

GEMs FI Strategy Watch

Panama arbitration risks: Takeaways from call with legal expert

Key takeaways

- Arbitration claims against Panama from Cobre Panama mine closure could be very substantial as a percentage of GDP.
- Commercial arbitration takes on average 2 years. Arbitration under treaty takes on average 4 years (plus annulment process).
- Panama could claim that it is protecting the environment, but its liability to compensate investors could still remain.

How to think about Panama's arbitration risks

On 12 December, we hosted a conference call with Laura Sinisterra to discuss the arbitration risks faced by Panama due to the closing of the Cobre Panama mine. Laura Sinisterra is a partner in Debevoise & Plimpton LLP's International Dispute Resolution Group in New York. Her practice focuses on international arbitration, concentrating in the mining and energy sectors, particularly in Latin America. Laura Sinisterra based her comments only on publicly available information. In this note, we summarize our key takeaways from the call.

Two arbitration processes under way

First Quantum has publicly announced two arbitration processes. Firstly, a commercial arbitration under the International Chamber of Commerce (ICC) Rules based on a breach of the concession agreement. Secondly, an international arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) Convention based on the investor protections included in the Canada-Panama Free Trade Agreement. Under the treaty, there could be claims of, for example, violations of fair and equitable treatment and protection against expropriation without prompt, adequate, and effective compensation.

How long does the process take?

The length of arbitration proceedings depends significantly on the litigation strategy pursued by the parties (for example, Panama could seek to prolong proceedings through a "bifurcation" strategy). Under the treaty, on average decisions are rendered three and a half years after proceedings commence (after an initial consultation period). It is more common for proceedings to take much longer than much shorter than the average. Under the commercial arbitration process based on the concession contract, decisions take on average around two years. At any point, the parties can choose to terminate arbitration by mutual agreement. (*Continues inside*).

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Risk of a very large arbitration award

Given the size of the initial investment (\$10bn, over 12% of GDP) and of the mine's operations, there is a risk of a very material arbitral award if Panama is found liable under the treaty. Under a standard of "full reparation," First Quantum could claim forgone future cash flows (which would be discounted to present value) over the life of the original contract (potentially including possible extensions). The burden of proof would fall on the investor to substantiate the claims.

Possible defenses from Panama?

Panama may claim that closing the mine was a lawful exercise of its sovereign regulatory powers in favor of public welfare objectives, such as protection of the environment and human health. However, a tribunal could decide that these legitimate sovereign prerogatives do not absolve the country of its obligations to compensate investors and make reparations (some of the relevant provisions in newer treaties have not yet been tested by tribunals).

What happens when a ruling is reached?

Awards under commercial or international treaty arbitration are both binding and enforceable, and there are no avenues to appeal the award or re-litigate the merits. But note that under ICSID, Panama could seek an annulment, a process that could take 1-1.5 years (during this time, the enforcement of the award may or may not be "stayed" or paused by the court). However, ICSID annulments are very rarely successful in fully invalidating awards. Under commercial arbitration, there is also a "set aside" process to challenge the award, but the grounds to do so are limited.

What if Panama does not comply with an award?

Countries frequently voluntarily comply with arbitration awards and negotiate with investors on a mutually satisfactory payment plan. But if Panama does not comply, an investor can seek enforcement on an ICSID award from any country that has ratified the ICSID convention (over 170 countries). For a commercial award, enforcement could be facilitated because Panama is a contracting state to the New York Convention and the Inter-American Convention on Commercial Arbitration.

To recover on its arbitral award against Panama, the investor would ask the courts in another country to enforce the award against Panama's commercial assets located in its jurisdiction. However, some assets are subject to sovereign immunity and protected from enforcement. A recent example of a successful enforcement action was when Ecuador's bank accounts located in Luxembourg were frozen due to an unpaid arbitral award (Perenco vs. Ecuador). Subsequently, Ecuador negotiated a payment plan with Perenco.

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