

Whenever possible our lawmakers ensured increased investment. For example we can read in the preamble of our mining law that „Investments in mining are encouraged by fiscal and administrative facilities, being free of any constraints in terms of return on investment and use of profit.“

To make sure that this includes foreign investment, from the times of nineties onwards, Romania concluded Bilateral Investment Treaties (BIT) with foreign trade partners. Usually BITs include an initial running period and can be cancelled by either party in simply notifying the other.

As Romania was considered a potentially risky country, BIT treaties were to add that extra security in giving foreign investors the possibility to sue host countries if their investment didn't come to fruition (!).

If a host government is considered risky then this also includes its juridical system. Hence comes ISDS or Investor State Dispute Settlement. Abstract as it may sound, this is a parallel justice system that has no relationship to national or transnational law courts.

It works via arbitration meaning that both parties to this process choose their arbitrator or judge and agree on a third arbitrator (middle man). They then haggle out the case behind closed doors; almost in a bazaar-style manner.

Commercial arbitration cases however, produce final decisions that cannot be appealed; not at any supreme court or even at the European Court of Justice. The World Bank's International Centre for Settlement of Investment Disputes (“ICSID”) is the traditional place for ISDS cases to take place.

In the past 20 years ISDS has become big business. Not any one can be an ISDS arbitrator or judge: according to the OECD over half of those accredited are company lawyers. More than 60% of them also represent investors in ISDS disputes as lawyers.

Only foreign investors have the right to sue host governments under ISDS. If they win a case, they can count on compensation in billion dollar amounts. Governments, even if they are able to successfully fend off a case, still remain with high lawyers' fees and legal costs (on average EUR 6.5 million per case) which ultimately are paid by taxpayers. Mere threats of an ISDS case have come to prevent useful laws from being passed in being used as a bargaining chip by lobbyists. Small or poor states with few specialized legal teams avoid costly ISDS cases and therefore agree in advance.

All of Romania's main political parties have been staunch supporters of ISDS. When the European parliament recently voted on whether or not to include ISDS in the EU-US TTIP free trade agreement, Romania's social-democrat MEPs lobbied hard for ISDS amongst their EU party colleagues, many whom were divided on the issue.

To recuperate its failed \$1-billion (U.S.) mining investment Gabriel announced in January this year the start of arbitration proceedings in submitting a dispute 'Notice' to the President, the Prime Minister and the Romanian Government. Gabriel's announcement of last week that it filed a request for arbitration before the ICSID against Romania ("Request for Arbitration") comes in response to the authorities' silence over that Notice. Being a company registered in the Netherlands, in Canada and even Jersey, Gabriel can decide whether to base its action on Romania's BIT with Canada or the Netherlands or several. The case has been filed on the ICSID's webpage but confirmation is still lacking.

This marks the culmination of threats of an ISDS case that have been ongoing since 2013 when Gabriel Resources was pushing Romania's parliament to approve their mine by passing a law declaring their mine plans of overriding national interest to as to annul stalled permitting procedures and to expropriate the local population refusing to leave.

"If the lower house [of parliament] does reject the project, we will go ahead with formal notification to commence litigation for multiple breaches of international investment treaties for up to \$4-billion," Gabriel's chief executive officer Jonathan Henry vowed in an interview. "Our case is very strong and we will make it very public that Romania's effort to attract foreign investment will suffer greatly."

What we know is that is that Gabriel will likely use the „Fair and Equitable Treatment“ clause (FET).

It allows foreign companies a very wide interpretation about what is fair and equitable. It has also proven useful: 75% of ISDS cases won by US companies were based on FET.

\$4 billion dollars, the amount that Gabriel is blackmailing the government with to approve its illegal mine, represents almost 2% of our country's annual GDP.

In the arbitration case Gabriel will be represented by White & Case LLP, a global law firm priding itself with having secured two of the largest ISDS compensation payments ever - one of which for a Canadian gold mining company against Venezuela."

Certain multinational law firms have come to encourage just about any company to venture out into new territories, invest by proposing challenging projects in challenging environments and call upon their services to sue host government for loss of investment and damages when and if rejected for obvious reasons.

If we can stop ISDS to be included in TTIP, we'll stop making this mechanism from becoming the usual practice used to impoverish our budget. Currently, ISDS cases in Romania and abroad are exceptions that are raised in bilateral agreements between states that can be terminated by either party notifying the other.

If ISDS is included in TTIP, it will be binding for all EU Member States and the cancellation

of this clause will be almost impossible. We will stuck with it for a very long time.
From a practical standpoint, unless you want ISDS become a mechanism widely used in the near future, you can start by signing the petition. Let us not allow the exception to become the rule!

source: miningwatch.ro