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# Investment protection in the mining sector

## A guide to protecting foreign investments in the OHADA Zone

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# Overview

The mining sector is playing, and will continue to play, an essential role in energy transition. As demand for critical metals and minerals continues to intensify, a significant increase in foreign investment is likely to occur in the coming decades, with over US$1.7 trillion in investment required to help the transition to clean energy. Demand for precious metals also remains strong, with considerable industrial demand playing a significant role in price increases over the course of 2023.

As investment increases, it is important for mining investors to ensure that they take steps to mitigate any political risk when they enter into long-term, capital-intensive projects abroad.

Mining investments tend to involve a significant commitment of capital with long-term profit horizons. This can make them particularly susceptible to various types of political risk, such as:

- resource nationalism;
- environmental regulation; and
- the increased politicization of mining projects.

Put simply, as demand increases, so does the risk that governments will take steps to interfere with mining projects, whether for political or economic gain. This effect has been felt in recent years, as there has been a significant increase in the number of mining cases brought before the International Centre for Settlement of Investment Disputes ("ICSID").

This article, part of our series on investment protection in the mining sector in Africa, focuses on the Organisation for the Harmonisation of Corporate Law in Africa ("OHADA") zone and, notably, on Ivory Coast, Guinea, Mali, and Senegal, countries rich in mineral resources including gold, iron, bauxite, manganese, limestone, diamonds, and lithium.

In each of these States, the mining sector assumes a pivotal role, contributing significantly to gross domestic product ("GDP"), tax revenues, and serving as a linchpin in strategies for resource optimisation and diversification. The mining industry propels 20 percent of Guinea's GDP and 10 percent of Mali's, where it stands as the primary source for over half of the nation's tax revenues. Ivory Coast has ambitiously set a target to double the contribution of its mining production to GDP by 2025, ascending from 3 percent to 6 percent. Meanwhile, in Senegal, the extractive sector, predominantly mining, commands 7 percent of public revenues, surpassing US$333 million.

# What is investment protection, and why is it relevant to the mining sector?

When a host State harms a foreign investment, the domestic legal system may not provide an adequate remedy. Sometimes, domestic court challenges or lobbying efforts may not be appropriate, or they have been exhausted without resolving a dispute. Foreign investors can reduce the risk of investing abroad by ensuring that their investments benefit from the protections contained in investment treaties.

There are more than 2,000 investment treaties currently in force worldwide. The majority of these treaties are bilateral investment treaties ("BITs") concluded between two States. There are also multilateral investment treaties, with arguably the most well-known being the Energy Charter Treaty, which protects investments in the energy sector.Investment treaties contain substantive investment protection standards, which protect the 'investments' of 'investors' from internationally wrongful governmental interference.

In the mining sector, the types of interference may take various different forms, including, but not limited to:

a. changes to mining laws;

b. changes to royalty or tax regimes;

c. cancellation of concessions;

d. unreasonable refusal to renew a concession;

e. new environmental regulations, or wrongful use of environmental enforcement measures; or

f. export bans.

If a State interferes with an investor's investment, and if there is an investment treaty in force between the home State of the investor and the host State of its investment, that investor may be able to bring a claim against the State under the treaty before an international tribunal.  If successful, an investor may be able to recover substantial damages, placing it in the position it would have been in but for the internationally wrongful conduct of the State.

# Investment protection in the OHADA zone

## Structuring investments in order to benefit from protection

Investors in the mining sector in the OHADA zone would be well-advised to seek to structure their investments in order that they benefit from the protection set out in investment treaties. This can be done at the outset of an investment or after the investment has been made, provided, in the latter case, that any dispute has not already begun or is reasonably foreseeable.

Investment structuring to benefit from investment protection can often complement structures reflecting corporate or tax considerations. Many investment treaties will provide protection to investments which are indirectly held. In other words, protection often is not dependent on the relevant entity directly holding the foreign investment. As long as it is inserted within the ownership structure, protection may be available.

Mining activities within the OHADA zone typically involve the issuance of exploration and exploitation permits, as well as the establishment of local subsidiaries. This structure highlights a distinctive feature of the region, where national regulations intersect with OHADA uniform acts. While legal aspects directly related to mining are governed by national law, the framework for corporate law is derived from the OHADA Uniform Act on Commercial Companies.

In the OHADA zone, and despite the OHADA treaty's objective to "promote economic development and encourage investment," there is no specific uniform act addressing investment matters. However, investments are not entirely absent from these acts, as evidenced by the OHADA Uniform Act on Arbitration.

It stipulates that "arbitration may be based on an arbitration agreement or on an instrument related to investments, such as an investment code or a bilateral/multilateral treaty on investments". It is also worth noting that neither OHADA nor its individual member States offer model BITs.

As a result, investor protection relies on the investment treaties to which each host State is a party and on domestic investment laws, which include guarantees and protective provisions. While certain investment laws may include a standing offer to arbitration on the part of the State, it would be prudent for investors to seek to ensure as far as possible that the ownership structure of their investment brings an investment treaty into play, rather than relying on domestic investment laws alone.

Many OHADA zone States have a network of BITs with States that may frequently appear in the ownership structure of an international investment in the mining sector:

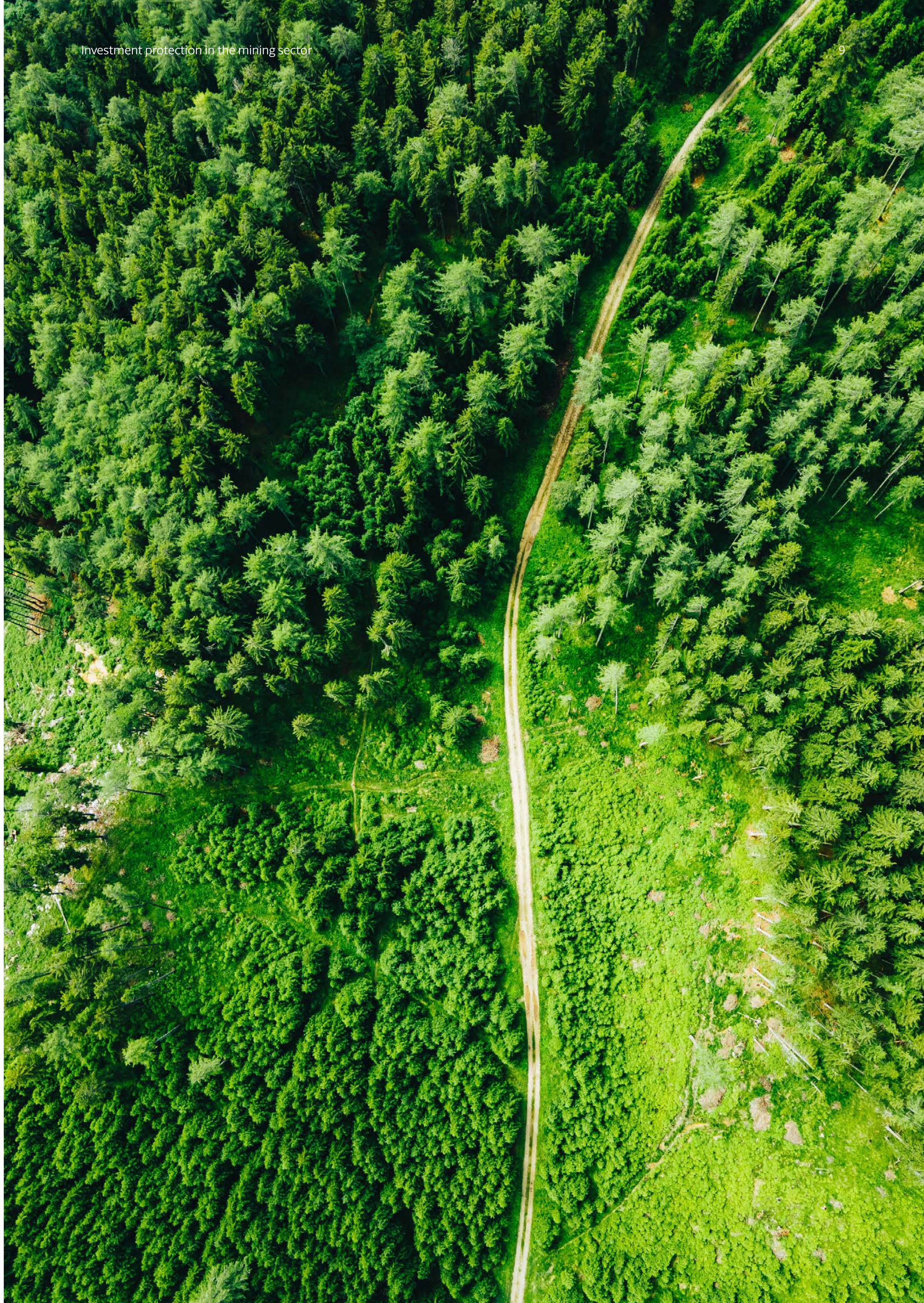
a. The Ivory Coast has BITs in force with Canada, Belgium-Luxembourg Economic Union, the UK, the Netherlands, Switzerland, and others.

b. Guinea has BITs in force with Canada, the UAE, Switzerland, and others.

c. Mali has BITs in force with Canada, China, the Netherlands, Switzerland, and others.

d. Senegal has BITs in force with Mauritius, South Africa, Qatar, USA, India, the Netherlands, the UK, Switzerland, and others.





# Mining regulation in the OHADA zone

...significant political and legislative changes have recently occurred in the four countries under scrutiny, and more broadly within the OHADA zone

Mining investment in the OHADA zone involves the intertwining of various bodies of rules. While OHADA Uniform Acts govern broad aspects of business life, including areas of interest to investors such as security, corporate and insolvency law, certain domains fall beyond the scope of OHADA law and remain under the jurisdiction of national laws. These notably encompass mining, tax, environmental and labour law. In addition to the interaction between OHADA law and national law, an additional layer is introduced through regulations from regional monetary and financial institutions, such as the West African Economic and Monetary Union ("UEMOA"), particularly in the field of currency exchange regulation.

Furthermore, significant political and legislative changes have recently occurred in the four countries under scrutiny, and more broadly within the OHADA zone.

On the legislative front, several reforms directly altering the legal framework of mining activities have been initiated. New mining codes became effective in Niger in July 2022 and in Mali in August 2023. The mining code of Burkina Faso was amended in July 2023, and Cameroon was poised to enact a new mining code by the end of 2023. Additionally, in June 2023, a community mining code for UEMOA was adopted by the UEMOA Council of Ministers.

Laws addressing more specific themes but primarily impacting mining activities have also been enacted. For example, in May 2022, the Senegalese law on local content in the mining sector came into force. In Mali, a law with a similar name was promulgated simultaneously with the new Malian mining code. In September 2022, Guinea also promulgated its law on local content, establishing a Regulatory and Control Authority for Local Content and stipulating various categories of sanctions, including fines, contract termination, withdrawal or refusal to renew permits, authorisations, or licences, as well as operation suspension for up to five years.

Although the concept of local content is not new, the increasing reliance on it and the novelty of the mechanisms in place require heightened attention from investors, and local assistance to understand the practical implementation of these new rules.

Another noteworthy development is resource nationalism, as exemplified by Mali with its new mining code. Among the changes introduced are the increase in the optional State participation level in mining projects, the elimination of the possibility for investors to select the most favourable tax provision, and the end of tax exemptions on petroleum products granted during the production phase.

Some of these developments may give serious concerns to those who have invested in mining projects in the relevant States. These investors would be well advised when taking advice on the impact of domestic legal changes on their investments, to also consider whether their rights under investment treaties may bring protection.

# How to protect your investments if there is governmental interference

Simply the availability of an investment treaty can be a valuable tool for an investor in seeking to negotiate with governments. When a measure is enacted or threatened and a dispute arises, many investment treaties require the parties to engage in good faith negotiations before any action can be taken. The ability of an investor to bring an arbitration may incentivise governments while at the negotiating table.

It is important to remember that not all foreign investments qualify for protection under an investment treaty, and not every type of State conduct will breach the standards of protection ordinarily set out in investment treaties.



The below checklist has been created with mining investors in mind to provide a preliminary assessment of the availability of investment protection and what to do in the event that a dispute arises.

## 01.

### Is there treaty protection available and what is your claim?

**a. Is there an investment treaty in force?**

Look to the ownership structure of your investments in order to determine whether there is an applicable treaty. If an investment treaty is not currently available in your corporate structure and a dispute has not yet begun or is not reasonably foreseeable, it is not too late to restructure your investments in order to obtain protection.

**b. Are you an investor?**

Definitions of an 'investor' vary between investment treaties. It is often the case that an investor can benefit from the protections of an investment treaty through mere incorporation in a State. However, sometimes a higher degree of connection to a State is required. 'Investor' status can often be bestowed on companies with only indirect ownership of the relevant investment.

**c. Have you made an investment?**

Typically, an investment treaty contains a broad and non-exhaustive definition of the types of investments it covers. This can include shares in locally incorporated companies which may be performing day-to-day tasks in the context of a mining project. It can also include a concession agreement for a project itself.

**d. Have any investment protection standards been infringed?**

Different investment treaties provide different investment protection standards. However, most investment treaties will contain an obligation for investments to be accorded fair and equitable treatment and protected from uncompensated expropriation.

# 02.

## Negotiating with the State and beginning arbitration

e. **Mandatory negotiations under an investment treaty:** the investment treaty may require you to enter into negotiations with the State. The protections in the investment treaty may be leverage in difficult negotiations.

f. **Commencing arbitration:** a typical investment arbitration can last for up to three years. There may be opportunities for settlement along the way. Many mining companies have already used third-party funders to fund claims under investment treaties. Third party funding allows an investor to bring a claim without the fees and costs associated with that claim affecting the investor's balance sheet or having an impact on its cash flow. The third party funder funds the investor's legal fees and costs associated with the arbitration in return for a portion of the proceeds of any award in the investor's favour. This is non-recourse funding; if the investor does not succeed, it does not have to pay the funder.

# 03.

## Receiving compensation in the event of success

g. **Arbitral award:** a tribunal records its final decision in the form of an award. If you are successful, the tribunal may award damages. Many States wish to be perceived as adhering to their international legal obligations and will pay an arbitral award voluntarily.

h. **Enforcement:** if a State does not pay voluntarily, as noted above, it would be possible to enforce the award against non-State immune assets of the State held abroad.



# How can we help?

## Hogan Lovells

Forming part of our market-leading global disputes offering, the Hogan Lovells international arbitration team has extensive experience in investment arbitration matters. We often advise on bilateral and multilateral investment treaties, including at a pre-dispute phase, in ensuring that investments are structured in a way which not only reflects investors' corporate and tax requirements, but also the availability of investment protection. We can help you best take advantage of the protections set out in investment treaties in order to avoid disputes. When disputes cannot be avoided, we assist our clients in investment arbitrations, seeking favourable settlements or awards.

## ADNA

With offices in Abidjan (Ivory Coast), Conakry (Guinea), Casablanca (Morocco), and Algiers (Algeria), ADNA is firmly established in Francophone Africa, particularly in the OHADA zone, where some countries currently exhibit the continent's most pronounced growth rate. ADNA provides comprehensive legal advisory services to mining investors, covering the investment structuring stage to maximise the benefits of OHADA legislation, regional financial and monetary regulations, and local laws. This support extends throughout the entire project lifecycle, including the stages of dispute prevention and resolution, if needed.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