When is compensation payable for breach of a stabilisation clause? The case for the cancelled mining development agreements in Zambia

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Abstract

The main focus of this thesis is the threshold beyond which compensation is payable for breach of a stabilisation clause. The discussion is based on the tax stability clauses contained in the mining development agreements unilaterally cancelled by the Government of the Republic of Zambia in early 2008. The outstanding characteristic feature of the tax stability clauses was government's undertaking that it shall not, for the stability periods ranging between 10 to 20 years, introduce new fiscal measures resulting in a "material adverse effect" on the distributable profits of the mining companies or the dividends received by the shareholders of the companies. Government further undertook to 'fully' and 'fairly' compensate mining companies should such measures be introduced during the stability periods. The question investigated by the thesis is whether the fiscal measures introduced by government in early 2008, as amended in 2009, have resulted in a "material adverse effect" on the distributable profits of mining companies or the dividends received by the shareholders of the companies and, therefore, entitle mining companies to compensation from government. The main findings of the thesis, among others, are that: <ul> The threshold beyond which the obligation to pay compensation is triggered varies considerably depending on the specific contractual formulation of the stabilisation clause involved. However, it is significantly lower than the threshold beyond which host States must pay compensation in regulatory taking cases. Although there are several international arbitral awards in which payment of compensation has been ordered for breach of a freezing stabilisation clause, there is no known similar award in cases involving breach of an economic equilibrium stabilisation clause. Even in cases in which compensation has been ordered for breach of a stabilisation clause, there is no evidence of how much the presence of a stabilisation clause contributes to the total quantum of the compensation awarded. The tribunals either take a "contractual perspective" or an "expropriation perspective" to arrive at their respective decisions on the quantum of compensation. International arbitral tribunals take into account any 'excessive' or 'windfall profits' made by investors in deciding the quantum of compensation payable to the investor for breach of a stabilisation clause. The tax stability clauses contained in the mining development agreements cancelled by the Zambian government are typical economic equilibrium stabilisation clauses. Based on these findings, among others, the thesis has concluded that there are equal chances that the Zambian government may or may not be ordered to pay compensation to the aggrieved mining companies. Notwithstanding this conclusion, however, the thesis has noted that government's unilateral cancellation of the mining development agreements has potential to negate the country's investment image. Against this background, the recommendation of the thesis is that government and the aggrieved mining companies must engage in discussions with a view to reaching at an amicable solution to their standoff. The rationale behind the recommendation is that an amicable solution presents a perfect opportunity for both parties to come up with a decision that is mutually beneficial to their interests. Also it is less costly than international arbitration.

Description

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Keywords

Mining development agreements, Republic of zambia, Breach of a stabilisation clause, Compensation, UCTD

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