GUINEA: OUTLOOK ON INVESTMENT PROTECTION ONE MONTH AFTER THE *COUP*

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1 THE *COUP* AGAINST PRESIDENT ALPHA CONDE

On 5 September 2021, Lieutenant-colonel Mamady Doumbouya appeared on national Guinean TV, surrounded by eight of his men in combat gear, announcing that the president, Mr Alpha Condé had been removed from office. He proclaimed the suspension of the institutions, including the government, and that a new constitution would be drafted.

Guinea is the world's second largest bauxite producer and aluminium prices soared in the weeks following the *coup*. One month later it is still too early to assess the economic impact of the *coup*, especially on foreign investors. Mining companies with investments in Guinea do not seem concerned about its impact on their activities. Meanwhile, the new ruling junta has sought to reassure miners of the stability of their production and of their existing contracts, including during the new president's investiture speech on 1st October.

However, this is unlikely to be the end of the matter as there are often discrepancies between governmental promises and the practical impact regime changes can have on foreign investors' activities. Foreign investors have already experienced disruption in their supply chains due to the temporary closing of all Guinean borders, and to the arrival of foreign capital after financing arrangements for new projects were halted. In addition, there is little clarity regarding the status of foreign investment in other key sectors of the Guinean economy, such as agriculture and infrastructure. In other words, now is a good time for investors to assess the level of protection of their investments in Guinea.

2 THE PROTECTION OF FOREIGN INVESTMENTS IN GUINEA

Foreign investors can benefit from three types of international protection for their investment in Guinea. First, Guinea is a party to 10 bilateral

investment protection treaties ("**BIT**s").[1] Most of these BITs provide substantive protections to qualifying foreign investors having made investments within the territory of Guinea (*e.g*. protection against unlawful expropriation and unfair and unequitable treatment, full protection and security, notably in times of insurrection and riots, etc.). They can also provide that disputes with the State relating to investments be resolved through international arbitration instead of having to resort to local courts. Guinea is also a member of the Organization of Islamic Cooperation (OIC) Investment Agreement, which likewise provides for substantive protections and the availability of conciliation or international arbitration to settle investment disputes. There are, however, still some doubts as to the OIC's ability to administer disputes involving its member States.[2]

Second, Guinea's Mining Code includes provisions enabling investors in the mining sector to resolve disputes with the State relating to their investments through international arbitration. Guinea also implemented an Investment Code, which includes protections, notably against unlawful expropriation, for foreign investors and the possibility to resolve disputes with the State through several arbitration mechanisms, including the International Centre for Settlement of Investment Disputes (ICSID) or OHADA's Common Court of Justice and Arbitration (CCJA).

Third, contracts entered into with the State or State entities can prove a strong protection for foreign investors, provided that they stipulate the possibility to resort to neutral and delocalized dispute resolution mechanisms (such as international arbitration). Key contractual protections include stabilization clauses (clauses freezing the legal framework applicable at the date of signature of the contract, thereby negating any effect of legislative changes intervening during the life of the contract), the renunciation to sovereign immunities, obligations on the

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[1] With Turkey, Canada, France, Germany, the UAE, Burkina Faso, Serbia, Malaysia, Italy and Switzerland (source: https://investmentpolicy.unctad.org/international-investment-agreements/countries/87/guinea).

[2] In a recent case brought under the OIC Investment Agreement, the OIC secretary general surprisingly, and contrary to the terms of the OIC Investment Agreement, refused to appoint an arbitrator on Libya's behalf, after Libya had declined to appoint its arbitrator. This indirectly led to the annulment of the award by the Paris Court of appeal, because the claimant then sought to have Libya's arbitrator appointed by the Permanent Court of Arbitration, instead of the French *juge d'appui*.

State to assist the foreign investor to obtain the necessary authorizations for its activities, or even substantive international law protections (such as fair and equitable treatment).

3 RECOMMENDATIONS

It is important that investors consider whether their investment is protected under any of the norms described above, the key issue being the access to a neutral venue to resolve disputes, preferably through arbitration. Investors who have entered into agreements with the Guinean State or Guinean State entities (*e.g.* concession agreements or mining conventions) should carefully consider them to ascertain the level of protection they provide.

Equally critical is the ownership structure of the investments and whether one or more entities in the chain of ownership, or individual shareholders, may invoke the protections of a BIT. Investors owning assets in Guinea and located in Canada, France or Germany may invoke such protections, as these countries have a BIT in force with Guinea. Conversely, entities located in the UK, the BVI or Australia cannot. Chinese companies with assets in Guinea will be in the same position, as the BIT between Guinea and China has been signed but has not yet entered into force.

Alternatively, investors which do not have access to treaty protection but whose investment has not yet been subject to detrimental State measures may still restructure their investment. For example, they may consider relocating a parent entity to a country which has a BIT with Guinea or creating a new level in the chain of ownership by setting up a new company in such country. The availability of this choice and as such even the choice itself, will heavily depend on the language of the specific treaties, although it merits consideration. It should also be noted that the restructuring of an investment to benefit from the protection of an investment protection agreement may be considered as an abuse of right and disregarded by an arbitral tribunal in case the measures invoked by an investor had already been implemented or were imminent at the time of such restructuring. By way of illustration, assuming that the Guinean authorities announced the application of potentially detrimental measures to a Singaporean mining investor or to the country's mining sector (*e.g.* the revocation of a mining license or of sector specific tax exemptions) and that that same investor

sought to restructure and incorporate a company in France (for the sole purpose of claiming French nationality and bringing claims under the French BIT), an investment tribunal would likely find those claims to be inadmissible.

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