WHITE & CASE

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Africa Focus

Africa in the coronavirus era

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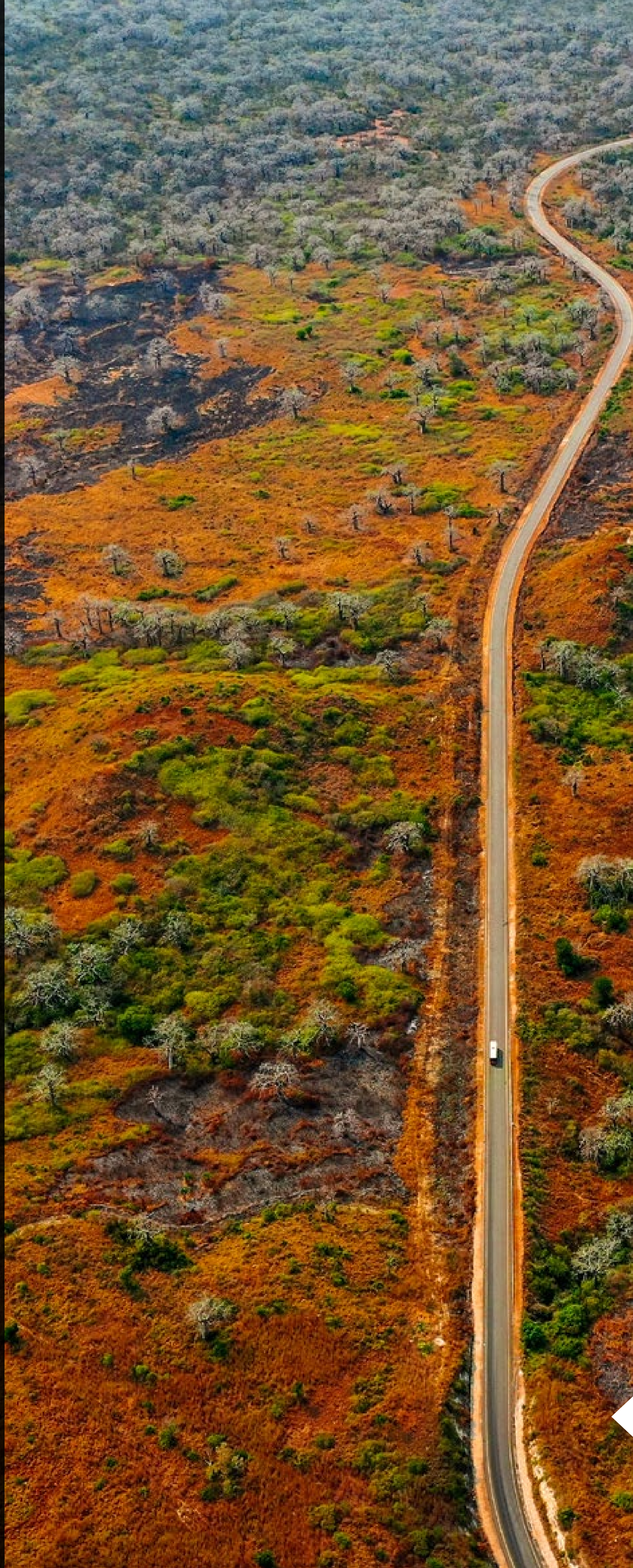


Africa in the coronavirus era

As we publish this report in September 2020, amid global concerns about the COVID-19 pandemic, its crushing human toll and economic cost and the profound uncertainties all around, we see an increasing focus—internationally, nationally and for many of us at a personal level—on planning for the future and taking steps towards recovery and growth in a with- or post-COVID-19 world.

A carefully calibrated re-opening of our economies is necessary not only to save lives today but also to ensure growth and prosperity, while protecting and enhancing lives in the decades to come. With this in mind, and with an eye on trying to understand and find opportunity in a with- or post-COVID-19 future, we present this fifth edition of *Africa Focus*.

We begin this issue with "Privatization trends in Angola," which describes several initiatives to develop and expand infrastructure in Angola, including by implementing frameworks for private investment in major Angolan projects. Next, "Sovereign debt relief proposals" tackles the significant economic and fiscal challenges to implementing much-needed debt relief in Africa, particularly given the economic impact of COVID-19.

"International project finance and currency reforms in West and Central Africa" sets out current and anticipated reforms to harmonize business laws, revise foreign exchange regulations and introduce a new currency in many of the Francophone nations, and in "World Bank and African Development Bank increase their financing and anticorruption enforcement," our lawyers highlight the importance of continuing to pay attention to sanctions and debarment risks when participating in new coronavirus-related financing opportunities.

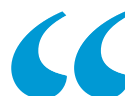
"Africa's mines of the future: COVID-19 and ESG issues" explains how businesses can attract investors and customers in a post-pandemic world by demonstrating their environment, social and governance achievements, especially in context of the twin challenges of COVID-19 and climate change.

"Institutional arbitration in Africa: Opportunities and challenges" explores the continuing increase in arbitration options and caseloads across Africa, and "Nigeria's LNG Train 7 project breaks new ground" shows how oil & gas projects in Africa with strong fundamentals can continue to raise debt even in a volatile market.

Finally, "Looking to a future beyond oil" examines plans to transfer nearly 200 state-owned enterprises and assets in Angola to private investors over the next few years.

We welcome any ideas for further exploration in our upcoming issues. In the meantime, we hope this issue of *Africa Focus* continues to add to the constructive brainstorming around opportunity and investment in Africa.

Mukund Dhar
Partner, White & Case LLP
Africa Interest Group Leader



With an eye on trying to understand and find opportunity in a with- or post-COVID-19 future, we present this fifth edition of *Africa Focus*.

Aerial landscape from angola

Port facility and harbor of Luanda, Angola

Privatization trends in Angola

The current impact of privatization on the development and diversification of Angola's infrastructure

By Caroline Miller Smith and Bruna Beloso (White & Case LLP) and Nuno Cabeçadas (partner at Miranda & Associados)

One of Africa's trade heavyweights, Angola is blessed with a wide range of natural resources and a fertile climate. It ranks as one of the main exporters and importers in the sub-Saharan region. After his election in 2017, President João Lourenço moved decisively with wide-ranging legal reforms and other measures that aimed to reduce Angola's monolithic dependence on oil, increase foreign and domestic investment and ease of doing business, enhance governance controls and promote development of the private sector. The initiative was to be funded by expanding oil exploration and then production, combined with proceeds of the sale of roughly 200 state-owned enterprises (SOEs) across a wide range of industries to the private sector.

The COVID-19 global pandemic and plunging oil prices dealt President Lourenço's economic reforms a grievous blow. The International Monetary Fund (IMF)[1] forecasts that the Angolan economy will contract by 1.4 percent in 2020. This is admittedly better than the 3 percent contraction forecast for the global economy or 1.6 percent for sub-Saharan Africa, but nonetheless a disappointment, given the optimism that prevailed mere months ago. Angola's public debt/ GDP ratio reached 109 percent at the end of 2019, with more than 40 percent of total government revenue (US$9 billion per year) servicing its public external debt. While the April 2020 offer by the G20 group of nations to Angola and 76 other deeply indebted nations to suspend debt payments until the end of 2020[2] brings welcome relief, the country's debt-to-GDP ratio may nonetheless deteriorate further during 2020.

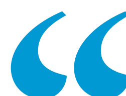
Following a swift shutdown of international travel and other strict countermeasures, by June 2020 Angola had a limited number of confirmed COVID-19 cases and few deaths, raising hopes that the country would be spared this additional blow. With oil prices likely to remain low for the foreseeable future, the need to diversify Angola's economy by growing its other sectors remains acute.

This article provides an overview of recent changes introduced by the Angolan government and their effects, in particular in the infrastructure sector, and highlights specific recent projects in the power and transportation sectors.

EARLY ATTEMPTS TO TRANSFER INFRASTRUCTURE TO THE PRIVATE SECTOR

Beginning in 1989, Angola introduced initial regulations to transfer certain activities to the private sector. These included creating forms of association between public and private sectors to increase the efficiency, productivity and competitiveness of the country's industry, which had been almost completely under national control since Angola's independence in 1975.

The public-private sector regime was regulated by Decree No. 32/89 and No. 8-F/91 until Angola enacted its first privatization law, Law No. 10/94, in 1994. The first round of privatizations took place during the 1990s and was followed by a series of privatization programs in the 2000s. Then the government introduced the National Development Plan (Plano Nacional de Desenvolvimento–PDN 2018-2022) to transform Angola's economy by increasing its non-oil sectors and strengthening the development of essential infrastructure.



Investors may be able to tap into major Angolan projects in the power, transportation and logistics sectors.

The plan included the privatization of state-owned enterprises (SOEs) in the telecommunications, oil, insurance and bank sectors, the liquidation of failing SOEs and the privatization of at least 20 SOEs in non-strategic sectors. The plan drove a broader update of Angolan legislation in order to accommodate investors' requirements and to align national standards to international practice.

As part of these updates, Angola has reformatted its public-private partnerships and private investments laws and has introduced competition regulation legislation for the

Figure 1: The composition of Angola's economy

Source: https://s3.us-east-1.amazonaws.com/qz-production-atlas-assets/charts/atlas_S1MMnh-7@2x.png

first time.

Angola's 2019–2022 Privatization Program (PROPRIV, approved by Presidential Decree No. 250/19 and put in place following the approval of the Privatization Law in May 2019) plans to transfer more than 190 companies and assets in different sectors—including mineral resources, transportation, telecommunications, health, agriculture and construction—to the private sector. The Angolan government has also approved a roadmap and a chronogram for the PROPRIV, detailing the steps and procedures to follow with each type of privatization procedure, including public tenders, limited tenders by prior qualification and public offers on the stock exchange.

RECENT LEGISLATIVE CHANGES

New public-private partnership law

In the past 20 years, several countries across Africa developed legal frameworks for public-private partnerships (PPPs) to attract and address the concerns of international financial institutions.[3] In 2011, Angola followed this trend and enacted Law No. 2/11, the country's first PPP law. This law was not successful due to difficulties at both the policy and implementation levels.[4] To overcome these issues, Law No. 2/11 was revoked and replaced by Law No. 11/19, in May 2019.

The new PPP law significantly simplified PPP approval and launch procedures, which are now exclusively the responsibility of the entity with the authority to determine contracting. The new law also removed certain restrictions concerning implementing PPP projects, such as a minimum value requirement for submitting a PPP. With regard to risk allocation, the new law maintains the principle that identified risks should be borne by both public and private partners, with the private partner taking on the majority of such risks.

Entities or services determined by the President of the Republic now monitor the implementation of PPPs, instead of Angola's Ministerial Commission for the Evaluation of Public-Private Partnerships. In addition, a specific negotiation commission set up by the relevant entities conducts contractual modifications, such as benefit sharing. Also, conflicts arising from PPP contracts will be settled by alternative dispute resolution mechanisms, namely negotiation, mediation, conciliation and arbitration.

Despite these legal changes, Angola does not yet have a significant track record of successful PPPs. Plans continue to be made in Angola's energy (particularly hydroelectric) sector and with infrastructure projects (including the Port of Namibe and the regeneration of railways) to be developed in the upcoming months. Many expect the new PPP law, combined with the Angolan government's declared intention to intensify its economic diversification efforts, will serve as catalysts for projects both structured under PPP models and funded on a project finance basis.

New private investment law

In 2018, a new private investment law, Law No. 10/2018, revoked legislation enacted in 2015 and established principles regarding private investment in Angola. This new regime granted investors rights, duties and guarantees from the government, in order to promote and regulate the new legislation.

The new private investment law aims to diversify Angola's national economy and target priority areas, including construction, public works, telecommunications and information technology, airport and rail infrastructure, and electricity production and distribution. The hope is to encourage national and foreign private investment, which would then propel productive activity and lead to the opening of new concessions and reduced monopolies.[5]

Competition law and regulations

Angola's new Competition Regulatory Authority (CRA), created by Decree No. 313/18, became operational in February 2019 and added another layer of transparency and governance.

The CRA oversees the implementation of the recent Competition Act, Act No. 5/2018, which was inspired by the EU competition framework (in particular, Portugal's competition regime) and by Mozambique's competition framework.[6] The Competition Act is expected to improve Angola's long-term business environment by regulating levels of market control, implementing procedures for inspecting and auditing state support, and establishing specific competition breach procedures and sanctions in order to reduce anti-competitive practices, such as abuse of a dominant position.

Angola's Competition Regulations, approved by Presidential Decree No. 240/18, set the following thresholds for mandatory merger notifications:

- Market share equal to or above 50 percent in the relevant market for the product or service
- Market share below 50 percent, but equal to or above 30 percent, in the relevant market for the product or service in addition to AOA 450 million (approx. US$1 million) turnover/revenues obtained in Angola in the last financial year by at least two companies involved in the merger
- The parties' aggregate turnover/revenues obtained in Angola in the last financial year exceeded AOA 3.5 billion (approximately US$7.5 million)

The Competition Regulations define a dominant position as market share that equals or exceeds 50 percent for a product or service. However, the existence of significant barriers to entry in the market may indicate that one or more undertakings hold a dominant position, even if they have less than 50 percent market share.

CURRENT INFRASTRUCTURE OPPORTUNITIES IN ANGOLA

In the past, the oil & gas sector received the most investment in Angola. Developing other types of infrastructure—in addition to continued oil & gas projects—could enable Angola to diversify its income

The new private investment law aims to diversify Angola's national economy and target priority areas.

Cambambe Dam on the
Kwanza River, Angola

© DigitalGlobe/Getty Images

sources, therefore reducing its dependence on oil, while also creating a stable environment and framework for private investment.

Power projects

The power sector is a priority for Angola, and the government has instituted an ambitious infrastructure plan to achieve 9.9 GWs of installed generation capacity and a 60 percent electrification rate by 2025.

Currently, Angola has an estimated electrification rate of approximately 43 percent in most cities and less than 10 percent in rural areas. The current installed capacity is estimated at 5.01 GWs, less than the 6.3 GW capacity that was targeted for the end of 2018. The government expects to reach the 6.3 GW capacity target once the Soyo combined-cycle plant and the Laúca hydroelectric project are fully operational.[7] For these and future projects, external financing and private project development will be key.

A project that stands out in the power sector is the Laúca hydroelectric plant, located on the Kwanza River, between the existing Capanda and Cambambe hydroelectric power stations. The project's installed capacity will be more than 2,000 MWs once completed, which would more than double Angola's current hydroelectricity generation capacity.

The plant will feed the North grid, and the government intends to connect the North, Central and South energy production grids over the next ten years. Six turbine units will generate more than 2,000 MWs of hydroelectric power for approximately 750,000 people. A second power station, constructed to take advantage of the remaining river flow, will generate an additional 65.5 MWs. The Laúca project will be publicly owned by Angola's Gabinete de Aproveitamento de Medio Kwanza (GAMEK), on behalf of the Ministry of Energy and Water (MINEA).

A fifth turbine went into commercial operation in July 2019, increasing the capacity to

1,670 MWs, and the installation of a sixth and last turbine is expected to achieve the full planned capacity in 2020. This capacity, together with the hydroelectric plants of the Middle Kwanza River (Capanda and Cambambe), the Mabubas and Lomaum and the Soyo combined-cycle power plant, along with a few thermal power plants, has allowed for the interconnection of a total of ten provinces.[8]

Transportation projects

Angola's limited rail connectivity and existing airport network put significant pressure on its road transport system.

Angola is currently preparing for a partial privatization of its three main railway lines (Figure 2):

- Caminhos de Ferro de Luanda—between Luanda and Malanje in the north
- Caminhos de Ferro de Benguela—between Lobito port and Luau, on the border with the Democratic Republic of the Congo (DRC)
- Caminhos de Ferro de Moçâmedes—between Moçâmedes and Menongue in the south[9]

The Benguela railway line, destroyed during the civil war and abandoned in 1975, has been rebuilt from Lobito to the border with the DRC, with the support of Chinese investment. This railway line is not transporting minerals yet, but it is already having an impact on the communities living along the route, contributing to social and economic transformation.[10]

There are plans to incorporate the Benguela railway line into the Lobito Corridor project, which aims to connect Angola, the DRC and Zambia, integrating the existing railways in the DRC (Société Nationale des Chemins de Fer du Congo) and in Zambia (Zambia Railways Limited). This project's key objective is to provide more efficient rail transportation from the DRC's copper belt and Zambia to the Atlantic Ocean port in Lobito, Angola. The three countries are discussing repair, maintenance and operation of the rail network, with this railway project looking to gain traction over the coming months.

Train in a railway station, Benguela, Angola

Figure 2: Angola's three main railway lines

DEVELOPMENT POTENTIAL AND OPPORTUNITIES

One key aspect of large infrastructure projects is that their extensive reach can potentially benefit development throughout Angola and the entire region.

Engaging with adjacent countries on common infrastructure projects could not only foster regional economic development but also enhance diplomatic relations by promoting a stable environment among the countries involved, since all would have a common goal in the completion and sound operation of each project.

Investors able to tap into major Angolan projects in the logistics and power sectors could benefit by contributing to oil industry infrastructure. In turn, Angola's

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government hopes that more developed infrastructure will attract further investment in its oil sector.

Currently, China is the largest foreign financier of infrastructure projects in Angola, with loans provided by the Export-Import Bank of China and the International Commercial Bank of China. The current planned credit facility debt owed to China represents 41 percent of Angola's total debt stock, and Chinese funding has been crucial for several major infrastructure projects, including a new airport project in Luanda, the Caculo Cabaça hydropower project and the Benguela railway project.[11]

Time will tell if multilateral development finance institutions, export credit agencies and investors from other countries will also be prepared to invest at similar scale in Angola's infrastructure sector.

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1 IMF Data Mapper https://www.imf.org/external/datamapper/profile/OEMDC/WEO

2 https://www.reuters.com/article/us-health-coronavirus-g20-statement/g20-countries-agree-debt-freeze-for-worlds-poorest-countries-idUSKCN21X29A

3 https://blogs.worldbank.org/ppps/ppp-laws-africa-confusing-or-clarifying

4 https://filda.co.ao/wp-content/uploads/2018/07/Painel-III.pdf

5 https://www.angop.ao/angola/en_us/noticias/economia/2018/9/40/Privatisation-makes-companies-more-profitable,3a9aebda-970e-48a2-b1e6-328f20983d1d.html

6 https://globalcompetitionreview.com/insight/europe-middle-east-and-africa-antitrust-review-2020/1195070/angola-overview

7 https://www.export.gov/article?id=Angola-Electric-Power-Generation

8 https://www.agaportal.de/_Resources/Persistent/9b30061a86679b2d92583306f129786aa690262a/eia_angola_wasserkraftwerk_1.pdf.

9 https://www.transportesenegocios.pt/angola-prepara-privatizacao-parcial-da-ferrovia/

10 FitchSolutions Angola Infrastructure Report Q3 2019, p. 8

11 Ibid.

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Sandton City, South Africa, home to most of the major financial, consulting and banking firms in South Africa

Sovereign debt relief proposals

Economic and fiscal challenges of implementing debt relief in Africa

By Melissa Butler, Cenzi Gargaro, Ian Clark, Stuart Matty, Jessica Oliver, Dimitrios Lyratzakis

While the COVID-19 pandemic continues to pose unprecedented challenges to countries worldwide, the impact is even more critical on developing countries that already face high debt burdens. Developing countries—including many African nations—will require significant liquidity and financing support to deal with the pandemic, which the IMF estimates may cost at least US$2.5 trillion. In the face of such seemingly insurmountable fiscal challenges, a number of supranational agencies and private bodies are looking to provide potential solutions and give these countries the fiscal space to deal with their looming problems.

The G20 nations announced a debt service suspension initiative (DSSI) in April 2020 in response to a COVID-19 "call to action" from the World Bank and the IMF. The DSSI supports a net present value (NPV)-neutral, time-bound suspension of principal and interest payments for eligible countries that make a formal request for debt relief from their official bilateral creditors, and it encourages private creditors to participate on comparable terms. Since the announcement, many market participants have come forward with alternative or supplemental proposals to expand the initiative, with a particular focus on private sector involvement.

Although these suggested solutions are well intentioned, countries should carefully consider the impact on all of their financing arrangements before availing themselves of various available debt relief options. As momentum increases to support countries facing real economic challenges, there are important practicalities and legal impediments to implementing any form of debt relief program.

DOWN THE RABBIT HOLE

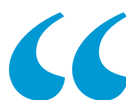
"Alice started to her feet, for it flashed across her mind that she had never before seen a rabbit with either a waistcoat-pocket, or a watch to take out of it, and burning with curiosity, she ran across the field after it, and fortunately was just in time to see it pop down a large rabbit-hole under the hedge. In another moment down went Alice after it, never once considering how in the world she was to get out again."[1]

Much like when Alice jumped down the rabbit hole, navigating a path through multiple finance agreements that contain complex legal provisions at a time of financial distress can lead borrowers to wonder how they will ever find a way out.

Sources of complication

In most cases, confusion for sovereign borrowers arises because financing agreements typically are drafted with provisions that seek to ensure creditors will have a seat at the table when signs of financial distress appear on the horizon, if some form of rescheduling or restructuring may be contemplated. This is true in both official sector and private sector documents, with the only distinction drawn between domestic debt (usually local market debt issued in local currencies) and external debt (issued in foreign currencies). As a result, the terms of official sector debt often contain clauses that could trigger breaches in private sector debt documents, and vice versa.

In addition, there is often a lack of consistency across agreements, including terminology related to enforcement rights. Given the way that financial agreements are designed to interlink in the face of financial distress, borrowers must have a thorough understanding of their financing agreements before deciding to commence any form of debt negotiations—even where it is actively encouraged by a creditor or class of creditors. This is necessary to manage the process in an orderly fashion without triggering unintended consequences in other financing arrangements, which can start a "domino effect" of potential defaults across multiple agreements.



The challenges of the COVID-19 pandemic are even more critical for countries that already face high debt burdens.

For example, one provision in the terms of a financing agreement for one sovereign nation makes it a default if the relevant country "discontinues its payments to creditors or commences negotiations with one or more of the [country's] creditors on a moratorium, waiver of debts outstanding, deferment of payments or discontinuation of debt service." This broad default provision does not relate specifically to financial indebtedness or to external debt, and so (in theory) it would capture non-payment to commercial creditors. It would also be triggered if the relevant country starts to negotiate with one creditor in relation to the deferment of payments or discontinuation of debt service. Therefore, even if the lender never intended either of these consequences at the time it made the loan, the country could easily find itself in default under this agreement.

Then there is the domino effect that defaults produce in other agreements. This particular provision is drafted as a default (i.e., a default

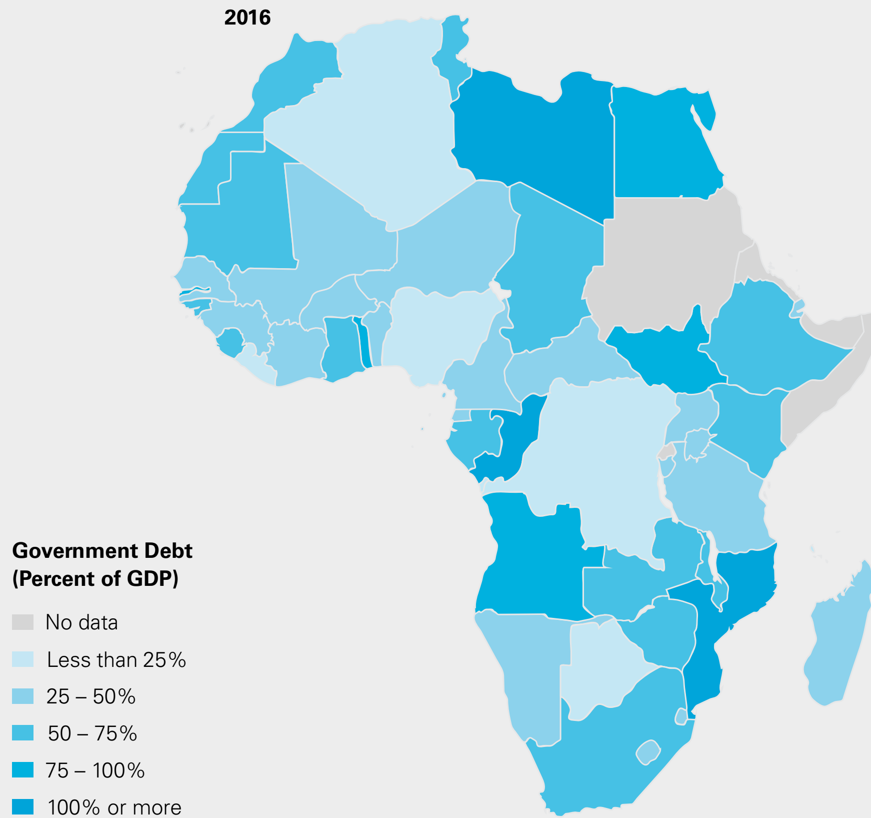
will occur if the country takes any such action). In a different financing agreement for the same country, a default provision states that "an event of default occurs [under this agreement] if an event which constitutes a default occurs under any other agreement involving the borrowing of money with a bank or financial institution." So unless it is managed in an orderly fashion, breaches of agreements can quickly spread across other agreements making it difficult for the country, like Alice, to consider how in the world to resolve the problem.

Finally, once a financing arrangement has been signed—whether governed by English, New York, French, Chinese or "international" law—unless the agreement terms contemplate changes as part of any debt negotiations (which is unlikely), any changes to the agreement terms evidencing the debt must be agreed between the parties and documented as an amendment to the original documents. This legal principle protects parties to agreements from seeing the terms unilaterally changed or having subsequent laws amend previously agreed commercial terms. No law of any country regularly used for financing agreements will allow terms to be retroactively applied to the document, thereby amending them without the agreement of the parties. So to avoid being in breach of the contractual terms of the agreement evidencing the debt, the sovereign borrower must enter into amendment agreements related to the affected debt.

It is in this context that sovereign borrowers should consider the various relief packages being offered.

If there is a fiscal or other imperative for a country to seek debt relief, it should do so on an informed basis to avoid a potentially disorderly process. The debt management office charged with managing that country's debt should fully understand the impact that any creditor engagement will have on that nation's financing arrangements. It also should actively manage any of its agreements that contain broad creditor-engagement provisions in advance, to avoid triggering a breach under those agreements and potentially then triggering defaults under other agreements.

Figure 1: Change in government debt (as percent of GDP) from 2016 to 2020



Source: International Monetary Fund

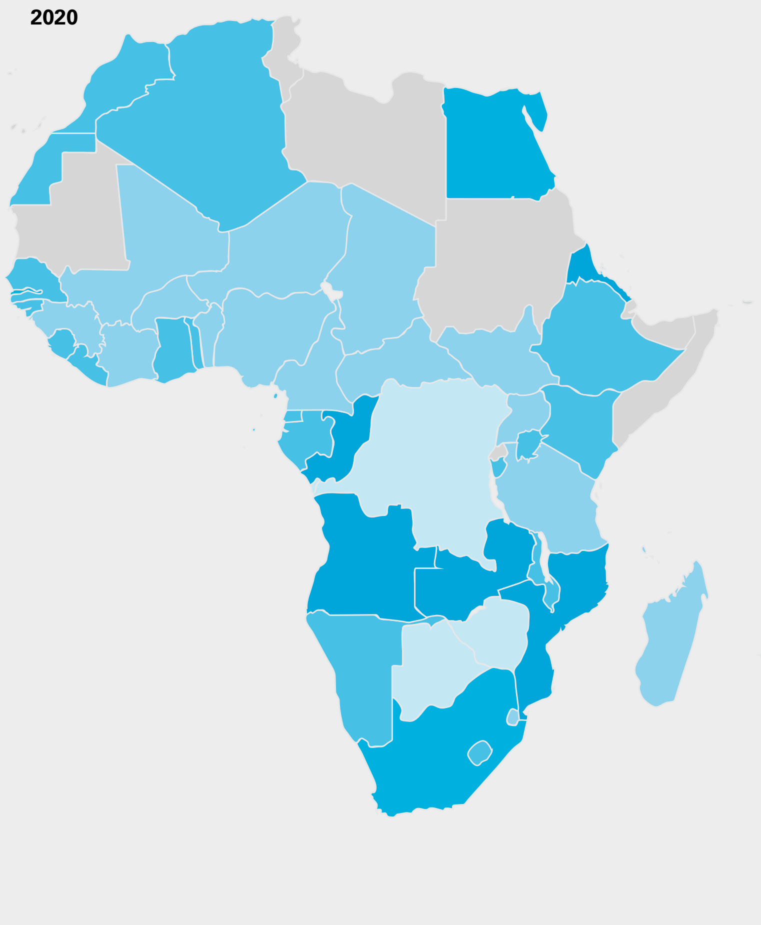
THE DSSI

The DSSI is available to countries that are eligible to receive assistance from the World Bank's International Development Association and to all nations defined as "least developed countries" by the United Nations.

Many countries have been hesitant to engage in discussions thus far, in part due to concerns about triggering debt defaults and rating actions that could impair access to future financing. Although the DSSI itself applies only to a country's official bilateral debt, deferring or suspending debt service payments to its bilateral creditors could be enough to trigger acceleration or default provisions under the country's loan agreements or bond terms. As the broad default example above shows, a formal request to suspend payments as required under the DSSI could easily trigger this type of default, since it is clearly the commencement of a negotiated process to defer payment of debt service.

Countries may not have such terms in their financing portfolios, in which case it would require a consideration of the specific terms that do apply to ensure that the formal request does not trigger a default. A well-advised country normally can conduct its creditor engagement and communications in such a way as to ensure that if at all possible, "obvious" defaults are not triggered. For example, a country could make sure not to "declare" a moratorium on its external debt, as this is a common Eurobond default provision across many sovereigns.

The Institute of International Finance (IIF) estimates that debt service payments owed by DSSI-eligible countries from the



start of May through the end of 2020 amount to approximately US$11 billion for official bilateral lenders, US$7 billion for multilateral lenders and US$13 billion for private creditors. Clearly, any meaningful support for these countries must therefore encompass multilateral and private lenders in addition to the official sector.

While the DSSI encouraged private creditors to participate on comparable terms, participation is voluntary. The G20 nations acknowledge that negotiating private-sector participation in particular will likely be a lengthy process, due to the DSSI's abstract terms and the unique position of each debtor country.

In addition, countries that wish to maintain continued market access should be aware that part of the terms of the DSSI prevent raising further private debt unless otherwise agreed.

Further, this may impact the ratings of both lenders that provide relief and countries that benefit from it. Rating agencies will consider any deferment or change in payment terms for a country that results in a diminished financial obligation to be a default. And lenders' ratings may be impacted if they defer a large number of facilities, since at least one rating agency has indicated that delays of principal or interest payments on a sovereign loan lasting more than six months would lead it to classify the lender's full exposure to this sovereign as impaired, which could affect the lender's credit profile. Multilateral lenders would also need the support of their member countries. The President of the World Bank Group stated recently that multilateral lenders would require full compensation from shareholder contributions if they were to participate.

PRIVATE CREDITOR PARTICIPATION

Voluntary, case-by-case participation

The IIF—a trade association representing the private creditor community and comprising nearly 450 leading financial institutions from more than 70 countries—wrote a letter to the IMF and World Bank in May, offering broad qualifications for any private sector participation in the DSSI. It highlighted the need for a case-by-case approach, stating that debt service suspension would be based on the underlying legal documentation and that individual creditors would each need to determine whether their fiduciary duties allow them to participate in the initiative and on what terms. It also made clear that participation would need to be voluntary, without prejudicing any enforceability rights such creditors may have.

However, while acting individually and voluntarily, creditors will also expect each country to seek broad participation, with such initiatives supported widely across the private investor community to support fair burden sharing. This could put a lot of pressure on a sovereign country, and may require extensive rounds of negotiation and outreach to achieve a sufficient threshold level of participation, such that individual creditors are willing to participate. Again, as highlighted above, this would also require sovereign governments to navigate the terms of their financing agreements to ensure that any negotiations do not trigger defaults under financing agreements, further complicating the country's ability to manage the process in an orderly fashion.

The issues considered above related to ratings would be equally relevant to private sector negotiations. In addition, depending on how processes are managed, sovereigns could find themselves dealing with different groups of creditors, which may have different interests that need to be managed.

Mandatory, blanket participation

Many commentators have highlighted the shortcomings with voluntary private creditor

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participation and called for an automatic, blanket standstill on debt repayments, arguing that without mandatory participation, any debt relief afforded to eligible countries would simply be used to service private sector debt to those creditors that did not participate, rather than to finance health-related expenditures to combat the COVID-19 pandemic.

The United Nations Conference on Trade and Development (UNCTAD) has proposed a comprehensive temporary standstill on debt repayments, including all external creditors and with possible annual renewals based on debt sustainability assessments. However, implementing a collective and automatic participation can also raise problems. Any unilateral change in a debt repayment schedule would result in a default under those financing agreements and likely a cross-default in others, as well as a decline in the credit rating of the relevant country, the combined effect of which would likely prevent further market access until the situation had been resolved. Moody's has indicated that any suspension or delay of payments to private creditors, unless permitted under the contractual terms, would likely cause a default under its definition. Moody's has already placed ratings under review for several African countries, including Ethiopia, Côte d'Ivoire and Senegal.

Since the legal regimes under which most of the debt has been incurred do not contemplate such a standstill process, any initiative would also require an overarching legal mechanism to shield sovereigns from defaults, litigation or enforcement actions. UNCTAD has called for an immediate stay on all creditor enforcement actions and for jurisdictions that govern most emerging market sovereign bond documentation to deter lawsuits against debtor countries. Yet modifying the relevant laws in the United Kingdom and the United States—which govern the majority of sovereign bonds—would be lengthy, complex and perhaps ill-suited to the urgency of the current situation—even if it were politically acceptable within those countries.

Debt exchange

The African Union and the UN Economic Commission for Africa announced a proposal for African countries to exchange their commercial debt for new concessional paper, and they are designing a special-purpose vehicle for the swap, guaranteed by a triple-A-rated multilateral bank or a central bank. The initiative would convert the current debt into securities with a longer maturity, benefiting from a five-year grace period and lower coupons.

The proposal is in the early stages. But for any exchange to be effective, it would need to sweep up dissenting or hold-out votes, potentially increasing the risk of litigation, particularly if the economic terms were materially worse for holders changing from "B" rated debt with a certain yield to "AAA" debt, as well as navigate any tax consequences for such holders. This would also only deal with debt in the form of bonds. So its limited focus would still leave countries needing a solution under their other financing agreements or government guarantees, which can often contain more restrictive provisions and wider defaults, with earlier trigger points, than public financings.

Central credit facility

Another proposal by a group of sovereign debt experts is to create a central credit facility (CCF) with a multilateral development bank, such as the World Bank. Each country requesting relief would deposit into the CCF all interest payments on commercial and bilateral debt falling due during the prescribed standstill period, which would be reinvested and redeployed to finance a predetermined and monitored set of emergency expenditures arising out of the COVID-19 crisis. Creditors entitled to those interest payments would receive in exchange an identical instrument representing an interest in the country's CCF. This instrument would correspond to the amount of the creditors' reinvested interest payments and would enjoy de facto seniority in any future liability management transaction of the debtor country. Receiving this instrument would constitute a full discharge and release of the debtor's obligation in respect of the interest payment. A similar mechanism could be implemented for deferral of principal payments.

More detail is needed to understand how this innovative proposal would work in practice, and it remains unclear whether governments will adopt the policy. Participation of private creditors would still ultimately be on a voluntary basis, and such participation would require the consent of each creditor to amendments of the underlying legal agreements through a formal consent solicitation process that carries the destabilizing risk of holdout creditors.

CONCLUSION

Many questions still remain regarding the implementation of the DSSI, in particular around the extent of collaboration from the private sector and what the potential credit rating, market access or other longer-term consequences might be for countries that choose to participate (or not) in a sovereign debt relief initiative.

In the absence of an overarching legal mechanism to shield sovereigns from defaults, litigation and enforcement actions, it will be challenging to come to a collective agreement, whether on a voluntary or mandatory basis.

Instead, each country will likely need to conduct a wholesale review of its financing commitments to identify potential triggers and negotiate individually with its creditors: a time-consuming and potentially costly exercise. Although a number of interesting and innovative proposals have suggested what form private sector participation might take, they do not yet solve the fundamental legal problem. Ultimately, the underlying finance agreements and bond documents are private commercial acts of each sovereign, and a failure to pay interest and/or principal amounts when due is a breach of the agreement, as it would be for any other debtor.

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1 *Alice's Adventures in Wonderland*, by Lewis Carroll

View Of Suspension Bridge Against Sky, Brazzaville, Democratic Republic Of Congo

International project finance and currency reforms in West and Central Africa

Harmonizing business laws, a revised foreign exchange regulation and introducing a new currency

By Paule Biensan, Alain Chan Hon and Louis-Jérôme Laisney

Currency is a hot topic in West and Central Africa, in both the Economic and Monetary Community of Central Africa (EMCCA, or CEMAC in French)[1] and the West African Economic and Monetary Union (WAEMU)[2] zones. Several currency and related reforms currently being implemented and contemplated could affect the structures and other key aspects of international project financings in West and Central Africa.

The member states of both the EMCCA and the WAEMU belong to the Organization for Harmonization of Business Law in Africa (OHADA)[3], which has increasingly adopted a set of unified legislation, resulting in a reliable, more sophisticated legal framework for businesses involved in international project financings. The EMCCA has established a new foreign exchange regulation. In addition, WAEMU countries plan to replace the West African CFA franc, the common currency in use for the past 75 years[4], with a new common currency called the Eco.

Here is how these reforms will affect international project finance transactions in West and Central Africa.

OHADA'S UNIFIED BUSINESS FRAMEWORK ATTRACTS INVESTORS

Since OHADA's creation in 1993[5], investors throughout West and Central Africa have been able to rely on a modern, unified legal framework for their project finance transactions.

OHADA legislation is a civil law legal system that aims to provide a common business and legal framework across all 17 member states, while enhancing the legal certainty and predictability of international transactions in the region. One important law affecting international project financing, the 2010 "Uniform Act Organizing Securities," created a uniform, modern security law for OHADA nations. It allowed the possibility of appointing a security agent, acting in its own name, on behalf of lenders, and reinforced lenders' rights by enabling them to use new, efficient security enforcement mechanisms, such as out-of-court appropriation ("pacte commissoire").

Other new and revised laws for the OHADA region followed, including:

- Uniform Act related to general commercial law act, revised in December 2010
- Uniform Act related to commercial companies and economic interest groups, revised in January 2014 and effective May 2014
- Uniform Act organizing collective proceedings for clearing debts, revised in September 2015 and effective December 2015
- Uniform Act on the harmonization of accounting, adopted in January 2017 and effective January 2018

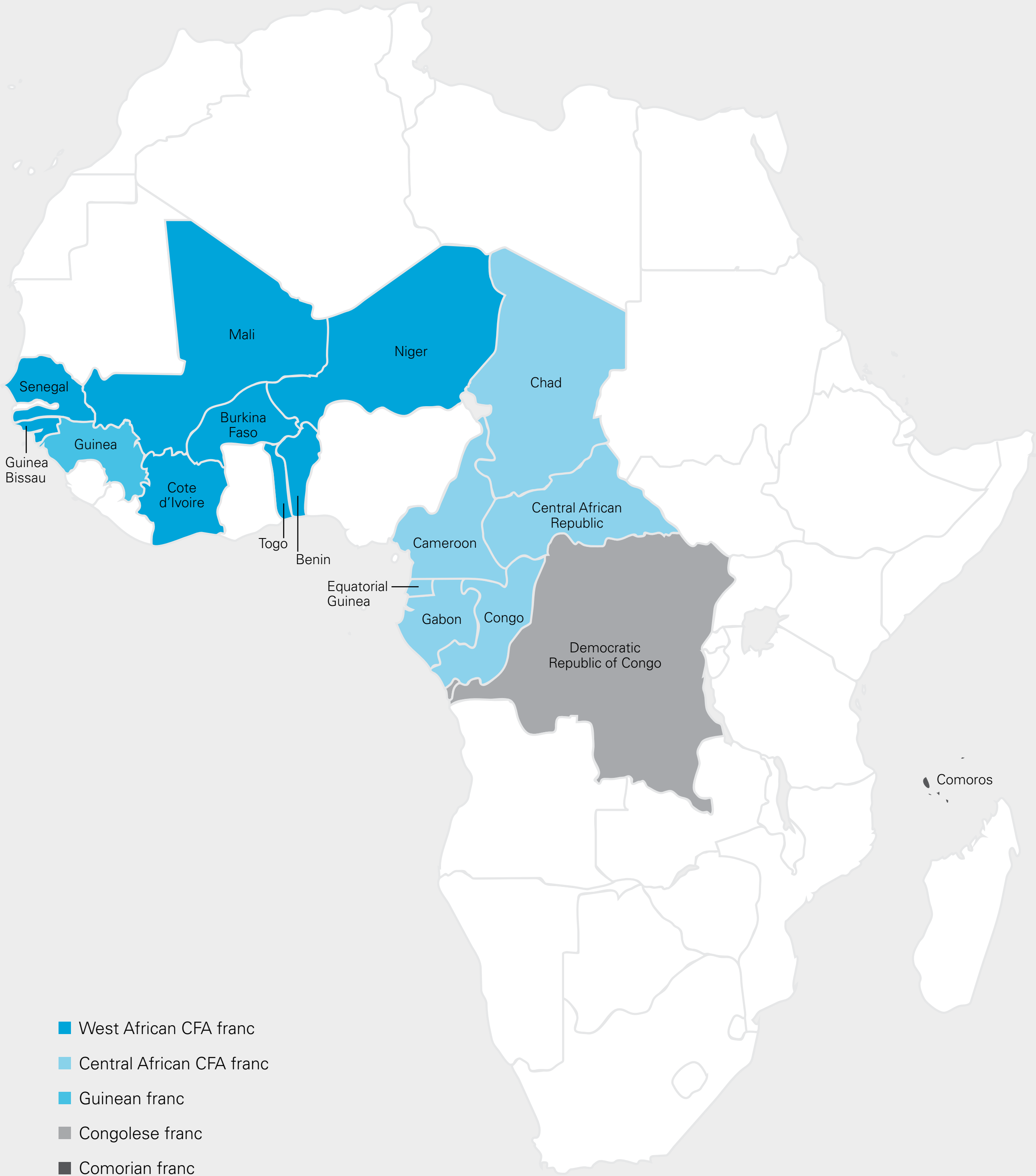
A new "Uniform Act on Mediation," adopted in 2017, provides an enhanced legal framework for all aspects of mediation in OHADA's 17 member states. This new alternative dispute resolution mechanism aims to achieve more rapid and easier enforcement of agreements in the OHADA zone.

Although the sophistication and reliability of OHADA's legal regime in certain specific business law areas offers a degree of comfort to investors in the region, other aspects of transactions remain subject to the national laws of the relevant countries. For example, the determination of tax registration fees remains the strict prerogative of individual nations. Thus, the amount of tax registration fees varies from one member state to another, even in the same cross-border transaction. This encourages forum shopping and contradicts OHADA's goals of harmonizing business regulations.

The fact that OHADA members belong to different regional organizations is also a key point to take into account when carrying out an international project finance transaction. Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo belong to the WAEMU, while Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea and Gabon are members of the

Currency and other reforms could affect key aspects of international project financings in West and Central Africa

Figure 1: EMCC and WAEMU countries



EMCCA. This leads to the application of different rules pertaining to economic law and foreign exchange controls (See Figure 1).

The current momentum towards currency reforms in the WAEMU and the EMCC may result in increased practice discrepancies within the OHADA zone, highlighting the need to analyze these reforms and assess their direct legal consequences on international project finance transactions.

EMCCA IMPLEMENTS A REVISED FOREIGN EXCHANGE REGULATION

In 2014, following a sudden drop in oil prices, EMCCA members began debating a new foreign exchange regulation. Facing worrisome low levels of currency reserves, the EMCCA member states finally enacted Regulation 02/18/CEMAC/UMAC/CM on foreign exchange control (the New FX Regulation) in December 2019. The main goal of the New FX Regulation is to address the lack of enforcement that hampered the former foreign exchange regulation[6].

The New FX Regulation entered into force, the Bank of Central African States (the BEAC) issued implementation instructions, and then financial intermediaries and economic operators were granted a six-month implementation period through December 2019 to achieve compliance with the New FX Regulation. The New FX Regulation did not provide for any grandfathering, which forced companies that had previously entered into transactions in the EMCCA region to conduct due diligence and regularization processes for previous transactions to ensure that they complied with the New FX Regulation.

Three sets of rules in the New FX Regulation are particularly relevant when carrying out an international project finance transaction.

Offshore bank accounts (Article 41 et seq. of the New FX Regulation)

The New FX Regulation expressly constrains residents from opening offshore bank accounts (the former foreign exchange regulation was silent on this point). Prior authorization of the BEAC is required to open offshore bank accounts. This authorization is granted at the BEAC's discretion, upon request by the applicant, and must be renewed every two years. In the absence or at the expiration of such authorization, the account must be closed and the credited funds must be repatriated to an onshore bank account.

One characteristic of project finance transactions is that they are generally conducted on a non-recourse basis. In practice, this means that lending banks can only rely on locally generated revenues—sometimes denominated in local currency—from the project to reimburse their loans.

To mitigate the risks inherent to these transactions (in particular, foreign exchange, transferability, enforcement and moratorium risks), lending banks usually require the project company to open and maintain offshore bank accounts in an overseas financial center, such as London or Paris. The funds deposited in these offshore bank accounts then are converted into pounds, euros or US dollars on a regular basis, and the lending banks maintain security interests in these offshore bank accounts in order to secure their loans.

In practice, the New FX Regulation turns the BEAC's policies regarding granting authorizations into one of the key parameters in gauging the bankability of an international project finance transaction.

Onshore foreign currency bank accounts (Article 43 et seq. of the New FX Regulation)

Opening an onshore foreign currency bank account is now also subject to the prior authorization of the BEAC (under the former foreign exchange regulation, this authorization was granted by the Ministry of Finance of the relevant country).

The authorization is granted at the BEAC's discretion, upon request by applicants, and must be renewed every two years. In the absence or at the expiration of such authorization, the account must be closed, and the funds credited in the account will probably be transferred to the BEAC in exchange for Central African CFA francs (XAF).

Export proceeds received abroad (Article 53 et seq. of the New FX Regulation)

The New FX Regulation requires exporting companies to repatriate their export proceeds within 150 days from the export date. Intermediation fees and other transaction-related fees may be deducted from the amount to be repatriated, up to a maximum of 10 percent of the total export proceeds for each repatriation.

From a foreign investor's point of view, the New FX Regulation's provisions appear stringent and cumbersome. Under this new paradigm, whether project financings will proceed smoothly and successfully will largely depend on how much pragmatism the BEAC is ready to demonstrate.

WAEMU REPLACES THE WEST AFRICAN CFA FRANC (XOF) WITH THE ECO

In June 2019, the Economic Community of West African States (ECOWAS) decided to create a new monetary union, supporting a single currency called the Eco, composed of current WAEMU member states and Nigeria, Ghana, Gambia, Liberia, Guinea, Cape Verde and Sierra Leone. To that end, the WAEMU countries and France also entered into the CFA francs cooperation reform agreement in December 2019 (the 2019 Cooperation Reform Agreement).

The Eco monetary union is intended to be implemented gradually, starting in 2020, to allow countries to achieve compliance with several convergence criteria, including limits on budget deficits, inflation and debt-to-gross domestic product ratios.

For the WAEMU countries, introducing the Eco also means the end of the CFA franc (XOF), which has become increasingly controversial in recent decades. Among the criticisms levied is that the CFA franc is an outdated remnant of the French colonial influence. In practice, this change implies the modification of several CFA franc-linked financial arrangements that WAEMU countries have in place with France.

Free convertibility and fixed parity maintained

The 2019 Cooperation Reform Agreement aims to replace a 1973 cooperation agreement between the WAEMU countries and France (the 1973 Cooperation Agreement) and later be complemented by a guarantee agreement (containing implementation technical provisions) to be entered into between the WAEMU countries and France.

Pursuant to the 1973 Cooperation Agreement and a 1973 operation account agreement between the WAEMU countries and France (subsequently amended in 2005 and 2014), the Central Bank of West African States (CBWAS) had to deposit 50 percent of its foreign exchange reserves into an account opened with the French Treasury (Trésor Français). In return, France ensured free convertibility of CFA francs (XOF) into French francs and later euros. This allowed CBWAS to benefit from unlimited advances by the French Treasury, provided that CBWAS complied with certain ratio requirements.

Following the signing of the 2019 Cooperation Reform Agreement, this account will be closed, and the funds will be repatriated to the CBWAS, which will be entitled to invest the foreign exchange reserves as it sees fit.

France will remain the guarantor of the Eco in the WAEMU countries, but free convertibility will instead be guaranteed through a credit line granted by France. The countries will also maintain a fixed rate of exchange between the Eco and the euro (EUR 1 = Eco 655.96).

17

member states in the Organization for Harmonization of Business Law in Africa (OHADA)

Governance reform

France currently has representatives appointed to the CBWAS Board of Directors, the CBWAS Banking Commission and the CBWAS Monetary Policy Committee, in accordance with the provisions of the 1973 Cooperation Agreement, the CBWAS statutes and the WAEMU Banking Commission Agreement. According to different official French statements and the 2019 Cooperation Reform Agreement, after the reform, France may retain the right to appoint an independent member to the CBWAS Monetary Policy Committee in order to monitor reserves held by the CBWAS. A representative would be reintroduced if the reserves level falls below a certain threshold. However, as a general rule, France will no longer have representatives in the other governance bodies.

In May 2020, the French Council of Ministers (Conseil des Ministres) adopted a bill authorizing the approval of the 2019 Cooperation Reform Agreement. Next, the bill must be submitted to a vote by the French Parliament, then promulgated by the French President of the Republic before it enters into force. The 2019 Cooperation Reform Agreement has the merit of ending the CFA franc currency, while ensuring a smooth transition to the Eco.

However, with seven other countries that are not members of the WAEMU (Nigeria, Ghana,

Gambia, Liberia, Guinea, Cape Verde and Sierra Leone) expected to join this monetary union, the 2019 Cooperation Reform Agreement can only be considered a temporary solution.

It remains unclear whether free convertibility and fixed parity — which are major variables in the context of international project finance transactions — will be maintained after the other ECOWAS members accede to the Eco monetary union.

Mali, Bougouni, Aerial view of RN7 road across arid Sahel zone

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1. EMCCA (Communauté Économique et Monétaire de l'Afrique Centrale in French) is a customs and currency union among Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea and Gabon that currently uses Central African CFA francs (XAF) as common currency. The Bank of the Central African States (BEAC), acts as the central bank for this currency union.
2. WAEMU (Union Economique et Monétaire Ouest-Africaine) is a customs and currency union among Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo that currently uses West African CFA francs (XOF) as common currency. The Central Bank of West African States (BCEAO), acts as the central bank for this currency union.
3. OHADA is composed of 17 West and Central African countries (Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo), which have adopted a common system of corporate and business uniform acts and implementing institutions. The uniform acts passed by OHADA are deemed exclusively business-related and are directly applicable in each of the 17 member states.
4. Except Guinea-Bissau, which entered the CFA franc monetary system in 1997.
5. Treaty of Port Louis (Mauritius).
6. Regulation no. 02/00/CEMAC/UMAC/CM dated 29 April 2000.

A high angle view over downtown city Dar es Salaam Business District Tanzania

World Bank and African Development Bank increase their financing and anticorruption enforcement

Pay attention to sanctions and debarment risks amid new COVID-19 financing opportunities

By Scott Hershman, Dan Levin, Bingna Guo and Emily Holland

In recent weeks, the World Bank, the African Development Bank (AfDB) and other multilateral development banks (MDBs) have greenlit financing and loans at unprecedented rates in response to the global pandemic and recession.

This is particularly true for countries in Africa, where World Bank and AfDB lending was already on the rise. As the opportunities for companies to bid on and participate in World Bank and MDB-financed projects in Africa and elsewhere increase, so does the potential for corruption, fraud and other forms of misconduct, which can result in possible suspension and debarment through these institutions' sanctions systems.

Here are risks and consequences for contractors undertaking MDB-funded commitments—including those financed with emergency COVID-19 disbursement funds—and key compliance takeaways for a post-COVID-19 era.

53
firms and individuals debarred or sanctioned in 2019 by the World Bank

THE IMPORTANCE OF UNDERSTANDING DEVELOPMENT FUNDING SANCTIONS

A major goal of the World Bank and other MDBs' sanctions regimes is to protect development funding.

Past analysis by the World Bank indicates that nearly 25 percent of all investment projects receive at least one complaint of fraud or corruption. In response, the World Bank and other MDBs have established and are now vigorously enforcing administrative suspension and debarment regimes, with a focus on deterring behavior that would compromise their respective development agendas. Nonetheless, many companies and their compliance officers remain unaware of these systems and the serious consequences that can follow from any misconduct.

This lack of awareness can prove detrimental to companies. Over the past several years, the World Bank has demonstrated a willingness to investigate aggressively and to impose debarment and non-debarment sanctions to address misconduct connected to the activities they finance. Many MDBs, which share a harmonized agenda reflecting agreed goals and tools to fight corruption and fraud, have established investigative anti-corruption frameworks and entered into agreements to cross-debar any entities debarred by other banks for at least one year. The MDBs have not harmonized all aspects of their sanctions systems or enforcement approaches, including in some cases, the scope and definitions of sanctionable conduct that they target and the standards they apply when deciding to pursue misconduct.

As a result, these frameworks and systems can be confusing for contractors, but are essential to understand before committing to an MDB-financed opportunity.

WORLD BANK AND AFDB SANCTIONS SYSTEMS

The World Bank describes its jurisdiction as contractual in nature. Its enforcement powers derive from the Bank's loan agreements, its fiduciary duty is enshrined in the Bank's Articles of Agreement, and its enforcement actions are informed by the Bank's anti-corruption guidelines.

The World Bank's Integrity Vice Presidency (INT), which appointed a new chief in May 2020, investigates potential violations of Bank rules. The Suspension and Debarment Officer (SDO), which heads the Office of Suspension and Debarment (OSD), reviews evidence submitted by the INT and determines whether the evidence supports a finding that alleged sanctionable practices have occurred. Parties may negotiate settlement agreements with the INT at any stage during the sanctions process. Appeals of SDO determinations are heard by the Sanctions Board, which conducts a de novo review of cases, generally with the benefit of an expanded record, and issues decisions that may not be appealed. Many contractors are subject to review by the Integrity Compliance Officer, which monitors contractors subject to its supervision.

The structure and approach of the AfDB's sanctions system largely mirrors the World Bank's system. An Integrity and Anti-Corruption Department investigates allegations

of sanctionable practices and submits findings to the Sanctions Office, led by a Sanctions Commissioner. If a company chooses to litigate, the AfDB's Appeals Board conducts a de novo review of the record and issues binding decisions. Like the World Bank, the AfDB has sought to improve the transparency of its sanctions regime, including by publishing an annual report of its Sanctions Appeal Board.

Typically, a contractor learns of the World Bank's enforcement interest on a matter by receiving an audit letter or a "show cause" letter. It is important to take these letters seriously and bring them to the attention of compliance and integrity personnel, since failing to do so can risk losing a critical opportunity to present your case later. The World Bank may temporarily suspend a contractor when INT commences an investigation if sufficient evidence exists to conclude that a sanctionable practice has occurred that would result in debarment for at least two years. An early temporary suspension bars a contractor from the opportunity to be awarded new contracts for six months (and longer if extended).

The Bank's baseline sanction is a three-year conditional debarment. Settlements are typically shorter (two to three years in duration). Litigating to the Sanctions Board can result in a shorter debarment period, but does not always achieve that result. When determining an appropriate sanction, the Bank considers a non-exhaustive set of "aggravating" and "mitigating" factors, broadly defined, that may be applied in full, partially or not at all. Aggravating factors include the severity of the misconduct, the harm caused, any interference with the investigation and any past history of adjudicated misconduct. Mitigating factors include playing a minor role in the misconduct, voluntarily taking corrective action and cooperating with an investigation. Where applicable, these factors may result in adjustments of up to 50 percent from the baseline sanction.

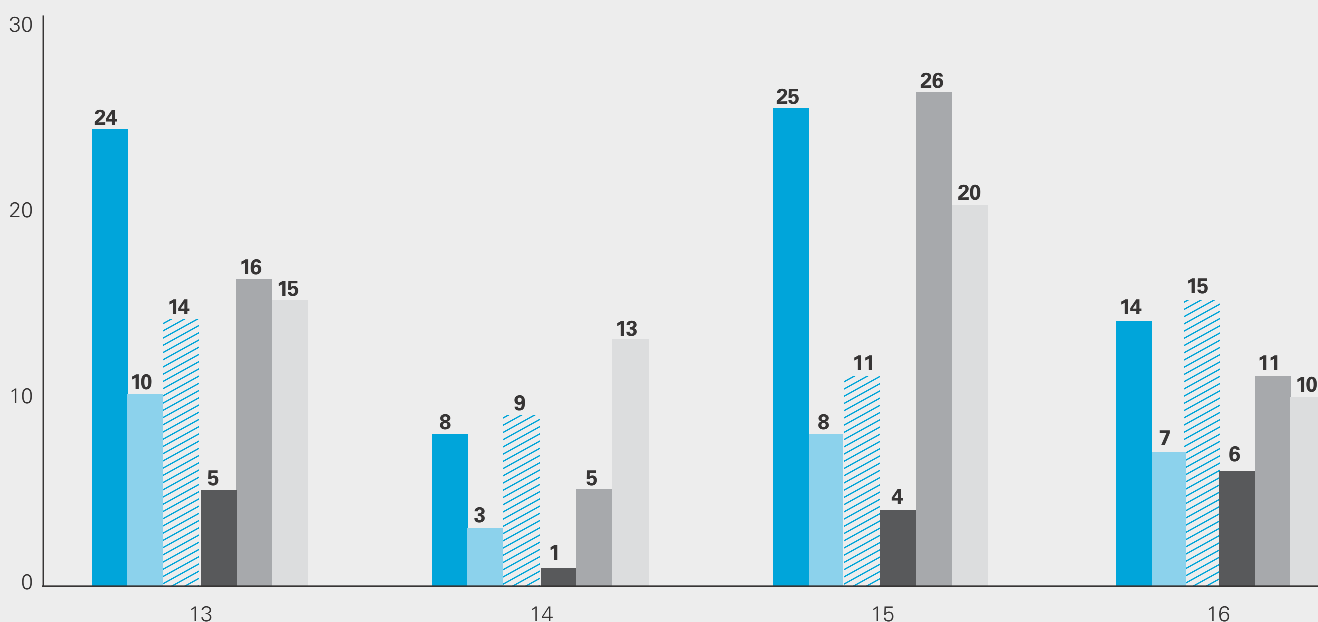
When deciding whether to extend sanctions to a corporate group (including parent companies, subsidiaries, sister entities, joint venture partners and associated individuals), the World Bank requires some level of involvement or participation, although in the past, it has held multinational corporations accountable on the basis of the actions of a single employee's misconduct.

Finally, the impact of an imposed sanction can be severe: If a debarment of at least one year is imposed, the contractor is cross-debarred by other MDBs, and the discovery of local law violations may result in a referral to national authorities.

RECENT WORLD BANK ENFORCEMENT PATTERNS

Until recently, World Bank suspension and debarments had been rising. Other MDBs, including the AfDB, had largely followed a similar pattern. However, the World Bank's second joint *Sanctions System Annual Report for Fiscal Year 2019*, released in October 2019, showed significant enforcement efforts that had still slightly

Figure 1: New cases opened by region in fiscal years 2013 to 2017 (Source: World Bank)[3].



declined from the Bank's previous enforcement statistics.[1]

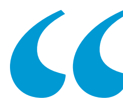
In 2019, the World Bank debarred or otherwise sanctioned 53 firms and individuals, including through settlements (compared with 83 firms and individuals in fiscal year 20180. The OSD temporarily suspended 24 firms and 10 individuals in 2019 (compared with 29 firms and 11 individuals in 2018), and reviewed 16 settlements (down from 26). The INT issued 42 referrals in 2019 (compared with 43 in 2018). Finally, the World Bank imposed 33 cross-debarments based on debarments imposed by the AfDB, the Inter-American Development Bank and the Asian Development Bank (compared with 73 in 2018).[2]

MDB INVESTMENTS IN AFRICA

Both the World Bank and the AfDB have increased their investments across industries to countries in Africa in recent years. During its fiscal year 2017, the World Bank unveiled plans to provide a record US$57 billion in financing for projects in sub-Saharan Africa through the end of its fiscal year 2020. In line with this pledge, the World Bank issued US$18.4 billion to partner countries and businesses in sub-Saharan Africa during 2019. The World Bank has committed a further US$25 billion in investments through 2030 to support digital transformation across North Africa and sub-Saharan Africa, with plans to mobilize another US$25 billion from the private sector.

Meanwhile, the AfDB disbursed US$7.4 billion during its fiscal year 2017, its highest year on record, and in September 2019 reported US$20 billion in disbursements over a three-year period.

Now, crucial emergency needs arising from the global pandemic have prompted the World Bank, AfDB and other MDBs to make additional pledges. As of the date of writing, the World Bank had committed up to US$160 billion in grants and financial support over a 15-month period to help more than 100 developing countries, with further funds committed by the MDBs, including the AfDB.. These financing amounts and the rates at which they are being approved are notable and could translate into additional opportunities for companies to bid on and participate in World Bank and AfDB-financed projects in Africa and elsewhere.

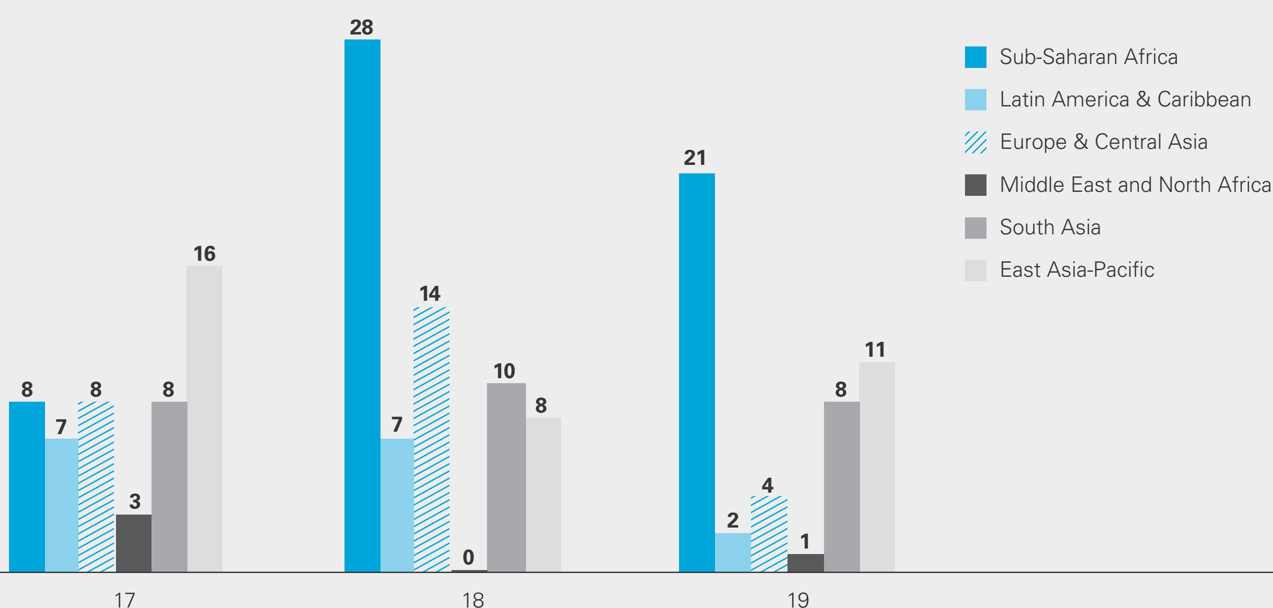


Today's sanctions landscape carries greater risks and consequences than ever before.

However, they also carry increased risks associated with sanctions and debarment procedures.

Indeed, for the last several years, sub-Saharan Africa has ranked at or near the top of new World Bank sanctions cases opened by region, based on the location of the World Bank–funded project or program involved in the case (see Figure 1).

In addition, sub-Saharan Africa ranks among the top regions worldwide with respect to the



Circular water fountain shot directly from above. Cape Town, Western Cape, South Africa

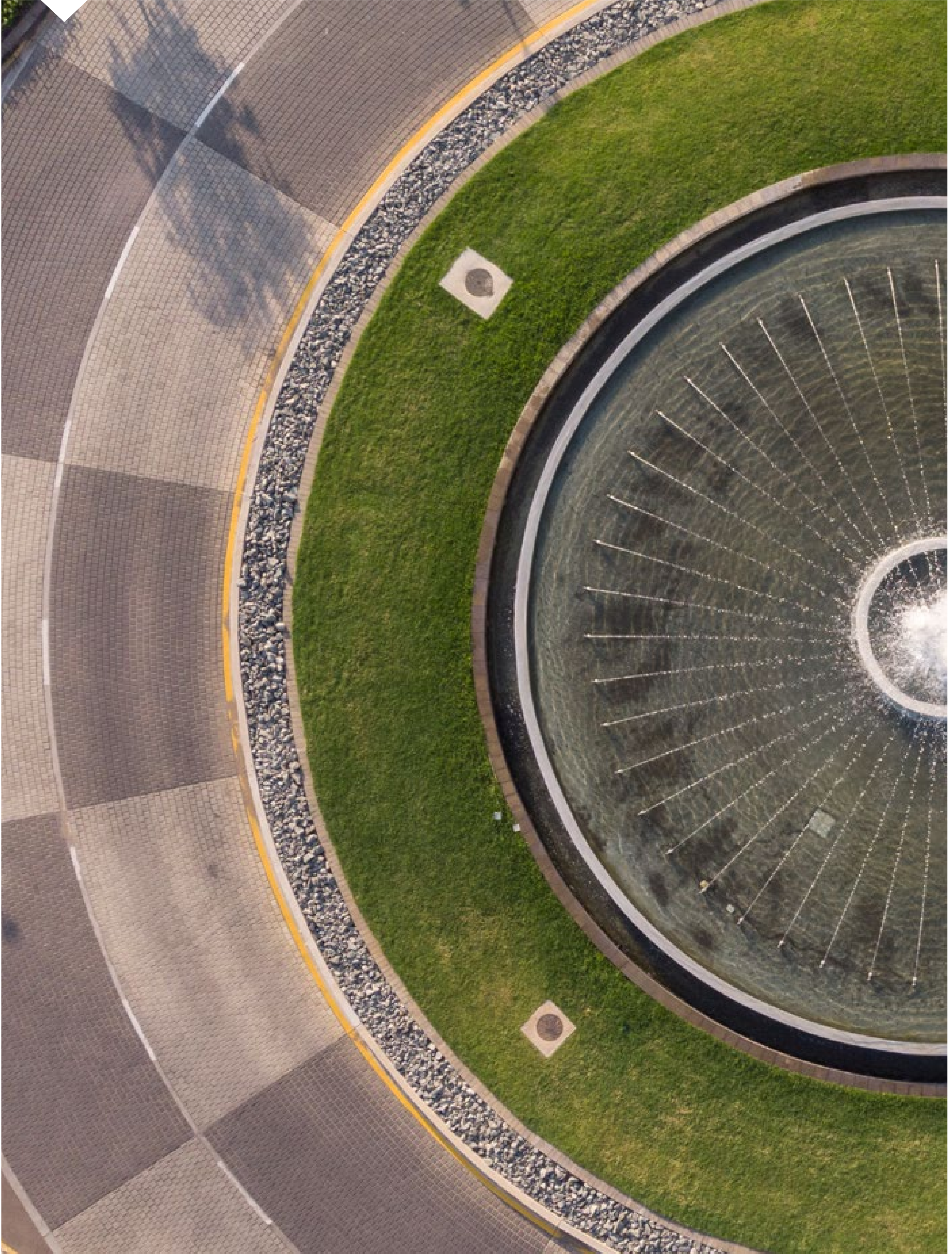
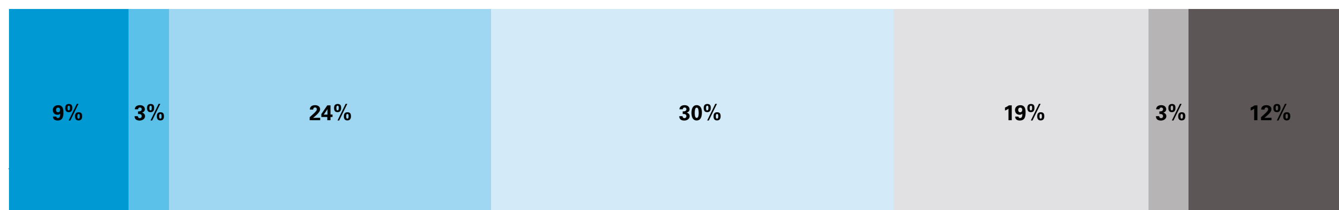
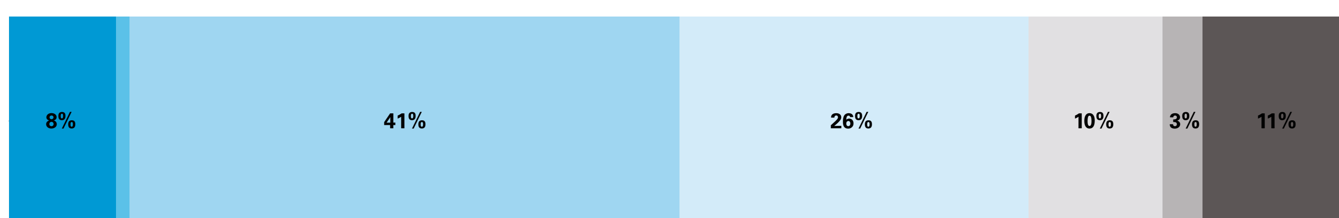


Figure 2: Regional origin of respondents sanctioned by the SDO and World Bank's Sanctions Board in fiscal years 2015 to 2019

Sanctioned by the SDO and the WBG Sanctions Board (205 respondents)



Sanctioned via settlement (118 respondents)



Source: World Bank)[4]

Sub-Saharan Africa · Middle East & North Africa · East Asia & Pacific · Europe & Central Asia · Latin America & Caribbean · North America · South Asia

regional origin of respondent entities and individuals sanctioned by the World Bank—either by the SDO and the World Bank's Sanctions Board or via settlement (see Figure 2).

COMPLIANCE TAKEAWAYS IN A POST-COVID-19 LANDSCAPE

Today's sanctions landscape carries greater risks and consequences for contractors than ever before.

This is reflected most recently in indications by the World Bank, the AfDB and other MDBs that they intend to remain diligent about their anti-corruption efforts while emergency disbursement funds mobilize and the international responses accelerate in high-risk markets.

For that reason, contractors engaged or planning to bid on World Bank and other MDB contracts in high-risk markets should take a careful look at their compliance systems and ensure they understand the risks of engaging on contracts financed by MDBs.

Make sure you:

- Understand World Bank and other MDB compliance obligations, common pitfalls that can give rise to enforcement actions, and the potential (and significant) collateral effects such as cross-debarment and referrals
- Train employees on practices that can lead to debarment proceedings, particularly in light of the different standards the World Bank and other MDBs apply when deciding whether to pursue allegations of misconduct
- Introduce controls to avoid misconduct in your World Bank and other MDB projects
- Conduct risk assessments to identify gaps in your internal controls that could lead to sanctionable conduct
- Understand the significance of World Bank and other MDB communications, such as audit and show-cause letters

Finally, if you discover that any misconduct has occurred in your contracts, it is important to take swift action. This includes undertaking an independent internal investigation so your management teams can make informed decisions, identifying culpable personnel and gaps in compliance systems and demonstrating appropriate remedial actions.

1 The World Bank Group, World Bank Group Sanctions System Annual Report FY 2019, available at http://documents1.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf

2 Ibid

3 http://documents1.worldbank.org/curated/en/129141508163808440/pdf/2017-INT-Annual-Update-FINAL-spreads-10102017.pdf

4 The World Bank Group, World Bank Group Sanctions System Annual Report FY 2019, available at http://documents1.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf at p. 39

The mine shaft used to access underground excavation tunnels sits illuminated at a gold mine in Democratic Republic of Congo. Photographer: Simon Dawson/Bloomberg

Africa's mines of the future: COVID-19 and ESG issues

Companies that achieve ESG objectives are more likely to attract investors and customers in a post-pandemic world

By Matthew Burnell

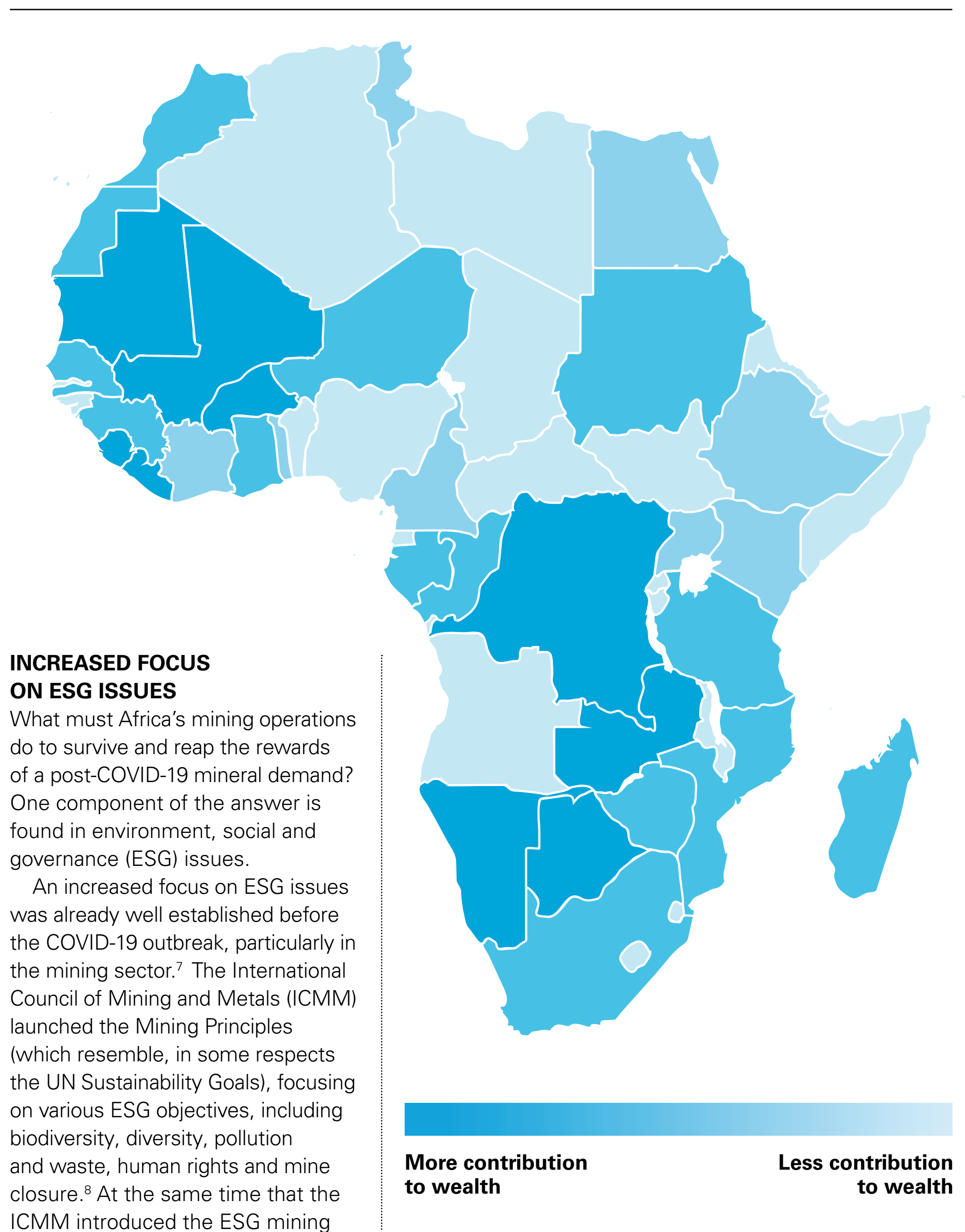
Mining is one of Africa's most important industries. In recent decades, mining has been a major driver of improved socioeconomic indicators across the continent (Figure 1).

Over the past 20 years, state-owned Chinese banks have been important investors in developing Africa's mines and supporting infrastructure.[2] The COVID-19 pandemic and the associated global economic downturn may likely restrict this flow of funds to Africa in the short- to medium-term, thus reducing mineral exploration, the development of new mines[3] and limiting the development of major logistical infrastructure intended to facilitate the delivery of African minerals to world markets.[4] The latter includes the "Belt and Road Initiative" involving crucial infrastructure projects in sub-Saharan Africa.[5]

However, reduced mining development might not be bad news for everyone. It may even create new opportunities for existing mining operations, particularly those supplying copper, chromium, molybdenum, lithium, graphite and cobalt, which are expected to be in high demand to develop clean energy generation and storage technologies.[6] As demands for these minerals increase, supply may be constricted due to these exploration and development constraints.

Provided they are able to survive the economic recession following COVID-19, the future looks bright for these mining operations when the global economy begins to recover.

Figure 1: Contribution of mining to African economies. (Source: Ericsson, M. and Löf, O. (2019[1]).



INCREASED FOCUS ON ESG ISSUES

What must Africa's mining operations do to survive and reap the rewards of a post-COVID-19 mineral demand? One component of the answer is found in environment, social and governance (ESG) issues.

An increased focus on ESG issues was already well established before the COVID-19 outbreak, particularly in the mining sector.[7] The International Council of Mining and Metals (ICMM) launched the Mining Principles (which resemble, in some respects the UN Sustainability Goals), focusing on various ESG objectives, including biodiversity, diversity, pollution and waste, human rights and mine closure.[8] At the same time that the ICMM introduced the ESG mining

standard, two significant global events occurred:

- COVID-19 shut down countries and economies, impacting mining as well as many other industries. That impact has been both direct (ability to operate the mine) and indirect (loss of demand for the minerals produced.) It highlighted the fallibility of labor-intensive industries, which were forced to halt operations due to both rampant spread of the virus in the close confines of underground mines and the vulnerability of the health and social-services infrastructure supporting the miners.[9]
- The resurgence of the Black Lives Matter movement following the death of George Floyd in Minneapolis[10] brought inequality and human rights again to the forefront.

These events reinforce a shift in the social license to operate. The relationship between a mine and the host community now requires companies (and the company group) to demonstrate supply chain integrity and transparency.[11]

This form of product-provenance is familiar to the diamond mining market under the Kimberley Process. Similarly, greenhouse gas emissions and water scarcity have compelled companies to adopt green procurement measures to ensure that their products are sourced sustainably and with a lesser impact on the environment. However, in a post-COVID-19 world, customers, suppliers and investors are more likely to insist that mining operations demonstrate that they are taking measures to improve diversity, promote and protect human rights, reduce their carbon footprint and establish more stringent measures that protect employees from occupational diseases and pandemics.

Mining companies that demonstrate their ESG objectives are achieved (or at least achievable) are more likely to attract investors and customers, while those that do not adapt may be unsupported in the future, notwithstanding their mineral deposits.

With this in mind, here are some opportunities and risks that mining operations should consider.

CLIMATE CHANGE AND INFRASTRUCTURAL INTEGRITY

The World Economic Forum's Global Risk Report[12] identified water scarcity and the failure to adapt to climate change as the two greatest risks to the global economy. The report highlights that extreme weather events may:

- Impact the availability of resources and raw materials
- Result in damage to key infrastructure, such as roads, rails, pipelines and communication and electricity networks
- Affect the health, safety and well-being of employees and host communities (such as those experienced during Brazil's Brumadinho tailings dam failure, which sparked the Church of England Pension Board Tailings Dam disclosure project)[13]

In addition to these possible physical risks arising from climate change events, mining operations may also experience "transition risks." These are risks of reputational harm, possible prosecution or loss of business if companies fail to implement measures to reduce greenhouse gas emissions or fail to adequately manage the effects of climate change on the business. In this regard, climate change risk assessments are critical to identify physical and transitional risks at an operational level and throughout the supply and customer chains. It is important for management to understand that both their suppliers and customers are also adopting measures to manage the physical and transitional risks associated with climate change.

A 2017 South African study found that measures to mitigate climate change-related risks were not taken because there was no support from senior management and because climate change-related investments were viewed as an expense that would not generate a return.[14] Since that report, perceptions of climate change and ESG issues have shifted significantly. Shareholders are becoming more aware and outspoken about steps taken–or not taken–by directors and managers, including in mining companies. Shareholder activism is becoming commonplace.

INCREASED AUTOMATION AND THE SOCIAL PROBLEM

Scaling down operations and placing mines under care and maintenance during the COVID-19 pandemic has significantly impacted the economies of countries that rely heavily on mining (Figure 2). At the same time, restarting operations too quickly led to increased infection rates, which caused some mining operations to temporarily close in order to manage the impact on employees.

An obvious strategic step for Africa's mining companies is to focus on technological advancements that reduce the number of underground miners, thus reducing the risk of health and safety incidents. This would mean that when the next COVID-19-type event occurs, mining companies would be less affected, as operations continue remotely, with employees separated by a healthy distance or by screens.

Mining companies that are already considering technologies to improve efficiency may gain further competitive advantages by implementing these in response to government regulations regarding the conditions under which their workforces must operate. However, these technologies come at a cost to employment, and Africa desperately needs employment opportunities. Public-participation processes for prospective mining operations in Africa often include quietly desperate individuals looking to the mine for employment, to help feed their families. Sometimes, and especially if layoffs are looming, desperation leads to tearing up a mine's social license and a revolt against its operations.

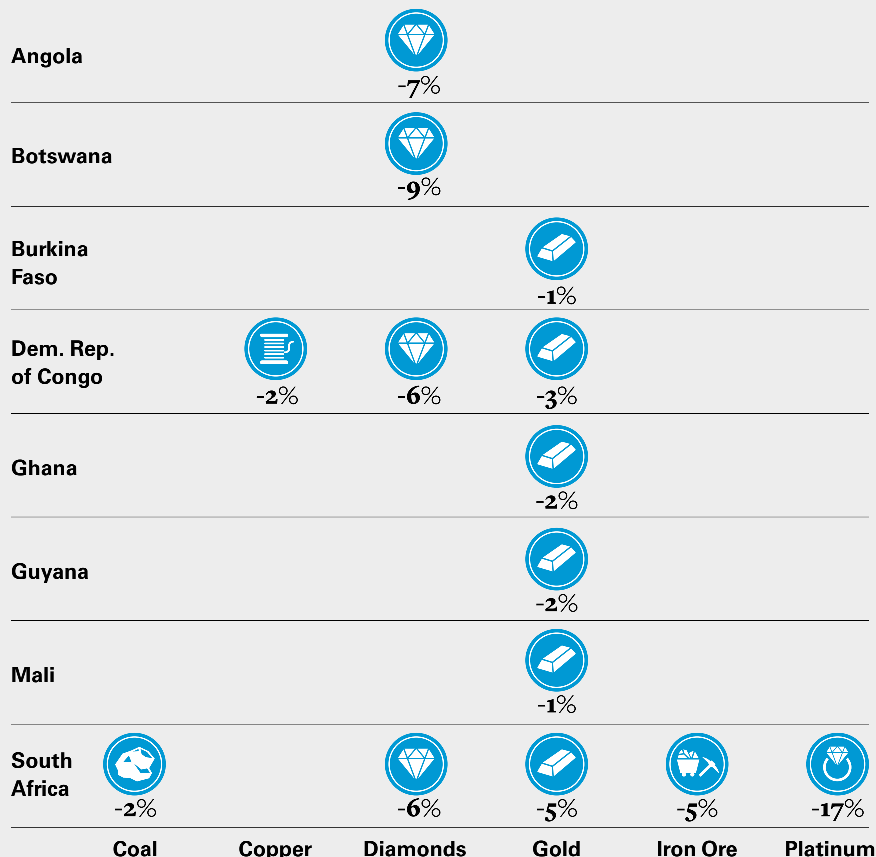
Host-community concerns rarely find simple or immediate solutions. In the same way that companies have found technological answers to extract minerals more effectively and use resources more wisely, innovative solutions (possibly from the social sciences) must be developed to improve community engagement processes.[16] These include identifying better ways to communicate, understand each other and collaborate to develop sustainable communities that exist independently of any mining operations.

INCREASED AUTOMATION CREATES AN OPPORTUNITY FOR IMPROVED GENDER DIVERSITY

Institutional investors especially are paying more attention to a company's recruitment and human resource policies when making investment decisions.

Diversity is recognized as a source of innovation and agility.[17] As the mining industry moves from labor-based to technology-based operations, an opportunity is emerging to enhance gender diversity in an industry that has heavily skewed towards men.

Moving into a fourth industrial revolution will demand additional science, technology, engineering and mathematics (STEM) skills, as mines begin to control their operations using artificial intelligence. This change could increase the risk of cyberattacks on mining operations and result in "prolonged and widespread outages, safety incidents, liability claims and associated legal costs, data clean-up costs, reputational damage, management distraction and physical damage to assets."[18] Although STEM fields are typically dominated by men, the mining industry will need to attract women into these fields if they are to enjoy the benefits of diversity.[19]



CONCLUSION

It is impossible to predict what future crises will affect the mining industry, although most point to climate change either directly or indirectly. Incorporating ESG risks and benefits into corporate strategies can help mining companies enjoy the benefits of technology, diversity and sustainability while building resilience and agility against future challenges.

At their core, these initiatives are driven both by investor-shareholder sentiments and legal compliance obligations. Mining laws are undeniably evolving across Africa. In what has been termed a "fourth generation" of mining codes in Africa[20], the law of the jurisdiction in which a mine is located will likely become the minimum required standard informed by various international ESG guidelines and codes such as the Global Mining Initiative, the Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights.

While the law lags behind, there are economic opportunities for companies that take steps now to stay ahead of their competitors.

1 Ericsson, M. and Löf, O. (2019). Mining's contribution to national economies between 1996 and 2016. Mineral Economics (2019) 32:223–250

2 Simone Liedtke China's mine development in sub-Saharan Africa likely to slow Mining Weekly on 20 May 2020.

3 Ibid note 1.

4 Ibid note 2.

5 Ibid note 3.

6 World Bank Group Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition at 12.

7 Financial Times A new ESG mining standard will help drive responsible production 22 February 2020.

8 International Council on Mining and Metals Mining Principles https://www.icmm.com/mining-principles#

9 Coronavirus in South Africa: Outbreak closes Mponeng gold mine https://www.bbc.com/news/world-africa-52791780

10 Jelani Cobb The Death of George Floyd, in Context *The New Yorker* https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context

11 Canadian Minerals and Metals Plan at 43

12 http://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf

13 https://www.churchofengland.org/investor-mining-tailings-safety-initiative

14 http://piv.nbi.org.za/2017/Website%202017/NBI%20Adaptation%20Case%20Studies%20Report%202017%20(Final).pdf

15 Mining Technology: Impact of Covid-19 on African mine production https://www.mining-technology.com/comment/covid-19-african-mine/

16 M Burnell Developing and applying a constitutional framework for public participation in South Africa https://open.uct.ac.za/bitstream/handle/11427/27383/thesis_law_2017_burnell_matthew_grant.pdf?sequence=1&isAllowed=y

17 Roni Reiter-Palmon (ed) Team Creativity and Innovation at 44.

18 EY Top 10 Business Risks Facing Mining and Metals in 2019 – 20 at 8.

19 Prospectors and Developers Association of Canada's Sate of Mineral Finance 2019: At the Crossroads at 31.

20 Hany Besada & Philip Martin (2015) Mining codes in Africa: emergence of a 'fourth' generation?, *Cambridge Review of International Affairs*, 28:2, 263-282

Skyline of Nairobi, Kenya

Institutional arbitration in Africa: Opportunities and challenges

Africa's arbitration options and caseloads continue to rise

By Robert Wheal, Elizabeth Oger-Gross[1], Tolu Obamuroh and Opeyemi Longe

International arbitration remains the dispute resolution mechanism of choice for cross-border disputes.[2] Although this is a global trend, recent years have seen a significant increase in the use of international arbitration to resolve disputes involving African parties.

According to the International Chamber of Commerce (ICC), 130 parties from sub-Saharan Africa accounted for approximately 5 percent of all parties in its 2019 caseload, with Nigerian (19), South African (13) and Mauritian (10) parties taking the lead. The 2019 caseload for the London Court of International Arbitration (LCIA) shows that African parties were involved in slightly more than 10 percent of the cases (up from 8 percent in 2018).[3] In investor-state arbitrations, 15 percent of the 2019 combined caseload at the International Centre for Settlement of Investment Disputes (ICSID) involved disputes from sub-Saharan Africa, while the Middle East and North Africa accounted for 11 percent of disputes.[4]

This slow, steady rise in the Africa-related caseload of arbitral institutions is not surprising given the institutional support provided, which is crucial in high-value disputes, (in 2018, the average amount disputed in cases referred to the ICC by parties was US$45 million) and these arbitration institutions' ability to innovate and adapt to global commercial needs.

AFRICA'S ARBITRATION OPTIONS

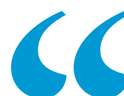
Currently, nearly 100 arbitration institutions of various sizes and areas of focus exist across Africa (see Figure 1).

Of course, not all of these institutions will earn strong global or even regional reputations. For the moment, at least, the ICC and the LCIA continue to dominate international arbitration in Africa, as they do international arbitration worldwide (see Figure 2).

In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two institutions. The Lagos Court of Arbitration (LCA) ranked as the highest African arbitration institution, although in sixth place. So, despite the multitude of emerging African arbitration institutions, most African users appear to continue to prefer to resolve their disputes primarily under the auspices of the ICC and LCIA.

The reasons for this are complex and multi-faceted, though this preference is most likely linked to the ICC's and the LCIA's proven track records and substantial experience, which underlie their well-established reputations. The emphasis on reputation, recognition and experience effectively results in a greater weighting towards long-established institutions. This means it may take a long time before newer arbitration institutions in Africa can build their own international following and performance track record.

No matter how high-quality an arbitration institution's administration, it takes a long time for that quality to translate into reputation and then utilization. For example, the Singapore International Arbitration Centre (SIAC) commenced operations in 1991, but did not register 90 new cases in one year until 2006. The number of new SIAC cases increased to 160 in 2009, and SIAC has received a steady inflow of new cases each year since then, with 479 new cases in 2019 (see Figure 2).



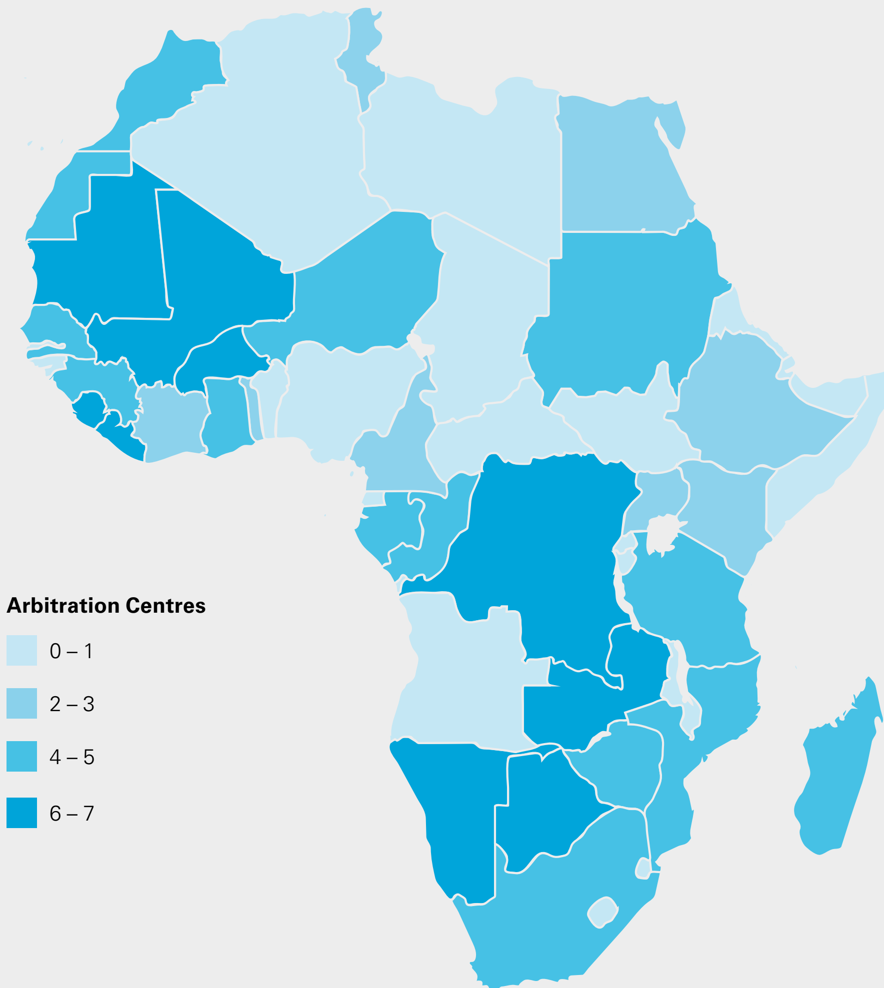
Currently, nearly 100 arbitration institutions exist across Africa

THE RISE OF AFRICAN ARBITRATION INSTITUTIONS

Recent trends suggest that parties are increasingly using top African arbitration institutions to resolve their disputes.

According to survey respondents in the School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report, the top five arbitral centers in Africa are the Arbitration Foundation of Southern Africa (AFSA), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Kigali International Arbitration Centre (KIAC), the Lagos Court of Arbitration (LCA), and the Nairobi Centre for International Arbitration (NCIA)[6]. CRCICA had administered a total of 1,385 cases at the end of 2019, including 82 new cases in 2019 alone[7]. AFSA also has a caseload of approximately 60 international matters in addition to its domestic caseload of about 500 matters[8]. The caseloads of KIAC[9], NCIA[10] and

Figure 1: Local arbitration institutions in Africa



ALGERIA

- Centre for Conciliation, Mediation and Arbitration of the Algerian Chamber of Commerce & Industry, Algiers
- Annaba Mediation & Arbitration Centre, Annaba

ANGOLA

- Centre for Extra Judicial Resolution of Disputes (CREL)[1]
- Angolan Centre for Arbitration of Disputes (CAAL)[2]
- CEFA Arbitration Centre[3]
- Harmonia Dispute Resolution Centre[4]
- Angola Arbitral Juris[5]
- Mediation and Arbitration Centre of the Angolan Industrial Association (CAAIA)[6]

BENIN REPUBLIC

- Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce & Industry of Benin
- Conciliation and Arbitration Chamber of the Cotton Interprofessional Association of Cotonou
- EV Arbitrage & Mediation Cotonou

BOTSWANA

- Botswana Institute of Arbitrators

BURKINA FASO

- Ouagadougou Arbitration, Mediation & Conciliation Centre of the Chamber of Commerce & Industry

BURUNDI

- Burundi Centre for Arbitration & Mediation

CAMEROON

- Centre d'Arbitrage du GICAM (Groupement Interpatronal du Cameroun), Douala
- Centre d'arbitrage du CPAM, Yaounde
- African Intellectual Property Organization (OAPI)

CENTRAL AFRICA REPUBLIC

- Centre d'Arbitrage, de Mediation et de Conciliation de Centrafrique (CAMC-CA), Bangui.

CHAD

- Centre de Mediation et d'arbitrage, Ndjamena

CONGO

- Centre d'Arbitrage et de Mediation attached to the Brazzaville Chamber of Commerce, Industry, Agriculture and Jobs, Libreville.
- Centre de mediation et d'arbitrage au Congo (CEMACO)

DEMOCRATIC REPUBLIC OF CONGO

- Le Centre d'Arbitrage du Congo (CAC) Kinshasa
- National Centre for Arbitration, Conciliation & Mediation (CENACOM), Kinshasa

DJIBOUTI

- Intergovernmental Authority on Development (IGAD) Business Arbitration Centre

EGYPT

- The Egyptian Arbitration and Mediation Centre[7]
- Cairo Regional Centre for ICA (CRCICA)
- Sharm El Sheikh International Arbitration Centre
- Dr A Kheir Law & Arbitration Center (AKLAC)
- The Egyptian Center for Voluntary Arbitration and the Settlement of Non-Banking, Financial Disputes[8]

ETHIOPIA

- Addis Ababa Chamber & Sectorial Association Arbitration

GABON

- Centre d'Arbitrage, de Mediation et de Conciliation (CAMC-GA)

GHANA

- Ghana Arbitration Centre
- Ghana ADR Hub
- Ghana Association of Certified Mediators & Arbitrators (GHACMA), Accra
- Copyright Office Ghana Arbitration Centre

GUINEA

- Arbitration Centre Chambre d'Arbitrage de la Guinee, Conakry

IVORY COAST

- Arbitration Centre Chambre d'Arbitrage de Cote d'Ivoire
- Common Court of Justice & Arbitration of OHADA
- Chamber of Commerce & Industry of Ivory Coast, Abidjan

KENYA

- Dispute Resolution Centre, Nairobi
- Nairobi Centre for International Arbitration
- Strathmore Dispute Resolution Centre (SDRC)

LESOTHO

- The Directorate of Dispute Prevention & Resolution

LIBERIA

- Liberia Chamber of Commerce

LIBYA

- Libyan Centre for Mediation & Arbitration
- The Libyan International Arbitration Commercial Centre

MADAGASCAR

- Arbitration Centre of Madagascar

MALAWI

- Agricultural Commodity Exchange for Africa

MALI

- Centre d'Arbitrage et de Conciliation du Mali (CECAM) Bamako

MAURITIUS

- Mauritius Chamber of Commerce & Industry (MCCI) Arbitration and Mediation Center (MARC)
- The Mauritius International Arbitration Centre (MIAC)
- Permanent Court for Arbitration Mauritius Office

MOROCCO

- Euro-Mediterranean Centre for Mediation & Arbitration, Casablanca (Now Casablanca International Mediation and Arbitration Centre (CIMAC))
- Rabat International Mediation & Arbitration Centre (CIMAR)
- CCIS, Agadir

MOZAMBIQUE

- Centre for Arbitration Conciliation & Mediation (GACM) Maputo

NIGER

- Centre de Mediation et d'Arbitrage de Niamey (CMAN) attached to the Niger Chambre de Commerce, d'Industrie et d'Artisan

NIGERIA

- Regional Centre for ICA Lagos (RCICAL)
- Maritime Arbitrators Association of Nigeria (MANN)
- Lagos Court of Arbitration Centre
- International Centre for Arbitration & Mediation, Abuja (ICAMA)
- Lagos Chamber of Commerce International Arbitration Centre
- Janada International Centre for Arbitration & Mediation, Abuja

RWANDA

- Kigali International Arbitration Centre (KIAC)

SENEGAL

- Arbitration Centre of the Dakar Chamber of Commerce, Industry and Agriculture
- Dakar Arbitration & Mediation Centre

SOUTH AFRICA

- Arbitration Foundation of Southern Africa
- Equillore Group
- Africa Alternative Dispute Resolution (Africa ADR)
- The Association of Arbitrators
- China Africa Joint Arbitration Center (CAJAC)
- Commission for Conciliation, Mediation & Arbitration (CCMA)
- Tokiso Dispute Settlement Pty Ltd

SOUTH SUDAN

- South Sudan Chamber of Commerce, Industry & Agriculture, Juba

SUDAN

- Arab Centre for Arbitration
- International Chamber of Arbitration
- The Sudanese Centre for Conciliation & Arbitration

SWAZILAND

- Conciliation, Mediation and Arbitration Commission (CMAC)

TANZANIA

- The National Construction Council, Dares Salaam.
- East African Court of Justice (Arbitration Institution) Arusha.
- Tanzania Institute of Arbitrators (TIA), Dar es Salaam

TOGO

- Arbitration Court CATO, Lome.

TUNISIA

- Centre for Conciliation & Arbitration of Tunis (CCAT)
- Al Insaf Center, Tunis

UGANDA

- Centre for Arbitration & Dispute Resolution, Kampala
- Centre for Arbitration and Dispute Resolution

ZAMBIA

- Zambia Centre for Dispute Resolution

ZAMBIA

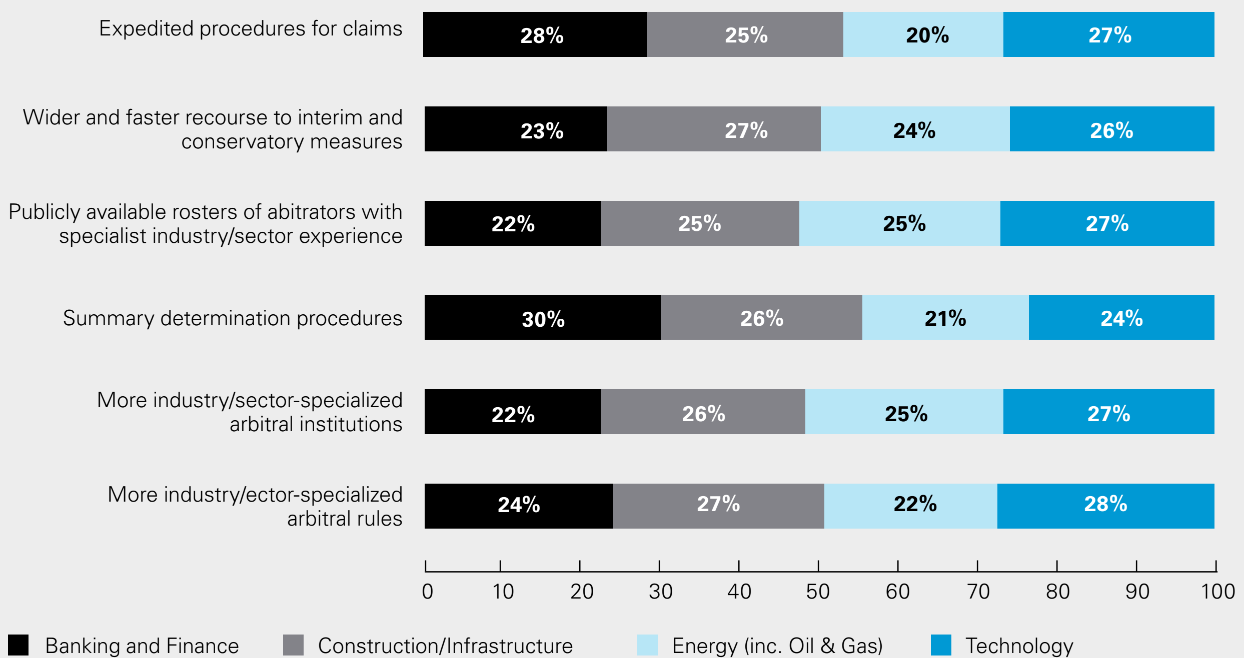
- Commercial Arbitration Centre in Harare
- Africa Institute of Mediation and Arbitration, Harare

Figure 2: Leading arbitral institutions globally, by new case filings annually

New case filings	2019	2018	2017	2016
International Centre for Dispute Resolution (ICDR/AAA)	Awaiting	993	1,026	1,050
International Chamber of Commerce (ICC)	869	842	810	966
Singapore International Arbitration Centre (SIAC)	479	402	452	343
London Court of International Arbitration (LCIA)	200	317	285	303
Hong Kong International Arbitration Centre (HKIAC)	503	265	297	262
Stockholm Chamber of Commerce (SCC)	175	152	200	199
Total	**2,226**	**2,971**	**3,070**	**3,123**

(Source: LexisNexis (2016-18) and websites (2019, except ICDR all years))

Figure 3: Which of the following improvements and innovations would make international arbitration more suitable for resolving cross-border disputes in these industries and sectors?



Source: "2018 International Arbitration Survey: The Evolution of International Arbitration" at https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration

the LCA are also growing, while the MCCI Arbitration and Mediation Center (MARC), the alternative dispute resolution arm of the Mauritius Chamber of Commerce and Industry, also remains a high profile center. In addition, regional institutions like OHADA's Court of Justice and Arbitration are reforming their systems to play a more prominent role as an international arbitration-administering institution. In November 2017, the OHADA Council of Ministers approved an update to the Uniform Act on Arbitration and the Common Court of Justice and Arbitration Rules to reflect recent developments in international arbitration practice.

The increase in the number of cases administered by top African arbitral institutions may be a sign that these institutions are coming of age and developing their reputations. The growth, even if slow, of these institutions shows that users are having good experiences with them, including state-of-the-art facilities[11] and well-trained work forces dedicated to the efficient management of arbitration disputes. Modern, party-friendly rules that cater to users' needs also reassure parties that their disputes will be resolved in a fair, efficient and transparent manner.

Arbitral rules are one tangible way for arbitral institutions to build a profile internationally. Well-designed, user-friendly rules help demonstrate an institution's credentials as a market leader.

In particular, arbitral institutions should ensure that their rules meet the desire among practitioners and clients for cost-effective redress options. Examples of this include the ability to appoint an emergency arbitrator and the introduction of an expedited arbitration procedure. Appointing an emergency arbitrator generally enables parties to seek urgent relief before a tribunal forms, and thereby take advantage of arbitration quickly, rather than having to rely on courts. An expedited procedure allows for a rapid resolution of simple disputes or, if chosen by the parties, more complex disputes on a condensed timetable. Both recognize the desire among business users for quick, efficient procedures for urgent cases.

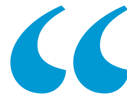
Table 1 compares the arbitral rules of the LCIA, the ICC and a selection of Africa's highest- profile arbitration institutions.

As Table 1 shows, the top arbitration institutions in Africa use substantially the same sets of rules as those of the LCIA and the ICC, and they reflect most, if not all, of the latest trends.

The rules of all of the top African arbitral institutions include key metrics for determining the effectiveness of arbitration rules, such as default appointment of arbitrators and time limits for an arbitrator challenge (both designed to protect against recalcitrant parties). They also provide for interim measures to protect the subject of the dispute or to preserve evidence and ensure that arbitration does not become a fruitless exercise. However, some African arbitral institutions need to review their rules to satisfy users' growing appetite for expedited and summary procedures. We understand, for example, that CRCICA and KIAC plan to include expedited rules in their next rule revisions.

Although it is testimony to the quality of many African arbitration institutions that their rules reflect the latest market practices, it can be challenging to remain abreast of the wishes of arbitral users. Even with already up-to-date rules, it makes sense to reevaluate them, as the LCA, for example, is currently doing. The success of many of these institutions will depend, in part, on whether they are seen as providing innovative solutions to novel challenges. For example, the White & Case 2018 International Arbitration Survey identifies some key improvements that users would like (see Figure 3).

Overall, African arbitration institutions can aim to meet arbitration users' demands by ensuring that their rules continue to adapt to fulfill the particular needs of users in Africa. Although this is a long-term challenge, and reputations are not built overnight, Africa's arbitration institutions appear to be headed in the right direction.



The increased number of cases administered by top African arbitral institutions may be a sign that these institutions are coming of age

1 Elizabeth Oger-Gross is a member of the Lagos Court of Arbitration's Arbitration Committee

2 Queen Mary University London, 2019 International Arbitration Survey: International Construction Disputes, pp. 8-9; Queen Mary University London, 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 2. (The 2018 survey was undertaken in collaboration with White & Case; the 2019 focuses particularly on construction disputes.)

3 LCIA, 2019 Annual Casework Report, available at file:///H:/Synced%20Folders/Downloads/20014%20LCIA%202019%20Casework%20Report%2028%20May.pdf, p. 11.

4 The ICSID Caseload Statistics, Issue 2020-1, available at https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf, p. 12.

5 ICC at https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/.

6 The School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report: Top African Arbitral Centres and Seats, authored by Emilia Onyema (a Reader in International Commercial Law at SOAS), available at https://eprints.soas.ac.uk/33162/.

7 https://globalarbitrationreview.com/article/1226853/cairo-centre-unveils-case-figures-and-new-advisers

8 https://arbitration.co.za/wp-content/uploads/2019/06/AFSA-Newsletter_JUNE-2019_1.pdf

9 Since it was established in 2012, KIAC has administered 89 arbitration cases involving parties from the United States of America, Italy, South Africa, Kenya, Korea, Turkey, Burundi, Nigeria, Pakistan, Senegal, Spain, Switzerland, Singapore, France, Zambia, Uganda, India, China and The African Union.

10 NCIA registered 14 new cases during 2018-2019, bringing the total number of cases administered by the institution from its inception in 2013 to about 30. See https://www.ncia.or.ke/wp-content/uploads/2019/08/2019-Annual-Casework-Report.pdf

11 For example, the LCA, CRCICA, KIAC, AFSA and others have hearing rooms equipped with appropriate furniture, internet connectivity, microphones, stenograph, audio/visual, transcription equipment as well as user-friendly websites.

12 Available in Article 11 of the Draft Rules, which will come into operation in September 2020. See https://arbitration.co.za/wp-content/uploads/2020/07/200701-AFSA-IA-Rules-for-public-consultation.pdf

13 Article 35.1 of the LCA's Expedited Rules 2018 includes a time limit of one month from the closure of the Proceedings.

Table 1: Comparative chart of the arbitration rules of the most active institutions in Africa

	London Court of International Arbitration (LCIA) Rules 2014	International Chamber of Commerce (ICC) Rules 2012 as amended effective 2017	The Arbitration Foundation of Southern Africa (AFSA) Rules 2017	The Lagos Court of Arbitration (LCA) Rules 2018
Default number of arbitrators	Sole arbitrator (Article 5.8)	Sole arbitrator (Article 12.2)	As agreed by the parties or as determined by the Secretariat. (Rule 15)	Sole arbitrator (Article 8)
Time limit for arbitrator challenge	Within 14 days of formation of tribunal or becoming aware of the grounds for challenge. (Article 10.3)	Within 30 days of notice of appointment or becoming aware of the grounds for challenge. (Article 14.2)	Within 15 days of becoming aware of the grounds for challenge. (Rule 19.3)	Within 15 days of notice of appointment or becoming aware of the grounds for challenge. (Article 15.4)
Availability of emergency arbitrator	Available. (Article 9B)	Available. (Article 29 and Appendix V)	Silent[12].	Available. (Article 12.1)
Expedited procedure	Available. (Article 9A)	Available if parties agree or if the amount in dispute does not exceed US$2 million. (Article 30 and Appendix VI)	Available. (Rule 16.8).	Available. (LCA Expedited Arbitration Rules 2018)
Interim measures	Available (Article 25.1)	Available. (Article 28.1).	Available. (Rule 33.1)	Available. (Article 28.1)
Time limit for issuing award to the parties	No time limit.	Within 6 months from date of the last signature of the Terms of Reference. (Article 31)	No time limit. (Rule 39).	Silent[13].
Cost allocation	Tribunal has discretion, but given the general principle that costs should reflect parties' relative success and failure. (Article 28.4)	Tribunal has discretion, taking into account all the relevant circumstances. (Article 38.4)	Tribunal has discretion. (Rule 42.2)	The costs of the arbitration shall in principle be borne by the unsuccessful party, subject to the tribunal's discretion. (Article 44.1)

Kigali International Arbitration Centre (KIAC) Rules 2012	The Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules 2011	MCCI Arbitration and Mediation Center (MARC) Rules 2018	Nairobi Centre for International Arbitration (NCIA) Rules 2015
Sole arbitrator (Article 12)	Three arbitrators (Article 7.1)	As determined by the Court (Article 6.1)	Sole arbitrator (Rule 7.1)
Within 14 days of notice of appointment or becoming aware of the grounds for challenge. (Article 18)	Within 15 days of notice of appointment or becoming aware of the grounds for challenge. (Article 13.3)	Within 15 days of notice of appointment or becoming aware of the grounds for challenge. (Article 12.2)	Within 15 days of the formation of the Arbitral Tribunal or on becoming aware of the grounds for challenge. (Rule 11.3)
Available. (Article 34)	Silent.	Available. (Article 23 and Appendix 4)	Available. (Rule 28.1)
Silent.	Silent.	Available if parties agree or if the amount in disoute does not exceed 25 million MUR. (Article 20.1)	Exoedited formation of the Arbitral Tribunal available. (Rule 10.1)
Available. (Article 33)	Available. (Article 26.1)	Available. (Article 23)	Available. (Rule 27.1)
No time limit. (Article 38)	Silent.	Silent.	Within 3 months from the date of close of hearing. (Rule 29.1)
Tribunal has discretion, taking into account all the relevant circumstances. (Article 42)	The costs of the arbitration shall in principle be borne by the unsuccessful party, subject to the tribunal's discretion. (Article 46.1)	Tribunal has discretion, taking into account all the relevant circumstances. (Articles 32.2 & 32.3)	The costs of the arbitratin shall reflect the parties' relative success or failure, except where the tribunal considers the principle inappropriate. (31.7)

Two men working at oil storage tank. Kaduna, Nigeria, Africa

Nigeria's LNG Train 7 project breaks new ground

A US$3 billion financing amid a volatile market shows oil & gas projects with strong fundamentals can continue to raise debt

By Jason Kerr, David Baker, Gabriel Onagoruwa (White & Case LLP) and Chike Obianwu and Zelda Akindele (Templars)

In May 2020, during the most volatile period in the oil & gas sector in 40 years, Nigeria LNG Ltd (NLNG) signed a historic US$3 billion corporate loan to finance the construction of its seventh liquefied natural gas (LNG) train. The Nigeria LNG Train 7 project (Train 7), expected to boost Nigeria's LNG output by close to a third, is seen as a strategic imperative for the country's long-term economic stability.

The financing package for the development of Train 7 set a new template for structuring expansion financings in the international oil & gas sector. The large and complex financing is the first time that development of an LNG project has been financed using a multi-sourced corporate loan structure. Train 7 will be financed by a combination of NLNG's internally-generated cashflows and US$3 billion of debt raised from a broad range of financiers, including three export credit agencies (ECAs), two developmental financial institutions (DFIs) and twenty-six international and Nigerian banks.

Structured as hybrid corporate finance, the Train 7 financing shares features of both corporate and project finance, even though it fits more towards the corporate end of the finance spectrum. From a bankability perspective, regardless of the financing's ultimate classification, the overall risk assessment was similar, although financiers derived comfort from NLNG's operational and financial track record and its robust credit history.

During a difficult period for the market, the Train 7 financing sends a signal to international markets that oil & gas projects with strong fundamentals can continue to raise debt—even in the midst of a global pandemic and one of the worst oil and gas shocks in history.

THE PROJECT

The Train 7 project is led by NLNG, a joint venture between the Nigeria National Petroleum Corporation (NNPC) and international oil majors Royal Dutch Shell, ENI and Total, established in 1989 to monetize Nigeria's vast but under-utilized natural gas reserves. NLNG commenced operations following the successful completion of its two-train base project in October 1999 on a site approximately 40 kilometers south of Port Harcourt on the eastern part of the Niger Delta.

NLNG currently operates a liquefaction complex comprising six complete liquefaction trains and associated facilities with a capacity of 22 million tons per annum (mtpa) of LNG and five mtpa of liquefied petroleum gas (LPG) and condensates. It has grown to become a leading LNG producer in the Atlantic Basin and transformed Nigeria into one of the largest LNG exporting countries in the world.

Train 7 will add approximately eight mtpa of LNG and increase NLNG's overall capacity to 30 mtpa, while further bolstering Nigeria's competitiveness in the global LNG market. The Train 7 financing leveraged NLNG's credit history and long-term operational and profitability track record to establish the hybrid structure, which enabled NLNG to raise a nine year US$3 billion corporate loan with an availability period of four years. Lenders will rely on NLNG's balance sheet and will have no direct recourse to NLNG's shareholders for the Train 7 financing, including during the construction phase.

US$3 billion
corporate loan financing package

Train 7 has received support from a diverse group of global financiers, including:

- 26 international and Nigerian commercial banks
- Two DFIs—the Africa Finance Corporation (AFC) and the African Export-Import Bank (Afrexim)
- Three ECAs—Korea Trade Insurance Corporation (KSure), the Korea Export-Import Bank (K-EXIM) and SACE.

The international and Nigerian banks and the DFIs provided US$1.5 billion of debt on an uncovered basis, and the South Korean and Italian ECAs directly funded or covered the remainder of the Train 7 financing. Guaranty Trust Bank and Sumitomo Mitsui Banking Corporation (SMBC) were the joint financial advisers.

A NEW FRONTIER

Train 7's financing structure has created a new playbook for how similar projects could be funded in the future. NLNG's strong cash position provided a solid foundation for the innovation.

Prior to the Train 7 financing, NLNG was essentially a debt-free company with significant cash reserves on its balance sheet. Its lease obligations under LNG tanker time-charters with its wholly owned shipping subsidiary, Bonny Gas Transport, accounted for the balance of its substantive financial liabilities. In addition to its strong credit history and low leverage, NLNG built a successful operational track record over two decades and attracted a strong portfolio of internationally-rated buyers under long-term sales arrangements.

As NLNG expanded production capacity over time, its turnover grew substantially, with high profit margins allowing it to deliver consistently strong financial results year-on-year. Even as its business matured, NLNG's shareholders continued to be integrally involved throughout the value chain, from dedicated long-term gas supply through to technical support and marketing and sales. NLNG's credit strength meant it could approach the market with a financing proposal for Train 7 that was heavily slanted towards corporate finance. The group was able to rely heavily on its historic financial performance and operating track record, which allowed for flexibility when choosing its financing model.

Traditionally, large-scale LNG expansions have been financed using a project finance model with some degree of recourse to additional credit support during the construction phase. This reflects the capital-intensive nature of expansion projects, the associated construction and interface risks, and the longer debt tenors typically sought. However, NLNG's financiers accepted hybrid financing terms for Train 7 on the spectrum between corporate and project finance.

Although NLNG sought to raise US$3 billion in debt, it had significant turnover from its existing operations, with multiples of earnings to cover debt service – even before factoring in the future cashflow from Train 7. This provided a strong mitigant for the financiers against the completion risk of Train 7. Nevertheless, NLNG is still essentially a single asset business operating within the LNG industry, and the Train 7 financing was seeking a nine-year tenor, which was at the high end for corporate finance. Therefore, certain project finance characteristics, in particular lender controls and oversight, were incorporated into the financing terms. These characteristics were generally much lighter than would be found in more classic project finance models. For example, the security package provided as part of the Train 7 financing is not the full-blown security regime typically found in project finance transactions.

While security extends to NLNG's bank accounts and LNG sales, the controls over its commercial arrangements are less extensive. NLNG retains the flexibility to manage its business with minimal interference in the normal course. This includes the freedom to establish and operate its accounts and manage its cashflows and investments outside the confines of a controlled payment waterfall structure.

Notwithstanding the hybrid nature of the Train 7 financing, the overall risk assessment was very similar from a bankability perspective, regardless of its ultimate classification, whether as corporate finance or project finance, or a combination of the two. However, the financiers derived comfort from the management of NLNG's operations over the preceding 20 years and assumed that NLNG would continue to conduct future business in a prudent and rational manner.

PROFITABILITY

The Train 7 financing undoubtedly benefited from a number of economic factors that facilitated the financing terms it was able to secure.

A number of NLNG shareholders, well-known in the international debt and capital markets, had interests in successful LNG operations across the value chain in other parts of the world. NLNG had generated close to US$7 billion in gross revenues in 2018 and consistently achieved approximately 30% average profit margins. Based on its historical financial performance, the financial model in the management case presented to the financiers indicated that NLNG was expected to maintain a strong financial profile during the life of the Train 7 financing. Even under conservative assumptions, it was projected to be able to service its debt obligations through its contracted LNG volumes from its existing Trains 1 to 6 operations.

From the financiers' perspective, these factors reduced the Train 7 completion risk and reinforced the approach of focusing on NLNG's balance sheet rather than relying on modelling the forecast revenues from the Train 7 project. Although NLNG ran a number of modelling sensitivities for the financiers, the corporate finance approach of balance sheet financial ratios was adopted, with a focus on EBITDA, gearing and net worth, rather than forecast cashflow ratios applied in project finance.

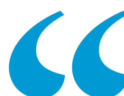
TRACK RECORD

Before Train 7, NLNG had implemented three expansion, including the NLNG Plus Project, comprising Trains 4 and 5, which had been funded through multi-sourced project finance in 2002. Each of the expansion projects was built in line with Shell's design and engineering practices under its own lump-sum turn-key construction contract. Each project was delivered under budget and within three months of the scheduled completion date.

NLNG's operations have been underpinned by technical support and robust health, safety and environmental management systems. Shell Gas Nigeria BV provides ongoing technical and operational assistance to the existing LNG complex and will continue to do so for Train 7. Shell's active participation has played a key role in ensuring that NLNG's production consistently exceeded its nameplate capacity over the last 10 years. From the financiers' perspective, NLNG's experience in completing expansion projects and the technical combined with operational support provided by Shell Gas Nigeria BV mitigated NLNG's construction and operating risks for Train 7.

SUPPLIER AND CUSTOMER DEALS

The natural gas for the complex is supplied to NLNG by experienced upstream gas developers affiliated with its shareholders under three



This financing package is a new template for structuring expansion financings in the international oil & gas sector

Oil storage tank with feed pipes leading to power station boilers, Nigeria, Africa

long-term gas supply agreements. The gas developers source natural gas from a large number of fields with proven, deliverable reserves. These are transported to the plant by gas transmission systems.

NLNG's gas supply agreements allow for capacity optimization among the gas suppliers to ensure NLNG's supply security. In addition, NLNG benefits from long-term take-or-pay sales agreements for the existing Trains 1–6 with LNG buyers with strong credit and/or long-term access to regasification terminals, and it has concluded the LNG sales agreements in connection with Train 7.

To further mitigate marketing risk from a bankability perspective, NLNG has undertaken to maintain a minimum annual base contract quantity of LNG sales contracts for the duration of the Train 7 financing. The basket gives NLNG the flexibility to respond to current market conditions and optimize its sales strategy, while providing assurance to the financiers that NLNG will maintain a minimum contracted volume of LNG sales at all times.

THE VALUE CHAIN

NLNG makes a significant contribution to the Nigerian government's revenue drive and its objective of eliminating all flaring of associated gas. In recognition of the likely benefit to Nigeria's economy, the Nigerian government promulgated the 1993 Nigeria LNG (Fiscal Incentives, Guarantees, and Assurances) Act, which allows NLNG to establish and operate foreign accounts with minimal foreign exchange restrictions.

The NLNG Act granted NLNG and its shareholders certain tax incentives, guarantees and assurances by the government. This legislative backing mitigates foreign exchange and volatility risks, as the requirement for repatriation of proceeds of sale is not applicable to NLNG's revenue flows.

NLNG's entire gas intake is supplied under three gas supply agreements with gas suppliers operated by affiliates of its shareholders. Similarly, some of its produced LNG is sold to affiliates of its shareholders. This vertical alignment of interests has guaranteed NLNG's enduring success. It reduces conflicts of interest related to delivery delay or failure, force majeure and other defaults, which could typically cause tension between gas suppliers and LNG producers (on one side) and LNG producers and their buyers (on the other). This dynamic provides a further measure of justification for the limited controls that the financiers agreed to impose on NLNG's commercial arrangements.

THE WAY FORWARD

It is clear that strong fundamentals underpinning NLNG's business enabled it to attract the ground-breaking US$3 billion hybrid corporate loan and to introduce ECAs into the debt mix to augment the commercial bank offering and enhance liquidity and pricing. NLNG responded to bankability issues and structured the financing to accommodate the needs of a diverse range of financiers.

This financing sets the benchmark for future LNG financings globally, as LNG markets continue to develop and companies mature into significant industrial players worldwide.

Modern suspension bridge over Catumbela River linking cities of Benguela and Lobito in Angola

Looking to a future beyond oil

Angola's Privatization Program 2019 – 2022

By Inigo Esteve and Samuel Curme (White & Case LLP) and João Robles (Partner at FCB Sociedade de Advogados)[1]

One key facet of the Angolan government's recent reforms is the Privatization Framework Law (Law No. 10/19, enacted in May 2019 and approved by Presidential Decree no. 250/19 in August 2019). This Decree will govern Angola's impending IMF-backed privatization program (PROPRIV). PROPRIV forms part of the country's broader economic reforms, which include a Macroeconomic Stabilization Program focused on strengthening fiscal sustainability, reducing inflation and improving financial sector stability, and a National Development Plan (2018 – 2022) that seeks to promote human development, public sector reform and economic diversification and growth.

As part of PROPRIV, 195 Angolan companies were shortlisted for privatization over the three years 2019- 2022. The stated aim prior to the COVID-19 pandemic was for most of Angola's fully and partially state-owned companies to be divested by the end of 2020 and for large state-owned companies to have sold their key assets by the end of 2022. While the impact of COVID-19 on the overall timing of PROPRIV remains to be seen, it is clear that its implementation remains a key priority for the Angolan government. This is highlighted by the government's recent announcement confirming the commencement of the privatization process for ENSA, the state-owned insurance company, and the government's indirect holdings in Banco BAI.

Numerous high-profile Angolan companies will participate in PROPRIV, including state-owned oil company Sonangol, the national diamond company ENDIAMA and the national airline TAAG.

This article highlights the key macroeconomic and political drivers behind PROPRIV, introduces the companies subject to privatization and explains the proposed framework for PROPRIV's implementation.

POLITICAL AND MACROECONOMIC CONTEXT

Political background and anti-corruption headway

Since taking office, President João Lourenço has overseen swift political change in Angola. The previous regime, headed by José Eduardo dos Santos, attempted to institute privatization programs during 1989 – 1994 and during 2001 – 2005. These attempts were largely unsuccessful due to the previous government's failure to implement the regulatory frameworks for each, as well as allegations of corruption and the country's civil war.

Soon after President João Lourenço assumed governmental control in 2017, the Angolan government reinvigorated the privatization process by establishing the IGAPE in February 2018 to oversee and manage privatization policy and by enacting the Privatization Framework Law a year later.

In addition, the Angolan government's renewed efforts on anti-corruption issues are reflected in the Privatization Framework Law, which includes a comprehensive list of individuals and entities—including certain public officials and persons directly connected to them—that are prohibited from participating in PROPRIV. Furthermore, the government enacted the 2018 Law on the Repatriation of Financial Resources (Law No. 9/18), a progressive piece of legislation facilitating the repatriation of funds illegally held outside the country by Angolan individuals and corporations.

As Angola seeks to transform into a more diverse economy, international investors may be presented with a range of opportunities.

Diversifying an oil-dependent economy

Angola's economy relies heavily on the oil sector. Consequently, its economy has suffered from declining oil prices since 2014—which was then exacerbated by the COVID-19 pandemic pushing Brent oil prices to their lowest levels since the late 1990s and causing US oil futures to turn negative for the first time on record. Although some had predicted that Angola would emerge from its recession during 2020, the country's continued reliance on oil is an inherent risk to its economic outlook.

PROPRIV seeks to pivot Angola away from its dependency on the oil sector and to increase the number of industries and sectors that can materially contribute to the country's economic recovery and growth throughout the 2020s. PROPRIV is bolstered by certain IMF-mandated reforms and improved transparency and accountability measures, as detailed below.

Debt reduction, economic recovery and IMF support

The ratio of Angola's gross public debt to GDP increased by 243 percent during 2014 – 2019, primarily due to falling foreign currency oil revenues, resulting in a depreciation of the kwanza and a rise in inflation. This ratio is expected to continue to increase during 2020. The country has requested G20 debt relief, and is in advanced talks with certain countries that import its oil to adjust its financing facilities. PROPRIV will likely remain at the frontline of the country's efforts to reduce its debt.

Angola's State Secretary for Budget and Public Investment recently announced that the government, in conjunction with the IMF, is seeking to limit its gross public debt to GDP ratio to 90 percent in the short- to medium-term. Before the COVID-19 pandemic, Standard & Poor's published credit analysis had noted that Angola's gross debt increased in 2019 to 103 percent of the country's GDP, principally driven by a reduced kwanza value. Standard & Poor's had expected the country's debt burden to decline toward 92 percent of GDP in 2023, if the government delivered on its fiscal consolidation targets (Figure 1). The anticipated economic impact of COVID-19 now makes this unlikely. Therefore, PROPRIV remains essential to diversify Angola's economy and reduce its public debt, while will also play a pivotal role in the country's economic recovery following COVID-19.

In December 2018, the IMF approved granting Angola a US$3.7 billion three-year extended fund facility (EFF) to support the country's economic reforms. The IMF's key aims are to restore Angola's fiscal sustainability and provide the foundations for economic diversification, including through the implementation of PROPRIV. The IMF has highlighted that the fundamental pillars of its program include:

- Reducing Angola's gross debt through fiscal consolidation
- Increasing exchange rate flexibility through exchange rate depreciation and a commitment to a market-determined exchange rate
- Introducing a supportive monetary policy to reduce inflation and allow the accumulation of international reserves
- Strengthening Angola's banking system through improved governance, credit-risk management and undertaking an extensive asset quality review
- Updating and bolstering the anti-money laundering and counter-terrorist financing frameworks

195
Companies selected to participate in PROPRIV

So far, the IMF has disbursed a total of US$1.48 billion under the EFF. Subject to any concessions that might be made due to the impact of the COVID-19 pandemic, the IMF will only release the remaining tranches if the Angolan government continues to reach fiscal milestones set by the IMF and ensures that the tender processes (detailed below) conducted in connection with PROPRIV are sufficiently transparent and maintain accountability.

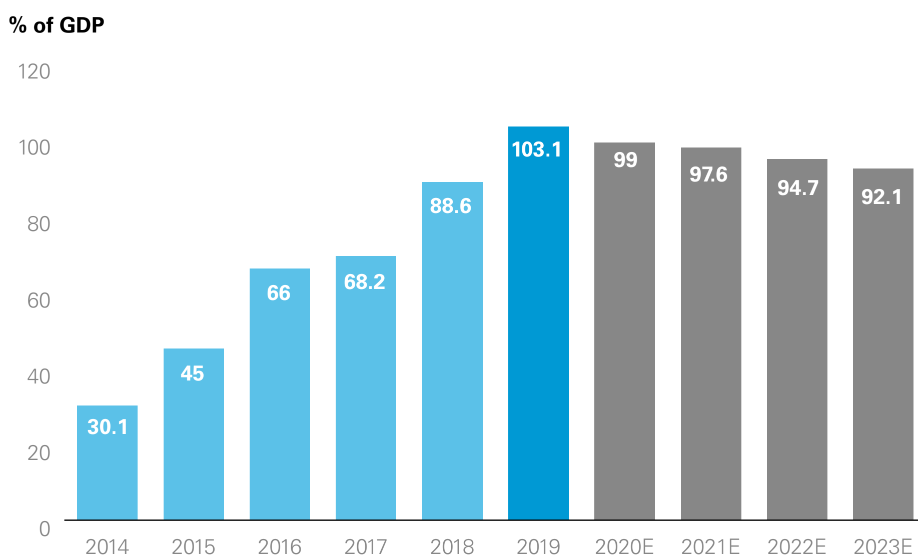
HOW PROPRIV WILL BE IMPLEMENTED

Angola's original intention was to implement PROPRIV gradually between 2019 and 2022. Although the COVID-19 pandemic may delay matters, a new timeframe for the program's implementation has not yet been published. In addition, the recent announcements regarding the privatization of ENSA and Banco BAI highlight the government's intent to meet its original timetable of completing 88 percent of the program by the end of 2020 and 100 percent by the end of 2022.

The Angolan government, in conjunction with IGAPE, has selected 195 companies to participate in PROPRIV from various sectors—including natural resources, agriculture, industrial, telecommunications and information technology, finance, transport and tourism—by taking into account the following key factors:

- Nature of the assets
- Number of years for which the entity has audited financial statements that do not include reservations
- Size, based on turnover and importance to the country's GDP
- Attractiveness, in terms of financial results and cash flow
- Nature and size of activities

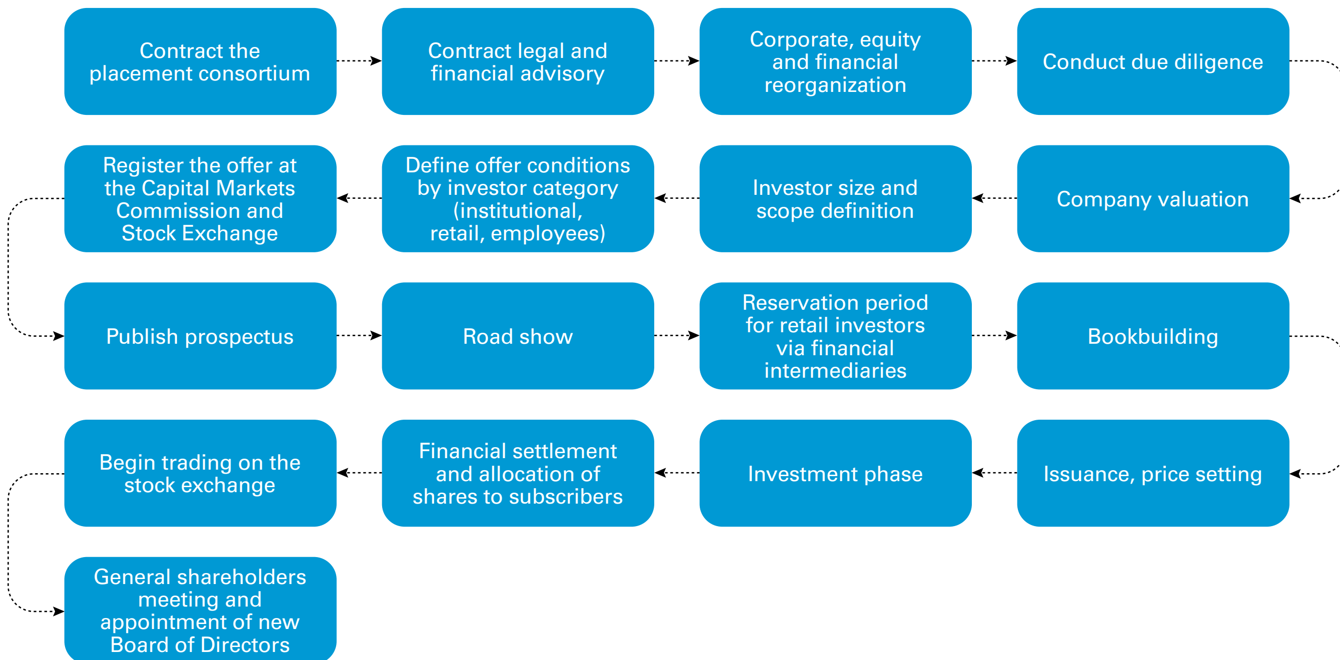
Figure 1: Angola's general government gross debt



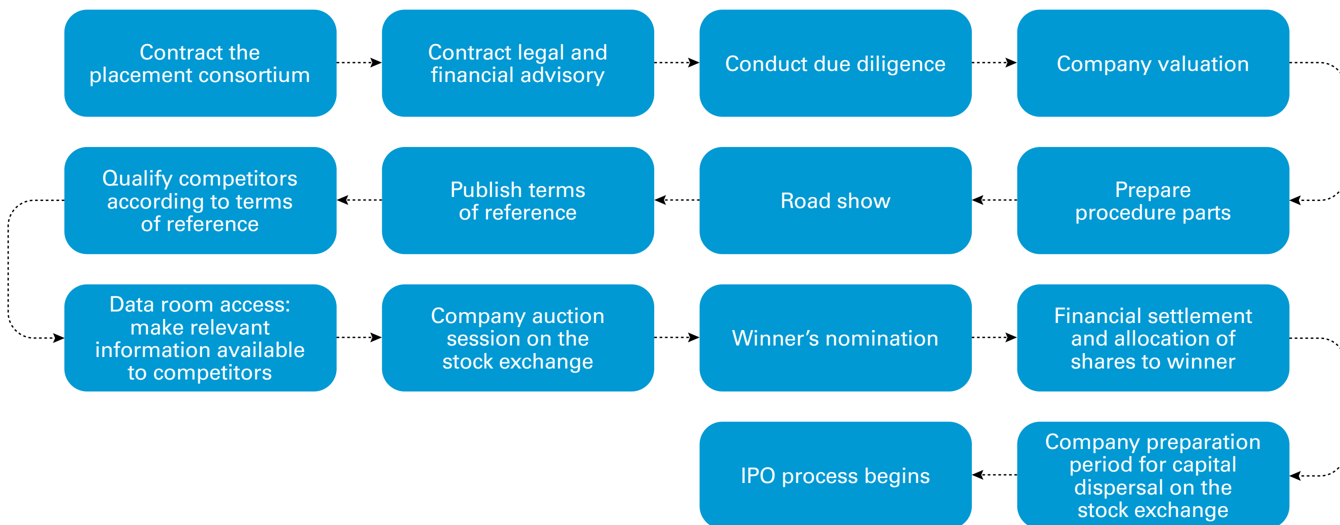
Source: S&P Global Ratings

Figure 2: Four roadmaps for going private in Angola

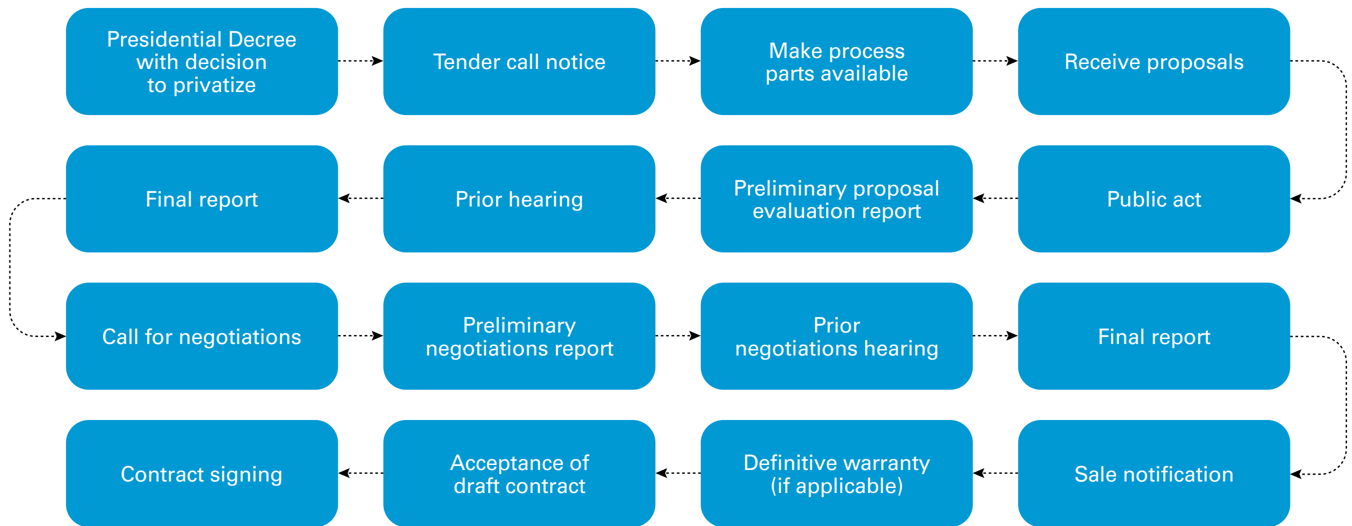
#1 THROUGH AN INITIAL PUBLIC OFFERING



#2 THROUGH AN AUCTION ON ANGOLA'S STOCK EXCHANGE AND DERIVATIVES (BODIVA)



#3 THROUGH A PUBLIC TENDER



#4 THROUGH RESTRICTED TENDER BY PRIOR QUALIFICATION

Miradouro da Lua, Angola

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Using these criteria, the selected companies and assets were sorted into categories with potentially different target investor bases:

- Companies of national importance (32)
- Companies and assets in which Sonangol has an interest (50)
- Other companies and assets (62)
- Industrial units located in Special Economic Zones (51)

See the Appendix at the end of this article for the list of companies selected to participate in PROPRIV, including the year in which each company or asset's privatization is due to commence and the chosen method of privatization.

PROPRIV stipulates that all privatizations will be implemented either through stock exchange offerings or via a tender process. The government, with IGAPE, has consulted sector experts to determine which method is most appropriate for each company or asset in light of its strategic and operational objectives.

Stock exchange offerings

PROPRIV facilitates taking companies and assets private via sales on the Angola Stock Exchange and Derivatives (BODIVA), by way of an initial public offering (IPO) or an auction on BODIVA. PROPRIV provides indicative roadmaps for each of these processes (Figure 2: Roadmaps #1 and #2).

In general, going private through a stock exchange process offers greater transparency, given the initial disclosures involved in connection with any listing on BODIVA and the ongoing disclosures thereafter.

PROPRIV envisages that companies undergoing privatization through the IPO process will each undertake an initial offering of their shares, followed by several subsequent offers, until control of the relevant company is effectively transferred to private investors.

In addition, although only 17 companies have initially been identified as suitable candidates for the IPO process (primarily due to the required audited three-year financial track-record), PROPRIV is clear that companies privatized through the public tender route may become eligible for the IPO process in the future.

Tender processes

Companies that are not eligible to use the stock exchange process must seek privatization by either:

- Public tender—An open procedure in which all interested entities that meet the requirements of the tender's terms of reference may participate through submitting bids (Figure 2: Roadmap #3).
- Restricted tender by prior qualification—A more limited tender process in which only previously qualified candidates are invited to submit a bid (Figure 2: Roadmap #4).

To ensure maximum efficiency and transparency, PROPRIV stipulates that each tender process should encourage broad participation and, unlike the stock exchange privatizations, will involve a single sale or offer, rather than multiple tranches. All public tender procedures conducted in connection with PROPRIV are subject to the Public Contract Act of 14 September 2016 (Law 9/16).

According to the government, transparency in the tender process will be a crucial factor in PROPRIV's implementation, with the World Bank, Angola's financial sector and its chambers of commerce closely monitoring PROPRIV's progress and execution

MANAGING PROPRIV

A simple and specialized organizational structure has been proposed to efficiently implement and manage PROPRIV. A National Commission, comprising all key government ministries involved in PROPRIV, has been constituted and will be responsible for overseeing its implementation and ensuring smooth inter-ministerial coordination. The Minister of State for Economic Coordination will manage the National Commission, and IGAPE will continue to manage, monitor and assist with PROPRIV's implementation.

The National Commission has appointed a technical group, comprising representatives of each stakeholder and is coordinated by the Secretary State for Finance and Treasury. The technical group is responsible for interacting with the focal points of each ministry and company and coordinating with them to prepare for and monitor the execution of each company's privatization.

In addition, the Angolan government has partnered with the World Bank for support and will engage consultants to advise on the subsequent stages of each transaction, including for financial, legal and technical advice.

INTERNATIONAL PARTICIPATION IN PROPRIV

As Angola seeks to transform into a more diverse national economy, international investors and advisers may be presented with a further range of opportunities to benefit from and support Angola's economic development.

In order to increase the appeal of PROPRIV to international participants, the government enacted the Private Investment Law (Law No. 10/18) in 2018. The Private Investment Law simplified the process of foreign investment into Angolan companies by dispensing with requirements for foreign investors to obtain regulatory approval and/or a license to acquire an interest in an Angolan company or asset.

In addition, the Angolan Central Bank recently enacted Notice No. 15/2019 which, among other things, simplified the legal regime surrounding foreign exchange transactions, including in relation to the acquisition and sale of shares of Angolan companies listed on the BODIVA in the context of PROPRIV.

To the extent foreign investors seek to repatriate dividends or certain other economic rights attaching to shares in Angolan companies, they will require approval from the Angolan Private Investment Agency. However, obtaining this approval is a straightforward process, and it is not required if the stake in the relevant company carries voting rights not exceeding 10 percent.

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1 The authors would like to thank Ibrahim Soumrany and Kelly Trueman for their contributions to this article.

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Appendix: Companies and assets selected for PROPRIV

LEGEND

SECTORS

Agriculture

Medical

Construction

Natural resources

Education

Real estate

Energy

Telecom & IT

Financial

Tourism

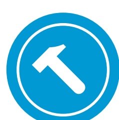
Fisheries

Transport

Industrial

STATE SHARES	**D**	Directly through the state
	I	Indirectly through a state-owned enterprise
METHOD	**AA**	Disposal of shareholdings
	AC	Capital increase
	AAct	Asset disposal
	CDEG	Granting of exploration and management rights
PROCEDURE	**IPO**	Initial public offering
	LB	Auction through the exchange
	CP	Public tender

#1 COMPANIES OF NATIONAL IMPORTANCE



Company	State shares	Method	Procedure	Starting year
Financial				
ENSA Seguros	100% (D)	AA	IPO	2019
Banco Angolano de Investimentos	8.5% (I)	AA	CP	2020
Banco Caixa Gerol de Angola	25% (I)	AA	LB	2020
Banco Comércio e Indústria	100% (D)	AA	IPO	2020
SDZEE	100% (D)	AA	LB	2020
Banco Económico	39.4% (I)	AC/AA	LB	2021
BODIVA (Angola Securities Exchange)	100% (D)	AA	IPO	2021
Agriculture				
Aldeia Nova	59% (I)	AA	LB	2020
Industrial				
CUCA	1% (I)	AA	CP	2019
EKA	4% (I)	AA	CP	2019
NGOLA	1% (I)	AA	CP	2019
África Téxtil	100% (D)	AAct	CP	2020
Biocom	20% (I)	AA	CP	2020
Nova Cimangola	28.13% (D)	AA	CP	2020
SATEC	100% (D)	AAct	CP	2020
SÉCIL DO LOBITO	49% (D)	AA	CP	2020
Textang II	100% (D)	AAct	CP	2020
Construction				
Moto-Engil Angola	20% (I)	AA	CP	2020
Telecom & IT				
MSTelcom	100% (I)	AA	LB	2020
Multitel	50% (I)	AA	LB	2020
NetONE	51% (I)	AA	CP	2020
TVCABO Angola	49.27% (I)	AA	IPO	2020
UNITEL	25% (I)	AA	CP	2020
Angola Cables	60% (I)	AA	LB	2021
Angola Telecom	100% (D)	AA	LB	2021
ENCTA	100% (D)	AA	CP	2022

Appendix: Companies and assets selected for PROPRIV (Continued)

#1 COMPANIES OF NATIONAL IMPORTANCE (CONTINUED)

Company	State shares	Method	Procedure	Starting year
Natural Resources				
Sonangalp	51% (I)	AA	IPO	2021
ENDIAMA	100% (D)	AA	IPO	2022
Sonangol	100% (D)	AA	IPO	2022
Transport				
SGA (ENANA)	100% (D)	AA	CP	2019
SonAir	100% (I)	AA	LB	2021
TAAG	100% (D)	AA	LB	2021

#2 COMPANIES AND ASSETS IN WHICH SONANGOL HAS AN INTEREST

Company/asset	State shares	Method	Procedure	Starting year
Real estate				
Centro Infantil I de Junho	100%	AA	CP	2019
Centro Infantil Futuro do Amanhã	100%	AA	CP	2019
Dirani SGPS	100%	AA	CP	2019
Dirani II – Projectos Imobiliários	100%	AA	CP	2019
Dirani III – Projectos Imobiliários	100%	AA	CP	2019
Dirani V – Projectos Imobiliários	100%	AA	CP	2019
Fouton	27%	AA	CP	2019
Genius	10%	AA	CP	2019
Centro de Convenções Talatona	100%	AA	CP	2020
Solo Properties Nightsbridge	100	AA	CP	2020
Tourism				
Atlântida Viagens e Turismo	100%	AA	CP	2019
International Travel Service and Systems	100%	AA	CP	2019
WTA Houston Express	40%	AA	CP	2019
WTA International	100%	AA	CP	2019
WTA (Paris)	100%	AA	CP	2019
WTA Travel Agency	100%	AA	CP	2019
Miramar Empreendimentos	100%	AA	CP	2020
Medical				
Clínica Girassol	100%	CDEG	CP	2019
Transport				
Manubito	100%	AA	CP	2019

#2 COMPANIES AND ASSETS IN WHICH SONANGOL HAS AN INTEREST (CONTINUED)

Company/asset	State shares	Method	Procedure	Starting year
Energy				
Luxerviza	80%	AA	CP	2021
Industrial				
LOBINAVE - Estaleiro Naval do Lobito	35%	AA	CP	2020
PAENAL - Porto Amboim Estaleiro Naval	10%	AA	CP	2020
Education				
Puaça	100%	AAct	CP	2021
Natural resources				
Jasmin Shipping Company Limited	35%	AA	CP	2019
Societé Ivoirienne de Raffinage	20%	AA	CP	2019
SONAID	30%	AA	CP	2019
Angoflex Industrial	100%	AA	CP	2020
China Sonangol International	30%	AA	CP	2020
China Sonangol International Holding	30%	AA	CP	2020
Kwanda – Suporte Logistico	30%	AA	CP	2020
OPS Productions	50%	AA	CP	2020
OPS Serviços	50%	AA	CP	2020
Petromar	30%	AA	CP	2020
Puma Energy	28%	AA	CP	2020
SONACERGY	40%	AA	CP	2020
Sonadiets Limitada	30%	AA	CP	2020
Sonadiets Services	30%	AA	CP	2020
Sonangol Cabo Verde	99%	AA	IPO	2020
Sonasing Mondo	10%	AA	CP	2020
Sonasing Saxi Batuque	10%	AA	CP	2020
Sonasing Xikomba	30%	AA	CP	2020
Sonasurf Angola	50%	AA	CP	2020
Sonasurf International	49%	AA	CP	2020
Sonatine Marine Limited	51%	AA	CP	2020
Sonatine Marine Services	51%	AA	CP	2020
SONIMECH	30%	AA	CP	2020
Technip Angola	40%	AA	CP	2020
ENCO	78%	AA	CP	2021
SONAMET Industrial	40%	AA	IPO	2021

Appendix: Companies and assets selected for PROPRIV (Continued)

#3 OTHER COMPANIES AND ASSETS

Company/asset	State shares	Method	Procedure	Starting year
Agriculture				
Complexo de Catete	100% (I)	AAct	CP	2019
Complexo de Silos da Caala	100% (I)	AAct	CP	2019
Complexo de Silos da Caconda	100% (I)	AAct	CP	2019
Complexo de Silos de Catabola	100% (I)	AAct	CP	2019
Complexo de Silos da Ganda	100% (I)	AAct	CP	2019
Complexo de Silos da Matala	100% (I)	AAct	CP	2019
Entreposto Frigorífico de Caxito	100% (I)	AAct	CP	2019
Entreposto Frigorífico do Dombe Grande	100% (I)	AAct	CP	2019
Entreposto Frigorífico do Namibe	100% (I)	AAct	CP	2019
Fábrica de Latas do Dombe Grande	100% (I)	AAct	CP	2019
Fábrica de Processamento de Tomates do Dombe Grande	100% (I)	AAct	CP	2019
Fábrica de Processamento de Tomate e Banana do Caxito	100% (D)	AAct	CP	2019
Fábrica de Processamento de Tomates do Namibe	100% (I)	AAct	CP	2019
Fazenda Agro-Industrial do Cuimba	100% (D)	AAct	CP	2019
Fazenda Cubal	100% (D)	AAct	CP	2019
Fazenda de Longa	100% (D)	AAct	CP	2019
Fazenda Pungo-Andongo	100% (D)	AAct	CP	2019
Fazenda Quizenga	100% (D)	AAct	CP	2019
Matadouro Indústria de Camabatala	100% (D)	AAct	CP	2019
Matadouro Indústria de Porto Amboim	100% (I)	AAct	CP	2019
Matadouro Modular de Luanda	100% (I)	AAct	CP	2019
Projecto de Desenvolvimento Agrícola de Camaiangala	100% (D)	AAct	CP	2019
Projecto de Desenvolvimento Agricola de Sanza Pombo	100% (D)	AAct	CP	2019

Company/asset	State shares	Method	Procedure	Starting year
Telecome & IT				
ACS – Angola Comunicações e Sistemas	100% (I)	AA	LB	2020
ELTA	20% (I)	AA	CP	2020

Company/asset	State shares	Method	Procedure	Starting year
Tourism				
Hotel da Base do Kwanda	100% (I)	AAct	CP	2019
Hotel de Convenções de Talatona	100% (I)	AAct	CP	2019
Hotel Florença	100% (I)	AAct	CP	2019
Hotel Maianga	100% (I)	AAct	CP	2019
Hotel Riomar	100% (I)	AAct	CP	2019
Hotel Infotur Benguela	100% (D)	AAct	CP	2020
Hotel Infotur Cabinda	100% (D)	AAct	CP	2020
Hotel Infotur Lubango	100% (D)	AAct	CP	2020
Hotel Infotur Namibe	100% (D)	AAct	CP	2020

#3 OTHER COMPANIES AND ASSETS (CONTINUED)

Company/asset	State shares	Method	Procedure	Starting year
Transport				
SECIL MARÍTIMA	100% (D)	AA	CP	2019
TCUL	100% (D)	AA	CP	2020
Unicargas	100% (D)	AA	CP	2020
Fisheries				
Centro de Apoio a Pesca Artesanal da Barra do Dande	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal da Caota	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal da Damba Maria	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal das Salinas	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do Egito Praia	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do Kazai	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do Kicombo	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal da Lucíra	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do N´zeto	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do Soyo	100% (D)	CDEG	CP	2020
Centro de Apoio a Pesca Artesanal do Tômbwa	100% (D)	CDEG	CP	2020
Centro de Salga e Seca de Moçâmedes	100% (D)	CDEG	CP	2020
Centro de Salga e Seca do Tômbwa	100% (D)	CDEG	CP	2020
Peskwanza EP	100% (D)	CDEG	CP	2020
Centro de Formação e Processamento de Pescado do Ngolome	100% (D)	CDEG	CP	2021
Centro de Larvicultura e Engorda do Massangano	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal do Buraco	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal do Cabo Ledo	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal da Equimina	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal da Ilha de Luanda	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal do Landana	100% (D)	CDEG	CP	2021
Centro de Apoio a Pesca Artesanal do Lombo-Lombo	100% (D)	CDEG	CP	2021
Estaleiro da Caota Deolínda Rodrigues	100% (D)	CDEG	CP	2021
Estaleiro Naval Ex-Soconal	100% (D)	CDEG	CP	2021

#4 INDUSTRIAL UNITS LOCATED IN SPECIAL ECONOMIC ZONES

Industrial unit	State shares	Method	Procedure	Starting year
Industrial				
ABSOR	100% (D)	AA	CP	2019
ANGTOR	100% (D)	AA	CP	2019
BETONAR	100% (D)	AA	CP	2019
Bombágua	100% (D)	AA	CP	2019
CARTON	100% (D)	AA	CP	2019
COBERLEN	100% (D)	AA	CP	2019
Galvanang, Indústria de Galvanização, LDA	100% (D)	AA	CP	2019
INDUCABOS – Indústria de Cabos Eletricos, LDA	100% (D)	AA	CP	2019

Appendix: Companies and assets selected for PROPRIV (Continued)

#4 INDUSTRIAL UNITS LOCATED IN SPECIAL ECONOMIC ZONES (CONTINUED)

Industrial unit	State shares	Method	Procedure	Starting year
INDUCARPIN - Indústria de Carpintaria, LDA	100% (D)	AA	CP	2019
INDUGALV	100% (D)	AA	CP	2019
INDUGIDET	100% (D)	AA	CP	2019
INDUPACKAGE	100% (D)	AA	CP	2019
INDUPAME	100% (D)	AA	CP	2019
INDUPLAS - Indústria de Sacos Plásticos	100% (D)	AA	CP	2019
INDUPLASTIC - Indústria de Acessórios de Plástico	100% (D)	AA	CP	2019
INDUTIVE	100% (D)	AAct	CP	2019
INDUTUBOS - Indústria de Tubos de HDPE	100% (D)	AA	CP	2019
INFER	100% (D)	AA	CP	2019
JUNTEX	100% (D)	AA	CP	2019
MANGOTAL	100% (D)	AAct	CP	2019
MATRELÉCTRICA	100% (D)	AA	CP	2019
MECAMETAL	100% (D)	AA	CP	2019
NINHOFLEX	100% (D)	AA	CP	2019
Pipeline – Indústria de PVC lda	100% (D)	AA	CP	2019
SACIANGO	100% (D)	AA	CP	2019
TELHAFAL	100% (D)	AA	CP	2019
TRANSPLAS	100% (D)	AA	CP	2019
UNIVITRO	100% (D)	AA	CP	2019
VEDATELA	100% (D)	AA	CP	2019
ANGOLACABOS	100% (D)	AA	CP	2020
BTMT – Indústria de AP, BT & MT e Caldeira LDA.	100% (D)	AA	CP	2020
CALCANTE – Indústria de Calçados	100% (D)	AA	CP	2020
EMPAVE	100% (D)	AAct	CP	2020
FUNSULCACO	100% (D)	AAct	CP	2020
FUNDINAR	100% (D)	AAct	CP	2020
INDUCAMAR	100% (D)	AAct	CP	2020
INDUCERANG	100% (D)	AAct	CP	2020
INUCOMBO	100% (D)	AAct	CP	2020
INDUCON – Indústria de Contadores Elétricos	100% (D)	AAct	CP	2020
INDUFEX	100% (D)	AAct	CP	2020
INDULOUÇAS	100% (D)	AAct	CP	2020
INDUMASSAS	100% (D)	AAct	CP	2020
INDUTITE	100% (D)	AAct	CP	2020
LABCONTROL	100% (D)	AAct	CP	2020
PIVANGOLA	100% (D)	AA	CP	2020
PORTATURA	100% (D)	AAct	CP	2020
SIDUREX	100% (D)	AAct	CP	2020
TENSÃO BT	100% (D)	AAct	CP	2020
UNINDULAB	100% (D)	AAct	CP	2020
URSUCOBAL	100% (D)	AAct	CP	2020
ZUB II	100% (D)	AAct	CP	2020

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