AFRICAN NATIONS MUST RESIST SIREN SONG OF RESOURCE NATIONALISM

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Legal Briefings – By **Peter Leon, Partner and Africa co-chair**

Countries that shun populist moves appear more attractive as commodity prices fall

In South Africa, President Cyril Ramaphosa announced the ANC would amend the country's constitution to allow land expropriation without compensation ©Reuters

The spectre of resource nationalism is again rearing its head across Africa, leading to significant regulatory intrusions in Tanzania, the Democratic Republic of Congo and South Africa — all major mining jurisdictions.

Unlike the outright nationalisations undertaken by many postcolonial African (as well as Latin American) governments in the 1960s and 1970s, resource nationalism refers to the more modern trend of governments adopting fiscal and regulatory measures to exert greater control.

In July 2017, Tanzania enacted three laws asserting "permanent sovereignty" over its natural resources including oil and gas while drastically amending the country's mining code.

Together with new regulations, the laws allow the government to renegotiate investor-state contract terms that parliament deems "unconscionable", and impose quotas for the procurement of local goods and services, and employment of local personnel.

The government is also entitled to a free equity interest of between 16 per cent and 50 per cent in mining groups, which are prohibited from suing the state in courts outside Tanzania.

In March, the DRC overhauled its investor-friendly mining code , doubling the state's free equity interest from 5 per cent to 10 per cent (plus another 5 per cent upon each licence renewal) and requiring at least a 10 per cent shareholding by Congolese citizens. It also introduced a 10 per cent royalty on "strategic minerals" and a 50 per cent tax on "super profits".

In South Africa, President Cyril Ramaphosa announced this month that the African National Congress would amend the country's constitution to allow land expropriation without compensation, appeasing a demand from the Economic Freedom Fighters, a rival political party, for the nationalisation of mines and banks.

This is a further blow to a mining industry already bedevilled by proposed changes to the country's mining code and empowerment charter, which include raising quotas for ownership and management by black South Africans.

So why is this happening? And why now? The resource nationalism cycle seems attributable to what economists call the "obsolescing bargain", which sees negotiating power shift from foreign investor to host state after investments are made (and cannot be moved to another jurisdiction).

Countries that are rich in natural resources but lack the capital, operational and technological resources to extract them profitably adopt liberal legal frameworks and fiscal incentives to entice foreign investors.

Once investments are made and are generating returns, the host state might flex its legislative muscle to claim a greater share of the returns.

The drivers of resource nationalism are complex and country-specific, although some factors are common.

Dr Sangwani Ng'ambi, a Zambian academic, observes "a correlation between the rise in the price of the host state's natural resource and the rise of resource nationalism". The DRC's recent reforms, for instance, followed two years of rising copper and cobalt prices.

This trend is, however, "influenced not only by the desire to capture more revenue from a windfall in prices but also a desire by states to retain their political hegemony".

Thus, owing to its populist appeal, resource nationalism also arises where political rulers fear losing office. This is not the case in the DRC. Although this December's election will end Joseph Kabila's 18-year presidency, there is little doubt that his chosen successor will win.

By contrast, electoral support for Tanzania's Chama Cha Mapinduzi party declined from 80 per cent in 2005 to 58 per cent in 2015 and another election looms in 2020. Similarly, in South Africa, the ANC's support fell from 66 per cent in 2006 to 54 per cent in 2016 and it fears losing its majority in next year's general election.

Resource nationalism is most extreme in polities with weaker checks and balances. Tanzania's 2017 laws were rushed through parliament in six days. South Africa's more modest amendments have been entangled in parliament for six years and still risk annulment by the country's robust judiciary.

The question now is how African governments will react to the recent decline in the price of copper and other key commodities.

Countries that resist the fiscal and populist temptations of resource nationalism could well become more attractive and competitive than the likes of the DRC, Tanzania and South Africa — at precisely the point in the commodities cycle when this matters most.

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