Investor Treaty Obligations And Investor Protection In The Mining Industry

The issues and the challenges

I. OVERVIEW

International Investment Agreements and Concession Agreements

In 2018, global flows of direct foreign aid amounted to U.S. $1.3 trillion.[1] For many developing countries, foreign investment is critical in making them more competitive.

The main function of an International Investment Agreement ("IIA") between sovereign states is to prescribe how a host state is required to treat foreign investors. IIAs come into being either as a bilateral investment treaty ("BIT"), or as a multilateral investment treaty.

Where a host state grants a mining company a concession agreement, disputes tend to fall into two categories. First, there may be disputes over exploration or exploitation under the terms of the concession agreement. Second, there may be investment disputes over alleged expropriation of the mining company's investment.

Concession agreements typically include dispute resolution clauses that provide for: (1) informal *conciliation* processes or 'cooling off' periods; (2) formal *mediation* with a mediator if informal conciliation fails; and (3) referral to *arbitration*, if the parties are unable to reach a mediated settlement. Such arbitral proceedings, rulings and awards are generally private to the parties concerned.

Where host state measures do not amount to an undisputed breach of a concession agreement, arbitration under the concession agreement itself might not be available.

However, if there is an applicable IIA and state measures are alleged to amount to expropriation of an investment, unfair treatment, unjustified discrimination by government agencies or national courts, government withdrawal of tax exemptions or violation of stabilisation clauses in investment treaties etc., then in such circumstances an investor may have the option of either (i) suing the host state in that state's domestic courts, or (ii) referring the dispute to investment arbitration.

Under most BiTs, there will be a provision that enables an investor to refer a dispute to investment arbitration. Interim decisions and awards by investment tribunals are generally published.

II. ISSUES AND CHALLENGES

Recent investment tribunal cases tend to show four recurrent issues:

(1) Meaning of "investor"
(2) Compliance with local law
(3) Investor protection and state regulation
(4) Emergence of investor obligations

FIRST ISSUE - Meaning of "investor"

Jurisdictional issues often relate to the meaning of "investor" or whether *indirect investments* fall within the definition of "investment" (e.g. shareholding interests and participation in a host state company).

In ***South American Silver Limited (Bermuda) v. Bolivia*** (2018), Bolivia raised a jurisdictional objection that as the investor was not the direct owner of the shares, the tribunal had no jurisdiction. The objection was dismissed because there was nothing in the BiT, or any evidence from the time of the negotiation of the BIT, which suggested that the relevant state parties had excluded the possibility of indirect acquisition.

SECOND ISSUE - Compliance with local law

In ***Bear Creek v. Peru*** (2017), the tribunal rejected the argument that as a general rule investment tribunals lack jurisdiction over investments made in violation of domestic law.

However, in ***Cortec Mining v. Kenya*** (2018), the tribunal ruled that "explicit" language was unnecessary and that investments must be made *"in accordance with the laws of Kenya"* to be afforded protection.[2] The tribunal determined that it did not have jurisdiction because:

(i) the grant of the relevant mining licence was not a protected investment within the meaning of the applicable BiT, given that the grant did not comply with the laws of Kenya; and
(ii) there was an *implicit obligation of compliance* with domestic law, as both the ICSID Convention and the relevant BiT protected only "lawful investments".

Consequently, compliance with Kenyan local law *did* go directly to jurisdiction. On the face of it then, the *Bear Creek* decision does not appear readily reconcilable with the *Cortec Mining* decision.

However, the principle of proportionality established in ***Kim v. Uzbekistan*** may provide some guidance for tribunals as to a principled approach when dealing with the significance of compliance with local law. In *Kim*, the tribunal adopted a three-stage test proportionality principle. First,

[1] *UNCTAD World Investment Report 2019*, "Key Messages"
[2] See paragraph 333.

it assessed the significance of the obligation allegedly breached by the investor; second, it assessed the seriousness of the investor's conduct; and third, it evaluated whether the legal consequences of such violation were proportionate to the harshness of denying access to protection under the BIT.[3]

The *Cortec v. Kenya* tribunal did in fact apply the *Kim* proportionality principle when it considered whether non-compliance with local law went to jurisdiction; and also affirmed the significance of environmental legislation to the Mrima Hill project, given that location's special environmental vulnerability.[4]

THIRD ISSUE - Investor protection and state regulation

Recently, some states have placed sustainable development at the centre of national policy.[5] This has led to some renegotiated BiTs that are reflective of fundamental policy changes by host states.[6]

However, many older generation BiTs remain in force. These BiTs tend to contain broadly worded provisions that provide substantive protection for foreign investors whilst not requiring exhaustion of local remedies as a pre-condition for arbitration. The ISDS legal system has attracted strong criticism in recent years.[7]

The conflict between protection for investors and host state regulations tends to be articulated as substantive issues that relate to international investment standards of:

(i) fair and equitable treatment ("FET") and the protection of investor's legitimate expectations; and

(ii) indirect expropriation.

In ***Crystallex International Corporation v. Venezuela*** (2016), a mining investor acquired rights to exploit gold deposits. Later, when the investor sought permits to commence operations, the host state denied the investor an environmental licence owing to concerns about the project's impact on the environment and the indigenous people of the region. Venezuela was found to have unlawfully expropriated the investor's investment by breaching the FET standard: *"FET comprises, inter alia, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency"*.

FOURTH ISSUE - Emergence of Investor Obligations

Increasingly, host states are bringing counterclaims against investors on grounds of alleged wrongful investor behaviour. Any involvement in corrupt practices may prove fatal to an investor's attempts to protect the investment.

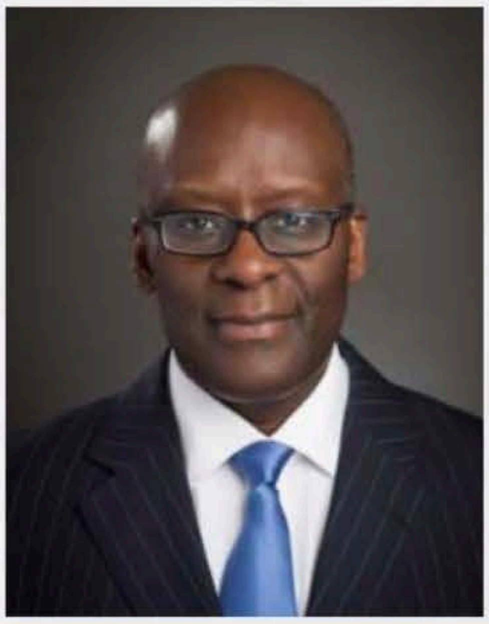
In ***Churchill Mining v. Indonesia*** (2016), it was held that investors operating in countries with a relatively weak adherence to the rule of law must act with due diligence. Turning a "blind eye" to corrupt practices, as well as participation in such practices, could result in the inadmissibility of an investor's claim, or the loss of access to international arbitration. Churchill's claims were found to be *"based on documents forged to implement a fraud aimed at obtaining mining rights"*, and therefore Churchill's claims relative the Government's revocation of its mining licence were ruled inadmissible.[8]

III. CONCLUSION

Arbitral tribunals in investor-state cases often possess wide powers to interpret the scope and meaning of a host state's obligations under the relevant IIA.

Investor-state arbitrations lack an appellate jurisdiction to promote consistent application of the law. It will therefore tend to fall to individual tribunals to determine, with finality, the extent to which an IIA limits a host state's regulatory powers and the state's ability to adopt and maintain sustainable development policies.

The emergence of investor obligations is a significant development. Where an investor fails to comply with local law, particularly in cases of alleged corruption, the three-stage *Kim* proportionality principle may provide a principled basis on which a tribunal can resolve challenges to jurisdiction.



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[3] See paragraphs 406-408 of the Kim decision on Jurisdiction.

[4] See paragraphs 345, 348, 352 and 365 of the Award.

[5] See, for instance, Kenya's Natural Wealth and Resources (Permanent Sovereignty) Act 2017, Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017, Written Laws (Miscellaneous Amendments) Act 2017.

[6] For example, see Tanzania-China (2013) BiT, which provides for limited recourse to investment arbitration. Under Article 12(2), the 2013 BiT gives precedence to the adjudication of investment disputes by the court of the host state. The Tanzanian BiT with the Netherlands that was up for renewal on 1 October 2018 was terminated in September 2018

[7] *UNCTAD World Report 2017*, Investment and the Digital Economy.

[8] In **Tethyan Copper Company Pty Ltd v. Pakistan (2019)**, an ICSID tribunal made an award of nearly US $6 billion against Pakistan. In 2017, Pakistan had failed on a Decision on Jurisdiction and Liability to establish facts to prove its allegations of corruption against the investor.