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Tanzania Bans the Export of Unprocessed Mineral Concentrates and Ores – The Importance of Bilateral Investment Treaty Protection

Will Tanzania be the next country to face a series of international legal claims?

This may be the case after Tanzania unexpectedly announced a ban of exports of unprocessed gold and copper ore on Friday 3 March. Tanzania's energy and minerals ministry also extended the ban to the export of mineral concentrates and ores for metallic minerals such as nickel and silver.

The ban will affect the many foreign mining investors in Tanzania, who will no longer be authorised to process these mineral products abroad. The impact was immediately felt, for example, with London-listed gold miner Acacia Mining announcing it had ceased exports of Tanzania gold and copper concentrate and was urgently seeking further clarification, as its shares immediately plunged 13%.

Mining is a crucial contributor to the Tanzanian economy, accounting for 3.7% of GDP in 2014, and Tanzania has stated its belief that the ban will cause exporters to process, smelter and refine unprocessed minerals in Tanzania rather than abroad. Acacia Mining alone is estimated to account for approximately 2% of Tanzania's total GDP.

Some have speculated that the ban may be a tactic used by the Tanzanian government in an ongoing tax dispute with Acacia Mining (see our October 2016 article). This appears to be a possibility, as governments around the world look creatively at utilising measures to ensure that multinational businesses pay their "fair share" of tax.

In response to the ban, appropriately placed foreign investors might turn to arbitration under one of the 20 bilateral investment treaties signed by Tanzania with countries such as the United Kingdom, the Netherlands, Germany, Switzerland, and Canada. Investors not linked to a country with a bilateral investment treaty with Tanzania will potentially be disadvantaged.

Protections under these treaties include, notably, a right to "fair and equitable treatment" (which includes the protection of the investor's legitimate expectations), as well as a right to fair compensation for expropriation. Investors may thus argue that these treaty rights were not complied with and seek compensation for any losses arising from the ban.

Awards rendered can be enforced internationally under the 1958 New York Convention, to which 156 countries are party, and, in the case of arbitrations administered by ICSID (an arm of the World Bank), the 1962 Washington Convention, to which 153 countries are parties.

As countries around the world increasingly engage in resource nationalism, and try to reverse some of the perceived negative effects of globalisation, we are seeing an ever increasing number of investment treaty arbitrations in reaction to these measures.

Squire Patton Boggs has world leading experience representing both investors and sovereigns in investment treaty arbitrations.

We expect to see more measures like this in emerging markets, whether in response to tax disputes or otherwise. Companies doing business should seek pro-actively to reduce the risks of economic loss occurring by considering how to structure their investments using bilateral investment treaties and maintaining a holistic approach to their tax arrangements.

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