

Mining: Digging the hot topics of mining arbitration

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Speakers

- Romain Dupeyré, Partner, DWF , Moderator
- Ali Boroumand, Partner, DWF
- Ewelina Wętrys, Local Partner, DWF
- Patrycja Treder, Counsel, DWF
- Ahmed Habib, Senior Associate, DWF
- Olivier Binyingo, Executive Vice-President DRC, Ivanhoe Mines



Agenda

- Introduction, Romain Dupeyré
- For real: how do managers of mining companies see arbitration as a tool to operate in a unsettled context, Olivier Binyingo
- Race for the strategic minerals, Resource nationalism and review of contracts, Ali Boroumand
- Unlocking the Potential of Counterclaims in Investor-State Mining Disputes, Ewelina Wętrys and Patrycja Treder
- Unveiling the Depths: Corruption in Mining Arbitration, Ahmed Habib

Introduction

Romain Dupeyré

Partner, DWF



Arbitration & Mining: News

- “Chinese miner loses claim over Congo lithium venture”, 18 March 2024
- “Canadian mining company serves Mexico with trigger letter”, 18 March 2024
- “Colombia mining award sheds light on tribunal split”, 12 March 2024
- “Romania relieved after defeating multibillion mining claim”, 11 march 2024
- “Peruvian mining company declares win against Trafigura”, 6 March 2024
- “Mining claim against Ghana clears hurdle”, 5 March 2024
- “Colombia defeats ICSID claim over environmental measures”, 29 February 2024
- “Congo can’t bring counterclaims in mining dispute”, 30 January 2024
- “Mozambique faces mining claim at ICSID, 29 January 2024
- “Mining investor’s claim against Armenia underway”, 29 January 2024
- “ICSID panel grants interim relief in Congo lithium feud”, 23 January 2024
- “Funded claimant must provide security for claim over mining ban”, 19 January 2024
- “India sees trigger letter in mining dispute”, 19 January 2024

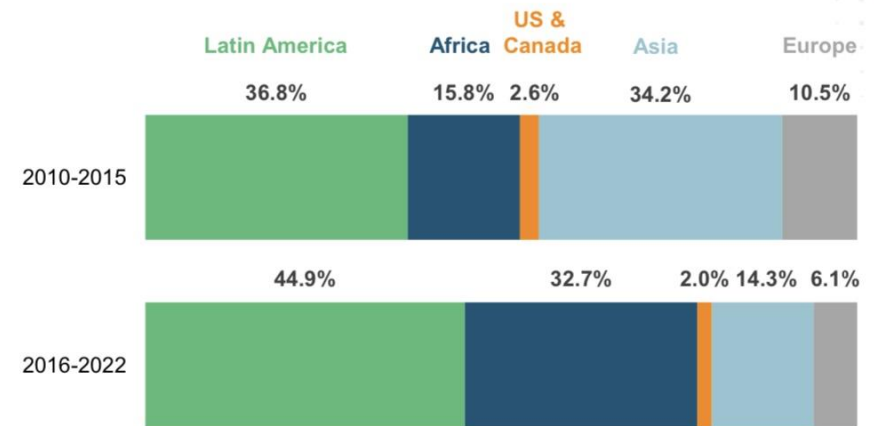
Arbitration & Mining: Significant surge

- Mining: sector with a particularly strong arbitration activity.
- The period of **energy transition** and the **increasing demand for critical raw materials and rare earth minerals** has resulted in a large number of disputes within the mining sector.

Figure 1: Treaty arbitrations filed over time



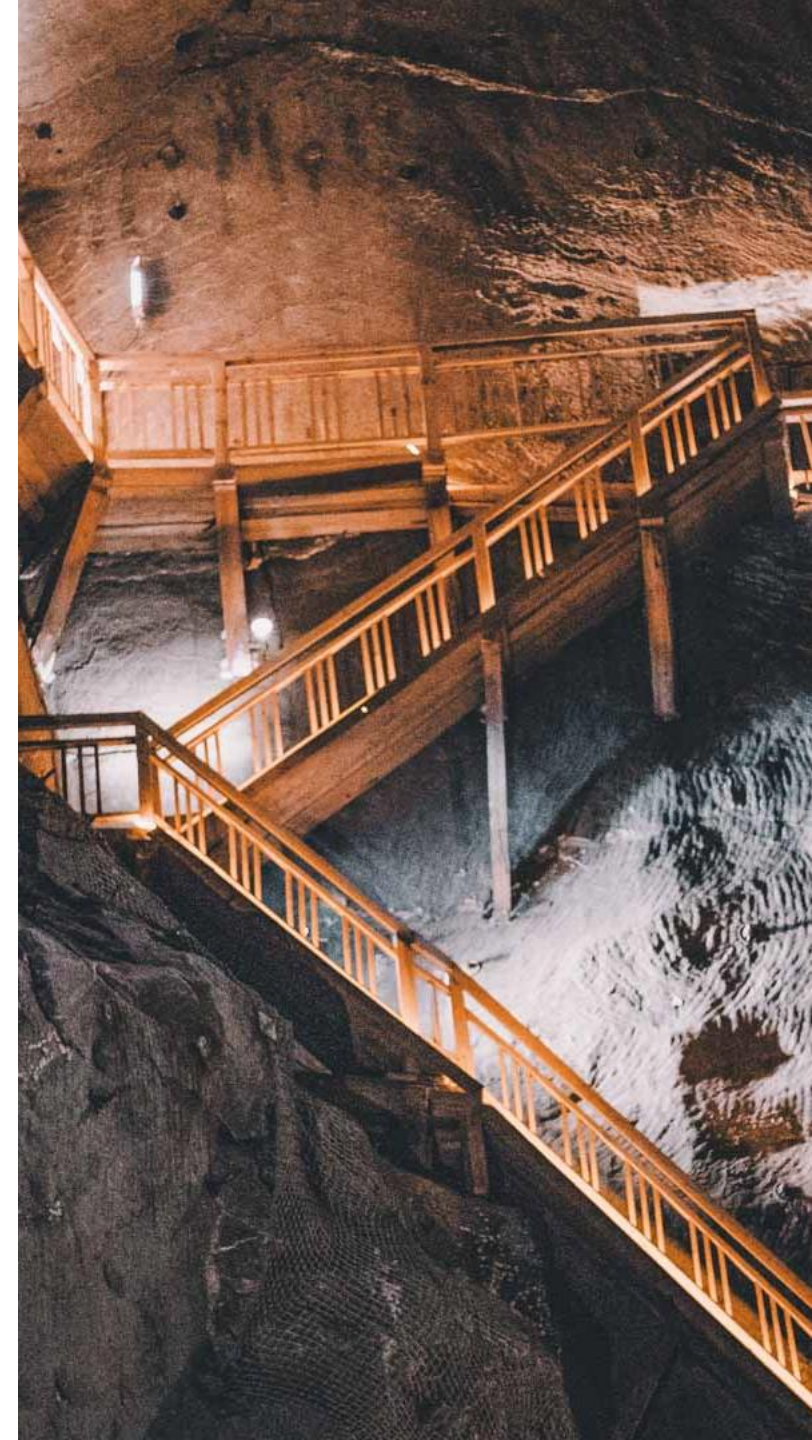
60%
of all cases were
filed in the past
10 years



- Frequent defendants: Venezuela, Columbia, Peru, DRC
- But also involve parties from Europe (Denmark, Romania), Asia...
- And may even involve France at some point: « Un colossal projet de mine de lithium en Auvergne divise la population », Le Monde, 18 mars 2023

Arbitration & Mining: Main features

- Mining is one of the **most international industries**, as highlighted in the [UNCTAD's 2020 World Investment Report](#), which points out that *“more than half of all projects are sponsored by foreign companies”*
- Due to the **capital-intensive nature of mining projects**, investments in this sector are also particularly large
- Several sectors **heavily rely on the output of the mining industry**. A notable example is the automotive industry, which depends on the supply of rare minerals like lithium, cobalt or nickel for its electrification
- The **mining sector is inherently intertwined with governments**, as the extraction of non-regenerable minerals is considered a prerogative of the state. Changing political landscapes and the lobbying activities of different stakeholders can therefore pose significant risks to investors
- The **value of mining projects increases significantly post-exploration**, as it encompasses the value of the discovered mining reserves. Projects can be evaluated based on their potential future incomes and the price of underlying commodities, even in their early stages



Arbitration & Mining: Data and statistics

- Arbitration institutions
 - ICSID (32%)
 - ICC (15%)
 - Ad hoc (12%) incl. UNICTRAL (*Vedanta Resources v ZCCM Investment Holdings*, seated in South Africa)
 - PCA (*Cassius Mining Ltd v the Republic of Ghana*; *Vedanta Resources v ZCCM Investment Holdings*, as appointing authority) (10%)
 - Others:
 - Ghana (*Cassius Mining Ltd v the Republic of Ghana*),
 - Lima (*Ariana Management Corporation S.A.C. v Urion Mining International B.V.*)

Recent trends and highlights: TPF

- Mining arbitrations are frequently funded by third parties
 - *Greenland Minerals A/S v Greenland and Denmark*: An Australian company has been ordered to provide security for costs while it pursues a funded arbitration against Greenland and the Kingdom of Denmark over a uranium mining ban.
 - *Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v. United Republic of Tanzania* (ICSID Case No. ARB/20/38)
 - *Winshear Gold Corp. v. United Republic of Tanzania* (ICSID Case No. ARB/20/25) (see on Youtube!)
 - *Montero Mining and Exploration v Tanzania*
 - *Galway Gold Inc. v. Republic of Colombia* (ICSID Case No. ARB/18/13)
 - *Silver Bull Resources v Mexico*
 - *AVZ International Pty Ltd., Dathcom Mining SA and Green Lithium Holdings Pte Ltd. v. Democratic Republic of the Congo* (ICSID Case No. ARB/23/20)
 - *Lupaka v Peru*
- ICC Case over a gold mine in Central Africa
 - The tribunal also finds that the claimant's financial position has changed significantly since the arbitration agreement was signed
 - In the tribunal's view, it cannot be said that the respondent assumed the risk of such a serious financial situation when it agreed to enter the SPA
 - The suggestion that the respondent should have secured some form of security for costs in the SPA in case it would end up in arbitration is not realistic
 - The claimant did not provide evidence of any steps taken since the filing of the Answer, when the SC application was first mentioned, to seek to obtain further funds to cover its own costs and satisfy an order of security
 - Turning to the quantum of the security sought, the Tribunal does not agree with the Claimant that the amount sought by the Respondent for its legal costs is "manifestly excessive". Given the amount in dispute, and the issue at stake, that amount seems reasonable.

Recent trends and highlights: Emergency & Interim reliefs

AVZ saga

AVZ International Pty Ltd., Dathcom Mining SA and Green Lithium Holdings Pte Ltd. v. Democratic Republic of the Congo (ICSID Case No. ARB/23/20)

- The ICSID tribunal directed the DRC to “re-establish” Dathcom as the owner of the exploration licence while excluding the perimeter covered by the new licence granted to the Zijin-Cominière venture.
- It also ordered the DRC to rectify mining fallout maps, protect Dathcom’s installations and equipment, to allow access to a hydroelectric power station, and to preserve the confidentiality of technical information.
- The state must also avoid “any new act likely to call into question” the mining licence or aggravate the dispute pending a final award.

AVZ International Pty Ltd, Green Lithium and Dathcom v Cominière and Jin Cheng

- Order from emergency arbitrator to restrain Cominière from seeking termination of the parties’ JV under a penalty of USD50,000 per day
- Second order restraining the state entity from conducting operations within the licence area under a penalty of USD50,000 per day

AVZ International Pty Ltd v. Dathomir (ICC 27401)

- Application for provisional measures to the tribunal applying the ICC rules for provisional measures to preserve the *status quo* including injunctions to:
 - Withdraw an application before local courts to dissolve the JV;
 - Comply with the arbitration clause.

Arbitration & Mining: ESG considerations

- **Environmental and social governance (ESG) plays an increasing role in mining arbitration.**
- Tribunals are likely to consider the livelihoods of nearby communities and whether a project had the “*social license to operate*”.
- A [recent survey](#) also indicates that 75% of participants expect **growing government interventions** based on ESG considerations.
- ITIE: Initiative pour la Transparence des Industries Extractives

« *Le Cameroun suspendu de l'ITIE, faute de participation de la société civile* », 1st March 2024



Recent trends and highlights

- Dissenting opinions are frequent
 - *Greenland Minerals A/S v Greenland and Denmark*
 - *Red Eagle Exploration Limited v Republic of Colombia* (ICSID Case No ARB/18/12)
 - *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v Romania* (ICSID Case No. ARB/15/31)



Recent trends and highlights

ICSID panel strikes out most of Tanzania's annulment bid

For a first, at ICSID, a panel has summarily dismissed most of Tanzania's grounds for annulling an Australian nickel miner's US\$76.7 million award – after it found they were manifestly without legal merit.

- In its decision, the ad hoc committee observed that the majority of the allegations raised by Tanzania were “extremely preliminary, lacking substance and legal basis”.
- It found that a plain reading of the award was sufficient to dismiss 19 allegations that the tribunal failed to state its reasons. This included dismissing Tanzania's arguments that the mining legislation had a public purpose; and suggesting the claimants to apply for new mining rights had “undone” the expropriation.
- The committee said it was not its place to review the “correctness” or “wisdom” of the tribunal's decision to uphold jurisdiction over its determinations on damages.
- However, it found it could not dismiss Tanzania's allegations that the tribunal had departed from a fundamental rule of procedure – as those allegations were not related to the “quality” of the award but instead the conduct of the tribunal throughout the proceedings.



Arbitration & Mining: Managing expectations

Large amounts are sometimes awarded

- **USD 6 billion in BIT damages for loss of copper mining rights in Tethyan v. Pakistan**
- **USD 254m in *Glencore Finance (Bermuda) Limited v Plurinational State of Bolivia* (PCA Case 2016-39)**

Claimed amounts exceed amounts awarded by a large margin.

- The analyzed arbitrations revealed a notable disparity between the amounts claimed and the amounts awarded. **In 44% of cases where both the claimed and awarded amounts were available, the amount claimed exceeded the amount awarded by a factor of 10.**
- The median claim is 4x the amount awarded.
- “Central African Republic Baraldi Mines Centrafrique wins arbitration case against the government”, 4 March 2024

The Central African Republic has been ordered by the International Arbitration Chamber of Paris to pay the Italian company €676,350 to compensate for its revocation of two mining exploration permits in 2021 (claim was for USD40m)



Romain Dupeyré

Partner

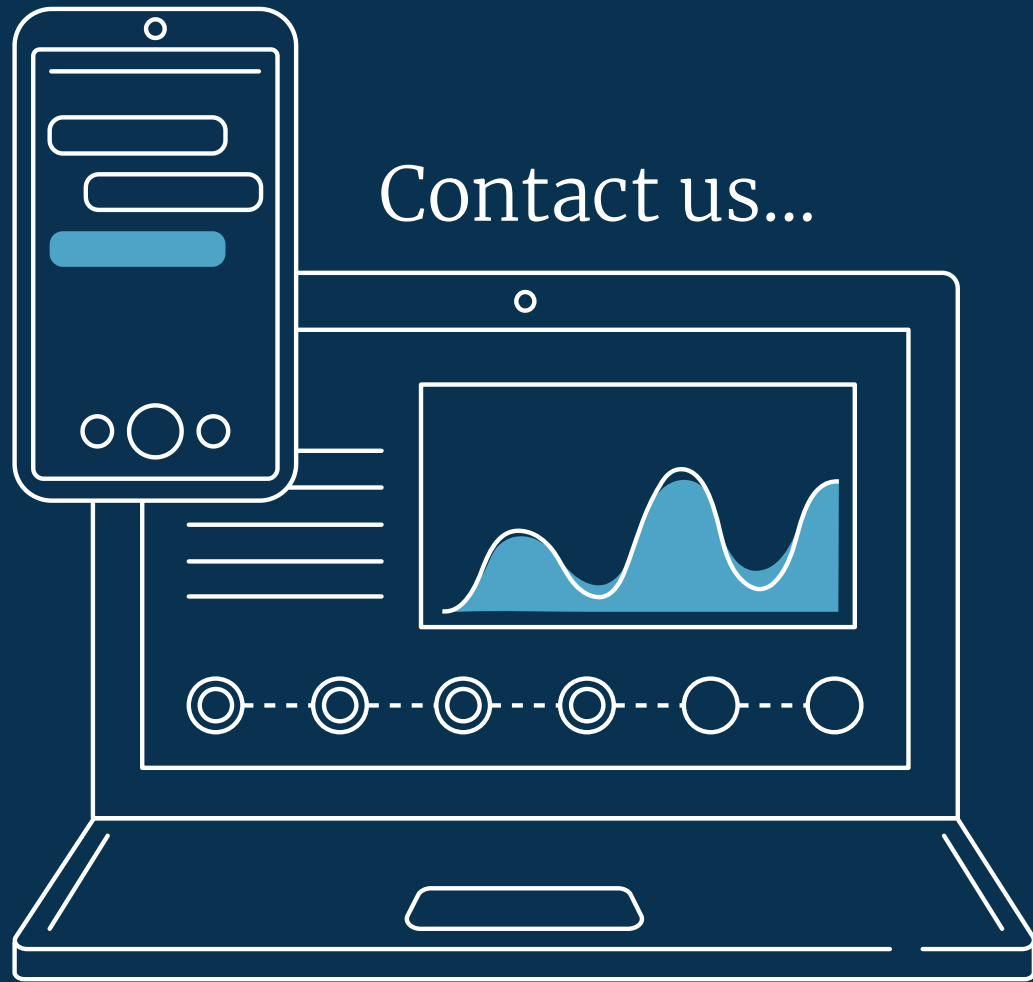
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For real: how do managers of mining companies see arbitration as a tool to operate in a unsettled context

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Race for the strategic minerals, Resource nationalism and review of contracts

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Unlocking the Potential of Counterclaims in Investor-State Mining Disputes

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- I. Legal Requirements for the Submission of Counterclaims by States

 - II. Arbitral Awards on Counterclaims

 - III. Conclusions



I. Legal Requirements for the Submission of Counterclaims by States

Jurisdiction of the Arbitral Tribunal over Counterclaims (1/3)



The Arbitral Tribunal must have **jurisdiction over counterclaims** brought by a State.



The jurisdiction of the Arbitral Tribunal over counterclaims is established based on

- international investment treaty (explicitly or implicitly),
- arbitration rules,
- consent of the Parties to the arbitration (e.g. a separate agreement).



Jurisdiction of the Arbitral Tribunal over Counterclaims (2/3)

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) explicitly establishes **the jurisdiction of an arbitral tribunal over counterclaims**.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Art. 9.19.2:

*„When the claimant submits a claim (...), the respondent may make a **counterclaim** in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant“.*



Jurisdiction of the Arbitral Tribunal over Counterclaims (3/3)



According to **Article 12 of the UNCITRAL Rules**, a counterclaim will be accepted as long as the arbitral tribunal has jurisdiction over it.



According to **Article 46 of the ICSID Convention**, the tribunal shall determine any incidental or additional claims or counterclaims that:

- Arise directly out of the subject matter of the dispute;
- Are within the scope of the consent of the parties; and
- Are otherwise within the jurisdiction of the Centre.



Direct Connection Requirement

The counterclaim brought by a State must be **sufficiently connected with the subject of a dispute/ the Claimant's primary claim.**



Obligations of Foreign Investors (1/2)



The BIT must establish **obligations on foreign investors**.



States should also consider whether the BIT may adjudicate on investor's breaches of local law (as opposed to international law).



Some of the areas where the State can incorporate from enforceable obligations for foreign investors include:

- Human rights obligations, including civil, political and labour rights;
- Environmental obligations, e.g., the obligation to conduct an environmental impact assessment;
- Obligations to respect indigenous peoples' rights; and
- Obligations to respect domestic law, e.g., anti-corruption legislation.



Obligations of Foreign Investors (2/2)

The BIT between Morocco and Nigeria is a clear example of setting out **obligations for foreign investors**.

Morocco – Nigeria BIT (2016) Article 18:

- "1. Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard*
- 2. Investors and investments shall uphold human rights in the host state.*
- 3. Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.*
- 4. Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties".*



II. Arbitral Awards on Counterclaims

Case law awarding counterclaims by States

Tribunals have awarded the counterclaims brought by the Respondent States against the foreign investors:

Burlington v. Ecuador (2017):

The Tribunal admitted and awarded the counterclaims brought by Ecuador against Burlington (ca. USD 41.5 M).

Perenco v. Ecuador:

The Tribunal admitted and awarded the counterclaims brought by Ecuador against Perenco (ca. USD 54,5 M).

Case law admitting counterclaims by States

Tribunals have considered counterclaims, irrespective of the provisions of the arbitration agreement:

Antoine Goetz and others v Republic of Burundi, ICSID Case No ARB/01/2:

The Tribunal found that the counterclaim arose out of the same bank operating certificate, which also formed the investment in dispute, and that it thus arose directly out of the subject matter of the dispute.

Urbaser et al. v Argentina, ICSID Case No ARB/07/26:

The Tribunal held that 'both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same concession and that the close connection between claim and counterclaim was therefore established.



Case law rejecting counterclaims by States

Tribunals have often rejected to exercise jurisdiction over State counterclaims by States based on lack of close connection with the primary claim:

Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID:

The tribunal found that the counterclaim of Venezuela is outside of its jurisdiction. The tribunal also remarked that the counterclaim of Venezuela was not properly substantiated and that Venezuela failed to quantify the damage caused by Rusoro. **The tribunal dismissed the counterclaims as outside its jurisdiction.**

Sergei Paushok, et al. v. The Government of Mongolia, UNCITRAL:

The case concerned a complaint about the legal measures that negatively affected the claimant's mineral extraction investment activities. Mongolia asserted counterclaims on various grounds: tax evasion, claims to pay back of worker fees, illicit inter-group transfers leading to further tax and levies evasion, violation of a licence agreement obliging the claimant to extract gold in a certain manner leading to further loss in taxes and revenues, and violation of environmental law and allegations of gold smuggling. **The tribunal dismissed the counterclaims as outside its jurisdiction.**



III. Conclusions

Why are the arbitral tribunals so rarely awarding counterclaims brought by States?



States rarely bring counterclaims in investment arbitrations



Lack of legal basis for bringing a counterclaim by a State



Defectiveness in the construction of counterclaims





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Unveiling the Depths: Corruption in Mining Investment Arbitration: A Shield or A Sword?

Ahmed Habib

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The corruption in the Mining sector has gained increased attention over the years

- **Extractive Industries Transparency Initiative:**

A global coalition of governments, companies, and civil society organisations united to promote transparency in mining; it reveals the payments made and received for natural resources to foster an environment where citizens can hold both companies and governments accountable for their actions

- **At the domestic level, some states have also taken steps to deter corruption and improve mining governance, for instance:**
 - **The Democratic Republic of Congo** and **Senegal** mandated compulsory publication of all mining contracts in their official gazette
 - **Senegal** has disclosed all contracts and licenses awarded from 1979 to 2021
- **There is a growing number of investor-state mining arbitrations in which corruption is invoked**



Corruption before Investment Arbitral Tribunals: A Sword or A Shield?

Corruption is raised by both host States and investors in various forms and for various purposes, for instance:

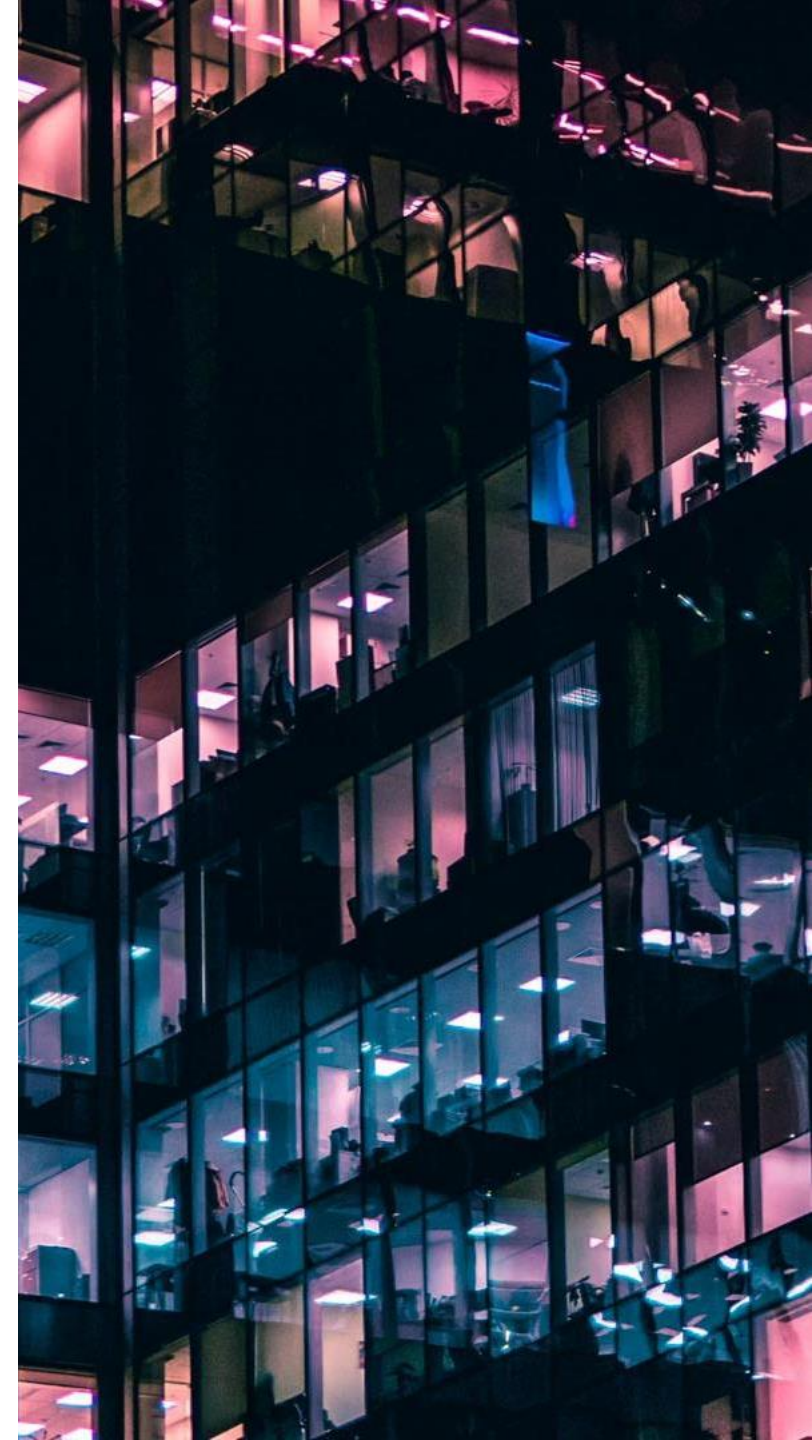
1) Invoked by a state to deny the tribunal's jurisdiction *by claiming that due to corruption there was no 'investment' within the terms of the investment treaty:*

– In *Metal-Tech Ltd v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3):

The Tribunal found that the corruption undertaken by the investor vitiates the consent of the state to ICSID Arbitration as the consent is only related to investments implemented in compliance with local law.

– In *Gustav v. Columbia* (ICSID Case No. ARB/07/24):

The Tribunal held that an investment will not be protected if it has been created by corruption and this is irrespective of specific language to this effect in the Treaty.



Corruption before Investment Arbitral Tribunals: A Sword or A Shield?

2) Corruption raised by the host State to claim that due to corruption, the claim's claims are inadmissible:

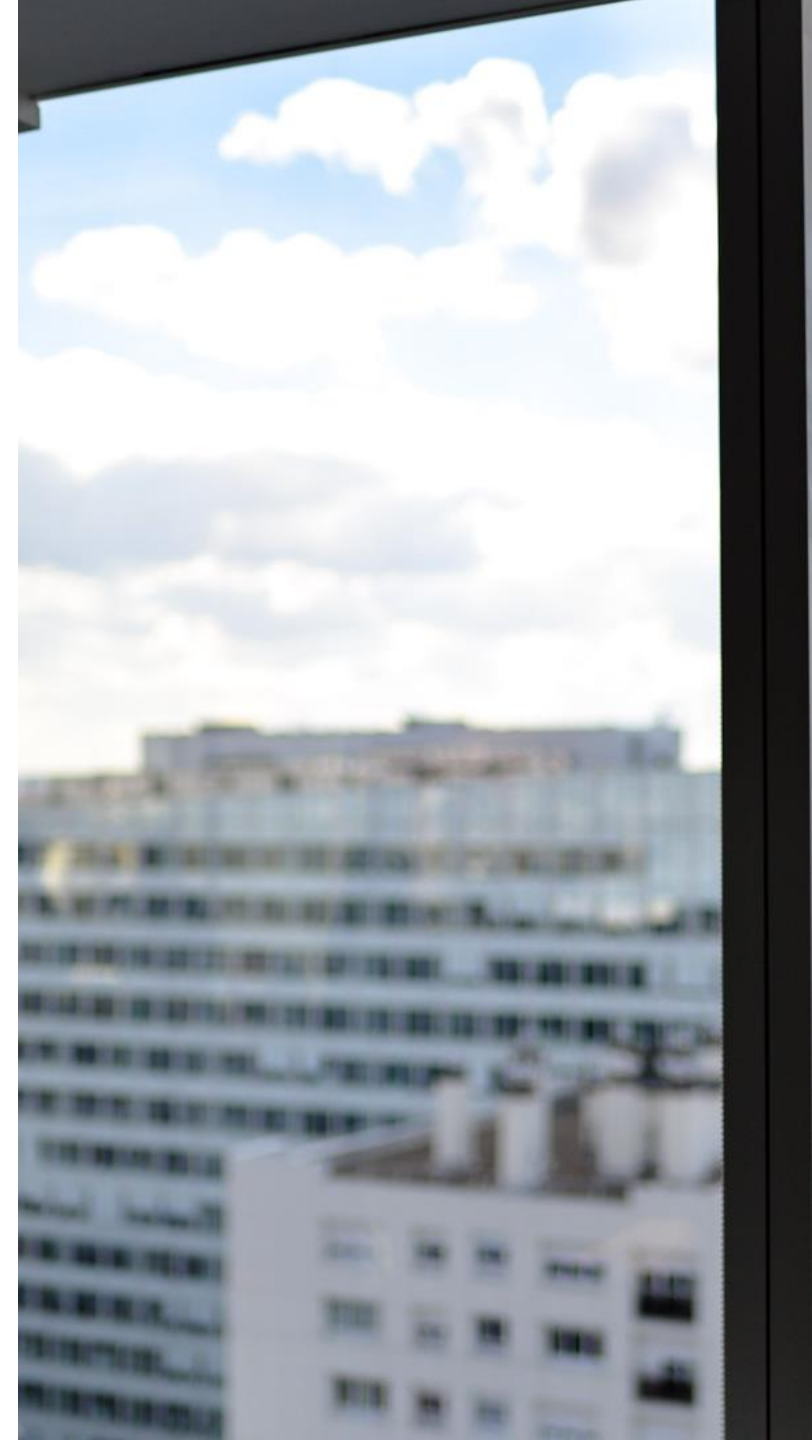
– In *World Duty Free v. Kenya* (ICSID Case No. ARB/00/7):

The Tribunal held that “*bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transactional public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*”

– In *BSG Resources v. Guinea* (ICSID Case No. ARB/14/22):

The Tribunal found that “[s]ince all the claims in these proceedings derive from mining rights secured through corrupt practices, they must be declared inadmissible.”

At the same time, the Tribunal found inadmissible Guinea's counterclaims for damage caused by the investors' corrupt practices deciding that the harm “*would not have occurred if the Guinean state officials in charge of making the controversial decisions [...] had not been on the receiving end of the corruption scheme.*”



Corruption before Investment Arbitral Tribunals: A Sword or A Shield?

3) Corruption put forward by an investor to accuse a host State of violating its international obligations under the investment treaty by engaging itself in corrupt conduct:

- In *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* ICSID (Case No. ARB/07/14):

The Tribunal held that “[c]orruption, if found, would constitute a grave violation of the standard of fair and equitable treatment.”

- In *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13):

The Tribunal found that “[t]he Tribunal shares the Claimant’s view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant by the BIT [...] and that ‘exercising a State’s discretion on the basis of corruption is a [...] fundamental breach of the transparency and legitimate expectations.’”



Corruption before Investment Arbitral Tribunals: A Sword or A Shield?

3) It is commonly accepted that corruption is contrary to public policy. As a consequence, any award giving effect to claims tainted by corruption may potentially be subject to annulment or its enforcement or recognition may be denied based on public policy grounds:

– In *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13):

The Tribunal found that “[t]he Tribunal shares the Claimant’s view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant by the BIT as well as a violation of international public policy.”

– Both Articles (V)(2)(b) of New York Convention and Article 34(2)(b)(ii) of the UNCITRAL Model Law address the unenforceability and setting aside of the arbitral award if an award is contrary to the public policy of the relevant state.





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QUESTIONS



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