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LEGAL MECHANISMS FOR PROTECTING FOREIGN INVESTMENTS IN MINING PROJECTS

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Abstract

This article examines the role of legal mechanisms for protecting foreign investments in mining projects. It analyzes regulations aimed at ensuring the stability and predictability of capital investments in an environment of heightened political, legal, and economic risks. The study explores international and national instruments, such as arbitration mechanisms, bilateral agreements, and specialized laws (e.g., FIRRMA in the USA), which establish a stable legal foundation for attracting investments and safeguarding investor interests. The importance of these mechanisms in reducing uncertainty in strategic sectors and maintaining a balance between the national interests of host countries and the needs of foreign companies is emphasized.

Keywords: legal mechanisms, foreign investments, mining projects, international agreements, arbitration, investment risks.

Introduction

The mining industry is one of the most capital-intensive and strategically significant sectors of the global economy. Amid globalization and rapid technological advancements, international companies actively seek opportunities to expand operations beyond their home countries. Foreign investments in mineral extraction play an important role in developing resource projects, allowing countries with abundant mineral resources but limited financial and technological capacity to attract necessary capital and innovation. At the same time, the mining sector represents a high-risk area for foreign investors, encompassing political, legal, economic, and environmental threats.

Investing in the mining sector faces numerous challenges, creating a need for reliable legal instruments capable of ensuring investment protection against political instability, legal uncertainty, and social conflicts. The legal framework for protecting foreign investments, encompassing both international and national mechanisms, must safeguard the rights and interests of investors while promoting sustainable development in host countries.

The purpose of this article is to analyze legal mechanisms for protecting foreign investments in the mining industry. Examining international and national legal instruments, as well as the specifics of their application in different countries, enables an understanding of the main approaches to securing foreign capital and assessing their effectiveness in the face of global challenges.

Main part. Types of risks for foreign investors in the mining sector

The mining industry is a sector engaged in the extraction and primary processing of natural resources. It encompasses exploration, development, and operation of mineral deposits, playing a crucial role in supporting the global industrial and energy infrastructure.

The mining sector ranks among the most lucrative industries in the world economy. As reported by Statista, in 2023, the net earnings of the leading 40 firms in this industry reached around $90 billion, indicating ongoing interest from global investors in this area. By the conclusion of 2024, it is projected that production in the mining sector will achieve 15,8 million tons, with a compound annual growth rate (CAGR) of 2,04% anticipated from 2024 through 2029 [1]. The top nations in mineral extraction – China, the USA, and Russia – are the primary investment hubs and raw material suppliers for the worldwide economy (fig. 1).

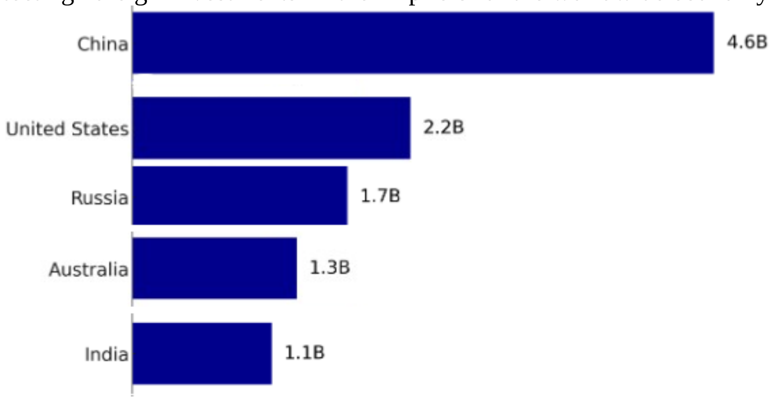

Figure 1. Volume of mineral extraction in different countries in 2024

Foreign investments in the mining sector are characterized by high returns. However, they also involve significant risks that can greatly affect the stability and profitability of projects. These challenges are often associated with the unique characteristics of the industry, including the substantial investment volume, long-term nature of projects, and high dependency on the legal and economic environment of the host country. In this context, several key categories of risks stand out that foreign investors must consider when making decisions (table 1).

Table 1.

Main types of risks for foreign investors in the mining sector [2, 3]

Type of risk	Description
Political risks	Nationalization: risk of forced seizure of assets from private companies by the state. Change of government: potential shifts in priorities and political views affecting the investment climate. Legislative changes: new laws that may worsen conditions for foreign investors, including the introduction of new restrictions or taxes.
Legal and regulatory risks	Difficulties in obtaining permits: delays or denial of licenses and permits necessary for starting or continuing operations. Tax regime changes: adjustments in tax rates or tax conditions, which may increase investor costs.
Environmental and social risks	Strengthening of environmental requirements: tightening of environmental protection norms, which can increase compliance costs. Risk of conflicts with local communities: potential for social protests related to the negative impact on the environment or the living conditions of local populations.
Economic risks	Currency changes: currency volatility that may result in revenue and spending losses. Inflation: a rise in production expenses, leading to a drop in real income. Price fluctuations of resources: variations in prices on the international market, which impact profitability within the mining industry.

The table illustrates that foreign investor in the mining industry encounter numerous risks, many of which are directly affected by elements outside the companies' control. Political and legal risks are significant, as they stem from the actions of government authorities empowered to unilaterally alter regulations affecting the operations of foreign companies.

International mechanisms for protecting foreign investments

Due to the capital-heavy and high-risk characteristics of the mining industry, investment protection measures are crucial tools for reducing the political, legal, economic, and regulatory risks encountered by foreign enterprises. The primary global tools for safeguarding investments encompass international treaties and agreements, arbitration systems, and specific guarantees aimed at shielding against political risks.

A notable international accord is the **Energy Charter Treaty (ECT),** which oversees transnational collaboration in the energy field [4]. Agreed upon in 1994, this agreement mandates that member countries guarantee equitable treatment for foreign investors and offers investors the choice to pursue international arbitration when their rights are infringed. In 2024, the EU opted to exit the ECT for various main reasons linked to its inconsistency with the EU’s contemporary climate objectives and energy strategy. The ECT was perceived as a hindrance to the European Green Deal and the pledges of the Paris Agreement, as it still safeguarded investments in fossil fuels, which opposed the EU's initiatives to shift towards renewable energy sources. By leaving the ECT, the EU can sidestep possible legal challenges and conflicts tied to safeguarding investments in fossil fuels. Ongoing involvement in the treaty might have resulted in legal actions from energy firms pursuing compensation for efforts to decrease fossil fuel consumption.

The USA did not sign the ECT as it preferred to retain sovereignty in energy policy and avoid international obligations that could restrict its flexibility in managing domestic resources. The ECT was initially intended to create a legal framework for energy relations in Europe and Asia, where the USA saw no significant strategic interests requiring its involvement.

In 2024, multiple international accords were established, including the **Clean Economy Agreement** under the Indo-Pacific Economic Framework for Prosperity (IPEF), signed by countries in the Indo-Pacific region, such as the USA, with the goal of facilitating a shift towards a green economy [5]. The primary objectives of this agreement are to promote sustainable development, lower greenhouse gas emissions, and encourage green technologies by establishing favorable conditions for trade and investment in clean energy and sustainable resource management.

The emphasis from the USA is on safeguarding private investors' interests, advancing eco-friendly technologies, and enhancing global collaboration in sustainable development, particularly in key areas like mining. The accord offers legal safeguards such as arbitration and promotes the creation of sustainable supply chains, research and development (R&D), emerging markets for renewable energy, and improved energy security. This method is in line with USA domestic policies focused on cutting emissions and attaining sustainable economic growth objectives.

Besides multilateral agreements, **Bilateral Investment Treaties (BIT)** are significant as well. These treaties are created between two countries to set up a legal framework for protecting investors from one country within the borders of the other [6]. BIT typically includes provisions to protect against expropriation, ensure fair and equitable treatment, and permit foreign investors to pursue international arbitration in case of conflicts. BIT play a crucial role for investors in the mining sector as they create a reliable legal structure and offer protection against erratic government behaviors.

For instance, the BIT between USA and the Republic of Rwanda acts as a regulation governing investment criteria for foreign firms in the USA, particularly in the mining industry [7]. This BIT incorporates measures to safeguard against unjust treatment of investors. It stipulates «national treatment», ensuring that investors are treated no less favorably than local companies in comparable situations. It also encompasses the «Most-Favored Nation» (MFN) principle, which guarantees that American investors enjoy the same rights as investors from other nations. A central provision of the BIT is safeguarding against expropriation or nationalization without immediate, equitable, and efficient compensation. This is particularly important in capital-heavy industries such as mining, where investors are susceptible to shifts in political and regulatory environments. The BIT states that any expropriation must be warranted by public interest, be non-discriminatory, and include fair compensation.

The BIT also guarantees the free transfer of profits, dividends, and capital related to investments. This provision is particularly significant for American companies in the mining sector, as it allows them to repatriate profits and return capital without obstacles, which is crucial for an industry with variable profitability, like mining. The agreement also provides for compliance with environmental protection standards and labor rights, aligning with USA policy to promote sustainable investments abroad. American mining companies are required to meet established environmental standards and protect workers' rights in line with international norms.

International arbitration mechanisms

A key component of legal safeguards for foreign investors, especially in the capital-heavy and risky mining industry, is the utilization of international arbitration methods. These mechanisms offer an impartial venue for settling conflicts between investors and governments, enabling cases to be managed beyond domestic courts. One of the leading arbitration organizations for managing investment disputes is the **International Centre for Settlement of Investment Disputes (ICSID),** created under the World Bank in 1965. ICSID allows investors to pursue arbitration in disputes with states, and its rulings are acknowledged and enforceable by the majority of member nations. This renders ICSID particularly appealing for foreign firms engaged in the mining industry, where political and regulatory uncertainties are significant.

For instance, ICSID dealt with the case of **Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador**, which included claims from USA gold mining firms. The companies claimed that El Salvador breached their investment rights as outlined in the bilateral investment treaty between the USA and El Salvador. The claimants requested compensation for their losses, contending that the Salvadoran government improperly canceled their mining licenses, leading to the halt of their operations. El Salvador, for its part, contended that the license revocations were warranted for environmental reasons and essential to safeguard the local ecosystem. The tribunal rejected the claims, highlighting that the claimants did not demonstrate a violation of the investment treaty [8].

A significant arbitration mechanism is the **United Nations Commission on International Trade Law (UNCITRAL),** created in 1966 to formulate standards and norms in international arbitration and trade. UNCITRAL offers model arbitration rules that are commonly utilized to settle investment disputes, particularly when parties opt against employing specialized systems like ICSID. Arbitration following UNCITRAL guidelines enables investors to settle disputes in an impartial jurisdiction, guaranteeing clear and equitable circumstances for resolving conflicts.

An example of an American mining company involved in arbitration under UNCITRAL rules is **Glamis Gold Ltd** [9]. The firm commenced arbitration against the USA, asserting that government actions infringed upon its rights under the North American Free Trade Agreement (NAFTA). The firm claimed that the new environmental and cultural regulations implemented by California greatly diminished the worth of its gold mining investment. The arbitration tribunal decided in favor of the USA, determining that the actions taken by the USA were warranted, non-discriminatory, and intended to preserve the environment and cultural heritage instead of violating the rights of the foreign investor. Moreover, Glamis Gold was unable to demonstrate that its hopes for regulatory stability were rational, considering the delicate nature of environmental and cultural matters.

While the **Multilateral Investment Guarantee Agency (MIGA)** is not an arbitration body, its operations greatly influence the protection of investor security. MIGA offers coverage for political risks, including nationalization, currency transfer limitations, and political violence, lowering the risk exposure for international investors. This type of insurance is especially sought after in the mining industry, where political unrest and regulatory shifts can greatly impact the financial feasibility of projects, particularly in nations with unpredictable legal frameworks. In the 2024 fiscal year, MIGA provided $8,2 billion in new guarantees for 40 initiatives in different economic sectors.

Therefore, international arbitration systems are vital in sustaining confidence in a nation’s investment environment by assuring investors that their rights will be safeguarded and their interests acknowledged, irrespective of the political circumstances or regulatory shifts in the host nation.

National legal mechanisms for protecting foreign investments: the USA experience

The regulatory system in the USA is based on a combination of measures to control access to strategic resources and protect investor rights. One of the key laws governing foreign investments is the **Foreign Investment Risk Review Modernization Act (FIRRMA),** adopted in 2018. Under this law, the powers of the Committee on Foreign Investment in the USA (CFIUS) were significantly expanded: the committee can review transactions in strategic sectors, including mining, to assess their potential impact on national security. For foreign companies wishing to invest in the extraction of rare earth elements, minerals, and other critical resources, obtaining CFIUS approval has become a mandatory procedure, especially if the investor gains access to important technologies or infrastructure. It is important to note that CFIUS primarily focuses on transactions that may affect USA national security, including access to sensitive technologies and infrastructure.

In addition to FIRRMA, the **International Emergency Economic Powers Act (IEEPA)** is in effect, granting the USA president the authority to impose restrictions on investments from countries deemed a potential threat. For the mining industry, which is involved in extracting strategic and rare earth metals, IEEPA can be used to protect the country's economic interests from foreign influence by regulating the level of foreign company participation in this sector and imposing sanctions if necessary.

Furthermore, the USA has strengthened control over foreign investments in infrastructure supporting mineral extraction, including the transportation, processing, and storage of extracted resources. Amendments to federal laws on critical infrastructure protection require foreign investors to obtain permits to operate in sectors such as energy and mineral processing. These measures are particularly relevant for foreign investors in the mining industry, as they provide legal protection against potential risks and ensure that national interests regarding natural resources are safeguarded.

Thus, the USA legal system protects investments while simultaneously restricting foreign companies' access to strategically important assets and resources. As a result, a stable and transparent investment climate is created, ensuring the protection of both state and investor interests in the mining sector.

Conclusion

Legal mechanisms for protecting foreign investments in mining projects play a critically important role in ensuring the security and predictability of capital investments in an environment of high political, legal, and economic risks. International and national instruments, such as arbitration mechanisms, bilateral agreements, and specialized laws (such as FIRRMA in the USA), establish a stable legal foundation that encourages investment and safeguards investor interests. These mechanisms help reduce uncertainty for companies operating in strategically important sectors, such as the mining industry, supporting a balance between the national interests of host countries and the needs of foreign investors.

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