KING & SPALDING

Africa *Bulletin*

May 2020

Foreword

We are pleased to introduce this edition of King & Spalding's Africa Bulletin. *Our firm has a rich history of providing the highest-quality legal services to our clients in relation to their transactions across Africa. Many of our lawyers allocate their time to deals and disputes in Africa, and other Africa-related work. Africa has been and remains a core part of King & Spalding's international offering.*

The following topics are covered in this issue:

- Structuring Investments Into Africa Through Mauritius to Benefit From Investment Treaty Protection
- Insights: Naana Frimpong and Ann Wyman of AfricInvest Discuss Recent Hot Topics in African Private Equity
- Overview of the New Algerian Hydrocarbons Law
- Eco, the West African Monetary Zone's New Single Currency

We hope that you find *Africa Bulletin* interesting, and we welcome any feedback you may have on this publication.

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INVESTMENTS

Structuring Investments Into Africa Through Mauritius to Benefit From Investment Treaty Protection

Introduction

Over the past few decades, through a series of sweeping reforms aimed at fostering a business-friendly legal and regulatory environment, Mauritius has cemented its place as a financial hub and gateway to investment in Africa and Asia. During this period, Mauritius has developed a robust network of double taxation agreements (DTAs) and investment promotion and protection agreements, otherwise known as bilateral investment treaties (BITs). While consideration of the former in tax planning is now a routine step in any cross-border investment transaction, analysis of the latter remains less systematic, and many investors may still be missing out on significant investment protections by forgoing investment structuring under BITs. Particularly in light of increases in capital inflow into Africa, foreign companies – especially those seeking to invest in potentially high-risk markets in Africa and sensitive sectors such as oil and gas and mining (but not limited to these) — should consider structuring their investment to ensure it is covered by an investment treaty. Mauritius is ideally placed in this respect due to its location, its favourable tax regime and its business-friendly environment.

I. Investment Structuring for Investment Treaty Protection Generally

Investment treaties often provide significant protection against unlawful State action (see below), especially for investments in high-risk jurisdictions and sectors for foreign investments (e.g., energy and mining). Investment structuring, or nationality planning, is the process by which an investor planning an investment in a foreign country evaluates all the investment treaties of that country to determine which treaties offer the most protection, and structures its investment to secure the greatest protection. This exercise is typically done in conjunction with structuring the investment for tax purposes, and a host State offering both tax efficiency and robust investment treaty protection is selected to channel the investment (usually by incorporating a special-purpose vehicle).

In May 2019, the Netherlands — traditionally a favoured jurisdiction for investment structuring due to its investor-friendly network of investment treaties and its tax appeal — announced a new Model BIT, which arguably excludes special-purpose vehicles from its scope. The Netherlands already announced that it would be renegotiating its BITs with certain countries, including Burkina Faso, Nigeria, Tanzania and Uganda.[1] More are likely to follow. As a result, structuring investments through Mauritius to benefit from Mauritius's BITs and DTAs is a good alternative to the Netherlands.

II. Structuring Investments to Benefit From Protection Under Mauritius's BITs

A. Mauritius's Strategic Initiative to Become the "Gateway" to Foreign Investment Into Africa

Beginning in the 1990s, Mauritius enacted a series of comprehensive legislative and regulatory reforms designed "to promote Mauritius as a reputed and effective trade and investment platform for the [African] continent."[2] As part of this initiative to position itself as a hub for foreign investment flows into Africa, Mauritius implemented significant legal reforms and sought to collaborate "with African States to leverage on the geostrategic position of Mauritius to drive investment into the continent."[3]

Specifically, Mauritius created a favourable tax environment for foreign investors by entering into a series of DTAs. To date, Mauritius has entered into DTAs with over 40 countries, including 16 with African countries.[4]

Mauritius also passed a series of laws to modernise its legislative and regulatory structures, among them the Investment Promotion Act 2000, Companies Act 2001, Anti-Money Laundering Act 2002, Business Facilitation Act 2006 and Financial Services Act 2007.[5] As a result of these initiatives, Mauritius experienced significant growth in foreign investment flows, particularly in cross-border investment between Mauritius and other African countries. Since 2012 alone, direct investment from Mauritius to Africa increased by 96% to US$27.9 billion as of June 2018, and investment from Africa to Mauritius increased by 115% during the same period.[6] Mauritius is also now the highest ranked country in the Sub-Saharan African region on the World Economic Forum's 2019 Global Competitiveness Report, which measures economic productivity and competitiveness, surpassing South Africa.[7]

A. Mauritius's Network of BITs

Mauritius also established a strong network of BITs. To date, Mauritius has signed 48 BITs, 28 of which are in force (10 with European countries; nine with Asian countries and the Middle East; eight with African countries – Burundi, Congo, Madagascar, Mozambique, Senegal, South Africa, Tanzania and Zambia; and one with Barbados). Mauritius also made it a strategic priority to expand its network of BITs with African countries, as demonstrated by the additional 19 signed BITs awaiting ratification, 17 of which are with African countries.[8]

In terms of substantive protections, Mauritius's BITs typically guarantee investors fair and equitable treatment, treatment no less favourable than the treatment afforded to investors from any other country, protection against expropriation without adequate compensation, and free repatriation of capital profits.

With respect to investor - State dispute settlement issues, while some of Mauritius's BITs (e.g. Swaziland, Mozambique)[9] arguably limit arbitration to cases involving expropriation and nationalisation, all other Mauritius BITs do not contain such a limitation and commonly provide for arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and/or ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Rules.

> *"Particularly in light of increases in capital inflow into Africa, foreign companies — especially those seeking to invest in potentially high-risk markets in Africa and sensitive sectors such as oil and gas and mining (but not limited to these) — should consider structuring their investment to ensure it is covered by an investment treaty."*

Mauritius is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[10]

C. Investment Structuring: To What Extent Is It Permitted?

1. Investment Structuring in Principle Is Permitted

Investment structuring (or restructuring) to benefit from BIT protection in principle is permitted. Tribunals have held that where the definition of investor in the treaty only requires the company to be incorporated or constituted under the laws of the home state to qualify as an investor– as do Mauritius BITs – it was not open to them to add other requirements into the text of the treaty (such as requirements relating to the nationality of the shareholder, ultimate control of the investor or real business activities in the home state).[11]

2. Two Limits to Investment Structuring

i. The Text of the BIT Excludes Investment Structuring

Some BITs define a protected "investor" as a legal entity that is not only incorporated in the home State but that also must carry out "real economic activities" in the home State and/or be held or controlled by nationals of the home State. Other BITs contain a "denial of benefits" clause that allows the host State to deny the benefits of the treaty to an entity that is ultimately owned or controlled by nationals of a third State. To our knowledge, most Mauritius BITs do not contain such restrictive definitions of investor,[12] and none contain a denial of benefits clause.

ii. The Timing of the (Re)Structuring

An investor, however, must consider the timing of any restructuring; some tribunals have refused to extend treaty protection to investments restructured after a dispute between the investor and the host State had already arisen or, in a handful of cases, when such dispute was deemed sufficiently foreseeable by the investor. Tribunals considered that such belated structuring was an "abuse of process" and declined jurisdiction.[13] Investors are therefore advised to structure their investment for BIT protection as early as possible, ideally at the time they make their investment.

In conclusion, foreign investors looking to invest in Africa should consider structuring their investments through Mauritius to take advantage of Mauritius's network of robust tax and investment treaties, which allow for such structuring.

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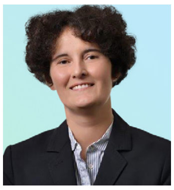

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3 Id.

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[5] OECD Investment Policy Reviews: Mauritius 2014, at 70-74 (June 23, 2014) (OECD Investment Policy Reviews), available at *oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en#page8*.

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[9] Agreement Between The Government of The Republic of Mauritius and The Government of The Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments, Art. 8 (not yet ratified); Investment Promotion and Protection Agreement Between The Republic of Mozambique and The Republic of Mauritius, Art. 8 (Feb. 14, 1997).

[10] OECD *Investment Policy Reviews*, supra note 5, at 97.

[11] See the salient case Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (Sept. 7, 2006), 241; and more recently, Renée Rose Levy and Gremcitel SA v. Republic of Peru, ICSID Case No. ARB/11/17, Award (Jan. 9, 2015), 184, and Charanne B.V. and Constr. Invs. S.A.R.L. v. Spain, SCC Case No. 062/2012, Award (Jan. 21, 2016), 417 TheGlobalCompetitivenessReport2019.pdf.

[12] But see Mauritius-Switzerland BIT, Art. 1(3) (Nov. 26, 1998) (defining “investors” as “legal entities, including companies, corporations, business associations and other organisations, established under the law of that Contracting Party and having real economic activities in the territory of the same Contracting Party”).

[13] Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), 113; Pac Rim Cayman LLC v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (Jun. 1, 2012), 2.96-2.99 (defining foreseeable as “as a very high probability and not merely a possible controversy”). *First published in MCCI Arbitration & Mediation Centre, MARC Insights, Issue 1, December 2019.

PRIVATE EQUITY

Insights:

Naana Frimpong and Ann Wyman of AfricInvest Discuss Recent Hot Topics in African Private Equity

Ann, please tell us about your background, how you came to join AfricInvest and the strategic focus of the firm.

I have a background in macroeconomic research and capital markets, and have been in the professional/financial services world for a long time. I spent a significant portion of my career working in sovereign capital markets at Citigroup and Nomura, running their Emerging Markets Research practices in Europe. This included a period of time with a focus on advising international hedge funds and pension funds on their investment strategies in fixed income and currency markets. Approximately seven years ago, I joined AfricInvest and now I am in a role that involves some macroeconomic research with more of a focus on long-term macro trends. In private equity, investment strategy cannot change over a very short time frame, as with capital markets investments, so you need to strategize around macro risk. I also spend a lot of time on client relations issues and on fundraising. In sum, I wear multiple hats, but I spend a considerable amount of time discussing African private equity in general with potential investors and discussing the ways in which AfricInvest in particular can invest their money to provide attractive returns while achieving impact over a long-term horizon.

AfricInvest has one of the highest numbers of successful exits in the African private equity space. What do you think has been the recipe for this success in a market in which it can be difficult to operate?

There are a couple of factors that contribute to the success that the firm has had in exiting. First and foremost, at the inception of every investment, the investment officers responsible for the deal are already expected to be planning an exit strategy—namely, the vehicle of exit and the value bridge that he or she will create over time.

Second, success builds success. The more successful exits we have and the more experience we have identifying opportunities and capitalizing on them, the more options we are able to conceive concerning how and when to exit. For example, we have already had many experiences exiting to strategic investors. Thus, our investment team already has the know-how about how best to approach these types of investors. The reality is that when you have had practice with exiting, it makes you nimbler.

Third, we have some of the most experienced teams operating in Africa. Not only do we have long-standing teams with a lot of localized expertise, we also have a very large team, which is very helpful in sharing information for identifying exit opportunities. We are also able to look at a wide range of types of exit. Thus, when a company is ready for exit, our perspective is not simply "IPO or bust." Rather, our team has the depth and experience to look at many other alternatives. Typically, as a result of the depth and size of our team, we also have a much wider network of potential buyers when the time comes to exit.

Fourth, reputation is another important factor. Reputation builds over time, and we have tried to ensure that when buyers purchase an asset from AfricInvest, they are comforted that it has been well built. Ensuring our reputation remains strong can also help to generate additional opportunities. We often remain on the boards of our portfolio companies well after exit, and sometimes new buyers are comforted by that type of long-term investment.

In summary, I think our success with exits is due to a lot of different factors, but ultimately, much of it stems from our focus and our experience.

One often hears of the difficulties that African-focused PE firms have in raising capital, as compared with their peers in other parts of the world. What do you believe are the key challenges for investors looking to invest in Africa?

The nature of the obstacles to investment changes depending on whom you are asking. Sometimes the challenges to investment are at the macro level. For certain investors, the projected returns do not justify taking the perceived risk of investing in Africa. For example, many large institutional investors, when assessing their allocations, choose not to invest in emerging markets at all because they do not feel that refraining will cause them to miss out on a high return opportunity, especially when it would be such a small portion of their overall portfolio. Our approach with these investors is to address both sides of the issue. First, with respect to perceived risks, we try to help these investors get comfortable that risks in Africa are not so different from the risks found in other countries. For example, currency fluctuations happen in other parts of the developed world and not just in Africa or just in emerging markets. We explain the ways in which we manage currency risk through our portfolio structuring, with an investment strategy that diversifies and lessens risk considerably. At AfricInvest, we try to diversify risk by investing not only in companies in many different countries, but also in companies that have regional businesses, and we focus on exports. In other words, our revenue stream is from multiple countries, ensuring that the currency risk is spread across many countries.

The collapse of the Abraaj Group has not helped in reassuring investors concerned about investing in emerging markets. Our response has been to remind them that, as with any private equity investment, Limited Partners should engage in thorough due diligence. We believe that the demise of Abraaj had more to do with the individual fund manager than with a wider regional issue. As a company, we are engaging in heavier operational due diligence since it is important that any potential investors feel comfortable that we are addressing the risks they perceive as being part and parcel of their investment.

In addition to perceived risk, we also spend time discussing our track record and projected returns with investors. African PE has historically had limited access to return enhancement tools afforded to developed markets funds (e.g. leverage, recycling), but this is changing. We believe that such tools, as well as important opportunities for growth and the opportunity to capitalize on our experience, will allow us to make our historically strong returns even more attractive.

So, in summary, our approach is to convince investors that it is possible to diversify enough so that you can minimize the macro risks present in Africa and also to demonstrate to investors that it is worth taking the risk for the returns. And of course, it is important to demonstrate to all these investors that you have the proper institutional framework, compliance and governance structures to ensure the safety of their investment.

Until now, Development Finance Institutions have dominated the LP space for African PE. There has been increasing interest in African investments from institutional investors such as pension funds, insurance companies and endowments. For example, the Chicago Public School Teachers' Pension and Retirement Fund and the San Francisco City & County Employees' Retirement System all have pledged to invest billions of dollars in Africa. In your experience, how significant has this broadening of the LP pool been in Africa? What percentage of LPs investing in Africa are institutional investors, and what vehicles are typically being used to make these investments?

In my experience, we have recently seen more interest from the U.S. than in the past. However, what is driving these investments is, I think, an interesting question. For a number of large U.S. pension funds, it is simply a realization that there is a whole continent that they have not touched. And if they can easily put hundreds of millions of dollars into, for example, niche-strategy developed market vehicles, then it begs the question why are they not able to deploy some of that capital in a whole continent?

The reality is that there are big opportunities in Africa, and some of the large pension funds are starting to catch on. It is also worth noting that the reason this may be happening, particularly from the U.S., is that there may be a growing openness from these U.S. pension funds to explore new opportunities, particularly in Africa. For example, the United States Agency for International Development (USAID) in partnership with, among others, the National Association of Securities Professionals has set up a program called MiDA (or Mobilizing Institutional Investors to Develop Africa's Infrastructure) in an effort to bring U.S. pension funds to Africa. Most pension fund managers have never been to Africa. And the reality is that it is hard to get your head around the idea of this giant continent as an investment opportunity, especially if you have never been there.

Another thing that is happening is U.S. pension funds are talking to African pension funds and they are putting their heads together to share ideas. This exchange of information is happening more and more. Local African pension funds are increasing their knowledge about asset allocation, about how to think about expanding their universe of investments, about how to invest in alternatives, including PE. The fact is that African pension funds know how to invest in Africa but have limited experience investing in alternatives, while the reverse is true for U.S. pension funds. Thus, there is a lot of opportunity for knowledge exchange.

These pension fund investments into Africa are organic and take time to materialize, but I think they are on the right path. Increasingly, we are seeing these funds setting aside resources for investment in Africa.

However, they often still have to do a fair amount of internal convincing, for example, ensuring that the trustees and other stakeholders are comfortable.

Regarding the question about the vehicle of investment for these local pension funds, investment funds (versus direct investments) are the most natural way to go. Making direct investments can be quite tricky and hard to manage, especially in terms of creating a diversified portfolio. Fund of funds is another natural way to make these types of investments in Africa, but questions can arise about costs, particularly management fees.

You mentioned that African pension funds do not have a lot of experience investing in PE. And we often hear that one key to unlocking significant capital for PE in Africa is to convince conservative African governments to invest pension fund assets in private equity funds. Do you agree? Of the institutional investors that are making investments, what proportion of those investments are from Europe or the U.S., and what do you think needs to be done both to develop and to encourage greater participation by African institutional investors?

We are lucky enough to count ourselves as one of the few PE firms that have raised money from African pension funds. This is in part a result of the fact that success begets success. The more these pension funds see that we are able to obtain good returns for their pensioners, the more often they invest with us. However, we are still continuing to actively engage in efforts to raise awareness and spread the word about the benefits of investing a portion of pension assets in PE.

We are proactive about talking to trustees and boards about these opportunities. For African pension funds, it is just getting them comfortable with African PE as an asset class so that they can make an allocation or ultimately multiple allocations to PE. It is worth noting that we have also had to address the "Africa" concern from African pension fund managers. In other words, in some cases we have found that African pension funds have been more comfortable with funds that invest partially in European countries and not only within Africa. We have been able to address some of that concern because one of our funds invests half of its assets in France (in companies with an African link) and the rest in Africa.

AfricInvest recently entered into a joint venture with a company that operates in the venture capital space (Cathay Innovation). The lack of significant deal flow in African PE has often been a criticism leveled by fund managers. Was this what prompted your collaboration with Cathay, and if so, do you foresee this as the trend going forward—that successful firms will have to engage more proactively in efforts to prepare a pipeline of good deals?

The reasoning behind AfricInvest's collaboration with Cathay was not actually to address deal flow concerns. Rather, the partnership was aimed at combining our geographically diverse and compatible efforts in the venture capital space. Cathay has strong relationships with a large network of innovative companies in Europe, Asia and the U.S., some of which see an opportunity to develop and grow in Africa. It is through such a network that we may uncover interest from a rideshare company that wants to grow its business in Africa, for example. The impetus for this collaboration was really to expand the network of potential deals in that early stage space. In so doing, the fund is helping to bring business models that have been successfully used elsewhere in the world and finance innovative efforts to adapt those models to the African context.

With respect to the other part of your question—whether there are enough companies moving from early stage to mid-cap to feed the larger PE funds—in our experience there are plenty of deals at both stages. Typically, it is just a matter of finding those deals and agreeing on a suitable valuation. There are many opportunities on the continent that simply are not getting enough financing. While AfricInvest has historically had some single-country funds that have invested in early stage companies, prior to the Cathay AfricInvest Innovation Fund, we never took a pan-African approach to early stage investments. We felt that the ecosystem was simply not ready for the typical 10-year fund structure for investments, as the time horizon was not adequate. However, now the environment in Africa is ripe for early stage investment, and it is possible to have an investment timeline that mirrors more traditional PE. But we had to wait almost two decades for the environment to be right for that. And this opportunity to invest in early stage companies—which by nature is a different investment approach—is not being met by traditional PE funds, which presents an opportunity.

Even in the mid-cap space, there are plenty of opportunities, and a fund's ability to capitalize on them depends on finding the right investment strategy. Our approach has always been to create a strong pipeline of deals, and to do so it is important to have boots on the ground. We have over 75 professionals, more than half of whom are out in the field sourcing deals. Firms with alternative structures (i.e., largely in Europe, with a fly-in/fly-out approach) will naturally be more dependent on deal flow through intermediaries, but we think the most attractive opportunities are sourced through our own network, and firms prefer AfricInvest for its local presence and network across the continent.

What effect, if any, do you believe Brexit will have on the African PE space? In particular, what effect do you think it will have on deal flow, the ability to add value and the ability to successfully exit?

Frankly, I am not so sure Brexit will have a huge impact on the African PE industry. Perhaps I am being too positive in my outlook, but I do not see it as having much of an effect at all. Should Brexit hit as hard as some people are suggesting it might, the reality is that the UK corporate sector has long-standing ties with other European countries. It might be a natural step for some companies to look more toward Africa than they have in the past. We have seen some of this happening already with some of the UK chambers of commerce focused more on building commercial relationships and business ties with Africa—the recent UK-Africa Trade Summit was one important example of this effort. Perhaps over the next five to 10 years, there may be an even closer relationship generally between the corporate sector in the UK and the corporate sector in Africa. In the PE space it may take some time before there is any measurable change. For example, today AfricInvest is the only African PE firm that is a member of the British Venture Capital Association, and there are still relatively few UK-based LPs in the African PE ecosystem. The UK's development institutions, such as DFID and CDC UK, could play an important role in bringing attention to African PE opportunities, and this just may fall on more open minds in a post-Brexit world.

Another recent topic in the news is the African Continental Free Trade Agreement (ACFTA). There remains a lot that must still happen before the agreement will be operating at or near its full potential. Once fully operational, what impact do you think this will have on deal flow or on the ability to create strong portfolio companies?

Signing up for ACFTA was quite an important achievement for the continent; however, implementing it, negotiating line by line which goods are tariff-free, what the enforcement mechanisms are, etc.—will be quite another matter. The devil is very much in the details. I think within a five-to-10-year horizon is when we will be able to assess how well the agreement is faring. Until then, I think we will be putting the cart before the horse if we anticipate that its signing will usher in an era of rapid increases in trade.

Currently intra-African trade is shockingly low, especially when compared with Europe and Latin America. Less than 20 percent of trade in Africa (approximately 18 percent) is with other African countries. If at a minimum ACFTA can breed awareness of the need for increased intra-African trade, that will already be valuable. The increase does not have to be significant—we do not have to become a United States of Africa to realize a net benefit. There are some regions on the continent that already see the value of these types of trade relationships – for example, East Africa and Francophone West Africa. There has to be an effort to sensitize leadership across the continent to the fact that increased intra-African trade has positive economic benefits. This will be a challenge, especially because this message is a little out of sync with where the rest of the world has been going—especially in the U.S. and the UK. And it is important to recognize that there will naturally be some countries that benefit more from a continental trade deal. The reality is that the more-industrialized countries will tend to do better. All the same, even an incremental improvement in intra-African trade will be better (and not worse) for the continent.

Assuming ACFTA is even marginally successful, its benefits to African PE likely depend on the strategy of the fund manager. At AfricInvest, there will be direct benefits to our business model. Since we are in the mid-cap space, there is a limit to how big a company can be when it is within just one country. We need our portfolio companies to be able to expand to other markets. Thus, the more that governments are open to free movement of goods, the easier it is for us to grow the type of companies we want to grow and create the value we want to create. You can see this already in East Africa and Francophone Africa, where regulations permit an investor to buy a bank in one country and open up branches in another country. The reality is that it is much easier for investors if the policy makers across a region are speaking the same economic language.

In the last few months, COVID-19 has upended industries and markets around the world. How do you anticipate that this new global threat will impact African Private Equity in the short- and long-term?

In the short-term we are focused, like many other companies around the globe including in the African PE space, on securing the welfare, safety and security of our teams, while at the same time ensuring business continuity. Thus, we have put in place the means to ensure that our teams, who are spread across our nine offices, are able to work from home while having regularly scheduled group meetings and updates. At the same time, our teams have remained in close communication with all our investees regarding the COVID-19 outbreak and its current and potential impacts. In particular, in our discussions with our portfolio companies, we have been specifically focused on safety and HR matters, cash forecasts, and potential areas of impact such as supply chains, logistics, commodity prices, inventory monitoring, demand for goods and services, collection, and (when appropriate) financial markets. We have asked all our portfolio companies to implement cuts on their OPEX and delay any CAPEX until we have more visibility on the reach and scope of this crisis.

We have also encouraged companies to begin to plan for how and when they may restart more normal operations in the aftermath of the crisis.

In the long-term, however, while Africa will certainly face many negative impacts from the COVID-19 crisis, there are a number of opportunities that may emerge. First, in Africa, unlike in PE geographies that rely more on commercial funding, the PE ecosystem is supported by DFIs. This means that at a fund level, the financial and technical support for investee companies in Africa may be more readily available in the midst of this crisis than it would be in other PE geographies. For example, we at AfricInvest are currently working with a number of DFIs to create a relief facility that will assist companies in the face of the crisis. At a sector level, we believethat a number of industries will likely provide for interesting opportunities over the coming year, including in the healthcare and education sectors and particularly with respect to online services. Moreover, as more international companies seek to reduce their reliance on East Asia and China, we believe that there will be opportunities for African companies to increase their involvement in international supply chains. We also expect the current downturn will lead to lower valuations in many sectors, which should have a positive impact on our investment activity.

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ENERGY AND RENEWABLES

Overview of the New Algerian Hydrocarbons Law

Introduction

After 15 years of foreign upstream oil and gas investment in Algeria being regulated by law No. 05-07 of 28 April 2005, as amended ("Law 05-07"), a new hydrocarbons law was published on the eve of 2020 — law No. 19-13, dated 11 December 2019, relating to hydrocarbons activities (the New Law).

1. Setting the Scene – Background of the Publication of the New Law

1.1. Historical context – from Law 86-14 to Law 05-07

Following the nationalisations of 1971, structured involvement of international oil companies in Algeria began under law No. 86-14 of 19 August 1986, as further amended (Law 86-14). This system offered three different investment vehicles: the association (incorporated joint venture with the Algerian national oil company, Sonatrach), the production sharing contract and the risk services contract (both types of contract also entered into with Sonatrach). In practice, though most investments were made on the basis of production sharing contracts, which appeared to be the preferred option. The old system produced 20 years of growth in upstream oil and gas investment, a growing number of foreign companies operating in Algeria, and an increase in discoveries and production.

Towards the end of the 1990s, given the growing competition among other countries around the world to attract foreign oil companies, the decade-long civil unrest in Algeria, the volatility of oil prices, growing internal demand and existing long-term gas export commitments, coupled with the alarming declining discovery rate, the government decided to issue a new law which was intended to boost the attractiveness of the Algerian oil and gas regime. Despite significant opposition, the New Law — 05-07 — was adopted, and it completely changed the hydrocarbons regime in Algeria. Sonatrach lost its regulatory prerogatives – which were mainly transferred to two independent agencies, ALNAFT and ARH – and was supposed to become a purely commercial oil company, competing for blocks like any other international oil company (IOC). The old production sharing system (as well as the association or the risk services contract) was abandoned in favour of a unique type of contract, the exploration and/or exploitation agreement (EEA), which was in fact more akin to a concession and whose fiscal terms were also completely overhauled to more closely resemble a concessionary tax system. Moreover, Law 05-07 was initially designed to put Sonatrach in a similar position to other IOCs; but in 2006, its fundamental principles were altered with the introduction of a compulsory minimum 51% participating interest for the benefit of Sonatrach.

1.2. Law 05-07, a law that has not lived up to expectations

During the 15 years that Algeria was under the regime of Law 05-07, the country held four exploration rounds, with limited success. In the 2008 round, only four blocks were awarded out of the 45 offered; in 2009, only three out of 10 blocks offered; in 2011, only two out of 10 offered; and in 2014, only four out of 31 offered. Moreover, no substantial new discoveries were made, and a decreasing interest of midsize and major oil companies has been noted over the past few years.

Even the amendment of Law 05-07 in 2013 — which introduced new incentives improving the attractiveness of the national mining domain with the aim of intensifying the exploration effort and, as a result, of discovering new conventional and unconventional reserves — did not make a difference.

"During the 15 years that Algeria was under the regime of Law 05-07, the country held four exploration rounds, with limited success."

This would not have been alarming had Algeria's economy not been largely reliant on hydrocarbons and had it effectively encouraged investment in other sectors. But for decades, hydrocarbons have accounted for more than 90% of the country's exports (approximately 93.6% in the first quarter of 2018). The economic contribution of the hydrocarbons sector has substantially decreased with the fall in oil prices that began mid-2014. As an illustration, hydrocarbons constituted around 60% of the country's revenues in 2014, but this figure fell to 47% in 2016 and to around 40% in 2018 and 2019. This decrease has had significant consequences for the economy, which were exacerbated by constraints linked to the sector (maturing fields) and the unattractiveness of the latest oil and gas upstream bidding rounds.

The New Law was announced at a time when the country, in a critical economic situation, was also facing political turmoil: Since February 2019, civil uprisings against the regime have forced President Bouteflika to resign and instigated new elections. The draft law was kept confidential, and in the absence of a proper consultation process, the public was left guessing as to the content of the amendments. Since the publication of the New Law at the end of December, the mystery has been lifted at least on the main principles of this new legal framework (see para. 2 below), although several topics deserve clarification. These remaining issues should be addressed in the implementing regulations which are yet to come (see para. 3 below).

2. Overview of the New Law

The New Law is generally more precise, simpler and more flexible, in particular by providing different contractual options and more room to contractually negotiate certain terms such as the sequencing of the different exploration phases, the financing and the sharing formula.

2.1. Main stakeholders

The main stakeholders involved in oil and gas activities remain the same as under the previous regime, with some adjustments to the allocation of powers between the minister in charge of hydrocarbons and the existing hydrocarbons' regulatory agencies.

Minister in charge of hydrocarbons

The minister is entrusted with the general role of defining and overseeing the implementation of the Algerian hydrocarbons and energy policy. The Minister is mainly involved in the mining titles granting process, the approval procedure for hydrocarbons contracts and their amendments, exploitation authorizations, and pipeline transportation concessions.

National Agency for the Development of Hydrocarbon Resources (ALNAFT)

ALNAFT is the holder of the mining titles and maintains its role of regulator as under Law 05-07. ALNAFT is responsible for managing the upstream mining domain, which includes issuing licensing rounds and evaluating bids for the selected perimeters, granting exploration and production rights (through specific administrative deeds), approving development plans, approving transfers of interests, etc. ALNAFT is no longer a party to the upstream oil and gas contracts, which are now entered into only between Sonatrach and one or several contractors (see para. 2.2.2.)

Hydrocarbons Regulatory Authority (ARH)

As under Law 05-07, ARH assumes a regulatory role, mainly with respect to technical issues and the control of the due compliance with the provisions of the law. The New Law has strengthened ARH's functions concerning transportation tariffs; third-party access and health; safety and environmental regulations.

Sonatrach

Sonatrach is the national oil company, which may develop oil and gas blocks either alone or with IOCs. Although it has, as under Law 05-07, the role of a purely commercial company which competes with other IOCs both in Algeria and elsewhere for acreage, Sonatrach continues to benefit from certain preferential rights and treatment.

2.2. Award of hydrocarbons' interests

2.2.1. Ownership of Hydrocarbons

All hydrocarbon resources remain the property of the state until such time as they are extracted in accordance with the provisions of Algerian law and the specific requirements detailed in the relevant Upstream Concessions and Hydrocarbons Contracts (detailed in para. 2.2.4 below).

2.2.2. Contractual Framework – Upstream Concession/ Hydrocarbons Contract and "Acte d'Attribution"

The State grants the right to explore and develop reserves to ALNAFT, through the award of mining titles. Upstream oil and gas activities under the New Law can be carried out either:

- by Sonatrach alone, under an "Upstream Concession" [Concession Amont] granted by ALNAFT, as the holder of the mining title (where Sonatrach can however, entrust the operatorship to a third-party operator); or
- by Sonatrach and one or several IOC(s), under a "Hydrocarbons Contract" [Contrat d'Hydrocarbures]. The New Law reinstates three types of "Hydrocarbons Contracts," as under Law 86-14, whereas Law 05-07 provided only for EEAs. The Hydrocarbons Contract will operate under the umbrella of an administrative deed named "Acte d'Attribution," granted by ALNAFT to Sonatrach and the IOCs. The cocontracting entity(ies) to a Hydrocarbons Contract shall be selected through a public tender process organized by ALNAFT, or through direct negotiations with Sonatrach (the Upstream Concession is then terminated and replaced by a Hydrocarbons Contract). As under Law 05-07, tenderers will still have to be pre-qualified.

The Upstream Concessions and the Hydrocarbons Contracts themselves and any amendments thereto (except for changes of names, transfers between affiliates and corrections of material errors) must be approved by a decree taken by the Council of Ministers and published in the Algerian Official Gazette.

Sonatrach and the IOC(s) are also required to agree in advance to the terms of a joint operating agreement, which will govern the respective rights and obligations of the parties.

Whilst this overview of the new Algerian hydrocarbons law focuses on the rights awarded under Concession Agreements and Hydrocarbons Contracts, it should be noted that the New Law also provides for a grant of more limited rights in the form of a prospecting licence.

2.2.3. Term of the rights awarded

The New Law no longer distinguishes between conventionals and unconventionals: The term of the Upstream Concessions and the Hydrocarbons Contracts, for both conventional and unconventional hydrocarbons, is set at 30 years, including an exploration period of up to seven years (which could be extended to nine years) and an exploitation period. The term can be extended for a maximum period of 10 years.

The New Law does not provide any details of the various phases, with the conditions for moving from one phase to another being left to the contracts and to negotiations.

2.2.4. Contractual structure of the Hydrocarbons Contracts

There are three types of Hydrocarbons Contracts to be entered into between Sonatrach and the IOC(s):

(i) Partnership Agreement [Contrat de Participation]

- The split of the participating interest shall be at least 51% for Sonatrach and a maximum of 49% for the IOC(s).
- The ownership of hydrocarbons shall pass on to the parties at the measuring point.
- It is not clear whether any specific requirements regarding the form of the partnership will be imposed (e.g. incorporated or unincorporated partnership, requirement for the IOC to set up a branch in Algeria).

(ii) Production Sharing Contract (PSC) [Contrat de partage de production]

- The contract shall set the terms relating to the sharing of production and cost of oil, including the priority order for the recovery of petroleum costs. The IOC(s)' share of production for cost recovery and net remuneration shall not exceed 49% of the total production.
- The ownership title over hydrocarbons produced shall pass on to Sonatrach at the measuring point, and Sonatrach shall then transfer its share to the IOCs at a delivery point to be agreed upon, which would most likely be FOB for export. The IOC is free to dispose of its share of production in reimbursement of oil costs (including provisions for abandonment costs) and its remuneration.

(iii) Risk Services Contract (RSC) [Contrat de services à risque]

- The IOC(s) shall act as mere service providers to Sonatrach. The contract shall define the calculation mechanisms for the recovery of petroleum cost and the remuneration of the IOC.
- The IOC(s) shall be paid in cash. In any event, the IOC(s)' net remuneration, after cost recovery, shall not exceed 49% of the total value of the production.
- Sonatrach shall have ownership title over all hydrocarbons produced under an RSC.

Concerning the financing obligations:

- In the Partnership Agreement, the financing obligations shall be proportional to the participating interests, with a possibility for the IOC(s) to carry Sonatrach's share during the exploration period; and
- In both the PSC and RSC, the terms relating to the financing of upstream operations shall be set out in the contract (the principle being that the IOC(s) shall bear the financing costs, with an option for Sonatrach to participate).

> *"There are three types of Hydrocarbons Contracts to be entered into between Sonatrach and the IOC(s)."*

As to the ownership of the facilities at the expiry of a Hydrocarbons Contract:

- In the Partnership Agreement, the parties shall keep the ownership over the facilities for which ALNAFT has not requested the transfer of ownership and all the facilities and equipment which are not ancillary to the perimeter; and
- Under both the PSC and RSC, the facilities built up for the performance of the contract shall belong to Sonatrach (and possibly be transferred to ALNAFT at the end of the contract, upon request).

2.3. Transfers

Transfers are defined as covering both assignment of interest and changes of control. Any transfer would trigger (i) ALNAFT's prior approval within 90 days (however, the law is silent on whether a lack of response from ALNAFT within the 90-day time frame would be deemed an approval), and (ii) Sonatrach's pre-emption right within 60 days (no deemed waiver appears in the law, however). In the case of a change of control, the minister in charge of hydrocarbons shall have three months to decide whether this transaction is "incompatible" or not with maintaining the participation of the relevant IOC in the Hydrocarbons Contract. If the minister decides that it is incompatible, the participating interests shall be transferred to Sonatrach or the other contracting parties, subject to a "fair compensation."

The transfer process under the New Law appears to be complex and to contain an unnecessary catch-all approval structure which limits exit rights for foreign investors.

Any transfer is subject to a 1% non-deductible tax on the transaction's value (except for "non-commercial" transfers between affiliates).

2.4. Tax regime

The tax regime under the New Law is in essence the same as under Law 05-07 (albeit with lower rates), with the exception of one new tax: the tax on the foreign co-contractor's remuneration.

Both the international investors and Sonatrach are subject to the same tax treatment. Under the New Law, upstream oil and gas activities are subject to the following taxes:

Surface Tax – which is due annually and calculated on the basis of a fixed rate per square kilometre, for each phase of the project. The rate of the surface tax is subject to an annual indexation set by ALNAFT based on the Algerian consumer price index (CPI). It is non-deductible for the calculation of the hydrocarbon tax and the income tax.

Hydrocarbons Royalty – which is due on a monthly basis and calculated at a rate of 10% of the production value (whereas under Law 05-07, the rate varied from 12% to 20% for production above 100,000 boe/d and there were multiple rates depending on the geographical zone and the production level). The production value is calculated by multiplying the quantities by the "Reference Price," minus transportation cost, natural gas liquefaction costs and fractionation costs for LPGs. It is deductible, for the calculation of the Hydrocarbon Tax and the Income Tax.

Tax on Hydrocarbons Revenues (THR) – which is the equivalent of the former *taxe sur les revenus pétroliers* under Law 05-07. It applies on the value of the annual production (as calculated for the Hydrocarbons Royalty) minus certain deductions, including the Hydrocarbons Royalty, annual investment tranches (with a 25% annual amortisation), operating costs, abandonment provision, IOCs' remuneration and carry forward. The rate of the THR varies from 10% to 50% depending on an R factor adjustment (which is in effect an internal rate of return). It is deductible for the calculation of the Income Tax (IR).

Income Tax (impôt sur le résultat) – which is similar to a large extent to the former ICR, under Law 05-07. It is a 30% annual tax applied to the taxable income, which is calculated after deducting depreciation rates set forth under Algerian law and the exploration costs. Both Sonatrach and the IOC(s) shall pay their respective Income Tax.

Tax on Foreign Partner's Remuneration – this tax did not exist under Law 05-07 (which was akin to a concessionary regime), but did exist under the old Law 86-14. This tax is payable by the IOC that is a party to a PSC or an RSC. It applies at a 30% rate on the gross remuneration of the IOC, but allows the IOC to obtain a tax credit.

Flat Rate Royalty on Early Production – it is a monthly payable tax at a rate of 50%, which applies to the value of an early production.

Flaring Tax – there is a prohibition on flaring, as under Law 05-07. However, where a specific derogation is granted, a non-deductible flaring tax applies at a rate of DZD 12,000 per thousand cubic meters, which is revised annually based on the Algerian CPI.

Water Tax – a non-deductible water tax applies, which is currently set at DZD 130 per m^3 of water extracted, and is revised annually.

Transfer Tax – a 1% transfer tax on the value of the transaction shall apply to any transfer of interests or change of control.

The Surface Tax, the Hydrocarbons Royalty, the THR and the Flat Rate Royalty on Early Production are paid by Sonatrach in the case of an Upstream Concession, a PSC or an RSC. In the case of a Partnership Agreement, these three taxes are paid by Sonatrach and the IOC(s).

The New Law also provides for reduced tax rates for the Hydrocarbons Royalty and THR in the case of complex geology, technical extraction issues and high development/production costs.

2.5. Other considerations

The New Law governs several operational aspects, including the possibility to grant another upstream concession or another Hydrocarbons contract in other geological layers or the grant of an authorisation for the exploration and production of other mineral or fossil substances other than hydrocarbons, local content considerations, State ownership over data generated, domestic supply obligations, unitisation, development plans, fortuitous discoveries, early production,

"The new hydrocarbons legal framework will no doubt give the oil and gas sector in Algeria new impetus."

abandonment, flaring, environmental issues, transfers of immovable assets and immovable assets by destination, foreign exchange, etc.

2.6. Downstream activities

Transportation by Pipeline – The New Law maintains that hydrocarbon transportation activities are exclusively carried out by Sonatrach, under a 30-year concession (which could be extended), with a third-party access right.

Refinery and Processing Activities – These activities can only be carried out either by Sonatrach alone or by Sonatrach in partnership with any Algerian or foreign entity (the concept of partnership is unclear), subject to the approval of the minister in charge of hydrocarbons and upon the recommendation of ARH.

2.7. Dispute resolution

International arbitration is allowed between Sonatrach and the IOC(s) for disputes arising out of the Hydrocarbons Contracts. However, any disputes with ALNAFT can be heard only before the competent Algerian courts, unless a treaty arbitration could be put in place.

2.8. Transitory provisions – existing contracts

Law 05-07 is repealed, with the exception of the provisions relating to the windfall profit tax and provisions applicable to PSCs governed by Law 86-14.

The existing EEAs under Law 05-07 and PSCs under Law 86-14 shall remain in force and grandfathered by these laws until their initially agreed term, and may not be extended or renewed beyond that term, with the exception of the provisions of the New Law relating to the environment, health and safety, and abandonment, which shall immediately apply.

EEAs governed by Law 05-07 can opt to move to the New Law if no production has started prior to 24 February 2013 and if the request for migration is made prior to 23 December 2020.

3. Conclusion – What to Expect Next

The new hydrocarbons legal framework will no doubt give the oil and gas sector in Algeria new impetus.

The New Law has set the general framework, but several elements either remain unclear or are yet to be dealt with under implementing regulations. Until then, the implementing decrees of Law 05-07 remain applicable to the extent they are not incompatible with the New Law. In all likelihood, at least 25 new regulations will be published in the following months. Although several practical aspects of petroleum operations are not dealt with in this law, such as customs and employment issues, the New Law, even if not perfect, marks real progress compared to the previous regime of Law 05-07.

A more detailed legal analysis on the above can be provided upon request.

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FINANCE

Eco, the West African Monetary Zone's New Single Currency

What is the Eco, and why is it a pertinent issue?

After decades of planning, the 15 members of the Economic Community of West African States (ECOWAS) recently agreed to adopt a new single regional currency named the "Eco" to replace the franc of the Financial Community of Africa (CFA franc). Since World War II, France has maintained strong financial links in Africa. The CFA franc is used in 14 African countries with a combined population of approximately 150 million and US$235 billion of gross domestic product. On the one hand, the CFA franc has arguably contributed to the economic stability of the countries that use the currency, is relatively easy to convert and has helped control inflation; on the other hand, countries that constitute the CFA franc zone have historically shown low levels of regional trade as well as limited monetary and fiscal independence.

The Eco will remain pegged to the euro, with financial backing from the French Treasury, at a fixed exchange rate. To begin using the Eco, African countries must meet 10 macroeconomic convergence criteria set out by the West African Monetary Institute. The four primary requirements to be achieved by each member country are (1) a budget deficit of no more than 3%, (2) an average annual inflation rate of less than 10%, (3) a central-bank financing deficit that must not exceed 10% of the previous year's tax revenue and (4) gross external reserves worth at least three months of imports. There are also six secondary requirements, including a stable real exchange rate and a positive real interest rate. Some African economists are skeptical that every ECOWAS country will meet the convergence criteria before the end of 2020.

What are the potential advantages of the Eco?

Proponents of the Eco consider its introduction a significant step in unifying West African countries. It is anticipated that the Eco will facilitate trade, lower transaction costs and facilitate payments among ECOWAS's 385 million people. French representatives will withdraw from decision-making and management

bodies of the West African Economic and Monetary Union (WAEMU). This will reduce external influence on monetary policies while creating an extra layer of independence. The WAEMU and the Central Bank of West African States (BCEAO) will have greater sovereignty to determine their stance on fiscal policies, interest rates and levels of inflation. Improvements in regulatory consistency and accountability in governance are anticipated. The reform will remove WAEMU's obligation to keep 50% of its foreign reserves with the French Treasury; instead, the union will now pool these reserves entirely within the BCEAO. Accordingly, this precludes the French Treasury from offering negative interest rates for African exchange reserves.

How will the Eco affect business in Africa and companies doing business on the continent?

The 15 ECOWAS countries represent a 385 million-consumer population, offering considerable trade opportunities for African entrepreneurs, investors and other stakeholders to leverage. Despite this, statistics reveal over 80% of Africa's exports are shipped overseas, while trade among African countries accounts for only 10%-20%. By contrast, in 2018, the 28 European Union (EU) member states exported 64% of their goods to another member state of the EU. The use of a common currency in West Africa could help rectify this issue. The Eco will help remove trade and monetary barriers by reducing transaction costs for African enterprises. Less tax on exports could boost regional trade, enhancing economic efficiency.

"It is anticipated that the Eco will facilitate trade, lower transaction costs and facilitate payments among ECOWAS's 385 million people."

However, there is no guarantee that the Eco will improve regional trade. The infrastructure deficit on the continent has made it increasingly difficult and expensive to move products within the African markets. Transit and tariff issues would need to be addressed in order to make it easier to do business in the region.

A collective regional currency could open the door to new markets for doing business in Africa. African business owners will benefit from price transparency concerning the value of goods across the region and less commodity price volatility. It is also plausible to foresee greater competitiveness for regional exports. Businesses will be under more pressure to provide higher-quality goods and set appropriate prices to retain their customers and appeal to other markets. The launch of the Eco and the implementation of the African Continental Free Trade Area will facilitate the free movement of goods, services and currency. In the long term, the Eco may improve Africa's negotiation position in relation to economic partnership agreements with China, Europe and the U.S. So far, France has been supportive of the Eco currency, with the French president pledging to invest 2.5 billion euros in Africa by 2022 to finance startups and small and medium-sized enterprises. Doing business successfully in the region requires a solid understanding of local nuances and effective risk management. To that end, legal advice is indispensable.

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The strength of our sector work on the continent is exemplified by the fact that King & Spalding is one of the most active international law firms representing clients on energy matters in Africa and has established itself among the top projects and energy practices Africa-wide–a position we have achieved by providing our clients with a strong combination of African regional and local experience and extensive commercial knowledge of the global energy industry. We are leading the way on many pioneering oil and gas projects in Africa, helping clients advance transformational projects that will have significant economic impacts on the countries in which they are located. In the previous year alone, the practice has advised on matters in Ghana, Algeria, Mauritania, Madagascar, Tunisia, Mozambique, Tanzania, South Sudan, Egypt, Guinea and Angola, spanning industry sub-sectors including oil and gas, LNG, mining, hydropower, and others. Among these are an innovative gas-to-power facility in Mauritania, one of the largest LNG export facilities proposed globally (in Mozambique); Guinea's largest-ever foreign direct investment; one of the first power projects financed under President Obama's "Powering Africa Initiative"; and a first-of-its-kind LNG project in Tanzania, among many others.

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