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Preface

Welcome to *The Middle Eastern and African Arbitration Review 2022*, one of Global Arbitration Review's annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 290 pages, they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Ghana, Kuwait, Lebanon, Mozambique, Nigeria, Qatar, Saudi Arabia and the UAE, and has overviews on energy arbitration, investment arbitration, mining arbitration, damages (from two perspectives) and virtual hearings.

A close read of these reviews never disappoints. Among the nuggets this reader noted were:

- African governments are keener than ever to advance mining projects, for various reasons. To that end, some seem more willing to settle disputes;
- China's investment in renewables infrastructure exceeded its investment in fossil fuels in 2021;
- Egypt is home to a new sports-arbitration provider;
- someone with a criminal record can sit as an arbitrator in Egypt – if all parties agree;
- Egypt's court of cassation has reversed a worrying appeal court ruling that had seemed to allow annulment of awards where damages were disproportionate to the harm suffered;
- courts in Kuwait are growing more resistant to the 'no authority to sign an arbitration clause' defence;
- Chinese investment in Lebanon is on the increase;
- Nigeria's Supreme Court has gone out on a limb to decry frivolous challenges to arbitral awards – calling it a 'disturbing trend', obiter dicta;
- 84 teams took part in the most recent running of the Saudi Center for Commercial Arbitration's Arab Moot Competition; and
- although it's not fully clear-cut, Abu Dhabi onshore courts may be falling in line with case law from Dubai on 'apparent authority' to conclude arbitration agreements, which would be helpful. As ever though in both emirates the picture is a bit mixed.

And much, much more – I particularly commend this year's overviews, which are packed with useful stuff.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, GAR would love to hear from you. Please write to insight@globalarbitrationreview.com. Please note all the content in this volume predates unfortunate events in Ukraine – so you won't see mention of that.

David Samuels
Publisher, Global Arbitration Review
April 2022

Mining arbitrations in Africa

Audley Sheppard QC, Amanda Murphy and Karolina Rozycka*
Clifford Chance

IN SUMMARY

By its nature, mining is a risky business that makes the sector inherently predisposed to disputes. It is thus no surprise that the mining sector has extensively resorted to international arbitration to resolve disputes in Africa in recent years, and 2021 was no exception. A number of new mining arbitrations involving African states were commenced over the past year, including three against the Republic of the Congo, as well as cases involving Mali, Mauritania, Sierra Leone and Cameroon. Most of the new known disputes that have arisen involve commodities that currently constitute a significant portion of African mineral exports, namely gold and iron ore (in addition to oil and gas). However, the push towards achieving net-zero emissions by states and global majors alike has increased global demand for other minerals that are required for the transition to a low-carbon economy. Key technologies required for this transition, including solar, wind, electric vehicles and battery storage, are dependent upon the mining of certain minerals, such as cobalt, copper, rare earths, graphite and lithium. As Africa is one of the largest sources of undeveloped reserves of these minerals, the green transition presents an opportunity for economic growth and development for many African states, as well as many opportunities for investors and miners in sub-Saharan Africa. However, increased global demand and investment in developing these minerals will bring inevitable challenges, with existing conflicts and political risk concerns being exacerbated.

DISCUSSION POINTS

- Volatility associated with the continuing coronavirus pandemic and conflict in some African states increases the risk of mining disputes in 2022
- Increased demand for green transition minerals, such as cobalt, copper, rare earths and lithium, presents an opportunity for investors and economic growth across many African states, but may well increase the potential for disputes to arise

This article aims to provide a concise overview of the risks and characteristics of mining disputes in Africa in the context of the current investment climate, and provide an update on mining arbitrations in Africa over the past year. The world is now over two years into the coronavirus pandemic, and many African governments are still struggling to deal with the unprecedented health crisis, with issues such as vaccine inequality and pandemic-induced poverty damaging the economies of many African states. Recent studies indicate that Africa is the 'most-affected region in the world' by the pandemic, and has resulted in 30–40 million more people living at the poverty line in Africa.[1] The flow-on effects of the global economic crisis are just starting to become more visible, with increasing inequality between rich and poor, debt levels rising significantly, as well as growing areas of unrest in some regions. During the past three months there have been increases in armed violence taking place in Burkina Faso, Niger, Mali, Libya, Nigeria, Cameroon, the Democratic Republic of the Congo (DRC), Kenya, Somalia, South Sudan and Sudan.[2] Debt levels, which were already 'astronomical', particularly in West African countries, have risen to formidable levels, it being estimated that in 2020–2021 debt servicing accounted for an average of 61.7 per cent of government revenues in West Africa.[3] In this environment, governments may be keen to develop mining projects in order to boost employment and their economy, and so foreign investment in mining projects may be welcomed now more than ever.

The likelihood of resource-related disputes is heightened owing to certain factors that – without being Africa-specific – are often prevalent in resource-rich African countries. In particular, mining investments and projects in Africa are often sensitive to political risk, which commonly manifests itself in the form of executive interference due to a climate of political instability, lack of consistent governance and limited infrastructure and public services. A corollary of Africa's structural and political challenges is increased exposure to security threats, ranging from trespass by artisanal miners to

1 Giovanni Valensisi, 'Covid-19 and global poverty: are the least developed countries being left behind?' (2020) 32(5) *The European Journal of Development Research* 1535, 1535–1557.

2 Armed Conflict Location & Event Data Project (ACLED), Regional Overview: Africa 15–21 January 2022 (Web Page, 2022) <https://acleddata.com/2022/01/27/regional-overview-africa-15-21-january-2022/>.

3 Development Finance International & Oxfam, 'The West Africa Inequality Crisis: fighting austerity and the pandemic' (Report, October 2021) p. 5 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621300/rr-west-africa-cri-austerity-pandemic-141021-summ-en.pdf>.

attacks by military or paramilitary groups. This article outlines several options available to investors to mitigate these risks, including the use of stabilisation provisions in long-term host state agreements.

Trends in investment arbitrations connected with Africa during 2021

Before looking at the trends that may impact future disputes, it is useful to begin with an overview of the new mining arbitrations involving African states commenced in 2021. As in 2020, the past year saw record numbers of international arbitrations commencing at both the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC). ICSID recorded an all-time high of 66 new cases in 2021, while the ICC recorded 846 new cases, down slightly from 946 new cases in 2020. At ICSID, the proportion of new cases involving sub-Saharan Africa remained steady at 15 per cent of ICSID's overall caseload, while the oil, gas and mining sector remained the largest sector accounting for 25 per cent of new cases. The new ICSID cases in the sub-Saharan Africa region (10 in total) involved Burkina Faso, the Republic of the Congo, Mali, Mauritania, Nigeria, Sudan and Tanzania. Of these 10 cases, nine involved the energy sector, with six of these relating to mining disputes.

There are now a total of four new cases on foot against the Republic of the Congo, all of which relate to the state's decision to revoke iron ore rights and grant them to a third party (which is reported to be beneficially held by Chinese parties). These cases are *EEPL Holdings v Republic of the Congo*, which was commenced at ICISD pursuant to the Congo–Mauritius BIT; *Congo Iron S.A and Sundance Resources Limited v Republic of the Congo*, which was commenced at the ICC pursuant to a contract; *Avima Iron v Republic of the Congo*, also commenced at the ICC under contract; and *Midus Holdings Limited and Congo Mining Ltd SARLU v the Republic of the Congo*, which was commenced at ICSID under the UK–Congo BIT.[4] It is notable that the state's measures at dispute in these matters were taken during a period of record high iron ore prices, triggered by high demand for iron ore as China ramped up steel production during 2020. Sundance Resources also commenced proceedings against the Republic of Cameroon in respect of the same iron ore project the subject of the dispute with the Congo (the Mbalam-Nabeba project).

4 Jack Ballantyne, 'Onslaught of claims against Congo continues', *Global Arbitration Review* (Web Page, 16 November 2021) <https://globalarbitrationreview.com/onslaught-of-claims-against-congo-continues>.

Of these six new mining dispute cases, two of them are against the Republic of Mali. The case of *Menankoto SARL v Republic of Mali* arose out of actions taken by Malian authorities in refusing to grant Menankoto a further one-year extension to their exploration permit, which Menankoto maintained that they were entitled to. Notably, this case was discontinued on 28 January 2022. Separately, the contractual dispute between *AGEM Ltd v Republic of Mali* remains on foot and confidential, however reports are speculating that the dispute stems from a tax issue over a small amount of the sale price of the Sadiola mine. Other recent mining concession cases include *Mauritanian Copper Mines S.A. v Islamic Republic of Mauritania*, which remains confidential, however, reports are speculating that the dispute relates to a temporary suspension of operations at the Guelb Moghrein copper and gold mine in 2012 and 2014.

Interestingly, the DRC turned the tables by commencing claims at the ICC against two Israeli BVI oil companies, owned by Israeli billionaire Dan Gertler. The DRC was reportedly seeking confirmation that the state may terminate oil exploration and exploitation agreements entered with Gertler's companies, Foxwhelp and Caprikat in 2010.[5] The DRC also sought damages of US$153.7 million relating to the company's delays in getting the projects operating. It has recently been reported that the DRC may end the proceedings following an agreement by which Gertler will return mining rights to the government without compensation (following the imposition of sanctions on him by the US). Although not directly related to the mining sector, the use of international arbitration by states to resolve disputes with investors, such as by seeking to declare an agreement lawfully terminated, is relatively novel, and may provide an additional tool in a state's toolkit when dealing with underperforming foreign investors.

With debt levels for many African states already at crippling highs, the prospect of an award ordering the payment of damages to an investor may be leading some states towards faster settlement of their disputes. For example, by coincidence, two unrelated cases involving Mali and Sierra Leone were discontinued on the same day (28 January 2022) after settlements were reached with the respective investors. The first of these cases was *Menankoto v Mali* (noted above), which was commenced on 24 June 2021 and later settled in December, merely six months after it was initiated.

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5 Carlos de los Santos et al, 'International Arbitration Newsletter – December 2021 | Regional Overview: Middle East and Africa', *Lexology*, (Web Page, 27 December 2021) <https://www.lexology.com/library/detail.aspx?g=ec44bfc7-4dac-4a7b-817f-1620f781fa59>.

The cases involving Sierra Leone were commenced by SL Mining, a UK commodities trader, at both the ICC and ICSID and related to the state's cancellation of SL Mining's licence and imposition of an export ban relating to the Marampa iron ore mine. It was reported that an agreement was reached between the parties allowing the mining project to continue and for the export restrictions to be lifted.[6]

ESG and climate change

Despite the ongoing economic, health and security crises driven by the pandemic, the lead-up to the COP26 Climate Change conference in Glasgow in November 2021 saw an increased focus on climate change action from many states and global energy leaders. This brought increasing attention to the concept of a 'just transition'. The notion of ensuring a 'just transition' from fossil fuels to renewable energy was incorporated into the 2015 Paris Agreement. It serves to ensure that the interests of workers and communities are at the centre of decarbonisation efforts.[7] The technological revolution required to address climate change presents significant opportunities, particularly for states endowed with the natural resources used in the production of these technologies, including cobalt, copper, rare earths, graphite, bauxite and lithium. Various African states have significant potential in relation to these commodities – the DRC is home to the largest reserves of cobalt, Guinea has the world's largest reserves of high-grade bauxite, and Zimbabwe, Namibia, Ghana, DRC and Mali have some of the largest reserves of lithium. Significant copper reserves are located in the DRC, Zambia, South Africa and Namibia, while rare earth deposits have considerable potential in Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi. However, the race for these minerals must be tempered by the growing consideration of the social and human rights impact of undertaking new mining operations (as well as closing existing fossil fuel operations). In this sense, the concept of a just transition has been described as putting the 'S' in 'ESG'.

6 Jack Ballantyne, 'Sierra Leone settles mining claims', *Global Arbitration Review* (Web Page, 11 May 2021) <https://globalarbitrationreview.com/sierra-leone-settles-mining-claims>.

7 International Energy Agency, 'Net Zero by 2050: A Roadmap for the Global Energy Sector' (Report, May 2021) p. 167 <https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf>.

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

This is particularly the case in the context of mining investments in Africa, in part because of the specific risks and characteristics outlined in this article. Stakeholders increasingly demand effective actions and heightened levels of transparency in relation to ESG issues, and mining investors seeking finance are increasingly required to demonstrate their ESG credentials. The mining industry is arguably the most exposed to ESG risks, with shareholder activism and NGO participation placing the sector under intensive focus. Particular emphasis is being placed on mining operations in Africa due to a poor historical track record by some foreign companies. For many African states, the harmful actions of some foreign investors in the past justify a focus on compliance by investors with local laws and, increasingly, ESG issues including international environmental and human rights standards. A failure to comply with these laws and standards may result in claims flowing from the termination of contracts or exploitation rights by states, as well as counterclaims being made by states against investors. Mining investors need to be ready to demonstrate their efforts in compliance with local laws and regulations, socio-environmental standards and business human rights principles. This is particularly true in the context of investor–state disputes concerning natural resources projects located in emerging jurisdictions, where respondent states and sometimes third parties, through amicus submissions will increasingly question claimants' compliance with their legal obligations. Similarly, many new generation bilateral investment treaties (BITs) and free trade agreements (FTAs) entered into by states contain express provisions regarding the states' right to regulate in order to protect public welfare objectives such as public health, safety and the environment.

Thus, it is likely that ESG-related issues will be an increasingly prominent feature in mining arbitrations in Africa, driven by increasing references to the protection of environmental, social and public health objectives in both contractual arrangements and investment treaties. Foreign investors are usually obliged to comply with local laws as a condition of their concession, or as a term in a host state agreement (where there is one). Breaches of these obligations may result in claims against the investor, or

counterclaims by the state. In the context of investment treaty arbitration, the plea of illegality, namely that the investor has failed to comply with local laws, is often pleaded by states 'as a question of admissibility or a question on the merits of the case'.[8]

Resource nationalism

Political risk remains another great challenge currently faced by investors in the mining industry. This is particularly the case in some African countries where political instability, the lack of strong governance and political structures, as well as more limited administration and public services may adversely impact the development and operation of mining projects.

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

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

8 Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29(1) *ICSID Review* 155, p. 155.

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

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

Managing political risk through host state agreements

Stabilisation of the applicable legal and regulatory framework is increasingly seen as essential for large-scale mining projects, given the often lengthy time frames involved from resource definition to exploitation. In this respect, mining companies are drawing on the experience of the international oil and gas industry, where businesses have long sought to manage the risks of adverse legislative change by including stabilisation clauses and choices of international law in their long-term agreements with host governments. In previous editions of this article, we have looked at the implications of Tanzania's mining reforms of 2017 and 2018, whereby the state sought to introduce a unilateral review and renegotiation of any existing contract containing an 'unconscionable' term and purporting to void any existing contract terms that submit the state to foreign court

jurisdiction. The state also passed the Mining (Mineral Rights) Regulations, abolishing various companies' retention licences for projects and transferring their rights to the government. This resulted in a number of arbitration disputes including three claims being commenced against Tanzania in 2020, with cases launched by Montero Mining pursuant to the Canada–Tanzania BIT, Winshear Gold Ltd pursuant to the Canada–Tanzania BIT, and Indiana Resources Ltd pursuant to the UK–Tanzania BIT. All three of these claims relate to the abolishment of the claimant companies' retention licences pursuant to the 2018 laws. While all of these cases remain on foot, there have been some positive developments with Tanzania entering into two framework agreements with Australian investors in December 2021, namely Black Rock Mining and Strandline Resources. On 13 December 2021, Black Rock Mining, a company listed on the ASX, announced that it had entered into a framework agreement with Tanzania to develop the Mahenge graphite mine.[9] It has been agreed that the project will be undertaken by a joint venture company (Faru Graphite Corporation) in which Tanzania will own a 16 per cent undiluted free-carried interest, with the remaining 84 per cent held by Black Rock (through a UK subsidiary). The framework agreement provides for resolution of disputes through arbitration under the UNCITRAL Rules. On 14 December 2021, Strandline Resources, another ASX-listed company, also announced entry into a framework agreement on similar terms, with the government to acquire a 16 per cent non-dilutable free carried interest in a newly formed joint venture company called Nyati Mineral Sands Limited.[10] Strandline Resources will also hold its interest in the joint venture company through a UK subsidiary.

There are several points to note about these recent announcements. First, both of these projects relate to minerals needed for decarbonisation technologies – namely graphite (in the case of Black Rock), and mineral sands containing zircon, titanium and monazite containing rare earths (in the case of Strandline) – signalling that Tanzania is keen to develop its green minerals economy. Second, in both cases Tanzania accepted a joint venture structure with a free-carried interest granting it a direct interest in the projects and the ability to oversee development from within. However, joint ventures

9 Black Rock Mining Limited, ' Black Rock Mining signs Framework Agreement with Government of Tanzania' (ASX announcement, 14 December 2021) <https://blackrockmining.com.au/framework-agreement-signed-with-the-government-of-tanzania/>.

10 Strandline Resources Limited, 'Strandline signs ground-breaking framework agreement with Tanzanian Government' (ASX Announcement, 14 December 2021) <https://www.strandline.com.au/irm/PDF/f4cb9849-57a4-4a89-9120-92aff4d11dc3/FrameworkAgreementSignedwiththeGovernmentofTanzania>.

are breeding grounds for disputes, including in relation to capitalisation obligations and adjustments to participating interests, as well as procedural issues, which is why it is crucial for any investor entering into such an agreement to be able to rely on an effective arbitration clause. The difficulty faced in the Tanzanian context is the impact of the mining law revisions in 2017, which give Tanzania the right to cancel a mining agreement containing a dispute resolution clause applying foreign laws or selecting a foreign seat. This may have been overcome in the context of Black Rock by specifying that the seat will be the East African Court of Justice. The fact that both companies have used UK holding companies to develop the projects further suggests that they may seek to rely on the protections offered by the UK–Tanzania BIT in the event of future disputes, including the ability to refer disputes to ICSID. Thus, while much uncertainty remains following the 2017 mining reforms, the entry into these framework agreements may signal a thawing in the hostility towards mining investors and the use of international arbitration to resolve natural resources disputes in Tanzania.

Security issues, IHL and the impact on mining disputes

The economic harm caused by covid-19, estimated by one to be a loss of between US$37 billion and US$79 billion in output in Africa alone, appears to have increased tensions in many African states as more people are plunged into poverty than ever before.[11] From an arbitration perspective, in countries where there is armed conflict, host states generally have a duty to protect the physical integrity and private property of their residents and investors, although this may be difficult to achieve in remote or dangerous areas. Mining companies may rely on relevant provisions of their mining concessions or conventions to secure the unimpeded enjoyment of their mining rights. Foreign investors may also rely on the application of the FET and full protection and security standards, which are present in most international investment agreements currently in force. Full protection and security has been interpreted to mean that the state is obliged to take 'active measures to protect the investment from adverse effects' that 'may stem from private parties', including demonstrators and armed forces.[12] States have been held liable for failing to protect investors or their investments against private violence, for example, through the failure of police to protect an investor's

11 The World Bank, 'For Sub-Saharan Africa, Coronavirus Crisis Calls for Policies for Greater Resilience' (Web Page, April 2020) <https://www.worldbank.org/en/region/afr/publication/for-sub-saharan-africa-coronavirus-crisis-calls-for-policies-for-greater-resilience>.

12 Christoph Schreuer, 'Full Protection and Security' (2010) *Journal of International Dispute Settlement* 1, p. 1.

property from occupation and to respond adequately to violent incidents. A series of arbitral awards confirm the application of 'full protection and security' to investments in Africa.

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

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

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

Impact of Chinese investments on African mining disputes

For some time now, China has been Africa's largest trading partner, with Chinese foreign direct investment (FDI) to Africa increasing markedly from around US$75 million in 2003 to US$2.7 billion in 2019. According to the Center for Global Development, China's development banks (Exim Bank of China and China Development Bank) have provided US$23 billion in financing for infrastructure projects in sub-Saharan Africa between 2007 and 2020, which is double the amount

lent by banks in the US, Germany, Japan and France combined.[13] Interestingly, for the first time, China's investment in renewables infrastructure (including thermal solar, hydro, wind, biomass, geothermal and energy storage) has exceeded its investment in fossil fuel infrastructure.[14] While the West has lagged significantly behind China with respect to investment in Africa in recent years, the US may be looking to reinvigorate its relationships, with President Biden's election promise that he will 'renew the United States' mutually respectful engagement toward Africa' including by 'restoring and reinvigorating diplomatic relations with African governments and regional institutions, including the African Union'.[15] However, the extent to which the US re-engagement will have any impact on China's standing as the largest investor in Africa remains to be seen.

For low- and middle-income African countries, repayment of the vast loans provided by China are starting to become a significant problem. In such circumstances, governments may be forced to turn to alternative ways to repay their debts, such as through granting rights and concessions over valuable resource assets. The inability to repay debt will likely reinforce China's economic influence and control over vast reserves of key mineral resources on the African continent. This will likely include securing access to minerals necessary for the transition to renewable energy, including cobalt, copper, rare earths, graphite, bauxite and lithium. The desire to shore up supply of these critical minerals will undoubtedly lead to significant investment competition in states endowed with such resources, which in turn will likely drive disputes both among private investors and between investors and the host state.

One notable characteristic of Sino-African mining contracts over the past decade is the inclusion of commitments to develop or contribute to infrastructure development, as some agreements between African states and China or Chinese state-owned companies contemplate the provision of infrastructure as a means of payment for the resource. These arrangements increase the potential for disputes between foreign investors and host states that can arise not only from the development and operation of mining projects but also from the construction and operation of large-scale

13 Andrea Shalal, 'Chinese funding of sub-Sarahm Africa infrastructure dwarfs that of West, says think tank' (Web page, 9 February 2022) <https://www.reuters.com/markets/us/chinese-funding-sub-saharan-african-infrastructure-dwarfs-that-west-says-think-2022-02-09/>.

14 Ren21, 'Renewables 2021 Global Status Report' (Report, 15 June 2021) p. 17 <https://www.ren21.net/wp-content/uploads/2019/05/GSR2021_Full_Report.pdf>.

15 Biden Harris Democrats 'The Biden-Harris Agenda for the African Diaspora' (Web Page) <https://joebiden.com/african-diaspora/>.

infrastructure projects. The interconnection between access to mineral resources and infrastructure investments could also result in situations where host governments decide to terminate mining rights as a result of an investor's failure to deliver on its infrastructure commitments.

Diversity in African arbitrations

Finally, there has been increased focus by some arbitral institutions on achieving greater geographical diversity in arbitrations in recent times. According to ICSID's statistics report for 2021, arbitrators from sub-Saharan Africa represented only 4 per cent of new appointments, although that is a slight increase from the historical average of 2 per cent.[16] The vast majority of arbitrators continue to hail from Western Europe (43 per cent) or North America (20 per cent). The ICC has sought to ensure geographic diversity through its appointments to the ICC Court, with 13 per cent of its members originating from Africa, 26 per cent from Asia, 39 per cent from Europe, 4 per cent from North America, 15 per cent from Latin America and 3 per cent from Oceania for the 2018–2021 term. However, the same diversity has not yet been achieved when it comes to tribunal appointments, where appointments from a limited pool of arbitrators continues to be the norm in large-scale international disputes. It is likely the shift will need to be driven from the bottom-up, with practitioners and in-house counsel taking the lead to identify and nominate diverse candidates in international arbitrations with connections to Africa. This was recognised in the 'African Promise', launched by academics and practitioners in 2019, which seeks to improve the 'profile and representation of African arbitrators, especially in arbitrations connected to Africa'.[17] The African Promise has now been signed by over 300 signatories, pledging to ensure that African arbitrators are adequately represented on arbitrator rosters and lists of candidates for consideration by clients.[18] Another initiative being driven by practitioners and arbitrators is the African Arbitration Academy, which aims to provide training to arbitration practitioners from Africa in order to 'equip them with the right set of skills to succeed within the international arbitration

16 ICSID, 'The ICSID Caseload – Statistics: Issue 2021-2' (Report, 2022) <https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf>.

17 Arbitration in Africa, 'The African Promise' (Report, 2019) <https://researcharbitrationafrica.com/files/promise/An%20African%20Promise%202019.pdf>.

18 ibid.

community'.[19] It delivered its first Flagship Training Programme in 2019, and has developed the Protocol on Virtual Hearings in Africa in response to the pandemic, for which it won several awards.

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19 African Arbitration Academy, Mission Statement, available at: https://www.africaarbitrationacademy.org/.

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