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AFRICA : HOW TO MAKE THE POTENTIAL A LONG TERM REALITY

Australia, October 2012

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AFRICA FOR INVESTORS

(High) Potential

(High) returns

(High) Risks

... to mitigate (in 54 different countries)

WHAT IS AFRICA?

- ✓ 54 countries and over 10 sub-regional organisations
- ✓ Population: 1 Bn inhabitants (1.5 Bn to 2 Bn in 2050 corresponding to 20% of the world population - vs. 9% in 1950)
- ✓ Growth: 5 to 8% (urbanisation, development of African private sector and solvent middle class); 5,5% of Africa's share of global FDI Projects
- ✓ Need for infrastructure developments (incl. power): US \$ 90 Bn/year during 10 years (including Energy for some US \$ 25 Bn)
- ✓ Energy and natural resources: approx. 30% of global mining resources, 10% of global mining production, approx. 10% of oil global reserves, approx. 8.1% of natural gas global reserves = large part of the economy
- ✓ Emerging sectors: telecoms, banking and also air transport
- ✓ Developments in areas such as LNG, land acquisitions, farming, green business, etc
- ✓ In 15 years, the share of African exports and imports have changed from Europe to other countries such as BRICS
- ✓ A fast-growing middle class: around 60m Africans have an income of \$3,000 a year – expected to reach 100m in 2015 (Standard Bank)
- ✓ Africa's growing population, urbanisation, new middle class, and rising purchasing power are creating opportunities and attracting investment in a range of sectors outside natural resources. Proctor and Gamble's CEO Bob McDonald described Africa as the company's "next frontier."

AUSTRALIA'S RELATIONSHIP WITH AFRICA

Australia

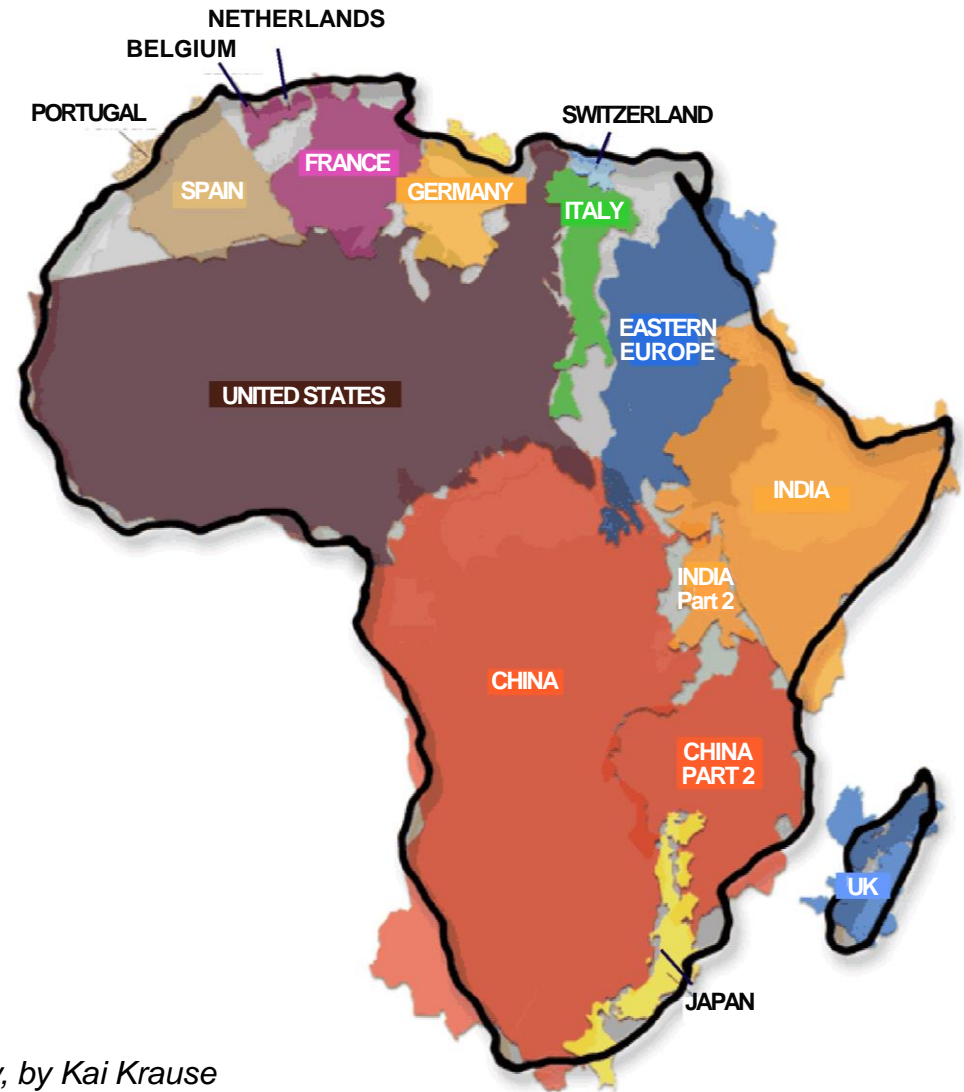
- ✓ Committed & planned investment by Australian companies in African resources projects is more than \$20 billion (Australian Department of Foreign Affairs & Trade)
- ✓ Australia's trade with Africa has grown steadily over the last decade at an annual average rate of 6.1 per cent. Australia's total merchandise trade with Africa was valued at \$5.8 billion in 2009-10 (Australian Department of Foreign Affairs & Trade)
- ✓ Australian resources companies have more projects in Africa than in any other region (Ann Harrap, Australian High Commissioner in South Africa)
- ✓ 230+ Australian companies with 650 mining projects across 42 countries in Africa
- ✓ About 40% of all Australian overseas mining projects are now in Africa

“AFRICAN PPP”

- ✓ Perseverance
- ✓ Perfection
- ✓ Partnership

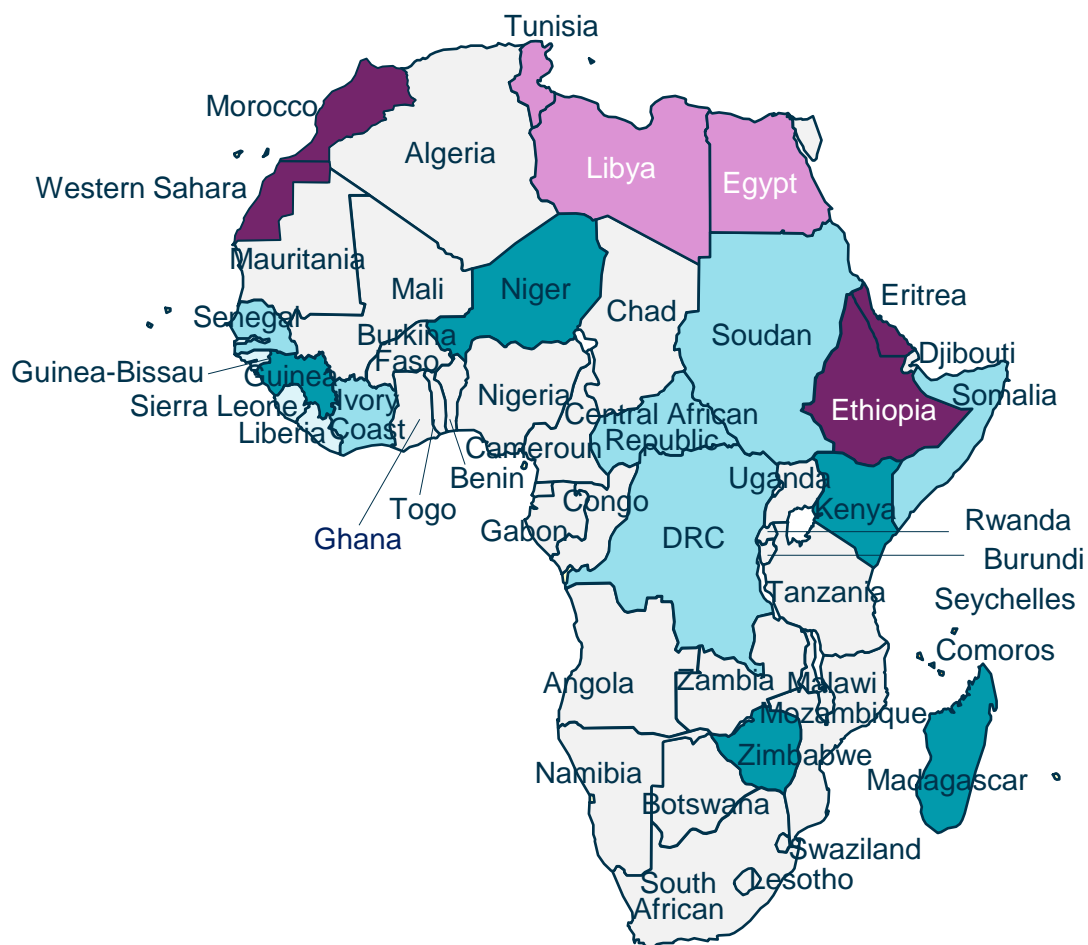
TRUE SIZE OF AFRICA

- ✓ World's second largest continent but Africa is still largely untapped from an investment point of view
- ✓ Over the past decade, 6 of the world's 10 fastest-growing
- ✓ In 8 of the past 10 years, Africa has grown faster than East Asia
- ✓ 10 markets account for ~75% of Africa's GDP: South Africa, Egypt, Nigeria, Algeria, Morocco, Angola, Libya, Sudan, Tunisia and Kenya



Source : A small contribution in the fight against rampant immappancy, by Kai Krause

POLITICAL CHANGES, DEMOCRACY AND GOVERNANCE



- Territorial Conflicts:**
- Western Sahara – Morocco
 - Ethiopia-Eritrea
 - Eritrea

- Internal crisis:**
- Central African Republic
 - Democratic Republic of Congo
 - Ivory Coast
 - Senegal
 - Somalia
 - Sudan

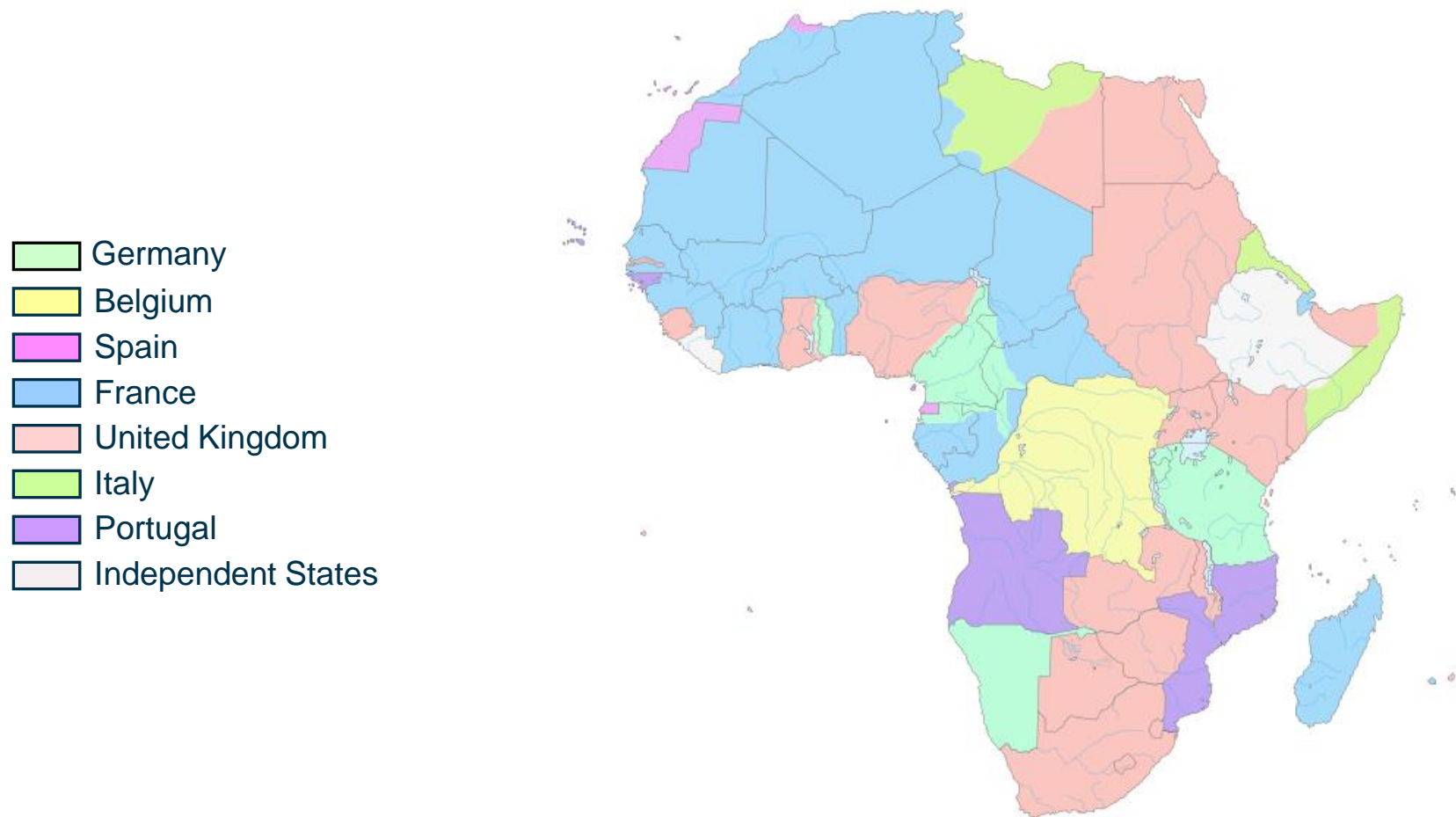
- Civil unrest:**
- Tunisia
 - Libya
 - Egypt

- Transitional Countries:**
- Guinea
 - Kenya
 - Madagascar
 - Niger
 - Zimbabwe

Source : Jeune Afrique Hors série N° 27 - L'Etat de l'Afrique 2011

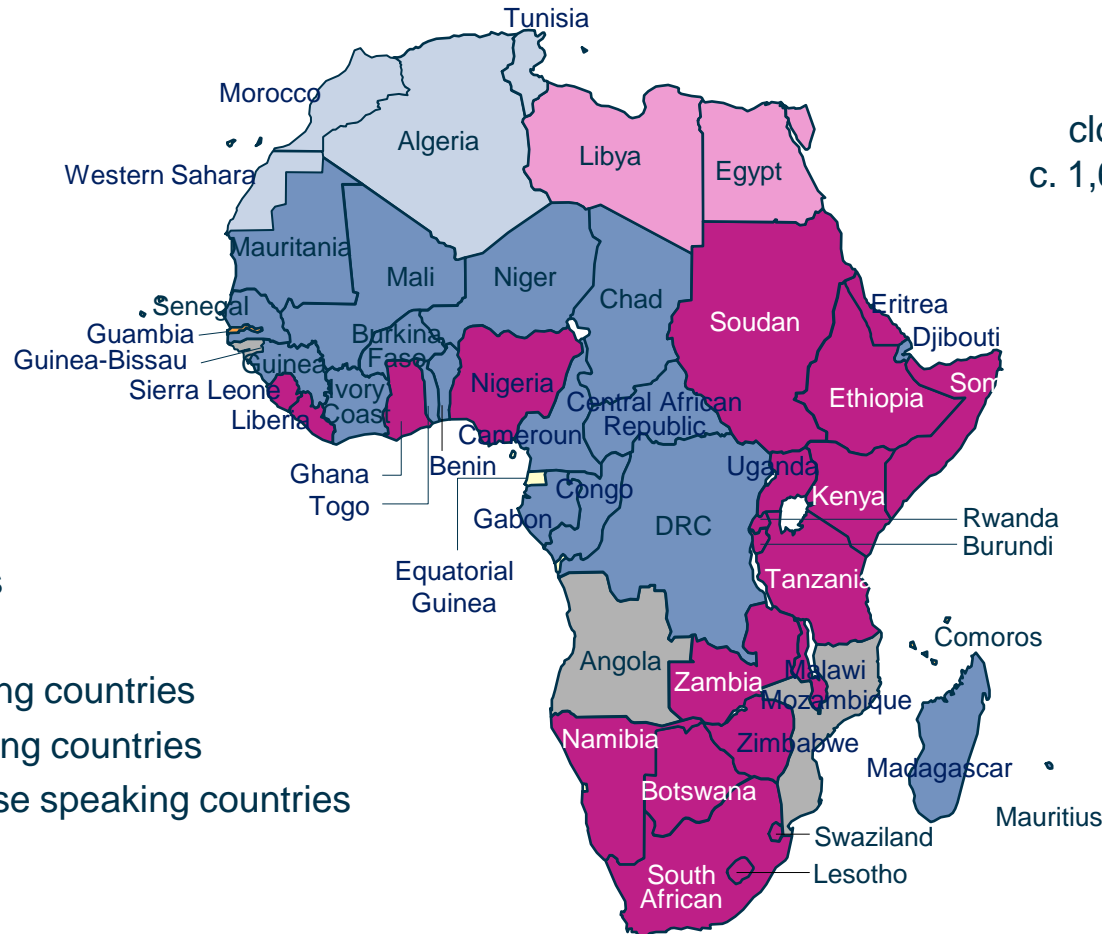
THE DIVISION OF AFRICA BY THE EUROPEAN COLONIAL POWERS

Map of European settlement in Africa, 1913



A CONTINENT OF CULTURAL AND LEGAL DIVERSITY

Africa is
a continent
of diversity...



54 sovereign nations
4/5 sub-regions
close to 1 billion inhabitants
c. 1,600 Government Ministers

...with different
influences
and languages

Many of the world's 6,000 languages are spoken in Africa – but English and French are the continent's main linguae francae

FRENCH SPEAKING COUNTRIES IN WEST (AND CENTRAL) AFRICA







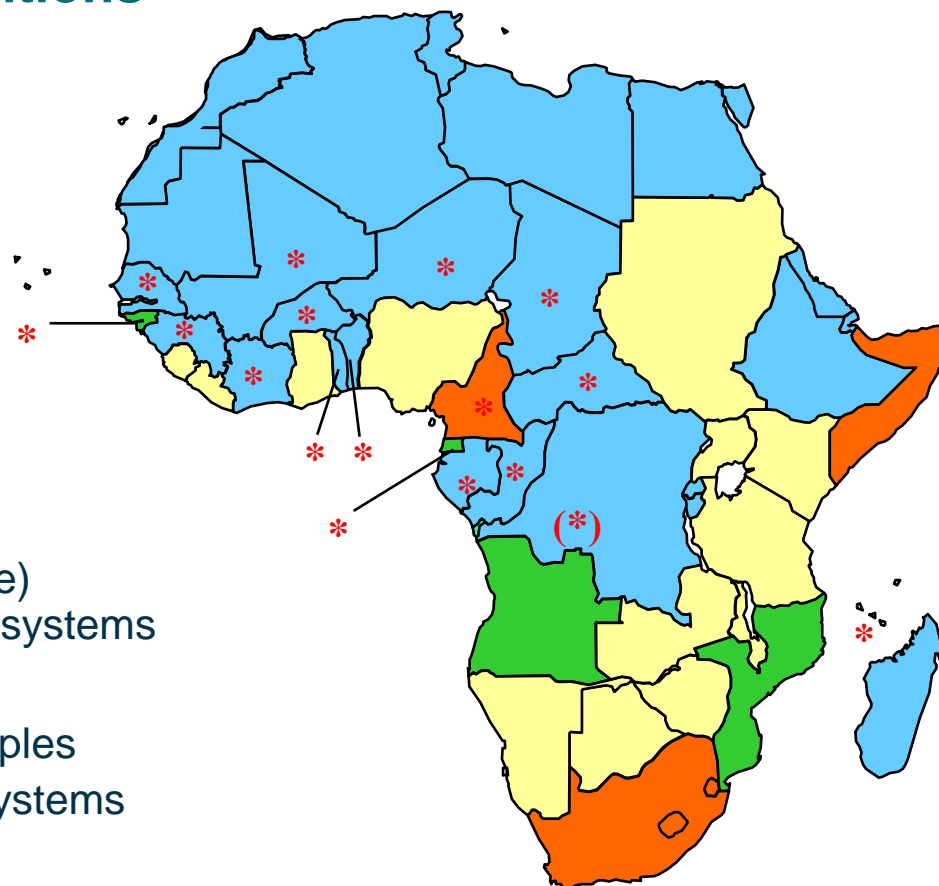
LEGAL SYSTEMS IN AFRICA

Common Law and civil law traditions

Two legal systems in Africa
(Sometimes complemented
by Islamic law or customary law)

Systems based on civil law principles

-  French legal system (Napoleonic Code)
-  Portuguese, Spanish and Italian legal systems
(largely based on Roman law)
-  Systems based on common law principles
-  Mixed civil law / common law based systems
- * OHADA signatory States



DIFFERENT LEGAL APPROACHES

ROLE OF THE STATE TO PROTECT PUBLIC INTEREST

Common Law

(usual law for financing, international contracts and of a number of Energy/ Natural Resources companies)

Contractual approach
Law of precedents



Differences in:

- Property Law
- Criminal Law
- Company Law
- Laws on taking security
- Insolvency Law

Civil Law

(Framework, law of Projects in most non-English speaking countries)

Main source of law:

- Written rules
- Administrative law and courts
- Mandatory Provisions

- Negotiation (Negotiable vs. non negotiable)
- Drafting
- Settlement of disputes



SOME DIFFERENCES BETWEEN COMMON LAW AND CIVIL LAW

Admissible evidence on existence/content of a contract:

- Freedom (civil law) vs. documents before contract signed not admissible (common law)
- The major difference: evidence of pre-contractual negotiations (e.g.. contract drafts) and post-contractual conduct is inadmissible for interpreting a contract under common law

Principle of good faith:

- Under the civil code “*agreements must be performed in good faith*” vs. no such concept with some exceptions (common law) vs. general principle to apply (international business community and arbitration)

Interpretation of contracts:

- Only if the wording as it stands is not clear enough (*pacta sunt servanda* as maybe codified)
- Common intention of the parties: civil law’s subjective approach (contract merely an instrument, pre-contractual negotiation and declarations of subjective intent is admissible) vs. common law’s objective approach (reference to purpose of the contract and its terms as a whole, meaning it would convey to a reasonable person with relevant background knowledge)

Hardship clause/duty to renegotiate:

- Considerable flux in private law, possible termination, enforcement of renegotiation provisions (civil law) vs no renegotiation, possible frustration doctrine, no enforcement of renegotiation provision (common law)

SUB-REGIONAL ORGANISATIONS WITHIN FRANCOPHONE WEST AFRICAN COUNTRIES

OHADA

Organisation for the
Harmonization of
Business Law in Africa



WAEMU

West African
Economic and
Monetary Union



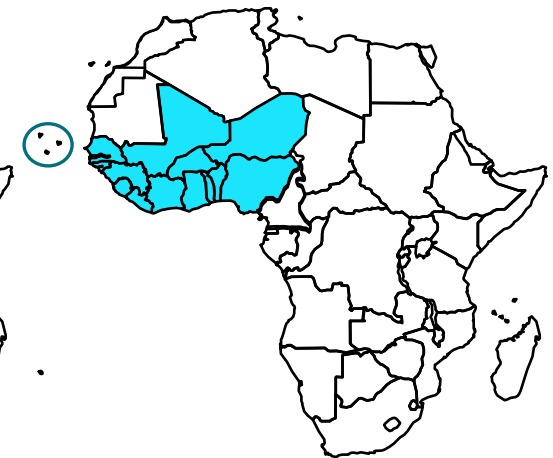
CAEMC

Central African
Economic and
Monetary Community



ECOWAS

Economic
Community of
West African States



* membership pending

“REGIONS” OF AFRICA

Economical organization involved in the management of conflicts

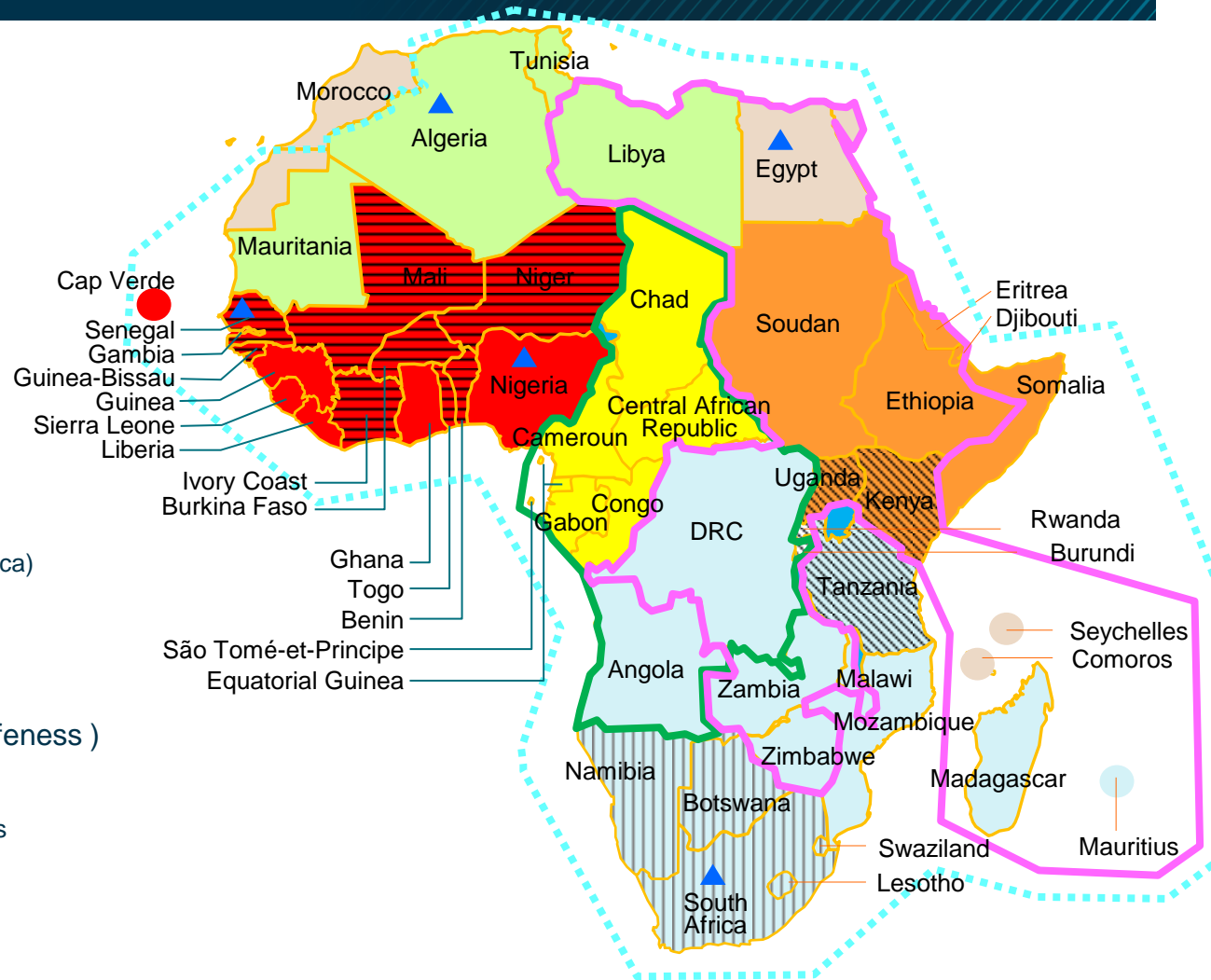
- ECOWAS (Economic Community Of West African States)
- ECCAS (Economic Community of Central African States)
- IGAD (Intergovernmental Authority on Development)
- SADC (Southern African Development Community)

Economical organization

- AMU (Arab Maghreb Union)
- UEMOA (West African Economic and Monetary Union)
- ECCAS (Economic Community of Central African States)
- COMESA (Common Market for Eastern and Southern Africa)
- EAC (East African Community)
- SACU (Southern African Customs Union)

Multisectoral organization (political, economical and safeness)

- AU (African Union)
- Initiating countries of NEPAD (New Partnership for Africa's Development)



Source: Questions internationales N° 33, septembre-octobre 2008

TOP 10 BUSINESS RISKS FOR MINING AND METAL INDUSTRY

1. Resource nationalism
2. Skills shortage
3. Infrastructure access
4. Maintaining a social licence to operate
5. Capital project execution
6. Price and currency volatility
7. Capital allocation
8. Cost management
9. Interruptions to supply
10. Fraud and corruption

Source: E&Y report 2011-2012

(WEST) AFRICA: A FEW THINGS TO KNOW...

- History/frontiers
- Trust and relationships
- Health and education (skilled workers)
- Local population/national and ethnic politics
- Respect/patience and perseverance (and good judgement)
- Costs and availability of local services
- Infrastructure/communication/utilities
- Decision making (hierarchy, collective vs. Individual decisions)
- Language/translation issues

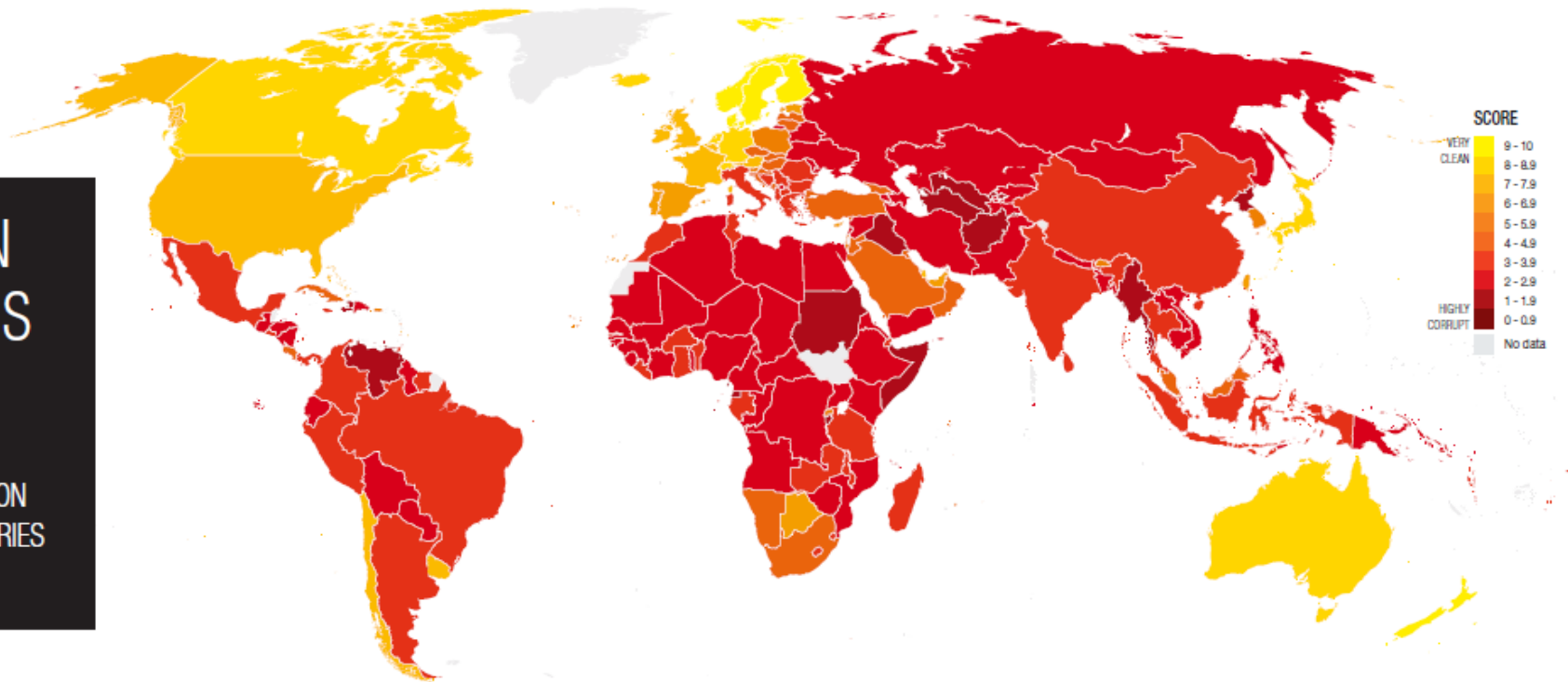
(WEST) AFRICA: THE NEED TO IDENTIFY RISKS IN ADVANCE

- Resource nationalism and indigenisation
- Pressures from NGOs and/or local groups
- Change of government / Coups d'Etat / change of law (sanctity of contracts vs. Sovereignty) / instability (institutional and legal / political risks)
- Armed conflicts
- Allegations of “unbalanced” or “illegal” contracts
- Pressures from price fluctuations
- Corruption / extortion
- Ease of doing business

Dig the law as much as the ground

CORRUPTION PERCEPTIONS INDEX 2011

THE PERCEIVED LEVELS OF PUBLIC-SECTOR CORRUPTION IN 183 COUNTRIES/TERRITORIES AROUND THE WORLD



RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	9.5
2	Denmark	9.4
3	Finland	9.4
4	Sweden	9.3
5	Singapore	9.2
6	Norway	9.0
7	Netherlands	8.9
8	Australia	8.8
8	Switzerland	8.8
10	Canada	8.7
11	Luxembourg	8.5
12	Hong Kong	8.4
13	Iceland	8.3
14	Germany	8.0
14	Japan	8.0
16	Austria	7.8
16	Barbados	7.8
16	United Kingdom	7.8
19	Belgium	7.5
19	Ireland	7.5
21	Bahamas	7.3
22	Chile	7.2
22	Qatar	7.2
24	United States	7.1

25	France	7.0
25	Saint Lucia	7.0
25	Uruguay	7.0
28	United Arab Emirates	6.8
29	Estonia	6.4
30	Cyprus	6.3
31	Spain	6.2
32	Botswana	6.1
32	Portugal	6.1
32	Taiwan	6.1
35	Slovenia	5.9
36	Israel	5.8
36	Saint Vincent and the Grenadines	5.8
38	Bhutan	5.7
39	Malta	5.6
39	Puerto Rico	5.6
41	Capo Verde	5.5
41	Poland	5.5
43	Korea (South)	5.4
44	Brunei	5.2
44	Dominica	5.2
46	Bahrain	5.1
46	Macao	5.1

RANK	COUNTRY/TERRITORY	SCORE
46	Mauritius	5.1
49	Rwanda	5.0
50	Costa Rica	4.8
50	Lithuania	4.8
50	Oman	4.8
50	Seychelles	4.8
54	Hungary	4.6
54	Kuwait	4.6
56	Jordan	4.5
57	Czech Republic	4.4
57	Namibia	4.4
57	Saudi Arabia	4.4
60	Malaysia	4.3
61	Cuba	4.2
61	Latvia	4.2
61	Turkey	4.2
64	Georgia	4.1
64	South Africa	4.1
66	Croatia	4.0
66	Montenegro	4.0
66	Slovakia	4.0
69	Ghana	3.9
69	Italy	3.9
69	FYR Macedonia	3.9

69	Samoa	3.9
73	Brazil	3.8
73	Tunisia	3.8
75	China	3.6
75	Romania	3.6
77	Gambia	3.5
77	Lesotho	3.5
77	Vanuatu	3.5
80	Colombia	3.4
80	El Salvador	3.4
80	Greece	3.4
80	Morocco	3.4
80	Paru	3.4
80	Thailand	3.4
86	Bulgaria	3.3
86	Jamaica	3.3
86	Panama	3.3
86	Serbia	3.3
86	Sri Lanka	3.3
91	Bosnia and Herzegovina	3.2
91	Liberia	3.2
91	Trinidad and Tobago	3.2
91	Zambia	3.2
95	Albania	3.1

95	India	3.1
95	Kiribati	3.1
95	Swaziland	3.1
95	Tonga	3.1
100	Argentina	3.0
100	Benin	3.0
100	Burkina Faso	3.0
100	Djibouti	3.0
100	Gabon	3.0
100	Indonesia	3.0
100	Madagascar	3.0
100	Malawi	3.0
100	Mexico	3.0
100	Sao Tome and Principe	3.0
100	Suriname	3.0
100	Tanzania	3.0
112	Algeria	2.9
112	Egypt	2.9
112	Kosovo	2.9
112	Moldova	2.9
112	Senegal	2.9
112	Vietnam	2.9
118	Bolivia	2.8
118	Mali	2.8

120	Bangladesh	2.7
120	Ecuador	2.7
120	Ethiopia	2.7
120	Guatemala	2.7
120	Iran	2.7
120	Kazakhstan	2.7
120	Mongolia	2.7
120	Mozambique	2.7
120	Solomon Islands	2.7
129	Armenia	2.6
129	Dominican Republic	2.6
129	Honduras	2.6
129	Philippines	2.6
129	Syria	2.6
134	Cameroon	2.5
134	Eritrea	2.5
134	Guyana	2.5
134	Lebanon	2.5
134	Maldives	2.5
134	Nicaragua	2.5
134	Niger	2.5
134	Pakistan	2.5
134	Sierra Leone	2.5
143	Azerbaijan	2.4

143	Botswana	2.4
143	Comoros	2.4
143	Mauritania	2.4
143	Nigeria	2.4
143	Russia	2.4
143	Timor-Leste	2.4
143	Togo	2.4
143	Uganda	2.4
152	Tajikistan	2.3
152	Ukraine	2.3
154	Central African Republic	2.2
154	Congo Republic	2.2
154	Cote d'Ivoire	2.2
154	Guinea-Bissau	2.2
154	Kenya	2.2
154	Laos	2.2
154	Nepal	2.2
154	Papua New Guinea	2.2
154	Paraguay	2.2
154	Zimbabwe	2.2
164	Cambodia	2.1
164	Guinea	2.1
164	Kyrgyzstan	2.1
164	Yemen	2.1

168	Angola	2.0
168	Chad	2.0
168	Democratic Republic of the Congo	2.0
168	Libya	2.0
172	Burundi	1.9
172	Equatorial Guinea	1.9
172	Venezuela	1.9
175	Haiti	1.8
175	Iraq	1.8
177	Sudan	1.6
177	Turkmenistan	1.6
177	Uzbekistan	1.6
180	Afghanistan	1.5
180	Myanmar	1.5
182	Korea (North)	1.0
182	Somalia	1.0

(WEST) AFRICA: A FEW SPECIFIC POTENTIAL LEGAL CONSTRAINTS

- Confusion in respect of local practice / the law
- Lack of reliable publication of regulations and case-law
- Unpredictability of legal issues which may arise and the response by the judiciary
- Dream of “administrative bargaining”
- Hierarchy of norms

THE LONG TERM REALITY: A “BANKABLE” PROJECT

- Profitable but for all stakeholders: Investors and shareholders / States and population
- In accordance with the local laws but also with international laws, principles and customs
- Predictability: on political stability, costs, taxes, laws, project players, work involved to develop the project, revenues in the ground, market for production

And for the life of the project

MITIGATION OF RISKS, SOME KEY ISSUES

- **Security of tenures, chain of title, certainty of all rights in relation to the full project (exploration, exploitation, land occupancy, infrastructure – law, decree, letters): dig the law**
- **Well balanced contract (and law), notion of economic balance:**
 - **investors (profitability – tax)**
 - **state (tax, participation)**
 - **population (local communities)**
- **Human rights and Soft law/hard sanctions (environmental protection, social infrastructure, extractive industry requirements, John Ruggie Protect-Respect-Remedies), local content**

DEFINING LOCAL CONTENT

“**Local content** refers to activities that **add value** to the local economy through the utilization of **local human and material resources** for the provision of goods and services within acceptable quality, health, safety and environmental standards with the **goal of stimulating the development of local capabilities and companies, and ensuring that the local community is able to benefit from its own natural resources.**”

LOCAL CONTENT

- Defining local content:
 - Employment Quotas
 - Training and Promotions obligations
 - Local procurement
 - Local communities Development
 - Direct Participation

- Local content and stabilisation, creeping expropriation, BITs

KEY PROVISIONS, KEY PROTECTION

- **Stability provisions (State contracts)**
- **Interpretative letters**
- **Arbitration - Crisis management and dispute resolution – Settlement Agreements**
- **Bilateral Investment Treaties (including for banks)**
- **Regional laws (OHADA, CEMAC, UEMOA, SADC, etc.)**
- **Ability to offer third party lenders an acceptable security package : e.g. security over the project/assets/accounts (civil law issues with common law financing – notion of public interest)**
- **Direct agreements and step in rights**

AN EFFICIENT PROTECTION OF INVESTMENTS: (PERSONAL) REACTION WHEN A “DISPUTE” STARTS

To take things seriously (form a crisis management team from first signs of a dispute)

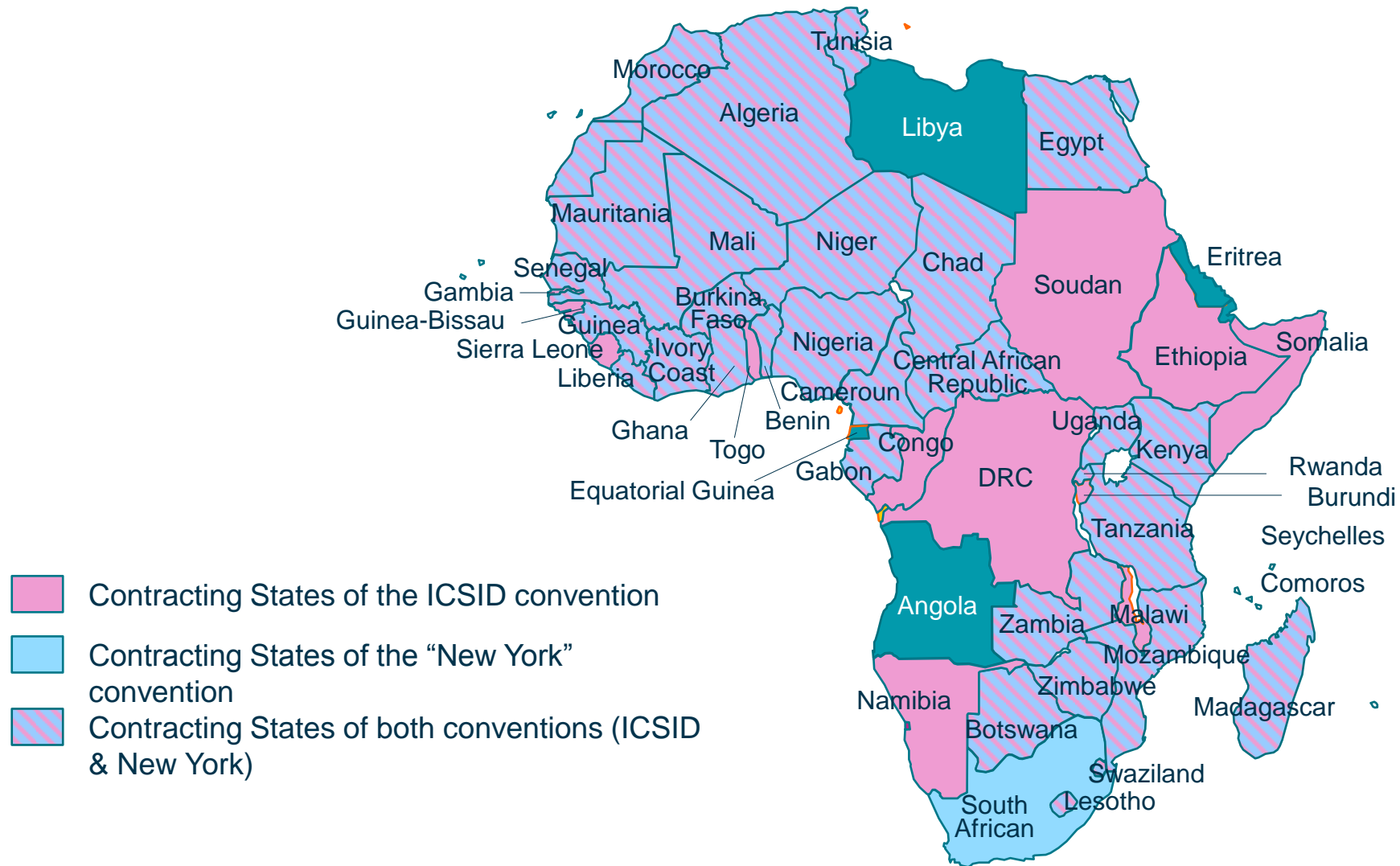
- Stay calm / no over-reactions
- Due Diligence of facts (can be complex...) / origin of the dispute
- Careful analysis of dispute resolution clause
- Good judgement
- Save face principle
- Act in accordance with the law and persevere
- Take time to settle / build the case
- Settle as law provides (2044)
- Settle as culture prefers

Ensure that the contract is “a well economically balanced International Social Bankable license to operate, stabilised in the limits of applicable human rights and which can be brought to arbitrators in case of disputes”.

BILATERAL INVESTMENT TREATIES SIGNED BY AFRICAN COUNTRIES (AS OF 1 JUNE 2009)

Country Name	No of BITs Signed	No of BITs in Effect	Country Name	No of BITs Signed	No of BITs in Effect	Country Name	No of BITs Signed	No of BITs in Effect
Algeria	39	23	Ethiopia	27	20	Mozambique	23	18
Angola	7	3	Gabon	12	6	Namibia	12	6
Benin	14	5	Ghana	26	8	Niger	5	3
Burkina Faso	14	6	Guinea	18	5	Nigeria	21	13
Burundi	7	3	Guinea Bissau	1	1	Rwanda	6	2
Cameroon	14	8	Ivory Coast	10	5	Senegal	22	8
Cape Verde	9	8	Kenya	12	3	Seychelles	3	1
CAR	4	2	Lesotho	3	2	Sierra Leone	3	1
Chad	13	3	Liberia	4	3	Somalia	2	2
Comoros	6	1	Libya	26	12	South Africa	45	24
Congo	10	5	Madagascar	9	6	Sudan	26	12
Côte d'Ivoire	10	5	Malawi	6	2	Swaziland	5	2
DR Congo	13	4	Mali	15	5	Togo	3	2
Djibouti	7	1	Mauritania	18	5	Uganda	15	7
Equ. Guinea	6	2	Mauritius	34	18	Zambia	12	2
Eritrea	4	1	Morocco	59	36	Zimbabwe	30	6

LIST OF AFRICAN CONTRACTING STATES OF ICSID & NEW YORK CONVENTIONS



HSF AFRICA PRACTICE

- An Africa group worldwide
- An Africa Coregroup
- A BD dedicated person
- An equivalent of some 80 lawyers full time
- A practice which is :
 - Multi language
 - Multi lawyers nationalities
 - Multi legal background
 - Multi practice areas
 - Multi countries

RECENT MARKET RECOGNITION

Ranked top tier for Africa: Projects & Energy *Chambers Global 2012, 2011, 2010, 2009*

Ranked top tier for Africa: Mining & Minerals* *Chambers Global 2012*

Ranked top tier for Africa: Corporate & Commercial *Chambers Global 2012, 2011*

"Herbert Smith LLP is highly recognized for its oil and gas and mining practice in Africa, for which it shows 'genuine industry knowledge', 'in-depth knowledge of local constraints', and 'perfect handling of possible contentious issues' "
Legal 500 EMEA 2012

"A market leader for mining, oil and gas, and energy projects in Africa"
Chambers Europe 2012

"Sources commend this firm's leading project development practice and outstanding expertise in West Africa"
Chambers Europe 2012

"Sources say: 'The team has a deep understanding of the legal frameworks in francophone Africa'. 'The go-to firm for Africa' " *Chambers Europe 2012*

"Sources say: 'Herbert Smith is the leader in Africa and knows the local law. They are responsive and committed to what they do'." *Chambers Global 2012*

*new category 2012

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Stéphane leads our global mining practice and he is also the head of the firm's Africa group. He has extensive experience in Africa, having lived and worked on the continent for seven years and having been involved for almost 25 years in a wide range of corporate transactions, projects and project financings in Francophone Africa on behalf of corporations, governments, banks and lending institutions, focussing in particular on the mining, energy and infrastructure sectors. Stéphane's practice in recent years has focussed more specifically on risk mitigation and crisis management, with demonstrated experience in handling crisis situations for our mining clients in Africa. His experience also includes advising on pre-contentious or contentious mining issues, including before local jurisdictions.

Stéphane has received numerous market accolades over the past 10 years regarding his expertise in Africa. By way of example, he is described in the 2012 edition of Chambers Europe as *'the leading lawyer for mining in francophone Africa'*, while according to Chambers Global 2012 sources recognise him as *"a person who lives and breathes Africa and is superb as regards francophone Africa work"*.

Some highlight examples of Stéphane's experience in the mining sector include advising:

- **Rio Tinto** as project counsel to its Simandou iron ore integrated project in Guinea for the continued exploration, mining and processing of iron ore and the construction of the related infrastructure facilities. This work also included the negotiation of a Settlement Agreement with the Government of Guinea last year resolving all outstanding disputes between the parties over the withdrawal of Rio Tinto's mining concession in 2008 by the former President
- **Rio Tinto** on its mining activities elsewhere in Francophone Africa (including in particular in Niger and Democratic Republic of Congo)
- **MagMinerals** on many aspects of the Kouilou greenfield potash and infrastructure project in the Republic of Congo (including in relation to the project financing)
- **the Ambatovy project company** holding the Ambatovy mining project in Madagascar as special consultant on issues relating to the attempted renegotiation by the government of the project mining rights
- **Avion Gold Corporation** on the acquisition of mining rights and a corporate restructuring in Mali
- **Etruscan** on the structuring of the Youga gold mining project in Burkina Faso
- **Semafo** on various matters relating to its mining activities in Francophone Africa
- **Goviex Uranium** on certain matters relating to its activities in Francophone West Africa.



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