How ISDS Interferes with the Governance of Critical Minerals for a Just Energy Transition—And What to Do About It

Madeleine Songy and Martin Dietrich Brauch

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Critical minerals lie at the heart of sustainable development and the transition to sustainable and renewable global energy systems. To achieve the Paris Agreement goal of limiting the global temperature increase to 1.5 °C and to triple renewable energy capacity globally by 2030, as states agreed to at COP 28 in Dubai,[1] the world needs to significantly increase the supply of critical minerals[2] needed for energy technologies through a combination of circular economy[3] approaches and ramped-up primary extraction, according to estimates from institutions like the World Bank,[4] IEA,[5] and IRENA.[6]

Governments of mineral-rich countries have long faced challenges in translating their mineral wealth into sustainable development, including with respect to the development and sharing of mining-related infrastructure, fair and robust fiscal regimes, responsible revenue management, environmental regulation, community consultations, and anti-corruption measures, among others.[7] New challenges will emerge as mineral value chains face pressures to decarbonize,[8] increased demand pushes mining into new territories and geopolitical tensions and technological innovation create uncertainty.[9]

To manage these challenges, mitigate risks, and optimize the benefits of resource-based development, resource-rich countries will need to develop or strengthen policy and legal frameworks related to the mining sector. Yet, as they do so, they will face an additional challenge: the risks and costs posed by investor–state dispute settlement (ISDS) based on investment treaties or contracts.[10]

Under investment treaties and contracts, states grant specific protections and privileges to foreign investors. ISDS allows the investor to claim monetary damages for alleged violations of those protections by the state through opaque and costly arbitration proceedings against the host state.[11] As of March 2024, one database includes over 2000 known ISDS claims, based on both treaties and contracts.[12] The number of claims is almost surely much larger, as many claims, especially contract-based claims, are not disclosed.

Since the Paris Agreement entered into force, at least 57 known ISDS cases have emerged or were decided based on critical mineral investments, and in 9 additional cases, states have been put on notice of a forthcoming dispute. Known ISDS cases primarily concern copper, lithium, silver, and iron ore. However, recent developments in ISDS cases have also related to investments in nickel, zinc, lead, and rare earths, among other minerals.

For the 57 known cases, the total damages claimed by investors exceeds USD 200 billion. While investors often claim that investor protections and ISDS are necessary because investors face discrimination, bias, and corruption in foreign markets, in practice many, if not most, of the ISDS claims related to critical minerals are challenging measures that governments have taken to protect or advance public interest. Measures that are not only necessary, but constitute good governance of the sector.[13]

In 2019, local miners formed a blockade in a mining district in northern Mexico with ample silver, lead, and zinc resources. Canadian mineral exploration company Silver Bull, which holds the rights to mining concessions in the district under its Sierra Mojada project, claims that the blockade has prevented the company from accessing the project. Silver Bull filed a notice of dispute in March of 2023 and is claiming a minimum of USD 178 million in damages, alleging that the Government's failure to address the blockade breached the investor's rights under the NAFTA legacy provision in the USMCA.[14]

In 2019, Ukrainian shareholders in a local mining company brought an ISDS case against North Macedonia in response to the government's termination of its concession in Kanzandol for the exploitation of copper, gold, silver, molybdenum, rhenium, lead, and zinc due to environmental concerns.[15] Local environmental groups actively campaigned against the issuance of a license for the mining project due to concerns over pollution along the Greek border.[16] The government, in response, held referendums that ultimately halted the construction of the mining complex, leading to the annulment of the concession agreement. The Ukrainian shareholders claimed USD 423.3 million in damages.

Peru's national tax authority assessed that a company processing copper ore in a deposit southwest of Arequipa owed additional royalties as well as payment of penalties and interest accrued. American shareholder Freeport-McMoRan and Dutch shareholder SMM Cerro Verde Netherlands B.V. in local company Sociedad Minera Cerro Verde S.A.A. each initiated proceedings against Peru in 2020. The American shareholder is seeking close to USD 1 billion in compensation.[17]

Tanzania revised its licensing regime in 2017 to abolish retention licenses that allowed investors to explore known mineral resource areas at a later date, reverting all areas to the dominion of the state.[18] Canadian investor Montero Mining, who retained a license for rare earth elements, initiated an ISDS case in 2021, seeking USD 118 million in damages.[19]

After months of anti-mining protests, an Ecuadorian court suspended silver and gold mining operations in the Rio Blanco mining concession area in 2018.[20] Chinese investor Junefield Gold, who retained those permits, initiated a case against Ecuador to challenge both the suspension of its mining operations as well as the state's decision to withdraw police forces from the area. The investor is seeking USD 480 million in compensation.[21]

In most cases (at least 25 cases), the investor challenged the government's termination of a mining concession or changes to the licensing regime. Other cases challenged measures undertaken by national tax or bankruptcy authorities (8 cases), government action to protect and preserve the environment or address social concerns (6 cases), and responses to protests against mining concessions (5 cases).

ISDS cases undermine the effective regulation of critical minerals. Given the evolving landscape of the energy transition and the technologies that enable it, states need to maintain their unobstructed ability to enact and modify important mining governance measures. ISDS can have a chilling effect[22] on mining governance by host states as foreign investors challenge state regulation of mineral sectors and states' authority to govern their resources. In addition to the risk of exorbitantly high awards against the state, states face millions of dollars in legal fees and arbitration costs, even if they successfully defend the case. As a result, states are less likely to take these legitimate measures.

To address the above and remove ISDS from investors' toolkits, states can terminate investment treaties with ISDS provisions or withdraw consent to arbitrate.[23] When negotiating private contracts, states can move away from ISDS provisions in mining concession agreements.[24] This action could be particularly meaningful in resource-rich, low- and lower-middle-income countries as they aim to leverage the increased demand for their mineral resources into broader sustainable and inclusive development.

Madeleine Songy *is a Program Associate and* ***Martin Dietrich Brauch*** *is a Lead Researcher at the Columbia Center on Sustainable Investment (CCSI).* *The authors would like to thank Lisa Sachs, Director at CCSI, for her invaluable review and insights.*

References

1 Conference of the Parties to the United Nations Framework Convention on Climate Change serving as Meeting of the Parties to the Paris Agreement, Outcome of the first global stocktake, Draft decision -/CMA.5, Proposal by the President, UN Doc. FCCC/PA/CMA/2023/L.17, December 13, 2023, https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf.

[2] Kirsten Hund, Daniele La Port, Thao P. Fabregas, Tim Laing, John Drexhage, *Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition* (Washington, DC: World Bank, 2020), http://documents.worldbank.org/curated/en/099052423172525564/P16627806f5aa400508f8c0bdcba0878a3e.

[3] "Circular Economy for Mining and Energy," Columbia Center on Sustainable Investment (CCSI), https://ccsi.columbia.edu/circular-economy-mining-energy.

[4] *Supra*, note 2.

[5] International Energy Agency (IEA), *The Role of Critical Minerals in Clean Energy Transitions* (Paris: IEA, May 2021), https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions.

[6] International Renewable Energy Agency (IRENA), *Global Energy Transformation: A Roadmap to 2050* (Abu Dhabi: IRENA, 2019), https://www.irena.org/publications/2019/Apr/Global-energy-transformation-A-roadmap-to-2050-2019Edition.

[7] "Extractive Industries," CCSI, https://ccsi.columbia.edu/content/extractive-industries.

[8] International Finance Corporation (IFC), *Net Zero Roadmap for Copper and Nickel: Technical Report* (Washington, DC: IFC, January 2023), https://ccsi.columbia.edu/content/net-zero-roadmap-2050-copper-and-nickel-value-chains.

[9] Perrine Toledano, Martin Dietrich Brauch, Solina Kennedy, and Howard Mann, *Don't Throw Caution to the Wind: In the Green Energy Transition, Not All Critical Minerals Will Be Goldmines* (New York: CCSI, May 2020), https://ccsi.columbia.edu/content/dont-throw-caution-wind-green-energy-transition-not-all-critical-minerals-will-be-goldmines.

[10] CCSI, *Primer on International Investment Treaties and Investor–State Dispute Settlement* (New York: CCSI, January 2022), https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.

[11] Ibid.

[12] "Arbitration Cases," Investment Arbitration Reporter, https://www.iareporter.com/arbitration-cases.

[13] Lisa Sachs, "Mining, Arbitration, and the Sustainable Development Challenge: Keynote Address at Global Arbitration Review (GAR) Interactive Mining," *Columbia Center on Sustainable Investment* (blog), March 25, 2021, https://ccsi.columbia.edu/news/mining-arbitration-and-sustainable-development-challenge-keynote-address-global-arbitration.

[14] Lisa Bohmer, "Canadian Company Puts Mexico on Notice of NAFTA Legacy Dispute Over Mine Blockade," *IA Reporter*, March 3, 2023, https://www.iareporter.com/arbitration-cases/silver-bull-resources-v-mexico.

[15] *Skubenko and others v. North Macedonia; Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets and others v. Republic of North Macedonia*, ICSID Case No. ARB/19/9, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/960/skubenko-and-others-v-north-macedonia.

[16] "Macedonia Terminates Concession Agreement for Kazandol Mining Project," *BNE Intellinews*, March 27, 2018, https://www.intellinews.com/macedonia-terminates-concession-agreement-for-kazandol-mining-project-138973.

[17] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1046/freeport-mcmoran-v-peru; *SMM Cerro Verde Netherlands B.V. v. Republic of Peru*, ICSID Case No. ARB/20/14), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1040/smm-cerro-v-peru.

[18] "Tanzanian Government Ordered to Pay Mining Giant 109m," *Lex Africa*, August 2023, https://lexafrica.com/2023/08/tanzanian-government-ordered-to-pay-mining-giant-109m.

[19] *Montero Mining and Exploration Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/21/6, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1143/montero-mining-v-tanzania.

[20] Lisa Bohmer, "Chinese Miner Makes Good on Earlier Threat to Bring Ad Hoc Treaty Claim Against Ecuador," *IA Reporter*, October 6, 2022, https://www.iareporter.com/articles/chinese-miner-makes-good-on-earlier-threat-to-bring-ad-hoc-treaty-claim-against-ecuador.

[21] *Junefield Gold Investments Limited v. Republic of Ecuador*, PCA Case No. 2023-35, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1260/junefield-v-ecuador.

[22] Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 7, no. 2, (2018): 229–250, https://doi.org/10.1017/S2047102517000309.

[23] "Termination of International Investment Agreements and Withdrawal of Consent to Arbitrate," CCSI, https://ccsi.columbia.edu/content/termination-international-investment-agreements-and-withdrawal-consent-arbitrate.

[24] Martin Dietrich Brauch, Perrine Toledano, and Cody Aceveda, *Allocation of Climate-Related Risks in Investor–State Mining Contracts* (New York: CCSI, June 2022), https://ccsi.columbia.edu/content/climate-change-clauses-investor-state-mining-contracts.