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# Global Mining - International Arbitration: Protecting your Global Mining Assets

Perth, Australia

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# Introduction

- Australian investors are active in Africa – and increasingly so.
- How can investors sufficiently protect these investments?



# Background

- Over 150 Australian mining companies have assets on the ground in Africa.
- Australian investors are involved in more than 600 mining projects in Africa.
- It is estimated that more than \$65B USD will be invested by Australian investors in African resource projects.

Source: *Aussie CEOs to share insights into investing in Africa*,  
[https://singapore.embassy.gov.au/sing/ahcsg\\_131106\\_article\\_BToped.html#:~:text=So%20much%20so%20that%20current,projects%20running%20across%2042%20countries](https://singapore.embassy.gov.au/sing/ahcsg_131106_article_BToped.html#:~:text=So%20much%20so%20that%20current,projects%20running%20across%2042%20countries)



# Location of Investments

- Most investments located in Western and Southern Africa
- Majority of investments in:
  - Coal
  - Platinum
  - Gold
  - Lithium



- Source:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/TradeinvestmentAfrica/Report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TradeinvestmentAfrica/Report/c02)



# How to Prepare?

- **The best time** to adopt an international arbitration provision, or structure one's investment to take advantage of treaty protections, **is in advance.**
- International commercial arbitration and investor-state arbitration can provide powerful protections, and allow a company to leverage third-party funding and a procedure that may allow opportunities for a business resolution.



# Protecting your global mining assets



## Introduction

- International Commercial Arbitration and Investor State Arbitration offer opportunities to mitigate risk
- Investor State Arbitration arises from investment treaties
- Allows for the investor to bring a claim directly against a state in international arbitration, under public international law (has advantages / disadvantages)

# Protecting your global mining assets

## Introduction

- General procedure for a claim:
  - Cooling off period;
  - Arbitration;
  - Annulment proceedings; and
  - Collection
- Option of arbitration may provide opportunity for a business resolution

How do companies leverage this to mitigate risk?



# Protecting your global mining assets

## Structuring the investment

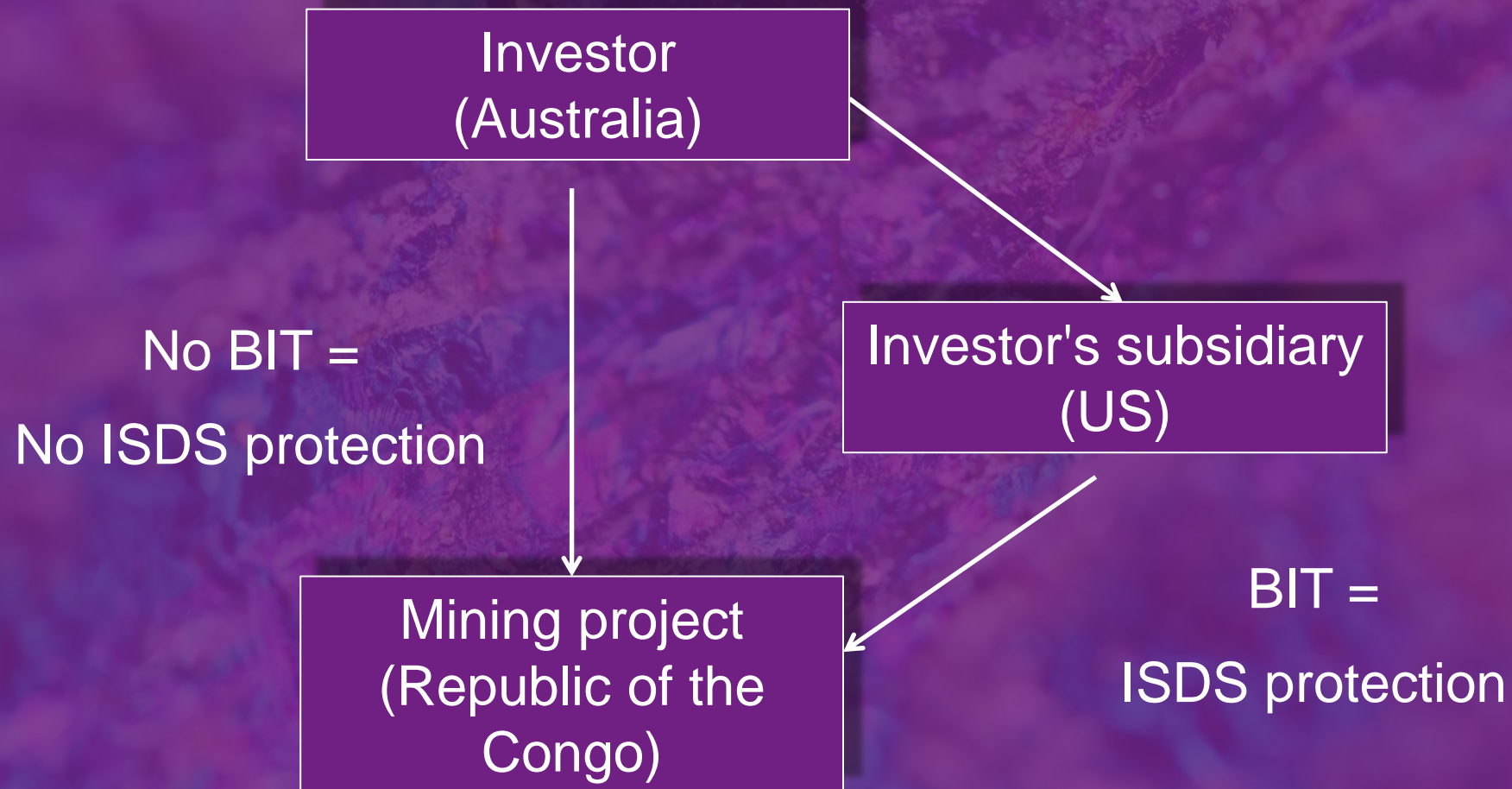
- Over 2800 bilateral investment treaties (BITs), regional investment treaties and free trade agreements with investment protections (FTAs)
  - Australia has 15 active BITs
- Easy to “get right” and also easy to “get wrong”
- Almost always have to be structured appropriately before a claim arises
- Nuances between treaties on what qualifies as an “investor” and “investment”
- Also nuances between treaties on specific actions that are carved-out, where a host state may act without giving rise to a claim





# Structuring a mining investment

Example of an Australian company investing in a mine in the Republic of the Congo





# Protecting your global mining assets

## Grounds for claims

- Expropriation
- Fair and Equitable Treatment
- Full Protection and Security
- National treatment
- Most favoured nation treatment



# Beware of Jurisdictional Issues

- There are a number of pre-dispute provisions to keep in mind
- Each can potentially end an otherwise-strong case
  - Scope of Arbitration Clause
  - Definition of “investor” and “investment”
  - Denial of Benefits Clause
  - Exhaustion of Local Remedies Requirements
  - Stabilization Clauses
  - Fork in the Road
  - Statute of Limitations
  - Any other temporal limitations
  - Contract v. Treaty claims



# Protecting your global mining assets

## Damages

- What happens if a project is in exploration stages?
- Different methods and approaches to valuing damages
- May be technical and economic issues



# Protecting your global mining assets

## Costs and funding of arbitrations

- Typical costs: legal fees, experts, tribunal costs etc.
  - Advance deposits common for tribunal costs
- Nature of costs awards
- Potential for third party funding





# Protecting your global mining assets

## Collecting arbitral awards

- What happens if a state does not pay?
- Negotiating settlements
- Seizing assets abroad
- Secondary market for awards



# Australia Investment Cases

- **Australian investors have brought 12 ICSID arbitrations:**
  - **Democratic Republic of the Congo (2)**
  - **Uganda (2)**
  - **Gambia**
  - **Egypt**
  - **Papua New Guinea**
  - **Timor-Leste**
  - **Indonesia (2)**
  - **Dominican Republic**
  - **Pakistan**



# Case Examples

- *AVZ International Pty Ltd., Dathcom Mining SA and Green Lithium Holdings Pte Ltd. v. Democratic Republic of the Congo* (ICSID Case No. ARB/23/20)
  - First ICSID case dealing with lithium mining.
- *Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/18/22)
  - Alleged expropriation of stake in mining project.
- *Barrick (PD) Australia Pty Limited v. Independent State of Papua New Guinea* (ICSID Case No. ARB/20/27)
  - State refused to permit mining operations due to “environmental and social problems.”



# Neighboring Issues

- Rise in “novel claims and counterclaims”
  - Growing prevalence of Environmental Social Governance (“ESG”) issues in arbitration proceedings in the mining sector
- Experience has shifted over time
- Case Examples:
  - *BSG Resources v. Guinea* (2022)
  - *Cortec Mining Kenya Ltd et al v. Republic of Kenya* (2021)
  - *Copper Mesa v. Republic of Ecuador* (2016)
  - *Bear Creek Mining v. Peru* (2017)



# How to Prepare

- Arbitrations can be expensive
  - Arbitration awards can be large
  - Arbitrations can be third-party funded
- **Most important:** know the situation on the ground
  - Ensure you are apprised of any potential regulatory measures
  - Ensure you are aware of obligations/rights under relevant treaties
  - Engage experienced counsel and involve them before an issue arises



# Questions?



**Diora Ziyaeva** is a Partner at Dentons LLP in New York. Her practice focuses on investor-state arbitration, international commercial arbitration, complex commercial litigation, and public international law. Dual qualified in Uzbekistan and New York, she has 14 years of experience successfully representing sovereign States and corporate clients in over 30 significant international arbitration proceedings. Notably, she is currently acting for a Canadian mining company in a US \$300 million ICSID claim against Colombia. She has successfully defended the state of Turkmenistan in seven investment disputes and the Republic of Kazakhstan in a \$1.2 billion arbitration involving energy reserves. She also successfully represented the Republic of Venezuela in a number of disputes, including US \$30.3 billion arbitration, and the State of Papua New Guinea in US \$100 million dispute.

Diora has been recognized as a “Rising Star” by Law360, as a “Future Leader” in Arbitration by Who's Who Legal, and as one of the American Bar Association's On the Rise – Top 40 Young Lawyers. She is a member of the ICC (International Commercial Court) Commission on Arbitration and co-chairs the Investment Law committee of the International Law Association, where she also seat on the Board of Directors. Diora is a Council on Foreign Relations (CFR) Term Member, a certified mediator, arbitrator, and serves as an Adjunct Professor of Law at Cornell Law School and at Fordham University School of Law, where she teaches international arbitration.

*Who's Who Legal describes Diora as a “very strong strategist and highly competent at articulating persuasive arguments. She has a sharp mind and pays attention to every detail. Her mastery of common and civil law equips her to give the best strategic advice.”*



# Thank you!

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