

African States Flex Muscles In Natural Resource Dealings

By **Kelly Rizzetta**

Law360, New York (October 12, 2012, 10:01 PM ET) -- Backed by proven reserves and increasingly sophisticated market knowledge, African sovereigns are negotiating for more control and better benefits in deals with developers seeking to tap the continent's vast energy and mineral resources, according to project experts.

Case in point: Cameroon is closing in on a development deal with Sundance Resources Ltd., the Australian miner looking to tap more than 775 million metric tons of high-grade material in an emerging iron ore province that spans Cameroon, the Republic of Congo and Gabon. The novel convention — a hybrid of the familiar concession and production-sharing models — gives the sovereign unprecedented control over its natural resources.

Thanks to its sheer size at an estimated cost of \$5 billion to \$10 billion, Sundance's Mbalam Iron Ore Project could become the poster child for a trend attorneys have seen percolating for the last few years as African governments hold developers to higher social, environmental and economic standards.

"There are a lot of expectations for this project," said Serge Yanic, a managing director at investment bank BMCE Capital who is serving as lead adviser to the government on Mbalam.

"We're trying to make sure that we're doing things the right way," Yanic told Law360 recently. "In Africa, there is a history [of exploitation]. We don't want to see the story of Africa continue that way. We want to change that."

Under the guidance of lead legal counsel Patton Boggs LLP, Cameroon has gone to great lengths in structuring the convention to make sure Sundance — which is on the verge of finalizing a \$1.5 billion buyout deal that will see it acquired by China's Hanlong Mining Investment Pty Ltd. — leaves the host country in better shape than it found it.

Negotiations are still in progress, with another round of talks slated to start next week in Dubai and a signing expected by mid-November. But the major components of the convention are in place, according to Patton Boggs partner Douglas C. Boggs, who is leading Cameroon's legal team with partner Robert S. Kapla.

The convention is structured as a concession in that Sundance has agreed to design, build and operate the mine infrastructure, as well as a roughly 600-kilometer rail line to haul the harvested ore to the port at Kribi, which the Australian mining company will build out, Boggs said.

The production-sharing piece comes from a provision that requires Sundance to design the railroad and export terminal for use by multiple future users. Cameroon, which will have both an equity and royalty stake in the project, will help its Australian partner develop the extra shipping capacity, drawing most of its funding from third-party users, according to Boggs.

“[The government] will be restricting the total use of the infrastructure by the original operator to a specified amount of the total infrastructure capacity,” he said. “[Sundance] cannot come in and say, ‘This is mine; go away.’ They’re building this not just for themselves, but for the entire industry.”

That long-term, multifaceted approach to infrastructure development is pretty typical of African states in the last decade, according to attorneys who have been practicing on the continent.

“[African governments] have generally become more sophisticated in terms of their ask,” Mayer Brown LLP partner Ian Coles, who heads up the firm’s mining team, told Law360 this week. “Ten or 15 years ago, a lot of these countries would not have had a part in the projects the way they do today.”

With the exception of Mbalam, most African project contracts being negotiated in the 2010s aren’t particularly groundbreaking in terms of their structure. The main provisions African governments push for look a lot like the wish lists of host governments the world over: royalty schedules, domestic content requirements and downstream provisions.

The real novelty, attorneys say, is in the numbers attached to those provisions. For the first time, African states are pushing for higher royalties, better environmental protections, more requirements to use local labor and suppliers, and more offtake rights.

“A lot of states want to make sure that ... locals will get jobs, that the [extraction company] will provide training programs,” said Olivier Chambord, a partner in Morgan Lewis & Bockius LLP’s business and finance department. “Know-how is part of it, but it’s not just know-how. It’s jobs, it’s training.”

“A lot of the time, we also find that states want to make sure that, to the extent possible, if the oil company is contracting out various parts of the development process ... local companies will see the benefit of that and are at least considered for those contracts,” he said.

The attorneys interviewed for this story, most of whom represent both sovereigns and extraction companies, reported little push-back from miners and oil and gas companies on these demands outside of the usual squabbling over the stringency of environmental provisions or the extent to which local contractors are qualified to handle their projects.

“The thing is, if you can get it right, you can help some of the poorest countries in the world and help your client get a good deal,” said Hunton & Williams LLP partner John Beardsworth. “You really can find that sweet spot.”

Sovereigns’ increased confidence in negotiations is due to a number of factors, but one of the biggest ones, according to Beardsworth, is that African resources are now a known quantity.

“In the year 2000, no one knew if there even was oil and gas in Kenya, in Uganda,” Beardsworth told Law360. “Companies didn’t know if they wanted to go in there. They needed more of a reward in order to take what they saw as a huge risk.”

That reward usually came in the form of highly favorable contract terms and little interference from the host government. But now that test wells have been drilled and operations established, royalties are starting to come in from those decade-old development deals and sovereigns are finding themselves sitting on growing piles of cash and a whole lot of proven reserves.

Some countries have been inspired to head back to the drawing board, reopening production-sharing agreements to negotiate for better splits with the developer, Beardsworth said.

Last month, Tanzania's energy ministry took a particularly aggressive stance and said it would re-examine more than two dozen oil contracts to make sure they include a big enough cut for the national energy company and delayed a licensing round for offshore oil and gas blocks scheduled for Houston until the process was complete. At about the same time, Mozambican officials warned that mining companies could find themselves facing fines if they don't take more care in relocating people displaced by projects.

African governments have also changed the way they approach the bargaining table to negotiate new contracts. Countries with less natural resource development programs seek out top counsel from international firms, while states with more experience have started putting together their own top-notch in-house teams. Legislative efforts are under way all over the continent to update mining, petrochemical and hydrocarbon policies to codify benefits for the host government.

"In a lot of African jurisdictions, legislation dictates that the government get a free carried interest in the project — 10 percent is quite common — plus a right to acquire further interest, usually another 10 to 20 percent," Coles said. "Government having ownership in these projects, which is something that is not quite so common in South and North America, is actually quite common in Africa."

Jude Kearney, a Greenberg Traurig LLP shareholder and chair of the firm's Africa practice, said African countries could afford to do that "because there's more than just a single company or a single country coming at them for a position in regard to their resources."

"It's not necessarily that that much has changed, other than the expectations of the government officials sitting across from their partners and counterpartners," he said.

Of course, conditions vary widely from one country to the next, and one must avoid the common pitfall of painting the whole continent with the same brush, says Chambord.

"The discussions that we have with the sovereigns ... vary greatly from one country to another, basically due to the fact that in some countries, we represent clients with an oil and gas industry that has already been set up for some time, and [officials] are knowledgeable about the industry and what its standards are," Chambord said.

Lawyers play a key role in bringing less experienced countries up to speed.

"In countries [that] don't have a very deep ... knowledge of what the industry standards are ... you almost have a sort of educational role in explaining what you would typically expect to see in [a certain] type of agreement," Chambord said. "And then you basically need to explain the rationale behind those provisions, and explain why it's been done this way in other places."

For firms that can handle that role with proficiency and sensitivity, African projects should provide a great deal of work in the coming decades.

Sixty-four oil and gas discoveries were made in the continent's emerging markets in just the last five years, according to a report business analytics firm GlobalData put out last week. The majority of the finds were in East Africa, in Uganda, Mozambique and Tanzania, which are just starting to build up their oil and gas regimes.

“We've been saying for 20 years that Africa is the new horizon,” Kearney said. “But now, it's not just a cliché.”

--Additional reporting by Liz Hoffman. Editing by Elizabeth Bowen and Andrew Park.

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