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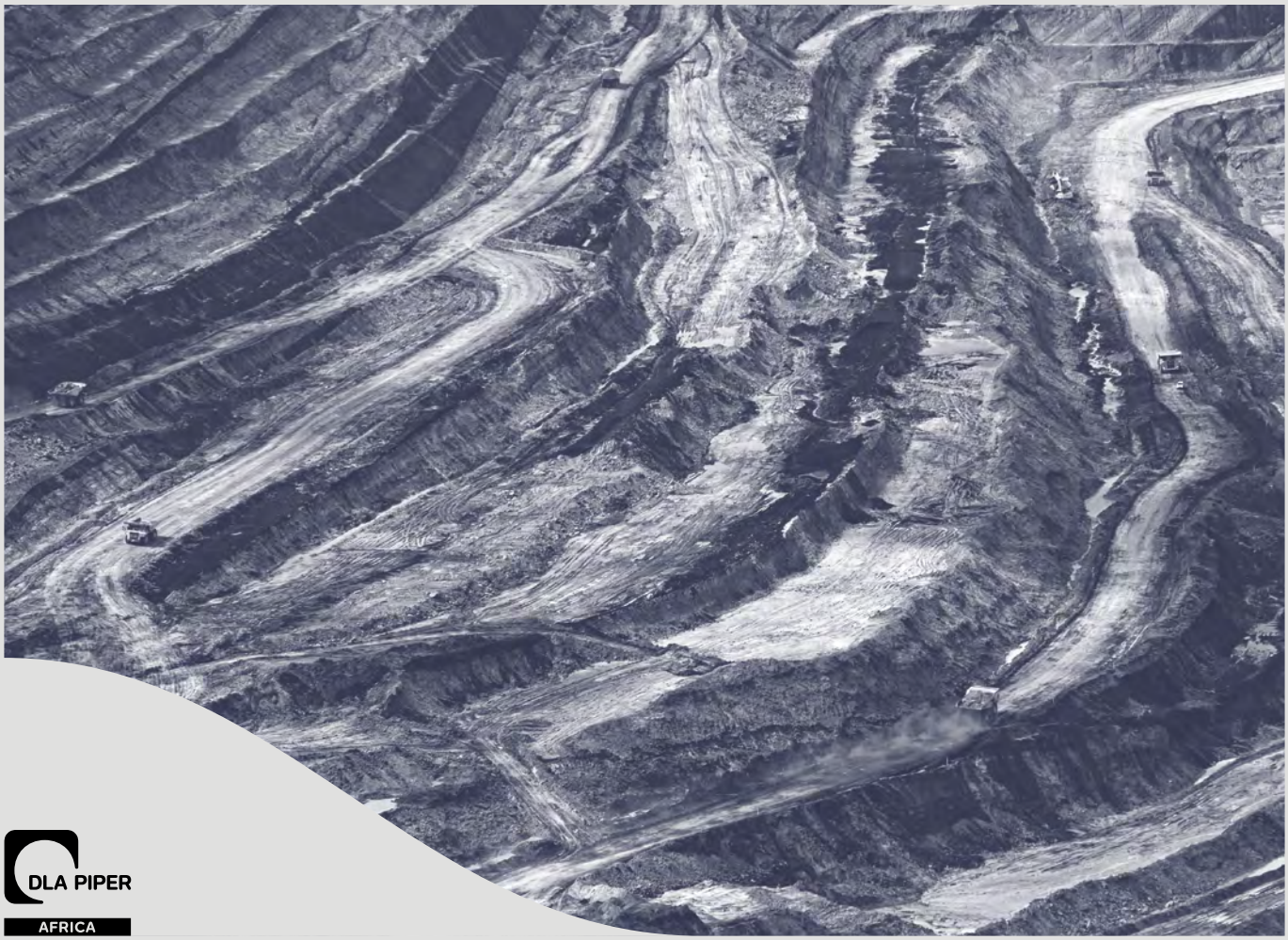
Africa Connected

ISSUE 4: ESG AND CLIMATE IMPLICATIONS FOR THE MINING SECTOR IN AFRICA



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Connecting you to Africa

Environmental, Social and Governance (ESG) and climate change considerations in the mining sector is the theme of this edition of Africa Connected.

In this issue we have articles on how mining companies can prepare for new ESG performance standards in 2020, the impact of World Bank sanctions and mine rehabilitation challenges as well as pieces on the Tanzanian mining reform and resource nationalization trends in Southern Africa, among others.

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ESG in 2020: What African resources-developers should do to prepare

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The risks inherent in sourcing and bringing to market a diverse range of mineral commodities has meant that the natural resources industry has always been particularly exposed to environmental, social and governance issues, particularly in Africa.

However, even for the most experienced operator, the ways in which ESG is evolving pose a real challenge. These include how ESG performance is defined, measured and reported; the speed with which communities, investors and other stakeholders are responding to real or perceived ESG failings; and the continued innovation in accountability, in terms of financial instruments, regulations and legal proceedings.

In this article, we explore some key developments and suggest a framework for integrating ESG performance into corporate values, strategy and risk management, in order to ensure continued access to capital and customers, and ultimately to sustain value creation.

Project debt

One of the most significant changes in ESG performance standards in 2020 will be version four of the Equator Principles, scheduled to take effect from July 1, 2020 – but which are already being implemented, either in whole or in part, by some lenders.

The Equator Principles have, since 2003, set the environmental and social baseline for the majority of international project debt financing, drawing on environmental and social guidelines published by the International Finance Corporation.

Three key changes to the Equator Principles will significantly lift ESG performance requirements for project debt finance for new mining projects, or the expansion of existing mining projects:

1. **Climate change risk assessment.** The amended Equator Principles introduce a requirement for climate change risk assessment, taking into account the extent to which a project may be exposed to "physical risks" of climate change (i.e. exposure to acute weather events, such as fires or floods, or chronic changes in weather patterns, such as sea level rise) or "transition risks" (i.e. risks associated with the transition to a low or net-zero carbon economy, including in terms of the cost of regulatory responses, changes in suppliers and inputs, and changes in consumption patterns), in a manner aligned with the recommendations of the Task Force on Climate-related Financial Disclosures.

2. **Human rights impact assessment.** The amended Equator Principles also require a human rights impact assessment, aligned with the UN *Guiding Principles on Business and Human Rights*, that identifies potential adverse human rights impacts of the project, including through consultation with affected stakeholders, and establishes effective grievance mechanisms for use by both affected communities and workers.

3. **Indigenous peoples.** The amended Equator Principles underscore the requirement to obtain the free, prior and informed consent of affected indigenous communities. Though not a new requirement for Africa, this has now been elevated to a global standard, with certain high-income OECD countries having previously been exempt.

Private equity

Investors are also playing their part. Private equity is increasingly applying ESG due diligence to investments and M&A transactions, both in traditional and specialist ESG-oriented funds. This due diligence goes beyond traditional legal due diligence, which is much more oriented to regulatory compliance. It interrogates consistency with underlying international instruments and multilateral conventions, as well as sector best practices, to identify latent ESG risks that might form a basis for re-evaluation, or a decision not to proceed, with an equity investment.

As a companion to ESG due diligence, a diverse range of ratings are increasingly being applied as a proxy for the ESG performance of corporates, particularly listed companies. Though the utility of some of these ratings is still limited (particularly in private M&A transactions) and there is considerable divergence between them (a recent study from the MIT Sloan School of Management found an average degree of correlation of 0.61 between ESG ratings, which stands in contrast to a 0.99 score for traditional credit ratings[1]), over time these should converge and as a result become more influential.

Public equity

Public equity markets are also having their say, with corporate regulators making moves to require enhanced disclosure of ESG risks and performance across several markets. The most prominent example is climate change, where the recommendations of the Task Force on Climate-related Financial Disclosures are rapidly emerging as the global standard for disclosure of climate change risk. Though the lack of a common terminology for ESG risks other than climate change (or a lack of consensus over a number of existing options) is holding back more rigorous requirements on disclosure of other risks, the trend is toward convergence over the medium term.

Consumers

Lenders and investors are not the only market players pushing for improved ESG performance; consumers and end-users are also having their say. Commodities markets operators like the London Metal Exchange, and industry bodies such as the Responsible Jewellery Council, have introduced or updated responsible sourcing requirements. These examine whole-of-supply chain handling and introduce disclosure, verification and certification processes. Increasingly, commodities unable to meet these standards will be not just devalued, but unfit for sale.

How African natural resources developers can respond

These changes are structural and permanent. Corporates that approach the increasing visibility of ESG issues and the elevated expectations of stakeholders as a fleeting phenomenon will see their value quickly eroded, as they and their projects become unable to attract capital and the market for their products evaporates.

Corporates should embrace the ESG challenge, starting with a board-level commitment to sustainability and to monitoring ESG performance on a regular basis. Identification of ESG risks should be integrated into, not sit separate from, more traditional risks. In the same way, attributed targets and metrics should make performance quantifiable and allow executive and operational teams to be held accountable.

Stakeholders should be comprehensively mapped and consultation should take the place of assumption in order to understand the diverse motivations, expectations and objectives. Stakeholder feedback, together with internal risk identification, should be used as a lens to interrogate corporate strategy to ensure that the proposed course is capable of creating long-term, rather than fleeting, value.

The outcomes of risk identification and strategic re-examination should be fed into revised policies and procedures and operationalized in a way that incentivizes individuals to ensure performance, including regarding employment. Performance should then be communicated back to stakeholders, consistently and coherently, in terms that avoid exposing the business to additional risk, whether by inflating expectations or by failing to deliver.

There is a growing body of evidence – in particular, work done by Ioannis Ioannou at London Business School and George Serafeim at Harvard Business School[2] – that robust sustainability-oriented practices are positively associated with both increased market valuation and, where genuinely strategic, improved return on capital.

Focusing on sustainability and meeting the ESG expectations of lenders, investors, customers and communities are not just safeguards against wrongdoing, but a legitimate business strategy, as much for participants in the African natural resources sector as any another.

1 https://mitsloan.mit.edu/ideas-made-to-matter/why-esg-ratings-vary-so-widely-and-what-you-can-do-about-it

2 See : https://hbr.org/2019/02/yes-sustainability-can-be-a-strategy and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312191 (requires account).

Emerging mining trends in resource nationalization in Southern Africa

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Introduction

Africa is still a frontier market, and this has often presented a unique opportunity for governments in African countries to create legal frameworks that attract sustainable investment. But Africa has always written its own rules. This has never been more apparent than in the governance structures of Africa's major pulling factor – natural resources.

Mining legislation in Southern Africa

In 2008 Zimbabwe introduced an indigenization policy that required all foreign-owned mining companies to "cede" – on a free carry (meaning that locals did not have to pay for the shares) – a 51% shareholding in their companies to employees, local communities and designated state-owned entities. While the law was well intentioned (in the sense that investors were in effect being required to empower locals through an equity participation) it was badly crafted, and gave rise to a multitude of negative effects, particularly encouraging rent seeking, which drove away investors. It is not surprising that the new Zimbabwean regime prioritized abolition of the indigenization laws as a way to attract much needed foreign direct investment.

Similarly, nearly a decade later in 2017, the Tanzanian government introduced sweeping changes to its mining legislation. The mining reforms were aimed at increasing Tanzanian nationals' and entities' participation in the mining sector, requiring local companies to own 51% in mining companies and for multinational companies to partner with local companies and financial institutions. However, this was then subsequently followed by new mining regulations; the Mining (Local Content) (Amendments) Regulations, 2019, which reduced the ownership restriction for local mining firms to a minimum 20% equity.

Comparatively, the Democratic Republic of Congo's Mining Code also underwent significant revisions in 2018, with the result that 10% share capital must be held by Congolese citizens. There has also been an increase in the state's free carry, non-dilutable stake from 5% to 10%, which is increased by a further 5% upon renewal of the mining license.

While these cases can be cited as extreme examples of local protectionist mining regimes, South Africa has adopted a moderate and structured approach under the Mining and Minerals Industry, 2018 (Mining Charter III), which came into force on March 1, 2019. This is perhaps owing to its stronger democratic and legislative structures. The Mining Charter III largely affected mining entities' Black Economic Empowerment (BEE) threshold requirements in respect of ownership. While existing mining rightsholders who have a minimum of 26% BEE shareholding are recognized as compliant, applicants for new mining rights are required to have a minimum of 30% BEE shareholding which must in turn include a minimum of 5% non-transferable carried interest to each of the following: qualifying employees; local communities; and a 20% effective ownership to BEE entrepreneurs.

Changing investment landscape

A pattern begins to emerge. Without being overly comparative – as there are always distinctions that can be drawn – African governments are seemingly pursuing greater state and local participation in the mining industry, mostly brought about by: fluctuations in global price/demand factors, geo-political and social factors particularly around a sovereign nation's right to resource revenue, new emergent investors (such as China and Russia), internal civil society pressure groups, as well as country-specific economic pressures. For the most part, unfortunately this is intrinsically linked to the national or quasi-political agenda of the country at any given time.

The question then becomes: "can this be viewed through the broader lens of investors as an opportunity or it is simply classified as sovereign and political risk." According to Verisk's 2019 Q1 dataset , out of the top ten highest-risk ranked countries on its Maplecroft's Resource Nationalism Index (RNI), Africa has four "extreme risk" entries: the Democratic Republic of Congo is ranked first, Tanzania third, Zimbabwe fifth, Swaziland seventh and Papa New Guinea eighth.[1] Notably, these are all Southern African countries with low-performing economies. This presents a marked opportunity for these governments to create properly crafted legislation that cannot be viewed as anti-investment.

It must be emphasized that most of these mining codes are outdated, having been drafted in the colonial era. And as governments become more commercially aware on the back of lucrative commodity prices, the state will demand a greater stake from foreign multinationals in the interests not only of a political agenda, but also on principles of equity. Hence, the recent trend of amending legislation.

The wording of most mining codes is telling; the preamble often states that minerals belong to or are vested in the state on behalf of its people. Mining companies will simply have to adapt to and factor in this reality. Governments will – predictably and periodically – impose higher profit taxes and royalties.

Nevertheless, governments are keen to engage foreign multinationals on commercial terms, and in most countries, negotiated concessions and investment incentives outweigh the perceived negative of giving away equity. The basic and palpable fact remains that large-scale investment leading to the rapid development of most African nations requires significant and sizeable capital. Hence, it is a matter of perception; where investment is implemented in a more aggressive and accelerated manner, it is viewed as resource nationalization and quasi-expropriation.
But where a more measured and judicious approach is adopted, it can be interpreted as simply resource participation, making it more palatable and, therefore, messaging becomes imperative.

African countries in the region are competing to attract foreign investment and the risk appetite of private capital is an important factor. Investors will continue to have concerns relating to policy inconsistency, issues of security of tenure and political instability aligned with the country risk profile of countries in the region. As such, there is a fine balancing act required with the radical shift and the introduction of nationalist policies in the extractives sector.

A shift in investment structures, particularly with a focus on in-country beneficiation and strong environmental, social and governance structures by mining companies will lead to the benefits of extractive capitalism being felt more directly at local level.

Predictable legislative landscapes often shape long-term, Sustainable mining sector activity. Mining companies are therefore advised to horizon scan and keep abreast of these trends so they can anticipate the cost of compliance on project operations and reputation, as this will remain a dynamic and topical issue.

1 https://www.maplecroft.com/insights/analysis/resource-nationalism-rises-30-countries/#embedform

World bank sanctions in Africa: A formidable compliance concern

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World bank group sanctions statistics in Africa

Every year since their inception, World Bank Group (the 'Bank') sanctions teams have pursued investigations into alleged sanctionable conduct regarding the Bank's projects in Africa. There have been both uncontested sanctions imposed by the Bank Suspension and Debarment Officer (SDO) and cases unsuccessfully appealed to the Sanctions Board throughout Africa every year since 2011.[1]

The proportion of all global allegations and investigations taking place in Africa is typically higher than most other regions.[2]

Debarments in Africa increased to five-year high proportions of the global total in 2019, reaching a 37.5% share.[3] The cases span the continent: the Bank has investigated complaints and imposed sanctions in countries across Africa, in sub-Saharan and north Africa.[4] Sanctions investigations effectively reach anywhere on the continent where the Bank has projects. No African country or region is exempt.

Sanctions process overview

The Bank's sanctions regime has expanded since it was first introduced in 1998.[5] The current two-tiered review process, adopted in August 2006,[6] in reality employs several stages of review and provides numerous opportunities for target entities to offer evidence in their defense. In 2007, the Bank extended its sanctions program to cover projects funded by the International Finance Corporation, Multilateral Investment Guarantee Agency, and World Bank Guarantees and Carbon Finance operations.[7]

1 *See, e.g.*, *World Bank Sanctions Board Decisions*, available at: https://www.worldbank.org/en/about/unit/sanctions-system/sanctions-board#4; *Suspension and Debarment Officer Determinations in Uncontested Proceedings*, available at: https://www.worldbank.org/en/about/unit/sanctions-system/osd#6.

2 For example, in 2019 the proportion of investigations begun in Africa was 43% or 21 of 49 total investigations begun worldwide in 2019. *World Bank Group Sanctions System Annual Report FY19*, World Bank Group, 1, 17 (2020). In fiscal years 2013-2017, Africa consistently ranked in the top three regions for highest share of investigations started worldwide. *Annual Update Integrity Vice Presidency FY17*, World Bank Group, 1, 24 (2018).

3 *Id.* at 64-66. These figures are not meant to suggest regional targeting, but rather are meant to shed some light on World Bank capacity for investigating sanctionable conduct in the region.

4 *See, e.g.*, Sanctions Board Decision No. 117 (2019)(Board decision in Kenya); Sanctions Board Decision No. 110 (2018)(Board decision in Nigeria); Sanctions Board Decision No. 88 (2016)(Board decision in Senegal, Mali, and Mauritania); Notice of Uncontested Sanctions Proceedings Case No. 579 (2019)(uncontested SDO decision in Tunisia); and Notice of Uncontested Sanctions Proceedings Case No. (2014)(uncontested SDO decision in Madagascar).

5 FY19 Report, *supra* note 2, at 5.

6 Bank Procedure: Sanctions Proceedings and Settlements in Bank financed Projects at 4, Section 1.01(b).

7 FY19 Report, *supra* note 2, at 5.

A preliminary investigation commences when the Bank's Integrity Vice President (INT) receives a complaint regarding potential corruption in Bank-funded projects. The INT receives complaints from all over the world; some come directly from Bank staff (18.5% in 2019) but most come from sources outside the Bank (81.5% in 2019).[8] For the INT to even begin a preliminary investigation, the complaint must pertain to an ongoing Bank-funded project (relevance) and must allege a sanctionable practice within at least one of four main buckets (jurisdiction) of sanctionable conduct: corruption, fraud, coercion or collusion.[9]

In assessing whether or not to elevate any complaint, the INT takes into account: (1) the seriousness of the allegations; (2) the impact on development that the alleged conduct might have; (3) the complainant's credibility; (4) whether corroborating evidence exists and will be obtainable; and (5) the size of the project and contract funds involved.[10] If the INT finds, based on all evidence collected, it is more likely than not (or by a preponderance of the evidence) that the target committed the alleged or other sanctionable conduct, the case is considered sufficiently substantiated and the INT will elevate the case to the SDO, who then conducts official sanctions proceedings.[11]

During sanctions proceedings, the SDO thoroughly examines the INT case and decides whether or not to recommend sanctions against the target entity. If the SDO determines that the INT has presented sufficient evidence that the target engaged in the alleged or any sanctionable conduct, the SDO will issue a Notice of Sanctions, including its recommended sanction.[12] The SDO chooses from a menu of the following possible sanctions: reprimand; conditional non-debarment; debarment; debarment with conditional release; or restitution.[13] The sanctioned target may accept the Notice by issuing no response or it may submit written replies contesting the findings to either the SDO or the Sanctions Board, the final arbiter of the Bank's sanctions cases.[14]

If a sanctioned entity submits a written response to the Sanctions Board, the Board will consider the

8 FY19 Report, *supra* note 2, at 16. Outside sources, according to the WBG, include contractors, other bidders on WBG projects, concerned citizens, government officials, employees of NGOs, and individuals affiliated with other multilateral development banks.

9 http://siteresources.worldbank.org/INTDOII/Resources/Cross_Debarment_Brief.pdf. *See also* FY19 Report *supra* note 2, at 9 (corruption is defined as "offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party"; fraud is defined as "any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation"; coercion is defined as "impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party"; and collusion is defined as an "arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party." The WBG also includes obstruction as a sanctionable offense, once an investigation has begun into a target.

10 FY19 Report, *supra note* 2, at 16. *See also* Bank Procedure at 12, Section 9.02 (SDO and Sanctions Board should also consider these criteria in determining the appropriate sanction.)

11 Bank Procedure, *supra* note 9, at 11-12, Section 8.02(b). *See also Id*. at 5, Section 2. During the period of preliminary investigation, *and before it recommends full sanctions proceedings*, the INT may seek Temporary Suspension of the target if INT believes that there will be sufficient evidence to support a finding that the target engaged in the alleged or other sanctionable conduct and if it believes that the investigation will be completely and successfully completed within the year.

12 *d.* at 7, Section 4.01. Once the Notice goes into effect, the sanctioned party will be put into automatic Temporary Suspension with the full force of debarment until and unless it pursues an explanation or response.

13 Reprimand is typically in the form of a formal letter reprimanding the sanctioned party; Conditional Non-Debarment describes certain remedial requirements (largely geared toward improving sanctioned party's internal compliance and corporate governance procedures) imposed on the sanctioned party as a condition for avoiding debarment from World Bank projects; under Debarment the sanctioned party is declared ineligible, either indefinitely or for a stated period of time, from being awarded or otherwise participating in Bank-funded projects; under Debarment with Conditional Release the sanctioned party faces the same terms as debarment, but with the possibility of early reprieve for instituting improvements in compliance and corporate governance; and Restitution under which the sanctioned party is required to pay restitution to the borrower and other affected parties.

14 In response, the target may submit an explanation to the SDO within 30 days presenting counterarguments and evidence and seeking withdrawal or modification of the recommended sanctions (Bank Procedure at 8, Section 4.02(b)); submit a written response to the Sanctions Board within 90 days either admitting to or contesting the charges and presenting counterarguments and evidence (Bank Procedure at 8-9, Section 4.04); or Submit no response, in which case the recommended course of action in the Notice goes into effect in 90 days (Bank Procedure at 11, Section 8.02).

case *de novo*.[15] Each party may also submit new evidence in order to facilitate the Board's assessment as to whether the evidence establishes that sanctionable conduct more likely than not occurred.[16] In assessing sanctions on the target, the Sanctions Board considers the totality of the evidence presented and surrounding circumstances, taking into account any potential mitigating factors such as cooperation with the investigation or imposition of remedial compliance policies adopted since the alleged misconduct, in order to arrive at the appropriate sanction.[17] A decision by the Sanctions Board is final, may not be appealed, and is binding on all parties to the proceedings.[18]

Multilateral development bank cross-debarment

In 2010, the World Bank Group reached agreement with other multilateral development banks (MDBs) – African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development and Inter-American Development Bank – for mutual enforcement of the Bank's sanctions through a process called cross-debarment. As part of this agreement, each of the five participating MDBs commits to debarring any entity debarred by any other of the MDBs party to the agreement.[19] The five banks use standardized terms for the four main types of practices for which entities may be sanctioned.[20] Cross-debarment is a tool that can severely threaten the existence of companies focusing on projects that rely heavily on funds provided by international development banks. In the fiscal year 2019 the Bank imposed 39 debarments eligible for cross-debarment with the other MDBs and recognized 33 cross-debarments from other MDBs.[21]

Case studies of sanctions imposed in Africa in 2018-2019

As described above, there are four main categories of sanctionable practices: corruption, fraud, collusion, and coercion.[22] The majority of the Bank's sanctions cases in Africa center around allegations of fraudulent misrepresentation in the bidding process for its projects.[23] Second most common, though considerably less frequent, are cases involving allegations of bribery.[24] At a distant third and fourth are cases involving collusion and coercion. However, a fifth category of sanctionable offense – obstruction – has emerged as a charge commonly added to existing cases where sanctions targets attempt to obstruct the ongoing investigation into their alleged sanctionable conduct.[25] Recent case studies offer insight into the practices that have resulted in the imposition of sanctions and how sanctioned company conduct ultimately affects the severity and duration of sanctions imposed. In both of the cases below, and in a majority of the Bank's sanctions cases, the Sanctions Board applied *respondeat superior* to attribute one employee's conduct to the entire firm.[26]

15 *Id*. At 11, Section 8.02.

16 *Id*. at 11-12, Section 8.02(b).

17 *See, e.g.*, Sanctions Board Decision No. 40 (2010) at para 28; Board Decision No. 117, *supra* note 4, at para 30.

18 Bank Procedure, *supra note* 9, at para 8.03.

19 http://siteresources.worldbank.org/INTDOII/Resources/Cross_Debarment_Brief.pdf

20 *Id*. *See also* FY19 Report, *supra* note 2, at 9.

21 *Id.* at 75.

22 http://pubdocs.worldbank.org/en/492221459454433323/Procurement-GuidelinesEnglishJuly12014.pdf, pages 6-7, Section 1.16.

23 In 2019, 68.4% of all debarments that occurred in Africa were for charges of fraudulent misrepresentation. FY19 Report, *supra* note 2, at 64-66.

24 In 2019, 31.6% of the remaining debarments in Africa were for charges of corruption. FY19 Report, *supra* note 2, at 64-66.

25 FY19 Report, *supra* note 2, at 9 (obstruction is defined as "(a) deliberately destroying, falsifying, altering, or concealing evidence material to an investigation or making false statements to investigators in order to materially impede a WBG investigation into allegations of a corrupt, fraudulent, or coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to an investigation or from pursuing the investigation, or (b) acts intended to materially impede the exercise of the WBG's contractual rights of audit or access to information.")

26 Board Decision No. 117, *supra* note 4, at paras 27-28; Board Decision No. 110, *supra* note 4, at paras 32-33.

Sanctions board decision no. 117 (April 1, 2019): eastern Africa regional transport, trade and development project

The Sanctions Board reviewed an INT case against the sanctions target alleging fraudulent misrepresentation exaggerating their prior qualifying experience during the bidding process on this Bank-funded project to improve roads and connectivity between Kenya and Sudan.[27] As is the case when the alleged offense is repeated, the INT sought aggravation.[28] The Sanctions Board found, based on all evidence presented, that it was more likely than not that the target had engaged in the alleged conduct.[29] The sanctions target admitted that the information in its bids included misrepresentations exaggerating prior experience (misrepresentation); they admitted that the two employees who included the misrepresentations in two separate bids did so recklessly and that supervisors failed to review their work (recklessly misleading); and that these misrepresentations, being included in the bids, were intended to win contracts and monetary gain (to obtain financial or other benefit).[30]

Taking into account the totality of the circumstances, including all potential aggravating and mitigating factors and the seriousness of the sanctionable conduct, the Sanctions Board conditionally debarred the sanctioned entity for one year with possible release from ineligibility if the entity established an internal integrity compliance program.[31]

Notably, even though the sanctioned entity had used the same falsified document in both bids, the Board applied its own precedent, finding that such circumstances constitute a single course of action rather than a repeated pattern of misconduct and holding that such single course of conduct are not grounds for aggravating the charges.[32]

Sanctions board decision no. 110 (April 23, 2018): economic reform and governance project in Nigeria

The Sanctions Board reviewed an INT case against the sanctions target alleging bribery and obstruction surrounding the target's bid to work on this Bank-funded project to improve the Nigerian government's economic and financial management system.[33]

27 Board Decision No. 117, *supra* note 4, at 2-3.

28 *Id.* at para 12.

29 *Id.* at paras 16-26.

30 *Id.*

31 *Id.* at para 46.

32 *Id.* at para 33.

33 Board Decision No. 110, *supra* note 4, at para 4.

The INT alleged that in its bid to conduct a tracer study on staff social service and severance programs, the targeted entity bribed a public official in an effort to win the bid.[34] The INT further alleged that the target deliberately attempted to conceal the bribery payments during the INT's investigation.[35]

The Sanctions Board found, based on all evidence presented, that it *was not* more likely than not that the target had engaged in the alleged conduct.[36] Evidence showed that the target entity paid the official NGN200,000 (offering something of value) but that those payments plausibly could have been made – as the accused asserted – to distribute to field enumerators implementing the tracer study (not for influencing the conduct of the official).[37] Nevertheless, because during the investigation the managing director of the sanctions target was found to have instructed their bank to omit certain portions of payment records that would have shown payment to the official, the Board found that the managing director had acted to materially impede the investigation.[38]

Taking into account the totality of the circumstances, including all potential aggravating and mitigating factors and the seriousness of the sanctionable conduct, the Sanctions Board conditionally debarred the sanctioned entity for three years and seven months, with possible release from ineligibility if the entity established an internal integrity compliance program, including specific anti-corruption training for the managing director implicated in the obstruction.[39]

Mining and other natural resources sanctions statistics

Mining-sector specific cases have been far less frequent and, even when taken up by the Bank's sanctions system, do not necessarily suggest anything inherent in or unique to the sector that lends itself to sanctionable conduct under the Bank's policies and procedures.[40] The few cases examined for this article demonstrate the same sanctionable conduct common in other sectors. The following case offers insight into how sanctionable conduct in the mining sector has resulted in the imposition of sanctions in mining projects and how sanctioned company conduct ultimately affects the severity and duration of sanctions imposed.

Sanctions board decision no. 75 (November 6, 2014): Extractive industries technical assistance project.

The World Bank Group's Extractive Industries Technical Assistance Project was a USD4 million project designed to build government capacity to improve management and regulation of the mining sector in Sierra Leone. As part of the project, the government agency managing the project on behalf of Sierra Leone solicited bids for a contract to supply off-road-capable motorcycles. The Sanctions Board, after examining the case presented by INT and the target's rebuttal, determined that it was more likely than not that the target had engaged in fraudulent misrepresentation in asserting it had obtained a manufacturer's authorization (MA) from a motorcycle manufacturer to contract with the Sierra Leonean government.[41]

The Sanctions Board found, based on all evidence presented, that it was more likely than not that the target had engaged in the alleged conduct.[42] Evidence presented in fulfilment of the elements of

34 *Id.* at para 6.

35 *Id.*

36 *Id.* at paras 21 – 27.

37 *Id.*

38 *Id.* at paras 28 – 31.

39 *Id.* at para 44.

40 FY17 INT Report, *supra* note 2, a 25. In fiscal years 2013-2014, for example, INT began investigations into alleged sanctionable conduct in the mining and energy sectors in only roughly 8 % and 10% of the cases, respectively. As the case study makes clear, the sanctionable conduct investigated does not depart in any particular ways unique to the mining sector.

41 Sanctions Board Decision No. 75 (2014) at paras 19-25.

42 *Id.*

fraudulent misrepresentation included: (1) a letter from the motorcycle manufacturer stating that it had never granted an MA to the target (misrepresentation); (2) inconsistency and lack of credibility inherent in the target's explanations as to how it obtained the MA (knowingly or recklessly misleading); and (3) the fact that the fraudulent MA was submitted in response to the government's solicitation for bids (to obtain financial benefit).[43]

Taking into account the totality of the circumstances, including all potential aggravating and mitigating factors and the seriousness of the sanctionable conduct, the Sanctions Board conditionally debarred the sanctioned entity for three years, with possible release from ineligibility if the entity improved its bid preparation policies and procedures.[44]

Conclusion

Maintaining robust World Bank compliance policies, cooperating with the Bank's investigations into sanctionable conduct, and other voluntary corrective actions may all serve as mitigating factors should investors find themselves involved in a sanctions investigation.[45] In its 2019 Annual Report, the Bank recommitted to its expanded institutional capacity for rooting out sanctionable conduct in Bank-financed projects worldwide, and also committed to continuing on the path to refine and improve its framework in order to maintain "the institution's commitment to an agile and evidence-based fight against corruption."[46] With Bank debarments in Africa growing to the highest share of all such debarments in 2019 and with the sanctions teams' reach across the continent wherever the Bank is financing development projects, investors in the region should stay abreast of the latest Bank sanctions policies and procedures and should consider implementing internal sanction compliance programs.

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43 *Id.*

44 *Id.* at para 37.

45 Bank Procedure, *supra* note 9, at para 9.02.

46 FY19 Report, *supra* note 2, at 6.

Climate change measures and disputes

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Introduction

Africa is rich in natural resources, and several African economies are dependent on supplying or using fossil fuels, including South Africa, the Democratic Republic of Congo, Ghana, Tanzania and Mozambique, to name a few.

The mining of natural resources has traditionally resulted in job creation and has gone some way to alleviating poverty in low – and middle-income countries on the continent. Most African governments have also invested in infrastructure geared towards the use of fossil fuels.

Both mining activity and the use of fossil fuels produced by mining are major contributors to the emission of greenhouse gases (GHGs) and a particular country's carbon footprint.

The top five global GHG emitters are China, the US, the collective members of the EU, India and Russia. Africa's carbon footprint is comparatively small. However, South Africa in particular is a significant global emitter of GHGs, with a heavy reliance on mining and fossil fuel-based energy.

In these circumstances, climate change has far-reaching consequences for many African countries.

What is to the world to do?

By adopting the Kyoto Protocol in 1997, certain developed countries agreed to comply with country-specific GHG emission reduction targets, and risked being penalized for failing to do so. However, this has had limited success, partly because some of the largest developing countries such as India and China are not party to the Kyoto Protocol, and the fact that the US has refused to ratify the treaty.

In 2016, in global acknowledgment of the need to address climate change, 195 countries (including the US, China, India and 47 African countries) signed the Paris Agreement, pursuant to the United Nations Framework Convention on Climate Change. However, the US has since given notice of its withdrawal from the Paris Agreement with effect from November 4, 2020.

The Paris Agreement deals with the mitigation of GHG emissions, adaptation and the reporting and financing thereof in order to reduce GHGs and thereby better manage the increase in the average global temperature. As part of the agreement, both developed and developing nations will make green financing available to fund projects that result in mitigation and adaption measures. This has the potential to help African countries to develop capacity and access the technology needed to implement reduction measures.

The signing of the Paris Agreement was indicative of governmental support for the mitigation of climate change. It was expected that climate change would play a critical role in governmental policies and decision-making, including in regard to licensing of operations and the introduction of new legislative measures, which has already been seen on the African continent.

Incentivizing appropriate behavior

According to the World Bank, 15 countries have introduced a carbon tax in order to incentivize companies to invest in and manage sustainable businesses and technologies that have lower GHG emissions or are carbon-resilient. More countries have introduced other carbon pricing initiatives.

In an unusual step for an emerging market economy, in 2019, South Africa introduced an environmental levy when promulgating the Carbon Tax Act. It is the only African country to have introduced a carbon tax to date.

The Carbon Tax Act, which is based on the polluter pays principle, imposes a tax on businesses

conducting activities in South Africa that emit GHGs above the threshold for the activity or sector. Each GHG-generating facility must be licensed and registered for purposes of the environmental levy.

The carbon tax is calculated with reference to the total GHG emissions of a taxpayer in a particular tax period, expressed as the carbon dioxide equivalent of those GHG emissions, resulting from fuel combustion, industrial processes and fugitive emissions. This will be determined in accordance with the reporting methodology approved by the Department of Environmental Affairs (DEA), or in the absence thereof, in accordance with the calculation set out in the Act.

For the tax period June 1, 2019, to December 31, 2019, carbon tax was levied at a rate of ZAR120 per ton of carbon dioxide equivalent of GHG emissions. This rate increases annually according to consumer price inflation (CPI) plus 2% for each tax period, from January 1, 2020, to December 31, 2022. After December 31, 2022, the rate of tax will be increased according to CPI.

While a threshold has been prescribed in the Act for industries participating in fuel combustion activities, no threshold has yet been prescribed for the actual mining of coal and other resources. The introduction of the carbon tax will nevertheless have a knock-on effect in the mining industry, as industries reliant on fossil fuels will look to avoid paying the carbon tax by developing new technologies or using renewable energy instead.

The tax burden of carbon tax will be reduced by a taxpayer by using carbon offsets prescribed by the Minister of Finance. There are also standard allowances for fossil fuel combustion, industrial process emissions and fugitive emissions, based on the activity/sector. The allowances are subject to a maximum limitation of 95% or 100% of the total GHG emissions of the taxpayer for that period. The national treasury has indicated that the result of these allowances is that the effective tax rate is reduced to less than half the prescribed rate of tax.

If a taxpayer implements measures to reduce GHG emissions, it may receive a performance allowance, not exceeding 5% of the total GHG emissions of that taxpayer. This is determined with reference to the sector GHG emissions intensity benchmark prescribed by the Minister of Finance, or in the absence thereof, zero, and the measured and verified GHG emissions intensity of the taxpayer.

The Carbon Tax Act also provides for tax incentives to reward the efficient use of energy. Taxpayers involved in the listed activities are incentivized to participate in the carbon budgeting system (duly confirmed by the DEA), through an additional allowance of 5% of the total GHG emissions per tax period.

Global commentators have stated that the carbon tax being implemented in South Africa is too low to have any real impact. Indeed, the tax is comparatively low when compared with other countries in which carbon tax is levied. However, the carbon tax has been criticized by businesses operating in South Africa as being too high. They have warned that this may ultimately lead to job losses.

The balancing of the various interests will require careful management by the South African government. There will need to be a concomitant increase in the development of carbon-neutral economic activities, in order to avoid an increase in the country's 28% unemployment rate.

The Integrated Resource Plan published by the South African government in October 2019 revealed that given the abundance of natural resources in South Africa and the existing infrastructure, the South African economy will continue – for at least the next decade – to be based on mining, and electricity generation via coal. Where new investments are made, they must be in more efficient coal technologies that comply with climate and environmental requirements.

Over the next ten years, the South African government also expects electricity generation from gas/diesel, wind and solar sources to increase, with a view to generation of energy from these three sources being almost equivalent to coal power generation by 2030.

When parties do not comply – climate change disputes

The ICC Commission on Arbitration and Alternate Dispute Resolution recently released a report on *Arbitration of Climate Change-related Disputes*. They predict exponential growth in climate change-related disputes, particularly given the increase in awareness and changes in investment decision-making.

Types of disputes that may arise and can be arbitrated in relation to climate change include:

- disputes pertaining to contracts concluded to address climate change such as contractual disputes in renewable energy projects or divestment disputes and associated environmental warranty claims, green funding, carbon trading and pricing;
- disputes not pertaining to contracts concluded to address climate change, but which have an environmental angle;
- disputes between states or companies, on the one hand, and large groups or classes of people on the other hand, where the parties have agreed to submit the dispute to arbitration;
- and investor-state disputes in terms of more recently concluded bilateral investment treaties.

The advantages of arbitration proceedings to resolve disputes of this nature include:

- the choice of arbitrator(s),which allows parties to ensure that the tribunal has the necessary technical expertise to decide environmental disputes (this can be regulated expressly in the arbitration clause in the contract or at the time of the arbitration itself);
- the determination of the dispute in a neutral forum, where the resolution of the dispute could otherwise be swayed by public debate or the views of the state in question;
- the ability to adopt a flexible and expedited approach, including to accommodate expert witness evidence, bespoke confidentiality undertakings and the granting of interim measures;
- the understanding of the international nature of such disputes, which requires an understanding of international law, domestic law, investment treaties and industry best practice;
- the cross-border recognition of arbitration awards; and
- the convenience of resolving state-state disputes, where there are often gaps in the dispute resolution mechanisms.

The use of arbitration in class actions or community disputes on the continent has been limited. However, arbitration may be a good way of resolving such disputes, because the company or state involved can avoid a multiplicity of actions. The party accused of an environmental infraction can also manage the reputational risk by submitting to arbitration and managing the confidentiality regime. Third-party funding also assists community parties in managing the cost implications of referring disputes to arbitration.

ESG implications of mine rehabilitation in Africa

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Introduction

In many African countries, mining is the backbone of their economies. Often, however, little consideration is given to environmental, social and governance (ESG) implications when a mining resource has been depleted or becomes uneconomical to mine. An appropriate legal framework that deals with mining rehabilitation is vital as part of sustainable mining.

In 2016, the copper and nickel mining company BCL was placed into liquidation in Botswana. The liquidator's report disclosed that BCL had, at some point, made provision of USD100 million for rehabilitation on closure. When the company ran into difficulties, however, it used a significant amount of this sum to fund its operations, leaving insufficient funds to cover the costs of any meaningful rehabilitation of its mines.

The BCL saga highlights two major issues. First, the need for adequate financial provision for mine rehabilitation. And second, that funds set aside for mine rehabilitation must be adequately ringfenced.

Understanding of the scope of mine rehabilitation

Most discussion on mine rehabilitation focuses on remedying the physical, environmental and structural damage to the ground and surrounding areas from mining But rehabilitation in a wider sense looks at the effects of closure on employees and communities reliant on the mine for employment and other social considerations like education, housing, health and community development.

Rehabilitation isn't something to consider only on the closure of a mine. It must also be properly planned prior to the opening of a mine, and continuously carried out during mining operations.

General problems facing mine rehabilitation

At the February 2020 Mining Indaba conference in Cape Town, a panel discussion on rethinking mine closure and rehabilitation highlighted some of the challenges:

- Legacy issues: mine rehabilitation is a relatively new concept. Many countries are faced with a large number of disused, abandoned and closed mines that are damaging the environment and hazardous to local communities. Usually, no rehabilitation provision has been made for these mines, leaving governments to shoulder the burden.
- Governance: this ranges from failure to implement the prevailing laws and regulations to corrupt officials who issue mining licenses to companies with no proper mining track record, or are paid to turn a blind eye to failures to make provision for rehabilitation.
- Inadequate legislation or regulations to address the issue of mine rehabilitation for the benefit of all stakeholders.

Legislation and regulation

In Botswana, Part IX of the Mines and Minerals Act obliges the holder of a mineral concession to ensure that their concession area is rehabilitated from time to time and ultimately reclaimed as far practically possible in a manner acceptable to the Director of Mines.

If a holder fails to do so, the government can, without prejudice to any other remedies available, carry out the necessary "restoration," the costs of which becomes a debt owed to the government by the concession holder. The obvious shortcoming of this provision is that it's not much assistance if the

company doesn't have the financial means or sufficient assets to cover the costs, or goes into liquidation with little or no provision for rehabilitation in place – leaving the government no meaningful right of recourse and shouldering the social, environmental and financial burden.

The Act allows the Minister to make regulations for the protection of the environment, but so far this hasn't happened, leading to uncertainty among stakeholders as to the expectations of the Director of Mines regarding rehabilitation. Any proposed regulations should be consulted on, to find the right balance of rehabilitation without onerous conditions that may affect the viability of any mining undertaking.

South African law requires mining companies to set aside funds at the outset of a project for rehabilitation of the local area when the mine closes. If the company is unwilling to use these funds after a mine closure, the government can take the money and carry out the rehabilitation work itself.

When it comes to enforcement of compliance laws, the most notable recent case involved the Gupta family-owned Tegeta mining company. Tegeta had been accused by the Public Protector of attempting to access funds set aside for mining rehabilitation. According to Tegeta, its intention was to use the funds for ongoing rehabilitation. However, South African law does not allow the funds to be used for ongoing rehabilitation – only for rehabilitation work on closure.

The National Prosecuting Authority obtained a court order preserving the funds held in two trusts established to retain the rehabilitation funds. The preservation order followed allegations that Tegeta, which is part of the Guptas' Oakbay Investments, withdrew money from the accounts and used it as collateral for loans, purportedly for mine rehabilitation.

Methods of safeguarding rehabilitation funds

How can funds be set aside and preserved for rehabilitation? Some responsible mining companies make payments into a separate high-interest bank account, obtain insurance or bank guarantees issued to provide sufficient financial security necessary for the company to fulfil its obligations for mine rehabilitation.

Another increasingly popular method is the creation of mine rehabilitation trusts by the mining companies. The board of trustees oversees and administers the trust funds to protect them from being used for other purposes. The mining company drafts the necessary plans and estimates for rehabilitation, and makes periodic payments to the trust, which accumulates adequate resources over time for rehabilitation projects. Recently, several mining companies in Botswana have used trusts as their preferred method of ringfencing such funds.

Conclusion

With increased focus on ESG issues, mine rehabilitation has become more important such that stakeholders including mining companies, communities and governments will have to look at ways to effectively address mine closures and their adverse effects.

Legacy mines in disuse are challenging, and will unfortunately have to be addressed by governments as many of the companies that owned the mines are no longer in existence. When it comes to modern mining, the more responsible industry players already include robust provisions for mine rehabilitation when planning to undertake new mining operations. The modern ethos that will increasingly develop in mining is aptly stated by a spokesman of the Minerals Council of Australia (MCA): "rehabilitation and mine closure are planned and considered across all stages of modern mine development and operation, from design to closure and rehabilitation is a critical component of a company's environmental management."

Mining in Tanzania: Effects of the mining legal framework overhaul

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In 2017, drastic and sudden changes affected the mining sector in mainland Tanzania. The Parliament of Tanzania, in a bid to protect the country's natural resources and the employment opportunities for its citizens, passed a series of legislations in July 2017 aimed towards achieving these objectives.

The laws introduced by Parliament were:

- the Written Laws (Miscellaneous Amendments) Act, 2017 amending the Mining Act 2010 (Amendment Act);
- the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (Sovereignty Act); and
- the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017 (Unconscionable Terms Act).

Together, these laws are collectively referred to as the 2017 Mining Laws.

The introduction of the 2017 Mining Laws formed the basis for the introduction of a number of mining regulations, including the Mining Local Content Regulations, 2018 (Local Content Regulations).

What did the changes mean for the mining industry?

For mining companies, the 2017 Mining Laws introduced a number of new conditions on the way they did business. The main features included:

- a 16% free carried interest for the government;
- restrictions on the export of raw resources for beneficiation outside Tanzania;
- giving the National Assembly the power to review all arrangements or agreements made by the government entailing the extraction, exploitation or acquisition of natural wealth and resources, including minerals;
- the prohibition of disputes over natural wealth and resources being adjudicated in any foreign court or tribunal which was not established in Tanzania and in accordance with the laws of Tanzania as well as categorizing as unconscionable any terms subjecting Tanzania to the jurisdiction of foreign laws or fora;
- the rejection and expunging of terms deemed by the National Assembly to be unconscionable;
- the requirement that when sourcing goods or services in the course of undertaking mining operations, any contractors, subcontractors and licensees undertaking mining activities give preference to indigenous Tanzanian companies; and
- incentivizing contractors, subcontractors and licensees undertaking mining activities to employ and train local citizens.

Three main areas remain a source of concern for stakeholders in the mining sector. These are: the free carried interest, the prohibition of dispute resolution in any foreign court or tribunal which was not established in Tanzania, and the introduction of the requirement to have and adhere to local content requirements. These three areas will be addressed in this article.

Free carried interest

Free carried interest (FCI) in the mining sector is a trend that has been rolled out among sub-Saharan African countries including Mali, Guinea, Democratic Republic of Congo, South Africa and Kenya. The key features of FCI are that:

- the government would have an actual stake in the mining industry;
- the government has greater control over what large-scale miners are doing with the country's natural resources;
- the government would receive dividends in profit-making periods of a mining project;
- the government's FCI would be non-dilutable; and
- the government would be able to increase its shares in the mining company with payment in kind (i.e. the mineral rights and the tax incentives could form part of the government's equity contribution for the issuance of additional shares).

Tanzania first introduced the concept of FCI through mining development agreements (MDAs). Under the earlier MDAs before the introduction of the 2010 Mining Act, FCI was not mandatory and could be negotiated by the mining company and the government. There were no set parameters for negotiations. Even where FCI was given to the government, the same was dilutable and saw the government's stake diminished through the requirement of significant capital injection. When the government could not match the capital injection, its FCI was reduced and in some cases completely extinguished.

Therefore, in order to protect the benefits Tanzania obtains from the mining industry, the 2010 Mining Act introduced a compulsory requirement for companies with a special mining license (SML) to negotiate and agree with the government the level of FCI and the state's participation. But the 2010 Mining Act failed to provide any negotiation parameters, such as the minimum level of FCI to which the government was entitled and did not specify whether such a stake was dilutable or not. The FCI levels and implementation was left entirely for the parties to agree, which did not solve the problem of the shortfalls which had previously existed.

Upon implementing the 2010 Mining Act, some shortfalls were identified, and in 2017 the government introduced changes when amending the Mining Act through the Amendment Act. The Amendment Act gave the government a minimum non-dilutable FCI in the capital of all mining companies in relation to the mining operations under not only a special mining license but also a mining license. It is important to note the changes made by the Amendment Act not only apply to new special and mining licenses issued after the Amendment Act but also affect all existing special and mining licenses, in that they were applied retrospectively. The changes made clear that the government's 16% FCI cannot be diluted. The compulsory 16% FCI means that the government's minimum stake will always be secured.

Impact on mining companies

To date, the government has been selective as to the enforcement of FCI, and in practice it is our understanding that the process for implementing FCI has affected less than 1%[1] of the mining companies in Tanzania. The lack of enforcement almost three years after the implementation of the Amendment Act has caused some concerns for investors, in particular regarding: how to carve out the unclaimed/unenforced FCI;

- the effective date of the FCI (i.e. the date when claimed by the government or the date of the Amendment Act); and
- the procedure to be followed in order for the government to enforce the FCI, i.e. by increasing share capital or requiring the current shareholders of mining companies to transfer the equivalent to the FCI to the Treasury (as the government's vehicle for investments).

While these changes to the 2010 Mining Act have provided some clarity on FCI, there are still issues which may mean mining companies are uncertain when evaluating how to deal with FCI.

Stakeholders continue to engage with the government in order to clarify the practical aspects of implementing FCI in mining companies.

Prohibition of dispute resolution in any foreign court or tribunal

Prior to the introduction of the 2017 Mining Laws, parties entering into agreements relating to the extraction, exploitation, acquisition and use of minerals were free to choose the laws regulating their agreements and the way in which any dispute arising could be resolved. In 2017, the Sovereignty Act prohibited any disputes arising from extraction, exploitation or acquisition and use of minerals from being adjudicated by judicial bodies or other bodies not established in Tanzania. The Sovereignty Act required all such agreements to apply the laws of Tanzania.

1 Based on our own knowledge of the mining sector in Tanzania.

In addition to the provisions of the Sovereignty Act, the Unconscionable Terms Act expressly provided that certain terms are to be deemed unconscionable, which included any provision or requirement subjecting Tanzania to jurisdiction of foreign laws and fora.

Impact on mining companies

Financing is a crucial part of mining operations due to the nature and scale of mining operations and as mining is capital intensive at the beginning and throughout the life of a mine. As such, in order for investors to extend facilities to a mining company, they need assurance that such agreements can be enforced; therefore making the agreement bankable. As explained by the World Bank,[2] the inclusion of a workable dispute resolution clause is a key element to making an MDA bankable. Therefore, the dispute resolution clause in the MDA was crucial. In ensuring that a dispute resolution clause is bankable, consideration is given to the following factors:

- the mode of dispute resolution;
- the cost of dispute resolution;
- the impartiality of the mode of dispute resolution, including neutral governing law and adjudication forum; the speed at which a dispute can be adjudicated;
- the ability for any dispute to be adjudicated by experts in the respective industry; and
- the ability to keep any proceedings private between the parties to the agreement in order to salvage ongoing working relationships.

Bearing in mind the above considerations, most MDAs in existence prior to the 2017 Mining Laws contained clauses which allowed for dispute resolution by way of arbitration in neutral countries such as the UK or Singapore, which have international arbitration centers such as the LCIA, ICC and ICSID. Therefore, the abrupt move to prohibit the resolution of disputes through foreign courts or tribunals which were not established in Tanzania, in addition to the threat of total expulsion of any clause contravening this prohibition, gave rise to obvious concerns from stakeholders as to the bankability of the MDAs.

Following the disruption caused by the prohibition to use foreign courts and tribunals, stakeholders engaged with the government in order to voice their concerns and the potential far-reaching damage which could be caused to the mining sector. The government has since proceeded to put in place remedial measures which have included the new Arbitration Act 2020 (Arbitration Act). The Arbitration Act overhauls the entire arbitration legal framework, but is also meant to amend the Sovereignty Act and by implication the Unconscionable Terms Act by removing the word *established* from sections 11(2) and (3) of the Sovereignty Act.

By removing the word *established*, the relevant provisions will read that: "disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs in the United Republic and in accordance with the laws of Tanzania."

The enactment of the Arbitration Act means that the arbitration clauses currently in the MDAs will only need to be amended to ensure that the venue for the arbitration will be in Mainland Tanzania. As the venue of an arbitration does not have any further implications as to the choice of procedure for the arbitration, the body or organ selected by the parties, this measure goes a long way towards addressing the concerns of the mining companies.

Following the introduction of the 2017 Mining Laws, the mining industry was shaken and mining companies in Tanzania saw their investments tumble.[3] This minor amendment has restored confidence in the market, meaning the mining sector's contribution to Tanzania's economy is predicted to grow steadily in the coming years.[4]

Local content requirement

Local content is one of the basic ways in which an economy, especially an emerging one, ensures that its people directly benefit from incoming investments. The requirement for mining companies to have a local content plan and to give preference to nationals exists throughout sub-Saharan Africa, including Angola, Gabon, Chad and Equatorial Guinea. The Amendment Act amended the Mining Act to include the requirement to have a local content plan. Local content has always been an integral part of the mining industry; however, historically

2 http://pubdocs.worldbank.org/en/508161479239656383/For-Consultation-WBG-Final-Draft-Report-on-Recommended-PPP-Contractual-Provisions.pdf at page 91

3 https://af.reuters.com/article/investingNews/idAFKCN1C0103-OZABS

4 https://tradingeconomics.com/tanzania/gdp-from-mining

the main aspect of local content in mining laws pertained to the employment and training of locals[5] as well as having a succession plan in place, which was to ensure that there was a clear strategy for the transfer of knowledge and preparing Tanzanians to fill positions which were at the time occupied by non-citizens.

Stemming from the amendments under the Amendment Act, the Local Content Regulations (Regulations) were introduced. The Regulations gave the relevant stakeholders three months within which to comply. The Regulations placed an obligation on contractors, subcontractors, licensees, or any other entity (relevant parties) carrying out mining activity to ensure that they had a local content plan as a component of their mining activities. In addition to the requirement to employ and train locals, the local content plan stipulated for new local content requirements in order to ensure that locally produced goods and services sourced by the relevant parties could be measured in actual monetary terms. The new aspects introduced by the Regulations included the requirements that:

- the relevant parties must adhere to the local content levels for specific mining activities as set out in the Regulations;
- the relevant parties must prepare and submit a long-term, five-year, local content plan which coincides with the entity's work program as well as an annual local content plan in respect of each year;
- where a non-indigenous Tanzanian company intends to provide goods or services to the relevant parties, they must incorporate a joint venture company in Tanzania with an indigenous Tanzanian Company and afford that indigenous Tanzanian company[6] an equity participation of at least 20% (this requirement is also now included as a condition to the mining licenses and special licenses issued);
- the relevant parties must establish and implement a bidding process for the acquisition of goods and services which gives preference to indigenous Tanzanian companies and provide the mode for evaluating bids received;
- the relevant parties must inform the Commission of every contract or purchase order which is sole sourced or which exceeds USD100,000; and
- the relevant parties must obtain approval from the Mining Commission prior to obtaining financial services from non-Tanzanian institutions.

Impact on mining companies

Mining companies with existing operations in other sub-Saharan African countries were moderately affected by the Regulations. This is because most of the requirements under the Regulations are similar to those in place elsewhere.[7] However, the biggest impact brought by the changes under the Amendment Act and the Regulations is the compulsory requirement for parties who are supplying goods and services to the relevant parties to incorporate a company in Tanzania and to further give 20% of their equity to indigenous companies. This is a problem for the following reasons:

- Tanzania does not manufacture the majority of goods required in mining operations and as such the market is supplier driven;
- most of the current suppliers of goods for mining operations were not incorporated in Tanzania;
- the Regulations only gave three months in which to implement this requirement; and
- the market had a shortfall of indigenous companies with the required capital to effectively enter into a joint venture with established suppliers.

5 Section 44 of the Mining Act 1998 and section 41 (4) (h) of the Mining Act 2010

6 A company incorporated under the Tanzanian Companies Act in which at least 20% of its equity is owned by a citizen or citizens of Tanzania; and has Tanzanian citizens holding at least 80% of the executive and senior management positions and 100% of non-managerial and other positions – as defined under regulation 3 of the Local Content Regulations.

7 https://unctad.org/en/PublicationsLibrary/ditccominf2018d4_en.pdf

Mining companies found themselves in a difficult position in that they were unable to source goods from many of their current suppliers without potentially being in breach of the law and their mining licenses. However, due to the niche nature of goods and services for mining operations, most mining companies have been able to initiate the procurement of goods and services not available in Tanzania through sole sourcing. The sole sourcing of goods remains a short-term solution for the issues arising as a result of the 20% equity requirement. It is our understanding that the Mining Commission has also identified the gaps created by the Regulations and as such it has been very cautious in applying the equity requirement so as not to unsettle the mining industry in Tanzania.

Conclusion

The introduction of the changes in the 2017 Mining Laws had a clear intention: to ensure that Tanzania and its citizens benefit directly and indirectly from the mining sector. The safeguarding of a nation's natural resources and ensuring locals benefit from natural resources is not a new phenomenon and globally it has been tapped into in order to ensure that there is mutual benefit derived from the mining industry.[8] The 2017 Mining Laws have had a number of stumbling points, but we believe, as practitioners in the sector, and as has been stated by authorities elsewhere in the country, "once these points of concerns have been resolved, the mining industry will continue to be a big contributor to Tanzania's GDP."[9]

8 https://unctad.org/en/PublicationsLibrary/ditcted2013d7_en.pdf (page 6)

9 https://www.bot.go.tz/Publications/EconomicAndOperationsAnnualReports/BOT%20ANNUAL%20REPORT%2017-18.pdf

Simplifying mining in Ethiopia: What has changed with the introduction of the mining cadaster portal

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Introduction

Ethiopia has an abundance of natural resources, including gold, potash, gemstones and tantalum. Land and natural resources are owned by the people and state of Ethiopia[1]: according to Article 89(5) of the Constitution of the Federal Democratic Republic of Ethiopia, the government is the custodian of natural resources and has the responsibility of ensuring that they are used for the benefit of the people. For this reason, development and extraction of natural resources is only possible with the approval and concession of the federal or regional government of Ethiopia, depending on the type of natural resource and scale of the mining activity[2]. The major laws of the mining sector in Ethiopia are the Mining Operations Proclamation No.678/2010, the Mining Operation (amendment) Proclamation No. 816/2013 and Mining Operation Council of Ministers Regulation No.423/2018.

The mining sector is an area where the government intends to attract more foreign direct investment. In order to attract investors to large-scale mining, the government is considering ways of improving the regulatory framework in the sector, including simplifying the process for applying for and obtaining exploration and exploitation licenses. To this end, the Ministry of Mines and Petroleum (MoMP) has recently introduced a mining cadaster portal.

The previous application process

This article compares the application process with the MoMP before and after the introduction of the mining cadaster portal. Before going into more detail on the recently introduced portal, it is important to explain the general requirements for the application of an exploration license, which must be obtained before acquiring a mining license. An applicant for an exploration license is required to complete a hard-copy application form prepared and provided by the MoMP. In addition to completing the form, the applicant is also required to submit documents relevant for the evaluation of the application provided under the law.

The MoMP requires all necessary documents to be submitted in hard copy. Once the application has been reviewed, the MoMP may provide comments on the proposed work program or geographic coordinates or on any of the submitted documents, if it has any. Acquiring information on mapping requires that applicants visit the Geological Survey of Ethiopia before determining the coordinates of the potential application. The whole process was complicated and time consuming.

In addition to this, it was mandatory to incorporate an entity (in the form of a branch or a subsidiary) in Ethiopia to submit an application. The problem with this requirement was that other ministries or

1 Article 40(3) of the FDRE Constitution.

2 Article 52 of proclamation 678/2010 renumbered as Article 54 by the Amendment Proclamation no.816/2013.

government agencies which are directly or indirectly responsible for the registration of mining companies failed to properly understand the difference between requirements for other investment sectors and laws specifically applicable to the mining sector. For instance, there is a minimum capital requirement provided in the investment law for areas of investments other than mining and petroleum. Foreign investors intending to invest in the mining sector were wrongly required to comply with the minimum capital requirement.

Introduction of the mining cadaster portal

With the introduction of the mining cadaster portal, all communication with the MoMP is online (instead of written communication as was the norm before), and this – to an extent – has simplified the application process as the applicant is required to upload documents onto the portal. Applicants are no longer required to visit the Geological Survey of Ethiopia to acquire mapping information and identify coordinates open for application as the information is available on the cadaster portal. Under the new system, once an online application is submitted, the MoMP will examine the application and provide their comments online to the applicant's account.

With the introduction of this system, applicants can now create an account from anywhere in the world and process an application provided they have all the necessary documents. Although it will not completely waive the requirement for having an entity at an early stage of the application (i.e. before acquiring an exploration license), investors will not be required to set up a company from the outset. The requirement to have a presence will come into effect at the final stage of the license application process (once an application for an exploration license is approved by the MoMP). Accordingly, foreign companies can use their offshore corporate documents to submit an application without necessarily establishing an entity in Ethiopia. Once the application is reviewed and approved by the relevant department within the MoMP, the applicant will be required to incorporate a company (preferably a branch) in Ethiopia to which the license can be issued.

Conclusion

The cadaster portal is a recent development and the MoMP is still improving the system, but once it begins to function smoothly, it should greatly reduce the amount of time spent on processing mining applications and accurately issue licenses on a first come, first served basis. It will also create room for coordinated management of the mining sector between regional states and the federal government.

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