JUS MUNDI

INDUSTRY INSIGHTS ISSUE 3

Mining Arbitration Report

March 2022

A report prepared by Jus Mundi

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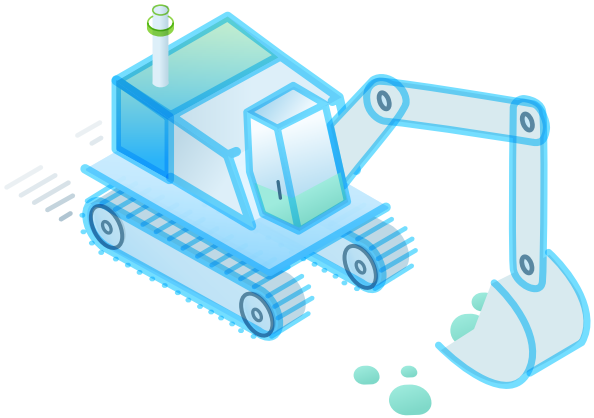
Foreword

This Report is part of a series of industry-focused arbitration Reports edited by Jus Mundi.

In each Report, we analyze the extensive international arbitration data available on Jus Mundi to give you data-backed insights into arbitration in a specific economic sector.

In this issue, we dug into our data available as of February 2022 to explore arbitration in the mining and quarrying industry. Due to the prevalence of confidentiality in arbitration, we cannot be exhaustive and include every existing mining arbitration case document in our analysis. Still, Jus Mundi is proud to have the most comprehensive database in international arbitration, both in investor-State and commercial arbitration. As of March 2022, over **40,000 case documents** are freely available on our database, which is continuously updated for the most thorough legal research possible.

Jus Mundi has accumulated a significant number of cases in the mining sector. We have achieved this by collecting data using artificial intelligence through local public resources, open sources, exclusive partnerships with major institutions such as ICC and VIAC, and collaborative partnerships such as with the IBA - which receives arbitral awards from various contributors globally - the CEA and the UAA. These partnerships have enabled us to give you exclusive insights into commercial arbitration.



In each Report, we present a unique overview of arbitral institutions, the key actors involved, and exclusive statistics in a specific industry. In this Mining Arbitration Report, we included an introduction on the latest issues in the industry, a recent case analysis of interest in the sector drafted by leading lawyers, and an article from seasoned experts giving a different perspective on the sector. Finally, we added a list of the latest mining arbitration cases filed from January 2021 to February 2022 and available on our database.

We hope you enjoy our complementary Report and learn from the data available on Jus Mundi.

You may also download our previous issues on Oil & Gas Arbitration and Construction Arbitration.

Introduction

Eduardo Silva Romero

Partner & Co-Chair of the International Arbitration Global Practice
Dechert, Paris

Mining, as a human activity, is as old as civilization. The age of this activity, however, is not synonymous with a lack of interest. Conversely, because of three of its modern facets, mining is perhaps the economic sector giving rise to the most interesting disputes in the ISDS and even international commercial arbitration landscapes.

To start with, mining no doubt is a risky activity. There indeed is a considerable distance between the exploration of a field, including the feasibility of a mining project, and the return expected by the mining company. Anyone who has participated in a mining case could testify to the point that a mining permit, license or concession is, by definition, a very uncertain venture: no mineral, for instance, may be found; or most of the mineral found may be very difficult – or too costly – to extract. As a result, one cannot help but note that this economic sector attracts a particular type of businesspeople.

In addition, mining is an activity which is under the close watch of States. This is understandable. Mining resources are normally very valuable, they belong, by constitutional norm or otherwise, to the States, and, as such, the States have a duty under their legal orders to obtain as much gains as

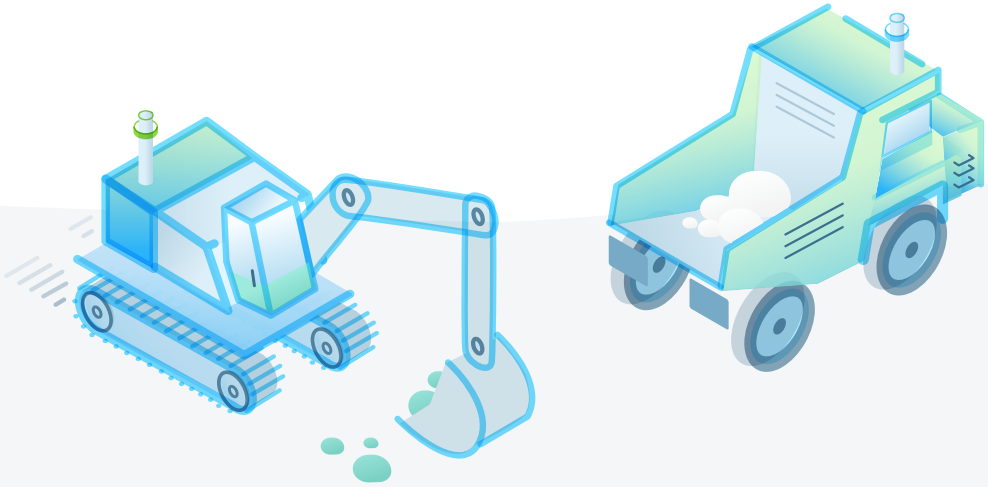
possible from such natural resources. This duty may, for instance, lead the States to enact new taxes at times when mineral prices are on the rise. In short, the relationship between mining companies and States is more often than not yet another inherent risk of the mining industry.

Lastly, mining regularly happens in places which are environmentally and socially sensitive. On the one hand, mining inevitably pollutes. This is the reason why in several cases between a mining company and a State, the issue of potential environmental defenses or, if available, counterclaims have arisen. There is, in any event, a tangible tension between the economic need for mining and the human right to a healthy environment. On the other hand, mining often occurs where indigenous communities reside. The arrival of mining companies to the land of those communities always causes misunderstandings and clashes. The conflicts, however, are not limited to demonstrations and fights. There is a true collision of cosmogonies in the circumstances: land is a source of revenue for the mining company, whereas land may be a sacred ancestral site for the indigenous community.

This Jus Mundi Report focuses on those interesting legal cases which have arisen from the conjunction of the three facets described above. Jus Mundi must be congratulated for this excellent initiative.

ABOUT THE AUTHOR

Eduardo Silva Romero *is Co-Chair of Dechert's International Arbitration Global Practice. Former Deputy Secretary General of the ICC International Court of Arbitration, he has far-reaching experience in all areas of international arbitration, including international sales and distribution contracts, construction, telecommunication, mining, oil and gas, and electricity-related disputes. He mainly focuses on disputes involving States and States entities. Mr. Silva Romero advises on arbitration matters conducted under the auspices of ICC, ICSID, PCA, ICDR, AAA, and the SCC as well as in ad hoc proceedings.*



Economic Landscape of Mining Arbitration

The rise in the number of mining arbitration cases has fluctuated over the years but there is a definite increase in the number of cases filed in the last few years.

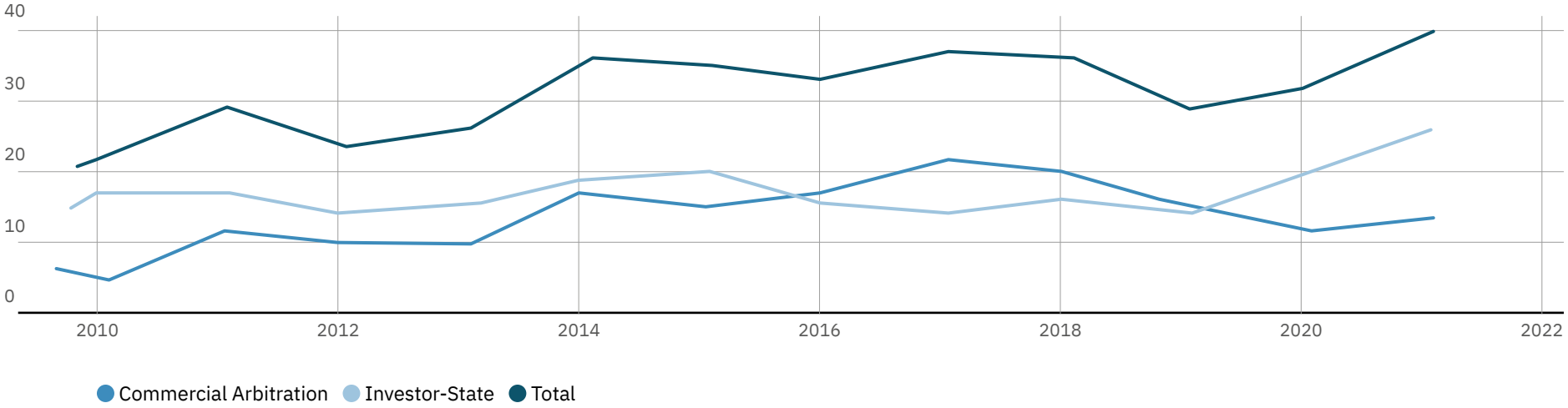
The rise in mining cases is consistent with the rise in mining activity. Read the case analysis of last year's big mining arbitration, Infinito Gold v. Costa Rica. Just this month, a mining case to follow was filed in GMAS v. Greenland and Denmark.

While oil & gas is an economic sector that is expected to decrease in activity in the next decade or two, the mining sector is expected to exponentially rise. Copper, cobalt, lithium, silicon and zinc, among many other mined resources and minerals, are essential to the green transition. Some are also in high demand due to their usage in manufacturing tech products.

Unlike most other industries, mining activities have not been thoroughly impacted by the pandemic. However, the data available on Jus Mundi show an uptick in the number of mining arbitration cases during that period.

Out of **37 cases** active in 2021 and available in Annex 1, **10** concern activities in **Central and South America**, and **15** in **Africa**.

These are clear regions of high mining activity, which therefore drive foreign direct investment, but also, in some parts, of political and legal instabilities. This combination makes the mining sector one of the prime users of international arbitration.



Trendspotting

From the data available on Jus Mundi, we can see a trend toward an increase in African mining arbitration cases, which will keep growing in the next few years. Mining activities are considerable in many African countries.

For instance, the Democratic Republic of the Congo alone accounts for over half of the world's cobalt reserves. It also has the largest mining exploration budget in Africa.
In 2021, DR Congo filed a commercial arbitration case before ICC in DR Congo v. Caprikat and Foxwhelp.
Access the Production Sharing Contract on which its claim is based on Jus Mundi.

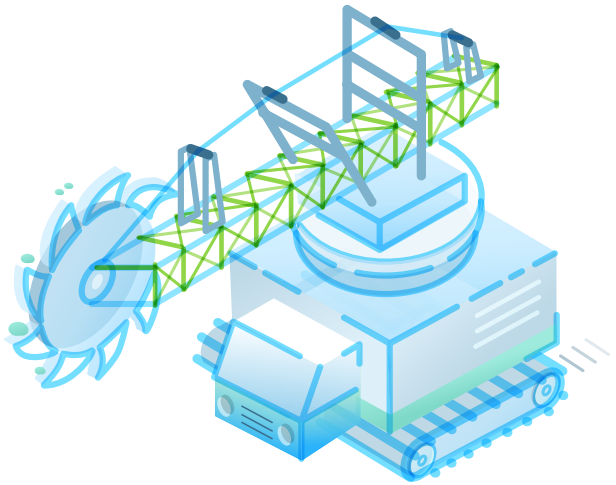
In the last few years, African States have wanted more control over the mining projects in their territory and a bigger share of the benefits they generate. Over a dozen -namely Burkina Faso, Cameroon, the DRC, Gabon, Guinea, the Ivory Coast, Kenya, Madagascar, Mali, Mozambique, Namibia, Senegal, Sierra Leone, Tanzania, Zambia, and Zimbabwe- have gone as far as to reform their mining legislative and regulatory landscape to the point that led investors to increasingly file for arbitration, although some of these reforms have significantly impeded the possibility to resort to international arbitration.

Suffice to say that the continent is a must-watch in mining arbitration in the next few years.

BREAKING NEWS

As we finalize this Report, Jus Mundi is adding to its database the latest document in the infamous Yukos saga, a famous case in the mining subsector of the extraction of crude petroleum and natural gas (oil). On March 23, 2022, Yukos filed a petition to enforce the arbitral award rendered on July 23, 2021 against Russia in the District of Columbia.

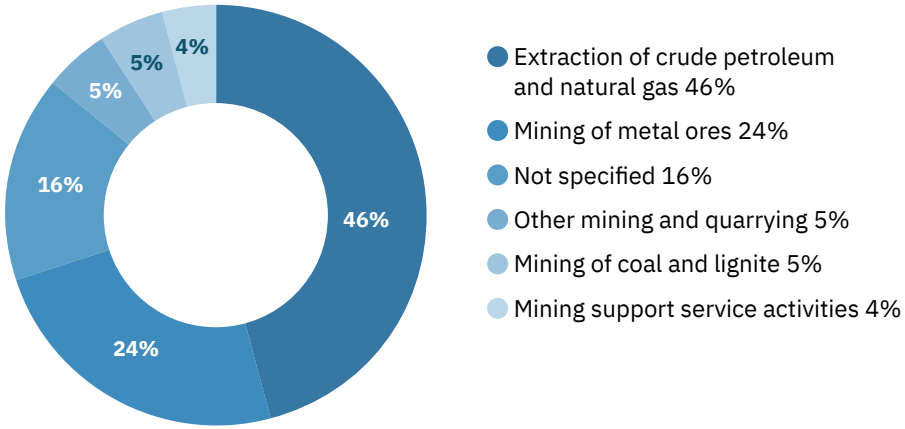
To keep abreast of developments in the case, set an alert on your Jus Mundi account now.



Mining Arbitration Cases on Jus Mundi

*For this Report, we only surveyed the data you can access, double-check, and monitor on Jus Mundi. Overall, we have found **548** arbitration cases available for mining and quarrying disputes in our multilingual search engine, of which **228** are **commercial arbitration cases** and **320 investment arbitration cases**.*

We have categorized the cases into the mining and quarrying sector and sub-sectors according to the Standard Industrial Classification of All Economic Activities (ISIC) to seamlessly deliver precise search results in our search engine through our useful economic filter.



Insight:

There are more commercial than investment arbitration cases in the most active mining sub-sector, *i.e.,* Extraction of crude petroleum and natural gas (oil): **138 commercial cases** for **115 investment arbitration cases.**

Economic sector	Number of cases	
MINING SUB-SECTOR	COMMERCIAL ARBITRATION	INVESTOR-STATE ARBITRATION
Extraction of crude petroleum and natural gas (oil)	138	115
Mining of coal and lignite	8	16
Mining of metal ores	41	90
Mining support service activities	11	12
Not specified	22	65
Other mining and quarrying	8	22

TOOLTIP

Try Jus Mundi's new Monitoring & Alerts feature to get updates on cases, arbitrators, or any searches or legal intelligence and business development.
Set alerts on #StabilisationClause, #SocialLicense, #OfftakeAgreement, or #Valuation

You can find mining cases on Jus Mundi from 1930 onwards.

If you want to access all available mining arbitration cases on Jus Mundi introduced in 2021, you can refer to Annex 1.

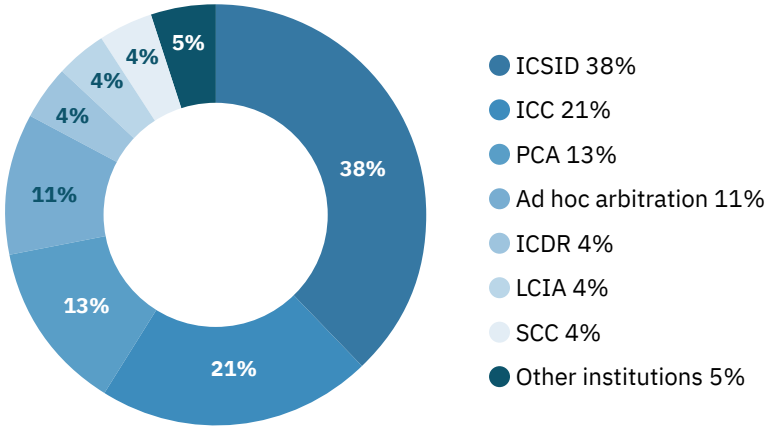
For instance, take a look at the cases filed against Colombia in 2021. Glencore International filed its third claim against Colombia in May 2021 and got Colombia's Application for Annulment in another case dismissed in September 2021. Its partner, Anglo American, also lodged a claim against the State in 2021, likely for the same reasons, *i.e.,* their blocked expansion plans of a coal mine due to environmental concerns and a resulting local court order.

You can also see the great proportion of cases filed in 2021 involving African States and State entities.

Most Selected Arbitration Institutions

We looked at all cases relating to mining arbitration available on Jus Mundi and the chosen arbitral institutions. We then gathered the data to show the popularity of each arbitral institution in mining arbitration, including the differences in choices in commercial and investor-State arbitrations.

Our survey revealed **26 main arbitral institutions** that have administered mining arbitrations over the years. Parties opted for various local and international arbitration institutions for their mining disputes, as well as for *ad hoc* arbitration in a major way.



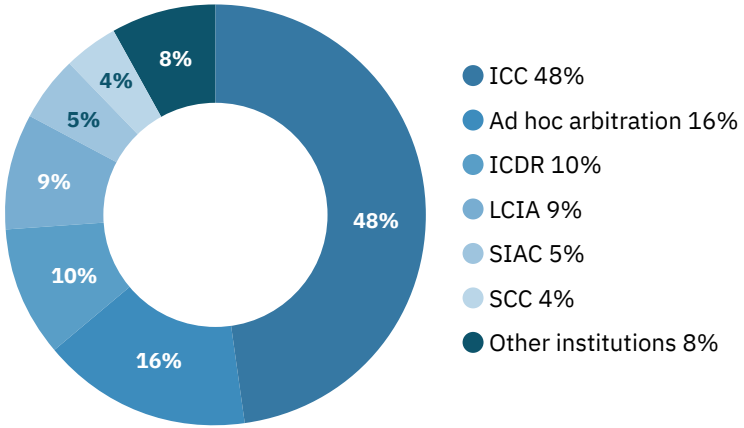
Most selected arbitral institutions overall in mining arbitration

Try our institutions and arbitration rules filters. Use CiteMap for rules of arbitration to find related jurisprudence.

TOOLTIP

Key Takeaways

- ICSID is the undisputed primary arbitral institution in mining arbitration. It comes as no surprise since most of the arbitration cases in the sector are investment arbitrations involving States or State entities.
  In fact, ICSID reported more cases – **25% of all its cases in 2021 to be exact** – in the Oil, Gas & Mining economic sector than in any other.
- The **Top 3** arbitral institutions administered **72%** of all mining arbitration cases.
- ***Ad hoc* arbitration** is surprisingly popular in mining disputes, **both in commercial and investment arbitration**.
  In 2021 and early 2022, States such as Haiti, France, Egypt and Kyrgyzstan opted for *ad hoc* arbitration, both in commercial and investment disputes.
- Over the decades, SIAC (Singapore International Arbitration Centre) and NAI (Netherlands Arbitration Institute) have risen in the sector, becoming institutions to keep on your radar for mining arbitrations.



Proportion of **commercial** *arbitration cases handled by institutions based on all mining and quarrying cases available on Jus Mundi as of February 2022*

- ICC is the top arbitral institution in mining commercial arbitration with **87 cases**.

  It is a prime choice in commercial arbitrations in general and was already ranked as the commercial arbitration institution most solicited in both our Oil & Gas and Construction Reports.

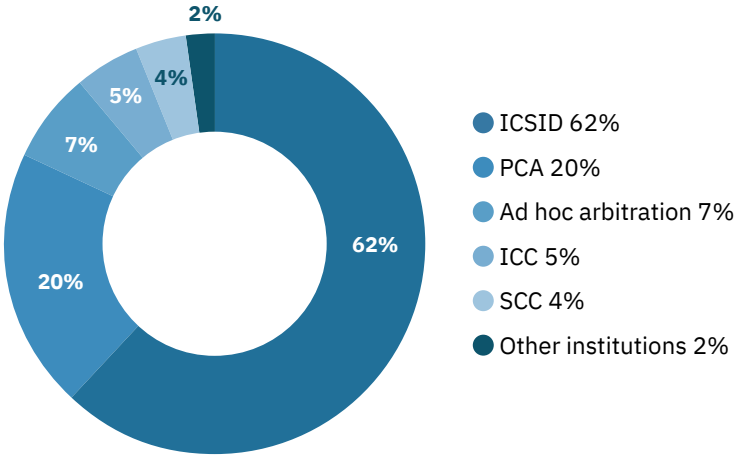
- ***Ad hoc* arbitration** represents **16%** of all mining commercial arbitration cases. It is the choice of arbitration the second most selected in mining commercial arbitration cases, with **30 cases**.

TOOLTIP

Discover all the data you need about each arbitral institution through our Arbitral Institution Profiles.

Mining, by its very nature, is an industry that tends to lead to more investment arbitrations than commercial arbitrations. Therefore, it comes as no surprise that ICSID is the uncontested investor-State arbitral institution administering mining disputes, by a wide margin.

This can be explained by the fact that mining projects are highly sensitive to political and regulatory developments.
In addition, the global demand for metals and minerals has been exponentially growing over the years, which has driven foreign direct investment and led to an increase in disputes arising out of them.

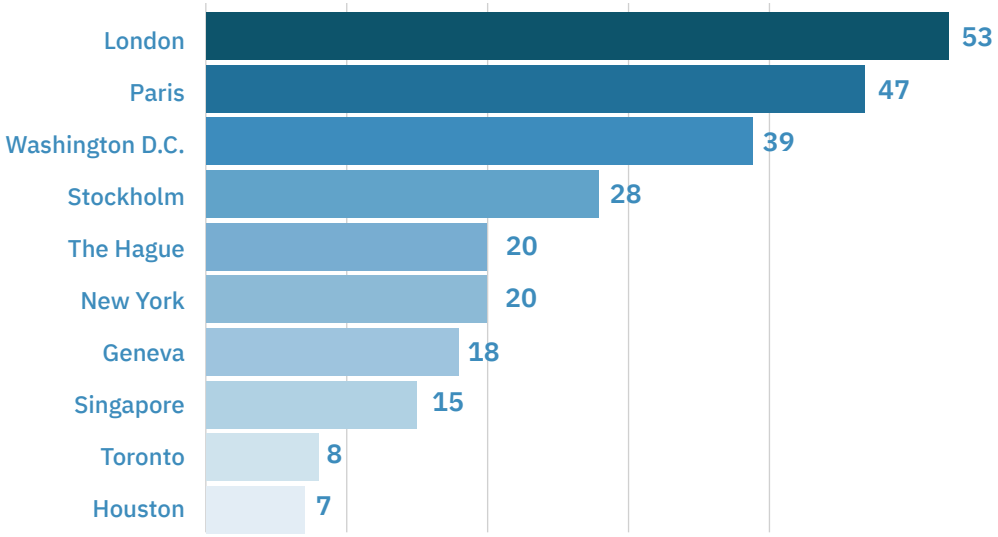


Proportion of **investor-State** arbitration cases handled by institutions based on all mining and quarrying cases available on Jus Mundi as of February 2022

Most Popular Arbitration Seats

The selection of a seat in mining arbitration is an important strategic choice, as its law applies to the arbitral procedure. Selecting an improper seat can result in several procedural and practical difficulties.

Our survey indicated **51 distinct seats** in mining arbitrations, some of which are established popular seats of arbitration and others are growing in popularity as of late.



Number of times the top 10 mining arbitration seats were selected in mining arbitration cases available on Jus Mundi as of February 2022

Key Takeaways

- In Latin America, Santiago and São Paulo are the preferred seats of arbitration for mining disputes.

  Santiago is of interest for parties from the Latin America. For instance, last year, two Ecuadorian parties chose to seat their mining *ad hoc* arbitration in Santiago in Igapó v. Petroecuador.

  As for São Paulo, domestic Brazilian courts are known to be arbitration-friendly, which explains its popularity as a seat of arbitration.

- Watch out for the newcomer: Abuja, the capital of Nigeria, has received increasing interest as a seat of arbitration for commercial arbitrations of mining disputes.

  It is likely that the interest in African seats will increase in mining arbitration in the coming years. Indeed, States and State entities have taken measures and made legal changes that will certainly lead (if they have not already) to an increase in mining disputes. However, some of these reforms include restrictions on international arbitration.

- London, chosen in **36 cases**, is now the prime seat choice for **commercial arbitration** in mining disputes, followed by New York and Paris. The upcoming reform to the English Arbitration Act will certainly make London an even more attractive seat in the next few years.

- Paris remains equally strong in **both commercial and investor-State arbitration**. This is directly correlated to ICC being the most popular arbitral institution in mining commercial arbitration.
- While London has been the most selected seat in recent years, others, such as Geneva and Singapore, have increasingly become more solicited.
- Singapore's changes to its arbitration law in the last few years has no doubt played a positive role in this increase.

Top 3 most selected seats in mining commercial arbitration

Most Appointed Arbitrators

The selection of arbitrators is a crucial step of the arbitration process, and mining disputes are no exception. In fact, their highly technical nature makes the selection of an arbitrator of paramount importance.

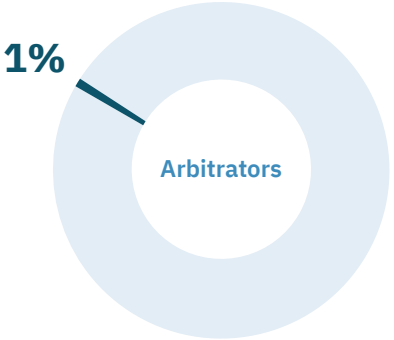
Finding the right arbitrator can be a cumbersome task, especially in a specific industry. At the time of writing, Jus Mundi's Directory contains over **6,000** arbitrator profiles, of which **579** have appeared in mining arbitration cases available on our platform. These **579** arbitrators have been **appointed 1,258 times**.

The chart below lists the names of the **top 10** arbitrators most appointed in mining arbitrations over the years as per our database.

Top 3 emerging arbitrators in the last decade

It is worth noting that, according to our database, the **top 3** emerging arbitrators in the last decade are not (yet) in the top 10 arbitrators most appointed in mining arbitration.

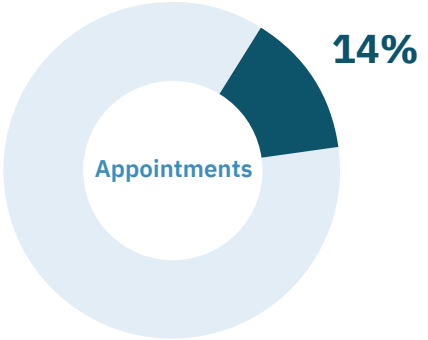
However, Douglas Zachary is in the **Top 3** arbitrators most appointed in mining **commercial arbitration** in the last decade.



Top 10 most appointed arbitrators in mining arbitration represent **1% of all arbitrators** involved in mining arbitrations
- according to our database -

Brigitte Stern
Horacio A. Grigera Naón
Bernard R. Hanotiau
Charles N. Brower
Philippe J. Sands
J. Christopher Thomas
L. Yves Fortier
Laurent Lévy
Albert Jan van den Berg
Gabrielle Kaufmann-Kohler

Top 10 most appointed arbitrators in mining arbitration



Top 10 most appointed arbitrators in mining arbitration represent **14% of all appointments** of arbitrators in mining arbitrations
- according to our database -

TOOLTIP

Jus Mundi's Directory helps you find the right arbitrator for your case. You can filter by gender, nationality, language, and, most importantly, by economic sector.

Key Takeaways

- The **Top 10** arbitrators represent **14%** of all appointments in mining disputes, while they represent only **1%** of all arbitrators involved in mining arbitrations.
- According to our database, **89%** of the **579** arbitrators have been **appointed five times or less**. Only **3%** have been appointed **more than 10 times**.
- The **most appointed arbitrator** in mining disputes is Brigitte Stern. According to our data, **all her appointments** have been in mining **investment arbitration**, except one. She is ahead with **36 appointments** in cases available on Jus Mundi.

Top 3 most **appointed women** in mining disputes

Our data exposes the lack of gender diversity in arbitrators appointed in mining arbitration: only **10 female arbitrators** are part of our **top 100**.

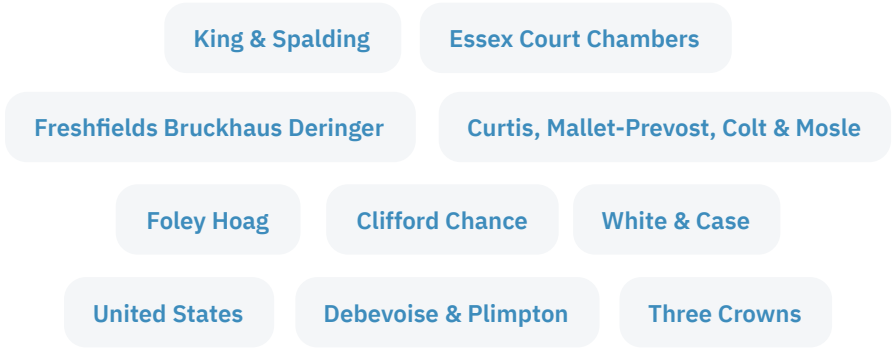
Arbitrator name	Number of appointments
Brigitte Stern	36
Gabrielle Kaufmann-Kohler	12
Jean E. Kalicki	10
Juliet Blanch	5
Yas Banifatemi	4
Laurence Boisson de Chazournes	4
Dorothy Udeme Ufot	4
Olufunke Adekoya	3
Inka Hanefeld	3
Dyalá Jiménez Figueres	3

Jus Mundi's Conflict Checker allows you to check conflicts of interests in seconds.

TOOLTIP

Most Active Arbitration Teams

Our data survey revealed **668** *active* **arbitration teams**, *including law firms, chambers, and government in-house teams, with a mining arbitration caseload. In the methodology used to analyze this data, we considered both commercial and investment arbitrations to provide a better overview of the key players in the market.*



Top 10 most active arbitration teams in mining arbitration
- according to our data -

Key Takeaways

- The **Top 10** arbitration teams' hires combined (**290**) represent **16.5%** of all law firms' hires in mining arbitration cases.
- Likewise, the **Top 3** most active arbitration teams in mining arbitration represent **8%** of all hires.
- King & Spalding is the most active law firm in mining arbitration with **54 cases**. Followed by Essex Court Chambers with **42 cases** and Freshfields Bruckhaus Deringer with **36 cases**.
- Last year alone, King & Spalding filed notices of dispute in 2 mining disputes: Talos v. Mexico and Stati v. Kazakhstan (II).

  Read King & Spalding's case analysis of a recent mining arbitration.

Get a 360-degree overview of your external counsel's expertise using Jus Mundi's firm profiles.

TOOLTIP

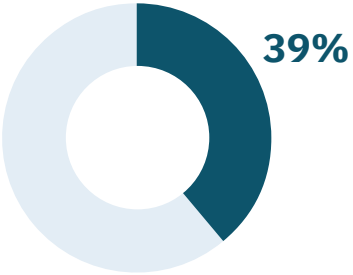
Most Active Expert Firms

Parties and tribunals rely heavily on experts. As a result, expert firms are often solicited in mining arbitration to address the complexity of the issues at stake and assess damages.

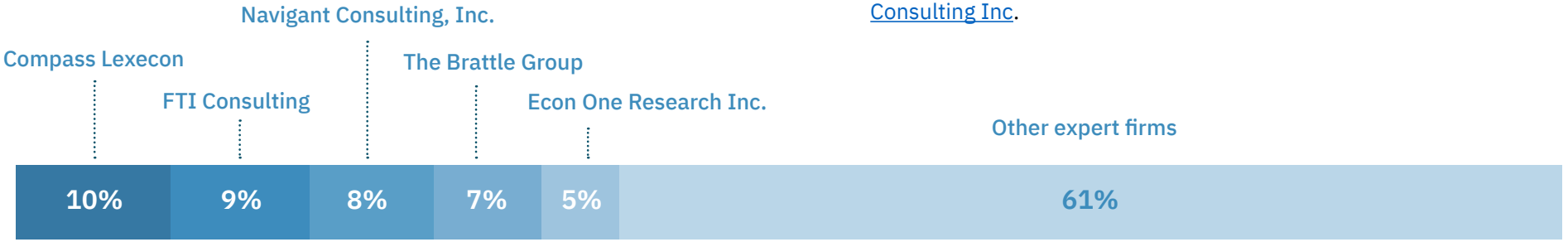
Expert evidence is of paramount importance in providing clarification, knowledge, and technical assessment of complicated issues. See our article below.

Our data show that **226** expert firms were solicited in mining arbitrations.

Key Takeaways



- The **Top 5 expert firms** represent **39%** of all hires. It includes Compass Lexecon, FTI Consulting, Navigant Consulting Inc., The Brattle Group, and Econ One Research Inc
- Quadrant Economics and RPA Inc. are the hot expert firms of the decade.
- Grant Thornton has had the most traction within the past 5 years.
- Exponent and Compass Lexecon, are expert firms on the rise in mining arbitration.
- Watch the newcomer: Versant Partners.
- The **Top 10** expert firms also include KPMG, Economía Aplicada, S. C., Charles River Associates, Credibility International, and SRK Consulting Inc.



Proportion of expert firms' hires in mining arbitration - according to our data -

Mining Arbitration Case Analysis

INFINITO GOLD LTD. V. REPUBLIC OF COSTA RICA, ICSID CASE NO. ARB/14/5
AWARD RENDERED ON JUNE 3, 2021

Viren Mascarenhas

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I. Introduction

Disputes over mining investments and activities continue to feature prominently in the ICSID caseload. This is unsurprising: mining is the exploration and exploitation of a sovereign State's natural resources. Although the facts and circumstances of each case are unique, Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5 concerns factors often found in mining disputes, such as legislative changes over the merits of mining activity; the degree to which a mining resource has been identified through exploration and industry-accepted hallmarks, such as scoping, pre-feasibility, and feasibility studies; domestic legal frameworks providing the legislative roadmap from exploration to exploitation, usually encapsulated in a mining code; environmental issues that may arise from mining activity, decided at the regulatory level over whether to issue an environmental permit; interplay between the executive, legislative, and judicial branches over mining policy and laws; and the quantification of damages suffered by the investor.

2. Facts of the case

This dispute concerns Claimant, Infinito Gold Ltd.'s ("**Infinito**" or "**Claimant**"), claims against Respondent, the Republic of Costa Rica ("**Costa Rica**" or "**Respondent**"), brought under the Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (the "**BIT**") relating to the development of a gold mining project in the area of Las Crucitas de Cutris in Costa Rica ("**Crucitas Project**").

The relevant factual history spans over a decade, including executive, legislative, and judicial developments. In 2000, Infinito acquired Industrias Infinito S.A. ("**Industrias Infinito**"), a company incorporated in Costa Rica that held a permit to explore the Crucitas Project. Following certain setbacks, Costa Rican President Óscar Arias and the Ministry of Environment and Energy granted Industrias Infinito an exploitation concession in 2008 ("**2008 Concession**") to develop the Crucitas Project. The government also designated the Las Crucitas Project as one of national interest.

Subsequently, Costa Rica declared a prohibition on open-pit mining

in 2010, which affected Industrias Infinito's 2008 Concession ("**2010 Executive Moratoria**"). The Costa Rican legislature also amended the Mining Code to prohibit open-pit mining, effective February 2011 ("**2011 Legislative Mining Ban**"). A series of court decisions upheld these mining prohibitions. In January 2012, the Costa Rican Ministry of the Environment, Energy and Telecommunications cancelled Industrias Infinito's 2008 Concession ("**2012 MINAET Resolution**"). Industrias Infinito failed in its attempts to challenge these measures through the Costa Rican courts. Industrias Infinito left the Crucitas site in September 2015.

3. The tribunal

The Tribunal comprised Prof. Gabrielle Kaufmann-Kohler (President), Prof. Bernard Hanotiau (appointed by Claimant), and Prof. Brigitte Stern (appointed by Respondent).

4. The tribunal's decision

On June 3, 2021, the Tribunal found that Respondent violated the fair and equitable treatment ("**FET**") standard in Article II(2)(a) of the BIT. However, the Tribunal declined to award damages from the breach.

JURISDICTION

By majority (with Professor Stern issuing a separate opinion on jurisdiction), the Tribunal rejected Costa Rica's objections that the Tribunal lacked jurisdiction *ratione materiae*, *ratione voluntatis,* and *ratione temporis*. First, the majority found that Claimant's shares in Industrias Infinito constituted its "main investment," which it owned or controlled in accordance with Costa Rican law. The BIT protected such indirect investment. Second, the majority dismissed Costa Rica's illegality objection as to whether the 2008 Concession had been obtained through corruption on the basis that the alleged corruption did not concern the making of the investment, and thus could not constitute an obstacle to jurisdiction, and, in any event, Costa Rica presented insufficient proof of corruption, notwithstanding the majority's intentional application of a lower standard of proof that accepted circumstantial evidence. Finally, the majority concluded that Infinito's claims were not time-barred.

MERITS

1.Fair and Equitable Treatment Standard

The majority of the Tribunal (with Professor Stern issuing a separate opinion) concluded that the BIT provides for an "autonomous" FET standard that is not limited to the minimum standard of treatment ("**MST**") under customary international law. While Canada made a non-party submission concurrently advocating for application of MST, the majority concluded that Canada's submission did not constitute a binding "agreement" within the meaning of Article 31(3) of the VCLT. Ultimately, the majority held that the 2011 Legislative Mining Ban and the 2012 MINAET Resolution deprived Industrias Infinito of the opportunity to apply for a new exploration permit and exploitation concession. Such treatment constituted a breach of FET.

2.Full Protection and Security Standard

The Tribunal did not find a breach of FPS under Article II(2)(b) of the BIT. It sided with other tribunals that have concluded that, absent express treaty language, the FPS standard ensures physical protection and integrity of the investor and its property within the territory of the host State.

3.Expropriation

The Tribunal also rejected Infinito's claim of judicial expropriation on the basis that Infinito, through Industrias Infinito, did not hold rights capable of being expropriated. This was because notwithstanding the "bad acts" that constituted a breach of FET described above, the 2010 Executive Moratoria on open-pit mining remained in effect.

EXCEPTIONS TO LIABILITY

The Tribunal rejected Costa Rica's defense that the environmental exception in Section III (1) of Annex I of the BIT "grant[ed] it some margin of discretion, as well as some level of protection from liability" for the challenged measures. The Tribunal concluded that the provision was not a "carve-out from the BIT's protections." Rather, a State's right to regulate in a "manner sensitive to environmental concerns" must remain "consistent with the investment protections set forth in the BIT." Any other interpretation would render meaningless the "otherwise consistent with this Agreement" language found in Annex I, Section III (1) of the BIT.

DAMAGES

The Tribunal declined to award any damages for the FET breach. Even if Claimant had been restored to the position of an exploration permit holder with a pending application for an exploitation concession, Industrias Infinito, nevertheless, would have been barred from obtaining a new exploitation concession due to the 2010 Executive Moratoria. Infinito's sole harm was loss of an opportunity to apply for an exploitation concession, which Infinito had neither proven, nor quantified. The outcome may have been different had the 2010 Executive Moratoria also been part of the alleged BIT breaches; however, claims related to them were time-barred. While the time-bar limit featured heavily in the tribunal's decision not to award damages for the FET breach, it is not atypical for parties to present alternative damages models including quantifying the loss of opportunity to develop a project.

Claimant applied for partial annulment of the award on October 1, 2021, on the tribunal's decision not to award damages. An ad hoc committee was formed on January 6, 2022.

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The Experts' Tip

TODAY'S COMPLEX MINING AND MINERALS DISPUTES FAVOR BREADTH OVER DEPTH IN EXPERTISE

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In the high-stakes world of international arbitration disputes, persuading the trier of fact that the client's position is the correct one — and that the opposing side's views are not credible — is a universal goal. To make their case, the first course of action for legal counsel is often to retain a unique industry veteran who can offer insights into specific technologies or industry issues. In some cases, such an expert is retained based on a client advocating for a specific individual with whom they are familiar and friendly.

However, experience in international arbitration suggests that focusing on the end goal of scientific and evidence-based persuasion could provide a more winning strategy and lead legal counsel to select experts based on their ability to identify issues, analyze technical topics, develop rigorous logical arguments, challenge untenable positions, and articulate well-reasoned arguments. Notably, this approach favors scientific rigor and broad experience over specific industry knowledge, the latter of which can leave counsel scrambling to rehabilitate unconvincing arguments that fail to reflect modern operational environments.

This issue is especially relevant to mining and minerals processing disputes. Mining and beneficiation plants, much like other industrial processing plants, tend to conjure images of caverns full of rudimentary mechanical equipment and manual labor driving operations — which could not be further from today's reality. These industries have evolved significantly since the industrial revolution ("Industry 1.0") and can today include autonomous and computerized systems, smart technologies, data-driven methodologies, and process simulations ("Industry 4.0").

The results are highly efficient, technologically complex industrial operations, which in the context of a dispute, frequently requires more than historical, academic, or single-disciplinary expertise to achieve clarity. In fact, unraveling root causes in today's sophisticated mining and mineral beneficiation plants demands broad, cross-industry understanding of how technologies are evolving and being integrated in different settings; how to distinguish causation between interrelated systems; and how to explain complex processes to non-technical audiences. For clients and their counsel, the consequences of engaging a single industry veteran expert, no matter how knowledgeable, can lead to unfortunate oversights and risk undesirable dispute outcomes.

Case in point

For example, in a recent case involving a beneficiation plant, the operators' failure to monitor the data stream from its supervisory control and data acquisition (SCADA) system regarding particle size prevented understanding about when and where the process was deviating from its design. In turn, the operators were unable to diagnose production issues and correct operations in an intelligent manner. The off-design operation resulted in a host of knock-on issues, including overwhelmed dryers, overflowing thickeners, burst slurry pumps, and broken filter presses. Even though construction was long complete, the complainant alleged that the knock-on issues were due to construction defects in various subsystems.

To manage the dispute, the claimant's counsel retained an industry veteran on hydro-cyclones to assess inefficiencies in plant performance. On the opposing side, the respondent chose to consult an industry veteran in beneficiation plants as well as an interdisciplinary team that included mechanical and electrical engineers. By the end of the case, despite industry veterans on both sides with specific knowledge in the technology at hand, it was the interdisciplinary team that took the lead role in presenting the technological case.

Breadth vs. depth

There were reasons the industry veterans ended up on the sidelines — and why this scenario repeatedly occurs in arbitrations and other large disputes involving industrial facilities.

One is that the perspective of the respondent's industry veteran was too narrow. The expert knew how to interpret particle-size distributions but had no perspective on how a SCADA system should be operated or, for instance, why dead-heading a slurry pump against a clogged filter press might cause the pump to explode or the press frame to distort. The electrical engineer with broad experience in SCADA systems, which are common across many industries, was better suited to explaining how such systems are connected to a multitude of sensors, how data can be accessed and analyzed, and what constitutes best practices for data retention. Likewise, the mechanical engineer, also having broad experience in general machinery and expertise in centrifugal pumps, was better suited to understanding and explaining the behavior of pumps under dead-head conditions and how over-stressed filter press frames might deform due to misuse, not construction defects.

Additionally, an industry veteran may not understand the need for objectivity in litigation and arbitration, which typically stands in contrast to an approach rooted in scientific rigor and multidisciplinary peer review. The industry veteran may default to saying things on the record that are based solely on experience as opposed to the evidence — or, alternatively, adopt positions that they think are desirable without proper support. In a different recent matter, an industry veteran labor estimator with no litigation or arbitration experience opined that repairing a switch room at an iron ore facility would require $200,000 when there was evidence that a similar repair of another switch room at the same facility only cost $8,000. The industry veteran failed to acknowledge the evidence on file, their analysis was not checked, and they simply proceeded to make comments they thought legal counsel might like to hear. In the end, the industry veteran cost the client significantly more than the price of their "expert" fees.

Choosing the right expertise

Interdisciplinary teams with broad industrial experience that follow scientifically rigorous methods can be much more effective in presenting persuasive, evidence-based arguments. Scientific rigor is pivotal to this assertion, as it prevents the adoption of untenable positions and maintains focus on positions that are still open for persuasion based

on well-supported reasoning. Most mining and mineral processing operations today include technologies that are common to many modern industries. Therefore, compared to an industry veteran with deep experience in one niche discipline, experts with broad experience — in this case, SCADA systems, hydraulics, power distribution, electric motors, lubrication systems, metallurgy, and centrifugal pumps—are better equipped to understand and shed clear light on the reasons a modern facility under-produces, delivers a poor-quality product, pollutes the environment, or is delayed.

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Annex 1 2021 MINING ARBITRATION CASES AVAILABLE ON JUS MUNDI

Case title	Institution	Date	Type
Montero Mining and Exploration Ltd. v. United Republic of Tanzania	ICSID	2/9/21	Investor-State
Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria	ICSID	2/10/21	Investor-State
WM Mining Company, LLC v. Mongolia	ICSID	2/17/21	Investor-State
Chilean Economic Development Agency (CORFO) v. Albemarle Corporation (II)	ICC	2/19/21	Commercial Arbitration
ICC Case - ID No. 1709	ICC	3/1/21	Commercial Arbitration
First Majestic Silver Corp. v. United Mexican States	ICSID	3/2/21	Investor-State
Mauritanian Copper Mines S.A. v. Islamic Republic of Mauritania	ICSID	3/4/21	Investor-State
Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States	ICSID	3/25/21	Investor-State
Sundance Resources Limited and Congo Iron SA v. Republic of Congo	ICC	3/25/21	Commercial Arbitration
AECI Mauritius Ltd v. Burkina Faso	ICSID	4/8/21	Investor-State
Corporación Nacional del Cobre de Chile (CODELCO) v. Empresa Nacional Minera del Ecuador (Enami EP)	ICC	4/8/21	Commercial Arbitration
World Natural Resources v. Republic of the Congo	ICSID	4/13/21	Investor-State

ICC: International Chamber of Commerce / ICSID: International Centre for Settlement of Investment Disputes

Case title	Institution	Date	Type
Perupetro S.A. v. Pluspetrol Norte S.A. (PPN), Korea National Oil Corporation, Posco Daewoo Corporation and SK Energy	ICC	4/20/21	Commercial Arbitration
ICC Case - ID No. 1769	ICC	5/1/21	Commercial Arbitration
Centerra Gold Inc., Kumtor Gold Company CJSC and Kumtor Operating Company CJSC v. The Kyrgyz Republic and Kyrgyzaltyn OJSC (III)	Ad hoc Arbitration	5/14/21	Investor-State
Glencore International A.G. v. Republic of Colombia	ICSID	5/28/21	Investor-State
Anglo American plc v. Republic of Colombia	ICSID	6/2/21	Investor-State
Avima Iron Ore Limited v. Republic of Congo	ICC	6/4/21	Investor-State
Alamos Gold Holdings Coöperatief U.A. and Alamos Gold Holdings B.V. v. Republic of Turkey	ICSID	6/7/21	Investor-State
Severgroup LLC and K.N. Holding OOO v. French Republic	Ad hoc Arbitration	6/7/21	Investor-State
World Natural Resources and WNR Congo v. Mercuria Energy Trading, Mercuria Capital Partners and Energy Complex DMCC	ICC	6/15/21	Commercial Arbitration
Menankoto SARL v. Republic of Mali	ICSID	6/24/21	Investor-State
Exxon Mobil Corporation v. Basra Oil Company	ICC	7/26/21	Commercial Arbitration
Democratic Republic of the Congo v. Caprikat Limited and Foxwhelp Limited	ICC	8/13/21	Commercial Arbitration
Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (II)	Ad hoc Arbitration	8/13/21	Investor-State

ICC: International Chamber of Commerce / ICSID: International Centre for Settlement of Investment Disputes

Case title	Institution	Date	Type
Raul Francisco Javier Linares Sanoja and others v. Republic of Peru	PCA	8/30/21	Investor-State
Eni S.p.A. v. Republic of Ghana	SCC	9/1/21	Commercial Arbitration
Discovery Global LLC v. Slovak Republic	ICSID	10/22/21	Investor-State
EEPL Holdings v. Republic of Congo	ICSID	10/29/21	Investor-State
Congo Mining Ltd SARLU and Midus Holdings Limited v. Republic of Congo	ICSID	11/15/21	Investor-State
AGEM Ltd v. Republic of Mali	ICSID	12/20/21	Investor-State
Enagás Internacional S.L.U. v. Republic of Peru	ICSID	12/23/21	Investor-State
Corporación Nacional del Cobre de Chile, Exploraciones Mineras Andinas S.A. and Inversiones Copperfield SPA v. Republic of Ecuador	ICSID	12/24/21	Investor-State
KrisEnergy Bangladesh Limited v. People's Republic of Bangladesh and Bangladesh Oil, Gas and Mineral Corporation	ICSID	1/26/22	Investor-State
Nederlandse Aardolie Maatschappij (NAM) v. Netherlands (I)	NAI	1/31/22	Commercial Arbitration
Nederlandse Aardolie Maatschappij (NAM) v. Netherlands (II)	NAI	1/31/22	Commercial Arbitration
Republic of Haiti and Bureau de Monétisation des Programmes d'Aide au Développement v. Preble-Rish Haiti S.A.	Ad hoc Arbitration	1/31/22	Commercial Arbitration

ICC: International Chamber of Commerce / ICSID: International Centre for Settlement of Investment Disputes
PCA: Permanent Court of Arbitration / SCC: Stockholm Chamber of Commerce / NAI: Netherlands Arbitration Institute

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