Ashurst London
Mining briefing

Mining in Africa – towards legal stability

Recent reforms of mining laws in African nations have led to a movement away from regimes regarded by many as "investor friendly", with states seeking to assert greater control and generate increased revenues from their resources. However, the importance of a stable regulatory framework in attracting foreign investment has also been recognised. As states attempt to balance these competing goals, an increased focus on the harmonisation of mining law regimes across African regions could provide comfort to investors.

Mining law reform

Africa hosts some of the world's largest reserves of minerals including gold, uranium, bauxite, iron ore, diamonds and platinum. As resource prices increased, considerable wealth was created from exploitation of those minerals. However, there is a general perception that African nations have not recovered an adequate share of mining revenues due to various factors including inefficient regulatory regimes and the superior experience and negotiating power of international mining companies. As a result, recent years have seen states attempt to reverse this position through a combination of regulatory reform and renegotiation of existing investment agreements with foreign private counterparties.

The difficulty for many African states is striking a balance between encouraging foreign investment in the mining industry (primarily by providing a stable investment regime) and ensuring that more of the benefits of mining flow to the country in question. Striking such a balance can be even more difficult in the current climate of weakening commodity prices.

Regulatory reform is the primary means by which states have sought to increase control over resources and obtain a greater share of mining revenues. The approaches adopted by individual countries have varied, however reforms are typically aimed at (1) increasing state participation in mining operations; (2) increasing taxes and royalties; and (3) imposing local content obligations, including requirements to procure goods and services from local sources and to employ and provide training for local employees. Notable examples of such reforms include:

1. **State participation**: Guinea has recently implemented laws giving the state the right to 15 per cent free equity participation in mining companies with the option to acquire additional participation up to 35 per cent. Similarly, Tanzania has adopted a mining law which authorises the state to negotiate a free equity participation in mining companies for projects requiring investment of at least US$100 million. Kenya has also introduced regulations requiring local equity participation of at least 35 per cent in companies holding mining rights.
2. **Royalties**: Zambia, Africa's biggest copper producer, recently doubled royalties on base metals from 3 per cent to 6 per cent and increased precious metals royalties from 5 per cent to 6 per cent. Similarly, the DRC has proposed an increase in royalty rates from 2 per cent to 6 per cent on non-ferrous metals and from 2.5 per cent to 6 per cent on precious metals. Burkina Faso has adopted a different approach, indexing its royalty rates on gold production with gold prices.
3. **Local content**: Angola and Guinea have adopted new mining laws requiring companies to employ and train citizens and procure goods and services locally. Mali requires that its minerals are processed locally, and the DRC has proposed a ban on the export of copper and cobalt concentrates to encourage domestic processing.

Other countries that have reviewed or reformed mining law regimes include Liberia, Gabon and Zimbabwe.

In addition to regulatory reform, some jurisdictions have sought to renegotiate existing investment agreements with foreign counterparties. Guinea and Ghana are two examples of governments which have established committees to review existing agreements.

Managing risk – stabilisation clauses

Mining projects often involve long-term agreements and high levels of investment, and changes in law are a significant risk for investors. The regulatory reform trends outlined above have heightened investor concerns.

> *"... it is possible that stabilisation clauses will become a less effective tool for the protection of investor interests under future investment agreements."*

Traditionally, stabilisation clauses in investment agreements have been used as a means of "fixing" the life of mine cost and otherwise addressing the risk of a change in law having an adverse effect on the commerciality of a mining project. Such clauses can take on a variety of forms, but typical examples are:

1. **freezing clauses**, which provide that laws in place at the time the agreement is executed will apply for the life of the agreement (although these have become less common); and
2. **balancing clauses**, which provide for the renegotiation of the economic terms of an investment agreement in the event of a change in law, to compensate for any loss suffered by the mining company due to such a change.

Stabilisation clauses are an important means of protecting investors against changes in law, but should be used with care. A key issue to consider when negotiating a stabilisation clause is whether it will be enforceable in the relevant jurisdiction. Certain states have the ability to claim immunity from the judgments of foreign courts and tribunals by invoking the doctrine of sovereign immunity. Whether a state can invoke sovereign immunity depends on its laws, and investors should carefully consider the state's laws ahead of entering into an investment agreement to determine whether sovereign immunity can be invoked. If it can, and where the laws provide that sovereign immunity can be waived, investors should seek to include a provision under which the state waives sovereign immunity, submits to the laws/rules of an agreed jurisdiction/arbitral body, and consents to relevant enforcement measures.

In order to obtain the protections provided by international law, the governing law provision should state that international law applies to the investment agreement.

The Zambian example

Even where sovereign immunity does not apply, there is a risk that a state will attempt to resist the enforceability of stabilisation clauses. An example of this is Zambia, which in recent years replaced its mining law regime.

Zambia's previous mining laws had authorised the Zambian government to enter into agreements with investors which included freezing and balancing clauses. As well as increasing royalties and taxes relating to mining projects, the new mining laws controversially provided that existing investment agreements were no longer binding on the government. Accordingly, a number of investors who had entered into agreements with the government which included stabilisation clauses under the previous regime became subject to the increased taxes and royalties. In addition, it is understood that the Zambian government did not compensate those affected, which may arguably, amongst other things, be in breach of its own constitutional requirements. As a result, affected counterparties have resorted to international arbitration against the Zambian government to seek compensation (the outcome of which is still being determined).

A more limited future

While the purported retrospective application of Zambia's reforms is an exceptional example, it is consistent with a recent trend of regulatory reform aimed at limiting the scope of stabilisation clauses. Guinea, Burkina Faso and the DRC have all made or proposed legislative amendments seeking to limit the applicability of stabilisation clauses (for example, permitting them to apply only to certain specified taxes) or reduce the period of time over which stabilisation clauses will apply. Accordingly, it is possible that stabilisation clauses will become a less effective tool for the protection of investor interests under future investment agreements.

Seeking comfort from the petroleum industry

The reforms and trends described above have given mining companies seeking to invest in Africa cause for concern. However, there has been a recognition among African nations that a stable regulatory framework is important if the region wishes to remain attractive to foreign investment.

In this regard we can look to the petroleum industry and the efforts of the African Petroleum Producers' Association (APPA). In a previous Energy Briefing, we noted that APPA had conducted a comparative analysis of the hydrocarbons legislation, regulations and model agreements in force in the 16 APPA member states to, among other things, determine a set of principles, practices and trends applicable to the hydrocarbons industry in Africa and incorporate these into a model production sharing agreement.[1]

While it is considered unlikely that the comparative analysis will lead to a single model production sharing agreement being implemented across the APPA member states, it is hoped that the member states will use the model production sharing agreement to review their own respective model production sharing agreements so that they are better able to incorporate the principles, practices and trends specific to the petroleum industry in Africa.

Mining to follow?

The African mining industry has not yet taken steps towards harmonisation of mining laws as extensively as APPA's comparative analysis. However, the benefits of regional harmonisation of regulatory regimes have been recognised; for example by the Economic Community of West African States (ECOWAS), a group of 15 West African countries.[2]

In 2009, the ECOWAS member states agreed "*The ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector*". The Directive contains guiding principles for member states as to what national mining laws should address, providing (among other things) that member states:

1. can enter into stabilisation agreements subject to ratification by parliament;
2. will review, update and harmonise fiscal (i.e. taxation) regimes every three years; and
3. will mutually agree the terms on which states can participate in mining operations.

While little information relating to implementation of the Directive is available at present, and it is considered unlikely that the goals of the Directive will be achieved by the proposed July 2014 deadline, there is some evidence that member states are seeking to incorporate its principles into local laws. For example, the head of Sierre Leone's National Minerals Agency last year stated that the country had been holding discussions with Guinea in relation to the harmonisation of mining tariffs across the west African region.

Conclusion

"While true harmonisation of laws may be an unrealistic goal, we expect that it will become a more prominent topic as states seek to address investor concerns resulting from the recent reforms."

As bodies such as ECOWAS have recognised, well-developed and harmonised mining laws and policies across African regions could increase the mining revenues available to states and promote the efficient use of such revenues within local economies, while at the same time encouraging foreign investment. Investors would have greater comfort that individual regimes will not be subject to future upheaval, and standardised laws could ease the often lengthy and complex negotiation process for investment agreements.

While true harmonisation of laws may be an unrealistic goal, we expect that it will become a more prominent topic as states seek to address investor concerns resulting from the recent reforms.

[1] The APPA included 16 members when the comparative analysis was undertaken, but now consists of 18 members: Algeria, Angola, Benin, Cameroon, Chad, Democratic Republic of Congo, Congo, Côte d'Ivoire, Egypt, Gabon, Ghana, Equatorial Guinea, South Africa, Libya, Mauritania, Niger, Nigeria and Sudan.

[2] ECOWAS was founded by the signing of the Treaty of Lagos on 28 May 1975 and is currently made up of 15 member states from West Africa including: Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

Further information

For more information on any of the points raised within this briefing, or on Ashurst's Africa group in general, please do not hesitate to get in touch with your usual Ashurst contact or:

Martin Kudnig
Partner, London

T: +44 (0)20 7859 1679
E: martin.kudnig@ashurst.com

Tim Kennedy
Associate, London

T: +44 (0)20 7859 1545
E: tim.kennedy@ashurst.com