

# Client Alert

International Arbitration Practice Group

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## Recent Developments: Kenya—What Legal Options are Available to Mining Companies?

Foreign mining companies with investments in Kenya whose mining licenses are cancelled and/or whose revenues decrease as a result of these new drilling charges and/or royalty schemes may be able to bring compensation claims against Kenya before international investment arbitration tribunals. Compensation claims are not restricted to active mining properties as exploration and development properties may also have significant value that can be determined by expert means on an independent basis.

Kenya has entered into a number of bilateral investment treaties (BITs) and the treaties that are in force may be relied upon by investors to bring claims against Kenya. The bilateral investment treaties that are currently in force include those between Kenya and France, Germany, Italy, the Netherlands, Switzerland, and the United Kingdom, respectively.<sup>1</sup> Bilateral investment treaties entitle investors from one State party to submit claims against the other State party to international arbitration. Even if no treaty exists between an investor's home state and Kenya, the investor may be able to bring claims under a treaty between Kenya and a third country if its investment is held through a subsidiary incorporated in that country.<sup>2</sup>

While the language of each bilateral investment treaty must be carefully examined, most treaties mandate that an investor's investments shall enjoy "fair and equitable treatment,"<sup>3</sup> "full protection and security,"<sup>4</sup> and treatment no less favorable than that granted to the host State's own investors or those of any other state.<sup>5</sup> Most treaties also entitle the investor to "adequate and effective compensation" if the host State expropriates or nationalizes its investment,<sup>6</sup> and some also protect the investment from "unreasonable and discriminatory treatment."<sup>7</sup>

Bilateral investment treaties also contain dispute resolution clauses that, as noted above, allow investors to submit disputes with the host State to international arbitration, in particular to the International Centre for Settlement of Investment Disputes (ICSID) or by way of *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).<sup>8</sup> Here too, it is important to carefully examine the language of each bilateral investment treaty.<sup>9</sup>

Kenya signed the ICSID Convention on May 24, 1966, and became a Contracting State on February 2, 1967.<sup>10</sup> As a result, international

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investment arbitrations may be brought against Kenya before ICSID. There are no such cases currently pending against Kenya.

Therefore, if Kenya's cancellation of the mining licenses is not reversed, and/or the new drilling charges and royalty schemes are successfully implemented, foreign mining companies that are protected by bilateral investment treaties that are in force and that have been affected by these measures may be able to claim against Kenya for breach of, *inter alia*, the treaties' provision prohibiting expropriation without adequate and effective compensation.<sup>11</sup>

Other legal options may be available to foreign investors to bring claims against Kenya before international arbitration tribunals if they are unable to rely on bilateral investment treaties that are currently in force. Companies may have entered into concession contracts or joint venture agreements with a governmental authority that may contain their own dispute resolution clauses. These clauses need to be carefully reviewed, and may provide for disputes to be resolved through international commercial arbitration before an internationally recognized body such as the International Chamber of Commerce in Paris, or the London Court of International Arbitration. It is also possible that these dispute resolution clauses provide for the possibility of resorting to ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

If there are no contract-specific dispute resolution clauses, it may be possible for foreign investors to bring claims against Kenya before international arbitration tribunals by way of Kenya's own laws. The relevant laws of Kenya in the context of mining disputes appear to be the Mining Act,<sup>12</sup> and the Foreign Investments Protection Act.<sup>13</sup> However, there appear to be no general dispute resolution provisions in either of these two Acts that would allow foreign investors to bring claims against Kenya before international arbitration tribunals. Most disputes that would arise under the Mining Act are settled by the Commissioner of Mines and Geology.<sup>14</sup> As for the Foreign Investments Protection Act, it specifically cites Article 75 of the Kenyan Constitution, which provides that "[e]very person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court..."<sup>15</sup> In this connection, it is worth noting that delays in resolving disputes under national laws may in certain instances give rise to claims of denial of justice under international law.<sup>16</sup>

In conclusion, if the Government of Kenya does not reverse the mining license cancellations, and goes forward with the implementation of more onerous drilling charges and royalty schemes, investors would be well-advised to ensure that they can rely on bilateral investment treaties entered into by Kenya and that are currently in force. In these circumstances, and as compared to other options that may be available, there is no doubt that the protection provided by bilateral investment treaties is the most effective form of protection for foreign investments, including mining concessions, given that foreign investors are granted access to independent and effective international investment arbitration tribunals for the resolution of their disputes.

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- <sup>1</sup> The Italy-Kenya BIT does not appear to be available online. Moreover, it is always worthwhile to check with the relevant government authority whether the BIT in question has or has not entered into force.
- <sup>2</sup> Some BITs provide that their scope of protection extends beyond the continental borders of the State in question. Thus, for example, the Netherlands-Kenya BIT protects investments made by investors based in Surinam, the Netherlands Antilles, as well as in the Netherlands itself (Art. 17). The United Kingdom-Kenya BIT provides that its protections “may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes” (Art. 12) (emphasis added). However, no such Exchange of Notes appears to have taken place.
- <sup>3</sup> See, e.g., France-Kenya BIT, Art. 3; Germany-Kenya BIT, Art. 2(1); Netherlands-Kenya BIT, Art. 7; Switzerland-Kenya BIT, Art. 4(1); United Kingdom-Kenya BIT, Art. 2(2).
- <sup>4</sup> See, e.g., France-Kenya BIT, Art. 6(1); Germany-Kenya BIT, Art. 4(1); Switzerland-Kenya BIT, Art. 4(1); United Kingdom-Kenya BIT, Art. 2(2).
- <sup>5</sup> See, e.g., France-Kenya BIT, Art. 4; Germany-Kenya BIT, Arts. 3 and 4(4); Netherlands-Kenya BIT, Art. 5; Switzerland-Kenya BIT, Arts. 4(2) and 4(3); United Kingdom-Kenya BIT, Art. 3.
- <sup>6</sup> See, e.g., France-Kenya BIT, Arts. 6(2)-6(4); Germany-Kenya BIT, Art. 4(2); Netherlands-Kenya BIT, Art. 9; Switzerland-Kenya BIT, Art. 6; United Kingdom-Kenya BIT, Art. 5.
- <sup>7</sup> See, e.g., France-Kenya BIT, Art. 3; Germany-Kenya BIT, Art. 2(2); Netherlands-Kenya BIT, Art. 7; Switzerland-Kenya BIT, Art. 4(1); United Kingdom-Kenya BIT, Art. 2(2).
- <sup>8</sup> Of the Kenya BITs that appear to be in force, the Germany (Art. 11) and United Kingdom (Art. 8) BITs provide for ICSID arbitration only; and the France (Art. 8) and Switzerland (Art. 9) BITs provide for either ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.
- <sup>9</sup> Thus, for example, Article 11 of the Netherlands-Kenya BIT provides as follows: “The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.” (emphasis added)
- <sup>10</sup> See <https://icsid.worldbank.org>.
- <sup>11</sup> Moreover, under customary international law, a state must pay compensation to a foreign national if the state expropriates its property. See, e.g., Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 322, § 7.2.
- <sup>12</sup> Available at [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/MiningAct\\_Cap306.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/MiningAct_Cap306.pdf). See also [www.kenyalaw.org](http://www.kenyalaw.org).
- <sup>13</sup> Available at <http://world.moleg.go.kr/fl/download/24280/C5CEDN5TLKKLXWG9YXLO%E2%80%8E>. See also [www.kenyalaw.org](http://www.kenyalaw.org).
- <sup>14</sup> Mining Act, Art. 61.
- <sup>15</sup> Foreign Investments Protection Act, Schedule.
- <sup>16</sup> An investor would still need to be protected by a valid BIT guaranteeing fair and equitable treatment in order to bring such denial of justice claims against Kenya.