

## AFRICA RISK CONSULTING

### Senegal Monthly Briefing October 2015

#### Senegal Summary 9 October 2015

*Karim Wade, former number two in the administration of his father ex-president Abdoulaye Wade (2000-2012), and his co-accused move forward international judicial proceedings in order to overturn their illicit enrichment convictions and halt the government's plans to seize alleged assets. After several delays, the government pledges to pass a new mining code before the end of 2015. The government plans to omit several investor-friendly exemptions in order to raise revenues. The new mining code may increase the risk of contract renegotiation. Senegal fails to improve its ranking in the World Economic Forum's (WEF) 2015-2016 Global Competitiveness Index (GCI).*

#### International judicial proceedings halt Sall's plans to seize alleged assets

President **Macky Sall** (2012-present) continues to pursue **Karim Wade**, the former number two in the administration of his father, former president **Abdoulaye Wade** (2000-2012). The government is seeking to execute the 23 March decision of the **Cour de Repression de l'Enrichissement Illicite (CREI)** to seize and sell off the assets controversially assigned to Wade, starting with three houses.<sup>1</sup> The CREI assigned assets worth CFA 117 billion (\$193m) to Wade, of which it ruled that CFA 69 billion (\$114m) was illicit.<sup>2</sup> The CREI subsequently sentenced Wade to a six-year prison sentence and fined him CFA 138 billion (\$227m).<sup>3</sup>

However, Wade and his co-accused – who in several cases have provided corporate documentation confirming that they own assets on the CREI list – have launched several international judicial procedures to challenge the CREI ruling and asset seizures. Notably, prominent businessman **Ibrahim Abou Khalil 'Bibo Bourgi'** has launched international arbitration at the **World Bank's International Centre for Settlement of Investment Disputes (ICSID)** to reclaim **Aviation Handling Services (AHS)**.<sup>4</sup> The procedure has reportedly halted the government's attempts to seize AHS.<sup>5</sup> Bourgi has also filed cases at the **Cour Commune de Justice et d'Arbitrage (CCJA)** of the **Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)** based in **Abidjan (Côte d'Ivoire)** in relation to several seized assets that the CREI assigned to Wade without documented evidence.<sup>6</sup> In addition, Bourgi has launched a procedure with the **United Nations Commission on International Trade Law (UNCITRAL)**, in which he is claiming financial compensation for the seizure of his real estate company, Senegal-based **Hardstand**.<sup>7</sup>

Moreover, a **United Nations (UN) Working Group on Arbitrary Detention** report dated 7 May stated that Wade's detention is arbitrary and recommended that the government ensure "full compensation" to "remedy the prejudice inflicted" (see *ARC Briefing Senegal June 2015*).<sup>8</sup> The UN agreed to review the case from 2 to 19 September because government lawyers had failed to meet a deadline to submit its case.<sup>9</sup> The UN working group has not yet made its decision to uphold its ruling

<sup>1</sup> L'As, 6 Oct 2015.

<sup>2</sup> See ARC Briefing for Senegal, April 2015

<sup>3</sup> See ARC Briefing for Senegal, April 2015

<sup>4</sup> La Gazette, 9 Aug 2015

<sup>5</sup> L'As, 6 Oct 2015.

<sup>6</sup> Sud Quotidien, 7 Aug 2015.

<sup>7</sup> Leral, 8 Sept 2015.

<sup>8</sup> United Nations Working Group on Arbitrary Detention, 7 May 2015

<sup>9</sup> Leral, 25 Aug 2015.

or not. State lawyer **El Hadji Diouf** claims the initial UN working group ruling disregarded the sovereignty of the Senegalese justice system.<sup>10</sup> If the UN re-affirms its request to release Wade and the Senegalese government refuses to release him, the **International Court of Justice (ICJ)** will hear the case.<sup>11</sup>

*"I would be surprised if the outcome (of the UN working group review) is negative for the Senegalese government. They will do whatever they can do reverse the decision."<sup>12</sup>*

The Wade's **Parti Démocratique Sénégalais (PDS)** has weakened and fractured since losing power in 2012 to Sall. In the lead up to the 23 March CREI ruling Abdoulaye Wade, who remains the party president but is now based in **France**, ordered the party to appoint Karim Wade as the PDS' presidential candidate in the next election expected in 2017.<sup>13</sup> (Sall has pledged to hold a referendum in 2016 to reduce presidential term limits from seven to five years, to pave the way to hold the election in 2017.<sup>14</sup>) Karim Wade's candidacy has helped to highlight the human rights and legal issues around his imprisonment, however some party officials have called for a new presidential candidate.<sup>15</sup> Several PDS officials have put forward party secretary general **Oumar Sarr** as a potential candidate.<sup>16</sup>

*"Oumar Sarr is the most eligible candidate but he is not considered a national threat to Macky (Sall). Karim Wade will stay the PDS candidate until Abdoulaye Wade decides. It's only Abdoulaye Wade who can decide this. If Abdoulaye Wade is absent there is no PDS. At present Macky has no (political) challengers."<sup>17</sup>*

### New mining code aims to boost revenue

Mines and industry minister **Aly Ngouille Ndiaye** has confirmed that the government aims to pass a new investor-friendly mining code before the end of 2015.<sup>18</sup> The new code will replace the current legislation passed in 2003 whilst Sall, a former geological engineer, was the minister of state for mines, energy and hydraulics.<sup>19</sup>

The new mining code has faced several delays. The Wade administration launched a review of the code and the Sall administration was expected to pass a new code in 2013.<sup>20</sup> However, the Sall administration subsequently launched extensive consultation with stakeholders and sought assessments of the draft code from several law firms.<sup>21</sup> The government convened a public meeting in February 2015 to discuss the stakeholder input and then circulated a draft code to various ministries for comment.<sup>22</sup> Since then, the government has sent the draft code to parliament for adoption, subject to a favourable vote.<sup>23</sup> The mining code will become law when Sall signs off on the legislation and the government gazettes the new law.<sup>24</sup>

The government claims that delays are related to its intention to pass a best-practice code.<sup>25</sup> However, the new code aims to raise more revenue from the sector. Ndiaye has publicly complained that the government has received only 2% of mining industry profits, totaling \$294m, in the past decade since the introduction of the 2003 code.<sup>26</sup>

<sup>10</sup> Jeune Afrique, 22 Sept 2015.

<sup>11</sup> Leral, 25 Aug 2015.

<sup>12</sup> Source, investigative journalist, Senegal

<sup>13</sup> See ARC Briefing for Senegal, Apr 2015.

<sup>14</sup> See ARC Briefing for Senegal, Oct 2014.

<sup>15</sup> Press Afrik, 2 Oct 2015.

<sup>16</sup> Source, investigative journalist, Senegal

<sup>17</sup> Source, investigative journalist, Senegal

<sup>18</sup> Mining review, 14 Sept 2015.

<sup>19</sup> Mining review, 14 Sept 2015.

<sup>20</sup> Mining review, 14 Sept 2015.

<sup>21</sup> Mining review, 14 Sept 2015.

<sup>22</sup> DLA Piper, 4 Aug 2015.

<sup>23</sup> DLA Piper, 4 Aug 2015.

<sup>24</sup> DLA Piper, 4 Aug 2015.

<sup>25</sup> Mining review, 14 Sept 2015.

<sup>26</sup> Mining review, 14 Sept 2015.

The government plans to omit several investor-friendly exemptions in the current code and increase tax rates.<sup>27</sup> However, the code will simplify the types of mining titles and lift ownership restrictions on titles to improve investor attractiveness.<sup>28</sup> The key changes in the draft code include:

- A royalty system based on the type of mineral.<sup>29</sup> Despite the low commodity price environment, the new code is expected to increase the royalty rate for gold from 3% to 5%. This is in line with **Teranga Gold's** agreement with the government for the **Sabodala** mine, the only producing gold mine in Senegal, signed in 2013.<sup>30</sup> However, the royalty rates for other minerals may be kept low to encourage investment in alternative minerals.<sup>31</sup>
- To simplify the titles available, the code will introduce two options – a 'small mine permit' or a 'mining permit'.<sup>32</sup> The current code's distinction between a 'mine permit' and a 'mining concession' has reportedly caused some confusion.<sup>33</sup> The new code also has a provision for a 'semi-mechanised mining authorisation', to cover artisanal mining operations on a maximum of 50 hectares.<sup>34</sup>
- The initial term for small mine permits will increase from three to five years, renewable for an unlimited number of three-year terms.<sup>35</sup> The initial term for a mining permit is between five to 15 years, depending on the mineral reserves and investment required.<sup>36</sup>
- Annual production quotas to improve resource management and increase the life span of mines.
- A restriction in the current code on foreign investors owning 100% of a Senegalese company will be removed; however, a Senegalese registered company will still need to hold a mining title.<sup>37</sup>
- There are new local development provisions, deadlines for commencing operations, and increased transparency provisions.<sup>38</sup>

The new mining code will increase the risk of contract renegotiation. The mining code in force at the time of the title award is applicable to current holders of mining titles.<sup>39</sup> However, in an interview in January 2014, Sall said the new code would result in the renegotiation of some mining contracts.<sup>40</sup> The new code will not establish a mechanism for contract reviews.<sup>41</sup> Some legal commentators have suggested the government plans to coerce miners to allocate a share of their income to promoting the sector or to logistics support to the mines ministry's technical departments.<sup>42</sup>

The mining sector currently contributes less than 2% of GDP.<sup>43</sup> There are only two producing mines in Senegal – the Sabodala gold mine; and **Australia-based Mineral Deposits Ltd's Grande Côte Mineral Sands Project**. In March 2014, a government official source said developing the mining sector, particularly iron ore and phosphates, was one of the key priorities of the government's economic roadmap, **Plan Senegal Emergent (PSE)**.<sup>44</sup> However, since Sall came to power in 2012 mining investors in Senegal have complained about excessive tax demands from the government in the context of an undeveloped sector.<sup>45</sup>

<sup>27</sup> Mining review, 14 Sept 2015.

<sup>28</sup> Industrial minerals, 8 Sept 2015.

<sup>29</sup> Mining review, 14 Sept 2015.

<sup>30</sup> Mining review, 14 Sept 2015.

<sup>31</sup> Mining review, 14 Sept 2015.

<sup>32</sup> DLA Piper, 4 Aug 2015.

<sup>33</sup> DLA Piper, 4 Aug 2015.

<sup>34</sup> DLA Piper, 4 Aug 2015.

<sup>35</sup> DLA Piper, 4 Aug 2015.

<sup>36</sup> DLA Piper, 4 Aug 2015.

<sup>37</sup> DLA Piper, 4 Aug 2015.

<sup>38</sup> DLA Piper, 4 Aug 2015.

<sup>39</sup> DLA Piper, 4 Aug 2015.

<sup>40</sup> ENSAfrica, 20 Mar 2014.

<sup>41</sup> DLA Piper, 4 Aug 2015.

<sup>42</sup> ENSAfrica, 20 Mar 2014.

<sup>43</sup> Mining review, 14 Sept 2015.

<sup>44</sup> See ARC Briefing for Senegal, Mar 2014

<sup>45</sup> See previous ARC Briefings for Senegal

## Senegal fails to improve on competitiveness ranking

Senegal showed no improvement in the **World Economic Forum's (WEF)** recently released **Global Competitiveness Rankings**. Senegal placed 110<sup>th</sup> out of 140 countries with a score of 3.7 on the **2015-2016 Global Competitiveness Index (GCI)**, released on 30 September.<sup>46</sup> Senegal received the same score of 3.7 in the 2014-2015 GCI, ranking 112<sup>th</sup> out of 148 countries.<sup>47</sup>

The GCI is based on an analysis of 12 pillars of competitiveness.<sup>48</sup> Senegal's best scores were for innovation (47<sup>th</sup> out of 140 countries); institutions (63<sup>rd</sup>); business sophistication (65<sup>th</sup>); and goods market efficiency (69<sup>th</sup>).<sup>49</sup> Senegal's worst scores signaled a deterioration of the social indicators. They include health and primary education (128<sup>th</sup>); higher education and training (129<sup>th</sup>); infrastructure (109<sup>th</sup>); market size (103<sup>rd</sup>); and macroeconomic environment (103<sup>rd</sup>).<sup>50</sup> The report cites access to finance, tax rates, restrictive labour regulations and complexity of tax regulations as the most problematic factors for doing business in Senegal.<sup>51</sup>

Senegal placed above its neighbours in the **West Africa** sub-region in the 2015-2016 index, except for **Côte d'Ivoire** (91<sup>st</sup>). Senegal ranked 15<sup>th</sup> among African countries. **Mauritius** (46<sup>th</sup>) was the highest ranked African country, followed by **South Africa** (49<sup>th</sup>) and **Rwanda** (58<sup>th</sup>).<sup>52</sup>

## Implications

The Karim Wade case has entered another phase, with the start of international proceedings that seek to overturn the controversial CREI ruling. The government will face significant hurdles defending the CREI ruling due to the widespread irregularities that several human rights monitors, business and legal sources have noted around the CREI process and its ruling. In addition, Wade has an extensive and experienced legal team. High corruption risks are associated with asset seizure process, particularly those that do not follow due process.

The draft code represents a trend of increasing state participation in mining legislation across Africa and globally. The new code will bring Senegal in line with other West African countries but will increase contract risks. This will compound the government's difficulties in raising revenue from a sector that is experiencing a significant and prolonged global downturn.

The GCI highlights the lack of investor confidence in the Senegalese government. Investors in Senegal under the Sall administration face significant business risks and project delays. The government's PSE economic roadmap has also faced significant delays. Moreover, the GCI underlines Senegal's deteriorating education and healthcare.

<sup>46</sup> www3.weforum.org

<sup>47</sup> www3.weforum.org

<sup>48</sup> www3.weforum.org

<sup>49</sup> www3.weforum.org

<sup>50</sup> www3.weforum.org

<sup>51</sup> www3.weforum.org

<sup>52</sup> www3.weforum.org

### About Africa Risk Consulting:

**Africa Risk Consulting (ARC)** is a pan-African consulting company that provides timely, relevant information and advice that enables its clients to take informed investment decisions and to safeguard their reputations.

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