Disputes against governments under investment treaties: a growing trend in the mining industry in 2020

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A commitment of capital in a foreign state, particularly with long-term profit horizons, can be a risky undertaking. When a host state harms a foreign company's investment, the domestic legal system may not provide an adequate remedy. For example, an investor may not wish to settle disputes before a host state's domestic courts for reasons of (i) fear of bias; or (ii) unfamiliarity with the domestic legal system.

Foreign investors can reduce the risk of investing abroad by ensuring that their investments benefit from the protections contained in investment treaties. This is not new in the mining sector. Since the late 1990s, nearly 50 cases concerning mining concessions have been brought before the International Centre for the Settlement of Investment Disputes (ICSID), one of the main institutions facilitating disputes under investment treaties. However, the number of cases brought by mining companies, from micro-cap to the largest players in the global market, is on the increase. Of the approximately 50 cases brought before ICSID in 2020, more than 20% concern mining concessions. This is a significant increase on previous years (2019: 10%; 2018: 10%; 2017: 0%).

In this article, we first briefly explain what protection under an investment treaty involves before analysing the rise of investment claims in the mining sector in 2020 and its likely continued rise in 2021 and beyond. We will also explore the growing role played by third-party funders in international disputes. Third-party funding allows an investor to bring a claim without the fees and costs associated with that claim affecting the investor's balance sheet or having an impact on cash flow.

What does investment protection involve?

There are more than 2,000 investment treaties currently in force worldwide. The majority of these are bilateral investment treaties (BITs) concluded between two states. There are also multilateral investment treaties concluded between multiple parties, such as the Energy Charter Treaty.

Importantly, most modern investment treaties contain investor-state arbitration clauses. These operate to allow an investor of one state party (such as a mining company incorporated in the relevant state) to bring an international arbitration against the host state (in other words, the foreign state where the investor's investment is located) before an international tribunal. This international arbitration can be brought without the need for further consent on the part of the host state. This may allow investors to bypass local courts and obtain damages directly from the host state.

Typically, to qualify for the protection of an investment treaty, an "investor" must establish that it has an "investment" in the host state pursuant to the definitions in the relevant investment treaty. Not every government action will breach the standards of protection in an investment treaty, and different investment treaties provide different investment protection standards. Some of the most frequently invoked standards of protection include:

1. **Fair and equitable treatment**: The fair and equitable treatment standard aims to ensure that the conduct of business by a foreign investor is not hampered by the host state without good reason. This includes, for example, a failure to protect an investor's legitimate expectations; lack of good faith; lack of procedural fairness, due process or transparency; lack of a stable and predictable framework for investments; and discriminatory or arbitrary conduct.

2. **Prohibition on uncompensated expropriation**: Expropriation is the taking of an investment by a state. The taking can be direct, such as seizing assets or property, or indirect, such as depriving an investor of the value of its investment through regulatory action or other governmental measures. Investment treaties typically guarantee that a state cannot expropriate an investment without prompt, adequate, and effective compensation. In addition, expropriations must be for a public purpose, undertaken non-discriminatorily, and carried out under due process of law.

3. **Umbrella clause**: An umbrella clause is a provision in an investment treaty which provides that a state undertakes to observe obligations that it has entered into with respect to an investor and/or an investment. This could include a contract which a host state has entered into with a foreign investor.

4. **National treatment**: National treatment provisions guarantee that investors and their investments are afforded treatment no less favourable than that afforded by a host state to its own nationals and their investments.

In the mining sector claims could be (and have been brought) in relation to state actions against investment such as (but not limited to) the revocation or cancellation of a mining licence; a change in local laws; or an export ban.

Investor-state arbitration can be a powerful tool for investors. The most common remedy is monetary damages, which is frequently honoured without the need for enforcement. However, if a State fails to honour an award, investors may take various measures to ensure enforcement, such as applying to a domestic court to attach assets of the respondent state. Having a state rather than, for example, a state-owned mining company as a counterparty may also be beneficial to mining company claimants since states are more likely to hold assets abroad which could be attached for the purposes of enforcement than individual companies.

Further, many states are now experienced in disputes under investment treaties and the use (or threatened use) of investor-state arbitration need not necessarily signal the end of a relationship between an investor and a state. Rather, the availability and use of investor-state arbitration can be an effective means of getting a government to the table for meaningful negotiations and eventual settlement.

Investor-state arbitration in the mining sector in 2020 and third-party funding

2020 has seen a significant increase in the number of claims brought against states by mining companies. In the course of this year alone, claims have been brought by companies against states primarily in South America and Africa, but also in Central America, North America, Europe, and Asia.

We anticipate that the number of claims brought by mining companies will continue to increase in 2021 for three primary reasons:

1. **Resource nationalism**: In a time of economic slowdown, the risk that states will adopt nationalistic and protectionist policies in relation to their natural resources increases. While the risk of outright expropriation may be lower than in previous years, the continuing global rise of resource nationalism may contribute to a further increase in claims. This can manifest itself in various ways, such as through increased tax pressures, amended contract terms, a hostile regulatory environment, political instability, government interference and international sanctions.
2. **Environmental protests and measures**: There is an increasing electoral demand for governments to take strong and decisive action on environmental grounds. Such measures, particularly when poorly or hastily implemented, can affect the investments of mining investors. Environmental concerns have also led to instances of activist, local government or community "blockades" at sites. This can lead to claims that states did not provide assistance, leaving investors unable to access mining sites and continue their work.
3. **Third-party funding**: Many mining companies have already used third-party funders to fund claims under investment treaties. Third-party funding allows an investor to bring a claim without the fees and costs associated with that claim affecting the investor's balance sheet or having an impact on its cash flow. The third-party funder funds the investor's legal fees and costs associated with the arbitration in return for a portion of the proceeds of any award in the investor's favour.

Prudent investors in the mining sector will obtain advice on the structure of their foreign investments to benefit from investment protection under investment treaties. This will allow them to be able to bring a claim in case of adverse governmental conduct, including by the local courts. Advice should also be obtained if and when a dispute arises in order to take all appropriate steps early on.

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