Look Before You Leap!

The Importance of Properly Structuring International Investments in the Mining Sector

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Investments in the mining sector are commonly subject to strict regulation across the globe and face unique regulatory, environmental and geopolitical risks. Managing mining projects becomes more challenging for investors operating in foreign markets. It is not rare that the confluence of political and social pressures results in a government taking measures that adversely affect foreign investors.

Moreover, as global demand for metals and minerals rises with the transition to renewable energy, so has the number of disputes in the mining sector. According to recent statistics from the World Bank's International Centre for the Settlement of Investment Disputes, the oil and gas and mining sectors accounted for the largest share of investment arbitrations registered in 2023.

International investors in the mining sector should consider structuring their investments to secure international protections to mitigate the risk of adverse governmental measures.

What Is an International Investment Agreement?

An international investment agreement (IIA) is a treaty between two or more countries, in which one country agrees to protect investments made in its territory by investors from the other country. There is a worldwide network of approximately 3,000 bilateral and multilateral IIAs.

IIAs offer important substantive protections and dispute settlement mechanisms. Common provisions include:

- The host government agrees to provide "fair and equitable treatment" and "full protection and security" to foreign investors and their investments
- The host government agrees to not adopt arbitrary or discriminatory measures that impair foreign investors and their investments
- The host government agrees to protect foreign investments from direct and indirect expropriation or nationalization
- The host government consents to resolving disputes with foreign investors in international arbitration

These provisions aim to discourage governments from enacting measures that harm international investors and their investments, while allowing foreign investors to resort to international arbitration instead of bringing claims against the host government in its own domestic courts. International arbitration has the advantages of confidentiality, allowing the parties to choose the adjudicators, flexible procedures and increased ease of enforcement.

How Can Investors Ensure That Their Investments Are Protected by IIAs?

IIAs protect "investors," which are normally defined as legal entities of one contracting state who have made an investment in the other contracting state.

Sophisticated international investors often structure their international investments through a third country to secure IIA protection (or more favorable IIA protection). For example, a Chinese investor investing in the mining sector in Namibia may consider structuring its investment through a Dutch subsidiary to secure IIA protection because Namibia has an IIA with the Netherlands but not with China.

While nationality planning should be a consideration at the onset of mining projects, investors are not entirely without recourse when an existing project is not protected under an IIA. Under these circumstances, the investor may be able to restructure its investment to secure IIA protection.

Accordingly, investors should carefully consider properly structuring or restructuring their international investments in the mining sector to ensure that they are entitled to IIA protections to the maximum extent possible, to mitigate the risk of adverse governmental measures.

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