinvestment of certain local operations such as the disposal by Anglo America of certain of its mines in South Africa in recent years and the potential withdrawal from Tanzania by Acacia Mining if the talks with the Tanzanian government are unsuccessful.

A further risk to the efficiency of the mining industry is the growing illegal mining trade (including the use of child labour), which trade is likely to be boosted by the recovery of the commodity prices. The overall impact on investors will in all likelihood not only impact revenue streams but also the triple bottom line of mining companies, in that together with the economic implications, there are social (including reputational) and environmental downsides for companies operating in a country that is plagued by an illegal mining trade. Tanzania has

been reported as making strides in combating the illegal trade, the Minerals Minister of Tanzania has been reported as claiming the growth in GDP (approximately 1.3%) as attributed to the greater efficiencies deployed in the combating of illegal mining and the more stringent regulatory regime referred to above. However, this positive outcome was accompanied by the statement that the "aim [is] for a larger piece of the pie" and thus a clear intention to continue to strengthen the favour of the Tanzanian legal regime towards local incentives as opposed to boosting investment in general. It has been reported that a major contributor to the growth in Tanzania was the productivity of Acacia Mining in-country which, as noted above, will potentially disinvest from Tanzania as a result of the regulatory overhaul and therefore the growth in GDP recorded may be a short-term phenonium, if the engagement between Acacia Mining and the government does not result in an agreement on the way forward.

Although not a new concept, the lack of adequate infrastructure remains problematic in the mining industry. A report published by BMI Research, confirmed that a key restriction on investment in the mining industry remains the lack of infrastructure which is a long-term structural issue. However, there are indications that projects are being implemented to increase the infrastructure capability of Africa in order to better support the mining industry and attract more investments into the continent. For example, Botswana is investing in developing its power infrastructure to address a shortage in electricity, South Africa is planning to improve its railway network.

Strong trends in the African mining industry are therefore an aggressive overhaul of regulatory frameworks in the Sub-Saharan region to attempt to improve the local benefits reaped from mining operations, a lack in infrastructure and illegal mining. This is contrasted with the reported recovery of commodity prices, long-term projects for the improvement of infrastructure and strides in the illegal mining trade. Thus, while the benefits of an upswing in commodity prices may allow for M&A deals to be on the rise due to a seemingly more attractive profit margin, the downswing of the commodity price recovery will need to be considered in relation to the connected negative impact on local incentive legislation and illegal mining. However, a recent analysis by Deloitte indicates that the potential of a mining market (including the quality of the relevant deposit) still strongly influences investment decisions.

The overall cost of doing business in Africa and in particular the mining industry appears to be on the rise and the level of legislative change has given strength to the adage that only death (or in this case potential disinvestment) and taxes are certain. The mining industry is on a revolving circuit, as the higher the commodities price rises, the greater the possibility that more African countries will seek to impose restrictive local incentive requirements and the more likely that the cost for large mining companies will increase, with a resultant potential for disinvestment. Any disinvestment is likely to have a knock-on effect on any planned infrastructure developments as revenue streams are removed. The social and economic impact of this will inevitably have disproportionate effects on the very persons that the local incentive requirements are seeking to benefit.

The point made in this article is not that local incentive requirements be removed but that governments introduce these in a manner in which it (i) is balanced with the economic reality of carrying out mining operations and (ii) is certain, so that investors have a level of predictability in terms of costs. Disinvestment is not often as a result of the introduction of local benefits, as most mining companies understand the need for social upliftment and local participation requirements. Rather, it is often as a result of the uncertainty of an ever-changing regulatory landscape which makes investment decisions, which require a long-term horizon, difficult.

Therefore, whether the predicted rise in M&A deals in Africa will bear fruit is dependent on (i) investors' abilities to adapt to the rapid changes in legislation and to make use of structures that take into account increased local incentive legislation and (ii) on governments providing greater political and legislative certainty. Whether, a middle road between these contrasting objectives can be found, remains to be seen. However, one thing remains certain, the opportunities in the mining industry in Africa remains the great potential still to be unlocked in Africa.

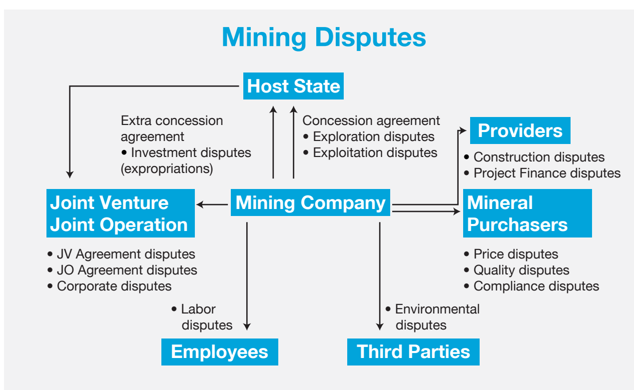
"The greater the contrast, the greater the potential. Great energy only comes from a corresponding great tension of opposites."

DISPUTE RESOLUTION IN AFRICA MINING ASSETS: EXPLORING THE ARBITRATION ROUTE

Introduction – Africa's Mining Industry

Mining is one of Africa's flagship industries and a growth engine for many of the continent's countries. Not only have some of the "mining champions"[2] developed a significant infrastructure, but also a consistent regulatory framework to allow domestic and foreign investors to access their mineral resources. Since mining is a complex business, requiring significant investments, potentially generating high returns and involving manifold political issues, disputes will inevitably arise. It is worth exploring if and to what extent international arbitration can be a suitable and effective dispute resolution mechanism for typical mining disputes.

Typical Mining Disputes



It is common wisdom that each dispute turns on its facts. From a systematic perspective, however, an attempt to classify typical mining disputes could look as follows:

We will look at the suitability of (international) arbitration as dispute resolution mechanism in each of the above shown relationships:

Disputes with the host state: Such disputes can either revolve around the mining concession agreement or concern adverse state measures against investors.

(1) The first type of disputes will generally relate to the mining company's exploration and exploitation rights and obligations under the mining concession agreement. Violation of these rights can include security issues, such as not receiving adequate protection through the host state, the outbreak of war and similar force majeure situations preventing performance, as well as incursions on the mines by illegal miners. It is similarly conceivable that the host state sues the mining company, e.g. for failing to perform the exploration or exploitation, not paying the concession fees, taxes and bonuses, or for environmental damages.

If the law of the host state allows for arbitration (as it is the case for example in the Ivory Coast, Ghana, Mozambique or Namibia)[3], the parties can submit concession agreement disputes to commercial arbitration by using an arbitration agreement (if the concession agreement does not automatically provide for arbitration). In addition to the concession agreement, these disputes will generally provide for the host state's national mining regulation as substantive law. The majority of host states have promulgated either a mining

1. The authors would like to thank Ms. Natalia Filandrianou, LL.M., for her precious research contributions.
2. E.g. Angola, the Ivory Coast, the Democratic Republic of the Congo (DRC), Ghana, Mozambique, Namibia, Nigeria, South Africa, Tanzania and Zambia.
3. Ivory Coast: Article 190 Mining Code 2014; Ghana: Section 27(3) Minerals and Mining Act 2006; Mozambique: Article 8(2)(g) Mining Law 2014; Namibia: Section 49 (2)(b)(xii) Minerals Act 1992.

code or a mining act, which provides the general framework for mining concessions for domestic and foreign investors.[4] In these scenarios, international arbitration provides an effective dispute resolution mechanism because it provides, inter alia, for a neutral forum, a decision-making body of experts, and a final decision that can be widely enforced.

(2) The second type of disputes revolves around adverse measures from the host state, which may or may not qualify as breach of the concession agreement. Such adverse measures include expropriation, discrimination or unfair treatment by government agencies or national courts, violations of stabilization clauses contained in investment treaties or withdrawals of tax exemptions. To the extent these disputes do not already qualify as breach of the concession agreement, the mining company could try to sue the host state in its domestic courts. A more attractive forum may result from an investment treaty between the host state and the investor's home state. Africa accounts for 842 Bilateral Investment Treaties (BITs) and, in their vast majority, the BITs refer to investment arbitration in case of dispute, very often under the ICSID[5] Rules[6]. Besides these BITs, there are regional investment agreements like the Investment Agreement for COMESA[7] and the SADC[8] Protocol on Finance and Investment,[9] which also contain provisions for investment arbitration.[10] In these investment arbitration cases, the substantive law of the dispute will be the provisions of the investment treaty the host state potentially violated through its actions as well as public international law.

Disputes with providers: The mining company will collaborate with many service providers, in particular with regard to the project's funding and the construction of the mining site and other infrastructure. This can lead to project finance or construction disputes, which are both generally suitable for commercial arbitration. The arbitrability of such disputes will not depend on the national laws of the host state, since most project financers and construction operators are located in third countries. In this respect, it is also noteworthy that commercial arbitration is traditionally used as dispute resolution mechanism for construction disputes, since it allows the use of highly qualified arbitrators, counsels and experts.

Disputes within the supply chain: Disputes may also arise with the purchaser of minerals (usually traders or refinement companies), e.g. because of pricing, quality issues or compliance issues (e.g. no sale of "blood diamonds" or minerals extracted by children, alleged breaches of anti-bribery or anti-corruption legislation). These disputes can be heard in international commercial arbitration, either based on an arbitration clause in the purchase agreement or a subsequently concluded arbitration agreement. Again, the advantages of international arbitration are, inter alia, that it provides for a neutral forum, a decision-making body of experts, a final decision that can be widely enforced, and for confidentiality of the issues at stake.

Disputes within a joint venture or joint operation: Mining operations will often be organized as joint ventures or joint operations (sometimes also involving a government agency or state-owned company as mandatory partner). Consequently, disputes might also arise from the joint venture or joint operation agreement or as regards the operation of the company used for the joint venture. Subject to the arbitrability of intra-company disputes, such disputes can be heard in commercial arbitration, which again offers a neutral forum, a decision-making body of experts, a final decision that can be widely enforced, and confidentiality of the issues at stake as the main advantages. Also in these cases, it is common to opt for a third-state substantive law for the joint venture or joint operation agreement or organize the joint venture company under the laws of a third state.

Disputes with employees and third parties: Finally, a mining company, just as any industrial operation, may face issues with its employees or third parties, such as indigenous populations claiming violations of their environmental rights. These disputes will generally be handled by local courts.

Mining Disputes in Africa – A Brief Case Law Overview

Most of the reported mining arbitrations are invest-

4. In addition, the host states have also promulgated a series of other laws, e.g. environmental and labor laws, and regulations to complement the mining code or act, which can also play a role in concession agreement disputes (e.g. in determining breaches committed by the mining company).
5. Convention of the International Centre for Settlement of Investment Disputes of 1965.
6. Markus Burianski/Federico Parise Kuhnle in: Into Africa, April 2017, Arbitration in Africa – Managing Risks in a Growing Market, p. 12; http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults (last visited: 22 May 2018).
7. Common Market for Eastern and Southern Africa. Members of COMESA are: Burundi, the Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
8. Southern African Development Community.
9. Members of SADC are: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.
10. Article 28 COMESA Treaty; Article 28 SADC Protocol on Finance and Investment.

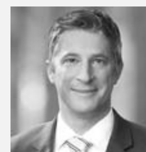
ment arbitration cases, which are often public. However, since arbitration is generally confidential, there is a high and hardly quantifiable number of publically unavailable commercial mining arbitration cases dealing with concession agreements, construction works, supply chains, joint ventures and operations.

Among the known cases, the following stand out: First Quantum v. DRC[11] related to the revocation of copper mining titles and permits. The case was complex since it also involved parallel commercial arbitration proceedings lodged against the state under the ICC Rules. Eventually, all claims were settled in 2012 and the arbitration proceedings were discontinued.[12] Another interesting case involving the DRC is the Miminco case.[13] In this case, the investor alleged that DRC officials and soldiers seized the mine and confiscated its equipment. Moreover, Miminco was evicted from its office premises in Kinshasa. The parties eventually settled the case. The case of Piero Foresti et al. v. South Africa[14] arose out of the introduction of Black Economic Empowerment (BEE) provisions in the South African Mineral and Petroleum Resources Development Act of 2002. BEE provisions discriminated in favor of historically disadvantaged persons by requiring the compulsory divestiture of equity by the mining operators in order for the disadvantaged to access the mining sector. An ICSID Tribunal dismissed the Italian mining investors' claims with prejudice and ordered the investor to reimburse South Africa EUR 400,000 for fees and costs. Interestingly, South Africa kept the BIT with Italy in place unlike with many other European states. Finally, among commercial arbitration cases, there is an interesting case where the host state sued the mining company: In Senegal v. ArcelorMittal (conducted under the ICC Rules in Paris)[15], Senegal brought a claim for rescission of a USD 2.2 billion contract against ArcelorMittal. The claim was based on ArcelorMittal's suspension of works for the development of an iron ore mine and related infrastructure projects. Senegal won the case and the company eventually paid USD 150 million to settle the case.[16]

Conclusion

As mining is a growing industry in many African states, so is its potential for disputes. For many of the potential disputes, international commercial arbitration provides for an effective dispute resolution mechanism with features preferable to domestic court proceedings. In some cases with unlawful host state intervention, investment arbitration will even be the only effective remedy. Mining companies are well advised to devise their dispute resolution strategy before disputes arise.

Contributors' Profile



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Dr. Federico Parise Kuhnle is a member of the Frankfurt Dispute Resolution group. He mainly advises clients in national and international arbitration and litigation proceedings. Federico joined White & Case in 2016. Prior to this, he gained considerable experience as a research assistant and trainee lawyer in the fields of dispute resolution and corporate/M&A with several international law firms in Frankfurt as well as with a renowned Swedish law firm in Stockholm.

11. International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21 cf. https://www.italaw.com/cases/567 (last visited: 22 May 2018).
12. On 12 April 2012 the ICSID Tribunal issued a procedural order taking note of the discontinuance of the proceeding, cf. https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/21 (last visited: 22 May 2018). According to a press release by the company all claims were settled in March 2012, cf. https://www.first-quantum.com/Media-Centre/Press-Releases/Press-Release-Details/2012/ First-Quantum-Closes-Sale-of-Residual-DRC-Assets-to-ENRC-and-Finalizes-Settlement-of-All-Claims-in-Relation-to-DRC-Operations/default.aspx (last visited: 22 May 2018).
13. Miminco LLC and others v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14, cf. https://www.italaw.com/cases/3586 (last visited: 22 May 2018)
14. Piero Foresti, Laura de Carli and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, cf. https://www.italaw.com/cases/446 (last visited: 22 May 2018).
15. Senegal wins court case against Arcelor Mittal – government: https://www.reuters.com/article/senegal-arcelormittal/senegal-wins-court-case-against-arcelor-mittal-government-idUSL5N0H64EZ20130910 (last visited: 22 May 2018).
16. Burnett/Bret, Arbitration of International Mining Disputes, OUP 2017, Appendix 2, p. 307, para. 65.

COMMODITY TRADING IN AFRICA: MANAGING RISK & OPTIMIZING OPPORTUNITIES

Commodity trading of any calibre inherently holds a varying degree of risks. Large trading corporations have systematically incorporated, and increased their reliance on, information technology as part of their risk management. This development stems from the rapidly changing commodity trading industry, specifically in energy. Despite the risks associated with the volatile oil prices, which we shall get more into later, trading in the energy industry has not been immune to the technological and demographic changes which have been experienced by most established industries. Which is that more people are having greater access to pertinent information that was once highly protected, which in turn has spurred an increase in players? Growing global profit pools, profile diversification of industry leaders, and the decrease in entry barriers have attracted an influx of new players with niche and boutique services tailored to optimizing trading logistics. Naturally this increase in players, and the subsequent impact on the industry, has required for applicable risk management strategies in order to optimize opportunity. Given how nuanced and complex risk management and its strategies can be, I aim only to highlight some of the most prevalent and relevant strategies that are being adopted and how Africans are embracing globalization to optimize their trading opportunities.

Optimization & Globalization

Increasing globalization in African energy markets has allowed for traders and firms to adopt and benefit from various risk management strategies. One of the most prevalent being the benefits from Global Supply Management risk mitigation strategies, a set of strategies aimed to reduce costs of supplying goods and services while mitigating the risks involved in doing so in an effort to obtain the lowest cost of ownership Such as; mitigation of supply risks by locating niche consumers and suppliers as seen in the numerous Virtual Pipeline Networks in and between South Africa, Congo, and Nigeria. Mitigation of Financial Risk through the increasing use of CDS's, Netting, and other forms of credit derivatives. Mitigating of Negotiating Risks as exemplified in the rising effort and frequency in Bilateral Agreements such as the MoU between Equatorial Guinea and Burkina Faso inked in 2017 as championed by the LNG2Africa initiative. Although on a governmental level, it still highlights a deviation from rigid contract terms which have and continue to expose African suppliers to unfavourable terms. One of the most notable examples stemming from the 2007 supply contract between Equatorial Guinea and Multinational BG for 3.4 million tonnes of LNG for 17 years. The contract saw Equatorial Guinea unable to renegotiate the contract once BG diverted the supply towards Asia's burgeoning economies where demand had pushed prices almost thrice fold above the initial intended US market. Despite the legality of the contract, which would go on to make BG $1 Billion a year, new forms of bilateral agreements specifically aim for mutual optimization terms.

Optimization And Volatility

As I type this piece, oil prices have surged to their highest level in three and a half years – just above

$70 a barrel. How can one forget how merely 2 years ago the industry was shaken by oil prices reeling to the $20's range, and only two years before that hitting highs of over $100! I say all this to highlight the obvious truth understood by all energy traders – prices are volatile. At this point all the risk-loving mavericks are surely chanting their "high risk, high reward" mantra; however, a more volatile market like the energy markets requires greater detail to the process of price risk management. The most common risk management strategy being hedging with derivatives.

We have been seeing an increasing use of derivatives contracts in the price risk management strategies in African traders. Some markets, such as the Nigerian oil market have already developed advanced swap contracting strategies which have become ingrained in their hedging strategies. Even extending past their energy industry as exemplified by the three-year $2.4 Billion Currency -Swap between Nigeria and China to reduce the need to use the dollar in bilateral trade. Significant efforts have also been made by the JSE's nascent Hedge Future and Options derivatives through the introduction of bespoke contracts such as the Diesel Hedge Futures or Options (DSEL). The contract provides a hedge against movements in the local pump price of diesel through following the price of European Gasoil futures, as traded on the New York Mercantile Exchange and provides traders and investors with a hedge against price movements of diesel refined in Europe. These efforts to fit the hedging strategies to local markets has allowed for traders and firms to optimize their risk management strategies.

Manage Relationship. Manage Risk

Where trading markets have begun to open up in Africa and new players have begun to emerge, there still lies the reality of fundamental trading risks inherent in most developing economies, including contract performance risk, operational risk, and political risk, to name a few. Scholars and institutions alike have elaborated ad-nauseum on the theoretical management of legal/reputational risk, political risk, and contract performance risk. However, just like war, many of the risks are not managed theoretically but through the actions and reactions of those at the front line. This essentially makes the management of relationships (buyers/sellers/ agents/ facilitators or other parties that encompass an ecosystem of trading networks) as critical to risk management as any hedging strategy. Much like any other honour-based cultures, solid business relationships formed on mutual friendship and trust tend to take precedence over foreign opportunities. Thus managing ones trading relationships in Africa is one of the most crucial aspects to risk management and optimizing profits. Ignorance to this aspect has historically been a stumbling block for most international traders looking to enter into the African market, adding to the stigma of the difficulty to conduct business in the continent. Although we are seeing a growing focus being placed on the systematics of operations in energy trading, the luxury of faceless trading is one with limited reach and opportunity in Africa.

With trading in Africa becoming increasingly populated and sophisticated, so are the risk management strategies being made available to its markets. Optimization of the trading opportunities comes from a balance between utilizing relevant hedging strategies while also respecting relationships that revolve ones' trading universe. With the JSE continuing to lead african exchanges in future contracts and options, we are posed to see similar exchanges adopt these options in the long term as they become established. Nonetheless, it is an exciting time to trade energy in Africa given the aggregate growing economy and middle class and we are far from seeing the true optimization opportunities nestled in our continents potential.

Contributor's Profile

Zwelakhe Gila is an energy economist that specializes in analytics and trading of energy products in Africa. He manages the SADAC region for DMWA Resources, and is currently the Head of Trade & Commerce for the African Energy Chamber of Commerce.

Before joining DMWA Resources, he was a key Trade Analyst for one of South Africa's largest LPG storage facilities and importers while also managing a number of the regulatory and licensing factions. He has consulted on numerous energy projects in South Africa, providing trading logistics solutions, econometric analytics and regulatory advisory services.

Zwelakhe holds a BSc in Consumer Economics from the University of Illinois, and a MSc in International Oil & Gas Management from the University of Dundee. He also holds a certificate in in LPG Trading, Marketing & Price Risk Management.

FUNDING THE DEVELOPMENT OF AFRICA'S OIL AND GAS RESOURCES

Unlocking the huge resource potential in Africa remains a significant challenge for the continent as competition for global capital continues to intensify, with investors sharply focused on capital discipline and shareholder returns. Endowed with significant resources, Africa holds over 200 billion barrels of proven oil equivalent reserves representing almost 10% of global reserves and, according to the industry consultancy Wood Mackenzie, an additional 70 billion barrels of prospective hydrocarbons are yet to be discovered and exploited. The continent has been at the forefront of emerging frontier plays with new basins discovered in East Africa; including large offshore natural gas discoveries in Mozambique and Tanzania, as well as oil in Uganda and Kenya. In the West, Senegal and Mauritania are also making their mark following large gas discoveries offshore. With the recent resurgence in the oil price, there are some green-shoots of exploration as International Oil Companies (IOCs) acquire low-cost acreage along the emerging frontiers as well as in regions with established petroleum systems.

Despite the growing optimism and success seen on the exploration front, the repercussions stemming from the oil price crash in 2014 continue to reverberate across the sector and, in particular, on projects in Africa where risks are viewed as higher in comparison to The Organisation for Economic Co-operation and Development (OECD) countries. The knock-on effect has been a marked reduction in capital expenditure as projects have either been shelved, or relegated to the mountain of non - economic unbankable projects. Since 2014 Sub - Saharan Africa upstream investment alone fell by 56%. The capital allocation decisions by upstream companies have come under significant scrutiny and pressure from shareholders and banks alike. Investment in the industry in Africa has also been negatively impacted by Governments who have, at best, been slow to recognise and react to global competition for capital, and at worst, tightened terms for investors, making investment uneconomic.

The banking sector's view of oil and gas projects is now being scrutinised with a newly acquired conservative lens. The criteria for projects has tightened with the introduction of increased requirements for upstream financing which has resulted in some players being frozen out of the market. This has resulted in limited activity in the funding of oil and gas projects over the last few years. IOC sponsored projects aside, the majority of the funding has come from restructuring and refinancing where companies have extended maturities and softened financial covenants on pre-existing deals.

The funding gap has driven the emergence of a new pool of capital, primarily global traders and private equity groups who have attempted to fill this hole. Broadly speaking, the philosophy of private equity investment in the sector has been focused on achieving higher returns by exploiting cost advantages in a low operational expenditure and capital expenditure environment, as well as achieving favorable entry valuations. For the global traders, their investment has been linked to locking

in production volumes.

A number of banks traditionally involved in funding projects in Africa have pulled back and this has been further compounded by the announcement from the World Bank to cease upstream funding post 2019. The latter has a significant impact on projects in Africa as lenders tend to take comfort from the participation of the World Bank in transactions that relate to governance, political risks, social and environmental concerns.

For those investors who have remained committed to the continent, funding has increasingly focused on tightly structured solutions with a shift towards greater conservatism. The experiences of loans made out at the oil price peak to Indigenous companies, as well as investors being negatively impacted by failed E&P companies such as Afren, Petroceltic and Seven Energy are fresh in the mind of the market and a reminder of how things can go wrong with companies operating in the sector. Nevertheless activity has picked up with the uptick in oil prices with a number of projects coming to market or being added to a growing pipeline. Current hydrocarbon hotspots of activity include incumbent producers such as Nigeria and Angola, where TOTAL recently sanctioned the Zinia field - the first Final Investment Decision (FID) in Angola for approximately four years - as well as the emerging basins of Mozambique, Senegal, Mauritania and Kenya. It is important to acknowledge that of the total discovered volumes over the last 10 years globally, emerging offshore basins in Africa have been a key component with a greater role for gas discoveries which has accounted for a significant portion. The challenge to monetise gas resources in Africa is expected to be met by innovative Liquefied Natural Gas (LNG) solutions, illustrated by GoFLNG in Cameroon with the shipment of its first FLNG cargo to China with 60 thousand tones of liquefied gas. The trend is expected to continue.

With the project hopper filling up, competition to access financing is heating up across the continent on various projects. How are banks assessing these projects from a funding perspective? Firstly, bankers will seek comfort in highly structured deals with significant equity support combined with credible sponsors. Project sponsors with strong balance sheets will have an advantage relative to smaller peers in accessing bank finance. In terms of funding structures the majority of projects will fall within the project finance domain primarily Reserve Based Loans, Pre-Export Finance and Development Finance. For example in Nigeria where NNPC has struggled to fund its share of development costs, we have seen a series of pre-export type funding with JV partners co-lending on the back of increased production from additional wells. Other considerations which a lender will take into account include how credible the management team are in terms of their experience and expertise in executing projects in Africa, having recognisable offtakers, secure offshore account structures, the strategic importance of the project to the host country and how above ground risks are mitigated for.

Provided that oil prices remain stable, there are encouraging signs of an African oil and gas renaissance with increased activity and interest. We expect equity and debt providers alike to be less bullish which we believe will help drive economically robust, high quality and bankable projects to the fore. African governments in turn must recognise the competitive nature of global capital and must tread carefully in creating the right balance between incentivising investors whilst ensuring that the benefits from natural resources have a positive impact on economic development. The sustainability of the industry in Africa demands it. Whether the challenge is met, or not is yet to be seen.

Contributor's Profile

Camillo Atampugre is a member of the Natural Resources team at Absa Corporate and Investment Banking with a focus on oil and gas clients across Africa. He has 12 years experience in oil and gas investment banking and before joining Absa worked for Barclays Plc and HSBC in their oil and gas sector teams.

At Absa Camillo is responsible for leading the origination and execution of oil and gas transactions. His experience includes working on M&A transactions, Debt Funding as well as ECM transactions for oil and gas clients including International Oil Companies, National Oil Companies, Independent E&Ps and Indigenous companies.

Camillo holds an MPhil in Economics from the University of Cambridge and a First Class Honors degree in Economics from the University of Leeds.

CLEAN ENERGY INVESTMENT IN AFRICA POLITICAL RISK INSURANCE SOLUTION

By **Thomas Mahl,** Managing Director, SFR Consulting Germany
Franz Karmann, Managing Director, SFR Consulting Germany

It is no secret that insufficient electricity generation is a major problem of large parts of Sub - Saharan Africa (SSA), constraining demand and consequently affecting economic growth. The following figures illustrate this: Currently, around 600 million people in SSA lack access to electricity and 30 out of 49 countries in the region experience power shortages on a daily basis. Reliance on diesel power to address outages costs some countries between 1% and 5% of GDP/year. Annual GDP growth is expected to be around 5% in most of the countries over the next 5 years. Furthermore, an estimated 7.5% rise in electricity demand alongside a demographic growth of 2% is expected over the next decade. To reach the expected 2030 growth targets, 65 GW of power capacity have to be installed at a cost of around USD 20bn/year, half of which would account for transmission and distribution (see studies by the IEA, IRENA).

However, despite the huge need for action, actual investments in energy infrastructure have been limited so far, failing to meet the demand for increased generation capacity, grid extension, maintenance, and the operation of outdated installations. Similarly, the private sector's appetite for investing in Africa's energy sector has been limited by difficulties in securing appropriate long-term cost-effective financing for a number of reasons. Among the most important of them is the discrepancy between the long-term investment needed for energy projects and the short timeframe in which the political landscape may change combined with a perceived high probability of political unrest. Generally, the commercial insurance market is cautious and shows limited appetite to give political risk protection for long tenors in such circumstances, resulting in a comparative absence of political risk insurance coverage for the African energy sector. To close this gap, Munich RE, the African Trade Insurance Agency (ATI) and the European Investment Bank (EIB) have launched a new investment insurance facility (African Energy Guarantee Facility (AEGF)) which provides a political risk insurance capacity of USD 1,4 billion for 25 Sub-Saharan African countries.

AEGF is being developed as one of the key EU (European Union) responses to the Sustainable Energy for All initiative to facilitate and mobilize private sector involvement in the African energy sector. Designed as an open-architecture framework of insurance and reinsurance agreements the facility will offer political, sovereign and sub - sovereign non-payment risk insurance for investors and lenders. This is important because reliable access to clean and efficient energy supply is a major key to building a sustainable economic base. With the increased availability of clean energy, SSA will be able to attract more investments, create an environment where companies can thrive and build healthier communities where pollution and climate change wreak less havoc on daily life.

The design and creation of the AEGF followed a market assessment backed by EUR 1 million of technical assistance provided through the EU - Africa Infrastructure Trust Fund. This identified market gaps that hold back investment and identified partners who could help to address market weaknesses. Last year the EIB provided EUR 2.6 billion for new investment across Africa. Projects supported include improving agriculture, energy, telecom, transport and water infrastructure as well as strengthening microfinance lending and private sector investment across the continent.

AEGF will become an excellent contributor for achieving the UN Sustainable Goals by boosting private investments in sustainable energy projects. The Initiative follows the strategy of Munich Re that wants to create new markets by pushing back the boundaries of insurability. It will remove a major obstacle for renewable energy investments in Africa. As such, the AEGF is a blueprint for risk - sharing between insurers, reinsurers and international financial institutions and we strive to address other impediments to the development of emerging countries with comparable solutions as well.

PUBLIC-PRIVATE PARTNERSHIPS IN FRANCOPHONE AFRICA: EMERGING CHALLENGES AND OPPORTUNITIES

By **Sophie Pignon,** Partner, Bird & Bird Paris

It is beyond any doubt that Public-Private Partnerships (PPP) constitute a key element of Africa's future economic growth. Indeed they muster the needed technical and financial resources in order to build in record time the infrastructure that is required for the African socio-economic life.

According to the data provided by the World Bank, Francophone sub-Saharan Africa posted the best performance of the continent in 2017, for the fifth time in six years. This group of 22 countries recorded growth of 3.2%, while the rest of sub-Saharan Africa recorded a rate of 2.1%. Furtherrmore the eight countries of the WAEMU zone recorded growth in exceed of 6%, confirming its position as the continent's largest high-growth region. With a sustained growth rate and real economic potential including great natural resources, it is certain that the region provides investment opportunities

At the same time, the legal and tax systems of the countries in the region are experiencing major changes. Numerous interstate initiatives and projects have been carried out such as the business law harmonization process at work within OHADA area or the convergence of regulations in the framework of economic and monetary unions.

Despite such significant advances, infrastructure failure in the electricity, water, telecommunications and transport sectors continues to be a pressing issue for the entire continent. The AfDB's economic outlook report of 2018 showed that Africa must invest between 130 and 170 billion dollars a year in its infrastructure to meet its needs, whereas investments reached only 62 billion dollars in 2016. It must be kept in mind that weak infrastructure represents a major brake to Francophone Africa's development and severely limits productivity.

Ultimately, two situations can be distinguished. In some situations the territories are simply not covered by infrastructure networks. However sometimes countries benefit from infrastructures but they are not fully reliable or of a poor quality. A number of factors play a role in this situation. In many cases African States do not have sufficient financial resources for direct financing of great projects. Moreover conception, construction and maintenance of infrastructure need very precise expertise. Given that the frequent absence of true know-how, it is not usual for the performances to be unsuccessful.

In this context, the PPP model brings concrete solutions to the challenges faced by Francophone Africa's States from a technical and financial standpoint. The use of PPP model seems to be more developed in Anglophone Africa (South Africa, Nigeria, Kenya and Uganda represent almost 50% of the PPP over the past 25 years) while Francophone Africa could much more benefit from it.

Used since the 1990s, the term PPP has not been legally defined and refers more generally to a management approach involving the public and private sectors. PPP (in the broadest sense) can be defined as a contractual arrangement whereby the private sector sets up the infrastructure and/or provides the services that are usually provided by the public sector. This process enables the public sector to finance and operate the infrastructure with financial and technical support from the private sector.

Some of the PPP types allow entrusting on a long-term basis to a private partner an overall mission including design, construction, financing, operation and maintenance of equipment meeting the needs of the public entities. It is a deferred payment contract: the economic operator shall be remunerated by the rent paid by the public entity in consideration for the provision of the equipment. The private partner may be subject to performance targets for the duration of the contract. The equipment and works are transferred to the public partner at the end of the PPP.

There is another type of PPP that is much more common in Francophone Africa. They are met everywhere, from the port concession to the delegated management of urban transport, not forgetting the operation of water, sewage and

electricity networks... There is no shortage of examples. In this type of contract, the economic operator shall be remunerated by the charges levied on users. The operator then assumes a risk related to the operation of the equipment and the service. To set up this type of project, there are two solutions to consider: the question is whether the private partner will finance infrastructure or only focus on operation and maintenance of the equipment.

What are the advantages of using PPP in an African context? Of course it depends of the type of PPP.

Under the first category of PPP the payment system is a great advantage. It allows paying only at the end of the construction period or until the provision of equipment. It makes it possible for the public entity to spread out the payment over the total duration of the project. Moreover this type of partnership creates the conditions for financing optimization because the private sector is responsible for bringing investments. This partnership provides also a full service from design to operation which enhances effectiveness. Finally the allocation of risks is based on the idea of the partner that is best able to manage it. We can see that this scheme can interest African States that have to work within budgetary constraints and are seeking expertise in the field of basic infrastructure.

The other type of PPP has globally the same characteristics but is distinguished by its remuneration method as pointed out. In the second scenario users pay most or all equipment costs through their charges. This partnership helps decrease the financial burden on public budget.

Nevertheless there are some potential disadvantages, which are not overwhelming. This involves anticipating possible traps. Often public entities are not prepared and have trouble delegating. This is also linked to the public sector's fear of loss control on more or less strategic tasks. Mainly the establishment of complex partnerships involves setting up a transparent competitive tendering procedure. It could be potentially time-consuming and costly. Furthermore the private sector benefits from less favorable financial conditions than the public entities. Particular attention should be pay to the financial equilibrium of the contract. We can observe that there is often some concern about cost for public finances of certain arrangements.

Therefore Africa now faces new issues related to the acceleration of the infrastructure development. Francophone North Africa -Morocco and Tunisia- already take the lead over their African neighbors. They have developed a special legal framework to support future PPP projects in many sectors. For instance, since the adoption of its PPP Law in 2015, Morocco is in the process of identifying airport projects that meet the eligibility criteria. Numerous projects are under study such as a second airport in Marrakech or Benslimane and Tit Mellil near Casablanca. As another example, the Tunisian Minister of Energy announced in April 2018 the launch of an international call for tenders for a major wind and solar project under the PPP model (800 MW). We can see that PPPs also serve the major structuring policies of African States: renewable energy development plans are a perfect example.

Today Francophone sub-Saharan countries are joining them. Only one francophone sub-African project is subject to a specific PPP law: the extension of the Dakar-Diamniadio motorway in Senegal. Nevertheless, more and more sub-Saharan African countries are adopting modern legislation concerning PPPs and wish to prepare themselves to enter into partnerships with the private sector through public administrations reorganization or civil servants training.

The first challenge is undoubtedly to develop an appropriate legal framework. But that is certainly not enough; many projects do not succeed or are suspended because of institutional or political instability. A lot of possible initiatives can be taken to improve the situation such as reorganizing public sector and promoting transparency and competition. Public entities need to know precisely economic realities to make sure that users will be able to ensure the payment of the performance. In this context, management training can play a major role.

It is clear that Francophone will need to take account of a large number of aspects. They have to elaborate a road map: it is no coincidence that more and more countries are planning the development of PPPs and are incorporating this requirement in their development strategy.

Each PPP project has unique characteristics and involves its special challenges, risks and legal issues. Given the complexity and duration of projects involving the public and private sectors, public entities, sponsors and lenders need the assistance of experienced advisors to accompany them through each stage of the process.

NAMIBIA'S MINING SECTOR: AN OVERVIEW AND OPPORTUNITIES

By **Lauren Davidson,** Economist, Chamber of Mines Namibia

Namibia has become a sought after hot spot for mining investment inflows, which has attracted over US$2.896 billion in new mine investments and re-investments in recent years. Subsequently, the country has witnessed the simultaneous construction of three prominent mines over three years. This is not just a vote of confidence in Namibia's mineral potential, but also a result of the relatively stable regulatory framework that has remained conducive to promoting growth in the sector. In the new global market for electric vehicles, Namibia has become renowned for its declared and existing deposits of battery minerals and newly discovered resources.

Namibia's lineage tells of an extensive history in mining activities, with the first accounts of mining dating back to the 1850's of indigenous tribes extracting and processing copper in the Northern parts of Namibia. The first formal diamond and copper mines were established in the early 1900's. It was only much later when the sector diversified into other areas of mineral production with the country's first ever producing uranium mine, Rössing, and gold operation, Navachab mine, that opened their doors in 1976 and 1989 respectively. With over decades in contribution to the local economy, these mines are still in operation today.

Namibia's mining sector has evolved to become a world-class producer of some of the highest quality diamonds, a combined product from off-shore and land-based mines that are operated by Namdeb Diamond Corporation and Debmarine Namibia respectively, which are jointly owned by the Namibian Government and Debeers. Moreover, Namibia has become one of the world's largest uranium producing countries with the ramping up of Swakop Uranium's new Husab mine. This is not to mention the recent establishment of B2Gold's Otjikoto mine, which has more than doubled the country's gold output; and Weatherly's Tschudi mine that produces LME grade copper cathode. Namibia is also a prominent producer of base metals, industrial minerals, dimension stone, other semi-precious metals and more recently, lithium, graphite and tantalum that belong to the battery minerals family.

There are two pieces of legislation in place that govern the mining sector; the Minerals (Prospecting and Mining) Act of 1992 and the Diamond Mineral Act of 1999 as well as a Minerals Policy. The legislative fibre promotes benefits to the local economy, while safeguarding national interests and the security of tenure to mining rights holders. The Minerals Act and Policy document is currently being revised to align legislation with industry best practice, safety issues, as well as the Africa Mining Vision. A large portion of the industry is successfully represented by a reputable and independent organization called The Chamber of Mines of Namibia. The organization is an advocacy body and is also responsible for its intermediary role between Government and the mining sector among a range of other important functions that include promoting industry best practice in the areas of health, safety and environment. Through an open and collaborative relationship with government, the organization continuously works towards maintaining a regulatory framework that is conducive to growing the mining sector, while balancing the needs of private investors and ensuring optimum socio-economic benefits to the nation. The sector is also supported by a robust geological survey that houses relevant and timely geological data that is easily accessible by investors.

Namibia's mining sector is much smaller in comparison to that of its prominent neighbours, South Africa and Zambia. However, these differences are relative in terms of the country's population, the size of its economy and mineral endowments against those of its regional counterparts. The sector weighs in as the most significant contributor of GDP, in terms of primary production. On average, the industry constitutes 12% of Namibian GDP, generates approximately 50% of the country's export revenues and paid N$5.587 billion to Government in 2017, through corporate taxes, royalties, export levies, dividends and employee's tax. In terms of employment, the sector directly created 16,903 jobs in 2017, of which over 95% were Namibians. Even more noteworthy is indirect employment creation, which amounted to 118,335

jobs using an industry acclaimed mining multiplier of seven. Despite being a capital intensive sector and thus not a large employer by nature, the industry's indirect job creation is sizeable which accounts for 17.5% of the total labour force.

Apart from direct benefits to local economic development, the Namibian Government recognizes the potential to increase domestic revenue from mining activities. The crux of such efforts have involved downstream activities that focus on further beneficiation to Namibia's minerals , which are mostly exported in processed or refined form. However, specialist investigation into the exploitation of such opportunities revealed that for most minerals economies of scale are not viable for investments into refining, fabrication and manufacturing activities. The high component of local expenditure has provided an alternative approach to maximizing local windfalls from mining. In particular, the mining sector spent 41% of total mining revenue on goods and services procured from the local economy, which presents a significant opportunity to develop local industries in these areas. This area of development is strongly advocated by the Chamber of Mines to fully understand its economic potential and benefits as it is largely unexploited by local industries. Upstream linkages through mining has received explicit support and acknowledgement by the Namibian Government through the fifth National Development plan.

The recent production of battery minerals in Namibia also unfolds opportunities for further processing possibilities of these, should new exploration projects give rise to new mines. Although such developments are long-term in nature, the battery minerals rush has most certainly revived exploration activity in Namibia over the last two years with expenditure increasing three fold from N$94 million in 2016 to N$303 million in 2017. The urgency for battery minerals is reflected in the pace at which companies have made progress on some projects, many of which are nearing pre-feasibility stages. In particular, the recent discovery of cobalt in the North of Namibia and confirmed resources of rare earths has generated broad international interest due to the high value and strategic importance of these two minerals respectively. The development of a battery minerals sector locally may thus not be as far flung in the distant future as perceived.

Typically, no mining sector is without its challenges and subject to the market forces that characterize commodity booms and busts. Namibian uranium producers are under increasing pressure to minimize and contain costs in a uranium price environment that has persistently undermined profits since 2011. Consequently, one of the prominent uranium producers is embarking on a process to place the mine on care and maintenance. Luckily for Namibia, however, the country's uranium subsector is currently propelled by production from Swakop Uranium's Husab mine that is largely immune to the negative impacts of a depressed uranium price. The price has little bearing on Husab's operations which is owned by a state owned Chinese power company, and will be using the uranium to fuel nuclear reactors in China.

In a global market of rapidly improving mineral prices across most commodity groups, the future of mining in Namibia thus continues to offer some exciting opportunities for local and foreign investors, while it holds significant growth potential for the nation and its citizens if the right areas are exploited.

"Typically, no mining sector is without its challenges and subject to the market forces that characterize commodity booms and busts."

Contributor's Profile
Lauren Davidson is an economist at the Chamber of Mines of Namibia where she has been employed since 2013. She is responsible for promoting the sector's importance to the national economy and future growth opportunities through communicating information on mining sector developments to Chamber members, policy makers and the broader public. She also contributes to research and policy input for Namibia's mining industry. Lauren currently serves as an Associate Board member for the Economic Association of Namibia, and played a pivotal role in the formal establishment of the organisation. Lauren obtained her Bachelors of Commerce in 2009 at Rhodes University after which she successfully completed her Honours in Economics and a Post Graduate Diploma in Journalism at the same institution. She is currently pursuing a Masters in Development Management through the University of Birmingham.

COMMODITIES: BASE AND PRECIOUS METALS MARKET UPDATES

Base Metals: Nickel prices hit their highest level since November 2014

LME nickel three-month future prices averaged $13,899 per metric ton so far in 2018, constituting a rise of 32.8% from an average of $10,469 per ton in 2017. The rally in nickel prices was mainly driven by a 24% decline in the metal's global inventories as a result of the announcement of sanctions imposed by the United States on Russia, which would significantly reduce the supply of nickel in the market. Also, the metals' price was sup- ported by news that new production facilities for lithium-ion battery materials are being built, mainly in China, to meet the potential strong growth in demand for electric car batteries. However, expectations of higher supply from new output coming online from Indonesia and the Philippines, as well as a stronger U.S. dollar, signs of an economic slowdown in China, and rising concerns over an escalation in the American-Chinese trade row, have put downward pressure on the metal's price. As such, nickel prices dropped from $15,750 per ton on June 5, 2018, their highest level since November 2014, to $14,880 per ton on June 27, 2018. Still, nickel prices are projected to average $14,320 per ton in 2018 and to increase to an average of $14,500 per ton in 2019, supported by expectations of higher demand for electric cars and an anticipated deficit of 3% in the nickel market during the 2018-19 period.

Base Metals: Copper prices hit three-week low amid rising inventories

LME copper three-month future prices averaged $7,096 per metric ton so far in June 2018, constituting an increase of 3.5% from $6,854 per ton in May of this year. The increase in the metal's price was mainly driven by supply disruptions at the world's largest copper mine in Chile. But concerns over an escalating American-Chinese trade row pushed copper prices down earlier this week, as China and the U.S. both threatened further punitive measures. Copper prices closed at $6,773 per ton on June 20, 2018, their lowest level in three weeks, following news of a 38% surge in global inventories from end-May 2018. In parallel, the latest available figures show that global refined copper production was 5.91 million tons in the first quarter of 2018, up by 3% from 5.74 million tons in the same quarter of 2017, mainly driven by a growth of 8% in Chilean production. On a regional basis, refined output grew by 7% in Africa and by 4% in Asia, while it was nearly unchanged in the Americas and in Europe.

Precious Metals: Gold prices to continue to decrease on further U.S. interest rate hikes

Gold prices averaged $1,319 per troy ounce so far in 2018, constituting an increase of 6.5% from an average of $1,239 an ounce in the first half of 2017. The rise in prices coincided with a 8.3% year-on-year decline in the trade-weighted US Dollar Index over the same period. However, the metal's price decreased from an average of $1,335 an ounce in April 2018 to an average of $1,304 an ounce in May and to $1,285 an ounce so far in June 2018, reflecting the recent recovery in the US dollar amid a stronger U.S. economy, as well as easing tensions between North Korea and the United States. Further, gold prices reached a six-month low of $1,255 an ounce on June 27, 2018, despite the increased trade tensions between the U.S. and China, which shows that investors are seeking other safe haven assets, such as U.S. Treasury bonds. Further, gold prices are projected to regress from an average of $1,330 an ounce in the first quarter of 2018 to an average of $1,315 an ounce during the remainder of the year, reflecting expectations of further U.S. interest rate hikes and continued growth in U.S. bond yields in in coming months..

Precious Metals: Palladium prices to rise in 2018 on wider production deficit

Palladium prices averaged $1,011 per troy ounce in the first five months of 2018, constituting an increase of 30% from $777.9 an ounce in the same period of 2017, mainly driven by strong auto-catalyst demand, especially in China, as well as by tighter global supply. Also, continued strong growth in autocatalyst consumption for palladium is expected to raise the metal's global demand from 10.1 million ounces last year to 10.3 million ounces in 2018. The global autocatalyst sector is projected to account for 78.6% of demand for palladium in 2018, followed by the electronics sector (8.3%), the chemical industry (4.8%), the dental sector (3.8%) and the jewelry industry (2.7%). Further, gold prices are projected to regress from an average of $1,330 an ounce in the first quarter of 2018 to an average of $1,315 an ounce during the remainder of the year, reflecting expectations of further U.S. interest rate hikes and continued growth in U.S. bond yields in in coming months.

AFRICAN EQUITY MARKET INDICATORS AS AT 30-JUNE-2018

Country Name	Index Name	Index at 30-June	1-month % Δ	YTD % Δ	1-Year % Δ	1-Year Low	1-Year High	30 Days Volatility %
Botswana	BSE DCI	8,403	-1.66	-5.16	-9.13	8,403	9,246	2.757
BRVM	IC Comp	221	1.66	-8.93	-14.58	197	265	9.251
Egypt	EGX 30	16,349	-3.87	8.85	22.04	12,899	18,414	17.656
Ghana	GSE ALSI	2,879	-12.17	11.59	47.49	1,951	3,536	13.271
Kenya	FTSE NSE15	176	0.81	2.51	14.54	151	197	13.665
Malawi	MSE ALSI	30,737	4.47	42.31	94.88	15,773	30,780	9.971
Mauritius	SEMDEX	2,245	-0.52	1.93	5.35	2,116	2,310	4.019
Morocco	MORALSI	11,879	-4.14	-4.12	-1.44	11,866	13,388	7.609
Namibia	Local	1,271	-2.87	-2.19	25.48	12	1,461	21.869
Nigeria	NIG ALSI	38,279	-1.95	0.09	15.05	32,150	45,322	17.955
Rwanda	RSEASI	132	-1.12	-1.46	5.38	124	133	3.093
South Africa	JSE ALSI	57,611	2.99	-3.18	12.18	51,066	61,777	18.575
Swaziland	SSX ALSI	415	0.00	2.18	7.10	388	415	1.185
Tanzania	DAR ALSI	2,281	-1.57	-4.80	3.57	404	2,490	12.010
Tunisia	TUNIS	8,059	6.35	28.29	34.63	5,941	8,116	7.991
Uganda	USE ALSI	2,089	1.01	4.42	25.41	1,652	2,293	40.178
Zambia	LuSE ALSI	5,509	-0.85	3.41	15.75	4,642	5,608	1.670
Zimbabwe	IDX (USD)	342.75	-2.71	5.79	75.09	25	534	21.574

SELECTED AFRICAN CURRENCY EXCHANGE Vs. US DOLLAR AS AT 30-JUNE-2018

Country Name	Currency Name	Index at 30-June	1-month % Δ	YTD % Δ	1-Year % Δ	1-Year Low	1-Year High	30 Days Volatility %
Algeria	Dinar	117.38	-0.26	-2.23	-8.21	107.60	117.93	3.294
Angola	Kwanza	249.98	-5.28	-32.79	-33.63	164.88	249.98	9.324
Botswana	Pula	0.10	-4.10	-5.51	-1.84	0.08	0.11	9.332
CFA Franc	CFA Franc	578.21	0.38	-2.42	0.02	527.24	592.54	11.713
Egypt	Pounds	17.89	0.22	-0.64	1.33	17.57	18.16	2.265
Ethiopia	Birr	27.58	-0.23	0.00	-15.50	23.16	27.61	3.331
Ghana	Cedi	4.79	-2.49	-5.63	-7.78	4.29	4.83	31.653
Kenya	Shillings	100.85	0.69	2.31	2.78	99.91	104.18	2.478
Malawi	Kwacha	721.08	0.36	0.62	0.60	715.41	738.55	7.278
Mauritius	Rupee	34.56	0.03	-2.84	0.27	31.74	35.23	12.638
Morocco	Dirham	9.49	0.80	-1.70	1.57	9.09	9.74	5.899
Mozambique	Metical	59.19	1.37	-0.94	1.71	57.57	62.95	8.426
Nigeria	Naira	361.24	0.04	-0.35	-10.17	305.45	369.50	1.813
Rwanda	Franc	860.49	0.06	-0.75	-2.37	829.71	891.34	13.362
South Africa	Rand	13.71	-7.42	-9.70	-5.03	11.51	14.57	16.896
Tanzania	Shilling	2,268.61	0.25	-1.50	-1.39	2,137.00	2,284.31	3.748
Tunisia	Dinar	2.61	-1.32	-5.72	-6.57	2.35	2.65	13.800
Uganda	Shilling	3,882.50	-3.18	-6.16	-7.84	3,552.25	3,905.00	4.148
Zambia	Kwacha	9,988	3.1289	-0.1181	-7.88	8,766	10,400	13.512

SELECTED AFRICAN GOVERNMENT INTERNATIONAL BONDS AS AT 30-JUNE-2018

Country Name	Maturity	Price at 30-June	Mid-Yield at 30-June	1-month Yield Chg (%)	YTD Price Change (%)	Price 1-Year Low	Price 1-Year High	Amount Outstanding (US$ M)
Angola	12-Nov-25	109.293	7.812	0.695	-5.506	102.261	118.576	USD
Cameroon	19-Nov-25	105.604	8.460	1.092	-12.256	105.589	122.002	USD
Congo	30-Jun-29	81.532	8.635	0.623	-7.821	65.758	89.100	USD
Cameroon	19-Nov-25	105.604	8.460	1.092	-12.256	105.589	122.002	USD
Egypt	30-Apr-40	85.771	8.295	1.012	-15.320	84.329	103.215	USD
Ethiopia	11-Dec-24	98.018	7.012	0.245	-6.706	95.515	107.070	USD
Gabon	16-Jun-25	90.733	8.756	1.667	-12.872	89.703	106.780	USD
Ghana	14-Oct-30	121.774	7.939	0.596	-11.711	118.065	141.231	USD
Kenya	24-Jun-22	98.987	7.085	0.670	-7.245	97.997	108.350	USD
Ivory Coast	31-Dec-32	93.087	6.931	0.415	-7.116	90.123	101.626	USD
Morocco	11-Dec-42	101.763	5.369	0.179	-10.576	101.586	116.038	USD
Namibia	29-Oct-25	92.684	6.521	0.644	-9.342	91.459	105.604	USD
Nigeria	12-Jul-23	99.053	6.599	1.015	-6.897	97.582	107.418	USD
Rwanda	02-May-23	99.727	6.689	0.594	-5.028	99.522	106.237	USD
Senegal	30-Jul-24	98.401	6.572	0.693	-9.223	96.631	109.777	USD
South Africa	24-Jul-44	87.673	6.348	0.468	-12.763	85.053	103.430	USD
Tanzania	09-Mar-20	101.878	7.297	4.238	-3.127	101.792	105.657	USD
Tunisia	19-Sep-27	107.773	7.084	0.150	-2.525	107.734	111.481	USD
Zambia	30-Jul-27	89.008	10.906	0.836	-20.977	86.667	114.654	USD

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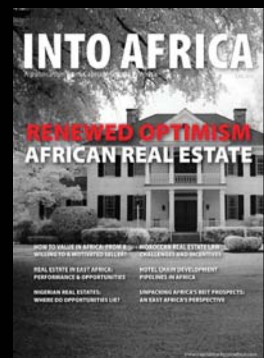

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