

The appeal of Africa: the improving legislative environment

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Presentation

- **An overview of the legal environment in Africa.**
 - Increased democracy and its impact on mining.
 - The rise of resource nationalism.
 - An emphasis on greater accountability, transparency and sustainable development.
- **Examination of recent developments and trends.**

A look at three African case studies:

 - **Botswana:** a model for Africa?
 - **Ghana:** an example of resource nationalism through fiscal reform.
 - **Liberia:** a third way?
- **How is this impacting on the investment scene?**
 - General observations.



An overview of the legal environment in Africa

- **Increased democracy and its impact on mining.**
 - Africa is currently experiencing a period of great democratic/political activity: in 2011, 15 presidential elections took place across the African continent. 9 presidential elections are scheduled to take place during 2012.
 - There are no overriding “*rules*” for mining, but increasingly governments, both old and new, appear anxious to ensure that their nations’ finite mineral resources are *fairly* distributed. This has led in some instances to the examination of current mining legislation and in some countries, such as in the DRC and Guinea, to the review of existing mining contracts.
- **The rise of resource nationalism.**
 - Resource nationalism (actions taken by a government to enhance the state’s control over national mineral resources) can take many forms, including:
 - resource rent taxes, increased royalties or other taxes;



An overview of the legal environment in Africa

- **The rise of resource nationalism (continued)**
 - greater controls on foreign investment;
 - local beneficiation and restrictions on exports of minerals;
 - mandatory government participation in mining projects or creeping/outright nationalisation.
- A report published by Ernst & Young in August 2011 identified resource nationalism as the “*biggest*” threat to face the global mining sector in 2011 and 2012.



An overview of the legal environment in Africa

- **An emphasis on greater accountability and transparency.**
 - Transparency in the mining industry has been furthered by:
 - the Extractive Industries Transparency Initiative (“**EITI**”);
 - the Dodd-Frank Act 2010;
 - OECD Convention on Corruption (signed 1997; in force from 1999);
 - UN Convention against Corruption (signed 2003; in force from 2005).
 - Compliance has been encouraged through improved regulation and stricter sanctions:
 - the FCPA has become more prominent;
 - the UK Bribery Act 2010 (effective from July 2011);
 - local anti-corruption initiatives.
 - Mining companies are increasingly guided by international best practice standards, for example:
 - the IBA’s Model Mine Development Agreement (2011); and
 - the UN’s Guiding Principles on Business and Human Rights (2011).



Examination of recent developments and trends

- **Botswana: a model for Africa?**

- According to the 2010/2011 annual survey of mining companies conducted by the Fraser Institute, Botswana continues to perform strongly despite Africa's declining performance over the past few years. Botswana's Policy Potential Index score improved from 66.5 in 2010 to 74 this year. It now ranks 14 out of 79 jurisdictions included in the survey, up from 21 out of 72 last year.
- Under its "*Corruption Perceptions Index*," Botswana was ranked 36 out of 180 countries by Transparency International in its 2009 Global Corruption Report. It is the highest ranked country in Africa.
- "*The terms for doing business in Botswana are...very clearly set out and implemented. You do not have to deal with issues such as the interpretation of some of the legislation*" – **James Campbell** (CEO of Rockwell Diamonds).



Examination of recent developments and trends

- **Botswana: a model for Africa? (continued)**

- Under the Botswana Mines and Minerals Act, 1999 (“**the Mines Act**”) the process of licensing – the grant, renewal and transfer of licences is *predictable and clear*.
- The Minister of Minerals, Energy and Water Resources (“**the Minister**”) has little or no administrative discretion and licensing conditions that may be imposed are explicitly stated.
- Further, according to a *Mining Weekly* report, the Botswana government has tried to create a competitive environment by issuing permits and licences according to the following target time frames:
 - diamond export permits within two days;
 - prospecting licences within 60 days;
 - small-scale mining concessions within 15 days;
 - large-scale mining concessions within 20 days.



Examination of recent developments and trends

- **Botswana: a model for Africa? (continued)**

- These efforts have led to opportunities for Botswana, including:
 - the Botswana government's 15% shareholding in the De Beers group;
 - Debswana - a 50:50 diamond mining joint venture between De Beers and the Botswana government;
 - DTC Botswana;
 - De Beers has recently agreed to move its sights and sales operations to Gaborone by the end of 2013. *"The best place in the world to go for rough diamonds in the future is going to be that diamond hub in Gaborone where you will get access to Botswana's diamonds as well as production from other countries"* – **James Campbell**.
- The Botswana government may well decide to exercise its pre-emptive rights to increase its stake in the De Beers group from 15% to 25%.



Examination of recent developments and trends

- **Ghana: an example of resource nationalism through fiscal reform**
 - Ghana is Africa's second largest gold producer.
 - During the 1960s, Ghana nationalised its mines. Gold production fell from 915,317 ounces in 1960 to 282,299 ounces in 1984.
 - In 1983 the Economic Recovery Plan was introduced and Ghana's state-owned mining industry was privatised. In 12 years output in the mining industry increased 700%.
 - To encourage FDI, in 1993 the Ghanaian government introduced an independent regulatory agency, the Minerals Commission, which is responsible for the regulation and administration of the minerals sector.



Examination of recent developments and trends

- **Ghana: an example of resource nationalism through fiscal reform (continued)**
 - The Minerals Commission has helped:
 - remove administrative uncertainty;
 - reduce bureaucracy, improve administrative efficiency and reduce corruption.
 - In October 2011 the International Monetary Fund recommended that Ghana revise its existing taxation system to boost state revenues.
 - Ghana's 2012 budget was released on 16 November 2011:
 - corporation tax for mining companies will increase from 25% to 35%;
 - a separate 10% tax on mining profits will also be introduced.



Examination of recent developments and trends

- **Ghana: an example of resource nationalism through fiscal reform (continued)**
 - *“With oil not expected to contribute...to overall revenue for some time... the 10 percentage point increase in the tax rate for mines – is a sound move”* – **Razia Khan** (Standard Chartered). This is debatable.
 - **Toni Aubynn**, head of the Ghana Chamber of Mines, predicts that these reforms are *“likely to discourage investment and the expansion of current projects.”*
 - A warning for the future: The Fraser Institute lowered Ghana’s **Policy Potential Index** score from 53.3 in 2010 to 45.1 in 2011. It is now ranked 47 out of 79, having previously been placed 34 out of 72 in 2010. We will have to see how Ghana fares in 2012.



Examination of recent developments and trends

- **Liberia: a third way?**

- Liberia's main mineral resources include gold, diamonds and iron ore.
- Before 1990, 65% of Liberia's export earnings and 25% of its GDP were attributable to the country's minerals sector. Subsequent civil war devastated the mining industry. In 2010, the mining industry only contributed 0.9% of Liberia's GDP. It continues to recover.
- Liberia recently transitioned from an "*open access*" to a "*competitive resource tender*" based regulatory regime.
- While reconnaissance, prospecting and exploration licences, as well as class A, B and C mining licences are granted and governed according to the Minerals and Mining Law, 2000 ("**the Mining Law**"), they are now, in addition, subject to the Amended and Restated Public Procurement and Concessions Act, 2010 ("**the PPCA**"), which in most cases requires interested parties to engage in a *competitive bidding process*.



Examination of recent developments and trends

- **Liberia: a third way? (continued)**

- Advantages of Liberia's new concession regime include:
 - the "*best*", rather than the "*first*" applicant is selected;
 - improved transparency and accountability: all decisions must be made in accordance with pre-published criteria; there is limited or no discretion; members or advisors of a particular body are prohibited from holding multiple positions; personal interests must be disclosed; there is a clear, internal appeal process.
- Disadvantages of Liberia's concession regime include:
 - owing to various stages and compliance hurdles, this system can be relatively slow;
 - the preparation of bid documents can be onerous in terms of time and expense;
 - there is no guarantee that a concession agreement will be negotiated and concluded between the parties.



How is this impacting on the investment scene?

- **General observations.**

- *"Miners have for a long time had to deal with uncertainty under the ground, now they have to deal with human uncertainty above the ground"* – **Fred McMahon** (Fraser Institute vice-president for international research).
- To encourage investment, African governments would do well to ensure that their regimes are clear, certain and consistently applied.
- Pan-African legislative developments are unlikely to follow such extreme examples as those set by countries such as Zimbabwe or Guinea, but rather look for a middle ground. Obviously, how or if a government decides to react to these global trends will depend on a country's particular socio-economic background and history.
- The simple answer to all this is fairness and balance: ensuring that governments receive an equitable share from their finite mineral resources.



THANK YOU

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