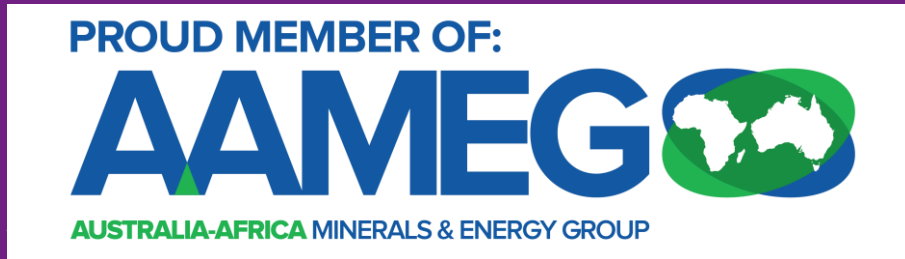


# Issues affecting your business



25 May 2023

Grow | Protect | Operate | Finance

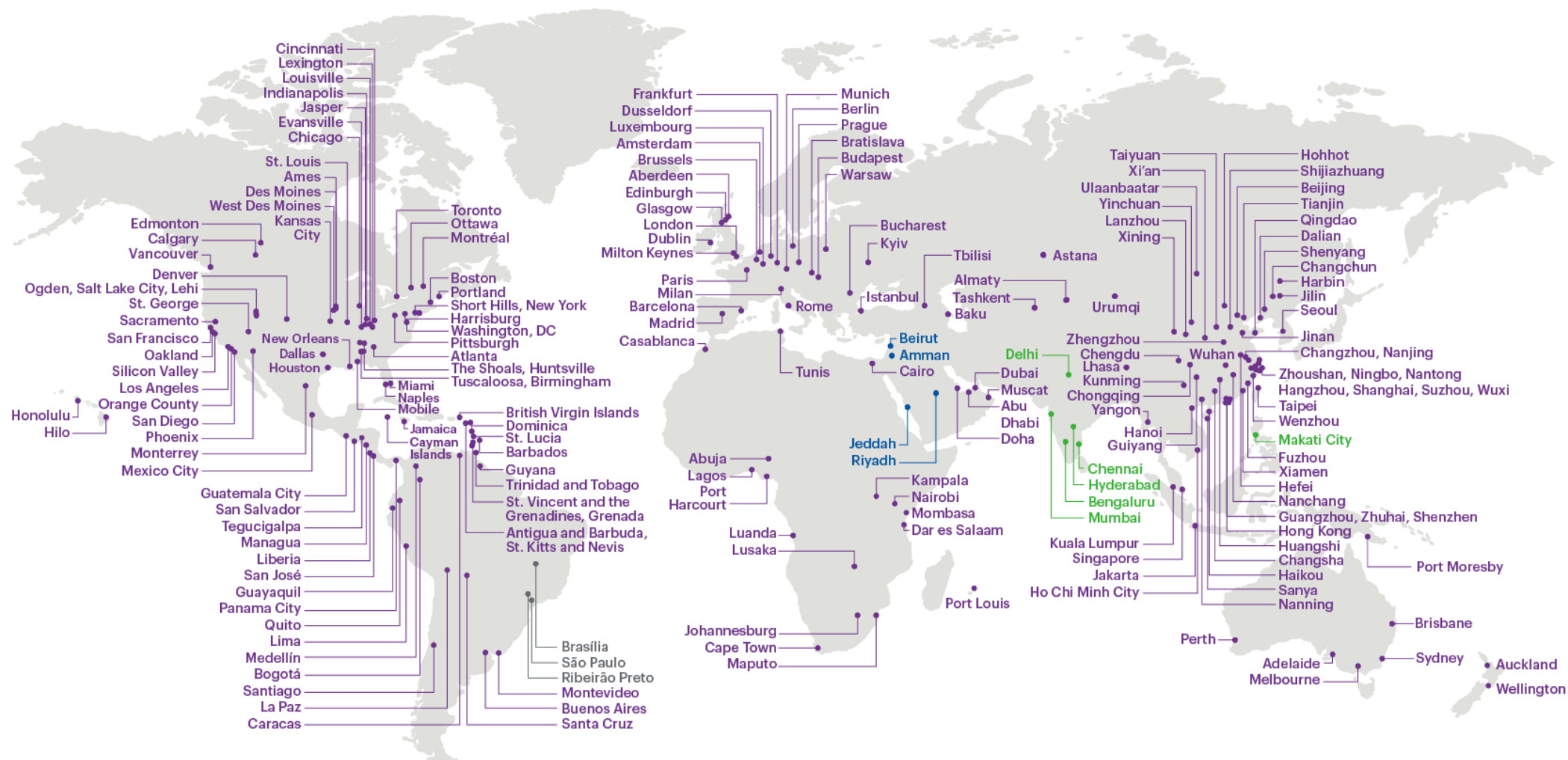
# Housekeeping

- Fire alarm and procedure
- Toilets
- Proceedings for the session

# Agenda

1. International investments – Donald Robertson
2. South Africa update – Brandon Irsigler
3. Zambia update – Joseph Jalasi
4. Tanzania update – Emma Kimario
5. Questions
6. Close

# Where we are



**200+**  
locations

**12,700+**  
lawyers

**80+**  
countries

Locations in purple represent Dentons offices.

Locations in blue represent associate firms, offices or special alliances as required by law or regulation.

Locations in green represent approved combinations that have not yet been formalized.

Locations in gray represent Brazil Strategic Alliance.





# International investments

Donald Robertson  
(Sydney)

# Considerations for investment protection

- An effective investment protection regime is founded upon:
  - the terms of an investment contract between the investor and State;
  - taking advantage of international legal instruments - investment treaties and international investment agreements, between States.
- **Investment contracts** reflect the agreed commercial deal (rights and obligations) and who carries the risk when circumstances change, what remedies are available and how to resolve disputes.
- **International investment treaties**
  - establish a global regime (now a network of over 3,000 instruments) that sets global standards of protection and State obligations;
  - establish a means by which investment disputes can be determined:
    - in a neutral venue;
    - by neutral arbitrators;
    - outside the host State,but with the arbitral decision having force throughout the world (no need to litigate in every State to recover assets).

# Working Group on Investment Contracts

- Major 3-year project now commencing, under the guidance of the *International Institute for the Unification of Private Law* (**UNIDROIT** – the major international law reform body).
- Project is to determine how investment contracts can better achieve the objectives of investment protection (usually addressed through investment treaties).
- Co-sponsored by the *International Chamber of Commerce* and UNIDROIT.
- Principle instrument being examined is the UNIDROIT *Principles of International Commercial Contracts* (**UNIDROIT Principles**).

# Protection under investment contracts

- Investment contracts should contain provisions addressing those matters that give rise to investment risk:
  - your choice of law governing the contractual relationship;
  - a forum for dispute resolution, typically neutral arbitration;
  - permitted periodic good faith renegotiation, especially if circumstances change, even without fault of either party;
  - the sequence of steps/process for dispute resolution;
  - supply chain issues (ESG, human rights, anti-corruption);
  - sovereign protections or waivers of sovereign immunity;
  - 'umbrella' provisions that turn contractual rights into treaty-protected rights.
- Non-State law ('rules of law' or 'soft law' especially not that of the host State) such as the UNIDROIT Principles now allowed by international guidelines. These address issues and concepts such as:
  - force majeure (Art. 7.1.7);
  - hardship (Art. 6.2);
  - provisions for 'relational' or long-term contracts (Art. 1.1.1);
  - renegotiation in good faith to secure 'equilibrium of the contract' (Art. 6.2.3).



# Protection under investment treaties

- Treaties establish international standards of protection, including:
  - fair and equitable treatment by the host State (covers nearly all situations);
  - full protection and security;
  - protection against uncompensated takings of property;
  - most favoured nation treatment;
  - national treatment (non-discrimination).
- Essential elements for obtaining the benefit of international investment treaties:
  1. *Nationality*: the investor must be 'foreign' (incorporation of local operating entity does not nullify this).
  2. *Investment*: aggrieved party must have an 'investment' as understood in the context of the treaty, not simply, for example, a one-off sale.
  3. *Location*: investment must have a physical presence in the territory of the host State.
  4. *Conduct of the State*: the respondent must be a 'State' (regulators and State-Owned Enterprises dealt with differently)

# Protection under investment treaties

- Access to investment treaty regime relies upon corporate structuring and planning
- Generally, structuring needs to be addressed prior to the 'investment' being made but can be dealt with after the initial investment in some circumstances, but it is too late if notice of a dispute already exists (so plan early)
- Assignments of rights (e.g. to litigation funders) can lead to a risk of 'commodification' of investment treaty claims. Generally, the 'investor' needs to be an active investor to qualify for protection





# South Africa

Brandon Irsigler



# Regulatory Environment developments



New mining rights electronic system

Update on Mining Charter 3, impacts and effects

Infrastructural challenges

# Southern African Update

## Botswana

- Reviewing mines and minerals legislation regarding mine rehabilitation
- Expansion of coal industry

## Namibia

- Critical Minerals
- Review of Minerals (Prospecting and Mining) Act 1992 ongoing

## Madagascar

- Rare Earth Minerals
- Revision of Law N.2007/036 on Investments in Madagascar (foreign investment)

## Zimbabwe

- General update
- Mines and Minerals Bill

## Mauritius

- Holding company jurisdiction
- Double Taxation agreements
- Professional Services





# **Zambia**

Joseph Jalasi

# Overview of the Mining Milieu

## Mining cadastre

- The Government through the Ministry of Mines and Minerals imposed a 44-day suspension on the issuance of mining rights to an extensive audit on the Mining Cadastre Department from the 23rd of February 2023.
- The outcome of the audit was that:
  - a number of active expired mining licenses in the system were deleted. This paved way for new applications for mining rights;
  - the connection of the Mining Cadastre system to other Government databases; and
  - the introduction of restriction on the number of active mining rights that can be held by a single beneficial owner.

# Mineral Royalty - Compliance

## Legal and Tax Issues

- Amendments to the Income Tax Act and the Property Transfer Tax Act have resulted in varying tax reforms effective in 2023. These include:
    - reduction of property transfer tax on transfer of mineral rights held by exploration companies from 10% to 5%;
    - mineral royalty tax is now deductible when determining the taxable income of mining companies; and
    - introduction of presumptive tax 4% for artisanal and small-scale mining based on gross turn over.
- This has given mining companies major tax relief.
- Potential licence holders should ensure that they are registered or incorporated as a company in Zambia.
  - Current mining right holders should ensure that the beneficial ownership information is up to date and accurate.
  - This will avail more opportunities for investors.

## Mining Policy and Regulation

- The Government, through the Ministry of Mines launched the 2022 National Mineral Resource Development Policy on 11th November 2022. The highlight of the policy is to create a semi-independent mining regulator. Currently, the Director of Mines regulates the mining industry.

# International Arbitration

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been domesticated.
- In 2022, in a bid to restore investor confidence, Zambia also enacted the Investment Trade and Business Development Act, No. 18 of 2022.
- The ITBD Act makes provisions for enforcement of Investment Protection and Promotion Agreements between an investor and the Government of the Republic of Zambia.

# Transfer Pricing

- Since 2018, the Income Tax (Transfer Pricing) (Amendment) Regulations, Statutory Instrument No. 24 of 2018 became effective.
- Investors operating in groups need to abide to the applicable basis upon which adjustments may be made to transactional prices in controlled transactions.
- The Regulations also provide for country-by-country reporting for large multi-nationals including mining companies.
- Investors additionally need to be aware of the OECD recommended three-tiered documentation structure, comprising master-file, local-file and country-by-country reporting of file storage. Small to mid-sized companies are however exempt from the Regulations.



# Environmental liability claims

## Parent company liability

- The United Kingdom Supreme Court (“UKSC”) case of *Vedanta Resources PLC and Konkola Copper Mines PLC v Lungowe and Others* 2019 UKSC 20.
- There appears to be a trend for mining companies operating in Zambia being sued for environmental claims against their subsidiary’s operation in Zambia.
- Parent companies should be wary of activities in their subsidiaries.

# Illegal Mining

- There has been an increase in illegal mining activities around the country.
- Particularly, there is illegal extraction of gold in Eastern Province, manganese in Luapula Province and a variety of minerals in North-Western Province.
- This has negatively affected major mining investors such as Kalumbila Mine – a mine owned by First Quantum Minerals Limited.



# Tanzania

Emma Kimario

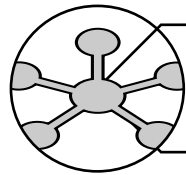
# Legal and Regulatory frameworks

## shaped by political landscape

- It has been a historical tendency for the legal and regulatory framework to be shaped by the political landscape.
- As now is widely known the political scene in the 2015 – 2021 appear not to be investor friendly. This period witnessed regulatory changes that were perceived as negative leading to scaling down of mining operations with some junior and mid exploration companies suspending their operations.
- However, with the central government leadership changes happening in the first half of 2021 things have changed slowly with the Government being perceived as welcoming to investors. The changes have been slow but encouraging. Some of these changes include legislative changes

# Tanzania Investment Act

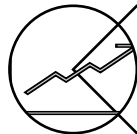
- The Act generally does not apply to the mining sector thus some benefits e.g. tax benefits would not apply to the sector.
- Exceptions to this general principle, thus investors in the sector are protected regarding:



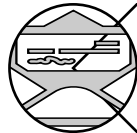
Free transfer of dividends



Unrestricted repayments of foreign loans



Transfer of profits



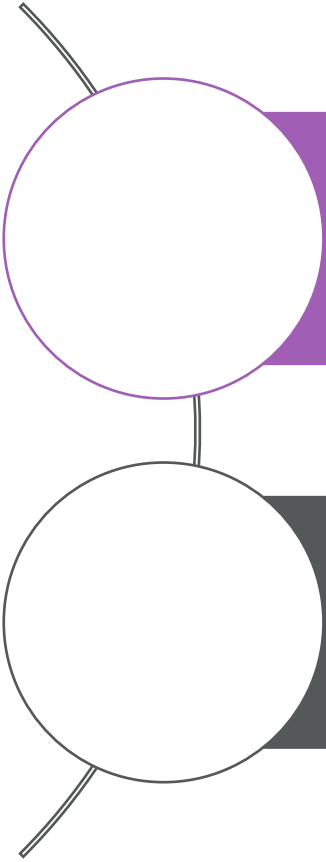
Salaries and benefits payable to expatriate staff



# Enactment of the 2020 arbitration law

- Amended the Natural Resources Permanent Sovereignty Act which had restricted disputes on natural resources to judicial and arbitral bodies established in Tanzania paving way for arbitration proceedings in foreign judicial bodies.
- It is arguable that the amendment however seems to retain applicability of Tanzanian laws in agreements related to exploration and exploitation of natural resources.

# Enactment of Data Protection Law



Applies to public and private bodies setting standards for collection and processing of personal data.

Establishes the Data Protection Commission as well as the Data Protection Board to enforce the new legislation

# East African Crude Oil Pipeline

- In 2022, various laws were amended in order to make special arrangements regarding provisions of the law which were deemed to be hindering the development of the East African Crude Oil Pipeline project. Examples include:
  - disapplication of provisions regarding prohibition of foreign arbitral bodies;
  - allowing placing of insurance with foreign insurers.
- While this step is not applicable to the mining sector, it sets precedent for possible similar arrangements for large scale mining projects.

**Questions**

Chatham House Rule

# Thank you

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