

MALI ECOWAS SANCTIONS: THE IMPACT ON FOREIGN INVESTORS

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As a major gold, diamond and mineral producer, Mali's response to recent sanctions will impact business in the region, forcing investors to turn to legal protections to avoid disruption.

THE ECOWAS SANCTIONS

On 16 September 2021, ECOWAS (Economic Community of West African States) imposed a first wave of sanctions on the Republic of Mali (“**Mali**” or the “**State**”) following the May 2021 ousting of Transition President Bah N’Daw by a military group.¹ These sanctions targeted “persons or groups of persons whose actions have a negative impact on the transition timetable” and included “travel ban[s]... and the freezing of their financial assets.”²

On 9 January 2022, ECOWAS voted for a second wave of sanctions following the junta’s refusal to organise presidential elections in the country by 27 February 2022 despite prior commitments to ECOWAS.³ Instead, the junta had decided to hold such elections by the end of December 2025, which ECOWAS likened to taking “the Malian people hostage during the next five years”.⁴

The new sanctions include:

- withdrawal of all ECOWAS ambassadors in Mali;

¹ See Final Communiqué of 4th Extraordinary summit of the ECOWAS Authority of Heads of State and Government on the political situation in Mali, dated 9 January 2022, p. 3. (<https://www.ecowas.int/wp-content/uploads/2022/01/Final-Communique-on-Summit-on-Mali-Eng-080122.pdf>).

² See Final Communiqué of Extraordinary summit of the ECOWAS Authority of Heads of State and Government dated 6 September 2021, p. 4 (https://www.ecowas.int/wp-content/uploads/2021/09/UK-Communique%CC%81-Final-Sommet-16-septembre-Situation-en-Guinea_210916_215714.pdf).

³ See Final Communiqué of 4th Extraordinary summit of the ECOWAS Authority of Heads of State and Government on the political situation in Mali, dated 9 January 2022, p. 3.

⁴ *Id.*

- closure of land and air borders between ECOWAS member states and Mali;
- suspension of all commercial and financial transactions between ECOWAS member states and Mali, with the exception of essential consumer goods, pharmaceutical products, medical supplies and equipment (including for the control of COVID-19), and electricity;
- freezing of Mali's assets in ECOWAS central banks;
- freezing of assets belonging to the State, State enterprises and parastatals in commercial banks; and
- suspension of all financial assistance and transactions from ECOWAS financial institutions to Mali.

In response, Mali has recalled its own ambassadors in ECOWAS member states and closed its borders while professing its openness to dialogue with ECOWAS to lift these “illegitimate, illegal and inhumane” sanctions. It has also reserved the right to apply further retaliatory measures against ECOWAS countries.⁵

Such measures are likely to cause practical disruptions to the circulation of goods, services and personnel and have a significant impact on Mali's economy. As analysts expect that disruptions in logistics supply and minerals exports will worsen over time⁶, foreign investors are monitoring these risks closely, with some considering alternative supply arrangements.⁷

⁵ See TV Declaration of Colonel Abdoulaye Maïga (Minister of Territorial Administration and government spokesperson) dated 9 January 2022 and Communiqué N° 7 du Gouvernement de la Transition, dated 9 January 2022, p. 1.

⁶ See Jeune Afrique dated 11 January 2022 (<https://www.jeuneafrique.com/1292927/economie/mali-cedeao-qui-paiera-les-salaires-des-militaires-la-dette-et-le-reste/>) or Global Trade Review dated 17 January 2022 (<https://www.gtreview.com/news/africa/fears-gold-mining-companies-could-be-hit-if-ecowas-mali-standoff-drags-on/>).

⁷ See excerpts of declarations of Barrick Gold or Hummingbird Resources at https://www.mining.com/web/barrick-says-mali-mines-unaaffected-by-ecowas-sanctions/?utm_source=Precous_Metals_Digest&utm_medium=email&utm_campaign=MNG-DIGESTS&utm_content=barrick-says-mali-mines-unaaffected-by-ecowas-sanctions.

LEGAL PROTECTIONS AVAILABLE TO FOREIGN INVESTORS

Contractual protections

Investments implemented through complex contractual arrangements such as infrastructure, extractive or construction projects may involve specific contractual protections.

In **stabilisation clauses** the State commits to guaranteeing the stability of the legal framework applicable to the contractual relationship with its private partner. These contracts may also include the State's **obligation not to intervene in the foreign party's operations**, including by way of additional restrictions on the movement of goods or personnel. Public or private contracts may also include *force majeure* or **hardship clauses**. These may be invoked where performance of contractual obligations becomes impossible or more onerous because of the State's measures, provided they fall within the scope of such provisions.

Lastly, **international dispute resolution clauses** – which may provide for mediation, conciliation and/or arbitration in case of disputes – may prove crucial in enforcing contractual rights against State or private counterparties in a neutral forum (*i.e.* outside the local court system).

Mali Investment Code

Foreign investors in Mali may also benefit from protections afforded under Mali's Investment Code (*Code des Investissements*).⁸ The code applies to foreign investments, with the exception of certain sectors,⁹ or where investments are regulated by another code, such as mining activities (see [below](#)).

- Under Article 8, the State must guarantee a favourable environment and legal stability for covered projects.

⁸ See Mali Investment Code, promulgated by Law No. 2012-016 dated 27 February 2012 (<https://investmentpolicy.unctad.org/investment-laws/laws/258/mali-code-des-investissements>).

⁹ Finance, banking and telecommunications.

- Article 11 further recognises the international law principle that foreign investors may enjoy, dispose of and benefit from acquired rights and goods.
- Article 29 gives qualifying investors the option to settle disputes through international arbitration under various possible rules.¹⁰

Mali Mining Code

Mali updated its Mining Code (*Code Minier*) in 2019.¹¹

- Article 17 ascertains the obligations of both parties for the duration of the operation and provides that a mining convention guarantees the titleholder the stability of the terms negotiated, notably with respect to tax, economic and exchange terms.
- The Code also recognises the right of small and large mining exploitation licence holders to exploit, process and commercialise the mining products extracted within the mining licence perimeter, in accordance with the applicable regulatory and legal provisions (Articles 67 and 69).
- It also allows holders of mining titles or exploitation licences to settle disputes with the State through international arbitration, if provided for under the applicable mining convention. Disputes can also be resolved through Malian courts or before a regional arbitration tribunal appointed in accordance with Malian law (Article 204).

Protection under international investment treaties

To date, Mali has entered into 22 bilateral investment treaties (“**BITs**”), only eight of which are currently in force, including those with large capital

¹⁰ Article 29 provides the possibility of arbitrating before tribunals operating under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), the dispute resolution arm of the World Bank.

¹¹ See Ministry of Mines’ website (<http://www.mines.gouv.ml/sites/default/files/2020-04/mali-jo-2019-36%20-%20code%20minier.pdf>).

exporting countries such as Canada, China, The Netherlands, Germany and Switzerland.¹²

Most of these provide substantive protections to qualifying foreign investors having made investments within the territory of Mali.¹³ and allow for resolution of disputes through international arbitration. The Canada-Mali BIT also includes a prohibition on the imposition of export levels on foreign investors.¹⁴

To benefit from a BIT, foreign investors must comply with the relevant BIT's jurisdictional and substantive requirements and identify the impugned measures that are allegedly attributable to Mali.¹⁵

RECOMMENDATIONS TO FOREIGN INVESTORS

1. **Closely scrutinise the protections provided under agreements with public or private parties**, and, if needed, seek advice as to their interpretation and scope under the applicable law (not necessarily Malian law).
2. **Document any detrimental impact** of the State's conduct on business operations since the beginning of the country's political instability in 2020 (*e.g.* border or checkpoint obstacles when transferring goods outside the country) through correspondence to authorities, internal memos and communications, or the use of local bailiffs (*huissiers de justice*) to record a specific measure, event or incident.¹⁶

¹² See full list of Mali's BITs in the UNCTAD database of treaties (<https://investmentpolicy.unctad.org/international-investment-agreements/countries/129/mali>).

¹³ *E.g.* protection against unlawful expropriation and unfair, discriminatory and unequitable treatment, full protection and security, notably in times of insurrection and riots, *etc.*

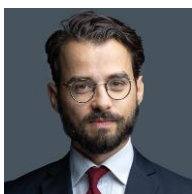
¹⁴ Canada-Mali, Article 9(2)(a).

¹⁵ While ECOWAS sanctions are not *prima facie* measures attributable to Mali, Mali's retaliatory measures (such as the closure of borders) may well qualify as such. If these measures have the practical effect of interfering with the operation of the investment, they may trigger a right to compensation for the foreign investors impacted, subject to establishing the existence of a loss.

¹⁶ Bailiffs may be called upon to record a specific situation and record it in a *procès-verbal*. Due to their status, this *procès-verbal* may then be used in subsequent proceedings and will be given the same evidentiary value as direct documentary evidence.

3. Depending on the agreements, **consider sending notices of *force majeure* or *hardship*** to contractual partners, in case performance becomes impossible or more onerous (depending on the definition of the applicable notion in the relevant contract).¹⁷
4. **Determine whether the investment is protected under the Mali Investment Code, the Mining Code or Mali’s BITs**, and determine whether the circumstances require notifying the State of a potential dispute arising out of a breach of the treaty as a prerequisite for initiating further proceedings.¹⁸

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¹⁷ Since neither Mauritania nor Algeria, who are not ECOWAS member states, have closed their borders with Mali, goods might be able to transit through their territories (at a higher cost for investors).

¹⁸ For instance, as far as timing requirements are concerned, under Article 21(2)(c) of the Canada-Mali BIT, a qualifying investor’s claim can only be submitted to arbitration if (i) at least six months have elapsed since the events giving rise to the claim; and (ii) “the disputing investor has delivered to the respondent Party written notice of its intent to submit a claim to arbitration at least 90 days prior to submitting the claim [...]”.