GEOPOLITICAL IMPACTS, OPPORTUNIES AND CHALLENGES

Regulatory intervention in the critical minerals sector

As the global economy moves towards lower carbon energy that is more interconnected and dependent on electronics, the demand for critical minerals is set to surge.

Against this backdrop, as nations rapidly seek to either gain access to or leverage the critical mineral resources they possess, there have been a variety of legislative and policy developments intended to advance these objectives. These developments have had a variety of impacts on the sector, ranging from commodity price volatility (i.e., the nickel market), to significant project relocation in order to secure public funding, to a shift in geographic investment focus to respond to increasingly stringent foreign direct investment (**FDI**) regimes. The shifting landscape is complex and does weigh heavily on the investment decisions of our clients. Understanding not only the domestic but international elements of the overall global critical minerals sector is paramount to ensuring investment decisions maximise the potential of a positive return (increasingly difficult in a volatile market) and the establishment of robust and resilient supply chains. Our experts in Australia, Canada, Cameroon, Chile, China, European Union (**EU**), Indonesia, Namibia, Nigeria, Senegal, United States (**US**), Zambia, and Zimbabwe (**Jurisdiction**) have shared the recent material developments in their locations to provide a global view of how the sector is developing. These developments can be categorised into three areas (1) Financial measures; (2) Non-Financial Measures; and (3) Changes to FDI regimes. Our international team of experts is available to speak in greater detail to the developments highlighted below, potential opportunities (and how to pursue these) and how to best respond to legal challenges that any of these developments may present.

1. Financial measures to facilitate mining and processing of critical minerals

COUNTRY	PROVIDING PUBLIC FUNDED DEBT/GRANTS/ STRATEGIC INVESTMENTS	INVESTING IN THE DEVELOPMENT OF TECHNICAL EXPERTISE	INVESTING IN SUPPORTING INFRASTRUCTURE	TAX CONCESSIONS	REDUCING RENTS/ COSTS FOR TENEMENTS
Australia	✓	✓	✓	✓	✓
Cameroon	✓	✓	✓	✓	✕
Canada	✓	✓	✓	✓	✕
China	✓	✓	✓	✕	✕
Chile	✕	✕	✕	✕	✕
EU	✓	✓	✕	✕	✕
Namibia	✕	✕	✕	✕	✕
Nigeria	✓	✓	✕	✓	✕
Senegal	✕	✕	✕	✕	✕
USA	✓	✓	✕	✓	✕
Zambia	✕	✕	✕	✓	✕
Zimbabwe	✓	✕	✓	✕	✕

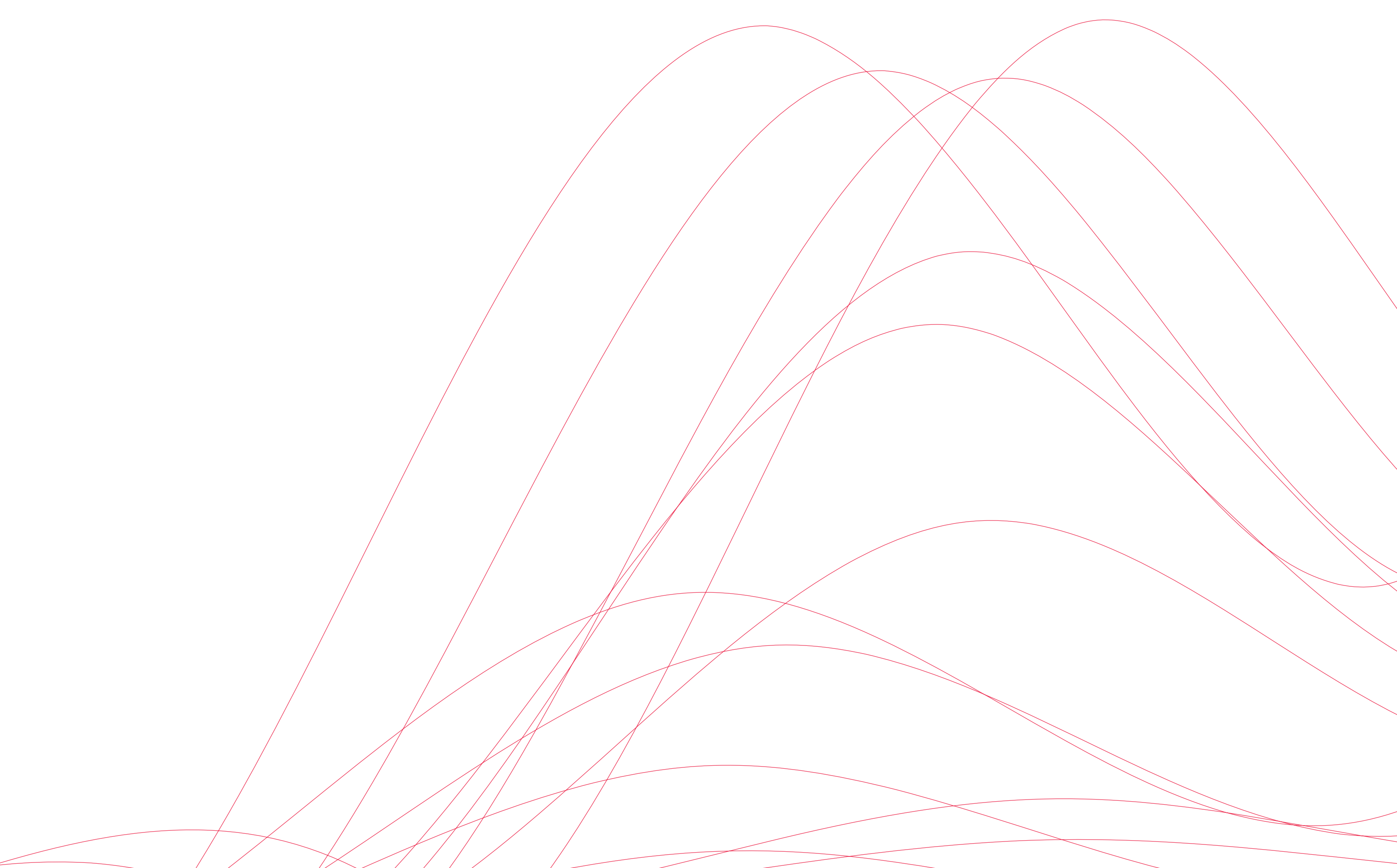
Specific observations:

1.1 Loan and grant financing

The provision of direct financial support (i.e., loans and grants) for critical minerals mining and processing is a primary function of a country's fiscal capacity and economic structure, with such support mainly found in large market-oriented economies. The US (with the largest loan and grant support on offer through the Inflation Reduction Act), Canada and Australia were the primary geographies to provide forms of loans and grants to stimulate domestic development and secure mineral access. While China undoubtedly allocates significant funding to critical mining activities and investments, the prevalence of state-owned enterprises in China's critical minerals sector means that the distinction between direct financial support and direct government spending is difficult to discern. The availability of various forms of public funding is well publicised, but often the process and criteria for access is opaque requiring specialist legal (and sometimes, political) support.

1.2 Tax concessions

Several Jurisdictions have introduced tax concessions to support the critical minerals sectors. Tax-based approaches (such as tax credits and favorable rules on deductibility) generally do not require a fiscal allocation and so are favored by governments facing budgetary constraints. Such concessions scale automatically to the productivity of the enterprise receiving the concession (as opposed to direct financing activities, which generally require the relevant government to determine the size of the grant or loan in each individual case) and are often more politically acceptable than direct financing in many Jurisdictions. The United States again offers the greatest (by value) of available tax credits, including Section 30D Tax Credits for EV batteries if certain requirements are met. Canada and Australia allow exploration companies to renounce exploration costs to shareholders that would otherwise be deductible by the company. In Canada in particular, DLA Piper has increasingly seen the use of Flow Through Shares as key aspect of fundraising activities for clients. Australia has also recently announced production tax incentives for downstream processing of critical minerals, being a 10% tax offset for processing costs (designed to allow Australian lithium and nickel producers to complete with lower cost geographies). In order to secure foreign investment, Cameroon and Zambia have each provided tax incentives to encourage development of major mining projects. Cameroon offers a tax exemption on equipment purchase/installation costs during project development as well as on corporate income. Zambia allows for deduction of mineral royalties, a low corporate tax rate on certain downstream processing activities, 0% tax on dividends and a 10 year carry forward period for mining operation losses.



2. Non-financial measures to facilitate mining and processing of critical minerals

COUNTRY	STREAMLINE APPROVALS	CREATION OF A CRITICAL MINERALS DEPARTMENT	ESG CREDENTIALS AND STANDARDS	INTERNATIONAL TRADE AGREEMENTS AND PARTNERSHIPS	CREATION OF A REGIONAL HUB FOR OPERATIONS	EXPORT RESTRICTIONS
Australia	✓	✓	✓	✓	✓	✗
Cameroon	✗	✗	✗	✗	✗	✗
Canada	✓	✓	✗	✓	✗	✗
China	✓	✗	✗	✗	✗	✓
Chile	✓	✓	✗	✓	✗	✓
EU	✓	✗	✓	✓	✗	✗
Indonesia	–	–	–	–	–	✓
Namibia	✗	✗	✗	✓	✗	✓
Nigeria	✓	✗	✗	✓	✗	✗
Senegal	✗	✗	✗	✗	✗	✗
USA	✓	✗	✗	✓	✗	✗
Zambia	✗	✗	✗	✗	✗	✗
Zimbabwe	✗	✗	✗	✗	✗	✓

Specific observations:

2.1 Export restrictions

Through the introduction of tariffs, quotas and bans, a domestic government typically hopes to force international firms to establish domestic processing facilities to drive employment opportunities for locals and foster local processing and manufacturing capabilities.

Indonesia has deployed significant export restrictions and is generally acknowledged to now dominate the world's nickel supply. Indonesia's export ban reflects the Indonesian government's direction to encourage miners to build more domestic smelters and export value-added nickel products. Chinese investment in nickel processing in Indonesia spiked with significant amounts of capital flowing from companies such as Zhejiang Huayou Cobalt Co and Tsingshan Group in nickel smelting and refining projects in North Maluku and Sulawesi respectively. Indonesia has also recently extended its export ban to bauxite ore. DLA Piper has leading experience in Indonesia's nickel market and associated regulations, including navigating the restriction on discounts below 3% to benchmark pricing for raw nickel ore which has material impacts on long term offtake arrangements for downstream processing projects.

In 2023, China began restricting exports of gallium and germanium, followed more recently, on December 1, with new export controls on high-grade graphite. China has justified these measures on the grounds of national security.

Zimbabwe, Namibia and Ghana have all recently introduced export bans on certain raw ores, including lithium.

2.2 International alliances

International alliances for the purposes of securing critical minerals/securing investment in critical minerals are a prolific feature of many of the Jurisdictions. The EU and the US are notably active in this space. These types of alliances help generate certain types of foreign investment, but also restrict others in order to ensure supply chain resilience and protect domestic industries. As examples:

(a) **EU**: The EU is a region without an abundance of critical minerals. Under the Critical Raw Materials Act (CRMA), the EU aims to strengthen its self-reliance by diversifying its supply chain from third-party countries so that by 2030 no single non-EU country provides more than 65% of the EU's annual consumption of each strategic raw material. To achieve this, the EU has established, and continues to build on, a network of international trade agreements and partnerships with resource-rich jurisdictions.

(b) **US**: In addition to various free trade agreements, the US has also commenced entering into bilateral critical minerals agreement (**CMA**) – one is place with Japan (covering five key minerals related to the production of electric vehicle (EV) batteries) and others under development with the EU and the UK. These CMAs are largely motivated by concerns on the part of US trading partners stemming from the IRA. The IRA includes consumer tax credits of up to USD 7,500 for new EV purchases. Eligibility for the credit is contingent on, among other things, the value and source of the EV battery components and applicable critical minerals – specifically, for eligibility for the critical minerals portion of the tax credit, the percentage of the value of the battery's critical minerals that are extracted or processed in the US or in a US free trade agreement (FTA) partner, or recycled in North America, must be at least 50% as of 2024, increasing to 80% by 2027. The CMAs are intended to qualify as FTAs, which are not defined in the IRA, for this purpose.

2.3 Cutting the red tape

A consistent theme across Jurisdictions is a desire to streamline the approval process and reduce the regulatory and administrative burden on market participants. The purpose of such regulation is to allow extractive and processing activities to be undertaken as quickly as possible following a critical mineral discovery. Notwithstanding this common objective, variances have been identified as to how the various Jurisdictions seek to achieve that objective.

In the EU, the CRMA is designed to reduce the administrative burden and simplify permitting procedures for critical raw materials projects. The CRMA also identifies strategic projects that will benefit from shorter permitting timeframes (24 months for extraction permits and 12 months for processing and recycling permits).

In Canada, the US, Australia and Zimbabwe, dedicated critical mineral offices have been established – Critical Minerals Centre of Excellence (CMCE) (Canada), Office of Critical Minerals and Metals within the Department of Commerce (US), Critical Minerals Office (Australia) and Zimbabwe Investment and Development Agency (Zimbabwe). Their purpose is to help develop policy to reduce red tape and assist proponents to navigate current regulatory systems, but it is generally acknowledged that so far limited progress has been made overall to cut red tape and streamline approval processes. It is consistently observed by DLA Piper that, in general, regulatory burden is the greatest barrier to project development. Accordingly, it is reasonable to speculate that, where both barriers to entry into a market (from an FDI perspective) but also to project development in that market are lower, that market is more likely to attract investment. Increasingly, it is observed that significant investments are being made in LATAM and African geographies whereas more developed countries have not necessarily been able to replicate so far, the success of their incumbent bulk commodity and fossil fuel industries.

3. Foreign Direct Investment Screening Regimes

COUNTRY	FDI SCREENING REGIME	HAS THE POLICY CHANGED OVER LAST 36 MONTHS IN RESPONSE TO CRITICAL MINERALS?
Australia	✓	✓
Cameroon	✗	–
Canada	✓	✓
China	✓	✓
Chile	✗	–
EU	✓	✓
Namibia	✗	–
Nigeria	✗	–
Senegal	✗	–
USA	✓	✓
Zambia	✗	–
Zimbabwe	✗	–

Specific observations:

FDI regimes exist in the US, Australia, Canada and China. These regimes are robust and sophisticated. There is a degree of similarity between US, Australian and Canadian regimes, being members of the “Five Eyes” intelligence sharing network. All have recently updated their FDI regimes to specifically recognize the national security of critical minerals and introduce additional measures that can be used to protect those interests. Australia and Canada have exercised those powers and publicly prohibited or required divestment by Chinese firms of interests in critical mineral projects. Accordingly, the historically large investment flows from China into Western nations are being observed directed towards Africa and LATAM, who are the beneficiaries of this capital.

In the People’s Republic of China (**PRC**), a security review must be conducted for any foreign investment that has or may affect national security, including minority investments, greenfield projects and in theory, offshore transactions between foreign parties resulting in a change in the ultimate foreign control of existing foreign investment in China. Investment proposals involving “important energy and resources”, understood to include critical minerals must be screened. Whilst China is generally recognized as being the world leader in the extraction and processing of various critical minerals, it has still introduced FDI measures to protect its own assets and industries.

Navigation of these FDI regimes in the critical minerals space is increasingly complex, even for ‘favored investment’, and foreign investors should expect increased scrutiny of any FDI proposal and be prepared to detail upstream ownership interests and provide a compelling rationale of why the proposed investment is not contrary to national security.

No FDI regimes exist in Chile, Cameroon, Zimbabwe, Nigeria, Namibia, Senegal, and Zambia. In these countries, foreign investment is actively sought without any explicit preference for funding from (or not from) certain jurisdictions. Notably, exploiting Chile’s salt flats requires approval from and collaboration with the Chilean government. As Australia and Canada have sought to block Chinese investment in lithium, Chile has attracted significant levels of investment. Cameroon has a local content requirement and Namibia can seek to require participant in foreign owned mining operations.

Conclusion

The ever changing regulatory landscape, as countries jostle to secure access to critical minerals or dominate the critical minerals market, poses material investment challenges, particularly where there are volatile impacts on market pricing. Understanding the international regulatory, and geopolitical landscape, requires an international team to unlock opportunities and support on unique and dynamic legal challenges. Investors that understand the market and are properly advised are well position to capitalize on opportunities, particularly where willing to adopt a long term investment horizon as all forecasts point ongoing minerals scarcity as the world’s population grows and in parallel electrifies to respond to ambitious carbon reduction targets.

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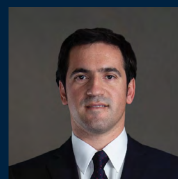

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