JONES DAY

COMMENTARY

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Tanzania Overhauls Mining Laws, Fines Investor US$190 Billion: Is Your Investment Protected?

IN SHORT

The Situation: Hoping to increase the nation's revenue from natural resources, the Tanzanian government is introducing a number of increasingly drastic reforms to the mining industry.

The Result: The new laws heighten the government's role and power in investment contracts, increase the costs of foreign investment, and substantially reduce investment protections, including international arbitration.

Looking Ahead: Investors should take immediate action to mitigate the risks associated with the Tanzanian government's actions pertaining to the mining industry.

Recently, Tanzania enacted a series of mining laws that significantly erode protection for existing and future investments in the mining industry. As part of these measures, one foreign investor has been assessed a US$190 billion penalty. It is important for investors to obtain immediate legal advice to address and mitigate the risks associated with the Tanzanian government's changes to the mining industry. Any foreign investor that has already invested in Tanzania or is considering an investment in Tanzania should urgently evaluate its status and determine the available legal options, including international arbitration.

These legislative changes may, unfortunately, slow economic growth in Tanzania, which had been steadily growing despite diminishing growth in Sub-Saharan Africa generally. This high level of growth has made the region a magnet for foreign investment, particularly with respect to investment in agriculture, mining, tourism, telecommunications, financial services, energy, and transportation infrastructure. However, investors in the region face relatively high political risk, and every investor is well advised to evaluate potential political, legal, and economic risk in a holistic manner.

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Tanzania's New Mining Laws

Tanzanian President John Magufuli is spearheading efforts to overhaul the mining industry to increase state revenue from natural resources. This has led to a series of increasingly drastic reforms. First, in March 2017, Tanzania banned the export of unprocessed ores. Next, effective July 1, 2017, Tanzania enacted the Finance Act, which imposes a one percent clearing fee on all minerals exported from Tanzania. The largest changes came a few days later, when President Magufuli signed three bills into law that dramatically change the landscape for current and future natural resources in the country.

Among other things, the new laws require the government to own at least a 16 percent stake in mining projects, increase royalty taxes on gold and other minerals, provide the government with the right to dissolve or renegotiate contracts for natural resources, and reject international arbitration for natural resource disputes. Compounding the problem, President Magufuli has suspended the issuance of new mining licenses pending implementation of the laws and stated the government would review all existing mining licenses granted to foreign investors.

Effects of Mining Laws

These changes are of deep concern for companies with investments in Tanzania because the new laws heighten the government's role and power in investment contracts, increase the costs of foreign investment in Tanzania, and significantly reduce investment protections that investors have enjoyed, such as international arbitration.

The repercussions of these laws are already palpable. Since the issuance of the export ban in March 2017, Acacia Mining's share prices and revenue have dropped dramatically, and the company may have to close its primary mine in Tanzania unless the ban is lifted. In addition, Tanzania has also assessed US$190 billion in back taxes against Acacia and recently detained a senior Acacia employee in relation to the dispute. Although Acacia has attempted to resolve its dispute amicably, the company has filed a notice of arbitration against Tanzania to protect its investment. Tremont Investments has also terminated a US$42 million takeover of its joint venture partner's stake in a Tanzanian project. Other companies are considering their legal options regarding the negative effects these laws might have on their existing Tanzanian projects.

Protecting Your Investment

The Tanzanian mining laws have drastically changed the investment climate in the country, including removing the right to international arbitration in the future. As such, investors must evaluate available options to ensure access to international arbitration to protect their investments. Bilateral investment treaties ("BITs") signed between an investor's home state and Tanzania provide foreign investors the right to bring claims to protect their investments. These treaties provide substantive protections for foreign investors, like guarantees of fair and equitable treatment, national treatment, and protections against expropriation. BITs generally include a compulsory arbitration clause for the settlement of disputes that arise between the state and a foreign investor of another signatory state.

There are presently 11 BITs in force between Tanzania and other states—including Canada, Germany, the Netherlands, and the United Kingdom. As Tanzania is already a party to these BITs, the new legislation does not remove the right to international arbitration under the preexisting treaties.

For instance, existing investors may consider bringing an arbitral claim to preclude the Tanzanian government from renegotiating or dissolving an existing mining agreement, or bring an arbitration claim to recover damages after the Tanzanian government has renegotiated an agreement and increased taxes on the investment. Several major companies have already taken this approach and initiated international arbitration against Tanzania in light of the new laws. Given the likely significant impacts that the new mining laws will have on investments in Tanzania, every prudent investor should consider how international arbitration can protect existing investments against future state actions. Investors contemplating a role in investing in Tanzanian natural resources should consider ways to structure their investments to take advantage of existing BIT protections.

TWO KEY TAKEAWAYS

1. Reforms to Tanzanian mining laws have dramatically altered the country's investment climate, including removing the right to international arbitration in the future.
2. Investors considering opportunities in Tanzania natural resources should contemplate structuring their investments to take advantage of existing bilateral investment treaty protections.

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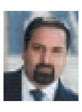

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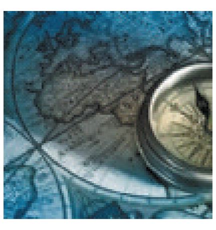

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