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Investment protection in the mining sector

A guide to protecting foreign
investments in Tanzania

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Overview

The mining sector is playing, and will continue to play, an essential role in the energy transition. As demand for critical metals and minerals continues to intensify, a significant increase in foreign investment is likely to occur in the coming decades, with over US\$1.7 trillion in investment required to help the transition to clean energy. Demand for precious metals also remains strong, with strong industrial demand playing a significant role in price increases over the course of 2023.

As investment increases, it is important for mining investors to ensure that they take steps to mitigate any political risk when they enter into long-term, capital-intensive projects abroad.

Mining investments tend to involve a significant commitment of capital with long-term profit horizons. This can make them particularly susceptible to various types of political risk, such as:



resource nationalism;



environmental regulation; and



the increased politicization of mining projects.



Put simply, as demand increases, so does the risk that Governments will take steps to interfere with mining projects, whether for political or economic gain. This effect has been felt in recent years, as there has been a significant increase in the number of mining cases brought before the International Centre for Settlement of Investment Disputes (“ICSID”).

This article, part of our series on investment protection in the mining sector in Africa, looks specifically at Tanzania. Mining is a leading industrial sector in Tanzania, and the value of its mineral exports has been increasing for several years. Mining in Tanzania comprises a variety of projects, including metals, industrial

minerals, fuel minerals and rare earths, and critical minerals (which currently are in the exploration stage). Tanzania historically has been, and continues today, to be a notable destination for foreign investment in Africa. Since 1998, the mining sector in Tanzania has witnessed a significant increase in foreign investment. Recent statistics indicate a substantial inflow of foreign investment: from 2017 to 2021, the sector attracted foreign investment amounting to over US\$1.8 billion.

What is investment protection, and why is it relevant to the mining sector?

When a host State harms a foreign investment, the domestic legal system may not provide an adequate remedy. Sometimes, domestic court challenges or lobbying efforts may not be appropriate, or they have been exhausted without resolving a dispute.

Foreign investors can reduce the risk of investing abroad by ensuring that their investments benefit from the protections contained in investment treaties.

There are more than 2,000 investment treaties currently in force worldwide. The majority of these treaties are bilateral investment treaties (“BITs”) concluded between two States. There are also multilateral investment treaties, with arguably the most well-known being the Energy Charter Treaty, which protects investments in the energy sector.

Investment treaties contain substantive investment protection standards, which protect the “investments” of “investors” from internationally wrongful governmental interference. In the mining sector, the types of interference may take various different forms, including but not limited to:

- changes to mining laws;
- changes to royalty or tax regimes;
- cancellation of concessions;
- unreasonable refusal to renew a concession;
- new environmental regulations, or wrongful use of environmental enforcement measures; or
- export bans.

If a State interferes with an investor’s investment, and if there is an investment treaty in force between the home State of the investor and the host State of its investment, that investor may be able to bring a claim against the State under the treaty before an international tribunal. If successful, an investor may be able to recover substantial damages, placing it in the position it would have been in but-for the internationally wrongful conduct of the State.



Investment protection in Tanzania

Structuring investments in order to benefit from protection

Investors in the mining sector in Tanzania would be well-advised to seek to structure their investments in order that they benefit from the protection set out in investment treaties. This can be done at the outset of an investment or after the investment has been made, provided in the latter case that any dispute has not already begun or is reasonably foreseeable.

Investment structuring to benefit from investment protection can often complement structures reflecting corporate or tax considerations. Many investment treaties will provide protection to investments which are indirectly held. In other words, protection often is not dependent on the relevant entity directly holding the foreign investment. As long as it is inserted within the ownership structure, protection may be available.

Tanzania has a number of BITs which are in force. With particular relevance to mining investors, it has investment treaties in force with China, Canada, Switzerland, UK, and Germany (among others). Tanzania is a Contracting State to both the ICSID Convention and the New York Convention. This means that arbitral awards against Tanzania can be enforced in the domestic courts of nearly 200 States worldwide.

Most foreign investors in Tanzania prefer to structure their investments through multiple entities. Common investment structures typically used include within the ownership structure companies incorporated in countries which have BITs with Tanzania, in order to enjoy access to investment protection. Operating entities ordinarily will be locally incorporated and mining operations are conducted through a licensing system. Thereafter, certain contractual arrangements between the companies and the Government are concluded for purposes of complying with certain regulatory requirements. For example, the Government has a right to acquire a minimum of 16 percent non-dilutable free carried interest (FCI) shares in the capital of the company holding a Mining Licence or Special Mining Licence depending on the type of minerals or level of investment as part of state participation in the mining operations.



Mining regulation in Tanzania

Mining regulation in Tanzania is governed by the Mining Act 2010 (as amended) (“Mining Act”). The Mining Act provides that all minerals found in Tanzania are public property held by the President in trust on behalf and for the benefit of Tanzanians, the owners of the entire mineral property. Accessing the mining sector in Tanzania requires mineral rights issued by the Government through the Mining Commission.

The available mineral rights are first granted through a Prospecting Licence, which is issued for four years subject to two renewal periods. A Prospecting Licence is not renewable after the second renewal. Upon discovering commercially viable mineral deposits, the holder of a Prospecting Licence can apply for a Mining Licence or Special Mining Licence depending on the capital to be invested. For a Mining Licence, the capital investment required is between US\$100,000 and US\$100 million, while for a Special Mining Licence, the capital investment required is at least US\$100 million.

While a Mining Licence is issued by the Mining Commission upon being satisfied with the applicant’s compliance with the law, a Special Mining Licence needs the Cabinet’s approval before it is issued by the Mining Commission.

A Mining Licence is granted for an initial period of 10 years but may be renewed for another 10-year period unless the holder is in default. A Special Mining Licence is granted for the estimated life of the ore body as indicated in the feasibility study report or such other period as the applicant may request, whichever period is shorter. The licence is also renewable for a period not exceeding the estimated life of the remaining ore body.

The Mining Act requires every authorised miner to pay to the government a royalty computed on the gross value of minerals produced under the licence at the rate of 5 percent in the case of uranium; 6 percent in the case of gemstones, diamonds, the metallic minerals, such as copper, gold (however, for raw gold that is sold to refinery centres, royalty is payable at 4 percent), silver and the platinum group minerals; 1 percent in the case of gems, that are cut and polished or engraved gemstones; and 3 percent in the case of other minerals including building materials, salt, and all industrial minerals.

Mining companies are required to operate within recognized standards such as complying with environmental standards by conducting environmental impact assessment, among others. Besides, on cessation or closure of mining operations, the mineral right holder is required to submit mine closure plan for purposes of rehabilitating the area and restoring it to its original position.

In 2017, Tanzania made efforts to reform its mining sector by asserting more control by the Government over the sector. While these changes aim at maximising benefits derived from mineral resources, they have also created uncertainties regarding the investment environment in Tanzania’s extractive industry. So far, the Government has attempted to engage stakeholders in dialogue, as part of its effort to strike a balance between attracting investments and national interests.



Uncertainties have arisen in relation to the regulatory requirements that mining investors should abide by.

Uncertainties have arisen in relation to the regulatory requirements that mining investors should abide by. For example, as indicated above, holders of Mining and Special Mining Licences are required to issue FCI shares to the Government depending on the type of minerals and level of investment. However, to date, there is no guidance on which type of minerals entitle the government to FCI shares.

Furthermore, there have been issues connected with local content requirements which require Tanzanian nationals to contribute 20 percent of capital to any joint venture company engaged in mining. Companies are also obliged to comply with corporate social responsibility regulations under the supervision of local Government authorities and the Mining Commission.

While Tanzania is politically stable, its mining legal framework has been uncertain and unpredictable for quite some time. Regulatory requirements are sometimes drafted in a manner that can be difficult both to understand and to implement. This can cause uncertainty for investors. Furthermore, investors may face a range of legal risks, including regulatory changes and forced renegotiation of agreements. There are also risks connected with potential cancellation of mineral rights and changes to the applicable tax regime. Investors may face legal action in some instances.

How to protect your investments if there is governmental interference

Simply the availability of an investment treaty can be a valuable tool for an investor in seeking to negotiate with Governments. When a measure is enacted or threatened and a dispute arises, many investment treaties require the parties to engage in good faith negotiations before any action can be taken. The ability of an investor to bring an arbitration may incentivise Governments while at the negotiating table.

It is important to remember that not all foreign investments qualify for protection under an investment treaty, and not every type of State conduct will breach the standards of protection ordinarily set out in investment treaties.

The below checklist has been created with mining investors in mind to provide a preliminary assessment of the availability of investment protection and what to do in the event that a dispute arises.

01.

Is there treaty protection available and what is your claim?

■ **Is there an investment treaty in force?**

Look to the ownership structure of your investments in order to determine whether there is an applicable treaty. If an investment treaty is not currently available in your corporate structure and a dispute has not yet begun or is not reasonably foreseeable, it is not too late to restructure your investments in order to obtain protection.

■ **Are you an investor?**

Definitions of an “investor” vary between investment treaties. It is often the case that an investor can benefit from the protections of an investment treaty through mere incorporation in a State. However, sometimes a higher degree of connection to a State is required. “Investor” status can often be bestowed on companies with only indirect ownership of the relevant investment.

■ **Have you made an investment?**

Typically, an investment treaty contains a broad and non-exhaustive definition of the types of investments it covers. This can include shares in locally incorporated companies which may be performing day-to-day tasks in the context of a mining project. It can also include a concession agreement for a project itself.

■ **Have any investment protection standards been infringed?**

Different investment treaties provide different investment protection standards. However, most investment treaties will contain an obligation for investments to be accorded fair and equitable treatment and protected from uncompensated expropriation.

02.

Negotiating with the State and beginning arbitration

- **Mandatory negotiations under an investment treaty:** The investment treaty may require you to enter into negotiations with the State. The protections in the investment treaty may be leverage in difficult negotiations.
- **Commencing arbitration:** A typical investment arbitration can last for up to three years. There may be opportunities for settlement along the way. Many mining companies have already used third-party funders to fund claims under investment treaties. Third-party funding allows

an investor to bring a claim without the fees and costs associated with that claim affecting the investor's balance sheet or having an impact on its cash flow. The third-party funder funds the investor's legal fees and costs associated with the arbitration in return for a portion of the proceeds of any award in the investor's favour. This is non-recourse funding: if the investor does not succeed, it does not have to pay the funder.

03.

Receiving compensation in the event of success

- **Arbitral award:** A tribunal records its final decision in the form of an award. If you are successful, the tribunal may award damages. Many States wish to be perceived as adhering to their international legal obligations and will pay an arbitral award voluntarily.
- **Enforcement:** If a State does not pay voluntarily, as noted above, it would be possible to enforce the award against non-State immune assets of the State held abroad.



How can we help?

Hogan Lovells

Forming part of our market-leading global disputes offering, the Hogan Lovells international arbitration team has extensive experience in investment arbitration matters. We often advise on bilateral and multilateral investment treaties, including at a pre-dispute phase, in ensuring that investments are structured in a way which not only reflects investors' corporate and tax requirements, but also the availability of investment protection. We can help you best take advantage of the protections set out in investment treaties in order to avoid disputes. When disputes cannot be avoided, we assist our clients in investment arbitrations, seeking favourable settlements or awards.

FB Attorneys

FB Attorneys has extensive experience in assisting investors looking to invest in the Tanzania mining sector. We offer expert guidance designed to ensure that investments in Tanzania are protected. Our firm has a mining desk, with experienced, skilled, and dedicated legal advisors conversant with the Tanzania mining regime and intimate knowledge of both the local and international legal landscape. We also often participate in stakeholders' forums with industry and government actors through our membership in the Tanzania Chamber of Mines. In the unfortunate case of disputes, we assist investors to take the most favorable route for resolution.



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