I. CHANGE IN LAWS AND GENERAL IMPACT ON LONG TERM MINING CONTRACTS

1) A somewhat controversial issue with moving perceptions.

❖ Precedents and background

- **Precedents**: similar situation for long term public investment contracts such as Concessions and PPP: modern equilibrium found in recent landmark projects in LDC’s and in some laws
- **Background**: Universal principle of contract law: Sanctity of contract:
  → Roman law principle: *Pacta sunt servanda*

**Consequences:**
- No unilateral change possible by a contracting party.
- Stability of the surrounding circumstances: Roman law principle: *Rebus sic stantibus*
- Implied term of stability or compensation for adverse material consequences of changes in law enforced in many jurisdictions for contracts entered into with Public Authorities.

**Principle**: In a public-private contracts when a change is not deriving from force majeure but from Government action such as change in laws upon which the private company has no control and when such a change has an adverse economic impact a right of compensation arises in conformity with the universal principle of sanctity of contract (*Pacta Sunt Servanda*). This right may be of different nature in different situation.
2) **How to implement this principle in modern mining contracts?**

**A) Background:** Considerations on investment decision in a mining project and general allocation of risks

<table>
<thead>
<tr>
<th>Risks borne by the Mining Company</th>
<th>Risks borne by the State</th>
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<tr>
<td>- Investment and operation Costs</td>
<td>- Political risks affecting contractual obligations (Include change in law)</td>
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<tr>
<td>- Value of the mineral</td>
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**B) From there how to deal more specifically with change of laws ?**

- Freezing the impact of all laws for decades is no more acceptable
- Transferring all the consequences of any change to the mining company without some form of compensation is not acceptable either

**C) Distinction should be made depending of the nature of the changes; examples:**

a. Law amounting to de facto Expropriation of part of the resources: either not applicable to the contract or Full compensation

b. Law increasing the rate or scope of turnover tax: either not applicable to the contract or partial compensation

   → Practice: Freezing the rate for a given time period or compensation above a threshold of material adverse impact

c. Law dictated by consideration of paramount Public interest (amounting to Public Order) and in line with international developments; No compensation unless material adverse impact; examples of such laws;

   - Norms
   - Environment
   - resettlement
   - Human, (community, indigenous Labor etc....)
3) **Particular situation of changes of laws of paramount Public Interest (no compensation unless)**

- **Principle:** Reinstating economic equilibrium above a certain threshold of adverse impact

This principle in line with legal tradition of many countries is widely recognized by modern practice

- UN Principles for responsible contracts
- UNIDROIT principles (International Institute for the Unification of Private Law)
- Legal principles in several African and other countries
- Fundamental principle of Napoleonic public contract law valid in many countries around the world

- **Comments on Guiding principle VII submitted to the conference:**
  
  - The draft leads to an immediate implementation of change in laws in the contract when such changes “reflect international standards, benchmark or recognized good practices”

  - It also provides that in such a case “due regard should be taken the consequences of any material adverse impact on the project economic viability as appropriate”.

> This draft of guiding principles is consistent with the reasoning developed above.

- **Question:** how to implement those principles in practice without opening renegotiation?

An answer may be found in a structured hardship clause rather standard in public–private contracts in many jurisdictions. It may also be found in the underlying equitable legal principles applicable in Napoleonic civil law countries such as francophone Africa:
Example of Hardship clause: Outline of relevant provisions:

1) Provision dealing (among others) with the change of laws on paramount interest: if the change does not have a material adverse impact no right of compensation arises for the mining company.

2) Provision dealing with the definition of material adverse impact; key objective indicators on economic equilibrium and viability by reference to:

   - a simple economic and financial matrix for the project lifecycle updated from time to time in a transparent manner when required.

   - Where the economic and financial content of the Matrix is agreed at the time of signature together with the calculation of key indicators such as IRR (Pacta sunt servanda)

3) Provision dealing with the right of reinstatement of part of the economic equilibrium in case of material adverse impact of change of laws of paramount public interest (could be a percentage).

4) Provision dealing with the Form of compensation:
   a. Indemnification (default provision)
   b. Additional mining rights
   c. Decrease in taxes
   d. others

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