JUS MUNDI

INDUSTRY INSIGHTS ISSUE 6

Mining Arbitration Report

March 2023
A report prepared by Jus Mundi

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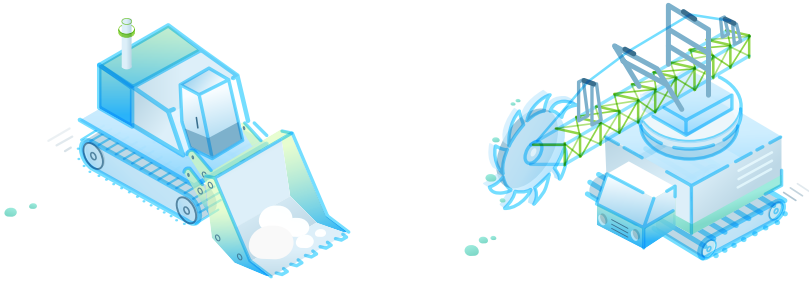
Foreword



*This Report is part of a series of **industry-focused arbitration reports** edited by **Jus Mundi**. In each issue, we examine the extensive international arbitration data available on our platform to give you data-backed insights into arbitration in a specific economic sector.*

In this issue, we present a goldmine of information based on the data available on Jus Mundi and **Jus Connect** as of February 2023 to explore the mining 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 February 2023, over 60,000 case documents are freely available on our platform, which is continuously updated for the most thorough legal research possible.

We collect data using artificial intelligence through local public resources and open sources. We also have **partnerships with major institutions** — such as the **ICC**, **AAA-ICDR**, **HKIAC**, **CBMA**, and **LACIAC** — as well as collaborative partnerships with leading organizations — such as the **IBA**, which receives arbitral awards from various contributors globally, the **CEA**, and the **UAA**. These partnerships enable us to give you exclusive insights into the diverse commercial arbitration landscape.

In each Report, we present a unique overview of arbitral institutions, arbitral seats, key actors involved, and exclusive statistics in a specific industry based on the data available on Jus Mundi and Jus Connect.

In this updated issue, you have access to:

- updated data-backed insights in mining arbitration;
- new data excluding the **Mining & Quarrying** sub-sector of "**Extraction of crude petroleum and natural gas (oil)**," which we cover separately in our **Oil & Gas Arbitration** Report;
- a range of unique and **in-depth mining insights and regional perspectives** from leading experts from around the world — including lawyers, experts, and in-house counsel;
- a list of Mining Arbitration cases (excluding the **Mining & Quarrying** sub-sector of "**Extraction of crude petroleum and natural gas (oil)**"), filed between 2021-2023, in **Annex 1**;
- a list of Mining Arbitration cases (including the **Mining & Quarrying** sub-sector of "**Extraction of crude petroleum and natural gas (oil)**"), filed between 2021-2022, in **Annex 2**.

Jus Mundi would like to thank all the excellent contributors and their firms for collaborating with us in producing this updated edition.

We hope you enjoy our complimentary Report and learn from the data available on our platform.

You may also enjoy other **Jus Mundi Industry Insights Reports** on:

- **Electricity & Renewables Arbitration**,
- **Maritime Arbitration**,
- **Oil & Gas Arbitration**, and
- **Construction Arbitration.**

Explore emerging trends in mining arbitration. Dig in!

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ABOUT THE CHIEF EDITOR

Clémence Prévot *is a former arbitration lawyer, qualified in New York and Paris, who now manages Jus Mundi's Blog, content collaborations, newsletter, and our famous Industry Insights Reports. She brings practical insights to the content created at Jus Mundi, thanks to her all-around experience in arbitration. She worked in law firms and in an arbitral institution, as a mediator, and with third-party funders, in different jurisdictions. Reach out to her with feedback, content ideas, and suggestions! (She doesn't bill for her time anymore, so don't hesitate to get in touch!)*

ABOUT THE EDITOR

Prior to joining Jus Mundi, **Georgios Andriotis** *was an Associate in the International Arbitration and Public International Law Group of Shearman & Sterling LLP in Paris for more than six years and a Deputy Counsel at the ICC International Court of Arbitration. He has represented corporations and State-owned entities in investor-State and commercial arbitrations under the Rules of the ICC and ICSID.*

Introduction

The mining industry is critical for the global economy, providing essential minerals and metals for a wide range of industrial and consumer products. However, the mining sector is subject to significant risks and uncertainties, including legal and regulatory risks that can create challenges for the different stakeholders involved.

Besides commercial risks arising out of contractual breaches, royalties or other financial arrangements, and disagreements over operational issues, the mining industry is often subject to the regulatory powers of a State, which can have a significant impact on the sector, as they can influence the permitting process, determine the standards that mining companies must meet, and set the penalties for non-compliance.

This is even more relevant as the mining industry has long been associated with significant environmental and social impacts, as well as challenges related to governance and transparency. First, environmental considerations are a critical aspect of responsible mining practices. Mining companies face challenges in adopting sustainable practices such as using renewable energy sources, implementing water recycling and treatment systems, and reducing waste and emissions. Second, social considerations are also essential, as mining operations can have significant impacts on local communities and indigenous peoples. In this regard, the mining industry encounters challenges in engaging with local communities to identify and address the social impacts of mining operations, as they can cause displacement, loss of livelihoods, and damage to cultural heritage sites. Finally, governance and transparency play a crucial role in shaping responsible mining practices. While mining companies are striving to adopt sustainable and ethical business practices, such as engaging with stakeholders, conducting regular environmental and social impact assessments, and providing transparent and accurate financial reporting, there are still significant challenges related to ESG considerations in the mining sector.

All the aforementioned risks and challenges are often the genesis of

complex disputes within the mining industry, with a wide range of parties involved in various aspects of mining operations, including exploration, development, production, and marketing. It is important to note that disputes involving the mining industry often have significant international dimensions. Mining projects are often located in developing countries, where the regulatory framework may be less developed and the legal system may be less reliable. This can create challenges for resolving disputes in a fair and impartial manner. In addition, mining companies are often multinational corporations with complex ownership structures, which can create challenges for identifying and resolving disputes involving multiple jurisdictions and legal systems.

As a result, international arbitration has, over the years, become a progressively important mechanism for resolving mining disputes, providing a means of resolving disputes in a neutral and impartial manner that is not subject to the legal and political risks of the domestic court system. In particular, investment arbitration has become a popular mechanism for resolving disputes involving the mining industry as it provides investors with a means of enforcing their rights under international law, while also allowing States to manage the risks associated with mining activities and regulate mining operations. This popularity becomes evident when one takes a look at the latest version of **ICSID's Caseload statistics according to which, the Oil & Gas and Mining sectors account for 24% of all ICSID cases registered in 2022**.

That said, an important issue arises: that of balancing the responsibility of the State and investor rights. Such an exercise in the mining industry is complex and multifaceted. On the one hand, States have a responsibility to manage their natural resources in a way that maximizes the benefits for their citizens. This can involve regulating mining practices, imposing taxes and royalties on mining companies, and ensuring that mining activities are environmentally sustainable and socially responsible.

On the other hand, foreign investors in the mining industry have certain rights under international law that protect their ability to make a profit from their investments. These rights include protections against expropriation, discrimination, and unfair treatment, as well as the right to seek compensation for losses resulting from State actions.

Finding the right balance between State responsibility and foreign investor rights in the mining industry requires taking a nuanced and context-specific approach that considers the political, economic, social, and environmental conditions of the host country, as well as the legal and regulatory framework governing mining operations.

In the meantime, one thing is certain though: as the mining industry continues to evolve and adapt to changing market conditions and societal expectations, international arbitration, whether investment or commercial, will continue to play an important role in resolving highly complex mining disputes and in supporting the long-term sustainability of mining projects.

This second edition of Jus Mundi's Mining Arbitration Report focuses on all those aforementioned topical issues and provides comprehensive data insights and key takeaways.

Data-Backed Trendspotting in Mining Arbitration

According to the World Bank, "[t]*he energy transition is expected to massively boost demand for minerals and metals, requiring an estimated $1.7 trillion in global mining investment. Attracting a share of this investment to low and middle-income countries could contribute to economic growth, jobs, and local development.*"

That said, over the last year, the mining and metals industry has experienced significant upheaval and transformations due to events such as the war in Ukraine, natural disasters, and changes in key mining regions. According to a report by Fitch Solutions, the mining and metals industry is expected to become more stable in 2023 as these challenges ease. However, the ongoing financial crisis and conflict could also result in slightly lower metal prices in 2023, although the commodities market is expected to achieve greater price stability. The surface mining market is expected to reach a value of $39.7 billion by 2030 with a compound annual growth rate of around 3.2%.

Nonetheless, according to a report by S&P Global, there will be a shortage of critical commodities starting as early as 2024, as a result of the increased demand for electric vehicles and renewable energy technologies. Governments around the world are expected to provide more financial resources for new mining projects to ensure a sufficient supply of minerals and metals to meet the growing demand for green energy.

2023 is expected to see elaborate discussions about the tension between mining for a green transition and the environmental impact of mining activities. The ESG considerations will also gain more significance, focusing on the local impact of mining activities, and the social aspects of mining operations. Despite the projected growth of the metals and minerals industry in 2023 and beyond, challenges such as market uncertainties, energy insecurity, and climate change will persist.

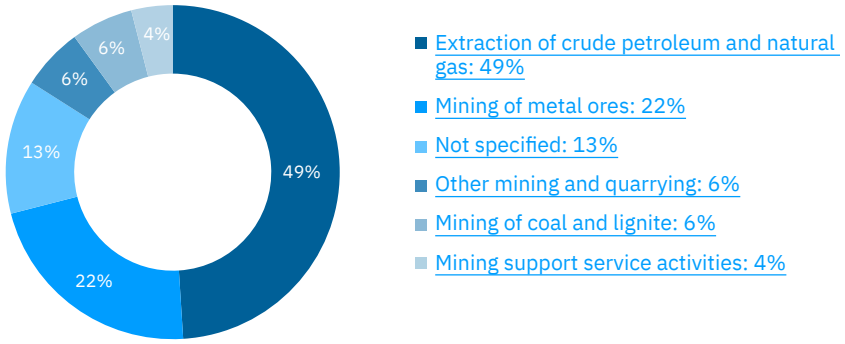
Mining Arbitration Cases on Jus Mundi

*For this Report, we only surveyed the data you can access, verify, and monitor on Jus Mundi. Overall, we have found **784** arbitration cases available for mining and quarrying disputes in our multilingual search engine, of which **436** are **commercial arbitration cases** and **348** are **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**.

Distribution of cases in Mining Arbitration per mining sub-sector

- according to our database as of February 2023 -



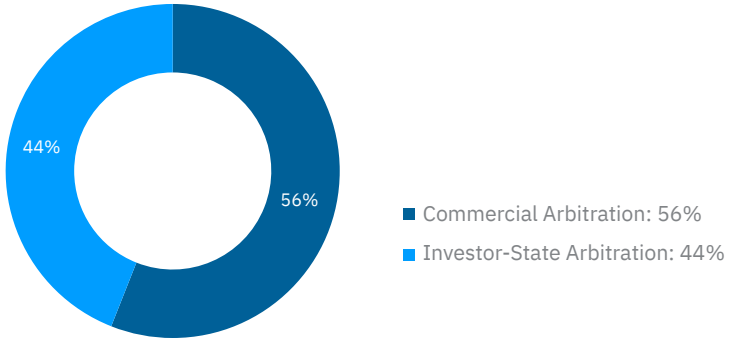
Our Data-Backed Insights

Over the past decade, the mining industry has emerged as one of the main users of international arbitration. The **majority of mining cases** available on Jus Mundi are **commercial arbitrations**.

To find cases in the field, simply use our Economic sector filter for **Mining & quarrying**.

Proportion of commercial and investor-State arbitrations in Mining Arbitration overall

- according to our database as of February 2023 -



The data of the cases in **Annex 1** – which comprises mining arbitration cases (excluding cases in the sub-sector "Extraction of crude petroleum and natural gas (oil)) introduced in 2021, 2022, and up to February 2023, according to our database – proficiently illustrates some of the general trends in mining arbitration, especially when analyzed side by side with the International Centre for Settlement of Investment Disputes (ICSID)'s own caseload statistics. ICSID is the arbitral institution administering most mining arbitration cases and therefore gives a good sense of the general trend in the sector.

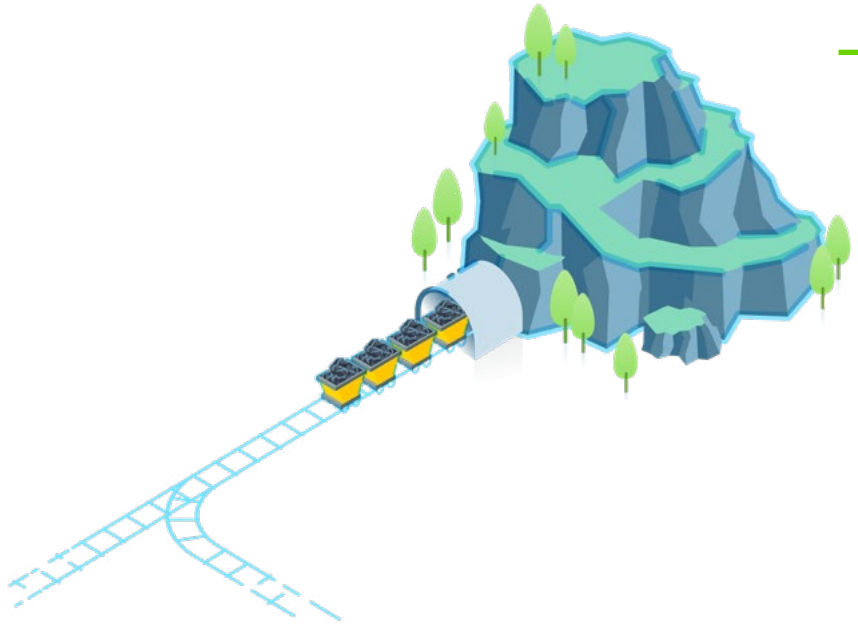
- The statistics presented in **ICSID Annual Reports** give an insight into the developments in investment arbitration in the field and perfectly illustrate the new trends discussed in the **Introduction**.

Historically, the extractive (*i.e.,* Oil, Gas & Mining) and energy (*i.e.,* Electric Power & Other Energy) sectors, as defined by **ICSID Annual Reports,** have been contenders for the most cases registered with ICSID in a given fiscal year, almost every single year in the last decade. However, ICSID's all-time statistics (*i.e.,* of all ICSID cases between 1966 and 2022) show that **25% of its historical caseload concerned the Oil, Gas & Mining economic sector**, which is more than any other economic sector.

This year, in its updated **2023-1 issue**, ICSID reports that 24% of cases registered in the calendar year 2022 involved Oil, Gas & Mining disputes, which means its caseload in the sector remains consistent over the years.

One caveat to mind in analyzing these figures concerns the fact that oil, gas & mining disputes are blended into a single category. Indeed, the oil & gas and mining industries are arguably evolving in opposite directions, which would warrant that the two economic sectors be differentiated in ICSID's statistics. While this Report edited by Jus Mundi focuses on Mining & Quarrying Arbitration, we have distinguished Oil & Gas Arbitration in a separate issue in order to analyze their respective evolution.

Some predict a decline in oil & gas activities in the next two decades, whereas mining activities are, on the contrary, expected to rise exponentially. The **2022 World Energy Investment Report** illustrates this tendency in numbers: investment in fossil fuels has slowly decreased since 2015 while it increased in renewable power. The mining industry is incremental to the transition toward renewable energy sources due to the vast and developing needs for copper, cobalt, lithium, zinc, rare and precious metals.

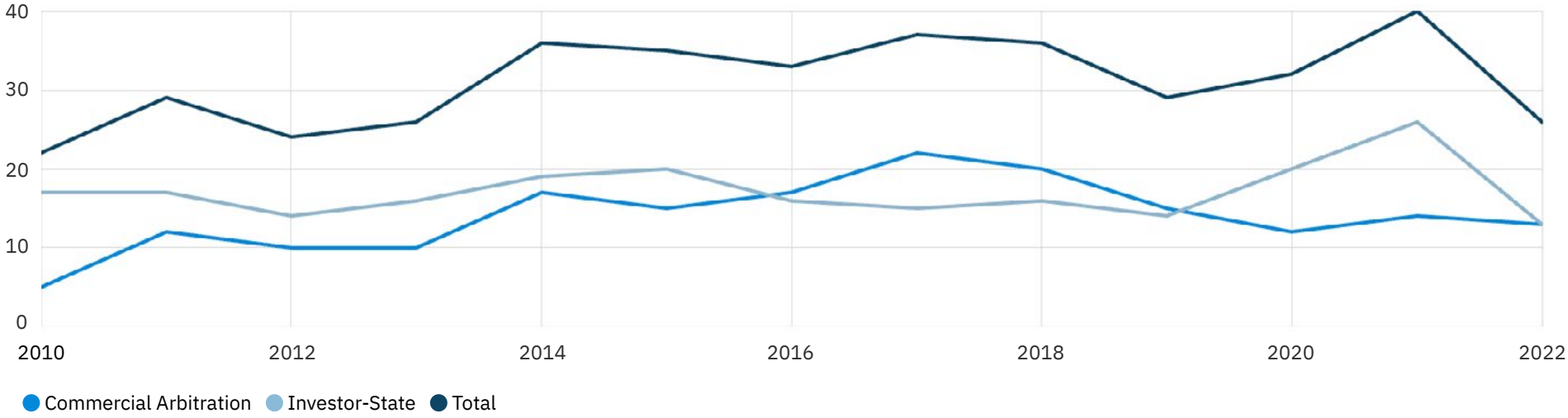


Inevitably, the increased investment in mining coupled with the many risks evoked in the **Introduction**— *e.g.,* the highly sensitive nature of mining projects to political and regulatory changes and the current partisan desires of host States to obtain more control over natural resources located within their territory — are a goldmine for arbitration. This is particularly the case in emerging countries in Latin America and Africa. This climate is bound to lead to a rise in mining disputes referred to arbitration, a favored dispute resolution method in the sector.

- Out of 37 cases filed in 2021 (and available in **Annex 2**), 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 explains why the mining industry is one of the prime users of international arbitration.

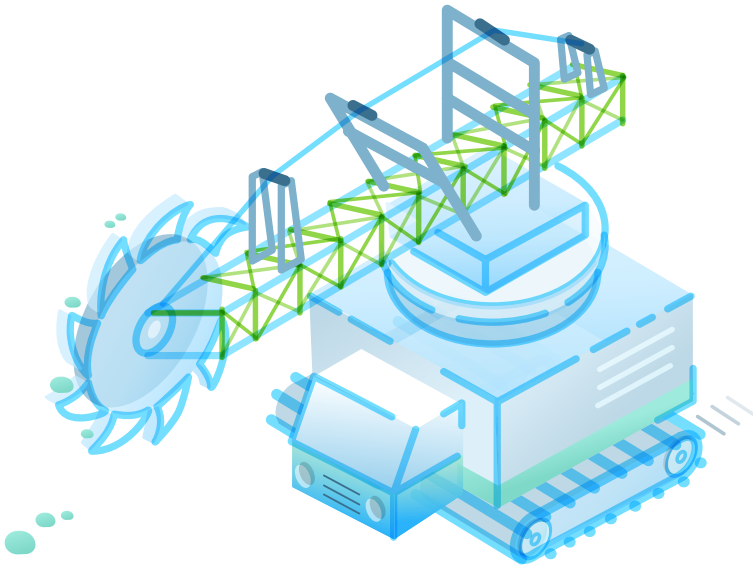
Evolution of the number of Mining Arbitration cases filed between 2010 & 2022

- according to our database as of February 2023 -



TOOLTIP

Try Jus Mundi's **Monitoring & Alerts** feature to get updates on cases, searches, arbitrators and arbitration practitioners, or even parties. Legal intelligence automated!



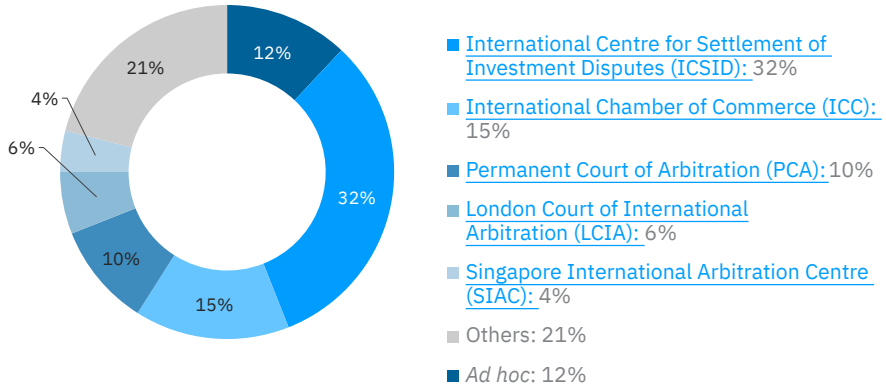
Most Selected Arbitration Institutions

We looked at all the Mining & quarrying arbitration cases available on Jus Mundi to gather data showing the popularity of each arbitral institution in the sector.

While parties opted for various local and international arbitration institutions for their mining disputes, a survey of our data revealed **34 main arbitral institutions** that have administered mining arbitrations over the years. *Ad hoc* arbitration is also very popular in mining disputes.

Most selected arbitral institutions overall in Mining Arbitration ((excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -



TOOLTIP

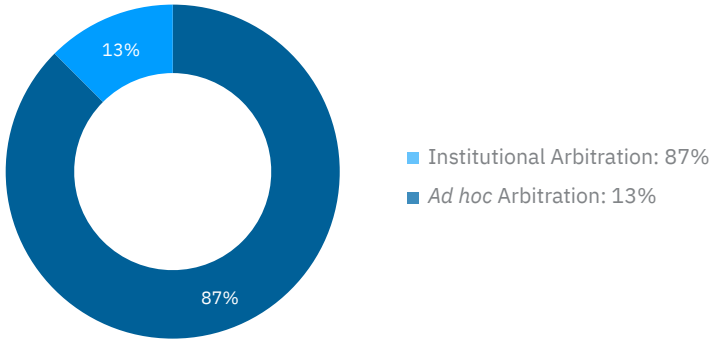
Try our institutions and arbitration rules filters.
Use **CiteMap** for rules of arbitration to find related jurisprudence.

Key Takeaways

- The **International Centre for Settlement of Investment Disputes (ICSID) is the primary institution chosen for mining & quarrying arbitrations,** with a whopping **32 %** of mining cases available on Jus Mundi administered by the institution.
- The **Top 3 arbitral institutions** — namely **ICSID, the International Chamber of Commerce (ICC)**, and the **Permanent Court of Arbitration (PCA)** — **administered 57%** of all mining arbitration cases available on Jus Mundi.

Proportion of *ad hoc* and institutional arbitration in Mining Arbitration overall (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -



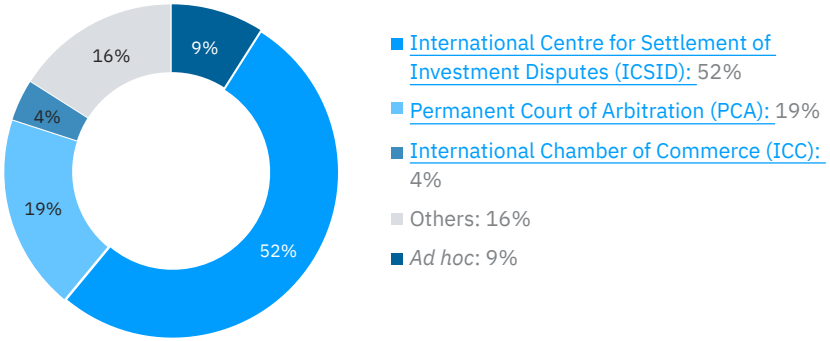
- ***Ad hoc* arbitration** is used in the sector but far from the levels seen in **maritime arbitration**, where *ad hoc* arbitration was used in 76% of cases available on Jus Mundi as of May 2022. It is used both in investment and commercial arbitrations in the sector, but predominantly used in commercial arbitrations.

Parties choose *ad hoc* arbitration in mining disputes about as much as they do in **oil & gas disputes** and **electricity & renewables disputes**. They have been favoring institutional arbitration more and more over the years.

In fact, ***ad hoc* arbitrations in investor-State disputes** in the field have steadily **decreased over the last decade**. In the last 2 years, only two arbitration cases (out of 35) available on Jus Mundi are not administered by an institution, *i.e.,* **Bahgat v. Egypt (II)** and **Centerra and Kumtor v. Kyrgyz Republic (III)**. They are both conducted under UNCITRAL Arbitration Rules.

Most selected arbitral institutions for investor-State arbitration cases in the Mining sector in the last decade (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -



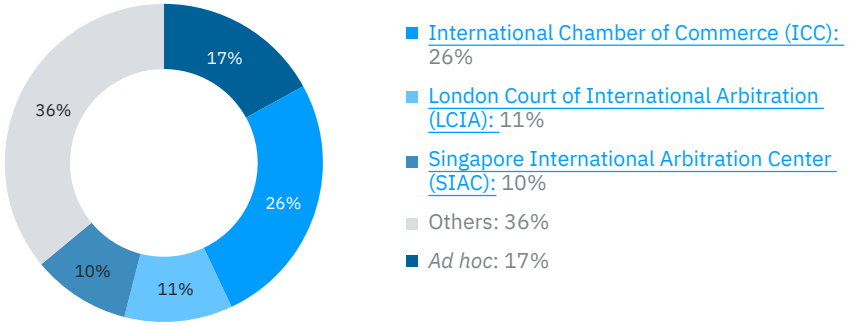
- While **ICSID** **administered 32% of all investor-State arbitrations** in the mining & quarrying sector, ICC and the PCA have handled a growing caseload of investor-State arbitrations.

Although **ICSID** is a staple of the ISDS regime, the regime itself has come under increasing criticism in the last decade, so much so that it has been said to be facing a legitimacy crisis. This was supposedly the reason **Bolivia** and **Venezuela** denounced the **ICSID Convention** in 2007 and 2012 respectively, as well as **Ecuador** in 2009 (which ended up signing the ICSID Convention again in 2021). It also led to the demise of the intra-EU ISDS system in the wake of the CJEU landmark decision in **Slovak Republik v Achmea BV**.

The amendment of the ICSID Rules and Regulations – which entered into force earlier last year on July 1, 2022 – has therefore been a welcomed development in addressing the ISDS regime's legitimacy crisis. Among other changes, the Rules now provide for greater transparency, which is essential, as noted by the tribunal in **Vivendi v. Argentina (II)**: "*public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function*" (para. 22).

Most selected arbitral institutions for commercial arbitration cases in the Mining sector in the last decade (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of August 2022 -



- **ICC** is the **top arbitral institution in commercial arbitration** of mining disputes.

In 2021 and up to February 2023 only, out of **35 mining arbitration cases** filed and available on Jus Mundi, **11 are commercial arbitration** cases, including **7 administered by ICC**.

- *Ad hoc* arbitration seems to remain popular in commercial mining disputes, unlike in investor-State disputes. The flexibility it offers may be responsible for its success.

TOOLTIP

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

- Although our data on LCIA arbitrations are more limited than for other global arbitral institutions compared to the size of its caseload, **LCIA** comes out as the **second most used arbitral institution** in **commercial mining disputes**, according to our data. Its mining arbitration caseload has been growing over the last decade.
- **Latin American** institutions are on the rise, especially in commercial arbitration. According to information released by the Center for Arbitration and Mediation Brazil-Canada (**CAM-CCBC**), in 2020 and 2021, more than 230 new cases were registered, which led CAM-CCBC to achieve the landmark figure of 1,311 administered arbitrations. In 2021, the total of the sums disputed in these cases amounted to BRL 5.6 billion, while the average amount in dispute reached BRL 43.7 million.

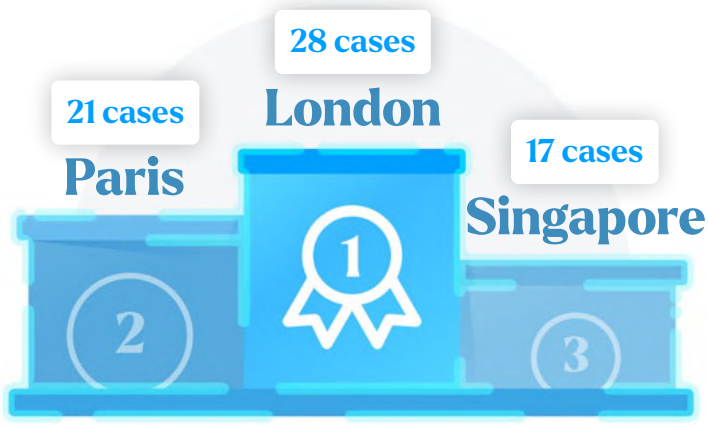
Most Popular Arbitration Seats

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

Our survey indicated **44 distinct seats** in mining arbitration, some of which are established and popular seats of arbitration and others which are growing in popularity as of late. Unfortunately, in many cases, the seat of arbitration is unknown. Confidentiality might be one of the reasons this information is unavailable.

Top 3 most selected seats in Mining Arbitration in the last decade (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 –



Key Takeaways

- The usual suspects comprise the top 3 most selected seats of arbitration in the last decade.

DISCLAIMER:

In investor-State arbitration, ICSID is the primary arbitral institution for mining disputes. Although ICSID arbitrations technically do not have a legal seat, our database registers these cases as seated in Washington D.C. in order to differentiate them from cases with unavailable information regarding their seat. We have therefore excluded Washington D.C. from our below rankings.

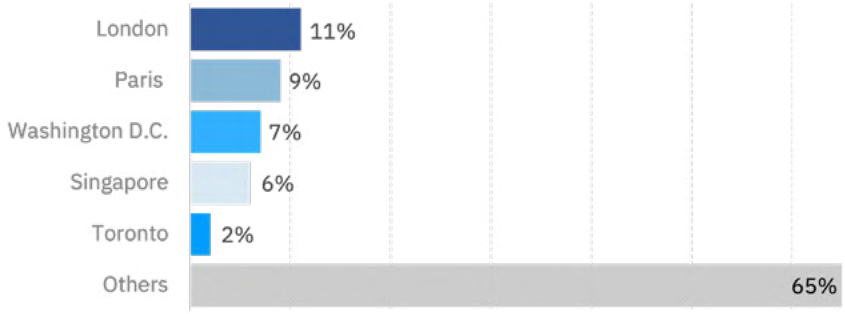
- **London** and **Paris** are arguably the biggest global arbitration hubs. They are trusted seats within arbitration-friendly jurisdictions.
- Singapore is becoming a strong reference, both in APAC and globally. Singapore's changes to its arbitration law in the last few years have undoubtedly played a positive role in this increase.

Toronto is also a popular seat of arbitration in the mining sector. While it does not tend to be a popular seat in most economic sectors, in the mining industry, however, Toronto plays an essential role. To find out why, take a look at **Choosing the Seat for an International Mining Arbitration: The Case for Canada.**

RETURN

Most selected seats overall for Mining disputes (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -



In **GMAS v. Greenland and Denmark**— a case we reported last year as one to keep on your radar —the parties chose to seat their arbitration in Copenhagen, thereby making its entry on our list of seats of arbitration in mining disputes (excluding the Mining & Quarrying sub-sector "Extraction of crude petroleum and natural gas (oil)") in 2022. It is interesting to note that the Australian claimant agreed to a seat of arbitration located in the respondent State.

- Although African States are heavily involved in mining arbitrations, very few seats chosen by parties are African. Of course, the political and social instabilities that put mining projects at risk in the first place and potentially lead them to arbitration also affect the legal and judicial landscape of these jurisdictions. However, **Lagos (Nigeria)** and the **Lagos Chamber of Commerce International Arbitration Centre (LACIAC)** are generally rising in popularity in arbitration.
- According to our data, **São Paulo (Brazil)** is a rising seat for mining arbitration in **Latin America. Câmara de Arbitragem do Mercado (CAM)** and the **Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC)** have both handled mining cases in the last decade.

TOOLTIP

Learn more about the latest developments in arbitration in 13 jurisdictions, including **Brazil**, with our **Arbitration 2022 Year In Review**.

In commercial arbitration, regional parties tend to prefer a local seat of arbitration, which is not the case when at least one of the parties involved is foreign, even when the object of the dispute or matter is set in the region.

The development of Brazilian arbitral institutions and seats is largely due to the favorable Brazilian Arbitration Act (BAA) enacted 26 years ago. Since then, commercial arbitration has become the country's most commonly used method of alternative dispute resolution.

Unfortunately, this may all change if the Brazilian Congress approves Bill No. 3,923/21 — meant to amend the BAA. According to the Brazilian Arbitration Committee (CBAr), the main arbitration entity in Brazil, the changes proposed in the bill increase legal uncertainty and weaken the country's entire arbitration system. Its approval would represent a real step backward, as it promotes undue interference by the State in private proceedings.

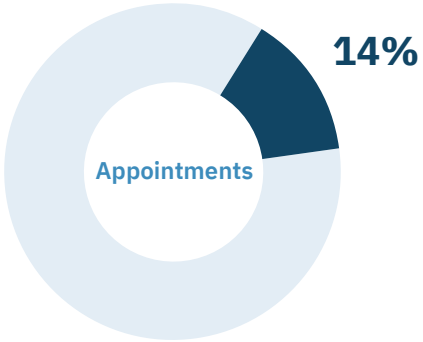
Most Appointed Arbitrators

The selection of arbitrators is a crucial step in the arbitration process. Mining arbitration is a technical sector with capital-intensive and long-term projects, which requires arbitrators to have specific expertise in the field. However, finding the right arbitrator can be a cumbersome task, especially in such a specialized industry.

At the time of writing this Report, Jus Connect contains over **9,000 arbitrator profiles**, of which **734** have appeared in **mining arbitration cases** available on our platform.

Top 10 most appointed arbitrators represent 14% of all appointments of arbitrators in Mining Arbitration

- according to our database as of February 2023 -



Gender equality and diversity in arbitration have been hot topics for a few years now. While many initiatives have been created to effect change in the legal profession and arbitral community, ICSID reports a fairly unchanged number of female arbitrators appointed in ICSID cases. To be fair, ICSID only started gathering this data in 2019. For the most part, however, the lack of diversity in international arbitration is still a great concern. Tribunals should represent the broad spectrum of stakeholders impacted by their decisions. This also goes for counsel teams.

Still, the same few women tend to be appointed and the cliché of the "male, pale, and stale" arbitrators has been hard to shake. ICSID reports in its all-time statistics, i.e., data **from 1966 to 2022**, that the **most appointed arbitrators are American, British, or French. In 2022**, it is fair to say that not much has changed as arbitrators, albeit now including some female arbitrators, still are mostly from **North America or Europe**.

TOOLTIP

Efficiently select your arbitrators with **Jus Connect**, our free professional network tailored-made for the arbitration industry. What's more, verify in just a few clicks if they could possibly be conflicted with our **Conflict Checker**.

Key Takeaways

- Our **top 5 contenders (inc. *ex aequo*)** for the most selected arbitrators all have a heavy caseload in mining arbitration.
- Brigitte Stern is an extremely active arbitrator with a range of expertise: she is the **most active arbitrator in mining arbitration**, according to our data.
- She was also in the top 5 most appointed arbitrators in our Oil & Gas Arbitration Report and Electricity & Renewables Arbitration Report.
- She arbitrated more mining disputes than any other economic sector, according to our data.
- She is exclusively appointed in the mining sector for investor-State arbitrations, according to our data. She is also the most active female arbitrator in these three economic sectors.
- The vast majority of her appointments came from States.

Find all these insights and more on her Jus Connect profile.

Top 5 most appointed female arbitrators in Mining Arbitration (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -

Brigitte Stern
Jean E. Kalicki
Gabrielle Kaufmann-Kohler
Loretta Malintoppi
Laurence Boisson de Chazournes
Inka Hanefeld
Juliet Blanch

- The same few female arbitrators seem to be appointed in Oil & Gas, Electricity & Renewables, and Mining arbitrations. While they are remarkable arbitrators, the strides made are not as great as hoped. That being said, this tendency is also true of male arbitrators.

Top 5 most appointed male arbitrators in Mining Arbitration (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -

Horacio A. Grigera Naón | Bernard R. Hanotiau | Philippe J. Sands

Charles N. Brower | Guido Santiago Tawil | David A.R. Williams

Pierre D. Tercier | Stanimir A. Alexandrov

Albert Jan van den Berg | Bernardo M. Cremades Sanz-Pastor

Alexis Mourre | Jan Paulsson | V.V. Veeder *

- The uptick in Latin American arbitrations has led to a natural increase in arbitrations conducted in Spanish. **Argentinian arbitrators** now appear in the **top 5 of nationalities** most represented in arbitrators, according to ICSID.

* The international arbitration community mourns the loss of Van Vechten Veeder QC, also known as V.V. or Johnny Veeder, who passed away on March 8th, 2020. As a gifted legal expert, his remarkable contributions to the field will always be remembered.

Two of the top 5 most appointed arbitrators in mining arbitration, according to our data, illustrate this trend, namely Horacio A. Grigera Naón & Guido Santiago Tawil.

- Horacio A. Grigera Naón is, in fact, the **most-appointed male arbitrator and second-most-appointed overall arbitrator in mining arbitration.**
  - Most of the cases he arbitrated were mining disputes.
  - He is appointed by investors in most cases.

- Charles N. Brower and Bernard R. Hanotiau are the **most appointed arbitrators in commercial arbitration of mining disputes**, according to our data.

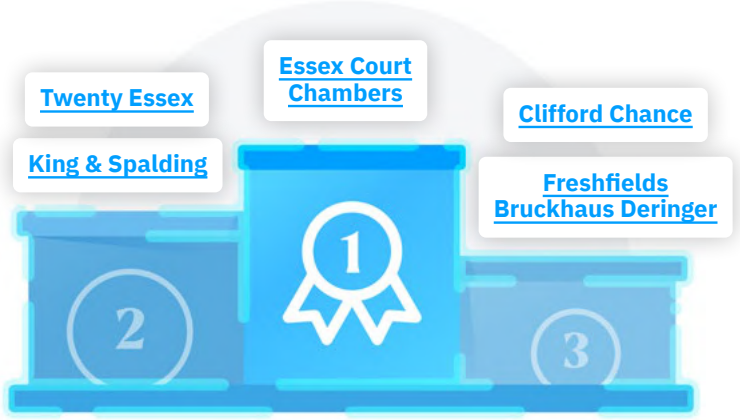
Most Active Arbitration Teams

As of February 2023, our data revealed **844 active arbitration teams in mining and quarrying arbitration**, *including law firms, chambers, governmental legal teams, and expert firms.*

Key Takeaways

Top 3 most active arbitration practices overall (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

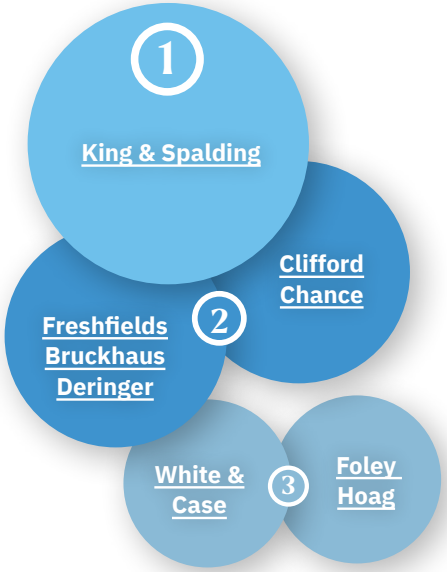
- according to our database as of February 2023 -



- Among the **top 3 most hired arbitration teams overall** (including *ex aequo*), — *i.e.,* law firms, chambers, governmental legal teams, and expert firms — **2** are **chambers** and **3** are **law firms.**
- Essex Court Chambers is the **most active arbitration practice**, according to our data. Twenty Essex, which comes second, is also the **most active arbitration practice in commercial arbitration of mining disputes.**

Top 3 most active arbitration law firms in Mining Arbitration - commercial & investor-State (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

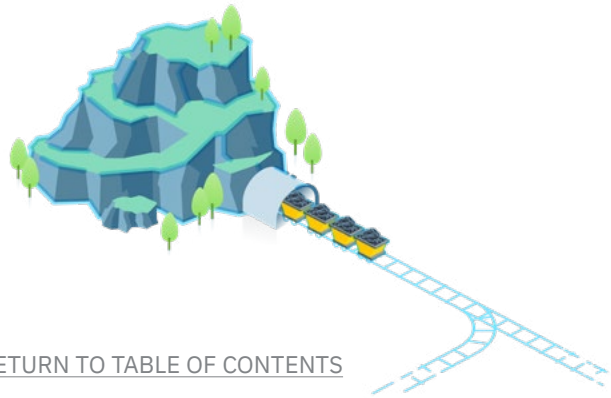
- according to our database as of February 2023 -



- King & Spalding, Clifford Chance, and Foley Hoag have heavier caseloads in mining arbitration than in any other economic sector, according to our data.
- Foley Hoag, which closes this top 5, is the only law firm in this ranking that has **only been involved in investor-State arbitrations in mining cases**, according to our data. All other firms ranked have been hired both in commercial and investor-State arbitration in mining cases.
- In 2022, our data shows that Clifford Chance has been involved in 3 mining cases, all investor-State arbitrations:
  - GMAS v. Greenland and Denmark;
  - Ascent v. Slovenia; and
  - Towra v. Slovenia.

In the last two cases, Clifford Chance represented the respondent State, i.e., Slovenia, while they represented the investor in GMAS v. Greenland and Denmark. The latter is also the one mining arbitration (excluding the Mining & Quarrying sub-sector "Extraction of crude petroleum and natural gas (oil)") in our database, with its seat located in Copenhagen. It is interesting to note that the Australian claimant in this case agreed to a seat of arbitration located in the respondent State.

- Clifford Chance also has one of the most active commercial arbitration practices in mining arbitration, according to our data.

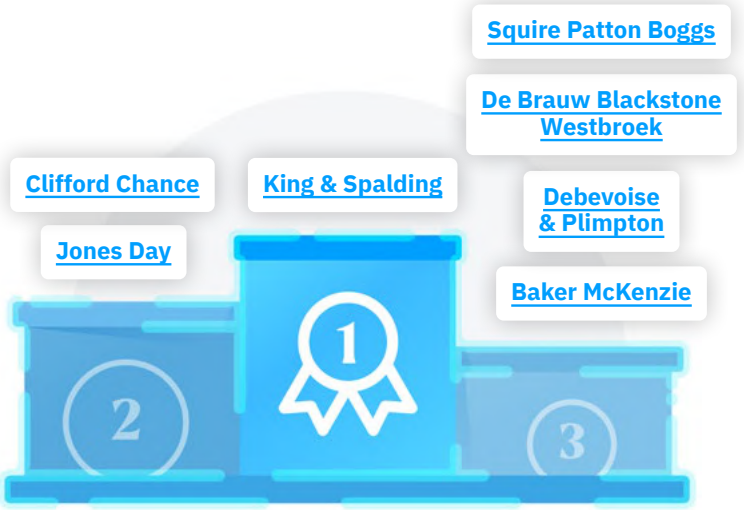


TOOLTIP

For a full picture of the key players in arbitration, take a look at our **Jus Connect Rankings**, including the **Most Active Arbitration Teams in Commercial Arbitration Overall & per Industry**.

Top 3 most active commercial arbitration practices in Mining Arbitration

- according to our database as of February 2023 –



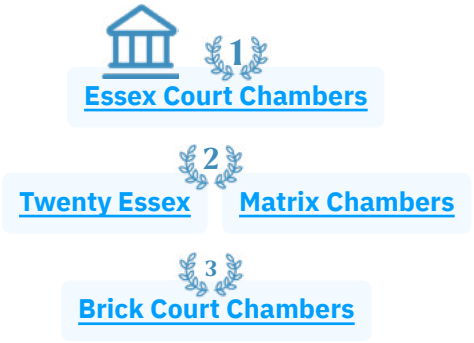
Squire Patton Boggs tends to be hired more often to represent respondents, including respondent States, and is more involved in commercial arbitrations of mining disputes than ISDS.

It is already involved in a newly filed mining arbitration in 2023 to represent Panama in MPSA v. Panama. This is a domestic commercial arbitration filed before the Inter-American Commission of Commercial Arbitration (IACAC).

- - Clifford Chance, Jones Day, De Brauw Blackstone Westbroek, and Baker McKenzie all have a heavier commercial arbitration caseload than investor-State.
- - De Brauw Blackstone Westbroek and Debevoise & Plimpton have been primarily involved in mining arbitration, more than any other economic sector.

Top 3 most active chambers in Mining Arbitration (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 -



- Essex Court Chambers is the **most active chamber** as well as the **most active overall arbitration practice in mining arbitration**, i.e., including law firms, chambers, governmental legal teams, and expert firms, according to our data.

TOOLTIP

Access crucial information and analytics about States on **Jus Connect's State Profiles**

Top 10 most active governmental arbitration teams in Mining Arbitration (inc. ex aequo) (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our database as of February 2023 –

- Mining projects heavily involve State, which are involved in mining arbitration both as commercial entities and as host countries. They can therefore be parties both to commercial and investor-State arbitrations.

Trendspotting in Latin America

- Close to half of the most active governmental arbitration teams are representing Latin American States, according to our data.

Mining projects are capital-intensive, long-term, and complex. Efficient ISDS is, therefore, critical, especially in developing regions with unstable political, social, and legal regimes.

Yet, **Latin America**, one such region, has known a serious wave of anti-ISDS feelings, particularly intensifying over the last decade.

As a result, three States denounced the **ICSID Convention**, namely **Bolivia** in 2007, **Ecuador** in 2009, and **Venezuela** in 2012, all of which are among the **most active governmental arbitration teams**, according to our data.

- On May 2, 2007, **Bolivia** sent a written notice of denunciation of the **ICSID Convention** to the World Bank, which took effect on November 3, 2007. In the aftermath, in 2009, Bolivia enacted a new Constitution which included provisions allowing for the creation of new laws in investment and arbitration. As a result, all foreign investments are now subject to Bolivian jurisdiction and laws. It subsequently denounced a total of 21 BITs.

In a continued effort to reform investment dispute resolution within its territory, on June 25, 2015, the Bolivian Congress enacted Law No. 708 of Conciliation and Arbitration, thereby mandating that arbitrations in which the Bolivian State is a party be seated in Bolivia. The seat of arbitration is critical regarding challenges to awards and their potential subsequent enforcement.

- **Ecuador** denounced the **ICSID Convention** on July 6, 2009, which took effect on January 7, 2010, only to sign it again on June 21, 2021, following grievances from foreign investors and to stimulate foreign investments in the territory. The Constitutional Court of Ecuador has since then upheld the constitutionality of Ecuador's ratification of the **ICSID Convention**.

TOOLTIP

Read about **the consequences of the denunciation of the ICSID Convention** and hundreds of other legal concepts with **Jus Mundi's Wiki Notes**.

Two mining cases were filed against Ecuador in 2022:

- **CODELCO v. Enami EP**, a commercial arbitration initiated by a Chilean State-owned company before **ICC**, claiming the breach of a partnership agreement with the Ecuadorian-State-owned mining company, ENAMI.
- **Junefield Gold v. Ecuador**, an *ad hoc* investor-State arbitration involving a Chinese mining company contending the liability of Ecuador for alleged disturbances by indigenous and anti-mining groups that prevented the company from carrying out its activities.

Learn more about the **Prevalence of ESG Issues in Arbitration Proceedings in the Mining Sector Involving Latin American States**.

Trendspotting in Africa

Not much has changed since our trendspotting analysis of the region in last year's edition of this report.

Mining activities are considerable in many African countries. 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.

The noticeable increase in African mining arbitration cases we reported is, therefore, still ongoing.

In the last few years, African States have wanted more control over the mining projects within 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.

TOOLTIP

Learn more about the latest developments in arbitration in 13 jurisdictions with our **Arbitration 2022 Year In Review**.

Most Active Expert Firms

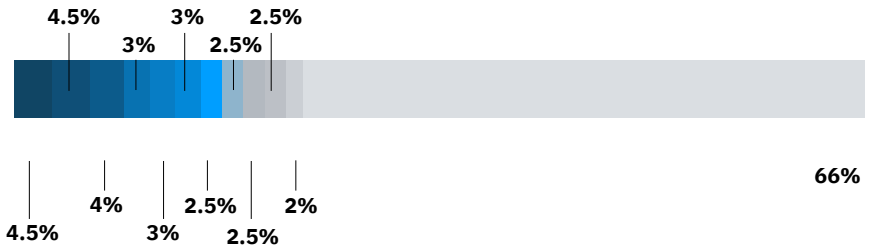
Parties and tribunals rely heavily on experts. As a result, expert firms are often solicited in mining arbitration to address the complexity of the issues at stake and assess damages. Mining projects create technical and complex disputes.

Therefore, expert evidence is paramount in providing clarification, knowledge, and technical assessment of complicated issues.

Our data shows that **226 expert firms** were solicited in mining arbitration, of which **65** have only acted in mining cases in the sub-sector "Extraction of crude petroleum and natural gas (oil)", *i.e.,* oil & gas cases.

Proportion of expert firms' hires in Mining Arbitration (excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")

- according to our data as of February 2023 -



Compass Lexecon: 4.5%
FTI Consulting: 4.5%
The Brattle Group: 4%
Navigant Consulting, Inc.: 3%
SRK Consulting Inc.: 3%
Credibility International: 3%
RPA Inc.: 2.5%
Charles River Associates (CRA International): 2.5%
Behre Dolbear Group: 2.5%
Econ One Research Inc.: 2.5%
Berkeley Research Group: 2%
Others: 66%

TOOLTIP

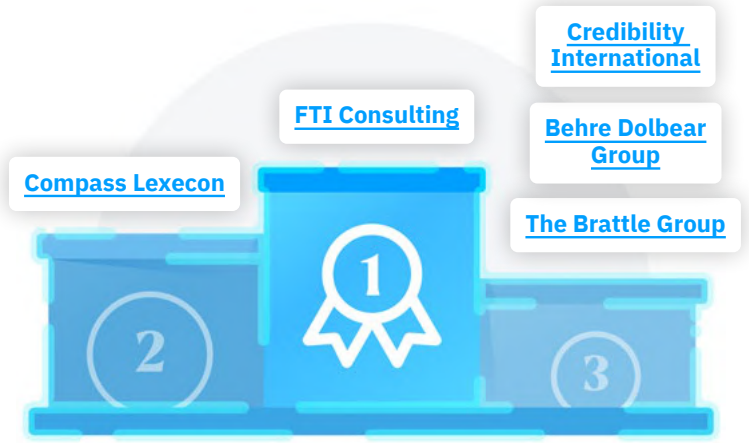
For a full picture of the key players in arbitration, take a look at our **Jus Connect Rankings**, including the **Most Active Expert Firms on Commercial Arbitration Overall & per Industry**!

Key Takeaways

- The expert firms listed in this graph are the top 5 most active expert firms in mining arbitration, according to our data. Of these, only Navigant Consulting, Inc. and Behre Dolbear Group do not have a commercial mining arbitration caseload, according to our data.

Top 3 most active experts firms in commercial Mining Arbitration

- according to our database as of February 2023 –



- FTI Consulting is the most active expert firm in mining arbitration, according to our all-time data, as well as the most active in commercial mining arbitration. Although it is among the top 3 most active expert firms in mining arbitration in the last 10 years, it is surpassed by Compass Lexecon whose mining caseload has been growing in the last decade.

Top 3 most active experts firms in Mining Arbitration over the last 10 years *(excluding the sub-sector "Extraction of crude petroleum and natural gas (oil)")*

- according to our database as of February 2023 -

- KPMG and Economía Aplicada, S. C. have risen in the last decade. But the **rising star in the last five years** is Versant Partners**,** according to our data.
- In the last 5 years, our data shows that Latin American mining cases have kept a high number of expert firms busy. For instance:
  - 2 mining cases against Mexico have involved a total number of 11 expert firms (Odyssey Marine Exploration v. Mexico, Legacy Vulcan v. Mexico);
  - 3 mining cases against Peru have involved at least 6 different expert firms (Lupaka v. Peru, Freeport-McMoRan v. Peru, Renco v. Peru & Activos Mineros**);**
  - 2 mining cases against Colombia have also involved at least 6 different expert firms (Red Eagle Exploration v. Colombia, Aris Mining v. Colombia).

Digging Deeper: Explorative Perspectives in Mining Arbitration

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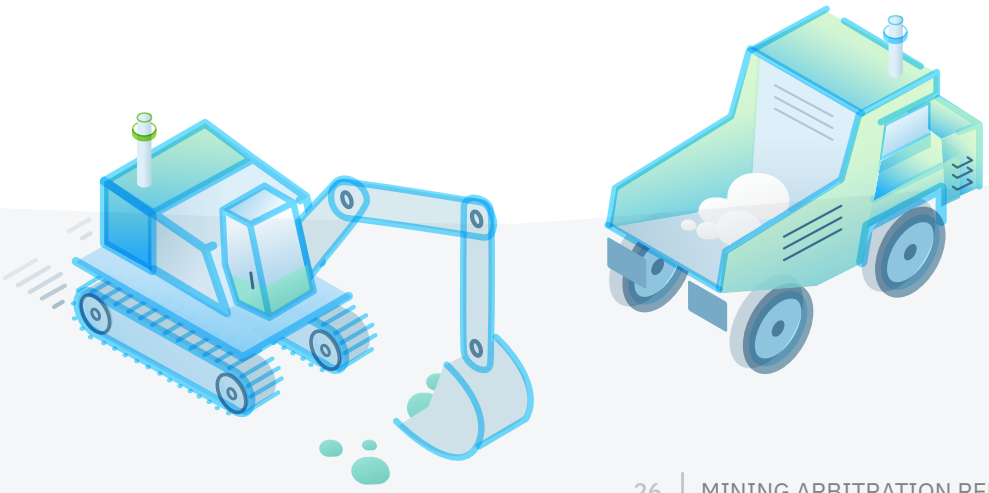

Digging Deeper: Explorative Perspectives in Mining Arbitration

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Associate
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MINING PROJECTS AND TAX DISPUTES: WHAT REMEDIES CAN BE ACHIEVED THROUGH INTERNATIONAL ARBITRATION?

International arbitration is a go-to means used by investors to challenge tax measures implemented in breach of contracts and licenses, as well as of international investment agreements (IIAs). Such measures may include tax reforms, abusive adjustments, unreasonable or discriminatory audits, etc.

The mining sector is not immune to these types of measures. In fact, the nature and scope of mining projects, the size and timing of required investments, and the stakes for the budgets of mineral-rich States, make it a regular target for tax authorities. Recently, some States have, for example, sought to address the general minerals price downturn by increasing contributions to State budgets arising out of mining projects.[1] An increased rate of tax audits and adjustments has also allowed States to recover a larger share of the revenues generated by mining operations. However, tax measures can often jeopardize, or even destroy, mining investments by affecting their profitability or operability.

International arbitration proceedings involving tax measures and mining projects are therefore on the rise. This short overview seeks to map out their salient features and the remedies available to mining operators.

1. Other tax and customs measures can take the form of increases in taxes on mining exploration, capital gains taxes on transfers of mining titles, changes in underground or open pit mining royalty rates, in financial incentive schemes, and increased requirements on repatriation of income deriving from mineral exports.

Resolving Tax Disputes Under Mining Contracts

Mining contracts or conventions can take different forms, depending on the type of operators involved, the region where the project is implemented and its advancement stage. Tax authorities often get involved with mining projects at the exploitation stage, once resources and reserves have been confirmed and mining is bound to start or has started. Tax authorities are also involved throughout the commercialization of the extracted resources, by collecting taxes on the resulting revenues.

As multi-faceted as mining projects can be, so are mining contracts. The contracting parties are generally the entity owning the resources (usually the State) and the entity looking to exploit them, most often a local entity in which the State holds an interest, often together with a foreign partner.

These contracts generally ratify the conditions expressed in the relevant permits or authorizations issued for the exploration and exploitation. They also address the economic, legal, administrative, financial, tax, customs, mining, environmental and social conditions for the exploration or exploitation.

In relation to taxes specifically, mining contracts usually provide for the tax regime applicable to the operation, in accordance with local legislation. They may provide for specific tax rates, breaks, exemptions, or credits (*e.g.*, VAT credits). They may also include specific tax stabilization clauses, which provide that no subsequent legislative or regulatory changes may adversely impact the tax regime applicable at the time of the contract's signing. Instead of tax specific stabilization clauses, mining contracts may also include general stabilization clauses, which cover all issues considered by the contract.

Other key features may include:

the State party's obligation to facilitate the issuance of authorizations, permits, or approvals necessary for operations;

the State party's obligation not to hinder the operations by, for example, imposing additional restrictions on the movement of goods; and

international dispute resolution clauses, providing for technical determination, mediation, conciliation and/or arbitration of disputes relating to the contract (generally under ICC, LCIA, or ICSID rules).

Regardless of such protections, tax audits are frequent in the mining sector, and can be triggered by a host of (more or less legitimate) reasons, including legislative amendments, new interpretations of existing tax rules, or political considerations. Since these audits and resulting adjustments can have serious consequences on the exploiting party's cashflow and ability to continue the exploitation of the mine, they must be considered carefully.

Notably, even before considering resorting to international dispute resolution, affected entities must focus on expressly preserving their rights to challenge the rightfulness of any tax adjustment, in all ensuing discussions/negotiations with tax authorities. This can prove difficult given the length and complexity of these procedures, that often include several layers of administrative and judicial review. However, settling tax disputes does not require or imply agreeing to the rightfulness of a tax adjustment, and any such concessions may to the contrary be damaging to the miner's ability to enforce rights under the relevant contract, notably as regards its ability to subsequently recover the full amount of the tax adjustment through international arbitration. Further, even during the arbitration procedure, a frank dialogue with the State and its tax authorities can be useful to pursue a fair settlement of the dispute. Lastly, documenting any adverse effect of tax measures is of paramount importance to preserve the operator's ability to enforce its rights before an arbitral tribunal.

Resolving Tax Disputes Under International Investment Agreements (IIAs)

Another source of protection for mining investments is the web of thousands of bilateral and multilateral IIAs (BITs, FTAs, etc.), which include procedural and substantive protections for qualifying investments made by foreign investors.

A significant hurdle to the use of IIAs in tax disputes may be the presence of a tax exception or carve-out, *i.e., a provision totally or partially excluding tax measures from the treaty's scope of protection.* Other treaty provisions may affect the admissibility of claims, such as the need to consult with tax authorities of the host State or to organize joint consultations between the States' tax authorities before any arbitration proceedings can be initiated (see, *e.g.*, Art. 21 of the ECT or Art. XII of the now-terminated 1996 Canada-Ecuador BIT).

On the merits, foreign investors may bring claims for breaches of the standards and protections found in the IIAs. The most common protection is the prohibition against direct or indirect expropriation (i.e., through measures equivalent to expropriation), without payment of prompt and adequate compensation (among other requirements). For example, in Oxus Gold v Uzbekistan (paras. 748-750), the tribunal assessed whether one of the challenged tax audits and VAT regime change had caused the "effective destruction of the value of the investment". In Burlington v Ecuador (paras. 391-402), the tribunal addressed the notion of "confiscatory taxation", noting that a taxation becomes an expropriation if it meets the test of substantial deprivation.

Foreign investors may also argue that they were subjected to a differing tax treatment without justification, and thus in breach of the prohibition against discrimination usually found under national treatment or most favored nation (MFN) clauses of IIAs. For example, a tribunal found a breach of the national treatment standard in the case Occidental v Ecuador (paras. 167-179), in relation to denied VAT refunds.

The manner and timing of the host State's introduction of the litigious tax measures may also breach the host State's obligation to provide fair and equitable treatment (FET), including the prohibition against arbitrary measures or lack of transparency. The retroactive imposition of a capital gains tax was thus found to breach the FET provision of the UK-India BIT in the Cairn v India case (para. 1816), because such measure did not adequately balance the foreign investor's "protected interest of legal certainty / stability / predictability" with the host State's "power to regulate in the public interest". In Oxus Gold v Uzbekistan (paras. 824-825 and 827), a tax regime change, including the revocation of various tax privileges applying to the export of precious metals, was found to breach the foreign investor's legitimate expectations and breach the host State's obligation to afford FET.

Before international arbitration tribunals, foreign investors have thus sought restitution or damages to compensate for the loss incurred.

Injunctive and declaratory relief has also been claimed, for instance by requesting the withdrawal of a tax demand (see, e.g., Cairn v India, paras. 1870-1878).

Stabilization clauses in contracts with the host State, or in regulations specifically directed at the foreign investor, have also proven useful before international investment tribunals to mitigate risks stemming from tax regime changes (see, e.g., Oxus Gold v Uzbekistan, para. 823).

The paper contains general views of the authors without regard to any specific underlying facts or circumstances. As such, it does not constitute legal advice. Any liability for the content, completeness or accuracy of the paper is excluded.

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Baptiste Rigaudeau *specializes in international arbitration, with a focus on commercial and investor-State disputes. He has experience working as counsel and secretary to international arbitration tribunals under all major rules, in proceedings governed by various procedural and substantive laws, both common and civil. He is the chair of the Global Steering Committee of the Chartered Institute of Arbitrators Young Members' Group and he co-leads the dispute resolution interest group of the African Society of International Law.*

Emilie McConaughey *specializes in international arbitration, both commercial and investment treaty arbitration, and has experience in a variety of sectors, including energy, mining, and construction. She acts as counsel and as administrative secretary to arbitral tribunals in a number of international arbitral proceedings and advises on public international law matters.*

THE EXPERTS' TIPS –

ARBITRATIONS INVOLVING OFFTAKE AGREEMENTS: INDUSTRY AND DAMAGES CONSIDERATIONS

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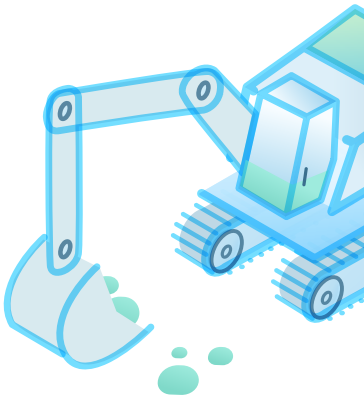
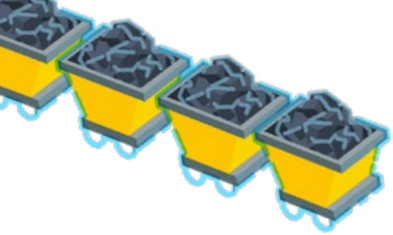


Under an offtake mining agreement, a buyer or offtaker commits to purchase a specified quantity or portion of a seller's future mining output. Offtake mining agreements run for varying lengths, including spot, short-term, and long-term. Under a spot contract, the purchase price is a one-time price that the buyer and seller agree on. Contract length varies but can be as long as 30 years.

An offtake mining agreement offers various benefits. From a seller's perspective, it guarantees revenue from the sale of output, which can be a key determinant when trying to acquire project financing. The buyer benefits from the guaranteed receipt of a specific amount of output over a specified time frame. Depending on the agreement's pricing provisions and contract length, an offtake mining agreement can also benefit a buyer by hedging against future price increases.

Offtake mining agreements also involve risks, including the possibility of a counterparty failing to fulfill its contractual obligations and preclusion of the chance to take advantage of short-term profitable opportunities that the contracting parties otherwise could in the absence of a contract.

Some of these risks are difficult to predict and can lead to disputes between the contracting parties. Among other factors, disputes in the mining industry commonly arise due to the contracting parties disagreeing on supplied volume, pricing, quality, shipping/delivery, and force majeure (uncontrollable circumstances that can cause the performance of a party's contractual obligations to become impossible or impracticable).



Supplied Volume Disputes

The contractual volume that a buyer purchases in an offtake mining agreement can either be a specified amount (*e.g.*, 8 million metric tons of copper per year), a percentage of a mine's production (e.g., 50% of the silver mined, extracted, removed, produced, or otherwise recovered), or a minimum quantity with the option to purchase more (*e.g.*, the offtaker agrees to procure at least 90% of the mined gold).

Supplied volume disputes can occur for various reasons, including but not limited to pricing volatility, regulatory changes, quantity and quality shortfalls, and unsuitability of supplied output for intended use. During periods marked by price volatility, there is the risk of possible manipulation of contractually agreed upon amounts either by the buyer or seller. When prices decrease, for example, a seller may be tempted to reduce the volume supplied to the buyer in an attempt to minimize the quantity of output sold at an unfavorable price. Alternatively, when prices increase, a buyer may try to reduce the contractually required purchase amount, for example, by advancing the view that the contract terms provided for the purchase of a smaller amount.

Forced government shutdowns such as those that were seen during the recent COVID-19 pandemic or other regulatory changes can make it expensive or impossible for a seller to provide contractually agreed upon volumes. A seller may be unable to achieve anticipated production capacity (production shortfall) or produce output that falls short of the required quality. Finally, the seller's output may not be suitable for the offtaker's intended use due to quality issues or changes in technology.

Considerations Related to Contractual Provisions and Counterparty Choice

The following considerations related to including contractual provisions (take-or-pay and deliver-or-pay clauses, change-in-law clauses, contract length, and remedies for failure to supply or purchase) and performing due diligence on a counterparty are examples that may be useful to contracting parties in mitigating counterparty risk and/or pursuing enforceable contractual remedies in offtake mining agreement disputes.

Buyers and sellers can mitigate counterparty risk through the inclusion of take-or-pay and deliver-or-pay clauses in offtake mining agreements.

A take-or-pay clause protects the seller by requiring the buyer to satisfy its contractual obligation by either (i) taking and paying the contract price for a specified supplied volume, or (ii) paying the seller a specified contract amount for the portion of the volume it fails to take. With such a provision, the buyer is not in breach of the contract if it elects not to take delivery of the specified volume.

A deliver-or-pay clause protects the buyer by requiring the seller to satisfy its contractual obligation by either (a) delivering the specified volume, or (b) paying the buyer a specified contract amount for the portion of the volume it fails to deliver. A seller is not considered to be in breach of the contract if it elects not to deliver the specified volume.

When compliance with an offtake mining agreement can be affected by regulatory and other government policy changes, it is beneficial for the contracting parties to include change-in-law clauses that clearly specify which party is responsible for such risk.

Buyers and sellers that would like to be able to take advantage of short-term profitable opportunities when they arise or those with uncertain demand and supply projections may find it beneficial to use spot and

short-term contracts, while those with a preference for supply and demand stability and certainty may opt for long-term contracts.

Contracting parties may also find it helpful to agree in advance on the remedy for failure to supply or purchase. For example, the supplier may be required to procure replacement volumes or secure alternate sources of supply.

Aside from contractual provisions, contracting parties may also benefit from evaluating various attributes that can influence a counterparty's ability to fulfill its contractual obligations. For example, a buyer that is concerned about a seller's ability to deliver specified volumes due to the uncertainty associated with one or more of the mines (*e.g.*, due to volatile supply costs or unstable geopolitical environment) may benefit from choosing a seller with access to alternate sources via a geographically diverse portfolio and/or relationships with other suppliers.

Summary Conclusion

Supplied volume disputes in offtake mining agreements occur for various reasons related to pricing volatility, regulatory changes, quantity and quality shortfalls, and unsuitability of supplied output for intended use. Contracting parties can mitigate the risks associated with offtake mining agreements and/or increase the likelihood of successful outcomes in disputes from the breach or default of contract by including certain contractual provisions and performing due diligence on their counterparties.

ABOUT THE AUTHORS

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THE IN-HOUSE COUNSEL TIPS –

NAVIGATING STREAMING AGREEMENTS: AN ACT OF BALANCING INTEREST

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In a decade-long commodity downturn cycle, miners have been faced with price volatility, a high level of economic uncertainty, growth of resource nationalism, and rising production costs. Under these circumstances, numerous mining companies have been driven to find alternative sources of financing. While traditional funding, such as debt and equity raising, was hardly accessible or simply unavailable to junior or mid-size miners, alternative financing mechanisms have been flourishing. In particular, streaming agreements have been gaining in popularity and are increasingly relied upon. Before, however, relying on such agreements, it is important and useful to explain a few concepts below.

Streaming Agreements in Practice

Under a typical streaming agreement, a mining company agrees to sell a portion of its future mining production (either based on a specified amount or an agreed percentage) in exchange for an upfront payment or by a series of instalments at a significantly discounted purchase price over a long period of time (*i.e.*, several decades) or for the life of the mine. Generally, the streamed metal will be a noncore or a by-product of the mining production, which makes it attractive for mining companies to enter into such an agreement. For example, a streaming agreement may provide for a buyer to acquire the right to purchase 50% of the silver produced as a by-product of gold production for the life of the mine. In exchange, such upfront payment provides cashflow and funds for the development of the project. In practice, the streaming agreement may provide for the delivery of actual metal (*i.e.*, gold bars) or, as in most cases, credit to the buyer's metal account on metals markets such as the London Metal Exchange or the ABX Global in Australia.

Such arrangements can be tailored to the uniqueness of each project and the parties' interests.

Drafting Tips

While there is an underline structure common to all streaming agreements, it is important to keep in mind the uniqueness and complexity of each project and reflect such reality in the drafting of the agreement.

PRICING-ADJUSTMENT MECHANISM

In terms of risks involved, there is an important balance to strike between the miner and the buyer. After the miner and buyer have entered into a streaming agreement, there will inevitably be some changes to the general economic, financial, and commercial conditions, especially when the stream is for the life of the mine. The miner may therefore want to protect its interest against any commodity price fluctuations and insert a price

adjustment mechanism in the streaming agreement. A price adjustment clause can be used to ensure that the commodity prices reflect market conditions. There can be a myriad of ways to provide for an adjustment clause such as providing for commodity prices to be adjusted against a consumer price index or a market index, depending on the jurisdiction. Ultimately, the choice of the adjustment mechanism will be a commercial decision, but parties should avoid reverting to a complex formula.

When it comes to price fluctuations, generally, a streaming agreement would also include a buyback clause or the possibility of revisiting the agreed price, especially when the stream is for the life of the mine. The parties may also want to include a right for the miner to buy back part of the streamed metal within a specified timeframe, following commencement of the metal's deliveries.

From a buyer's perspective, streaming agreements allow to secure long-term delivery of metals (physical or metal credits) below market price without assuming operational costs and limiting the risks associated with the project. The risk (i.e., production, political, economic, etc.) the buyer would be willing to accept, will be reflected in the price of the streamed commodity. The price agreed will entail a fixed price that is lower than the market price at payment.

SECURITY INTERESTS

In practice, the right of the buyer to purchase a portion of the future production may be secured or unsecured. That said, as a protection mechanism, the buyer would generally require a security interest. The security can take many forms, but at a minimum, it must provide some comfort. The jurisdiction in which the miner operates may affect the type of security favoured. In some jurisdictions the preferred security is a mortgage over tenements or over the facilities that produce the minerals or pledge over the produced minerals. When the rights are secured, the buyer will generally require a first charge security interest, but if this is the case, the streaming agreement should contemplate additional financing requirements. Given the nature of the streaming agreement, as alternative financing method, there will most likely be a need for the miner to raise additional financing (i.e., debt or equity). In such context, the new lender will anticipate taking priority in the ranking of charges, more specifically when a debt facility is involved. The buyer would be expected in such a scenario to subordinate its interest and an intercreditor agreement should be entered into to regulate the interests and rights of the various lender and financing providers. The intercreditor agreement will also elaborate on how those secured creditors may exercise and enforce their rights. Allowing for additional financing and some flexibility when it comes to ranking in the streaming agreement will ensure the bankability of the project.

REPRESENTATIONS AND WARRANTIES

Streaming agreements will also contain the general representations and warranties. Each party will represent that it is in good standing, has complied with all required corporate acts and has the power to enter into the streaming agreement. In addition, the parties should represent that entering into such agreement will not violate any other arrangements or obligations it is bound to or contravene any local laws. Furthermore, the buyer may require the miner to provide some comfort around its obligation to keep the tenement in due care and confirm that no other entity has the right or option to acquire the mining property or streamed minerals. The streaming agreement will generally contain an indemnification clause in favour of the other party in case of misrepresentation or breach of a warranty.

ASSIGNMENT AND CHANGE OF CONTROL

The buyer may also request additional security from the miner and include a restriction against change of control in the streaming agreement. In such case, a change of control clause would require that the streaming agreement will continue in full force and effect despite the change of control. Both parties may also subject the assignment of their rights and obligations in the streaming agreement to a prior written consent from the other party.

When Dispute is Unavoidable

In most cases, streaming agreements are entered into by two nondomiciled entities, typically operating in emerging markets. As such, any streaming agreements should contain a governing law clause as well as some form of dispute resolution mechanism. Regarding the former, it is recommended that the parties choose a law that both parties are familiar with and which enables them to resolve their eventual dispute in a balanced manner. Regarding the latter, if arbitration is chosen as the forum for dispute resolution, it is recommended to break down the dispute between legal and technical aspects (*i.e.*, specification or quality of the streamed commodity or the application of a pricing formula). Legal disputes will generally be resolved by a panel of three arbitrators, whereas technical disputes will involve an expert determination. The arbitration clause should also allow the parties to choose a neutral seat to resolve disputes and to provide safeguards that may not be available in domestic courts.

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Digging Deeper: Regional Perspectives in Mining Arbitration

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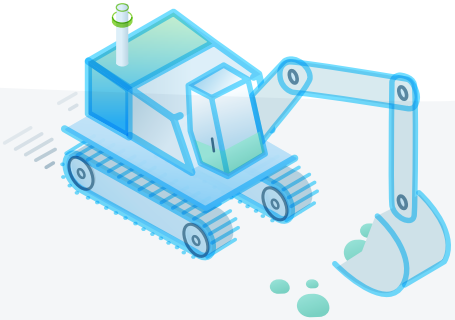

Digging Deeper: Regional Perspectives in Mining Arbitration

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CANADA

CHOOSING THE SEAT FOR AN INTERNATIONAL MINING ARBITRATION: THE CASE FOR CANADA

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The mining sector is a growing user of international arbitration. Arbitration as a means of dispute resolution is particularly attractive to players in this industry for a variety of reasons including because mining projects are often long-term, capital intensive projects which face a multitude of risks and uncertainties and engage parties in different jurisdictions - meaning disputes among international parties are prevalent. Arbitration offers: flexibility, the ability to select decision makers with subject matter expertise, enhanced finality, process and cost efficiencies, and a more readily enforceable outcome. However, deciding to submit disputes to arbitration via a dispute resolution clause in your mining contract (or agreeing to arbitrate in the absence of a contractual clause) is only the first step. Once parties choose to arbitrate, a number of other decisions need to be made and selection of the place of arbitration (the legal or arbitral seat) is one of the most important strategic decisions.

In choosing the seat of arbitration, the parties choose the law governing their arbitration procedure. The seat does not have to be in the same jurisdiction as the governing law of the contract, nor does it have to be the venue of any in-person hearing. Among other things, the choice of seat may determine or impact:

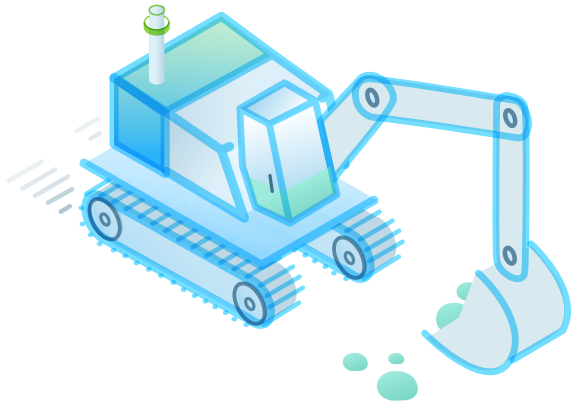
- What subject matter can be arbitrated;
- The jurisdiction of the court(s) that will have a supervisory role over the arbitration and the scope of the role of the courts;
- Factors impacting recognition and enforcement of arbitration agreements;
- Circumstances in which an arbitral award may or may not be recognized, enforced or set aside;
- Who has the power to grant interim measures and how that power is regulated; and
- The manner in which an arbitration is conducted.

The arbitral tribunal will typically use the law of the seat to determine any procedural issues that have not been specified in the arbitration agreement or cannot otherwise be agreed on between the parties. Diligence is therefore required when choosing the seat and choosing the wrong place can result in undesirable procedural and practical consequences.

Some important factors that must be considered in making this significant decision include the neutrality of the jurisdiction; the applicable arbitration law and legislation; the extent to which courts in that jurisdiction would interfere or assist with the arbitration process; whether the jurisdiction is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); whether there are any peculiarities in the local laws of the jurisdiction (for example, restrictions on who may act as arbitrators and counsel in the arbitration); whether the jurisdiction offers any sector-specific advantages or disadvantages; and practical considerations (such as proximity of witnesses, counsel or arbitrators; travel requirements or limitations; availability and cost of arbitration facilities and support services; climate; and time zones).

Canada offers several advantages from this perspective, making it a top choice for arbitrating international mining disputes. Leading Canadian seats include Toronto, Vancouver, Calgary and Montreal. Some of the reasons why parties should consider choosing a Canadian seat for mining arbitrations include the following:

- Canada is a bilingual country with a rich legal tradition in both common law and civil law.
- It has been recognized as one of the leading mining jurisdictions and offers diverse mining-related expertise.
- It is an arbitration-friendly jurisdiction and has adopted a modern statutory framework for arbitration as well as international best practices.
- Canada has an excellent reputation for fairness, neutrality, safety, stability and diversity.
- Canada was the first country to adopt modern arbitral legislation based on the UNCITRAL Model Law on International Commercial Arbitration.
- Canada is a party to the New York Convention.
- Leading international arbitral institutes support arbitrations being conducted in Canada.
- Procedural rules of any major international arbitral institute (for example, the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA)) can be used in an arbitration seated in Canada.



- Canadian courts are supportive of arbitration, respectful of party autonomy and readily recognize and enforce arbitration agreements and foreign arbitral awards.
- Canadian judiciary has expertise in dealing with disputes arising in the mining industry and has made a notable contribution to the development of international arbitration law.
- Canadian arbitration practitioners include highly skilled and experienced lawyers who are well-versed in the arbitration process and also have mining expertise.
- Canadian arbitrators have been recognized globally and include individuals with significant experience in mining disputes.
- Canadian seats offer world-class infrastructure, modern arbitration facilities with second-to-none technology and convenient and reliable access to ancillary services.
- Arbitrations held in Canada are typically more cost-effective compared to the more traditional arbitration centres.
- Canadian cities mentioned above are relatively easy to access from many different parts of the world.

In a nutshell, whether the parties value industry-specific expertise, modern arbitration legislation which restricts court intervention, sophisticated legal talent and arbitration experts (including the judiciary, arbitrators, counsel, accounting, environmental and technical mining experts), cost-saving benefits and/or a cosmopolitan, safe and neutral jurisdiction with world-class facilities, Canadian jurisdictions are very well-placed, and deserve serious consideration, for serving as legal seats in international mining arbitrations.

ABOUT THE AUTHORS

Rahat Godil *is a business-minded litigator with a diverse practice focusing on complex and high-value commercial and contractual disputes. She is a strategic thinker and leader committed to excellence, professionalism and inclusiveness. Rahat has significant commercial arbitration experience and regularly represents clients in both international and domestic institutional and ad hoc arbitrations. Rahat also has substantial experience with joint venture and shareholder disputes, multi-party disputes, class action defence, securities related litigation and constitutional litigation.*

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CANADA

STILL A GOOD PLACE TO ARBITRATE, NO APOLOGY NECESSARY

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Canada's mining industry is a key contributor to the economy and major employer in communities across the country. Two recent mining industry cases provide further evidence that Canada remains an arbitration-friendly jurisdiction, where the courts generally adopt a "hands off" approach and respect the parties' decision to arbitrate.

Baffinland v Tower -EBC, 2022 ONSC 1900

Baffinland entered into two contracts with Tower-EBC (the "**Contracts**") to perform earthworks for the construction of a rail line, together with related infrastructure, to transport iron ore from its mine in Nunavut to Milne Inlet where it is shipped. The project suffered lengthy and unanticipated delays and Baffinland terminated the contracts. Tower-EBC commenced an arbitration challenging Baffinland's right to terminate the Contracts and seeking damages arising from the termination.

The Arbitral Tribunal (constituted under the ICC Rules) (the "**Tribunal**") issued a Partial Final Award on Liability and Remedy, unanimously dismissing Baffinland's objection to the scope of its jurisdiction (over a related company) and finding that the Contracts had been wrongfully terminated. The Tribunal was divided on the issue of damages. The Majority awarded approximately $70 million in damages (the "**Majority Award**"), while the Minority would have awarded approximately $16 million. Thereafter, the Tribunal issued its Final Award on Costs.

Baffinland applied to the Ontario Superior Court of Justice [Commercial List], pursuant to the Arbitration Act, 1991, S.O. 1991, c.17 (the "***Act***"), for, amongst other things, an order setting aside the Majority Award (s.46), an order granting it leave to appeal the Majority Award (s.45), and, if leave to appeal was granted, an order granting the appeal and setting aside or varying the Majority Award as necessary (s.45). Section 46 of the *Act* empowers the court to set aside an arbitration award on one or more of ten enumerated grounds. Generally speaking, these grounds do not address the substance of the dispute, but rather issues such as the formation of the tribunal, adherence to the law of Ontario, and procedural fairness.

Relying on s.46(1)3 of the Act, Baffinland argued that the Tribunal exceeded its jurisdiction given the nature and quantum of damages awarded. While there is some conflict as to the standard of review on a question of jurisdiction since the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration)* v. Vavilov, 2019 SCC 65, Justice Pattillo held that the standard of review, if applicable, was correctness, and not reasonableness. That said, he found that Baffinland had failed to

raise any objection to the Tribunals' jurisdiction to deal with the disputed claims during the arbitration, and accordingly, pursuant to ss. 4 and 17(5) of the Act and Article 40 of the ICC Rules, it was deemed to have waived its right to object to the Tribunal's alleged excess of jurisdiction.

Baffinland also relied on ss. 19(1), 46(1)6 and 46(1)9 of the Act (natural justice and procedural fairness) in arguing that it was treated unfairly. It alleged that the Tribunal's President's conduct during the hearing interfered with the proceeding and was improper, and that the Majority relied upon *"highly dubious legal arguments"*. Justice Pattillo noted that the standard of review regarding procedural fairness is whether the requisite level of procedural fairness has been afforded, having regard to the fact that the proceeding is an arbitration agreed to by the parties where both parties are sophisticated and had legal representation throughout. He found that the questioning at issue by the President was not improper, and that Baffinland had an opportunity to address all the issues raised by the Tribunal, that it now complained of, at the hearing.

Regarding s.45 of the Act (appeals), the preliminary issue facing the court was a question of contractual interpretation, namely, whether the arbitration agreement, either expressly or by implication, prohibited appeals on a question of law. Justice Pattillo found no substantive difference in the ordinary and grammatical meaning of the terms "final and binding" and "finally settled" as found in the contracts, or in the meaning of "binding" and "settled" in the context of the resolution of a dispute. Both terms showed the parties' clear intent with respect to the finality of the process. Further, the Contracts incorporated the ICC Rules, including Article 35(6), which provides, amongst other things, that the tribunal's award is binding, and the parties are deemed to have waived their right to "any form of recourse"; and there is none under the ICC Rules. Accordingly, Justice Pattillo held that there could be no appeal of the Majority Award on a question of law, or otherwise. Baffinland's application was dismissed.

MDG Contracting Services Inc. v Mount Polley Mining Corporation, 2022 BCSC 1078

MDG entered into a contract to provide dredging work to remove tailings from an area within the Mount Polley mine (the "**Contract**"). A dispute arose concerning the Contract which the parties referred to arbitration. The initial hearing addressed questions of liability only. MDG's claim alleging liability on the part of Mount Polley was unsuccessful, while Mount Polley's counterclaim was successful.

MDG applied to the Supreme Court of British Columbia for leave to appeal the award on the basis of s. 30 (errors of law) and to set aside the award on the basis of section 31 (failing to observe the rules of natural justice) of British Columbia's former Arbitration Act, RSBC 1996, c 55 (the test for leave to appeal under the new/current Arbitration Act, SBC 2020, c 2 is unchanged, the bar remains high).

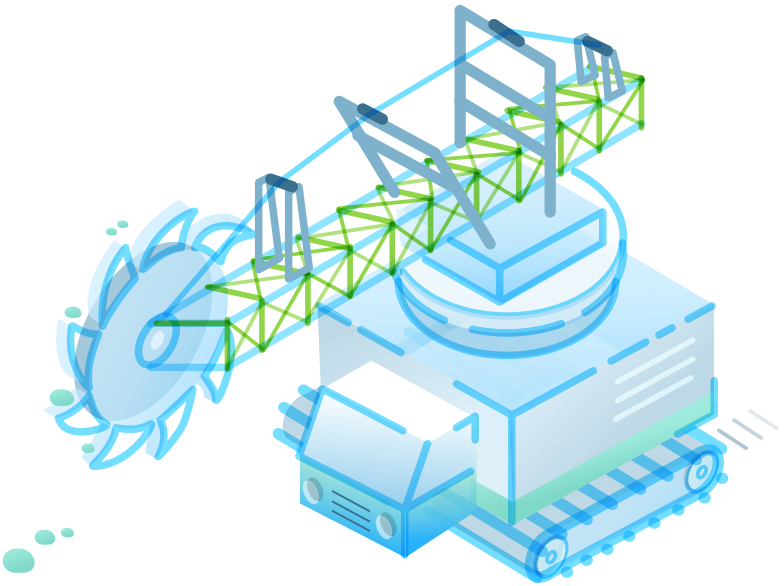
Regarding the high bar required for leave to appeal, Justice McDonald noted that the modern "hands off" view is that arbitration is an autonomous, self-contained, and self-sufficient process where parties agree to have their disputes resolved by an arbitrator, not courts. Courts must show due respect to the parties' decision to arbitrate, and the test for leave to appeal an arbitration award is not easily met. Identifying a question of law for appellate review is a threshold requirement for granting leave. Questions of law must be clearly perceived and delineated.

Citing the Supreme Court of Canada's decision in *Teal Cedar Products Ltd. v British Columbia,* 2017 SCC 32, Justice McDonald held that courts must be vigilant when faced with strategic drafting. It is an extricable question of law when a party alleges that "*a legal test may have been altered in the course of its application*". On the other hand, it is a mixed question of fact and law when a party alleges that "*a legal test, which was unaltered, should have, when applied, resulted in a different outcome*."

Once again, relying on *Teal Cedar,* Justice McDonald found that MDG's submission that despite the arbitrator making a correct statement regarding the law, he should have reached a different conclusion on the issues of negligent misrepresentation and breach, raised questions of fact or mixed fact and law. As a result, it did not meet the requisite threshold for leave to appeal, namely, an extricable question of law, for leave to appeal.

Justice McDonald also rejected MDG's argument that the Arbitrator had failed to follow the rules of natural justice, having found that the award contained ample details regarding the arbitrator's findings, relevant authorities, and reasonings.

It is often suggested that Canadians are too polite and overly apologetic. That might be the case in some circumstances, but not often when arbitration and arbitrators are challenged. Canadian statutes are, generally, supportive of domestic and international arbitration. So too are Canadian courts who continue to enforce arbitration agreements and the jurisdiction of arbitral tribunals.



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George Karayannides *is an experienced advocate who represents clients in litigation and arbitration on a wide range of complex and high-stake business disputes, including class actions. Since his call to the bar in 1986, George has represented various businesses, leading multinational companies, individuals, and government bodies in the financial, energy, transportation, telecommunications, manufacturing, infrastructure, and construction sectors. Regularly working with foreign counsel on cross-border issues, he has significant experience in a broad range of disputes. George has appeared before Federal and Provincial Courts, as well as arbitral (international and domestic) and administrative tribunals.*

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AFRICA

THE GROWING PREVALENCE OF ESG ISSUES IN THE MINING SECTOR AND HOW AFRICAN STATES ARE INCREASINGLY RAISING A RANGE OF ESG ISSUES AS DEFENCES TO INVESTORS' CLAIMS

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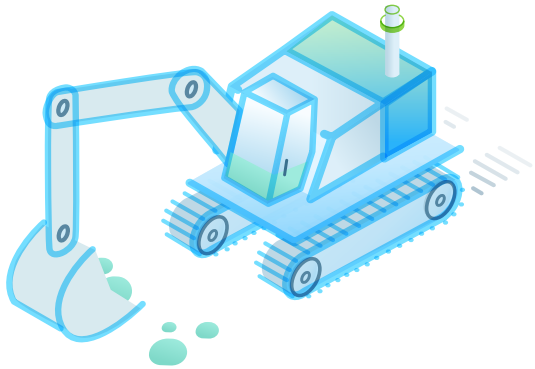

Dr. Oleksandra Vytiaganets

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Introduction

The African continent is home to 10 of the top 15 mining-intensive economies in the world. The mineral reserves of Sub-Saharan Africa are estimated to make up 30% of the world's total. Given that a greater proportion of the essential minerals for the energy transition, like lithium, chromium, and manganese, are located in sub-Saharan Africa, this market is of paramount importance.

With the growing inflow of investment in mining projects accompanied by the perception that the population of African States are not receiving a fair share of the benefits, the mining sector has undoubtedly played a significant role in the increase of investor-State disputes in the region. The survey of claims that had been registered with the International Centre for Settlement of Investment Disputes ("ICSID") as of February 15th 2023, shows that 31 out of 84 (40%) claims attributable to mining projects were brought against African States. These 31 cases amount to 16% of the total 186 ICSID claims brought against African States. Of these 31 cases, 10 have been initiated in the past three years (since June 2020).

This article will explore the increasing role of Environment, Sustainability and Governance ("**ESG**") considerations in mining investment disputes against African States. We assess the impact of ESG considerations from two angles. First, ESG used as a sword and triggering new claims when host States fail to carefully implement new regulations. Secondly, ESG used as a shield and exploited by host States in defending investment claims when they have arisen. To further explore the role of ESG in mining disputes, we will consider it by reference to three types of ESG issues, namely (1) taxation, (2) corruption, both of which speak to governance issues, the "G" of ESG, and (3) environmental concerns.

Taxation and Revenue

***May trigger claims*:** many resource-rich countries have recently amended their legislation to increase mining revenues and indirectly increase tax. Examples of such regulatory changes include:

- a significant increase in taxes and royalties (Democratic Republic of Congo ("**DRC**"), Mozambique, Ghana);
- strengthened transfer pricing regulations (Liberia, Guinea, Mali);
- a limitation on interest deductions (South Africa, Nigeria); and
- more stringent ESG and local content requirements (Tanzania, DRC, Angola, Burkina Faso, Ghana, Guinea).

Changes such as these can give rise to claims in a number of ways, including arguments that they amount to a breach of any stabilisation clause. There have been several cases of this type including:

- Somilo v. Mali (concluded ICSID case) wherein the Tribunal found that tax adjustments made by the State breached a contractual tax stabilisation clause; and
- Montero Mining v. Tanzania (ongoing ICSID case) wherein the claimant claims, amongst other things, that the local content requirement breached the applicable BIT;

***May be used as Defence*?** Tax avoidance claims have been used by resource-rich African States against mining companies as a defence or quantum-reduction tool in investor-state disputes (e.g., clean hands doctrine). Also, in parallel, the State can retaliate by bringing a claim for tax avoidance against the mining company, ideally before the courts of the home jurisdiction of the mining company.

Corruption

May be used as defence: as illustrated by BSGR v Guinea wherein the State argued that BSGR's claims stemming from the revocation of its mining rights were inadmissible because those mining rights were obtained through bribery of public officials and corruption. The Tribunal established overwhelming evidence of corruption and found the investor's claims inadmissible on the basis that the claims were secured through corrupt practices. The Tribunal ordered BSGR to pay 80% of ICSID's costs and Guinea's legal costs.

***May trigger claims*:** on the other hand, corruption allegations are now being used by claimants as part of their claims. By way of example, Cassius Mining (Australian) threatened to bring a potential USD 275m claim against the Government of Ghana in relation to a gold mining project near the border with Burkina Faso. The allegation is that the Government of Ghana failed to protect the company from a Chinese competitor who would have stolen USD 142m worth of gold as officials may have been bribed by the Chinese competitor: Ghana hit with claim over mining trespass. By way of further example, in Eni v. Nigeria, ENI claims the impropriety of the corruption allegations made by the FGN before the Italian, Nigerian and UK courts: Dutch and Nigerian Subsidiaries of Oil Giant Eni Bring OPL 245 Battle to ICSID.

Environmental Concerns

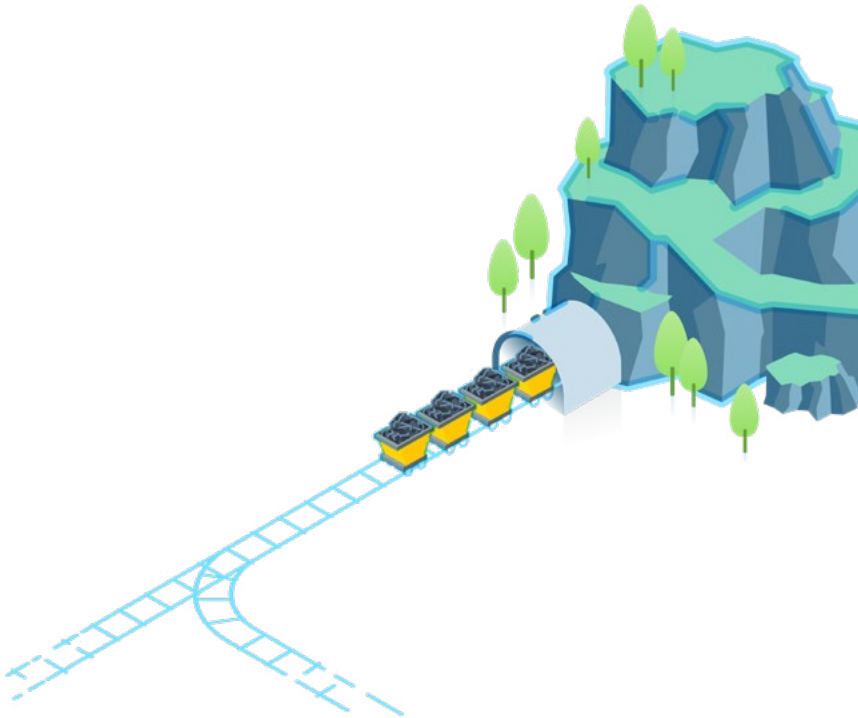
***May trigger claims*:** States are increasingly signing up to international commitments to meet climate change goals and reinforcing environmental protection. Investors in the mining sector have been challenging environmental regulatory measures for decades (*e.g.* Pac Rim v. El Salvador *and Bear* Creek Mining v. Peru) and, despite the increasing recognition of a State's right to apply and enforce its environmental protection laws against foreign investors, the issue remains controversial as most investment treaties were drafted without consideration of the host States' right to introduce measures to protect the environment (see also Environmental Issues in ISDS.

***May be used as defence or counter-claim*:** in contrast, host States may argue that investors' failure to comply with environmental requirements prior to the granting of a mining license is good grounds to deny investor rights (case in point: Cortec Mining v. Kenya). States outside the African region have also been bringing environmental counterclaims against investors for the environmental impacts of their investment activities (*e.g.* Perenco v. Ecuador and Aven v Costa Rica).

Thus, ESG issues are both causes of new claims (*e.g.*, a State's ESG measure is potentially in violation of a stabilisation clause) and defences to new claims (*e.g.*, the violation of ESG such as corruption could prevent the Tribunal from having jurisdiction or violation of environmental regulations could amount to a substantive defence) or even claims the Government could bring against the mining companies in their home jurisdictions (*e.g.*, a tax avoidance claim before a US Court).

A Common-Sense Way Forward

The key takeaway is that given the effectiveness of defences based on corruption and/or failure to follow local laws, host States are likely to raise similar ESG issues in future cases. For this reason, investors must make sure that their investments adhere to all local ESG regulations in order to prevent disputes from ever emerging in the first place and to guarantee that legitimate claims will not be rejected due to regulatory violations. If practical, investors could even consider working together with host States to establish and execute ESG policies.



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AFRICA

THE FUTURE OF MINING DISPUTES: STRIVING FOR LEGITIMACY

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Mining operations produce complex problems requiring specialist and at times, tailor-made solutions. Disputes which are not properly resolved present a major risk to the sustainability of a mining project.

It is no surprise that arbitration quickly emerged as the obvious choice for dispute resolution within the mining sector, particularly for international disputes. But it is becoming clear that arbitration is not the panacea for all disputes arising out of a mining project.

Arbitration was designed to provide an efficient, independent and neutral form of dispute resolution. In the West, its origins lie with merchants practicing international trade. Importantly, it was those initial users of arbitration that contributed, on an equal footing to the development of Western arbitration.

Western arbitration was later introduced, as a final product, into other jurisdictions which created a perception of the process having been «imposed». That is not to suggest that there is deficiency in the process; but it is important to understand the historical context of arbitration in Africa in order to understand why buy-in and thus the legitimacy of the Western arbitral system process is open to challenge in the region.

In some senses, this position is similar to that of civil litigation on the African continent. Civil litigation is available in almost every African jurisdiction, but faces legitimacy challenges because it was imported from, or imposed by, foreign «developed» nations. The process of civil litigation was not designed to suit the needs and context of the African region. This does not mean that the needs of the region cannot be met through a suitably adapted model of civil litigation; it simply means that, as things stand, the process was adopted without contribution to its design from local stakeholders.

The adoption of Western arbitration in Africa occurred under somewhat different circumstances and at a later point in history compared to civil litigation (which was often directly imposed by colonial powers). Nevertheless it also suffers from a similar legitimacy challenge because of its ties to colonial powers and the lack of African input in its development, notwithstanding the fact that the practice is not entirely foreign to African society where early forms of arbitration were integral to many African communities long before the colonial era.

This background then leads to one of the biggest challenges to mining projects in Africa - cultural tension. This tension manifests in disputes with governments and with communities in regions surrounding mining developments. In both instances there is often a lack of agreement on the appropriate procedure for the resolution of disputes. This tension is not unique to Africa, but it is certainly evident across the continent.

Government Disputes and Arbitration

In South Africa, the *Foresti* case presented as a symptom of the underlying problem. The key issue was the South African government's right to enact a local law aimed at addressing inequality caused by the policies of the Apartheid government, leading to parties (in this case, foreign investors) losing certain mining rights. The matter was referred to ICSID but was settled before final determination. More important that the outcome, though, was what South Africa did after being taken to an international tribunal on this sensitive issue.

In the years that followed, South Africa terminated (or did not renew) certain Bilateral Investment Treaties. In 2015, as a purported replacement for these terminated BITs South Africa passed the Protection of Investment Act, aimed at protecting the rights of investors.

Under the Protection of Investment Act, mediation was offered as the preferred and recommended substitute for the arbitration of investment disputes, confirming the long-held concern that investment arbitration was not universally accepted as the best way to resolve investment disputes.

South Africa is not alone in opposing investment arbitration. Many other African and Asian countries have also questioned the purpose and power balance in investment arbitrations. This has now led to a global debate on the future of investment disputes. For this debate to yield any meaningful outcome, input from those previously excluded from the design of the old investment arbitration system must be taken into account. Importantly, it seems that mediation or conciliation must be included in the process for resolving investment disputes.

Local Communities and Arbitration

Cultural tension also appears in disputes with local communities surrounding mining developments. A distrust of formal mechanisms (including court litigation) is evidenced by a high number of «repeat disputes» which re-appear after purportedly having been resolved. Reliance on an arbitral award (or court order) in defence of claims from communities hardly ever brings the issue to an end, with disgruntled community members instead resorting to creative means to obtain relief.

This tension is heightened by the fact that, as the South African Human Rights Commission has pointed out, *«many mining-affected communities continue to experience significant levels of poverty and systemic inequality, which reinforces the notion that the benefits of mining operations disproportionately favour mining companies and the State, and are often to the detriment of local communities»*. Getting community buy-in on the resolution of disputes is critical to a mine's social license to operate and the affected communities' feeling that they are valued stakeholders who are working hand in hand with the mine in their area, rather than under thumb of the mine.

Going Forward

In both investment disputes (with governments) and those on the ground (with local communities), we see evidence of clear distrust in the formal systems of resolving disputes. That distrust translates into a direct challenge against the legitimacy of formal arbitration processes in the region.

The question is then how do we address this distrust? Do we try enhancing trust in the existing system through a process of engagement, development and training? Or do we develop an entirely new system which enjoys the meaningful buy-in from all stakeholders?

The answer might lie somewhere in-between. The global arbitral community needs to be mindful of the question of legitimacy and enhance its efforts to create awareness, knowledge, and participation in the development of the practice which must address the particular needs of developing regions. If development occurs with meaningful participation from those who might question the legitimacy of the process, we stand a better chance of achieving broader stakeholder support.

Until we have a system that is truly supported by all stakeholders, parties seeking to resolve disputes must remain open-minded and creative in their approach to dispute resolution but one can never simply assume that obtaining an arbitral award will finally resolve a dispute.

ABOUT THE AUTHOR

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PREVALENCE OF ESG ISSUES IN ARBITRATION PROCEEDINGS IN THE MINING SECTOR INVOLVING LATIN AMERICAN STATES

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Each year, we have been witnessing an increase in the number of mining projects – and, each year, there appears to be an associated increase in mining-related disputes. This remains true for Latin America, more specifically, where in many countries, mining is one of the main GDP contributors and a key draw for foreign investment. With its complex history and geopolitical reality, it should come as no surprise that ESG concerns have come to the forefront in debates surrounding the presence and growth of the mining industry in the region.

Rise of ESG

While a global focus on ESG is not particularly new, its implementation in the private sector in Latin America has experienced a resurgence in recent years. While the causes of this are multiple – such as political shifts, the climate crisis, market volatility – it has brought both global and local attention to ESG issues. Locally, Latin American governments have committed to various international environmental instruments in an effort to curb emissions and protect the local environment. Internationally, there now is increased pressure from the global community and international organizations on the public and private sectors to foster sustainable investment, protect human rights and the environment, and combat corruption. This pressure has come from judicial bodies too: for example, the August 31st, 2021, ruling by the Inter-American Court of Human Rights which obliges all parties to the American Convention on Human Rights to comply with the UN Guiding Principles.

It should come as no surprise that ESG issues are particularly relevant to the mining industry in Latin America. Mining often involves stakeholders with competing objectives, such as local communities and MNCs. Further, extractive industries by their very nature impact the environment. While many companies and governments alike have been taking steps to ensure that corporate governance going forward focuses on environmental protection, this has not always been the case.

Recent Cases

In the past decade, a growing number of cases before investor-State and commercial arbitral tribunals have involved environmental, social or governance issues. ESG issues have come before arbitral tribunals on numerous occasions in the Latin American context. Most frequently, they will arise either as part of a State's defense based on the doctrine of sovereign powers, or as a State's counterclaim. The most recent and salient examples of ESG issues framed in both contexts in arbitrations against Latin American States have been set out below.

First, it should be noted that there has been a shift in how tribunals address ESG issues. When ESG issues were first discussed by an investor-State tribunal in a mining dispute, in Gold Reserve v. the Bolivarian Republic of Venezuela in 2014, they did not alter the tribunal's ruling. Venezuela argued that it had revoked the investor's construction permit due to the project's impact on indigenous communities and the local environment. However, the tribunal found the State's obligation to protect communities and the environment did not nullify its responsibility to the investor.

Similarly, in the 2015 decision in Quiborax et al v. the Plurinational State of Bolivia, the tribunal did not ultimately defer to the State's sovereign right to protect the public interest in contravention of its obligations to the investors. Bolivia had revoked the investors' mining concessions, formally due to tax irregularities, but also due to widespread community opposition to the project. The tribunal stated that Bolivia may have had a legitimate interest in protecting the project area – a salt flat reserve – but that this did not change the unlawful nature of the expropriation. In the end, environmental and social concerns, even though they were within Bolivia's sphere of legitimate interest, did not outweigh the investor's private interests in the project.

However, much has changed since. In 2016, the Copper Mesa v. the Republic of Ecuador tribunal openly considered ESG issues and granted them significant weight in its decision. In response to the investor's claims of expropriation of mining concessions, the State pointed to the investor's behavior towards local communities and its failure to secure their approval. While the tribunal found that Ecuador had breached the BIT, it brought in the investor's actions towards the communities to reduce the awarded damages. The violent response of the investor to social opposition of its project thus led to a 30% reduction in damages awarded.

Tribunals took similar views in Bear Creek Mining v. Peru and South American Silver v. the Plurinational State of Bolivia. The *Bear Creek* decision, issued in 2017, related to mining concessions that the State revoked after severe social conflict erupted in protest. Local indigenous communities were concerned about the potential impact of the project on their land and water rights; the resulting protests culminated in riots and the death of several demonstrators. While the tribunal found that the revocation of the concessions was not justified, it took into account the level and scale of community opposition in calculating damages. The lack of social support for the project, and no hope of ever obtaining it, were leading causes for the tribunal's decision to award less than 50% of the investor's damages.

Similarly, in *South American Silver*, the tribunal considered the investor's actions when assessing damages. Local indigenous communities mounted fierce opposition to the project, which was expected to cause severe impacts on their environment (which included sacred sites). In response, the government canceled the investor's mining concession. While the tribunal found that this amounted to expropriation, it took a hard look at claimant's actions on the ground. The tribunal found that the investor's actions exacerbated the conflict and caused further violence. As such, it was awarded $18.7 million of the $385.7 million sought.

While ESG issues as counterclaims are rarer in this context, it is helpful to mention the case of *Pereneco.* In Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), the French investor brought claims against Ecuador related to legislative acts that increased the investor's financial burden under hydro-carbon exploration contracts it had with the State and the State-owned oil company. Ecuador counterclaimed, alleging that Perenco caused environmental harm to the Amazon during its operation. While the tribunal granted Perenco partial damages, it did also award $54 million to Ecuador for its counterclaim.

Last, it should also be noted that ESG issues have likely been brought forth with greater frequency in commercial arbitrations as well. The confidential nature of these proceedings makes this more difficult to assess. However, where allowing a project to go forward leads to social unrest, it may be expected that States would look to force majeure or other hardship clauses as a means of defense in a dispute.

Conclusion

Going forward, we can expect that the importance of ESG issues in mining disputes will continue to rise. It is recommended that parties to contracts pay close attention to language, so as to ensure ESG-related disputes are addressed. With regards to investor-State proceedings, as more are brought under newer BITs, we are likely to see differences in how tribunals approach these issues. Newer BITs, which often have more stringent provisions on State measures related to the environment or the public interest, are bound to produce different results. On their part, investors should remain cognizant of national and international rules and guidelines on environmental and corporate governance.

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Annex 1 – 2021–2023 Mining Arbitration Cases Available on Jus Mundi

Case title	Institution	Type of case	Date
Minera Panamá S.A. v. Republic of Panama	IACAC	Commercial Arbitration	2023-01-01
Towra SA-SPF v. Republic of Slovenia	ICSID	Investor-State	2022-12-05
Junefield Gold v. Republic of Ecuador	Data not available	Investor-State	2022-10-04
Coeur Mining, Inc. and Coeur Mexicana S.A. de C.V. v. United Mexican States	Data not available	Investor-State	2022-09-01
Ascent Resources Plc. and Ascent Slovenia Ltd. v. Republic of Slovenia	ICSID	Investor-State	2022-08-15
ICC Case - ID No. 2014	ICC	Commercial Arbitration	2022-04-01
Greenland Minerals A/S (GMAS) v. Government of Greenland and the Government of the Kingdom of Denmark	Data not available	Investor-State	2022-03-22
Nederlandse Aardolie Maatschappij (NAM) v. Netherlands (II)	NAI	Commercial Arbitration	2022-01-31

ICSID: International Centre for Settlement of Investment Disputes / **IACAC: Inter-American Commission of Commercial Arbitration**
ICC: International Chamber of Commerce / **NAI: Netherlands Arbitration Institute**

Case title	Institution	Type of case	Date
Nederlandse Aardolie Maatschappij (NAM) v. Netherlands (I)	NAI	Commercial Arbitration	2022-01-31
Corporación Nacional del Cobre de Chile, Exploraciones Mineras Andinas S.A. and Inversiones Copperfield SPA v. Republic of Ecuador	ICSID	Investor-State	2021-12-24
AGEM Ltd v. Republic of Mali	ICSID	Investor-State	2021-12-20
Congo Mining Ltd SARLU and Midus Holdings Limited v. Republic of Congo	ICSID	Investor-State	2021-11-15
EEPL Holdings v. Republic of Congo	ICSID	Investor-State	2021-10-29
Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (II)	*Ad hoc* Arbitration	Investor-State	2021-08-13
Menankoto SARL v. Republic of Mali	ICSID	Investor-State	2021-06-24
Alamos Gold Holdings Coöperatief U.A. and Alamos Gold Holdings B.V. v. Republic of Turkey	ICSID	Investor-State	2021-06-07
Severgroup LLC and K.N. Holding OOO v. French Republic	PCA	Investor-State	2021-06-07

ICSID: International Centre for Settlement of Investment Disputes / **NAI: Netherlands Arbitration Institute**
PCA: Permanent Court of Arbitration

Case title	Institution	Type of case	Date
Avima Iron Ore Limited v. Republic of Congo	ICC	Investor-State	2021-06-04
Anglo American plc v. Republic of Colombia	ICSID	Investor-State	2021-06-02
Glencore International A.G. v. Republic of Colombia	ICSID	Investor-State	2021-05-28
Centerra Gold Inc., Kumtor Gold Company CJSC and Kumtor Operating Company CJSC v. The Kyrgyz Republic and Kyrgyzaltyn OJSC (III)	*Ad hoc* Arbitration	Investor-State	2021-05-14
ICC Case - ID No. 1769	ICC	Commercial Arbitration	2021-05-01
Umwelt- und Ingenieurtechnik GmbH v. Prolific Mining Corp.	SAC	Commercial Arbitration	2021-04-12
Corporación Nacional del Cobre de Chile (CODELCO) v. Empresa Nacional Minera del Ecuador (Enami EP)	ICC	Commercial Arbitration	2021-04-08
AECI Mauritius Ltd v. Burkina Faso	ICSID	Investor-State	2021-04-08
Sundance Resources Limited and Congo Iron SA v. Republic of Congo	ICC	Commercial Arbitration	2021-03-25

ICSID: International Centre for Settlement of Investment Disputes
ICC: International Chamber of Commerce / **SAC: Swiss Arbitration Centre formerly SCAI**

Case title	Institution	Type of case	Date
Mauritanian Copper Mines S.A. v. Islamic Republic of Mauritania	ICSID	Investor-State	2021-03-04
First Majestic Silver Corp. v. United Mexican States	ICSID	Investor-State	2021-03-02
ICC Case - ID No. 1709	ICC	Commercial Arbitration	2021-03-01
Chilean Economic Development Agency (CORFO) v. Albemarle Corporation (II)	ICC	Commercial Arbitration	2021-02-19
WM Mining Company, LLC v. Mongolia	ICSID	Investor-State	2021-02-17
Montero Mining and Exploration Ltd. v. United Republic of Tanzania	ICSID	Investor-State	2021-02-09
Barrick Gold Corporation v. Senegalese Revenue Authority and The Republic of Senegal	ICC	Investor-State	2021-01-01
Sundance Resources Limited and Cam Iron SA v. Republic of Cameroon	ICC	Commercial Arbitration	2021-01-01
Pascal Beveraggi and Skoda Octavia v. Democratic Republic of the Congo	Data not available	Investor-State	2021-01-01

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

Annex 2 – 2021–2022 Mining Arbitration Cases (inc. oil & gas)

Case title	Institution	Type of cases	Date
Montero Mining and Exploration Ltd. v. United Republic of Tanzania	ICSID	Investor-State	2/9/21
Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria	ICSID	Investor-State	2/10/21
WM Mining Company, LLC v. Mongolia	ICSID	Investor-State	2/17/21
Chilean Economic Development Agency (CORFO) v. Albemarle Corporation (II)	ICC	Commercial Arbitration	2/19/21
ICC Case - ID No. 1709	ICC	Commercial Arbitration	3/1/21
First Majestic Silver Corp. v. United Mexican States	ICSID	Investor-State	3/2/21
Mauritanian Copper Mines S.A. v. Islamic Republic of Mauritania	ICSID	Investor-State	3/4/21
Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States	ICSID	Investor-State	3/25/21

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

Case title	Institution	Type of cases	Date
Sundance Resources Limited and Congo Iron SA v. Republic of Congo	ICC	Commercial Arbitration	3/25/21
AECI Mauritius Ltd v. Burkina Faso	ICSID	Investor-State	4/8/21
Corporación Nacional del Cobre de Chile (CODELCO) v. Empresa Nacional Minera del Ecuador (Enami EP)	ICC	Commercial Arbitration	4/8/21
World Natural Resources v. Republic of the Congo	ICSID	Investor-State	4/13/21
Perupetro S.A. v. Pluspetrol Norte S.A. (PPN), Korea National Oil Corporation, Posco Daewoo Corporation and SK Energy	ICC	Commercial Arbitration	4/20/21
ICC Case - ID No. 1769	ICC	Commercial Arbitration	5/1/21
Centerra Gold Inc., Kumtor Gold Company CJSC and Kumtor Operating Company CJSC v. The Kyrgyz Republic and Kyrgyzaltyn OJSC (III)	*Ad hoc* Arbitration	Investor-State	5/14/21
Glencore International A.G. v. Republic of Colombia	ICSID	Investor-State	5/28/21
Anglo American plc v. Republic of Colombia	ICSID	Investor-State	6/2/21
Avima Iron Ore Limited v. Republic of Congo	ICC	Investor-State	6/4/21

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

Case title	Institution	Type of cases	Date
Alamos Gold Holdings Coöperatief U.A. and Alamos Gold Holdings B.V. v. Republic of Turkey	ICSID	Investor-State	6/7/21
Severgroup LLC and K.N. Holding OOO v. French Republic	*Ad hoc* Arbitration	Investor-State	6/7/21
World Natural Resources and WNR Congo v. Mercuria Energy Trading, Mercuria Capital Partners and Energy Complex DMCC	ICC	Commercial Arbitration	6/15/21
Menankoto SARL v. Republic of Mali	ICSID	Investor-State	6/24/21
Exxon Mobil Corporation v. Basra Oil Company	ICC	Commercial Arbitration	7/26/21
Democratic Republic of the Congo v. Caprikat Limited and Foxwhelp Limited	ICC	Commercial Arbitration	8/13/21
Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (II)	*Ad hoc* Arbitration	Investor-State	8/13/21
Raul Francisco Javier Linares Sanoja and others v. Republic of Peru	PCA	Investor-State	8/30/21
Eni S.p.A. v. Republic of Ghana	SCC	Commercial Arbitration	9/1/21

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

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

ICSID: International Centre for Settlement of Investment Disputes / **NAI: Netherlands Arbitration Institute**

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