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HOW INVESTMENT PROTECTION IN RELATION TO MINING PROJECTS CAN ASSIST IN CONTRIBUTING TO THE ENERGY TRANSITION

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I. INTRODUCTION

Considering the overall environmental impact of mining projects will often require a delicate balancing exercise. Undoubtedly, mining activities can have an environmental and social impact on the area where they are carried out; sometimes a significant one. Mining projects increasingly face opposition from local communities and activist groups, which can translate into political pressure to refuse or cancel a project.

However, one of the greatest challenges currently facing humanity is achieving the energy transition: carbon emissions need to be cut and a transition away from fossil fuels is essential. Metals and minerals like copper, nickel, cobalt, and lithium are crucial for energy transition infrastructure, such as wiring and electrification, and the production of battery energy storage systems and electric vehicles. To meet energy transition goals, mining plays a very important role. While extracting metals and minerals has an environmental impact (which mining companies are capable of mitigating through investing in renewables as they develop, such as green hydrogen, and in more efficient technologies), significant mining is needed for the energy transition to succeed. Such is the delicate balance.

With the strategic importance of metals and minerals on the increase, geopolitical concerns sit among the chief threats to mining's role in contributing to a secure and rapid energy transition. In response to increased demand, a number of governments are engaged in re-assessing their legal frameworks for mining. They have sought to rebalance their entitlements to their resources against the entitlement of foreign investors, through adjustments to royalty allocations, changes to taxation, or, in some extreme cases, outright nationalization. Geopolitical risk complicates an investment picture for miners. It is important that miners closely assess country risk profiles and

how they affect their investment activity.

Investment treaties can help mitigate these geopolitical risks. These treaties provide substantive protections to investments and provide investors the right to seek damages from an international tribunal for a government's breach of such protection standards by way of investor-state dispute settlement (ISDS). A frequent criticism of ISDS is that it offers too much protection to investors and their investments, preventing states from enacting "green laws." As investment treaties and international arbitral practice continue to modernize, it is within the ability of states and stakeholders to frame ISDS' evolution in line with energy transition goals. But this should not mean an overly restrictive approach to the protection of mining investments. Rather, investment protection should be viewed as making a key contribution to ensuring that sufficient metals and minerals are mined in order to reach the ambitious energy transition targets set. It is through investment protection that foreign investors may gain confidence to commit to the significant, costly, and long-term investments required by society of mining projects. As miners assess country risk profiles, the availability of, and level of protection offered by, investment treaties should be high on their agenda.

Investment treaties must continue to provide adequate legal protection and maintain the international rule of law. It is important that international tribunals are vigilant in seeking to reach the correct balance between appropriate defenses and the international legal obligations of states. It is equally important that international tribunals are alive to resource nationalism or other political measures labelled as environmental defenses. Governments which face social unrest as a result of mining projects may take restrictive measures against mining projects, particularly during an election year (of which there are notably many in 2024, as national elections will be taking place in 64 countries around the world this year). Tribunals should be encouraged to think carefully about the nuanced and complex position that mining projects often are in when they are the center of a dispute with a state. Now more than ever, it is essential that the international rule of law is maintained.

By the same token, investment protection is not an insurance policy against bad business decisions, nor can it be used as a shield to excuse investor conduct which is not in compliance with domestic law. International tribunals must also carefully balance the expectations of investors engaging in long-term mining projects with states' rights to regulate in the public interest.

This article is structured as follows: section II summarizes the significant role that mining has to play in the energy transition; section III reviews the recent statistics on mining-related ISDS disputes; section IV analyzes trends in both treaty practice and international arbitral practice related to addressing environmental concerns and where they cross over with resource nationalism and the appropriate balance to be sought to be struck by international tribunals; section V summarizes what investors in the mining sector can do to ensure that their investments are protected; and section VI concludes by discussing the importance of ensuring that mining investments are entitled to investment protection.

II. MINING HAS A SIGNIFICANT ROLE TO PLAY IN THE ENERGY TRANSITION

The energy transition is a challenge to humankind. The broad term "energy transition" can be understood as the steps already taken in addition to those to be taken in the future in order to achieve net-zero emissions by 2050, in line with the objectives of the Paris Agreement to the United Nations Framework Convention on Climate Change[1] of limiting global warming to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase even further to 1.5°C.[2] This involves a shift from an energy mix based on fossil fuels to one that produces very limited, if not zero, carbon emissions, based on renewable energy sources.

Mining companies have their own individual challenge: addressing the significant increases in demand for metals and minerals required to facilitate the energy

[1] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[2] *See* Energy Transitions Commission, *Material and Resource Requirements for the Energy Transition* at 7 (July 2023), https://www.energy-transitions.org/wp-content/uploads/2023/08/ETC-Materials-Report_highres-1.pdf.

transition. In March 2023, the mining consultancy Wood Mackenzie estimated that, by 2050, nickel demand could triple, copper demand could more than double, and demand for lithium chemicals could grow 700%.[3] Materials and metals will be needed to build solar and wind farms, batteries, electrolyzers, power grids, and other clean energy technologies. For example, the International Energy Agency (IEA) noted that "[a] typical electric car requires six times the mineral inputs of a conventional car, and an onshore wind plant requires nine times more mineral resources than a gas-fired plant."[4]

The Energy Transitions Commission (ETC), an international think tank, noted that there are more than enough materials on earth to meet the demands of the energy transition, but it added that ramping up the supply fast enough to meet the 2050 targets will be challenging.[5] The ETC further noted that the total cumulative material requirements for the energy transition are estimated to be around 6.5 billion tons of end-use materials.[6]

For the mining sector, this likely will mean not only greater levels of investment, but also investment in new jurisdictions and in relation to different metals and minerals. PwC reported that, in 2022, spending on the search for critical metals and minerals such as copper, lithium and cobalt grew significantly, and that as a result of projected supply shortfalls, continued investment to discover new deposits is essential for the energy transition.[7]

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[3] Robin Griffin, Anthony Knutson, and Oliver Heathman, *The Energy Transition Will Transform the Mining Industry*, FORBES (Mar. 10, 2023), https://www.forbes.com/sites/woodmackenzie/2023/03/10/the-energy-transition-will-transform-the-mining-industry/.

[4] IEA, *The Role of Critical Minerals in Clean Energy Transitions* at 5 (Mar. 2022), *https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf*.

[5] ETC, *Material and Resource Requirements for the Energy Transition* at 10 (July 2023), https://www.energy-transitions.org/wp-content/uploads/2023/08/ETC-Materials-Report_highres-1.pdf.

[6] *Id.* at 20.

[7] PwC, *Mine 2023: The era of reinvention* at 27 (June 2023), https://www.pwc.com/gx/en/issues/tla/content/PwC-Mine-Report-2023.pdf.

For example, in February 2024, the head of the International Seabed Authority expressed the view that "[d]eep-sea mining is likely just a matter of time."[8] Notably, on January 9, 2024, Norway's parliament approved seabed mining exploration in Norway's territorial waters, being the first state to formally authorize seabed mining activities in its territorial waters.[9]

The same is true on land: several states are currently lacking significant mining activities but have the potential to be significant future contributors in the energy transition due to their mineral resources. Guinea-Bissau has a relatively small mining industry, but it has the potential to grow because the country has untapped reserves of phosphates, bauxite, and industrial materials, among other metals and minerals.[10] The mining industry in Mali is dominated by gold, but it also holds significant deposits of lithium, which likely will be explored and developed in the coming years.[11] Both Finland and Portugal have significant, mostly unexplored, potential for lithium.[12] In January 2022, the government of Serbia, which does not produce lithium, cancelled the spatial plan for the Jadar lithium-borates project and revoked the licenses held by Rio Tinto related to the proposed project.[13] As mining investors move into new states and start taking on bigger, riskier projects, it is essential that they are able to do so

[8] *Deep-sea mining may be inevitable, says UN regulator*, MINING (Feb. 19, 2024), https://www.mining.com/deep-sea-mining-seems-to-be-inevitable-un-regulator/.

[9] *Id.*

[10] *IGF Welcomes Guinea Bissau as a New Member*, INTERGOVERNMENTAL FORUM ON MINING, MINERALS, METALS AND SUSTAINABLE DEVELOPMENT (Dec. 19, 2023), https://www.igfmining.org/announcement/guinea-bissau-new-member/#:~:text=Guinea%20Bissau's%20mining%20sector%20is,Africa%2C%20an%20important%20mining%20region.

[11] *Mali – Country Commercial Guide*, INTERNATIONAL TRADE ADMINISTRATION (Aug. 8, 2022), https://www.trade.gov/country-commercial-guides/mali-mining.

[12] *See* Filipa Soares, *Portugal Wants to Exploit its Lithium Reserves. But at What Cost to the Environment?*, EURONEWS (June 9, 2023), https://www.euronews.com/2023/06/09/portugal-wants-to-exploit-its-lithium-reserves-but-at-what-cost-to-the-environment; Pekka Vanttinen, *European lithium rush may start from Finland*, EURACTIV (Nov. 18, 2020), https://www.euractiv.com/section/politics/short_news/european-lithium-rush-may-start-from-finland/.

[13] *Jadar Project update*, RIOTINTO, https://www.riotinto.com/en/operations/projects/jadar (last accessed Mar. 28, 2024).

with some level of investment protection available.

III. Investment Disputes Involving Mining Projects are on the Rise

ISDS traditionally has been primarily used by the extractive industries. While ISDS has significantly diversified in recent years, its use by the extractive industries is unsurprising: projects are complex, long-term, capital intensive, highly regulated, and often politically sensitive.

Recent trends suggest that the number of ISDS cases related to mining projects are on the rise. While the existence of certain ISDS cases may be unknown, cases before the International Centre for Settlement of Investment Disputes (ICSID) in the mining sector (excluding oil and gas) increased from 0% of ICSID cases brought in 2017 to 20% in 2020.[14]

Taking Africa as an example, an empirical study of ICSID's caseload reveals that more than 15% of the cases brought against African states have related to mining disputes—a total of 32 cases. Over one-third of those cases have been brought since 2020.[15]

There also is a broad geographic spread of ISDS cases in relation to mining projects. Since 2020, cases have been brought against Kyrgyzstan, Ecuador, Mali, the Democratic Republic of Congo, Republic of Congo, Colombia, Mauritania, Tanzania,

[14] *See* Odyssey Marine Exploration, Inc. v. Mexico, ICSID Case No. UNCT/20/1; Barrick (Niugini) Ltd. v. Papua New Guinea, ICSID Case No. CONC/20/1; Freeport-McMoRan Inc. v. Peru, ICSID Case No. ARB/20/8; South32 SA Invs. Ltd. v. Colombia, ICSID Case No. ARB/20/9; SMM Cerro Verde Netherlands B.V. v. Peru, ICSID Case No. ARB/20/14; Kansanshi Mining Plc v. Zambia, ICSID Case No. ARB/20/17; Winshear Gold Corp. v. Tanzania, ICSID Case No. ARB/20/25; Barrick (PD) Australia Pty Ltd. v. Papua New Guinea, ICSID Case No. ARB/20/27; Nachingwea U.K. Ltd. v. Tanzania, ICSID Case No. ARB/20/38; Eni Int'l B.V. v. Nigeria, ICSID Case No. ARB/20/41; Lupaka Gold Corp. v. Peru, ICSID Case No. ARB/20/46.

[15] There have been 11 cases commenced against African states in the mining sector since 2020: Kansanshi Mining Plc v. Zambia, ICSID Case No. ARB/20/17; Winshear Gold Corp. v. Tanzania, ICSID Case No. ARB/20/25; Nachingwea U.K. Ltd. v. Tanzania, ICSID Case No. ARB/20/38; Montero Mining and Exploration Ltd. v. Tanzania, ICSID Case No. ARB/21/6; Mauritanian Copper Mines S.A. v. Mauritius, ICSID Case No. ARB/21/9; Menankoto SARL v. Mali, ICSID Case No. ARB/21/38; EEPL Holdings v. Republic of Congo, ICSID Case No. ARB/21/53; Congo Mining Ltd. SARLU v. Republic of the Congo, ICSID Case No. ARB/21/58; AGEM Ltd v. Mali, ICSID Case No. ARB/21/62; AVZ Int'l Pty Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/23/20; Pathfinder Minerals PLC v. Mozambique, ICSID Case No. ARB/24/4.

Peru, Papua New Guinea, Slovenia, Zambia, Mexico, Venezuela, China, Mongolia, China, and Mozambique.[16]

As mining projects continues to adopt a more central role in the energy transition, and as tensions between mining for the energy transition and the environmental impact of mining activities appears to increase, it would seem clear that ISDS will continue to play an increasingly important role in resolving disputes between mining companies and states. Similarly, in times of economic difficulties, paired with increased demand for materials, the risk that states will adopt nationalistic and protectionist policies in relation to their natural resources increases. In such circumstances, so too does the risk that those measures will result in ISDS disputes.

IV. TRENDS IN INVESTMENT TREATIES AND INTERNATIONAL ARBITRAL PRACTICE ADDRESSING ENVIRONMENTAL CONCERNS

States in increasing numbers have recently been making greater international commitments to meet their climate change goals and reinforce environmental protection. This has given rise to questions about whether investment treaties do enough to allow states to regulate in the public interest.

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[16] *See* International Mining Co. Invest, Inc. v. Kyrgyz Republic, ICSID Case No. ARB/22/25; Corporación Nacional del Cobre de Chile v. Ecuador, ICSID Case No. ARB/22/3; Menankoto SARL v. Mali, ICSID Case No. ARB/21/38; AGEM Ltd v. Mali; ICSID Case No. ARB/21/62; AVZ Int'l Pty Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/23/20; World Natural Resources Ltd. v. Republic of Congo, ICSID Case No. ARB/21/24; EEPL Holdings v. Republic of Congo, ICSID Case No. ARB/21/53; Congo Mining Ltd. SARLU v. Republic of Congo, ICSID Case No. ARB/21/58; South32 SA Invs. Ltd. v. Republic of Colombia, ICSID Case No. ARB/20/9; Glencore Int'l A.G. v. Colombia, ICSID Case No. ARB/21/30; Anglo American plc v. Colombia, ICSID Case No. ARB/21/31; Glencore Int'l A.G. v. Colombia, ICSID Case No. ARB/23/50; Mauritanian Copper Mines S.A. v. Mauritius, ICSID Case No. ARB/21/9; Winshear Gold Corp. v. Tanzania, ICSID Case No. ARB/20/25; Nachingwea U.K. Ltd. v. Tanzania, ICSID Case No. ARB/20/38; Montero Mining and Exploration Ltd. v. Tanzania, ICSID Case No. ARB/21/6; Freeport-McMoRan Inc. v. Peru, ICSID Case No. ARB/20/8; SMM Cerro Verde Netherlands B.V. v. Peru, ICSID Case No. ARB/20/14; Lupaka Gold Corp. v. Peru, ICSID Case No. ARB/20/46; Barrick (PD) Australia Pty Ltd. v. Papua New Guinea, ICSID Case No. ARB/20/27; Towra SA-SPF v. Slovenia, ICSID Case No. ARB/22/33; Kansanshi Mining Plc v. Zambia, ICSID Case No. ARB/20/17; Odyssey Marine Exploration, Inc. v. Mexico, ICSID Case No. UNCT/20/1; First Majestic Silver Corp. v. Mexico, ICSID Case No. ARB/21/14; Coeur Mining, Inc. v. Mexico, ICSID Case No. UNCT/22/1; Goldgroup Resources, Inc. v. Mexico, ICSID Case No. ARB/23/4; Silver Bull Resources, Inc. v. Mexico, ICSID Case No. ARB/23/24; First Majestic Silver Corp. v. Mexico, ICSID Case No. ARB/23/28; Highbury Int'l AVV v. Venezuela (III), ICSID Case No. ARB/23/27; Westmoreland Mining Holdings, LLC v. Canada, ICSID Case No. UNCT/20/3; Westmoreland Coal Co. v. Canada, ICSID Case No. UNCT/23/2; WM Mining Co. v. Mongolia, ICSID Case No. ARB/21/8; AsiaPhos Ltd. v. China, ICSID Case No. ADM/21/1; Pathfinder Minerals PLC v. Mozambique, ICSID Case No. ARB/24/4.

These questions have on occasion been aired in leading newspapers. Kaufmann-Kohler and Potestà noted in 2016 that mainstream media coverage of ISDS has been known to use terms such as "'obscure tribunals', 'secret trade courts', entailing a 'real threat to the national interest from the rich and powerful'."[17] This kind of reporting remains prevalent today, with particular reference to ISDS's tension with environmental measures, engendering assertions that ISDS is a tool for "fossil fuel firms . . . to hold the planet to ransom."[18] Kaufmann-Kohler and Potestà's 2016 conclusion that "[w]hereas the relevance, accuracy and possible consequences of this criticism are highly disputed, it is undeniable that, nowadays, investment arbitration is largely perceived as lacking legitimacy"[19] is pertinent today in the context of ISDS disputes concerning the effects of state environmental policies relating to mining projects.

Both recent treaty practice and international arbitral practice provide an insight into how investment protection and environmental protection may co-exist and into tensions between the two.

A. *Recent Developments in Treaty Practice*

In April 2022, Working Group III of the Intergovernmental Panel on Climate Change (IPCC) issued a report that highlighted the risks posed by ISDS to climate change mitigation efforts.[20] It noted that various suggestions have been put forward to accommodate climate change concerns in investment treaties, such as "reform of investor-state dispute settlement under the UN Commission on International Trade

[17] Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?* at 9-10 ¶ 17 (June 3, 2016), https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf.

[18] Arthur Nelson, '*Litigation terrorism*': *the obscure tool that corporations are using against green laws*, THE GUARDIAN (Feb. 12, 2024), https://www.theguardian.com/environment/2024/feb/12/litigation-terrorism-how-corporations-are-winning-billions-from-governments.

[19] *See* Kaufmann-Kohler and Potestà, *supra* note 17, at 10 ¶ 17.

[20] IPCC, *Climate Change 2022: Mitigation of Climate Change* (2022), https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf.

Law; modernisation of the Energy Charter Treaty; the (re)negotiation of international investment agreements; and the adoption of a specific treaty to promote investment in climate action."[21]

There also are examples of governments suggesting that the threat of ISDS cases creates regulatory chill. For example, in January 2022, New Zealand's climate change minister suggested that the New Zealand government had sought to slow down the pace of its phase-out of fossil fuels to reduce the likelihood of ISDS claims arising out of existing projects that may be affected by any planned phase-out.[22]

Some state responses to the alleged threat of regulatory chill caused by investment treaties to environmental regulation have recently led to a slew of treaty withdrawals. A series of states, comprising (at the time of writing) 11 European Union (EU) Member States and the UK, have in the past year announced their withdrawal from the Energy Charter Treaty (ECT).[23] These withdrawals were announced in the context of negotiations to modernize the text of the ECT. The proposed modernized text aimed to have a stronger focus on promoting renewable energy, including through a carve-out of fossil fuels from the protection of the ECT after the revisions had been in force for 10 years.[24] Additional wording was added to the preamble and throughout the text of the proposed modernized ECT to reiterate and strengthen the right of Contracting Parties to regulate within their territories.[25] The proposed modernized text received agreement in principle before the numerous withdrawals of Contracting Parties.

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[21] *Id.* at 1501 (internal citations omitted).

[22] Elizabeth Meager, *Cop26 Targets Pushed Back Under Threat of Being Sued*, CAPITAL MONITOR (Jan. 14, 2022), https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/.

[23] This does not include Italy: its withdrawal from the ECT became effective in 2016. *See* Letter from the Italian Director of the Department of Legal Affairs to the Secretary-General of the Energy Charter Secretariat (Feb. 5, 2015).

[24] Energy Charter Secretariat, *Decision of the Energy Charter Conference* at [3] (June 24, 2022), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

[25] *Id.* at [5].

On July 7, 2023, the European Commission (EC) published a proposal for a European Council decision on the withdrawal of the EU (which itself is a Contracting Party to the ECT) from the ECT.[26] The European Parliament noted that:

> Due to many concerns over the protection of fossil fuel investments and amid the lack of prospects for change, several countries have announced their intention to withdraw unilaterally. France, Germany and Poland are due to leave the ECT by the end of 2023 and Luxembourg by mid-2024. Additionally, the Netherlands, Slovenia, Spain and, more recently, Denmark, Ireland and Portugal have announced their intention to leave unilaterally.[27]

On March 1, 2024, the EC published two proposals for European Council decisions, recommending that the EU and its Member States should not block the adoption of the modernized ECT. The EC opined that the proposed modernized text is an improvement as compared to the current text, but equally cautioned that EU Member States (that have not done so already) must withdraw from the ECT within a reasonable time after the EU's and Euratom's own withdrawals unless a special authorization is obtained from the EU to remain.[28] Then, on March 24, 2024, the EC elaborated on its "three-pillared plan" concerning the ECT.[29] This would involve first: a majority of EU Member States leaving the ECT; second, the adoption of a modernized text of the ECT; and third, certain EU Member States opting out of the

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[26] Monika Dulian, *EU withdrawal from the Energy Charter Treaty*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Dec. 2023), https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf.

[27] *Id.* On February 26, 2022, the ECT Secretariat disclosed that the treaty's depositary, Portugal, had informed the Secretariat of Slovenia's October 13, 2023, written notification of withdrawal, meaning that Slovenia's withdrawal will take effect from October 14, 2024. Letter from the Portuguese Director of the Department of Legal Affairs to the Secretary-General of the Energy Charter Secretariat (Oct. 13, 2023), https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2023.10.13_-_Withdrawal_notification_Slovenia.pdf.

[28] *See Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Energy Charter Conference*, COM (2024) 104 (Mar. 1, 2024); *Proposal for a Council Decision on the position to be taken on behalf of Euratom in the Energy Charter Conference*, COM (2024) 105 final (Mar. 1, 2024).

[29] Toby Fisher, *European Commission explains plan for ECT withdrawal*, GLOBAL ARBITRATION REVIEW (Mar. 28, 2024), https://globalarbitrationreview.com/article/european-commission-explains-plan-ect-withdrawal.

bloc-wide withdrawal, thus remaining party to the modernized text of the ECT, if adopted.[30] The European Parliament is expected to vote on the "three-pillared plan" in May 2024.[31]

Further, on February 22, 2024, the Government of the United Kingdom announced that "[t]he UK will leave the Energy Charter Treaty (ECT) after the failure of efforts to align it with net zero[.]"[32] During the protracted negotiations to seek to modernize the ECT, the UK strongly advocated for a modernized text. However, the recent withdrawals from the ECT and the European Parliament elections in 2024 meant, in the view of the UK Government, that modernization could now be delayed indefinitely.[33] This conclusion would now seem to have been somewhat hasty given the EC's apparent renewed commitment to agreeing to a modernized text through its "three-pillared plan" described above. If adopted, the modernized text of the ECT could be seen as an investment treaty that sought to build in "green" protections for states.

Other attempts to seek to safeguard environmental protections within investment treaties without withdrawing from them entirely have had more success. In August 2022, the European Commission and Germany prepared a draft interpretative statement which aimed to clarify certain aspects of the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA)'s investment chapter.[34] This interpretative statement sought to provide "a more precise definition of the concepts of 'indirect expropriation' and 'fair and equitable treatment'" with the aim

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[30] *Id.*

[31] *Id.*

[32] Press Release, Department for Energy Security and Net Zero, *UK departs Energy Charter Treaty*, GOV.UK (Feb. 22, 2024), https://www.gov.uk/government/news/uk-departs-energy-charter-treaty#:~:text=Signed%20in%201994%2C%20the%20Energy,for%20investors%20in%20fossil%20fuels.

[33] Press Release, Department for Energy Security and Net Zero, *UK departs Energy Charter Treaty*, GOV.UK (Feb. 22, 2024), https://www.gov.uk/government/news/uk-departs-energy-charter-treaty#:~:text=Signed%20in%201994%2C%20the%20Energy,for%20investors%20in%20fossil%20fuels.

[34] European Commission Statement 22/5223, Statement from the Commission on the clarifications discussed with Germany regarding investment protection in the context of the CETA Agreement (Aug. 29, 2022).

of ensuring that "the parties can regulate in the framework of climate, energy and health policies, inter alia, to achieve legitimate public objectives, while at the same time preventing the misuse of the investor to State dispute settlement mechanism by investors."[35] On February 9, 2024, the CETA parties announced that the interpretative statement had been approved in substance and committed to the timely final adoption through the Joint Committee by written procedure once the linguistic review of all authentic languages under CETA has been completed.[36]

Other investment treaties have sought to safeguard policy space for climate initiatives through the inclusion of exception provisions based on Article XX of the World Trade Organization's General Agreement on Tariffs and Trade 1994 and Article XIV of the General Agreement on Trade in Services, which provide that the relevant agreements "shall not prevent the adoption or enforcement" of any measure taken for a range of public purposes, including those related to environmental protection, subject to a *chapeau* requiring that the measures must not "constitute a means of arbitrary or unjustifiable discrimination" or be a "disguised restriction" on international trade.[37]

Environmental carve-outs may seem a compelling approach in theory, but they must be approached carefully. While the focus of these carve-outs tends to be in relation to measures taken to restrict or phase-out fossil fuel expansion, if carve-outs end up being drafted too broadly, states could also attempt to use them to excuse political measures taken against a mining project that is providing much needed metals and minerals for the energy transition. Indeed, general carve-outs relating to

[35] *Id.*

[36] Directorate-General for Trade, *Joint Statement: Sustainable economic growth in the EU and Canada through the Comprehensive Economic and Trade Agreement*, EUROPEAN COMMISSION (Feb. 9, 2024), https://policy.trade.ec.europa.eu/news/joint-statement-sustainable-economic-growth-eu-and-canada-through-comprehensive-economic-and-trade-2024-02-09_en.

[37] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994); General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

environmental policy through new treaties or issuing interpretative statements, or even renegotiating existing treaties have been criticized for a number of reasons, not least because of their potential for being relied upon by states in response to investor claims.[38] They also may seek to withdraw rights for investors that have, in some cases, existed for decades.[39]

Further, the protection of legitimate expectations and compensation for expropriation frequently does not threaten the environment itself but only the budget of a state. The protections in investment treaties do not prevent states from taking environmental measures; they only create an obligation to pay damages if those measures unlawfully interfere with investments of investors. In such circumstances, a carve-out could be described as a method by which a state seeks to guard itself against paying damages rather than against regulatory chill.

B. *Balancing Environmental Defenses with Claims of Investors in International Arbitral Practice*

International tribunals rightly regularly recognize that states have the right and the responsibility to raise concerns relating to environmental issues connected with mining projects, but also that they must still act in accordance with their international legal obligations. Mining companies have a legal and social responsibility to act in accordance with environmental laws and regulations. However, there have been examples in international arbitral practice where environmental defenses have been considered insufficient to justify a state's conduct in relation to its international legal obligations vis-à-vis foreign investments in mining projects.

In *Gold Reserve Inc. v. Venezuela*,[40] Venezuela had granted two concessions, which eventually came to be owned by Gold Reserve, for the extraction of gold, copper, and molybdenum. Among various disputed measures before the tribunal was a revocation

[38] *See*, *e.g.*, Simon Lester and Bryan Mercurio, *Safeguarding Policy Space in Investment Agreements* at 7 (2017), https://www.cato.org/sites/cato.org/files/articles/lester-mercurio-iiel-issue-brief-december-2017.pdf.

[39] *Id.*

[40] Gold Reserve Inc v. Venezuela, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014).

order that declared the "absolute nullity" of the construction permit for one of the concessions and revoking it for "reasons of public order."[41] This revocation order referred to the "fundamental duty of the Venezuelan State to guarantee the protection of the environment and populations confronted with situations that constitute a threat to, make vulnerable, or risk the people's physical integrity, as well as involve imminent damage to the environment."[42]

Venezuela argued that the project raised critical environmental issues, since it was to be located in the environmentally fragile Imataca Forest Reserve, which was subject to a special management plan to not degrade the environment and to preserve the rights of indigenous peoples.[43] As such, Venezuela argued that the revocation order did not frustrate Gold Reserve's legitimate expectations because it was founded on the relevant ministry's authority to revoke annual permits that were contrary to Venezuelan environmental laws and the constitutional obligation to protect the environment.[44]

The tribunal acknowledged that "a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted."[45] However, the tribunal found that "this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions."[46] The tribunal did not underestimate Venezuela's "concerns regarding environmental protection," but it noted that none of the claimed grounds of concern raised by Venezuela in the arbitration had in fact been mentioned in the revocation order and, in any case, that "the better course of action for addressing any growing concerns

[41] *Id.* ¶ 24.

[42] *Id.* ¶ 593.

[43] *Id.*

[44] *Id.* ¶ 557.

[45] *Id.* ¶ 595.

[46] *Id.*

would have been to examine with [Gold Reserve] how best to proceed to alleviate the same."[47] The tribunal also noted that the Government stated publicly that it "would favour national interest over foreign companies in the mining sector and that the State was 'taking control' to 'save and appropriate what is ours.'"[48]

Similarly, in *Crystallex International Corp. v. Venezuela*,[49] the claimant owned a subsidiary that had purchased gold mining concessions in areas called "Las Cristinas."[50] In April 2008, the claimant's request for an environmental permit was denied (April 2008 Letter), which led to the recission of the mining contract in February 2011.[51] Venezuela argued that the denial of the environmental permit was due to concerns for the environment and the indigenous people of the Imataca Forest Reserve.[52]

The tribunal considered that, up to May 2006, Crystallex was overall treated in a straightforward manner and had a legitimate expectation that it had fulfilled all the relevant conditions required for the environmental permit.[53] However, the denial of the environmental permit, in the eyes of the tribunal, "manifested a complete volte-face to the previous course," and the April 2008 Letter as a result warranted "closer scrutiny."[54] The April 2008 Letter, which extended "to a mere two and a half pages," purported to set out the alleged reasons for denying the environmental permit.[55] It referred to serious environmental effects of the project on the local environment.[56]

The tribunal recognized that there is "no question that Venezuela had the right

[47] *Id.* ¶ 598.

[48] *Id.* ¶ 599.

[49] Crystallex Int'l Corp. v. Venezuela, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).

[50] *Id.* ¶ 6.

[51] *Id.* ¶ 7.

[52] *Id.* ¶ 590.

[53] *Id.* ¶ 588.

[54] *Id.* ¶ 589.

[55] *Id.* ¶ 590.

[56] *Id.*

(and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues."[57] However, the tribunal considered that the way that Venezuela put forward these purported concerns "present[ed] significant elements of arbitrariness and evidences a lack of transparency and consistency."[58] For example, concerns related to global warming "had not been raised a single time in the innumerable occasions of exchanges occurred between the Claimant and the Venezuelan authorities throughout the 4-year review process."[59] There also was "nothing in the administrative file relating to any analysis of the issue of global warming or carbon emissions in relation to the Las Cristinas project."[60] The tribunal thus found that Venezuela's raising of this issue after the fact to justify denying the environmental permit was a "clear example of arbitrary and unfair conduct."[61] Equally, the tribunal noted that there was no scientific data to justify the conclusion in the April 2008 Letter and that it was followed by increasing political hostility towards Crystallex.[62]

In *Bear Creek Mining Corp. v. Peru*,[63] the claimant held rights under a concession agreement to operate the Santa Ana silver mining site in Peru.[64] On June 24, 2011, Peru adopted a decree that revoked the claimant's concession to operate the Santa Ana project, resulting in a complete cessation of activities.[65] The decree was issued following significant and violent protests at the mine regarding the negative impact of mining and calling for the cancellation of the project.[66] The decree made specific

[57] *Id.* ¶ 591.

[58] *Id.*

[59] *Id.* ¶ 592.

[60] *Id.*

[61] *Id.*

[62] *Id.* ¶ 594 *et seq*.

[63] Bear Creek Mining Corp. v. Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017).

[64] *Id.* ¶ 1.

[65] *Id.* ¶ 202.

[66] *Id.* ¶ 173.

reference to the fact that executive power had been exercised for the purpose of safeguarding the environmental and social conditions in the relevant area.[67]

The tribunal considered that, prior to issuing the decree, the Peruvian authorities had considered the claimant's project to be lawful, supported the project, and even publicly declared that social unrest was not sufficient reason for revocation of the concession as a matter of Peruvian law.[68] Further, while the tribunal acknowledged that the concept of a "social license" to operate a mining project was "not clearly defined" as a matter of international law, it held that the concept at least involved outreach to local communities to gain support for mining projects, such as the Santa Ana project.[69] The tribunal also found that although the claimant could have done more in terms of outreach, the key point was that Peru had approved of the outreach program and so it could not justify revoking the concession on that basis.[70]

The tribunal also considered whether social unrest justified Peru's conduct.[71] The tribunal appreciated that, while it is politically plausible for a government to take action it hopes will resolve social unrest, the issues for the tribunal to resolve were whether the unrest was caused by, or could be attributed to, the claimant (such that Peru's international responsibility could be excluded or reduced based on the claimant's omission or fault) and whether Peru's action depriving the claimant of its rights was legally justified.[72]

This exemplifies the balancing act required of tribunals when assessing states' defenses to claims brought by investors in the mining sector. Investment arbitration is not an insurance policy against bad business decisions, and it cannot and should not be used as a means of excusing investor illegality. States have a right to regulate

[67] *Id.* ¶ 388.

[68] *Id.* ¶ 379.

[69] *Id.* ¶ 406.

[70] *Id.* ¶ 407 *et seq.*

[71] *Id.* ¶ 400 *et seq.*

[72] *Id.* ¶ 401.

and, where protection of the environment is concerned, it is important that states are able to regulate in the public interest. However, the above cases demonstrate that the right to regulate is not unlimited, and that state justifications for certain conduct must be properly supported with evidence. This entrusts international tribunals with an important duty in cases which may have significant consequences for ensuring that sufficient materials are extracted for the energy transition.

C. *In Order to Assist Mining in Contributing to the Energy Transition, Vigilance is Required in Both Treaty and International Arbitral Practice*

These examples of both treaty and international arbitral practice raise two important points surrounding the ability of ISDS to assist mining in continuing to contribute to the energy transition. First, it is within the gift of states and stakeholders to frame ISDS's evolution in line with energy transition goals. But this should not mean an overly restrictive approach to the protection of mining investments. It is possible to balance the ability for states to regulate in the public interest with the effective protection of genuine investments.

As noted above, environmental carve-outs need to be well-drafted to ensure that they are not relied upon by states to harm foreign investment through arbitrary or discriminatory measures. Poorly drafted carve-outs may risk otherwise viable and necessary projects being interfered with, affecting the security of supply of critical metals and minerals.

While many of the Contracting Parties to the ECT have suggested that their withdrawal was due to the fact that the proposed modernized text was not "green" enough, there has been no real commentary as to what could or should have been added to make the text "greener", or why there were no attempts to seek agreement on such a text. This suggests, as noted above, that environmental concerns over the proposed modernized text may have been a convenient escape route in circumstances where EU Member States have been subject to significant adverse awards in recent years. For example, Spain alone has outstanding ECT awards

totaling at least EUR 1.2 billion.[73]

Second, the examples of international arbitral practice set out above show that tribunals need to be vigilant to resource nationalism labelled as environmental defenses. In each of the examples set out above, the state sought to hide behind environmental justifications for conduct that, in fact, was better described as resource nationalism or due to political pressure. Of course, states may well have genuine defenses that their conduct was taken in the public interest with the protection of the environment the central aim. The key is for tribunals to closely scrutinize the evidential record.

Tribunals need to take environmental concerns seriously while maintaining the international rule of law. As mining becomes of greater strategic importance, it is likely that certain states may seek to adopt measures to secure a greater share of resources than investors legitimately expected. Such conduct risks a shortage of supply that can in turn affect the energy transition.

V. WHAT CAN INVESTORS IN THE MINING SECTOR DO TO ENSURE THAT THEIR INVESTMENTS ARE PROTECTED?

Investors in the mining sector can reduce the risk of investing abroad by ensuring that their investments benefit from the protections contained in investment treaties. Investors would be well-advised to seek to structure their investments in order that the ownership structure of the investment includes an entity incorporated in a state with an investment treaty in force with the host state of the investment. This need not be direct ownership. Many investment treaties cover indirect shareholders.[74] International arbitral practice confirms that where investment treaties contain broad

[73] Nikos Lavranos, *REPORT on Compliance with Investment Treaty Arbitration Awards* at 3 (2d ed. Oct. 2023), https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf.

[74] David Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 2014/03, at 18 (2014), https://www.oecd.org/investment/investment-policy/WP-2014-3.pdf; *see*, *e.g.*, Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments art. I(b), Oct. 3, 1991 (defining investment as "shares . . . including minority or indirect participation in a company or business enterprise").

asset-based definitions of "investment" (as most do), unless indirect shareholdings are specifically excluded from the definition of "investment", they will be covered.[75] Such structuring may take place either at the start of the investment or after the investment has been made, subject to the fact that any dispute with the state must not have commenced or become foreseeable.[76]

In the event of a dispute with a state, investment treaties will often require a mandatory period following notification of a dispute for the parties to seek to engage in negotiations. The availability of protections under an investment treaty may be a valuable tool for mining investors to rely on in the course of negotiations with a government, in particular where the relevant investor does not possess significant political capital in a particular jurisdiction or where a government is broadly supportive of a project but is being subjected to political pressure.

VI. CONCLUSION: ENSURING THAT MINING INVESTMENTS ARE ENTITLED TO INVESTMENT PROTECTION

The above demonstrates the important role that ISDS in relation to mining projects has to play in contributing to the energy transition. In particular when resource nationalism is a key issue, ISDS fosters neutrality in a manner that domestic legal systems may not. As Prof. Schill commented, ISDS has positively contributed to the promotion of the international rule of law and the investment treaties' aim of establishing institutions necessary for the functioning of the global market, promising "increased foreign investment flows, economic growth, and development in both capital-importing and capital-exporting countries."[77]

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[75] *See* Indian Metals & Ferro Alloys Ltd. v. Indonesia, PCA Case No. 2015-40, Final Award, ¶ 179 (Mar. 29, 2019); Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 137 (Aug. 3, 2004); Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 123-24 (July 6, 2007); Venezuela Holdings, B.V. v. Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 165 (June 10, 2010); Cemex Caracas Invs. BV v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 151-53, 156-57 (Dec. 30, 2010); Guaracachi Am., Inc. v. Bolivia, PCA Case No. 2011-17, Award, ¶¶ 352-56 (Jan. 31, 2014); Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 111 (June 19, 2009).

[76] *See* Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 554 (Dec. 17, 2015).

[77] Stephan Schill, *Enhancing the Legitimacy of International Investment Law: Conceptual and*

As states scramble to obtain sufficient materials for their own energy transitions, ISDS can contribute to a depoliticization of disputes and reduce the risk that they escalate into inter-state conflicts, particularly if there is to be a shortage of supply of critical metals and minerals.[78] Prof. Kriebaum notes that "the number of inter-State conflicts in the context of investment disputes has decreased substantially since the introduction of investment arbitration."[79]

In addition to being important that investors in the mining sector avail themselves of the protections available in investment treaties, it is equally important that states seek to ensure that those protections remain and are not unduly narrowed or excluded in future treaty practice and that tribunals are vigilant to environmental defenses and their overall justifications for state conduct. A failure to appropriately balance the right of states to take environmental measures in relation to the individual impact of mining projects and the need for those projects to extract the metals and minerals needed for the energy transition could result in states taking measures against those projects without any consequences. ISDS should take environmental concerns in particular seriously and should not be about creating regulatory chill but rather a chilling effect against measures taken discriminatorily, arbitrarily, or otherwise contrary to the international rule of law.

Methodological Foundations of a New Public Law Approach, 52(1) VA. J. INT'L L. 57, 62 (2011).

[78] *See* Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1(1) ICSID REV. 1, 4 (1986); Thomas Wälde, *The Specific Nature of Investment Arbitration*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 70 (Philippe Kahn & Thomas Wälde eds., 2007); Christoph Schreuer, *Do we need Investment Arbitration?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 879, 880 (Jean Kalicki & Anna Joubin-Bret eds., 2015); Christoph Schreuer, *Investment Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 295, 296 (Cesare Romano, Karen Alter, & Yuval Shany eds., 2013); Ursula Kriebaum, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, 33 ICSID REV. 14, 15 (2018).

[79] Kriebaum, *supra* note 78, at 26.

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