Kluwer Arbitration Blog

2023 PAW Recap – Day 2: Striking a Sustainable Deal: Balancing State Responsibility and Investor Rights in Mining

Natalia Rodriguez Alvarez, Sabina Nurbagandova, Antoine Cottin (Assistant Editor for Europe) (Laborde Law) · Saturday, April 1st, 2023

Following an exciting opening day (see here and here), on Day 2 of Paris Arbitration Week (PAW) Jus Mundi hosted a discussion on "Striking a Sustainable Deal: Balancing State Responsibility and Investor Rights in Mining". The panel was moderated by Alexandre Vagenheim (Jus Mundi) and included Diora Ziyaeva (Dentons), William Kirtley (Aceris Law), Mark Johns (Exponent) and Funke Adekoya San (Funke Adekoya & Company) as speakers.

According to Jus Mundi's 2023 Mining Arbitration Report, out of around 800 mining arbitration cases, 56% corresponded to commercial arbitration and 44% to investment arbitration. While states have the responsibility to manage their natural resources in a way that maximizes the benefits for their citizens, foreign investors have rights under international law and treaties to seek protection and compensation against unfair state action. Finding the right balance between State responsibility and investor rights has proven to be challenging.

Impact on Local Communities

As recalled by Alexandre Vagenheim, mining often has the effect of displacement, loss of lives, and damage to cultural sites (see the concept of social license to operate in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises). Mark Johns highlighted the key risks to consider when discussing the social and

environmental diligence that mines have to undertake when operating. Water management, decarbonization, greener production, and climate change are all critical and often intertwined. In his view, the first two deserve special attention. Water is essential for the mining industry, and polluted water directly affects nearby communities. Decarbonization is gaining momentum but it has to be promoted and requires highly trained professionals. Mr. Johns thus insisted on designing productive and environmentally friendly mines to prevent social disputes.

These social issues relating to the mining industry have had an impact in international arbitration. As Diora Ziyaeva highlighted, in the past decade, we have seen a growing number of social and mining-related disputes coming before arbitral tribunals (see *Gold Reserve v. Venezuela*, *Quiborax v. Bolivia* and *Bear Creek Mining v. Peru*). And there is a growing debate about transparency in relation to these disputes. The role of non-disputing party submissions in various stages of proceedings has been gaining prominence recently. Ms Ziyaeva explained that, as of today, there have been 94 petitions to participate in *amicus curiae*, of which 56 were fully accepted, 4 were partially accepted and 34 were rejected. These statistics show that tribunals accept the participation of third-parties when (i) the petition addresses matters within the scope of the dispute, (ii) the petitioner has a specific expertise or has a significant interest in arbitration, or (iii) there is public interest in the subject-matter and the petitioner was not dependent *vis-à-vis* the parties. In Ms. Ziyaeva's experience, for an *amicus* brief to be considered, it should be clear on its face and present arguments and data that have not yet been brought by the parties before the tribunal.

William Kirtley emphasized that the initiation of an arbitration would make no difference in a mining project if the production phase has yet to start or if it has already come to a halt. What he strongly advised to the investors was, *first*, "to never take justice into their own hands", as was the case, for example, in *Copper Mesa v. Ecuador*, where the investor had used fire shots, tear gas and mace against the local population and then started an arbitration to obtain compensation. The tribunal found that it was partly responsible for its own loss. *Second*, Mr. Kirtley recommended remaining "technical and dry" once the arbitration had started in order to secure the continuation of the project.

Environmental Issues

Highlighting a tension between the scarcity of resources, the polluting consequences of mining projects and the collective demand towards net zero, Alex Vagenheim contended that the mining sector is critical for the green transition. In this context, Diora Ziyaeva pointed out that Environmental, Social, and Governance (ESG) issues are frequently part of State defenses or counterclaims. *On the one hand*, cases such as *BSGR v. Guinea* and *Cortec Mining v. Kenya* prove that States can successfully defend their cases when investors fail to comply with governance or environmental requirements. *On the other hand*, there is certainly an increase in the State's practice of raising environmental counterclaims (see *Perenco v. Ecuador*). However, issues of standing (e.g., *Chevron v. Ecuador II*) and attribution (e.g., *Tethyan v. Pakistan*) are still there.

Ms. Ziyaeva noted that the recent generation of treaties addressing ESG issues reflects the relationship between trade, investment and obligations towards the environment as well as the connection between ESG and investors' obligations. Nonetheless, it remains unclear whether States can bring claims or counterclaims against investors on the basis of these provisions. One criticism is that these new treaties are like a patchwork quilt when it comes to resolving the issue.

Funke Adekoya San added that there is the necessity to equalize obligations between States and investors, especially on environmental and labor issues.

Mark Johns opined that the acceleration of the current pace of regulatory change makes it difficult for investors to keep up to date with regulatory regimes. On his end, Wiliam Kirtley stressed out the importance of stabilization, freezing and equilibrium clauses:

- In the case of stabilization clauses, parties have a fixed framework falling outside the host State's control. For the time being, stabilization clauses involve mainly taxation, and do not address environmental changes.
- Freezing clauses serve to fix certain laws concerning the project for a determined amount of time.
- Equilibrium clauses provide for a procedure to negotiate if an environmental concern arises. They can be used by mining companies to adjust contractual terms, if necessary.

Against this backdrop, Diora Ziyaeva confirmed that a nuanced and context-based approach that considers political, social, economic and environmental considerations of the host State is required to find a right balance between the States' right to regulate in a manner sensitive to environmental concerns and the investor protections contained in BITs.

Corruption

As explained by Ms. Adekoya San, the use of evidence of corruption as a bar to a claim has evolved in international arbitration. From a jurisdictional angle, *Metal-Tech v. Uzbekistan* is the first ICSID case dismissed at the jurisdictional stage on the grounds of corruption. Interestingly, both sides raised corruption allegations. The tribunal found that corruption did take place, and that there was no lawful investment.

Ms. Adekoya San explained how allegations of corruption come up as a defense on the merits in cases involving African states/parties. In *BSGR v. Guinea*, the tribunal noted that there were sufficient "red flags" of corruption, and ultimately dismissed the claim on a preliminary basis. Corruption allegations have also been brought up for setting aside the award (e.g., *P&ID v. Nigeria*).

Additionally, Ms. Adekoya San noted that it was still unclear what standard of proof applies to the issue of corruption in mining arbitration. As opposed to the old trend of corruption being deemed to be a matter of criminal law, tribunals are now more proactive in confronting the issue themselves.

Ms. Ziyaeva explained that ICSID tribunals have the power to inquire into corruption issues on their own initiative and if the allegations are being made by the parties, the tribunal should take into account international public policy. The key requirement is that tribunals issue an enforceable award, with low chances of set-aside. Tribunals do not seem to rely on the "beyond a reasonable doubt", but rather focus on red flags, existence of which shifts the burden of proof to the other party.

Damages Assessment

Practice has proven that mining claims are significantly larger than in other industries. From an investor's perspective, there are some industry-specific factors driving the assessment of damages.

According to William Kirtley, the pivotal factor in the determination of damages is having a good quantum expert, especially in ISDS arbitrations involving mining assets. As opposed to oil and gas disputes, damages in mining disputes are much harder to evaluate as it is not easy to predict where the mineral deposits are located without expensive drilling involved. This has a large impact on early stage mining projects, limiting damages to some costs.

From Mr. Kirtley's point of view, more problems arise when the quantity of available resources cannot be ascertained. For instance, if a social protest arises before the mine reaches an early stage, proving damages can be challenging. Unless the mining process has begun, it is difficult to convince a tribunal that there was any expropriation of the investment. Conversely, operational mining projects already producing can be evaluated based on the income they produce.

Addressing how ESG issues are taken into account by tribunals when assessing damages, William Kirtley observed that some years ago those issues were largely irrelevant (see *Quiborax v. Bolivia*), as opposed to the recent practice. For example, in *Copper Mesa v. Ecuador*, the tribunal assessed the claimant's contribution to its own injury as being at 30% of the amount of damages and concluded that the failure to complete an environmental study impacted the amount of compensation. In *Bear Creek Mining Corporation v. Peru*, the tribunal determined that the lack of support of the community had a direct impact on the tribunal's assessment of whether the project was viable and the compensation awarded.

Ultimately, tribunals have found two ways to take into account ESG in damages, either (i) limiting the investor's recovery to sunk costs, or (ii) diminishing damages on the basis of the investor's contribution to them.

Diora Ziyaeva noted that in *South American Silver v. Bolivia*, there was overwhelming evidence as to the investor's non-compliance with environmental requirements. The tribunal concluded that the acts of the state amounted to an expropriation and awarded damages of USD 18.7 million out of around 380 million claimed.

Mark Johns explained that ESG issues are difficult to quantify and numbers could sometimes be

viewed as arbitrary. He noted that it is often challenging for a tribunal to understand the science that goes into determining when a mine runs out of resources, what value it has and the amount of money mineral extraction would cost.

Finally, Funke Adekoya San questioned whether, in case a mining concession breached environmental legislation, a tribunal should accept jurisdiction and diminish the amount of damages for failure to comply with the law, contending it was an issue of proportionality. In any event, arbitral tribunals should look more carefully into these issues.

Conclusion

From the African perspective, Ms. Adekoya San suggested fewer disputes would arise if investors acted in the best interest of the investments. On her end, Diora Ziyaeva insisted on a balanced and nuanced approach that is context-specific. William Kirtley reiterated the importance of acting in good faith, while suggesting to draft detailed stabilization clauses in which both parties have significant endpoints. Finally, Mark Johns concluded that “investment should not be equated with invaders”.

Click here for full recording of the conference.

This entry was posted on Saturday, April 1st, 2023 at 8:45 am and is filed under Environment, Investment Arbitration, Mining Sector, Sustainability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.