

Client Alert

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Recent Developments: Mozambique—What Legal Options are Available to Investors in Oil, Gas and Mineral Resources?

Recent developments in Mozambique, including the announcement on October 21, 2013, by opposition party RENAMO (Mozambican National Resistance) that it would no longer abide by the 1992 peace pact that ended years of civil war with the ruling party FRELIMO (Mozambique Liberation Front), are causing concern about potential armed conflicts and ensuing disruption in Mozambique. Although widespread conflict appears unlikely at this stage, the latest events increase the risk of targeted attacks or other forms of selective interference with strategic assets by the political opposition and associated guerrillas. Investors in oil, gas and mineral resources in Mozambique would be well-advised to ensure that their investments benefit from investment treaty protection before the political tensions may escalate.

Mozambique has entered into a number of bilateral investment treaties (BITs) and the treaties that are in force may be relied upon by investors to protect their existing and future investments, including by permitting them to bring claims against Mozambique should conflicts and disruption materialize and losses occur. 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 Mozambique, the investor may be able to bring claims under a treaty between Mozambique and a third country if its investment is held through a subsidiary incorporated in that country.

The bilateral investment treaties that are currently in force include those between Mozambique and Algeria, Belgium and Luxembourg, China, Cuba, Denmark, Finland, France, Germany, Indonesia, Italy, Mauritius, Netherlands, Portugal, South Africa, Sweden, Switzerland, United Kingdom, United States and Vietnam. Mozambique is one of the African States with more BITs (19)—contrasting with the very few BITs entered into by most other sub-Saharan States—which permits foreign investors to consider alternative corporate structures for their investments in Mozambique that conveniently combine both BIT protection and favorable tax regimes.

While the language of each bilateral investment treaty must be carefully examined, most treaties mandate that investments shall enjoy “fair and equitable treatment”¹ and “full protection and security”². Other standards of protection may be available under certain BITs depending on the State's

conduct vis-à-vis a potential scenario of social and political unrest and its consequences on foreign investments.³ 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). Here too, it is important to carefully examine the language of each bilateral investment treaty.

Mozambique signed the ICSID Convention on April 4, 1995, and became a Contracting State on July 7, 1995.⁴ As a result, international investment arbitrations may be brought against Mozambique before ICSID, in particular if the applicable BIT provides for ICSID arbitration as an option available to investors.⁵

In this context, if political tensions in Mozambique escalate and result in losses to investors, which the government fails to reasonably avert or minimize, foreign investors in oil, gas and mineral resources that are protected by bilateral investment treaties in force and that have been affected may be able to bring a claim against Mozambique for breach of, inter alia, the treaties' provisions on full protection and security and fair and equitable treatment.

Other legal options may be available to foreign investors to bring claims against Mozambique before international arbitration tribunals if they are unable to rely on BITs. Companies may have entered into concession contracts or joint venture agreements with a governmental authority that may contain their own dispute resolution clauses.⁶ 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.

In conclusion, if unrest does follow the ending of the peace pact in Mozambique, investors would be well-advised to ensure that they can rely on bilateral investment treaties entered into by Mozambique. The protection provided by bilateral investment treaties is an effective and frequently the sole form of protection of foreign investments, and especially so of investments in oil, gas and mineral resources, which due to their strategic and large-scale nature are prone to becoming primary targets in situations of political and social unrest.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ See, e.g., United States-Mozambique BIT, Art. II(3); Netherlands-Mozambique BIT, Art. 3(1); Switzerland-Mozambique-BIT, Art. 4(1); United Kingdom-Mozambique BIT, Art. 2(2); Portugal-Mozambique BIT, Art. 2(1).

² See, e.g., United States-Mozambique BIT, Art. II(3); Netherlands-Mozambique BIT, Art. 3(1); Switzerland-Mozambique-BIT, Art. 4(1); United Kingdom-Mozambique BIT, Art. 2(2); Portugal-Mozambique BIT, Art. 2(2).

³ See, e.g., United States-Mozambique BIT, Art. IV(2), under which Mozambique may be liable to "accord restitution, or pay compensation ... in the event that covered investment under this treaty suffer losses in its territory, owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events, that result from: (a) requisitioning of all or part of such investments by the Party's forces or authorities, or (b) destruction of all or part of such investments by the Party's forces or authorities that was not required by the necessity of the situation." (emphasis added)

⁴ See <https://icsid.worldbank.org>.

- ⁵ Of the Mozambique BITs that appear to be in force, the Netherlands (Art. 9), the Portugal (Art. 9) and the United Kingdom (Art. 8) BITs provide for ICSID arbitration only; and the United States (Art. 9) and Switzerland (Art. 9) BITs provide for either ICSID arbitration or ad hoc arbitration under the UNCITRAL Arbitration Rules.
- ⁶ Alternatively, foreign investors may rely on domestic Mozambican legislation to resort to arbitration. The “Petroleum Law” (Law 3/2001), although excluding sectors like refining, distribution and commercialization, provides investors in the upstream oil and gas sectors with the possibility of submitting disputes to arbitration. Other investors may be able to rely on the “Investment Law” (Law 3/1993) for arbitrating disputes; however, this is subject to certain conditions and areas like mineral resources are outside its scope. The availability of either scenario is subject to case-specific assessment.