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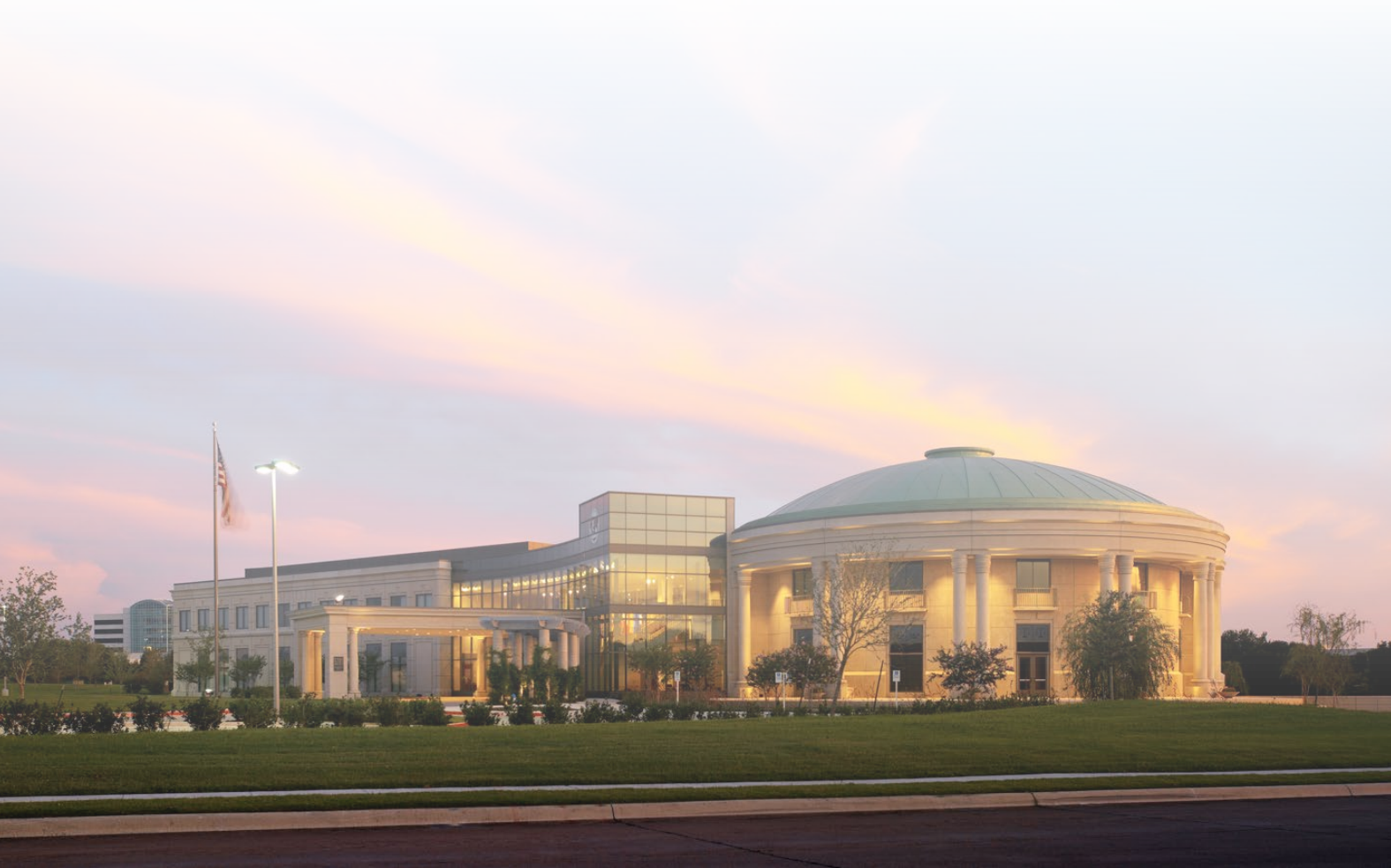

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TABLE OF CONTENTS

ARTICLES

HOW INVESTMENT PROTECTION IN RELATION TO MINING PROJECTS CAN ASSIST IN CONTRIBUTING TO THE ENERGY TRANSITION	*Markus Burgstaller & Scott Macpherson*	1
CHINESE PARTICIPATION IN THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM	*Rafael T. Boza & D. Carolina Plaza*	23
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR) PROCEDURES: A CLOSER LOOK AT SOME OF THE FUNDAMENTAL ARBITRATION RULES	*Ekaterina Long*	35
IBA GUIDELINES ON CONFLICTS OF INTEREST: THE 2024 REFORM AND ITS IMPACT ON INVESTORS	*Lorenzo Poggi*	42

How Investment Protection in Relation to Mining Projects can Assist in Contributing to the Energy Transition

by Markus Burgstaller & Scott Macpherson

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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CHINESE PARTICIPATION IN THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM

by Rafael T. Boza & D. Carolina Plaza

I. INTRODUCTION

As the global economy grows, international trade and investments across the world increase.[1] This has generated the proliferation of international investment agreements (IIAs), such as bilateral investments treaties (BITs), free trade agreements (FTAs), and multilateral investment treaties, to protect the rights of investors. With the protections given under IIAs, international disputes between foreign investors and states have also risen.[2]

The People's Republic of China has become a prominent player in the global economy, attracting substantial foreign direct investment (FDI) and emerging as a significant source of "outward direct investment."[3] Notably, foreign direct investment from China reached nearly 2.8 trillion US Dollars in 2022.[4] Further, China has a significant network of BITs protecting foreign investments. According to the United Nations Conference on Trade and Development (UNCTAD), China has 107 BITs in force as of 2021.[5]

Despite this, China's involvement in the investor-state dispute settlement (ISDS)

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[1] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: Investor-State*, 11 (2003), https://unctad.org/system/files/official-document/iteiit30_en.pdf.

[2] *See* International Centre for Settlement of Investment Disputes (ICSID), THE ICSID CASELOAD-STATISTICS, Issue 2024-1 at 4 (2024), https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf [hereinafter ICSID CASELOAD-STATISTICS] (Between 1972 to 1992, 28 cases were registered in the ICSID; from 1993 to 2012, 391 cases where registered; and from 2013 to 2023, 548 cases were registered.).

[3] Norah Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31 ICSID REV. 88, 88 (2016).

[4] *Foreign Direct Investment (FDI) from China-Statistics & Facts*, STATISTA (2024), https://www.statista.com/topics/5290/foreign-direct-investment-from-china/#topicOverview.

[5] UNCTAD, *IIAs by Economy*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed May 19, 2024).

system has been relatively limited. China remarkedly has not been involved in many ISDS cases, neither as claimant, through Chinese investors, nor as a respondent state. Since 2007, Chinese nationals have initiated only 13[6] cases before the International Centre for Settlement of Investments Disputes (ICSID) and China has been named as respondent in only 6 ICSID cases.[7] China likewise has had only a handful of cases before the Permanent Court of Arbitration (PCA), and we identified four involving Chinese claimants and two with China as respondent.[8] Compare this to the overall ICSID case load in the same period (since 2007) of 745 cases.[9] In this article, we briefly explore China's participation in the ISDS system, highlighting the arguments made by Chinese nationals as investors and by China as a respondent state, and evaluate three cases that we consider noteworthy.

II. ALLEGATIONS OF CHINESE INVESTORS AS CLAIMANTS

A. *Statistics: Chinese Investors as Claimants in Comparison with the Total Cases*

As stated, China's participation in the ISDS system has been relatively limited. The overall ICSID case load since 2007 is 745 cases, out of which only 13 cases were brought by Chinese investors.[10] This means that these cases represent only 1.7% of all ICSID cases. Moreover, out of the 140 PCA cases,[11] only 4 were brought by Chinese investors, constituting 2.8% of all PCA cases.[12]

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[6] There is a 14th case listed in the ICSID Caseload Statistics: *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Co.*, ICSID Case No. ARB/10/20. For purposes of this article, this case will not be taken into consideration as belonging within the ISDS system because the dispute arose out of a contract between two companies: Standard Chartered Bank and Tanzania Electric Supply Company.

[7] *See* ICSID, CASES, https://icsid.worldbank.org/cases/case-database (last accessed May 19, 2024) [hereinafter ICSID CASE DATABASE].

[8] *See* PERMANENT COURT OF ARBITRATION (PCA), CASES, https://pca-cpa.org/cases/ (last accessed May 19, 2024) [hereinafter PCA CASE DATABASE].

[9] *See* ICSID CASE DATABASE, *supra* note 7.

[10] *See* ICSID CASE DATABASE, *supra* note 7.

[11] There are 139 ISDS cases that have been made public by the PCA, and one of them, which we take into consideration here, *Jing v. Ukraine*, has not been made public yet. *See* PCA CASE DATABASE, *supra* note 8.

[12] *See* PCA CASE DATABASE, *supra* note 8; *see also Wang and others v. Ukraine*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1105/wang-and-others-v-ukraine (last accessed May 19, 2024).

B. *Description of Allegations*

The allegations brought by Chinese investors in the ICSID and PCA cases have been remarkably similar to those brought by investors of other nationalities. These include violations of the national treatment, fair and equitable treatment, and full protection and security provisions as well as claims of expropriation and the applicability of the most-favored nation provisions.

1. National Treatment Provisions

National treatment provisions stipulate that contracting states must provide investors and investments from the other contracting states treatment no less favorable than that given to their own investors and investments.[13] In that regard, Chinese investors have argued that respondent states have provided them with a less favorable treatment in comparison to the those contracting states' nationals.

For example, in *Alpene Ltd. v. Malta*,[14] Alpene, a Chinese investor who indirectly owned a Maltese bank, brought an action against Malta, arguing that Maltese officials subjected the bank to wrongful, arbitrary, and discriminatory measures that domestically owned banks did not face.[15] Although the case is still pending, if the tribunal finds that a discriminatory treatment was given to Alpene's investment based on its nationality, it could constitute a violation of the provision.

2. Most-favored Nation Treatment ("MFN") Provisions

MFN provisions require that contracting states give investors and investments from the other contracting states treatment no less favorable than the one given to investors and investments from other states.[16] Chinese claimants have argued that through the application of these provisions, arbitral tribunals should have jurisdiction to hear cases that they otherwise could not.

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[13] AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS 591 (2020).

[14] Alpene Ltd. v. Malta, ICSID Case No. ARB/21/36, Request for Arbitration (June 4, 2021).

[15] *Id.* ¶¶ 3, 8-9; *Alpene*, ICSID Case No. ARB/21/36, Notice of Dispute, ¶ 3 (Aug. 20, 2020).

[16] REINISCH & SCHREUER, *supra* note 13, at 686.

For example, in *Ansung Housing Co. v. China*,[17] discussed below, the claimant argued that the MFN provision contained in the relevant treaty would allow the tribunal to have jurisdiction over its claims allegedly brought outside the limitations period.[18] The tribunal disagreed, finding that the plain reading of the MFN provision does not extend China's consent to arbitrate, and therefore, the claim was time-barred.[19] Similarly, in *Beijing Everyway Traffic and Lighting Co. v. Ghana*,[20] the investor alleged that the MFN clause would allow Chinese investors to make claims that investors from the UK and Denmark could make.[21] Again, the tribunal disagreed, finding that the MFN provision did not expand its jurisdiction because those provisions cannot substitute for consent to arbitration.[22]

3. Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS") Provisions

Contracting states are obliged to provide FET to investors and their investments along with FPS.[23] The meaning of the FET and FPS principles are still debated.[24] The *S.D. Myers, Inc. v. Canada*[25] tribunal stated that there is a violation of the FET obligation when an investor "has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[26] On the other hand, FPS provisions provide that a state must "guarantee [s]tability in a secure environment, both physical, commercial and legal."[27]

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[17] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017).

[18] *Id.* at 124.

[19] *Id.* at 138, 141.

[20] Beijing Everyway Traffic and Lighting Co. v. Ghana, PCA 2021-15, Award on Jurisdiction (Jan. 30, 2023).

[21] *Id.* ¶ 93.

[22] *Id.* ¶¶ 287, 298

[23] REINISCH & SCHREUER, *supra* note 13, at 254.

[24] *Id.* at 272.

[25] S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

[26] *Id.* ¶ 263.

[27] Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award ¶729 (July 24, 2008).

It is common practice to see both of these provisions together.[28]

4. Expropriation

Generally, expropriation by a state is not prohibited. However, if a state decides to expropriate an investment, it must provide adequate compensation to the investor.[29] In *Shum v. Peru*,[30] discussed below, the claimant argued indirect expropriation based on actions of the Peruvian tax authorities.[31] The arbitral tribunal found indirect expropriation by the tax authorities because of the nature, duration, and impact of the measures taken against the claimant's investment.[32]

III. DEFENSES ARGUED BY CHINA AS RESPONDENT

A. *Statistics: China as Respondent in Comparison with the Total Cases*

China's participation as respondent in the ISDS system has been even more limited than Chinese investors' participation as claimants. Since 2007, out of the 745 ICSID cases, China has been the respondent in only six of them. This constitutes 0.8% of all ICSID cases.[33] In the same line, out of the 140 PCA cases, only two named China as respondent, which constitutes 1.4% of all PCA cases.[34]

B. *Description of Defenses*

Most of China's ICSID and PCA cases do not provide information about the defenses China raised; however, from the available information, the most common defenses China raised were that the investor claims were time-barred, the tribunal lacked jurisdiction, and China had the power to expropriate.

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[28] REINISCH & SCHREUER, *supra* note 13, at 540.

[29] *Id.* at 5.

[30] Shum v. Peru, ICSID Case No. ARB/07/6, Award (July 7, 2011).

[31] *Id.* ¶¶ 74-85.

[32] *Id.* ¶¶ 156, 170.

[33] *See* ICSID CASE DATABASE, *supra* note 7.

[34] *See* PCA CASE DATABASE, *supra* note 8; *see also Wang and others v. Ukraine*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1105/wang-and-others-v-ukraine (last accessed May 19, 2024).

C. *Investor Claims are Time-Barred*

As a general practice, in international arbitration, claimants have a set time to submit their claims to an arbitral tribunal in order to preserve the jurisdiction of the tribunal.[35] In ISDS cases, the limitation period is found in the relevant treaty, and when the claim falls outside of such period, the tribunal will declare its lack of jurisdiction and dismiss the case.[36] This is because the limitation period is a component of the state's consent to arbitration. This happened in *Ansung Housing*, further explained below, where the tribunal dismissed the case because the three-year limitation period in which the investor could have made the claim had lapsed.[37]

D. *Lack of Jurisdiction of the Tribunal and China's Indirect Power to Expropriate.*

Jurisdiction is an essential component of international arbitration and arbitral tribunals must have jurisdiction to resolve international disputes.[38] One type of jurisdiction tribunals must have is *ratione materiae* jurisdiction, equivalent to subject-matter jurisdiction.[39] *Ratione materiae* jurisdiction requires the claimant to show its qualification as an investor under the relevant treaty as well as proof that its investment is protected under the relevant treaty.[40] When *ratione materiae* jurisdiction is lacking, the arbitral tribunal must dismiss the case.[41] In *AsiaPhos Ltd. v. China*,[42] also discussed below, the tribunal dismissed the claim because according to the relevant treaty, China's consent to arbitration did not extend to the determination of whether its actions constitute an expropriation but rather only to the amount of

[35] Saar Pauker, *Admissibility of Claims in Investment Treaty Arbitration*, 34 ARB. INT'L 1, 1 (2018).

[36] *Id.*

[37] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017), ¶¶115-22.

[38] JOSEFA SICARD-MIRABAL & YVES DERAINS, INTRODUCTION TO INVESTOR-STATE ARBITRATION 41-74 (2018).

[39] Romesh Weeramantry & Clementine Packer, *Corruption and Fraud in Investor-State Arbitration: Central Asian Experience*, *in* INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTES IN CENTRAL ASIA: EMERGING ISSUES 435, § 16.02 (Kiran Nasir Gore et al. eds., 2022).

[40] *Id.*

[41] FREDERIC G. SOURGENS ET AL., EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION § III(A) (2018).

[42] AsiaPhos Ltd. v. China, ICSID Case No. ADM/21/1, Award (Feb. 16, 2023).

compensation once such an expropriation occurs.[43] The tribunal further stated that according to the relevant treaty, the claimant needed to challenge the expropriation's measures before the Chinese national courts.[44]

IV. CASE STUDIES

A. *Ansung Housing Co. v. China (ICSID Case No. ARB/14/25)*

One interesting case involving China as respondent is *Ansung Housing*, which was dismissed for lack of jurisdiction. The tribunal, comprising Prof. Lucy Reed (President), Dr. Michael C. Pryles, and Albert Jan van den Berg, rendered its award on March 9, 2017.[45] The dispute arose from Ansung's investment in a golf and country club and luxury condominiums in the Jiangsu province. The Korean-incorporated claimant faced several government-induced obstacles, including increasingly demanding land use requirements, higher prices for the land than initially agreed, and limitations on its rights to use the land.

The tribunal dismissed the case based on the three-year limitation period stipulated in the China-Korea BIT.[46] Ansung's claims were deemed time barred because they were filed after the expiration of this period.[47] Additionally, Ansung's argument to invoke the MFN clause of the BIT to bypass the limitation period was unsuccessful.[48] The tribunal held that the limitation period was a condition to China's consent to arbitration, which could not be circumvented by the MFN clause.[49]

The *Ansung Housing* case highlights several key issues. First, it underscores the importance of adhering to limitation periods specified in BITs. Investors must be vigilant in monitoring these periods to ensure their claims are timely. Second, the case illustrates the limitations of the MFN clause in extending procedural rights,

[43] *Id.* ¶ 187.

[44] *Id.* ¶ 185.

[45] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017).

[46] *Id.* ¶ 143.

[47] *Id.*

[48] *Id.* ¶ 138.

[49] *Id.* ¶¶ 138-141.

particularly when such rights are explicitly tied to a state's consent to arbitration. This decision reaffirms that procedural conditions precedent, such as limitation periods, are not easily circumvented by MFN clauses.

B. *Huawei Technologies Co. v. Sweden (ICSID Case* No. ARB/22/2)

Another noteworthy case involving a Chinese entity is *Huawei Technologies Co. v. Sweden*,[50] which is currently in progress. Huawei initiated this arbitration against Sweden and challenged its exclusion from the 5G network rollout bidding process. Sweden's telecommunication regulator had banned Huawei and ZTE from participating in the bidding process for the 5G communication networks over security concerns. Huawei contends that these actions violate the China-Sweden BIT.

The tribunal, led by Gabrielle Kaufmann-Kohler (President) and with Jane Willems and Zachary Douglas, is examining whether Sweden's actions violate the national treatment and FET standards and whether they constitute indirect expropriation of Huawei's investments in Sweden.[51] The outcome of this case will be significant in determining the extent of protection offered under BITs against regulatory actions motivated by national security concerns.

The *Huawei Technologies* case is particularly important due to its geopolitical implications. Sweden's ban of Huawei is part of a broader trend among Western countries to limit the involvement of Chinese technology companies in critical infrastructure, citing national security concerns.[52] The case raises important questions about the balance between national security and investment protection under international law. Specifically, it will test the limits of the national treatment

[50] Huawei v. Sweden, ICSID Case No. ARB/22/2, Request for Arbitration (Jan. 7, 2022).

[51] *Id.* ¶¶ 94-99.

[52] *See* Ryan Browne, *Top EU official urges more countries to ban China's Huawei, ZTE from 5G networks*, CNBC (June 16, 2023), https://www.cnbc.com/2023/06/16/eu-urges-more-countries-to-ban-chinas-huawei-zte-from-5g-networks.html; *accord* Christina Cheng, *Is the EU Finally Headed Towards a Ban on Huawei?*, CHINAOBSERVERS (Sept. 7, 2023), https://chinaobservers.eu/is-the-eu-finally-headed-towards-a-ban-on-huawei/; *see also* REUTERS, *U.S. actions against China's Huawei*, https://www.reuters.com/graphics/USA-CHINA/HUAWEI-TIMELINE/zgvomxwlgvd/.

and FET standards as well as the definition of indirect expropriation in the context of regulatory measures aimed at protecting national security. We saw something similar with Argentina's financial crisis and regulatory measures in the early 2000s, which gave rise to a number of important cases,[53] none of which were deferential to Argentina's economic policy concerns.[54]

C. *AsiaPhos Ltd. v. China (ICSID Case No. ADM/21/1)*

The case of *AsiaPhos Ltd. v. China*[55] involves claims of expropriation related to phosphate mines in the Sichuan province. AsiaPhos alleged that provincial directives led to the shutdown and sealing of its mines, which were located within a planned panda reserve and the Jiudingshan Nature Reserve.

The tribunal, chaired by Klaus Sachs (President) and with Albert Jan van den Berg and Stanimir Alexandrov, had to determine whether it could entertain claims regarding the occurrence of expropriation. The tribunal concluded it could not, as the scope of arbitral consent in the relevant BIT was limited to disputes concerning the amount of compensation, not the existence of expropriation itself.[56] This limitation underscores the importance of clearly defined terms within BITs regarding the scope of disputes that can be arbitrated.

The *AsiaPhos* case demonstrates the complexities involved in determining the scope of arbitral consent under BITs. By restricting the tribunal's jurisdiction to disputes over the amount of compensation, the BIT effectively limits the ability of investors to challenge the legitimacy of expropriation itself. This case also highlights the tension between environmental conservation efforts and investment protection.

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[53] *See* Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 451-52 (2007) (stating that by "2004, thirty-five ICSID cases were pending against Argentina, most of which were based on measures the government introduced to address the economic crisis in 2001").

[54] *See id.* at 478 (citing to the CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, case that "recognized that Argentina had not singled out foreign investors for discriminatory treatment" but "found that the government had denied such investors the stable regulatory framework advertised to foreigners throughout the 1990s," which constituted a violation of fair and equitable treatment).

[55] AsiaPhos Ltd. v. China, ICSID Case No. ADM/21/1, Award (Feb. 16, 2023).

[56] *Id.* ¶ 187.

Governments may face challenges in balancing the need to protect natural reserves with their obligations under IIAs.

V. BROADER IMPLICATIONS AND FUTURE TRENDS

The involvement of China in ISDS cases, though currently limited, is likely to increase as the country's outbound investments continues to grow and its economic influence expands. This trend will bring to the forefront several critical issues in international investment law.

For example, the interpretation of BIT provisions will continue to evolve as tribunals address new and complex disputes involving Chinese investors and the Chinese state. The *Huawei Technologies* case, for instance, may set important precedents[57] regarding the treatment of national security exceptions in BITs. As more countries impose restrictions on Chinese technology firms, the outcomes of these cases will shape the future landscape of international investment law.[58]

Further, the balance between regulatory sovereignty and investor protection will remain a contentious issue. Governments worldwide are increasingly adopting measures to protect public interests, such as national security, public health, and environmental conservation. These measures often conflict with the protections afforded to foreign investors under BITs. Current and future disputes will likely test the limits of regulatory exceptions and the scope of investor rights under

[57] Even though in ISDS cases tribunals are not "technically" bound by prior decisions, a practice of *stare decis* has nevertheless developed and continues to thrive. *See generally* David McArthur et al., *The Role of Precedents in Investment Treaty Arbitration*, *in* IN-DEPTH: INVESTMENT TREATY ARBITRATION (Barton Legum ed., 8th ed. 2024), *available at* https://www.lexology.com/indepth/the-investment-treaty-arbitration-review/the-role-of-precedents-in-investment-treaty-arbitration.

[58] *See e.g.*, Georgetown University, Center for Security and Emerging Technologies, *FCC Bans Sale of New Devices From Chinese Companies Huawei, ZTE and Others* (Nov. 28, 2022), https://cset.georgetown.edu/article/fcc-bans-sale-of-new-devices-from-chinese-companies-huawei-zte-and-others/#:~:text=The%20Federal%20Communications%20Commission%20voted,equipment%E2%80%94over%20national%20security%20concerns; *see also* Ben Lutkevich, *TikTok bans explained: Everything you need to know*, TECHTARGETS.COM (May 2024), https://www.techtarget.com/whatis/feature/TikTok-bans-explained-Everything-you-need-to-know.

international law.[59]

Finally, China's approach to ISDS and its engagement in international arbitration will be closely watched by other countries and investors. China's strategy in negotiating and implementing BITs, as well as its responses to ISDS claims, will influence global investment practices. As China continues to refine its legal framework for protecting outbound investments, other countries may adopt similar approaches.

VI. CONCLUSION

China's participation in the ISDS has been limited. Since 2007, only 1.7% of all ICSID cases were brought by Chinese investors as claimants and in only 0.8% of the cases was China the respondent. Similarly, out of all PCA cases, only 2.8% were brought by Chinese investors and in only 1.4% was China the respondent. Chinese investors have claimed violation of the national treatment, FET, and FPS standards as well as claiming expropriation and the applicability of MFN provisions. On the other hand, China's most common defenses are the lack of jurisdiction of the tribunal, its power to expropriate, and the prescription of the limitation period to present claim.

Despite its limited participation, China's involvement in international investment disputes provides valuable insights into the complexities of global investment protection, from the terms of the IIAs to the management of disputes. The cases of *Ansung Housing*, *Huawei Technologies*, and *AsiaPhos*, cited above, illustrate the diverse challenges facing investors and the intricate legal issues surrounding BITs. As China's role in global investment grows, its engagement with ISDS mechanisms and the evolution of its BITs will impact the future of international investment law.

[59] *See e.g.*, Eco Oro Minerals Corp. v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Direction on Quantum, ¶441 *et seq.* (Sept. 9, 2021) (discussing whether an environmental protection decree, banning mining in a sensitive area of Colombia's highlands was an expropriation).

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INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR) PROCEDURES: A CLOSER LOOK AT SOME OF THE FUNDAMENTAL ARBITRATION RULES

by Ekaterina Long

I. INTRODUCTION

The International Centre for Dispute Resolution (ICDR) is an international arm of the American Arbitration Association (AAA), which helps global businesses resolve their disputes anywhere in the world through arbitration and sometimes through concurrent mediation. The ICDR promulgated 42 International Arbitration Rules that facilitate its role as an administrator of disputes and governs the manner of conducting arbitrations. Additionally, it has promulgated a series of International Mediation Rules and Articles on Expedited Procedures to supplement the Arbitration Rules. Together, these Rules and Procedures lay the foundation of the ICDR dispute resolution process. This Article will only examine some of the fundamental International Arbitration Rules. It will not consider the ICDR Mediation Rules or International Expedited Procedures.

The examination of the International Arbitration Rules aims to familiarize international businesses with the ICDR's process in administering international disputes. It also advocates for the use of the ICDR's dispute resolution services because these Rules provide a well-established and efficient dispute resolution process with effective mechanisms for ensuring the independence and impartiality of its arbitrators in adjudicating disputes.

Before examining the ICDR Arbitration Rules, the Article will briefly discuss the background that prompted its writing.

II. BACKGROUND

The impetus behind this Article was a webinar that the Director of the Institute for Transnational Arbitration (ITA), Thomas (T.L.) Cubbage, and the ITA's Assistant Director, Dr. Darya Shirokova, conducted last February. During the webinar, the ICDR's Vice President, Steve Andersen, elaborated on the way the ICDR administers

international disputes, focusing on some of the most important ICDR Arbitration Rules and providing insights as to the nature of and the rationale behind some of them. This Article will analyze some of these Rules and assess the effectiveness of the ICDR dispute administration process.

III. ANALYSIS

One of the most fundamental prerequisites to resolve a dispute through the ICDR is to establish whether the dispute is international. The ICDR relies on the definition of an international arbitration provided by the United National Commission on International Trade Law (UNCITRAL).[1] There are several ways in which a dispute may be deemed international under this definition. Perhaps one of the most obvious is when "a substantial part of the obligations of [the parties'] commercial relationship to be performed is situated outside the country of any party."[2]

But the query of the ICDR's authority over a dispute does not end there. The ICDR must also have jurisdiction over the dispute before it can administer it. Article 1 provides that the ICDR may have jurisdiction over a dispute so long as the parties' contract expressly states so. The language of Article 1 vesting the ICDR with jurisdiction is broad such that the ICDR Arbitration Rules will apply even if the parties solely state that their dispute will be arbitrated by the ICDR without specifying that the ICDR Arbitration Rules will govern the dispute. The absence of an express requirement to refer to the ICDR Rules as the governing principles allows the parties to avoid any delays and expedites the dispute even in cases where the parties have failed to refer to the Rules in their contract.

Further, Article 21 permits the arbitrator or the tribunal to decide the issue of a dispute's arbitrability, or whether it is subject to an arbitration clause, such that the parties will not be required to address this through a court. Article 21 thus ensures the expeditious administration of disputes both in terms of the amount of time and

[1] International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (2021), Introduction, at 5.

[2] *Id.*

money the parties would have had to spend in the event they disagreed over a dispute's arbitrability.

This and other preliminary issues—such as arbitrator selection and whether the parties prefer to first attempt mediation—are ordinarily addressed during an administrative conference call. The call occurs no later than 10 days after the filing of a statement of claim. Article 4 specifically deputizes the ICDR to conduct this call to help the parties facilitate any outstanding preliminary issues. Under Article 5, the ICDR may even call upon and act through its International Administrative Review Council to help determine, for instance, any challenges to the appointment of an arbitrator. Articles 4 and 5 simplify the initial phases of an arbitration proceeding and help shepherd the parties towards the substantive legal issues. Additionally, Article 4 provides the parties with an opportunity to resolve the dispute through mediation, resulting in a potentially speedier and economically efficient resolution of the ultimate dispute.

Even if mediation does not lead to the final resolution of the dispute, the presumption of mediation is a salutary mechanism because it stimulates the parties to narrow the disputed issues. Significantly, Article 6 grants any party the right to forego mediation without imposing any specific requirement. This ability to opt in or out of mediation within the arbitration itself provides greater flexibility and control to the parties in attempting to resolve their dispute.

Article 7 also provides the parties with control over the process by enabling them to seek emergency relief even before the constitution of the arbitral tribunal. This ability is not an entitlement, and the party applying for emergency relief will need to meet four requirements before the ICDR as an administrator may grant the request. Specifically, the party needs to show: (1) the nature of the relief sought; (2) the reasons why the emergency relief is necessary before the appointment of the arbitrator; (3) the reasons the party is likely entitled to the relief sought; and (4) what injury or prejudice the party will suffer absent the relief.

These requirements are, however, not as onerous as those that are, for example, set forth in an injunctive relief remedy that the parties may seek in a state court. Article 7 merely requires the moving party to show the "injury or prejudice [it] will suffer if relief is not provided"[3] as opposed to the probable, imminent, and irreparable injury that is required to be shown to the court before it can grant an injunction. It may be argued that the less onerous burden of establishing the need for emergency relief in an ICDR arbitration is prone to abuse. Indeed, the ICDR Arbitration Rules do not expressly impose any obligation on the parties to act in good faith. But the parties' lawyers, whose actions must align with ethical obligations, should be able to steer their clients away from tampering with the ICDR arbitration process. Common sense also dictates that any attempt to tamper with the process will expose the party attempting it to a loss of credibility before a tribunal. This loss could be fatal to the party's advocacy moving forward.

Another important decision a party will be required to make is whether it should join all parties to an arbitration. This decision is best made before the appointment of the tribunal. Article 8 governs the joinder and appears to strongly encourage the parties to ensure they add all potential parties at the outset of the process. If the parties do not do so before the tribunal is appointed, they will have to, *inter alia*, obtain the consent of the party they wish to join. The consent requirement aims to protect the selection of the tribunal. But it may present a challenge given that many companies do not aspire to get embroiled in a legal dispute. Theoretically, however, they may consent to the joinder in the event they determine they could redress their own grievances in the arbitration against the other parties. One way or another, any untimely joinder is certainly going to increase time and costs. Parties should therefore carefully identify all those against whom they have or potentially may have any claims either before the arbitration commences or before the appointment of any arbitrator to avoid delays.

[3] *Id.* art. 7.1.d.

In some cases, however, a delay may be inevitable. Consolidation of several arbitrations may, for instance, be required. If that is the case, Article 9, which governs consolidations, mandates that the collateral decision on consolidation be rendered "within 15 days of the date for final submissions on consolidation."[4] This excludes the time that would be required for appointing a consolidation arbitrator. The request to consolidate two or more arbitrations into a single arbitration may be made by a party or the ICDR. The consolidation is particularly appropriate when "all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement."[5] Even if there are multiple arbitration agreements, consolidation may nonetheless be suitable if the arbitrations implicate the same or related parties and the disputes stem from the same legal relationships.

The ICDR as the administrator will "invite the parties to agree upon a procedure for the appointment of a consolidated arbitrator"[6] in its notice to the parties of its intention to appoint a consolidation arbitrator, giving them 15 days following the notice to agree. Should they fail to agree within this time, Article 9 requires the ICDR to appoint the consolidation arbitrator without their input. The deadline strongly encourages the parties to collaborate on agreeing to a procedure.

Consolidation aside, the parties are also able to agree on a procedure for appointing arbitrators under Article 13. Additionally, this Article permits them to rely on the ICDR list method of appointing arbitrators. The ICDR can send the parties its curated list of arbitrators to consider and encourage them to agree to several of them. If the parties are unable to agree on arbitrators, they will have 15 days during which they will need to "strike names objected to, number the remaining names in order of preference, and return the list to the Administrator."[7] If this procedure fails for any reason, the ICDR will appoint the arbitrators without further input from the parties.

[4] *Id.* art. 9.7.

[5] *Id.* art. 9.1.b.

[6] *Id.* art. 9.2.a.

[7] *Id.* art. 13.2.6.

The ICDR's carte blanche in appointing the arbitrators may facilitate the efficiency of the arbitration if there is no agreement as to the arbitrator, unless a party decides to challenge the appointed arbitrator.

In its challenge, however, the party will need to satisfy the requirements of Article 15 by showing the circumstances "that give rise to justifiable doubts as to the arbitrator's impartiality, or independence, or for failing to perform the arbitrator's duties."[8] This mechanism protects the integrity of the arbitration process unless the term "justifiable doubts" is misinterpreted by the challenger given that the term is not defined in the Rules. Nonetheless, the challenge does not automatically disqualify the arbitrator. The other parties will need to agree to the removal of the challenged arbitrator. Absent such agreement, the ICDR will have the ultimate decision regarding the removal.

In making its decision, the ICDR will be guided by Article 14, which requires arbitrators to be impartial and independent while acting in accordance with the ICDR Arbitration Rules, the terms of the Notice of Appointment, and *The Code of Ethics for Arbitrators in Commercial Disputes*.[9] Article 14 also imposes a disclosure obligation on the arbitrators, which requires them to "disclose any circumstances that may give rise to justifiable doubts as to [their] impartiality or independence and any other relevant facts [they wish] to bring to the attention of the parties."[10] The parties, too, have a disclosure obligation. If they fail in their disclosure obligation, they will be deemed to have waived their right to challenge the arbitrator.

IV. CONCLUSION

Companies conducting business internationally will need to face several important legal considerations before they enter a contract and when they begin anticipating a dispute with their contracting partner. One of the most fundamental

[8] *Id.* art. 15.1.

[9] *Id.* art. 14.1.

[10] *Id.* art. 14.2.

considerations is whether they want to resolve potential disputes through an arbitral or court process. This choice will be based on multiple criteria including, among others, the nature of the disputes that they anticipate may arise and the desire or need to keep the dispute confidential or have greater control over the entire process. This choice will have to be made before they enter a contract if they wish to arbitrate disputes.

In opting for an arbitration, they will have a choice over the alternative dispute resolution administrator. If the ICDR is their choice, they will be using one of the largest private providers of alternative dispute resolution in the world with a developed and efficient dispute resolution process. The parties will need to expressly submit to the ICDR's jurisdiction in their contract.

The other legal considerations the parties may need to face will come into play at the start of the dispute. The timing of certain decisions may be essential to their overall success in favorably resolving the dispute. One of these early decisions may be whether they should join their contracting partner's subsidiary or parent or any other affiliated entity in the arbitration when they file their statement of claim. Whatever the decision they may need to make, the parties are well-advised to begin developing their legal strategy as soon as possible. By the same token, the parties should bear in mind that they will likely need to adjust their strategy as the dispute develops.

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IBA GUIDELINES ON CONFLICTS OF INTEREST: THE 2024 REFORM AND ITS IMPACT ON INVESTORS

by Lorenzo Poggi

I. INTRODUCTION

In February 2024, the International Bar Association (IBA) published a proposal for an update to its Guidelines on Conflicts of Interest in International Arbitration ("Guidelines").[1] The Guidelines are a soft-law instrument setting the framework for the avoidance of conflicts of interest in international arbitration, and its application is almost universally accepted.

The existence of a conflict of interest between a party and an arbitrator may result in a challenge to the arbitrator—potentially delaying the proceeding and ultimately the disqualification of the arbitrator—which may undermine the interest of the party that appointed that arbitrator. This contribution addresses the impact of the 2024 reform on investors in investor-state dispute settlement ("ISDS").

II. UPDATE OF GENERAL STANDARDS

Part I of the Guidelines sets out "General Standards Regarding Impartiality, Independence and Disclosure," to which the parties and the arbitrators should conform to avoid a conflict of interest. As the 2024 introduction states: "Part I of the Guidelines contains the principles that must always be considered."[2] Indeed, some of the changes to the Guidelines introduced in 2024 could dramatically change the rules of the game for investors.

For instance, General Standard 4, paragraph (a), deals with the parties' waiver of potential conflicts of interest in case of inaction lasting more than 30 days after the

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[1] IBA Guidelines on Conflicts of Interest in International Arbitration, https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024#:~:text=will%20be%20necessary.-,(2)%20Conflicts%20of%20Interest,to%20be%20impartial%20or%20independent [hereinafter "Guidelines"].

[2] Guidelines, Introduction, ¶ 7.

arbitrator's disclosure or the discovery, by the affected party, of the objectionable circumstance. If the affected party does not raise an objection to the circumstance within the 30-day period, they are barred from raising it at a later stage.[3]

While there are no issues in relation to disclosure, as it takes place at a precise time, doubts may arise with respect to when (and if) a party has in fact learned of a given fact. To avoid any uncertainty, the 2024 drafters have added language setting out an objective standard to the formulation of General Standard 4, paragraph (a): "A party shall be deemed to have learned of any facts or circumstances . . . that a reasonable enquiry would have yielded if conducted at the outset or during the proceedings."[4] It follows that the 30-day waiver period for objecting to conflicts of interests is now extended to all circumstances that an investor reasonably should have known. However, as the scope of the presumptive waiver has been extended, the parties have a *de facto* duty to enquire about circumstances that may give rise to conflicts of interest if they do not want to lose their right to later complain about it.

Investors should, therefore, bear in mind that the new formulation is relevant not only to circumstances that they *subjectively* know concerning the relationship between the host State and arbitrator(s) but also the circumstances that they *objectively* should have known. Failure to do so may result in a waiver of the right to later raise the objection.

A new sentence potentially affecting investors in the appointment process and throughout the course of the arbitration has been included in General Standard 6. The newly introduced paragraph (c) of General Standard 6 specifies that "[a]ny legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party."[5] It follows that all the circumstances

[3] Guidelines, General Standard 4(a).

[4] Guidelines, General Standard 4(a), last sentence.

[5] Guidelines, General Standard 6(c).

giving rise to an actual or potential conflict of interest[6] must be disclosed[7] in relation to the controlling (or controlled) entities of the investor, potentially expanding the number and frequency of conflicts of interests in cases of large multinational corporations.

The changes in General Standard 6 are also reflected in General Standard 7, which sets out the duty of the parties and the arbitrators in the proceeding. A party now must disclose a relationship between the party and an arbitrator where it arises from a relationship between the arbitrator and "a person or entity over which a party has a controlling influence."[8]

Considering that the explanatory note to Article 6[9] makes clear that the provision shall be considered to extend to third-party funders and insurers (which are now seen frequently backing investors and their claims) it follows that the controlling entities of the funder or the insurer should also be disclosed.

III. EXPANSION OF THE ORANGE LIST

Part II of the Guidelines is named "Practical Application of General Standards" and provides for three lists of circumstances that are indicative of the fact that conflicts of interests exist (Red List), may exist (Orange List), or do not exist (Green List). The lists of circumstances are non-exhaustive[10] and, in any event, "the General Standards govern over the illustrative Application Lists."[11]

The Orange List provides for a non-exhaustive set of situations that "may, depending on the facts of a given case"[12] give rise to doubts about the impartiality and independence of an arbitrator. The circumstances in the Orange List, as the

[6] *See infra* (listed in the Red and Orange Lists).

[7] Guidelines, General Standard 4(a).

[8] Guidelines, General Standard 7(a)(i).

[9] Guidelines, Explanation to General Standard 6, ¶ (b).

[10] Guidelines, Part II, ¶ 1.

[11] Guidelines, Part II, ¶ 1.

[12] Guidelines, Introduction, ¶ 3.

Introduction of the 2024 Revision peremptorily states, "must . . . be disclosed pursuant to General Standard 3."[13] Accordingly, when choosing an arbitrator, an investor should consider all the circumstances in the Orange List, as the respondent state may use such grounds to challenge the arbitrator. Failure to disclose an Orange List circumstance may result in the appointment of the arbitrator by the administering institution as well as significant delays to the proceeding.

Further, the 2024 reform expands the list of "Services to a party" rendered by an arbitrator that the party must disclose and the presence of which may result in the arbitrator having a conflict of interest. For example, having assisted in mock trials or other activities for preparing an arbitral hearing on two or more occasions[14] and having served as a party appointed expert in an unrelated matter[15] may be sufficient for a conflict of interest as per the new (expanded) Orange List.

Investors therefore should bear in mind that employing or retaining such services from potential arbitrators may result in the institution or a court declaring their arbitrator conflicted and disqualified.

IV. CONCLUSION

The 2024 Reform, which is due to be approved by the IBA Council in May, does not dramatically change the substance of the well-known soft-law instrument, but it does contain some relevant changes that investors should bear in mind. The duty to enquire regarding circumstances that may conflict an arbitrator can have substantial consequences on the appointment process and likely delay the proceeding. Furthermore, the expansion of the Orange List may reduce the potential number of arbitrator candidates and jeopardize the appointment of a party's "preferred" arbitrator.

[13] Guidelines, Introduction, ¶ 3.

[14] Guidelines, Orange List, ¶ 3.1.4.

[15] Guidelines, Orange List, ¶ 3.1.6.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

II. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of

the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

III. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

IV. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

V. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary

international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to *ITA in Review*, ITA's law journal edited by ITA's Board of Editors and published in three issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) a listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.

Institute for Transnational Arbitration
ITA IN REVIEW

Table of Contents

Articles

How Investment Protection in Relation to Mining Projects can Assist in Contributing to the Energy Transition — *Markus Burgstaller & Scott Macpherson*

Chinese Participation in the Investor-State Dispute Settlement System — *Rafael T. Boza & D. Carolina Plaza*

International Centre for Dispute Resolution (ICDR) Procedures: A Closer Look at Some of The Fundamental Arbitration Rules — *Ekaterina Long*

IBA Guidelines on Conflict of Interest: The 2024 Reform and its Impacts on Investors — *Lorenzo Poggi*

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