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Getting to Yes: Negotiating Mining Investment Agreements During Difficult Economic Times - Focus on Africa

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March, 2014



Putting Contracts in Context

- Review and renegotiation of mining investment contracts is one of the principal trends arising from completed or proposed reforms across the African continent.
- Countries which have completed mining law reform over the last few years:

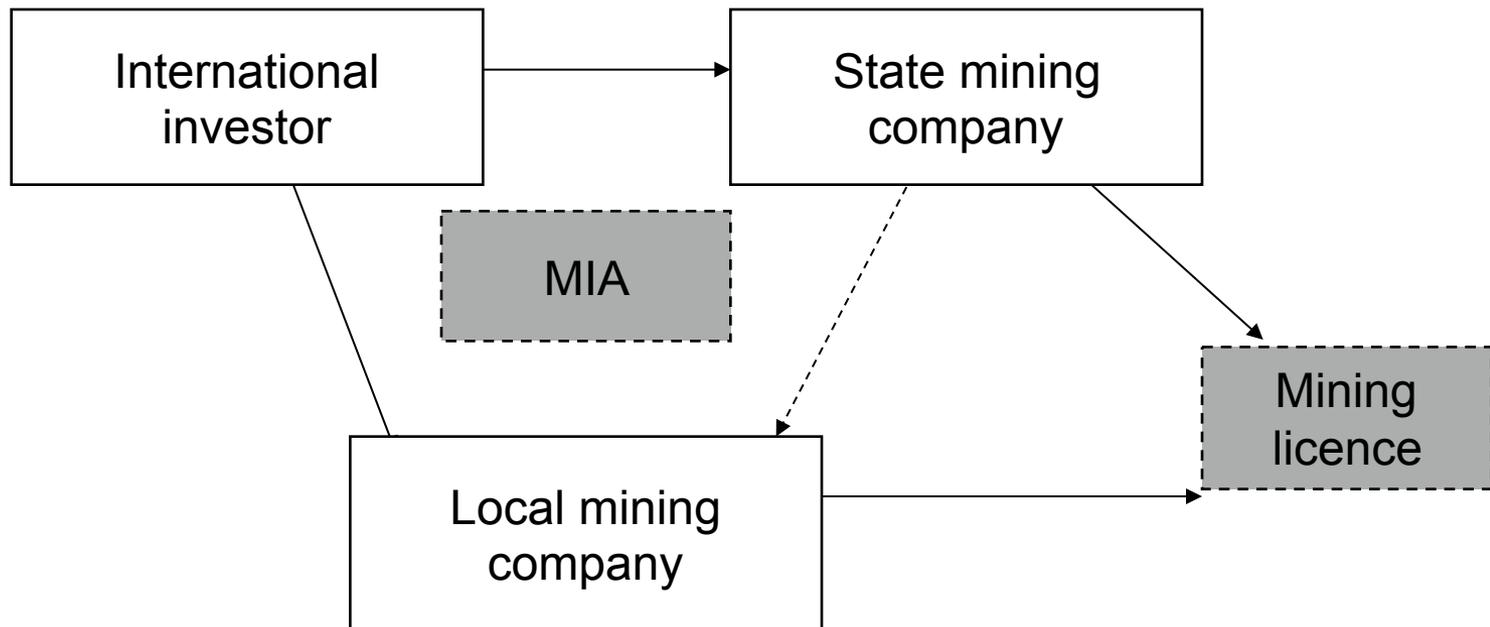
<ul style="list-style-type: none">○ Republic of Mali: (third largest gold producer in Africa)	Previous Mining Code: 1999 Current Mining Code: 2012
<ul style="list-style-type: none">○ Republic of Guinea (bauxite, iron ore (Simandou); gold)	Previous Mining Code: 1995 Current Mining Code: 2011 but not applied until April, 2013 (renegotiations of existing mining conventions)
<ul style="list-style-type: none">○ Democratic Republic of the Congo (copper, cobalt, rare earths, gold)	Current Mining Code: 2002 Currently proposing mining law reform Mining Contract Review: 2007-2010 (60 agreements renegotiated)

Putting Contracts in Context

<ul style="list-style-type: none">○ Republic of Cote D'Ivoire (gold, diamonds, iron ore, bauxite, manganese)	<p>Current Mining Code: 1995 Currently proposing mining law reform - several draft amendments to Code circulated. One of the proposed changes is a recognition of mining conventions.</p>
<ul style="list-style-type: none">○ Sierra Leone (gold, diamonds, rutile, ilmenite, bauxite, iron ore)	<p>Previous Mining Code; 1994 Current Mining Code 2009 Current law recognizes mining conventions and they exist for all large scale mining licence holders operating in country.</p> <p>The enactment of the proposed Extractive Revenues Imposition Bill would introduce a number of restrictions on agreements with a "prohibited revenue effect".</p>

What is a mining investment contract?

- Alternative names: “stability agreement”; “mining convention/ lease”
- Who are the relevant parties?
 - Government (sometimes through state mining company)
 - International investor
 - Local company holding exploration or exploitation licence



Bridging Expectations and Aligning Objectives

Host Government driven by:

- national, regional, local development objectives
- maximizing revenues
- maximizing ancillary economic benefits
- providing an investment climate which can attract future revenue streams while protecting communities and the environment

Mining Company driven by:

- obtaining a fiscal regime and resulting internal rate of return which are attractive to outside investors and allow for a financeable project
- stability
- investor perceptions of risk

Complicating Factors

- Government competencies and organization
- Political climate: national, local, regional, international
- Internal company dynamics
- Changes in underlying market conditions

Issues Considered in a Mining Investment Agreement

1. **Scope of operations under the MIA – exploration in addition to exploitation?**
2. **Development timeframe and key milestones**
3. **Infrastructure – will you need to build or can you use existing?**
4. **Fiscal package – period and form of stabilisation**
5. Community development, employment, education, housing and healthcare
7. Environmental Issues
8. **Exit and termination**
9. **Don't forget current political climate**

Scope of operations

- When do you enter into a MIA?
 - Usually in the late stages of exploration when degree of certainty
 - Considerations for different project stages

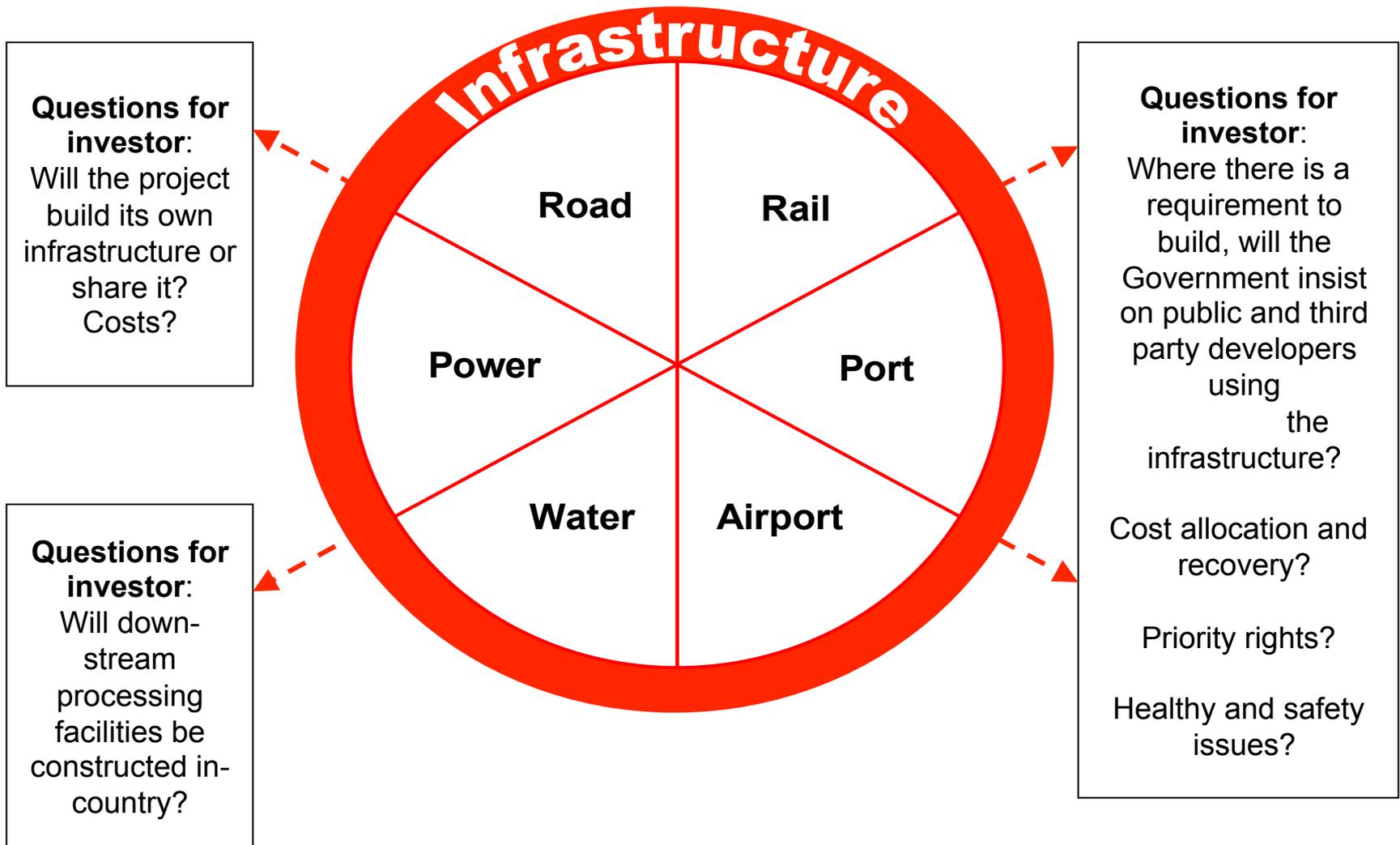


Pre-feasibility phase	<ul style="list-style-type: none">• Investor might require MIA earlier in process to give more certainty to project economics• Factor in the timing – negotiations can be protracted• Make sure terms cover exploration as well as development and mining• Is renewal or continuation of existing licence or licence area relevant?
Exploitation or development phase	<ul style="list-style-type: none">• Continued exploration rights might be relevant even at this stage• Technical consultants required to verify the licence area and MIA match up and input on technical requirements under MIA• Licence area to cover mine but also storage, tailings and infrastructure• Avoid disputes over mapping co-ordinates or third party claims

Development timeframe

- Government's position
 - Specific development milestones for each stage of project
 - Termination right for failure to reach milestone or general breach
 - Imposition of royalties as a penalty
 - Maintenance of production at an agreed or minimum rate
- Mining company's position
 - Greater the flexibility, the better
 - Minimum production levels mean can't ramp up or ramp down at will
 - Payment of minimum royalties will require funding if pre-commercial production
 - Avoid risk of termination for failure
 - Avoid being at the mercy of the Government generally over the timetable
 - Its leverage are approvals which are required later in the process (e.g. approval of feasibility study or mine plan)

Utilising the infrastructure surrounding the mine



Negotiating the fiscal package

- Typically the foundation of the MIA
- Approval or new law required?
- What are the options?
 - Stabilise a rate of tax or tax holiday?
 - Stepped royalty rates or taxes
 - Government equity – political & commercial advantages?
 - Compare terms with law and terms that apply to others
- Points for stabilisation clause
 - Period of stabilisation?
 - Scope – is it specific or general?
 - What is the position on enforceability?
 - Change of law risk
- Exchange controls
- Parent guarantee required?
 - Cost
 - Impact on project finance
 - Other form of financial assurance required?

What are the key fiscal terms?

- Royalty rates
- Income tax
- Turnover tax
- Rent resource tax
- Capital allowances
- Loss carry forward period
- Withholding taxes
- GST or VAT
- Import or export duties
- Capital gains
- Real property taxes
- Surface rents
- Government equity
- Signing bonus
- Other charges or ad hoc payments

Community development

- Social impact assessment / plan
- Committee for local community members
 - Impact of mine on local community
- Community funding minimum spend
 - Percentage of revenue or fixed amount?
- Important to have local “buy-in” to the project
- Beware of local and international laws on corruption/anti-bribery

Employment, education, housing and healthcare

- Mining company required to:
 - Provide level of education/training
 - Housing/healthcare to employees and their families; government officials assigned to project
- Employment targets
 - Targets for levels of employment of local citizens
 - Skilled and unskilled
 - Scholarships/training to “skill up” local workers
- Issues to consider include:
 - Anti-corruption and bribery
 - Costs of provision of level of education, training, housing and healthcare required
 - Collaboration with works unions/collective bargaining arrangements

Environmental

- What environmental laws apply to the mining project?
- What are the terms and conditions of environmental licences granted in respect of the project?
- May be dependent on approvals from different government departments (NB. sequencing)
- Environmental audits
 - When are they required?
 - Do you need a third party to conduct them?
- Closure management plan
 - Do you need a plan and when is it drawn up?
 - Does security need to be provided for the estimated costs of rehabilitation and what is the cost of providing that security (e.g. third party LOC)?
- Involvement of NGOs and their influence

Exit and termination

- Exit is a key aspect of control for Government

Change of control: Government's position

- Control the transfer or assignment of MDA/licence
- Limit the change of control (direct or indirect of mining company)

Change of control: mining company's position

- Agree circumstances when Government's consent to transfer cannot be withheld
- Negotiate level at which change of control occurs
 - Typically 50%
 - Some governments may seek to reduce this to 25-30% to capture minority investments

Termination rights

- Both parties will require termination provisions
- Government's right to terminate: need remedy periods; beware of a right for the Government to enforce transfer of all mining assets on termination for lower of fair value or depreciated book value

Current political and Economic climate

- You cannot negotiate a MIA in isolation!

During Periods of soft commodity prices and economic decline:

- Convey impact of softening commodity prices on project economics in as close to real time as possible.
- Adjustments to the financial model.
- Consider watering down stabilization clauses

Current Political and Economic Climate (contd.)

- What is the mining company's leverage?
- Political pressures
 - Government may be keen to attract international investment
 - Regime and legislative change – new government revisits MDA or existing government revisits terms following political / NGO pressure
 - Political instability/unpredictable policy
 - Currency fluctuations
 - External trade sanctions/civil unrest/war
- Understand who your counterparts are
 - Business, political affiliations/relationships
- When it all goes wrong
 - Sovereign immunity clauses
 - Choice of dispute resolution process
 - Enforcement of arbitral awards
 - Bilateral Investment Treaties

Conclusion: Getting to Yes

Mining reforms remain a challenging process, as their success depends on the country's capacity to maintain a delicate balance between a fair distribution of revenue among the various stakeholders, the growth of the local and national economy and the legitimate concerns of foreign investors, all issues negotiated in MIAs.

MIAs are never negotiated in isolation: the political and economic climates will have a significant impact on success or failure.

Both parties to the negotiations will require a range of technical and legal expertise.

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