

Global Arbitration Review

# The Guide to Mining Arbitrations

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Editors

Jason Fry QC and Louis-Alexis Bret

Second Edition

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## Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews, conferences and handy workflow tools, to name just a few. Visit us at [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com) to find out more.

Being at the centre of the international arbitration community, we often become aware of fertile ground for new books – important topics yet to be covered. Recently, mining disputes emerged as one such gap.

One might blithely assume mining is little different from energy (for which we have *The Guide to Energy Arbitrations*). But as our editors Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face different risks. Unlike a lot of oil and gas exploration, mining projects are on-land and visible, meaning they depend on the blessing of their neighbours, and are more likely to become politicised. It is also much easier to value an early-stage oil and gas asset than a mine, which has implications for both damages and how stakeholders behave. And different substantive principles apply. The *lex mineralia* is not the *lex petroli* and owes more to rulings from Australia and Canada than Texas.

But above all, the era of hydrocarbons is waning, while that of minerals and metals is in the ascendant. Copper, cobalt, lithium, silicon and zinc are at the heart of our evolution towards a cleaner planet. Without them and a growing array of other rare minerals – no batteries, circuit boards or solar panels, and one day, who knows, no future. But that, in itself, brings tensions to the endeavour.

For all these reasons, we thought it was high time we covered mining disputes in the esteemed GAR Guides series. The book you are reading – *The Guide to Mining Arbitrations* (second edition) – is the result. It is a practical, know-how text, organised in three parts:

- Part I identifies issues most salient in mining arbitrations, which tend to be driven by the unique nature of mining and metals as a business;
- Part II introduces select substantive principles that frequently arise; and
- Part III introduces some regional perspectives on mining arbitration.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in

international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*), and will soon be releasing books on investment treaty arbitration and evidence.

My thanks to the editors for their vision and energy in pursuing this project and to my Law Business Research colleagues in production for achieving such a polished work.

**David Samuels**

London

May 2021

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# **Part III**

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## Regional Issues in Mining Arbitration

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## The Rise of Mining Disputes Involving Chinese Companies

**Anton A Ware and Tereza Gao<sup>1</sup>**

### Introduction

The mining sector has been a major focus of Chinese outbound investment in recent years, both as part of and independent from the Belt and Road Initiative (BRI). Chinese companies are now active in establishing and developing mining projects around the globe. The continuing increase in the number and scale of these projects has brought in its wake a rise in related commercial and investment treaty disputes. Among the factors driving the increase in these disputes are shifts in global commodities prices, a growing perception in some jurisdictions that Chinese investment poses heightened national security risks, and rising concerns regarding the environmental and social impacts of mining. This chapter explores these developments.

### Continuing increase in mining sector outbound investments

In the past decade, the mining sector has been among the largest of all areas of Chinese foreign direct investment.<sup>2</sup> More recently, Chinese mining companies appear to have weathered the covid-19 storm. Chinese investors made significant overseas mining acquisitions in 2020, including Zijin Mining Group Co Ltd's acquisition of two gold mines

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<sup>1</sup> Anton A Ware is a partner and Tereza Gao is an associate at Arnold & Porter. The authors wish to thank Arnold & Porter Shanghai office interns Yangyang Cui, Sylvie Xue and Eva Wu for their assistance in the preparation of this chapter.

<sup>2</sup> See '2019 Statistical Bulletin of China's Outward Foreign Direct Investment', p. 62 (stating that, 'according to Statistics on the Distribution of China Outward FDI Stock by Industry from 2011 to 2019, the stock of mining industry amounts to approximately 175 billion US dollars, ranking No. 6 among all nineteen industries'); see also 'Report on Development of China's Outward Investment and Economic Cooperation 2020', p. 163 (stating that, 'as of the end of 2019, there were more than 1400 overseas mining companies with some level of Chinese investment').

in Colombia via its Hong Kong subsidiary<sup>3</sup> and China Molybdenum Co's acquisition of 95 per cent of the outstanding shares in the Kisanfu copper–cobalt mine located in the Democratic Republic of the Congo.<sup>4</sup>

The increase in outbound investment in the mining sector reflects a deliberate policy decision by the Chinese government. In August 2017, the PRC State Council published the ‘Guiding Opinions on Further Guiding and Regulating the Direction of Outbound Investments’, which were the first official rules adopted to guide outbound investments after China tightened its control over capital outflows in late 2016.<sup>5</sup> Significantly, the document provides that ‘participation in the exploration and development of outbound oil and gas, minerals and other energy and resources’ falls within the scope of ‘encouraged’ categories of outbound investment.<sup>6</sup>

China’s growing demand for minerals is an important driver of Chinese outbound investments in the mining sector.<sup>7</sup> Over the past decade, Chinese companies have been importing not only greater volumes of minerals, but also a broader array of mineral types. In addition to iron ore and coal, Chinese companies have targeted various other minerals, including copper, tin, zinc, nickel and uranium.<sup>8</sup> While China has long dominated the global market for rare earth materials,<sup>9</sup> the government has started to tighten its control

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3 See ‘Chinese foreign mining investment – China’s private sector eyes low-cost regions’ (12 March 2021), available at: [www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/chinese-foreign-mining-investment-8212-china-s-private-sector-eyes-low-cost-regions-63066809](http://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/chinese-foreign-mining-investment-8212-china-s-private-sector-eyes-low-cost-regions-63066809).

4 See Reuters, ‘China Moly buys 95% of DRC copper-cobalt mine from Freeport for \$550 million’ (13 December 2020), available at: [www.reuters.com/article/cmoc-congo-m-a-idINKBN28N0D9](http://www.reuters.com/article/cmoc-congo-m-a-idINKBN28N0D9).

5 See Herbert Smith Freehills, ‘Guiding Opinions on Further Guiding and Regulating the Direction of Outbound Investments’ (31 August 2017) (stating that, ‘before the Guideline opinions, due to lack of any formal unified legislation, the scrutiny measures caused a considerable slowdown in the relevant regulatory approval and filing processes, resulting in uncertainty around Chinese outbound investments’), available at: <https://hsfnotes.com/pwtd/2017/08/31/china-has-released-guidelines-on-outbound-investment/>.

6 See ‘Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People’s Bank of China and the Ministry of Foreign Affairs on Further Guiding and Regulating Outbound Investment Orientation’, Article 3(4), available at: [www.gov.cn/zhengce/content/2017-08/18/content\\_5218665.htm](http://www.gov.cn/zhengce/content/2017-08/18/content_5218665.htm).

7 See Climate and Finance Policy Centre, ‘China’s Mining Industry at Home and Overseas: Development, Impacts and Regulation, 2014’, p. 17 (stating that, ‘according to an analysis conducted by the Ministry of Land and Resources, 25 minerals will be in short supply in China by 2020, 11 of which are considered to be of key importance to the national economy’), available at: [www.ghub.org/cfc\\_en/wp-content/uploads/sites/2/2014/11/China-Mining-at-Home-and-Overseas\\_Main-report2\\_EN.pdf](http://www.ghub.org/cfc_en/wp-content/uploads/sites/2/2014/11/China-Mining-at-Home-and-Overseas_Main-report2_EN.pdf).

8 id., p. 48.

9 See ‘Mineral commodity summaries 2020: U.S. Geological Survey’, p. 132 (stating that in 2019 China was responsible for 80 per cent of the US’s rare earths imports), available at: <https://pubs.usgs.gov/periodicals/mcs2020/mcs2020.pdf>.

over domestic exploitation of these materials.<sup>10</sup> The inexorable increase in demand for such materials, especially in the battery, electric vehicle and other clean-energy industries, will no doubt continue to drive Chinese overseas investment in rare earth minerals in the coming years.

China's accelerating outbound investment in the mining sector is also being driven by a perceived need to further secure the country's resource base. For instance, Australia is currently the largest source of iron ore for China's steel mills, with around 60 per cent of China's iron ore imports originating from Australian mines.<sup>11</sup> However, as China's diplomatic relations with Australia and other developed countries has deteriorated in recent years, there is a pressing need for China to diversify away from and reduce its reliance on these sources.<sup>12</sup> That need may explain, in part, the three-month bidding war in November 2019 between a China-backed consortium, SMB-Winning, and Australia's Fortescue Metals Group, to develop Guinea's Simandou mountains, which is considered home to the world's largest untapped supply of high-grade iron ore.<sup>13</sup> SMB-Winning eventually won with a US\$14 billion offer (55 per cent higher than what its competitor had initially offered for the target company).<sup>14</sup>

At the same time, China has made efforts (often through the BRI) to promote economic cooperation with developing countries that are rich in mineral resources. Participants in the BRI include several of the world's largest producers of tungsten (Kazakhstan), nickel (Indonesia), palladium (Russia), chromium (Turkey) and other valuable minerals.<sup>15</sup>

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10 See the Rare Earths section of the official site of the Chinese Ministry of Industry & Information Technology (MIIT) (noting that the MIIT and the Ministry of Natural Resources have set quotas for rare earth production in recent years), available at: [www.miit.gov.cn/jgsj/ycls/xt/index.html](http://www.miit.gov.cn/jgsj/ycls/xt/index.html); see also China Briefing, 'China Tightens Control Over Management of Rare Earths' (25 February 2021) (reporting that, 'on January 15, 2021, the MIIT issued the draft version of the Regulations on Rare Earth Management to gather public opinions until February 15, 2021, which is aimed to protect its national interests and industrial security as well as prevent activities, such as illegal mining, destructive mining, unplanned and over-planned production, illegal trading of rare earth products, and destroying the ecological environment, among others'), available at: [www.china-briefing.com/news/china-tightens-control-over-management-of-rare-earth/](http://www.china-briefing.com/news/china-tightens-control-over-management-of-rare-earth/).

11 See *Mining Technology*, 'How China is moving beyond Australia for its iron ore hunger' (8 April 2021), available at: [www.mining-technology.com/features/how-china-is-moving-beyond-australia-for-its-iron-ore-hunger/](http://www.mining-technology.com/features/how-china-is-moving-beyond-australia-for-its-iron-ore-hunger/); see also Reuters, 'Special Report: Australia faces down China in high-stakes strategy' (4 September 2020), available at: [www.reuters.com/article/us-australia-china-relations-special-rep/special-report-australia-faces-down-china-in-high-stakes-strategy-idUSKBN25V1GM](http://www.reuters.com/article/us-australia-china-relations-special-rep/special-report-australia-faces-down-china-in-high-stakes-strategy-idUSKBN25V1GM).

12 See *Mining.com*, 'China to re-invest in its mining industry – report' (9 June 2020), available at: [www.mining.com/china-to-re-invest-in-its-mining-industry-report/](http://www.mining.com/china-to-re-invest-in-its-mining-industry-report/).

13 See Reuters, 'China-backed consortium wins \$14 billion Guinea iron ore deal, pipping Australia's Fortescue' (14 November 2019), available at: [www.reuters.com/article/us-guinea-simandou-idUSKBN1XO09B](http://www.reuters.com/article/us-guinea-simandou-idUSKBN1XO09B); see also *South China Morning Post*, 'Stake in huge iron ore mine in Guinea may cut China's dependence on Australia' (3 April 2021), available at: [www.scmp.com/news/china/diplomacy/article/3128209/stake-huge-iron-ore-mine-guinea-may-cut-chinas-dependence](http://www.scmp.com/news/china/diplomacy/article/3128209/stake-huge-iron-ore-mine-guinea-may-cut-chinas-dependence).

14 See Karl Decena, 'SMB-Winning nets giant Guinean iron ore mine development tender with US\$14B bid' (13 November 2019), available at: [www.spglobal.com/marketintelligence/en/news-insights/trending/LjaSYcEdRjnMwG4RsreA2](http://www.spglobal.com/marketintelligence/en/news-insights/trending/LjaSYcEdRjnMwG4RsreA2).

15 See Wikipedia: Lists of countries by mineral production (last accessed on 2 May 2021), available at: [https://en.wikipedia.org/wiki/Lists\\_of\\_countries\\_by\\_mineral\\_production](https://en.wikipedia.org/wiki/Lists_of_countries_by_mineral_production).

In addition, the BRI countries hold some of the world's largest deposits of uranium (Kazakhstan, Niger and Namibia)<sup>16</sup> and silver (Poland, Bolivia and Turkey).<sup>17</sup> China continues to encourage such investments through a variety of measures, including tax incentives.<sup>18</sup>

China has also attached greater importance to domestic environmental protection in recent years, which is also contributing to the increase in China's outbound investments in the mining sector. For mining companies, the costs of continuing to operate mines within China have increased, and the risks of failing to comply with stricter domestic policies and laws on environmental protection have risen.<sup>19</sup>

## Disputes in recent years involving Chinese investments in the mining sector

### Disputes arising from shifts in global commodities prices

Similar to mining companies from other jurisdictions, Chinese companies tend to be very sensitive to large or sudden shifts in the price of minerals, which often give rise to commercial disputes.

For example, in *Stonewall Resources Ltd v Shandong Qixing Iron Tower Co Ltd*,<sup>20</sup> Shandong Qixing Iron Tower Co Ltd (Qixing) entered into a share sale agreement (SSA) with Stonewall Resources Ltd to acquire Stonewall's South African mining assets in 2013. Just days before the agreed closing date under the SSA,<sup>21</sup> Qixing allegedly informed Stonewall that it intended to terminate the SSA on the ground that Stonewall had failed to guarantee the profit of the transaction at the request of the Shanghai Securities regulatory commission.<sup>22</sup> However, many suspected that the steep decrease in the gold price at that time was the underlying reason for Qixing's 'unexpected' decision to abandon the deal.<sup>23</sup>

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16 See *Mining Technology*, 'The 10 biggest uranium mines in the world' (last updated 17 June 2020), available at: [www.mining-technology.com/features/feature-the-10-biggest-uranium-mines-in-the-world/](http://www.mining-technology.com/features/feature-the-10-biggest-uranium-mines-in-the-world/).

17 See *Mining Technology*, 'The 10 biggest silver mines in the world' (last updated 27 January 2020), available at: [www.mining-technology.com/features/feature-the-10-biggest-silver-mines-in-the-world/](http://www.mining-technology.com/features/feature-the-10-biggest-silver-mines-in-the-world/).

18 See, e.g., 'Notice on Issues Relating to Enhancing Overseas Income Tax Credit Policies for Enterprises' issued by the Ministry of Finance and State Administration of Taxation, January 2017 (clarifying that preferential tax credit policies apply to a wide range of overseas enterprises, including mining enterprises).

19 See, e.g., Environmental Protection Law of the People's Republic of China (amended in 2014), Administrative Measures on the Soil Environment of Industrial and Mining Land (for Trial Implementation) (effective from August 2018).

20 HKIAC/A15021, 2016.

21 See *Law 360*, 'Aussie Miner Blasts Chinese Co. For Fraud Innuendo' (18 September 2017), available at: [www.law360.com/articles/964380/aussie-miner-blasts-chinese-co-for-fraud-innuendo](http://www.law360.com/articles/964380/aussie-miner-blasts-chinese-co-for-fraud-innuendo); see also Sina Finance, 'Feud or international fraud? The dispute between Qixing Tower and Australian enterprise was filed to application' (translated from Chinese) (26 August 2017), available at: <https://cj.sina.com.cn/article/detail/1444893750/375797?column=china&ch=9&c>.

22 See Sina Finance, 'Feud or international fraud? The dispute between Qixing Tower and Australian enterprise was filed to arbitration' (footnote 21) (noting Qixing's announcement on 17 November 2014 that, 'for the sake of protecting the interests of the company and investors, given the acquisition of assets this time cannot meet the company's forecast of the profit, the company decides not to renew the acquisition agreement with the other party after careful consideration').

23 See Global Arbitration Review (GAR), 'HKIAC resolves Australian–Chinese mining dispute' (7 September 2016), available at: [www.globalarbitrationreview.com/hkiac-resolves-australian-chinese-mining-dispute](http://www.globalarbitrationreview.com/hkiac-resolves-australian-chinese-mining-dispute).

Stonewall commenced an HKIAC arbitration against Qixing, pursuant to the SSA, seeking US\$110 million in damages (the estimated value of its South African mining assets) and legal costs, among other relief.<sup>24</sup> The arbitral tribunal awarded Stonewall damages based on the difference between the US\$141.5 million SSA price and the relevant asset value at the time Qixing gave its termination notice, which the tribunal assessed on the assumption that an alternative buyer would have been prepared to develop the assets, as Qixing had proposed.<sup>25</sup> The damages awarded to Stonewall were therefore only US\$12.6 million,<sup>26</sup> or approximately 10 per cent of the agreed price under the SSA.

Following Qixing's failure to voluntarily comply with the arbitration award, Stonewall sought to recognise and enforce the award before Beijing No. 4 Intermediate People's Court (the Beijing Court). Qixing sought to avoid the enforcement on the following grounds: (1) the arbitration procedure was unfair because Stonewall had made last-minute amendments to its claims and altered its legal arguments just a couple of weeks before the hearing; (2) the amount awarded was disproportionate, thereby infringing Qixing's investors' rights and violating public interest; and (3) the awarded interest rate of 8 per cent was unreasonably high and unfair, exceeding the maximum set under Chinese law.<sup>27</sup>

While the Beijing Court dismissed Qixing's application, noting that none of Qixing's grounds were supported by applicable law,<sup>28</sup> the Jinzhong Municipal Public Security Bureau (PSP) initiated a criminal case against Stonewall on the grounds that the dispute between Stonewall and Qixing involved a crime of contract fraud.<sup>29</sup> The Beijing Court then decided to suspend enforcement of the arbitral award in light of the pending criminal investigation.<sup>30</sup> It was not until 2019 that the Beijing Court resumed and completed the enforcement procedure after the PSP dismissed the criminal investigation.<sup>31</sup> The four-year saga of arbitration and litigation finally ended, but Qixing had gone insolvent in the meantime.<sup>32</sup>

Asset acquisitions are not the only form of mining investment that can be adversely impacted by large shifts in minerals prices. Long-term offtake contracts, which are very common in the mining sector, are also subject to significant stress in the event of such shifts.

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24 See KITCO, 'Qixing Iron Tower Claimed for USD110mn' (9 March 2015), available at: [www.kitco.com/news/2015-03-09/Qixing-Iron-Tower-Claimed-for-USD110mn.html](http://www.kitco.com/news/2015-03-09/Qixing-Iron-Tower-Claimed-for-USD110mn.html).

25 See GAR, 'HKIAC resolves Australian–Chinese mining dispute' (footnote 23).

26 See ASX, 'Update on Enforcement of Arbitral Award' (15 September 2017), available at: [www.asx.com.au/asxpdf/20170915/pdf/43mc52pltn9vgj.pdf](http://www.asx.com.au/asxpdf/20170915/pdf/43mc52pltn9vgj.pdf).

27 See (2017) Jing 04 Ren Gang No. 2 Civil Ruling.

28 See Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong, Article 7.

29 See CNINFO, 'Northcom Group Co., Ltd Announcement on Related Litigations' (translated from Chinese) (10 August 2019), available at: [www.cninfo.com.cn/new/disclosure/detail?stockCode=002359&announcementId=1206511158&orgId=9900010529&announcementTime=2019-08-10](http://www.cninfo.com.cn/new/disclosure/detail?stockCode=002359&announcementId=1206511158&orgId=9900010529&announcementTime=2019-08-10).

30 *ibid.*

31 *ibid.*

32 See Sina Finance, 'Qixing Tower was hit by a huge claim, and the profit dropped sharply' (translated from Chinese) (16 March 2015), available at: <http://finance.sina.com.cn/stock/s/20150316/023021726396.shtml>.

Over the course of a long-term offtake contract, sellers and buyers may find themselves stuck in a position where they have to either sell or acquire at a price well below or above the market or default on their obligations under the contract.<sup>33</sup>

For instance, in 2010, Shandong Rizhao Steel Holding Group Co, Ltd was the subject of an arbitration award ordering it to pay US\$114 million in damages for breaching its offtake obligation under a 15-year supply contract with its Australian partner, Mount Gibson Iron Ltd.<sup>34</sup> Shandong Rizhao and Mount Gibson had entered into the supply contract in 2007, under which Shandong Rizhao was obligated to purchase 1.5 million tons of iron ore from Mount Gibson annually.<sup>35</sup> During the second year of the parties' cooperation, however, the iron ore price in the spot market fell far below the contract price, which in Shandong Rizhao's view made its continued payments of the contract price unreasonable.<sup>36</sup> Shandong Rizhao defaulted on its payment obligation, claiming that the quality of the iron ore delivered by Mount Gibson was not up to the contractual standard.<sup>37</sup>

Shandong Rizhao refused to comply with the arbitral award, and Mount Gibson initiated an enforcement proceeding in China.<sup>38</sup> In parallel, Shandong Rizhao also initiated a Chinese court litigation against Mount Gibson for the alleged quality defects.<sup>39</sup> In October 2011, the parties mutually agreed to end the litigation proceedings and settled their dispute by, *inter alia*, entering into two new offtake agreements.<sup>40</sup>

The dispute between Shandong Rizhao and Mount Gibson highlights how readily mining disputes can arise out of long-term offtake contracts. It is worth noting that following the parties' arbitration and litigation, the two additional offtake agreements they entered into contained terms of just two and five years, much shorter than the 15-year span of their original agreement.<sup>41</sup>

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33 See GAR, 'Arbitration under Long-Term Mining Offtake Contracts and Royalty Arrangements' (18 June 2019), available at: [www.globalarbitrationreview.com/guide/the-guide-mining-arbitrations/1st-edition/article/arbitration-under-long-term-mining-offtake-contracts-and-royalty-arrangements](http://www.globalarbitrationreview.com/guide/the-guide-mining-arbitrations/1st-edition/article/arbitration-under-long-term-mining-offtake-contracts-and-royalty-arrangements).

34 See *Steel Times International*, 'Rizhao plans iron ore legal challenge' (23 August 2010), available at: [www.steeltimesint.com/news/rizhao-plans-iron-ore-legal-challenge](http://www.steeltimesint.com/news/rizhao-plans-iron-ore-legal-challenge).

35 See *Global Times*, 'Shandong Rizhao Steel faces \$114 mln fine to Mount Gibson' (18 August 2010), available at: [www.globaltimes.cn/content/564976.shtml](http://www.globaltimes.cn/content/564976.shtml).

36 See GAR, 'Chinese steel mill ordered to pay damages' (20 August 2010), available at: [www.globalarbitrationreview.com/chinese-steel-mill-ordered-pay-damages](http://www.globalarbitrationreview.com/chinese-steel-mill-ordered-pay-damages); see also *China Daily*, 'Rizhao Steel fined \$114m for breaching long-term contract' (19 August 2010), available at: [www.chinadaily.com.cn/business///2010-08/19/content\\_11178564.htm](http://www.chinadaily.com.cn/business///2010-08/19/content_11178564.htm).

37 See *China Daily*, 'Rizhao Steel to file suit against Australian iron ore company' (21 August 2010), available at: [www.chinadaily.com.cn/business//2010-08/21/content\\_11184570.htm](http://www.chinadaily.com.cn/business//2010-08/21/content_11184570.htm).

38 See *Australian Mining*, 'Mount Gibson Iron could seize iron ore exports from other miners' (7 February 2011), available at: [www.australianmining.com.au/news/mount-gibson-iron-could-seize-iron-ore-exports-from-other-miners/](http://www.australianmining.com.au/news/mount-gibson-iron-could-seize-iron-ore-exports-from-other-miners/).

39 See Jin Ri Tie Kuang, 'Monopoly of the three major mines is expected to be resolved' (translated from Chinese) (28 December 2012), available at: [www.tiekuangshi.com/news/14450.htm](http://www.tiekuangshi.com/news/14450.htm).

40 See Mount Gibson, 'Mount Gibson Agrees Settlement with Rizhao Steel' (18 October 2011), available at: [www.mtgibsoniron.com.au/wp-content/uploads/2011.10.18-Mount-Gibson-Agrees-Settlement-with-Rizhao-Steel.pdf](http://www.mtgibsoniron.com.au/wp-content/uploads/2011.10.18-Mount-Gibson-Agrees-Settlement-with-Rizhao-Steel.pdf).

41 See Mount Gibson, 'Mount Gibson Iron Limited Half-Year Financial Report' (9 February 2012), p. 3, available at: [www.mtgibsoniron.com.au/wp-content/uploads/2012-02-09-MGI-Half-year-financial-statements-31-Dec-2011-FINAL.pdf](http://www.mtgibsoniron.com.au/wp-content/uploads/2012-02-09-MGI-Half-year-financial-statements-31-Dec-2011-FINAL.pdf).

### Challenges associated with national security reviews

Chinese mining investors are facing increasingly difficult hurdles in making outbound mining investments in the United States, Australia, Canada and other western countries that scrutinise Chinese investments for national security concerns.<sup>42</sup> The scope of these national security concerns is constantly changing and expanding, and now covers factors including involvement of strategic assets<sup>43</sup> as well as the location of the mining project and its proximity to ‘secretive military installations’.<sup>44</sup> Parties to cross-border mining investments are therefore under increasing pressure to contemplate, negotiate and agree on the allocation of national security review risks. In addition, these risks will potentially affect other terms of sale and purchase agreements, such as hardship or force majeure (which parties may attempt to invoke to avoid the consequences of defaulting on their obligations). As the risks of failing to clear national security scrutiny have grown, so too have the opportunities for disputes to arise.

For example, General Moly, Inc (GMO), a US-listed molybdenum mineral development company, announced in August 2019 that it had a mining investment dispute with AMER International Group, a private Chinese metal conglomerate, with regard to a share purchase agreement for the purpose of financing a molybdenum mine project in Nevada.<sup>45</sup> The dispute related to AMER’s contractual obligation to make a further US\$10 million equity investment in the project. AMER claimed that deteriorating US–China relations (and associated national security review scrutiny) constituted a ‘material adverse effect’ excusing its investment obligation.<sup>46</sup> GMO threatened to commence an ICC arbitration in Hong Kong, but the parties eventually resolved their dispute through negotiations.<sup>47</sup>

Recent developments in Canada also illustrate the trend of intensified national security scrutiny for Chinese mining projects. Canada’s Minister of Innovation, Science and Industry issued revised Guidelines on the National Security Review of Investments on

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42 See Reuters, ‘Hostility to Beijing drives Chinese gold diggers into new territory’ (4 March 2021), available at: [www.reuters.com/article/mining-gold-china-ma-idUSL5N2L02O1](http://www.reuters.com/article/mining-gold-china-ma-idUSL5N2L02O1).

43 See James A Dorn, ‘Policy Analysis: U.S.–China Relations in the Wake of CNOOC’, 2 November 2005, p. 6 (noting heightened national security scrutiny of deals involving Chinese investment in strategic US assets); see also *New York Times*, ‘Unocal Deal: A Lot More Than Money Is at Issue’ (24 June 2005) (reporting that ‘the unexpected foreign bid for Unocal comes at a time when oil prices are hitting \$60 a barrel, energy reserves are gaining more value, and the United States is concerned about its own oil and gas resources’), available at: [www.nytimes.com/2005/06/24/business/worldbusiness/unocal-deal-a-lot-more-than-money-is-at-issue.html](http://www.nytimes.com/2005/06/24/business/worldbusiness/unocal-deal-a-lot-more-than-money-is-at-issue.html).

44 See Theodore Kassinger, ‘Location, Location, Location: Observations on CFIUS Opposition to Investment by Chinese Mining Company in Firstgold Corporation’ (8 January 2010), available at: [www.mondaq.com/unitedstates/article.asp?articleid=91996](http://www.mondaq.com/unitedstates/article.asp?articleid=91996) (discussing the Committee on Foreign Investment in the United States’ adverse recommendation for the proposed acquisition of Firstgold given ‘the current environment of exceptional concern about electronic warfare and intelligence gathering by potential adversaries, the combination of Northwest’s identity as a Chinese state-owned enterprise and the proximity of Firstgold’s mining properties to known, secretive military installations’).

45 See General Moly, FORM 10-K 2019 Annual Report, p. 8, available at: [www.annualreports.com/HostedData/AnnualReports/PDF/TSX\\_GMO\\_2019.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDF/TSX_GMO_2019.pdf).

46 See *Canadian Insider*, ‘General Moly Announces AMER in Default of Tranche 3 Private Placement’ (31 July 2019), available at: [www.canadianinsider.com/general-moly-announces-amer-in-default-of-tranche-3-private-placement](http://www.canadianinsider.com/general-moly-announces-amer-in-default-of-tranche-3-private-placement).

47 See General Moly, FORM 10-K 2019 Annual Report (footnote 45), pp. 9–10.

24 March 2021. The Guidelines now include a list of 31 minerals categorised as ‘critical for the sustainable economic success of Canada and our allies’, which are subject to national security scrutiny.<sup>48</sup> In addition, the location of a mining project may also be a reason for the Canadian governments to disallow a mining investment. The revised Guidelines follow in the wake of Canada’s decision in December 2020 to block a Chinese state-owned mining company, Shandong Gold Mining Co Ltd, from acquiring a Toronto-based mining company, TMAC Resources Inc, on national security grounds.<sup>49</sup> The gold mine involved in the transaction is located in Canada’s Arctic region, which reportedly is of strategic importance to the country’s military operations.<sup>50</sup>

A similar trend has been observed in Australia in recent years. In April 2020, two separate Chinese mining investments were blocked for failing to clear national security review hurdles in what many believe to be part of the larger recent geopolitical tug-of-war between the two countries. The first example concerned Baogang Group Investments’ offer to purchase a A\$20 million stake in Northern Minerals Limited’s advanced heavy rare earth project in Australia.<sup>51</sup> Commentators noted that this investment prohibition ‘sends a signal to the world that Australia is serious about its announced intention to work closely with the United States to source new supplies of critical metals and reduce American dependence on China’.<sup>52</sup> The second example concerned a Chinese lithium chemical producer,

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48 See Guidelines on the National Security Review of Investments (24 March 2021), available at: [www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html](http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html); see also ‘Minerals and mining’ under the official site of the government of Canada, available at: [www.nrcan.gc.ca/our-natural-resources/minerals-mining/critical-minerals/23414](http://www.nrcan.gc.ca/our-natural-resources/minerals-mining/critical-minerals/23414).

49 See ‘Canadian government invokes national security to block Chinese takeover of Nunavut gold mine’ (22 December 2020), available at: <https://financialpost.com/commodities/mining/canada-blocks-china-shandong-gold-mining-buying-tmac>; see also Reuters, ‘Canada rejects bid by China’s Shandong for Arctic gold mine on security grounds’ (22 December 2020), available at: [www.reuters.com/article/us-tmac-resources-shandong-gold-idUSKBN28W18R](http://www.reuters.com/article/us-tmac-resources-shandong-gold-idUSKBN28W18R); see also *Forbes*, ‘Canadian Government Ramps Up National Security Reviews Of Foreign Investments’ (9 April 2021), available at: [www.forbes.com/sites/riskmap/2021/04/09/canadian-government-ramps-up-national-security-reviews-of-foreign-investments/?sh=7a47df062ce0](http://www.forbes.com/sites/riskmap/2021/04/09/canadian-government-ramps-up-national-security-reviews-of-foreign-investments/?sh=7a47df062ce0).

50 See Radio Canada International, ‘Decision on Chinese purchase of Arctic mine delayed; former General against it’ (30 November 2020) (pointing out that ‘the mine site is only 100 km from a military NORAD radar warning site in Cambridge Bay which is part of a chain of stations gathering strategic information and transmitting it to military operations centres further south in the U.S. and Canada’), available at: [www.rcinet.ca/en/2020/11/30/decision-on-chinese-purchase-of-arctic-mine-delayed-former-general-against-it/](http://www.rcinet.ca/en/2020/11/30/decision-on-chinese-purchase-of-arctic-mine-delayed-former-general-against-it/); see also Radio Canada International, ‘China’s effort to buy an Arctic gold mine raises many concerns’ (10 August 2020), available at: [www.rcinet.ca/en/2020/08/10/chinas-effort-to-buy-an-arctic-gold-mine-raises-many-concerns/](http://www.rcinet.ca/en/2020/08/10/chinas-effort-to-buy-an-arctic-gold-mine-raises-many-concerns/).

51 See *Small Caps*, ‘Federal Government means business over critical metals, blocks Chinese investment in Northern Minerals’ (23 April 2020), available at: <https://smallcaps.com.au/federal-government-critical-metals-blocks-chinese-investment-northern-minerals/>.

52 id. (reporting that ‘former federal resources minister Matt Canavan led a delegation to Washington late last year to work with the US Government and Defence Department to ensure that the American military had sources outside China for the minerals needed in so many of its applications and equipment’); see also Anthony Barich, ‘Critical-mineral expert urges lateral thinking amid foreign investment reforms’ (31 August 2020) (George Bauk, ex-CEO of rare earths producer Northern Minerals Ltd, stated that ‘Australia’s government has been pretty dogged in its approach and is making a “second lane” of U.S. investment to ensure everyone’s not stuck in the “China lane”’), available at: [www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/critical-mineral-expert-urges-lateral-thinking-amid-foreign-investment-reforms-60103260](http://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/critical-mineral-expert-urges-lateral-thinking-amid-foreign-investment-reforms-60103260).

Yibin Tianyi Lithium Industry Co, Ltd. The company ended up withdrawing its application to the Australian Foreign Investment Review Board for a A\$14.1 million investment in AVZ Minerals Limited after it received advice from the Australian government that the investment would be ‘contrary to the national interest’.<sup>53</sup>

### Environmental and social concerns

Another source of disputes has been tensions relating to the environmental and social impacts of Chinese mining investments.

The one-year suspension of the Porgera gold mine in Papua New Guinea suffered by the Chinese Zijin Mining Group Co Ltd (Zijin) since April 2020 serves as a cautionary tale for Chinese mining investors regarding compliance with local environmental rules and regulations.<sup>54</sup> The Papua New Guinea government refused to grant an extension of lease renewal to Barrick (Niugini) Ltd, a Barrick Gold Project company in which Zijin and its Canadian partner invested in April 2020. James Marape, the Prime Minister of Papua New Guinea, stated that the government’s refusal was ‘due to environmental damage and social unrest’.<sup>55</sup> A series of domestic litigations and two ICSID arbitrations were initiated in July 2020, and the parties’ disputes are ongoing.<sup>56</sup>

Compliance failures have also resulted in local opposition against Chinese miners and have caused disruptions to mining activities. For instance, recently in Peru, a 24-day blockade of a road near Las Bambas mine, a project in which MMG Ltd (a subsidiary of China Minmetals Corporation, MMG) invested, prevented export of a significant amount of copper concentrate, which is reported to be worth over US\$530 million. The failure to export reportedly also caused difficulties for MMG to perform its obligations under its supply contracts with customers.<sup>57</sup> The local community had complained about environmental and social concerns for years and periodically blocked roads with organised protests. Similarly, Ecuagoldmining, a consortium located in Ecuador in which Junefield Mineral

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53 See *Small Caps*, ‘Federal Government bans second Chinese mining investment after AVZ confirms lithium project to generate \$6bn’ (25 April 2020), available at: <https://smallcaps.com.au/federal-government-bans-second-chinese-mining-investment-avz-minerals-lithium-project/>; see also Anthony Barich, ‘CATL backs another Australian lithium company as AVZ introduces Chinese investor’ (11 November 2019), available at: [www.spglobal.com/marketintelligence/en/news-insights/trending/wm6swncxevd74oargvo5og2](http://www.spglobal.com/marketintelligence/en/news-insights/trending/wm6swncxevd74oargvo5og2).

54 See Barrick, ‘Barrick and Papua New Guinea Progress Porgera Negotiations’ (5 April 2021) (announcing that the recommissioning of Porgera is on the table), available at: [www.barrick.com/English/news/news-details/2021/barrick-and-papua-new-guinea-progress-porgera-negotiations/default.aspx](http://www.barrick.com/English/news/news-details/2021/barrick-and-papua-new-guinea-progress-porgera-negotiations/default.aspx).

55 See Reuters, ‘Papua New Guinea warns Barrick over gold mine control’ (28 April 2020), available at: [www.reuters.com/article/barrick-gold-png-idUSL5N2CG2WQ](http://www.reuters.com/article/barrick-gold-png-idUSL5N2CG2WQ).

56 See GAR, ‘Papua New Guinea faces ICSID claim over mining project’ (10 July 2020), available at: [www.globalarbitrationreview.com/papua-new-guinea-faces-icsid-claim-over-mining-project](http://www.globalarbitrationreview.com/papua-new-guinea-faces-icsid-claim-over-mining-project).

57 See Reuters, ‘Protest blocks \$530 million worth of copper from MMG’s Peru mine association’ (24 December 2020), available at: [www.reuters.com/article/us-peru-copper-bambas/protest-blocks-530-million-worth-of-copper-from-mmgs-peru-mine-association-idUSKBN28Y0EY](http://www.reuters.com/article/us-peru-copper-bambas/protest-blocks-530-million-worth-of-copper-from-mmgs-peru-mine-association-idUSKBN28Y0EY).

Resources Limited and Hunan Gold Group Co, Ltd invested, faced persistent opposition by local communities.<sup>58</sup> Ecuagoldmining recently initiated an investor–state dispute with Ecuador's government, which could lead to a US\$480 million arbitration fight.<sup>59</sup>

In another case, a Chinese mining company paid a settlement of A\$50 million,<sup>60</sup> following an SIAC arbitration, due to its alleged failure to complete the mining proposal assessments required by the Australian government. In that case, an Australian mining company, Cape Lambert Resources, and the subsidiary of a Chinese state-owned metals trader, MCC Australia Sanjin Mining, entered into an asset sale agreement under which MCC agreed to pay US\$290 million to Cape Lambert in two instalments in 2008, with the remaining US\$70 million to be paid within two years on the condition that MCC secure mining approvals from the Australian government.<sup>61</sup> Following MCC's failure to pay the final instalment, Cape Lambert commenced the SIAC arbitration in April 2013 against MCC for damages.<sup>62</sup> The parties ultimately settled the dispute, with MCC making the above-mentioned settlement payment to Cape Lambert.<sup>63</sup>

As local communities and governments become increasingly sensitive with respect to environmental and social issues associated with Chinese mining investments, additional disputes are likely.

## Conclusion

All of the trends described above point in the direction of a continued increase in disputes arising from Chinese outbound investment in the mining sector, many of which ultimately will be resolved through commercial or investment treaty arbitration. As the examples discussed above illustrate, obtaining a favourable arbitration award in such a dispute is often not the end of the story, with lengthy and hard-fought enforcement battles in the Chinese courts often following. Participants in such investments – on both sides – would be well advised to devote adequate attention at the outset of the project to due diligence, risk mitigation and dispute resolution mechanisms.

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58 See Reuters, 'Exclusive: Chinese consortium Ecuagoldmining opens dispute with Ecuador over halted mine' (18 February 2020), available at: [www.reuters.com/article/us-ecuador-mining/exclusive-chinese-consortium-ecuagoldmining-opens-dispute-with-ecuador-over-halted-mine-idUSKBN20C2IT](http://www.reuters.com/article/us-ecuador-mining/exclusive-chinese-consortium-ecuagoldmining-opens-dispute-with-ecuador-over-halted-mine-idUSKBN20C2IT); see also GAR, 'Chinese investor threatens Ecuador over stalled mining project' (20 February 2020), available at: [www.globalarbitrationreview.com/chinese-investor-threatens-ecuador-over-stalled-mining-project](http://www.globalarbitrationreview.com/chinese-investor-threatens-ecuador-over-stalled-mining-project); and 'Geopolitical Monitor', 'Ecuagoldmining v Ecuador: Mining, the environment, and international arbitration' (4 June 2020), available at: [www.bilaterals.org/?ecuagoldmining-v-ecuador-mining](http://www.bilaterals.org/?ecuagoldmining-v-ecuador-mining).

59 See Reuters, 'Exclusive: Chinese consortium Ecuagold mining opens dispute with Ecuador over halted mine' (footnote 58).

60 See CNINF, 'Metallurgical Corporation Of China Ltd.'s Announcement Concerning the Progress of Disputes on Cape Lambert in Western Australia' (14 July 2014), available at: [www.cninfo.com.cn/new/disclosure/detail?plate=sse&orgId=9900008087&stockCode=601618&announcementId=1200053789&announcementTime=2014-07-15](http://www.cninfo.com.cn/new/disclosure/detail?plate=sse&orgId=9900008087&stockCode=601618&announcementId=1200053789&announcementTime=2014-07-15).

61 See GAR, 'Chinese–Australian metal dispute yields escrow order' (14 August 2013), available at: [www.globalarbitrationreview.com/chinese-australian-metal-dispute-yields-escrow-order](http://www.globalarbitrationreview.com/chinese-australian-metal-dispute-yields-escrow-order).

62 ibid.

63 See *Cape Lambert Resources Ltd v. MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228.

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