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Mining legislation, regulations and codes, business and strategy considerations in response to the recent law amendments in West Africa

SUNDOWNER DISCUSSION: EXPLORE THE EFFECTS OF THE WEST AFRICAN MINING REFORMS

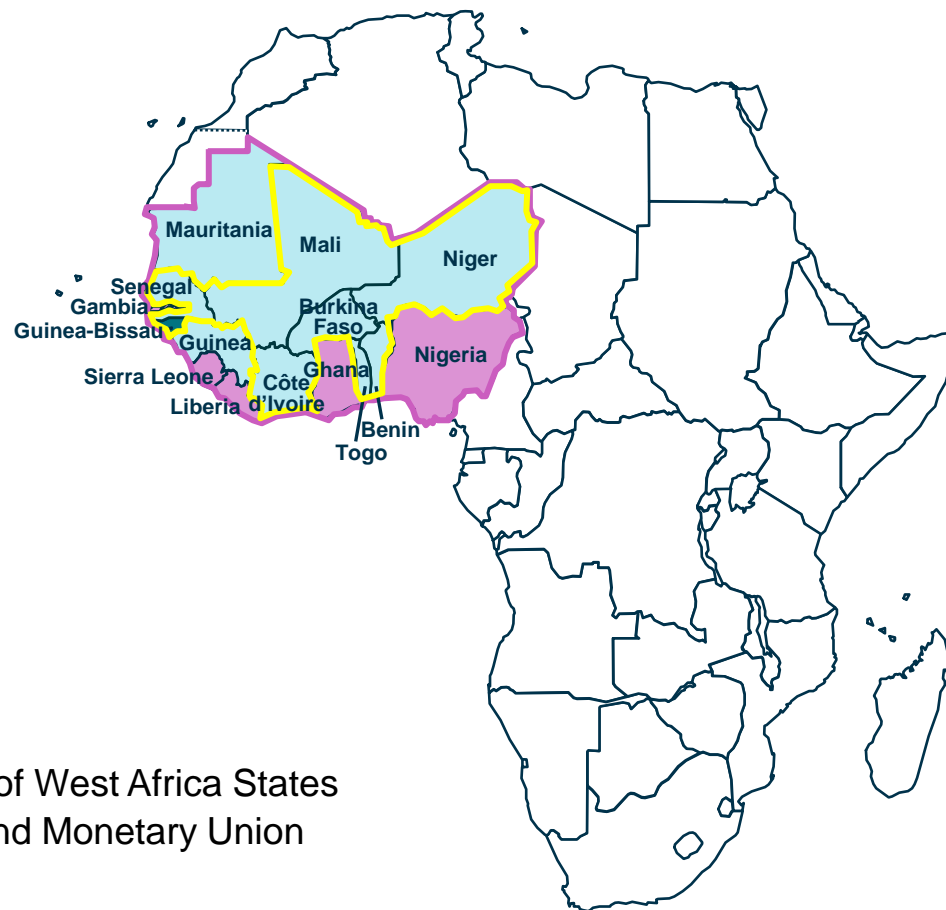
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Sub-regions in West Africa



- ECOWAS: Economic Community of West Africa States
- WAEMU: West Africa Economic and Monetary Union
- English speaking countries
- Francophone countries

A civil law based legal system

Two legal systems in Africa
(operating concurrently with Islamic
law and/or customary law)

-  Systems based on civil law principles
-  Systems based on common law principles
-  OHADA countries

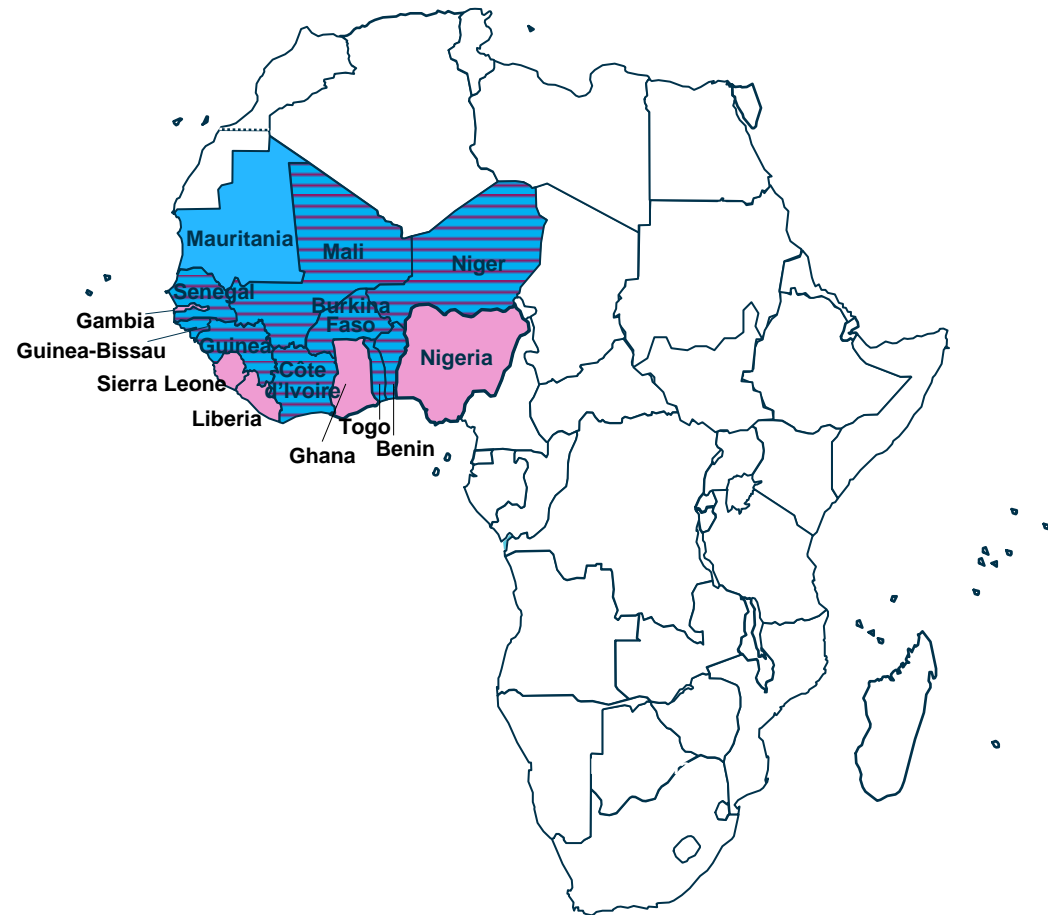


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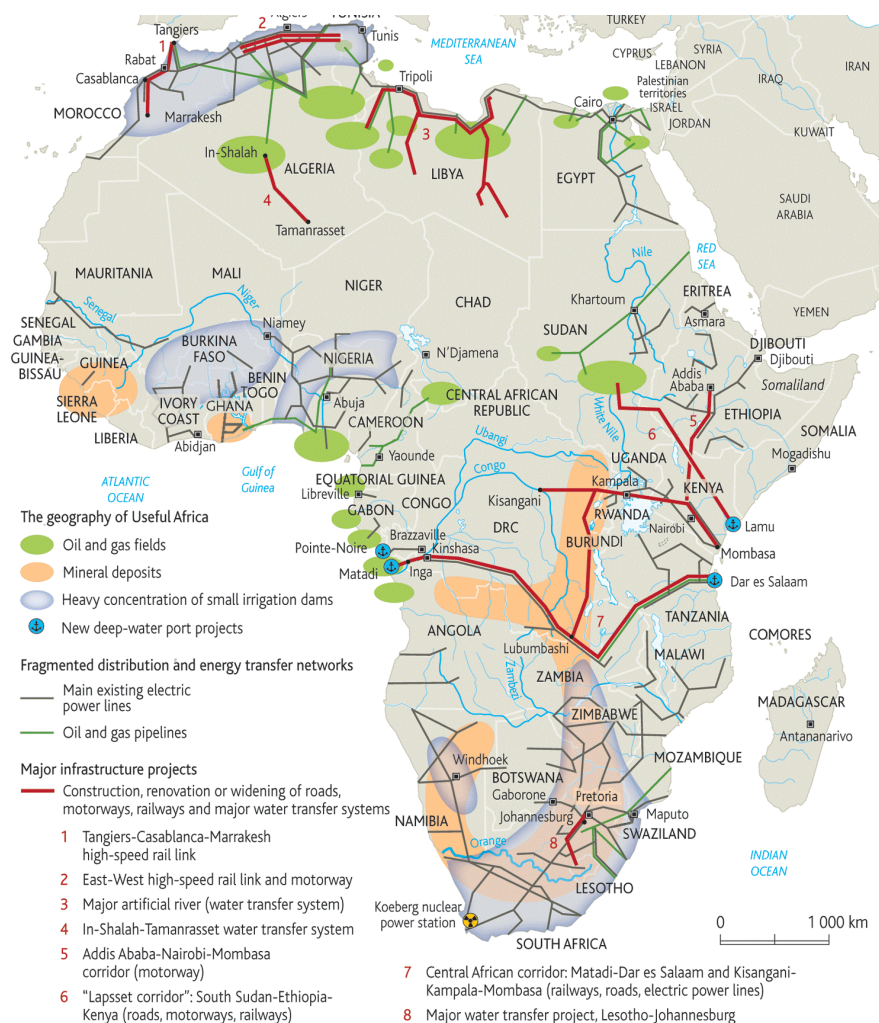
- I. West Africa: mining opportunities and mining reforms
- II. Main drivers of mining reforms
- III. New wave of natural resource governance initiatives
- IV. Major trends of these reforms reflected in mining codes
- V. Strategies of companies in response to mining reforms

I. WEST AFRICA: MINING OPPORTUNITIES AND MINING REFORMS

- A. Overview of the mining potential in West Africa
- B. Some recent mining highlights
- C. Main issues for mining companies
- D. Recent reforms in West African mining legal frameworks

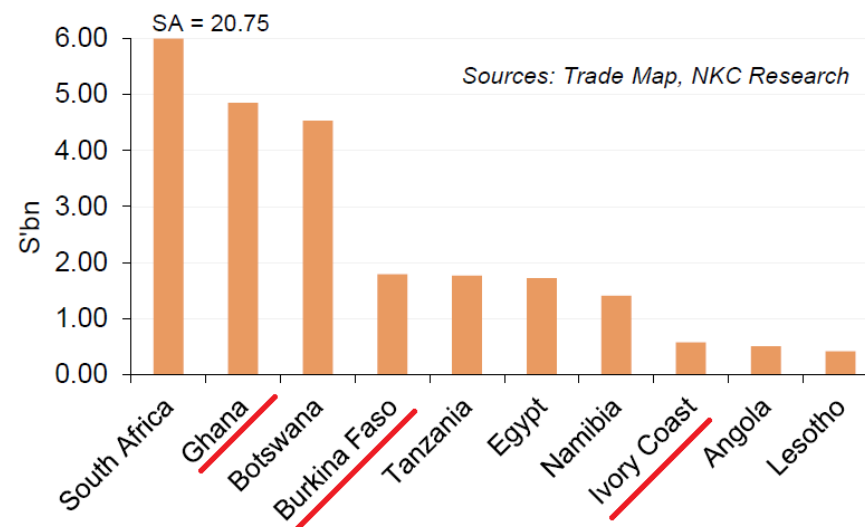
I. A. Overview of the mining potential in West Africa

Distribution of Africa's natural resources and infrastructure



- **Niger**, the world's fourth largest uranium producer
- **Ghana** second largest gold producer in Africa after South Africa
- **Mali** fourth largest gold producer in Africa

Top 10 African Mineral Exporters (2011)



Sources: Le Monde Diplomatique, Trade Map

I. B. Some recent mining highlights

Niger Uranium Limited on various matters relating to its operations in Niger

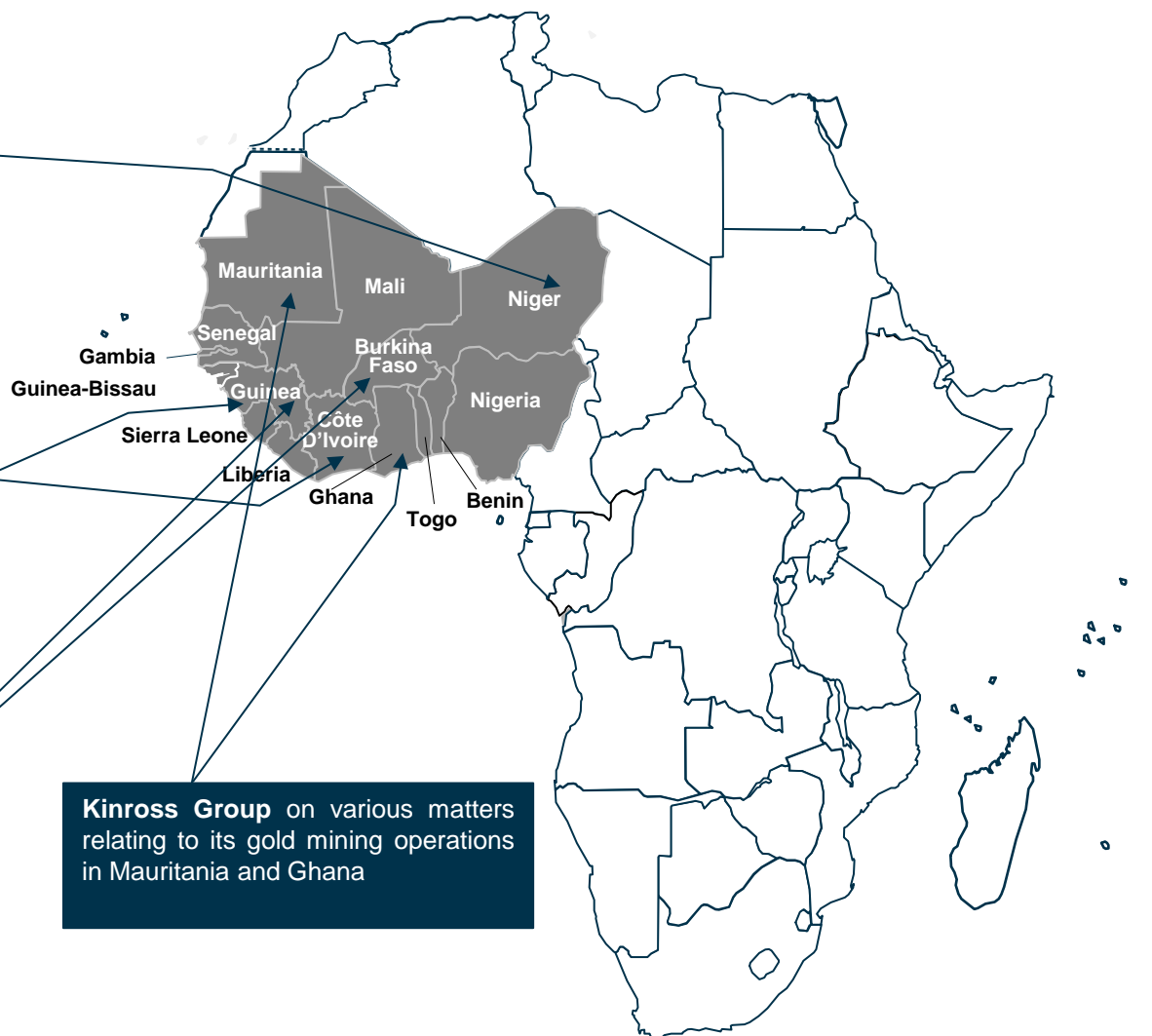
BHP Billiton on various matters in Gabon, Guinea, Liberia and DRC

Newcrest Mining in relation to its gold mining operations at the Bonikro mine in Côte d'Ivoire

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, including in particular a rail link and deepwater mineral port

Nordgold on its activities in Guinea and Burkina Faso

Kinross Group on various matters relating to its gold mining operations in Mauritania and Ghana



I. C. Main issues for mining companies (1)

The top 10 issues mining companies will have to face in the coming year:

1. The cost of contraction - mining productivity hits new lows
2. Matching supply to demand - market imbalances wreak commodity price havoc
3. The remaking of mining - exploring the innovation imperative
4. Finding funding: debt up, deals down, and juniors fight for survival
5. The project pipeline stutters: record impairments call capital allocation practices into question
6. Power to the people: local community demands ramp up
7. Resource nationalism spreads: government relations marked by rising hostility
8. Crackdown on corruption: a zero tolerance regulatory environment complicates compliance
9. Changing the safety equation: from zero harm to zero fatalities
10. A dearth of skills: the talent gap slinks into executive suites

Deloitte Report: Tracking the trends 2014

I. C. Main issues for mining companies (2)

Conditions for increasing mining investments in Africa

1. Infrastructure
2. Stable legal systems
3. Predictable tax regime
4. Profit repatriation guarantees
5. Access to foreign exchange
6. Judicial framework
7. Accountable bureaucracy

Main risks for mining companies in Africa

1. Resource nationalism (royalties, taxes, labour, State participation, etc.)
2. Skills shortages
3. Infrastructure access

I. C. Recent reforms in West African mining legal frameworks

Country	Mining codes having recently undergone/about to undergo changes	Reviewing of mining titles/contracts
Burkina Faso	October 2013: new mining code adopted by the Council of Ministers (to be voted by June 2014)	
Guinea	April 2013: amendment to 2011 mining code	Contracts under review since April 2012
Ivory Coast	March 2014: new mining code passed by Parliament	
Liberia	End of year 2014: 2000 Minerals & Mining Act to be replaced by new mining code	
Mali	January 2013: amendment to 2012 mining code	Complete inventory of mining contracts announced in September 2013
Mauritania	February 2012: amendment to 2008 mining code	
Niger		Contracts under review since September 2013
Senegal	2003 mining code due to be amended	Review commission set up in 2012
Sierra Leone		Contracts under review

II. MAIN DRIVERS OF MINING REFORMS

- A. Liberalisation of mining activities through different generations of mining codes
- B. Result of this liberalisation
- C. Awareness of a need for stronger mining governance strategies

II. A. Liberalisation of mining activities through different generations of mining codes (1)

Combination of factors leading to this liberalisation:

- Post-independence period: development of resource nationalism for many African governments
 - State mining companies (nationalisation)
 - Stricter regulations relating to taxation, domestic input sourcing, local employment
 - Drastic decline of Africa's share of worldwide mineral production:
 - Low mineral prices
 - State mining companies with small financial resources
 - Lack of investments in high political-risks areas
 - Indebtedness of many States
- ⇒ **Need to develop the mining industry by attracting private investors and minimising State ownership**

II. A. Liberalisation of mining activities through different generations of mining codes (2)

- **First generation (1980's)**
 - **State withdrawal** from productive activities to attract foreign investments
 - Role of regulator and promoter
 - Generous tax incentives to foreign investors
 - Development objectives, environment protection are of secondary concerns
 - E.g. Ghana: Mineral and Mining law, 1986
- **Second generation (early to mid 1990's)**
 - Creation of a new regulatory framework for mining in Africa: the World Bank's diagnostic and recommendations (1992)
 - Continuing trend of liberalisation and privatisation
 - Recognition of the need for certain social and environmental regulations as the responsibility of operating companies
 - E.g. Guinea: Mining Code, 1995
- **Third generation (late 1990's)**
 - Continuing trend of liberalisation
 - Example of Mali: 1999 new mining code

II. B. Results of this liberalisation

For mining companies	For host countries
<ul style="list-style-type: none">• Tax regimes more competitive• Stability of tax regime• Liberalisation of exchange controls and exchange rate policies• Generous incentives <p>⇒ Significant increases of foreign direct investment</p>	<ul style="list-style-type: none">• Incentive competition leading to a « Winner's curse »• Lack of diversification of national economy: no intersectoral linkages• Difficulty to monitor accurately the production and capital expenditures of the States• Limited benefits for local employment• Lack of transparency• Lack of capacity of the State to manage resources to meet development goals

II. C. Awareness of a need for stronger mining governance strategies

Result of the liberalisation	Economic and political context before 2013
<ul style="list-style-type: none">• Asymmetric relations of power and influence between States and mining companies• More benefits to mining companies	<ul style="list-style-type: none">• High mineral prices• Mining boom due to increased competition• Increased bargaining power for host governments



BROAD AWARENESS OF THE NEED FOR STRONGER NATURAL RESOURCE GOVERNANCE STRATEGIES

PART III. NEW WAVE OF NATURAL RESOURCE GOVERNANCE INITIATIVES

- A. A continent-wide mining reform
- B. Sub-regional efforts towards the harmonisation of national mining legislation
- C. Other initiatives

III. A. A continent-wide mining reform (1)

The need for changes in the governance of natural resources translated on a continental level with :

- The Africa Mining Vision
- Numerous non-West African countries having recently reformed their mining legal framework

III. A. A continent wide-mining reform (2)

- **Africa Mining Vision**, African Union, February 2009

“Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”

 - Contribution to the broad-based growth and development
 - Respect and promotion of human rights
 - Local and regional economic linkages
 - Diversification
- **Numerous examples of other African countries having recently reformed their mining legal framework**
 - Kenya October 2012
 - Rwanda January 2013
 - Gabon June 2013
 - Burundi July 2013
 - DRC (reform currently in process)

III. B. Sub-regional efforts towards the harmonisation of national mining legislation

- 1. Economic Community of West African States (ECOWAS)**
- 2. West African Economic and Monetary Union (WAEMU)**

III. B. 1. Economic Community of West African States “ECOWAS” (1)

ECOWAS

- A regional economic integration community gathering 15 countries
- A set of 3 regional legal frameworks to be adopted (a directive, a common code and a regional mining policy)
- Currently, only ECOWAS Directive C /DIR03/ 05/09 of 27 May 2009 on the Harmonisation of Guiding Principles and Policies in the Mining Sector

III. B. 1. Economic Community of West African States “ECOWAS” (2)

ECOWAS Directive

- Only binding upon Member States (not upon individuals and incorporated entities)
- To be complied with by 1 July 2014
- Objectives:
 1. Transparency (to improve) : for granting rights, etc.
 2. Lessening competition and consequential legal and tax adverse changes between member States
 3. Ensuring a balance between incentives to attract mining investors and national interest of member States
 4. Ensuring free access to information
 5. Protecting the environment and local communities in all their aspects (impacts, prior informed consent given freely)

III. B. 2. West African Economic and Monetary Union “WAEMU”

WAEMU

- Organisation promoting integration among 8 countries sharing a common currency, the CFA franc
- All members are also members of the ECOWAS
- Additional Act No. 01/2000 relating to the adoption of the Common Mineral Policy of the WAEMU
- Regulation No. 18. 2003/CM/UEMOA of 22 December 2003 relating to the Adoption of the WAEMU Community Mining Code:
 - Directly applicable to individuals and incorporated entities
 - Essentially addresses the same major issues as the ECOWAS directive:
 1. Grant of mining titles
 2. Programme for protection of environment
 3. Defines tax system applicable to minerals
 4. Governs recruitment and procurement rules

III. C. Other initiatives (1)

Since the beginning of 2000s, numerous initiatives to develop accountability and transparency in the governance of natural resources

- Disclosure obligations required by national laws governing the main investors
- A majority of non-compulsory/voluntary initiatives

III. C. OTHER INITIATIVES (2)

- **Disclosure obligations required by national laws governing the main investors**
 - US Dodd-Frank Act, 2010
 - UK Bribery Act, 2010
 - EU Accounting Directive, 2013
- **A majority of non compulsory/ voluntary initiatives originating from:**
 - **The United Nations:**
 - Kimberley process, 2000
 - Guiding Principles on Business and Human Rights, John Ruggie, 2011
 - **Governments:** Extractive Industry Transparency (EITI), 2002
 - **NGOs:** e.g. The National Resource Charter
 - **Financial Institutions:**
 - International Finance Corporation Performance Standards, 2012
 - Equator Principles III, 2013
 - **The mining industry:** International Council on Mining and Metals (ICMM), 2011

IV. MAIN TRENDS OF MINING CODES REFORMS

- A. Strengthening of State involvement in mining activities
- B. Fair sharing of mining revenue
- C. Local content
- D. Management of environmental impact
- E. Governance, transparency and corporate social responsibility (“CSR”)

IV. A. Strengthening of State involvement in mining activities (1)

- Increasing stakes in mining project either directly or indirectly through state-owned companies (i.e. Soguiipami in Guinea)
- Limitation on stabilisation: flexible tax regime sensitive to price movements
- Limitation on the duration of mining contracts

IV. A. Strengthening of State involvement in mining activities (2)

Country	Participation of the State	
	Former code	New code
Burkina Faso	<p>10% free participation for industrial mining permit</p> <p>Additional participation to be negotiated</p>	<p>10% for industrial and small-scale mining permit</p>
Guinea	<p>15% free participation</p> <p>Free participation limited to precious substance</p>	<p>Max 15% free participation</p> <p>Free participation not limited to precious substances</p> <p>% of free participation depends on the mineral</p> <p>Total participation limited to 35%</p>
Ivory Coast	<p>10% free participation</p> <p>Additional participation to be negotiated</p>	<p>10% free participation</p> <p>Additional participation to be negotiated but limited to 15% unless the State contributes to the exploration phase from the outset</p> <p>These limitations only apply to direct State participation</p>

IV. A. Strengthening of State involvement in mining activities (3)

Country	Duration of mining contract	
	Former code	New code
Burkina Faso	25 years with renewal periods of 5 years	20 years with renewal periods of 5 years
Guinea	Mining concession Duration: 25 years Renewal: 10 years Operating permit <ul style="list-style-type: none"> Industrial Duration: 10 years Renewal: 5 years Semi-industrial Duration: 5 years Renewal: 5 years 	Mining concession Duration: 25 years Renewal: 10 years Operating permit (industrial and semi industrial) <ul style="list-style-type: none"> Duration: 15 years Renewal: 5 years
Ivory Coast	No reference to mining contract in former code	12 years with renewal period of 10 years

IV. A. Strengthening of State involvement in mining activities (4)

Country	Stabilisation	
	Former code	New code
Burkina Faso	Unlimited	Maximum of 20 years
Guinea	Maximum of: <ul style="list-style-type: none"> • 10 years for operating permits • 25 years for concessions 	Maximum of 15 years Limited list of specific taxes Covers tax rates No application to tax base except for: <ul style="list-style-type: none"> • extraction tax • production tax • mineral substance export tax • precious stones export tax
Ivory Coast	No stabilisation	Tax and custom stabilisation introduced by new code

IV. B. Fair sharing of mining revenue

Country	Additional tax burden	Tax exoneration and incentives
Burkina Faso	<ul style="list-style-type: none"> • Tax on industrial and commercial profits and revenues at normal rates in lieu of preferential rate • New capital gains tax at 20% on the assignment of mining rights 	Removal of some tax exemptions: patent contribution, employer and apprentice tax, etc.
Guinea	<ul style="list-style-type: none"> • Taxes on extraction/production of minerals deductible from taxable profits • Withholding tax on non-wage income at normal rate and non deductible from tax on profits • Export taxes at a preferential rate in case minerals processed locally • Capital gains taxation in case of indirect change of control 	<ul style="list-style-type: none"> • Removal of some tax exemptions: patent contribution, registration duties, etc. • New tax exemption for imports during research and construction periods • Reduction of tax on income derived from investments • Reduction of corporate tax rate
Ivory Coast	No additional tax on windfall profits	Multiple tax exemptions including registration duties exemption on contribution to company's incorporation and capital increase (research and operating permits)

IV. C. Local content (1)

- **Goals?**

- Ensuring effective knowledge transfer
- Creating linkages: upstream, downstream and sidestream: proper participation of local industry and improving infrastructure and diversification

- **Tools?**

- Local procurement
- Local workers
- Training of local staff
- Employment quotas

- **An opportunity** for mining companies: pro-active companies in this area are likely to benefit from a real advantage over their competitors

IV. C. Local content (2)

Country	Provisions of local content
Burkina Faso	<p>Detailed obligations about preference to be given to:</p> <ul style="list-style-type: none">• Local businesses for any type of goods and services• Local employees for the recruitment of senior executives positions• Employment of local residents for work that does not require special skills <p>Training plan for executive positions for the progressive replacement of expatriate staff</p>

IV. C. Local content (3)

Country	Provisions of local content
Guinea	<p>Local employment quotas</p> <ul style="list-style-type: none">• Priority to Guineans while recruiting all categories of staff and management• Increasing quotas contingent on category of staff/stage of the project• Financial penalty• Mandatory annual reporting <p>Training</p> <ul style="list-style-type: none">• Training and development plan enabling the transfer of technology/skills to Guinean business and staff• Companies potentially required to fund additional staff training abroad• Career and progression plan for all employees <p>Local procurement requirements</p> <ul style="list-style-type: none">• Preference to be given to local suppliers and service providers• Increasing quotas contingent on the stage of the project• Mandatory annual reporting <p>Local beneficiation: taxes on export of certain unprocessed mineral substances</p>

IV. C. Local content (4)

Country	Provisions of local content
Ivory Coast	<p>Authorisation to operate a mining company may require Ivorian nationals to have a participation in the company (conditions to be detailed in a decree)</p> <p>Providing compliance with quality, price and quantity requirements, preference to be given to:</p> <ul style="list-style-type: none">• Local businesses when subcontracting mining operations• Local businesses for construction, supply and services contracts <p>Local preference when recruiting employees</p> <p>Obligation to implement/at least partially fund the training of:</p> <ul style="list-style-type: none">• local businesses selected as contractors to increase their capacity as providers• local staff• administration and geologists

IV. D. Management of environmental impact

Country	New provisions on environmental protection
Burkina Faso	<p>Creation of several funds</p> <ul style="list-style-type: none">• Fund for rehabilitation and safety of artisanal mining sites and combatting the harmful effects and use of chemicals• Fund for the protection and rehabilitation of the environment
Guinea	<ul style="list-style-type: none">• Environmental and social impact study required to obtain a mining title• Liability for damage caused by mining activities• Requirement to establish and fund a trust for the rehabilitation of the mining site once operations have ended
Ivory Coast	<p>Maintained requirement to establish a fund and pay for the rehabilitation of the environment after mining operations</p>

IV. E. Transparency and CSR (1)

- Role of Soft Law in conduct of mining activities: from Soft Law to law to public interest
- Integration of concepts of CSR, human rights and transparency in national mining legislation

⇒ **Enforceability of these concepts**

IV. E. Transparency and CSR (2)

Country	Corporate Social Responsibility	Transparency
Burkina Faso	Introduction of the CSR concept and provisions on the obligations to comply with and protect human rights and rights of local communities affected by mining activities	The State confirms its membership to the Extractive Industries Transparency Initiative (EITI) and the Kimberley Process
Guinea	Contribution to local community development through specific taxation, development agreement and local development fund	Title holders required to publish titles and contracts, as well as to sign and comply with code of conduct, in particular: <ul style="list-style-type: none">• EITI and Kimberley Process• Guinean anti-bribery provisions
Ivory Coast	Introduction of the CSR concept and provisions on the obligations to comply with and protect human rights and rights of local communities affected by mining activities	Compulsory compliance of the permit holders with requirements of the EITI, the Kimberley Process and the Equator Principles

V. STRATEGIES OF COMPANIES IN RESPONSE TO MINING REFORMS


- A. Protection: stabilisation clause, a useful but sensitive tool
- B. Anticipation: compliance with CRS and local content
- C. “To think of”

V. A. Protection: Stabilisation clause, a useful but sensitive tool

Current investors	New investors
<ul style="list-style-type: none">• Relying on the stabilisation clause concerning tax and custom regime• Being firm on the enforcement of the stabilisation clause and refusing the provisions included in the new mining code but• Be ready to make compromises and avoid jeopardising the contract on a long term basis	<p>Careful drafting of the stabilisation clause:</p> <ul style="list-style-type: none">• Limited scope: only tax and custom regime and never human rights or environment provisions• Renegotiation mechanism as a complement to the stabilisation clause

V. B. Anticipation: compliance with CSR and local content

Current investors	New investors
<ul style="list-style-type: none">• How to best comply with new mining codes requirements concerning human rights, environment, local content, CSR?• How to deal with existing agreements?	<ul style="list-style-type: none">• Showing real cooperation and understanding of such provisions• Being pro-active for the implementation of such provisions: even in countries where the mining legislation has not changed, companies should include these provisions in mining contracts



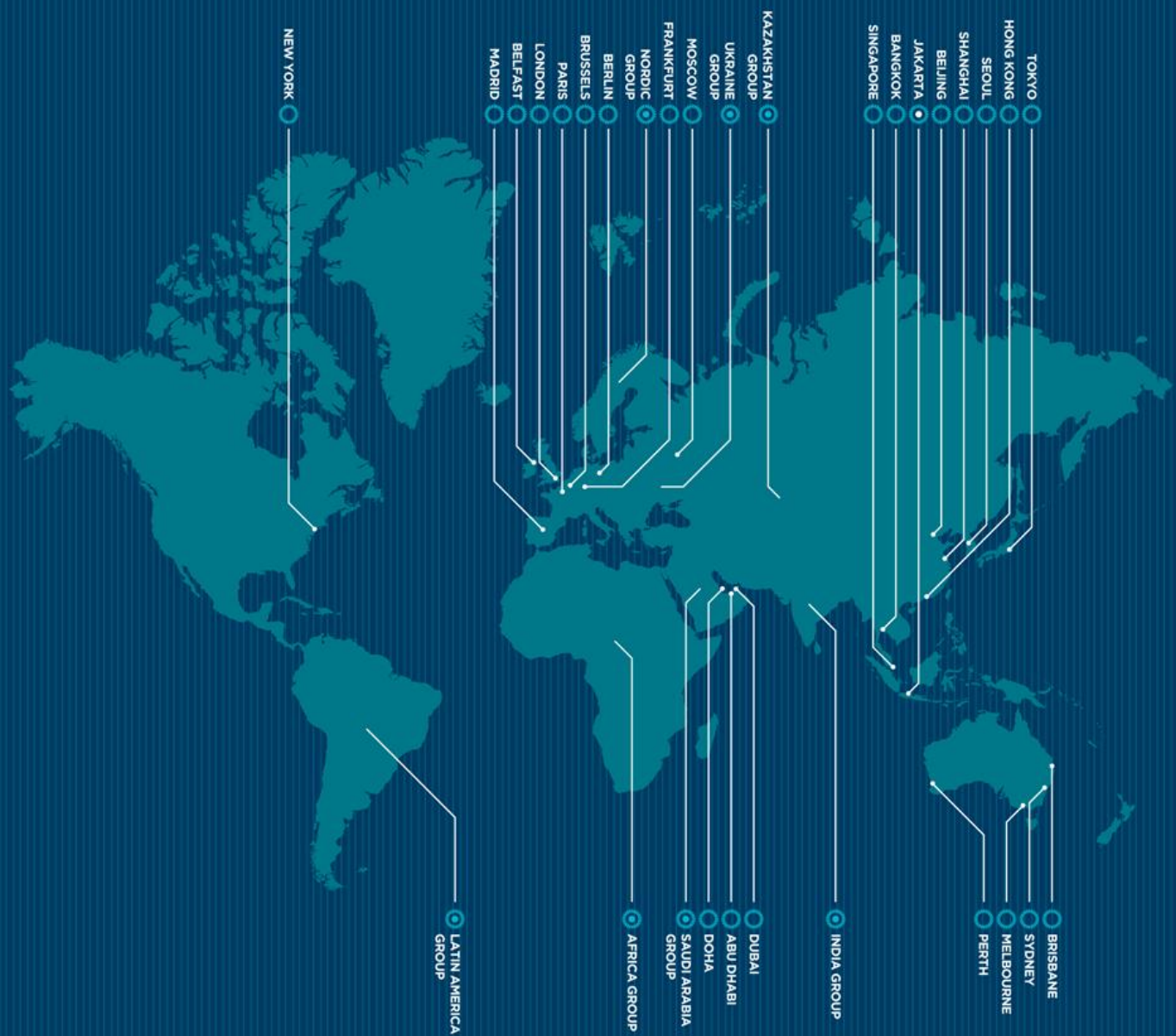
Real competitive advantages and good relations with government and communities

V. C. To think of

- Bankability of projects
- Well-balanced contracts
- Adapting mind-set/attitudes
- Accepting the role of “new legislations”
- Anticipating “new sanctions”
- (Re)considering the scope of stability
- Avoiding “escalation” (crisis management)
- Grievance mechanism
- Cooperation with stakeholders (NGOs)
- Specific cultural/environmental/institutional context
- Being “creative” (e.g. SWAPs)
- Doing more training
- Improving communication (“legitimacy”)
- Specific requirements of emerging countries
- Lack of infrastructure
- Expectations of local communities
- A reliable arbitration provision (as a tool)

CONCLUSION: THE 7 Ps FOR CREATING A PEACEFUL ENVIRONMENT

- Perseverance
- Perfectionism
- Partnership
- Pragmatism
- People
- Profits
- Planet



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