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PERSPECTIVES

INVESTMENT TREATY DISPUTES: SECTOR ANALYSIS

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This article considers investment treaty disputes in the construction, energy and mining and natural resource sectors.

Investment treaty disputes in the construction sector

Cross-border activity in the construction sector has seen exponential growth over the past decade, with an increasing number of complex construction projects being awarded, particularly in developing economies. The increased use of public-private partnership (PPP) investment vehicles and joint ventures with state-owned entities has given rise to further investment-related disputes caused by states' postponement, frustration or cancellation of different construction projects. The United Nations Conference on Trade and Development (UNCTAD) reports 106 United Nations Commission on International Trade Law (UNCITRAL) and International Centre for Settlement of Investment Disputes (ICSID) investment cases, 43 of which are pending. Furthermore, 15 percent of all cases registered and administered by ICSID in 2019 were construction-related disputes.

A foreign investor seeking treaty protection must first comply with a nationality requirement that

the investor be a national of the state party to the investment treaty that is not the host state. Second, foreign investors must have made a qualifying investment in the host state.

Examples of qualifying investments found in the construction sector include the acquisition of shares in a local construction consortium (*Hochtief Aktiengesellschaft v. Argentine Republic*), the grant of a long-term concession by a host state (*Malicorp Limited v. Arab Republic of Egypt*), a contractor's supply of services and materials and the mobilisation of its resources for the performance of a construction contract (*Pantechniki S.A. Contractors & Engineers v. Republic of Albania*), an operator's two-year commitment to provide vessels and services for a dredging contract (*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*) and a project company's claim to a share of profits or returns flowing from the right to operate a project following its construction (*Alpha Projektholding GmbH v. Ukraine*). Various construction works have also been found by tribunals to be qualifying investments, such as the development of a tourist resort, the development of a golf club and condominiums, the dredging of a canal, the construction and operation of a transfer station for hazardous waste, the construction of hydro-electric power facilities, the construction of a gas pipeline, improvement works at an oil refinery, the construction of a dam, the construction of roads and motorways, the construction and operation of an international airport, and the construction of bridges.

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Breaches of investment treaties have been found to include the exercise of state power which cannot be exercised by a contractual counterparty, including seizure of assets or control of a business (*Alpha Projektholding v. Ukraine*), issuance of a governmental decree resulting in the takeover of the claimant's operation of its investment (*ADC v. Hungary*), discontinuation of government funding (*KCI v. Gabon*), annulment by the courts of an arbitral award (*ATA Construction v. Jordan*) and withdrawing a concession to operate a development (*Corporación América and Kuntur Wasi v. Peru*).

Investment treaty disputes in the energy sector

The past decade has seen a significantly increased level of foreign investment as a result of international initiatives on the development of alternative energy sources. Many countries have implemented government subsidies and support schemes to encourage investment in renewable energy. For different reasons, some countries have recently decided to change or eliminate those incentives, triggering a wave of arbitral proceedings. Another important trend is the development of jurisprudence based on the Energy Charter Treaty (ECT), a major international instrument which focuses on the protection and promotion of foreign energy investment, free trade in energy products, freedom of energy transit, energy efficiency, and environmental matters. Since 2001, when the first investment arbitration case invoking the ECT was registered, the Energy Charter Secretariat has tracked 130 publicly known cases, 54 of which are pending.

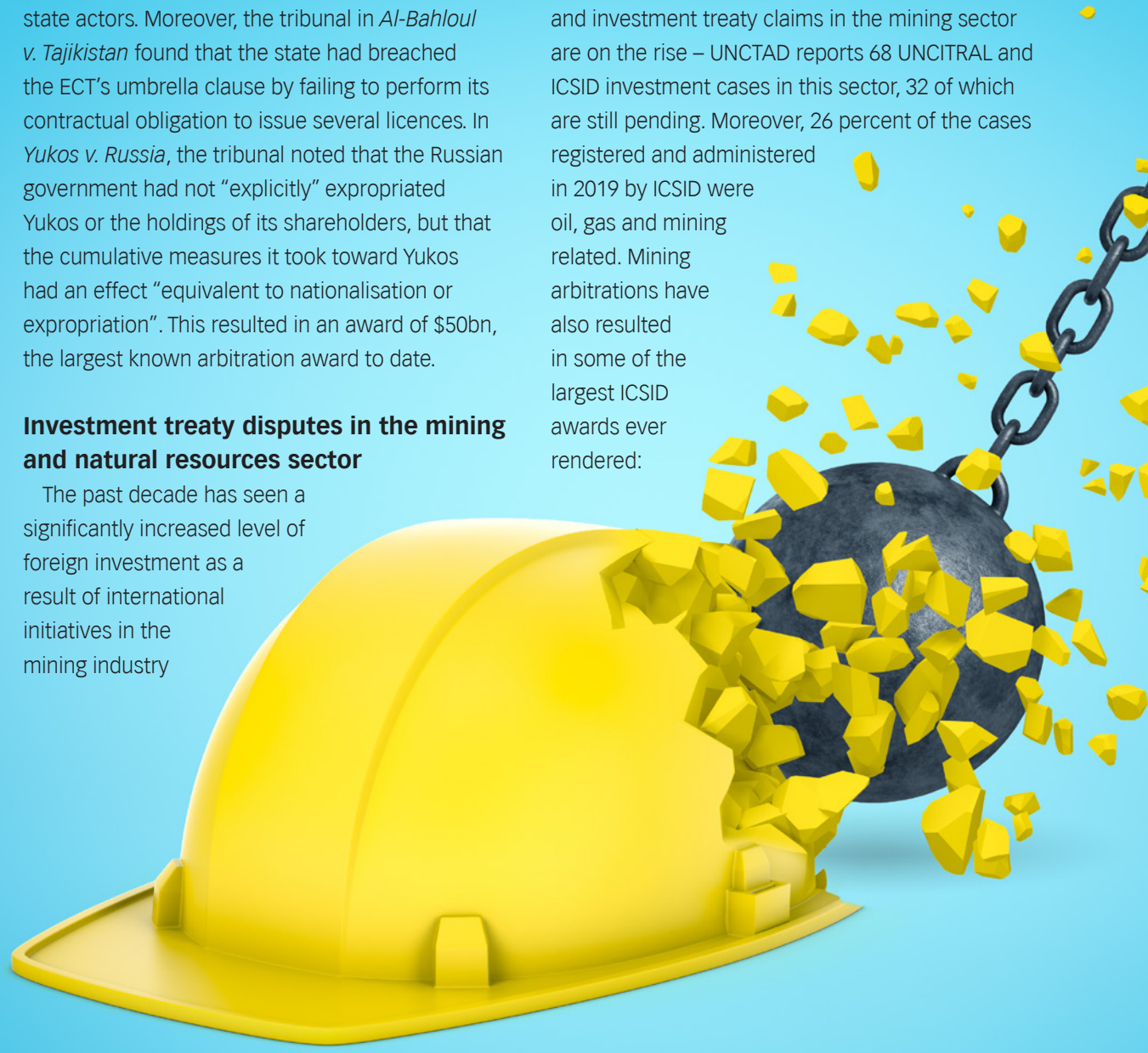
Examples of qualifying investments found in the energy sector include contractual rights under a power purchase agreement (PPA), including claims to money and performance by a state-owned electricity supply company (*Electrabel v. Hungary*), the right to claim money for an unpaid debt for the supply of electricity (*Energoalians v. Moldova*), an indirect controlling shareholding in three solar photovoltaic facilities (*Foresight and others v. Spain*), ownership and capital contributions in a wind farm (*Gamesa v. Syria*) and two photovoltaic projects owned through special purpose vehicles and participative loans, held by wholly owned subsidiaries (*OperaFund and Schwab v. Spain*). Notably, in *Veteran Petroleum Limited v. Russian Federation*, the tribunal found that it had jurisdiction by concluding that there was no indication that the drafters of the ECT intended to limit the meaning of ownership of shares to the beneficial ownership of shares.

As to breaches in the energy context, the tribunal in *RREEF v. Kingdom of Spain* noted that protection of the investor's reasonable and legitimate expectations is the most important element of the fair and equitable treatment standard, before concluding that Spain breached the ECT by retroactively applying a new tax regime and failing to ensure that the investor earned a reasonable rate of return on its solar investments. Likewise, the tribunals in both *Antin v. Kingdom of Spain and Greentech* and *NovEnergia v. Italy* concluded that regulatory regimes specifically created to induce investments in the energy sector cannot be radically altered (i.e., stripped of their key features) in ways that affect investors who invested in reliance on those regimes. In *AES Summit v. Hungary*, the tribunal interpreted the full protection and security standard broadly, holding that a state must take reasonable steps to protect its investors against harassment by third parties or

state actors. Moreover, the tribunal in *Al-Bahloul v. Tajikistan* found that the state had breached the ECT's umbrella clause by failing to perform its contractual obligation to issue several licences. In *Yukos v. Russia*, the tribunal noted that the Russian government had not "explicitly" expropriated Yukos or the holdings of its shareholders, but that the cumulative measures it took toward Yukos had an effect "equivalent to nationalisation or expropriation". This resulted in an award of $50bn, the largest known arbitration award to date.

Investment treaty disputes in the mining and natural resources sector

The past decade has seen a significantly increased level of foreign investment as a result of international initiatives in the mining industry and investment treaty claims in the mining sector are on the rise – UNCTAD reports 68 UNCITRAL and ICSID investment cases in this sector, 32 of which are still pending. Moreover, 26 percent of the cases registered and administered in 2019 by ICSID were oil, gas and mining related. Mining arbitrations have also resulted in some of the largest ICSID awards ever rendered:



Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan ($4.087bn), *Crystallex International Corporation v. Bolivarian Republic of Venezuela* ($1.2bn) and *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* ($967m).

Examples of qualifying investments found in the mining and natural resources sector include rights under a concession agreement concluded to operate a silver mining site (*Bear Creek Mining v. Peru*), rights under mining concessions held through the claimant's wholly owned subsidiary (*South American Silver v. Bolivia*), rights under a mine operation contract (*Crystallex v. Venezuela*), claims to money under several agreements concluded for cooperation in the mineral extraction and metallurgy business (*Mytilineos v. Serbia (II)*), marine support services to the oil industry (*Tidewater v. Venezuela*), majority shareholding in a local company that held an exclusive right to carry out mining activities (*EuroGas and Belmont v. Slovakia*), indirect ownership in a local company that held a licence for mining rare materials (*Stans Energy v. Kyrgyzstan (I)*), rights under a joint venture agreement, concluded with a local province, for the development of a copper-gold mine (*Tethyan Copper v. Pakistan*), and ownership of a thermal coal producer holding a mining concession (*Glencore International and C.I. Prodeco v. Colombia (I)*).

As to breaches, in *Bear Creek Mining v. Peru* the tribunal held that the government's decree prohibiting mining in areas near social unrest constituted indirect expropriation. Likewise, in *South American Silver v. Bolivia*, the tribunal held that Bolivia unlawfully expropriated the claimant's investment by failing to compensate the investor for reversing the ownership of the mining concessions to Bolivia. In *Copper Mesa Mining v. Ecuador*, the tribunal found that Ecuador breached the fair and equitable treatment obligation by arbitrarily revoking one of the mining concessions without due process. Similarly, the tribunal found that the guarantee of full protection and security had been breached by Ecuador through its flawed reaction to an anti-mining blockade of one of Copper Mesa's mines. Finally, in *Glencore International and C.I. Prodeco v. Colombia (I)*, the tribunal found that Colombia frustrated the legitimate expectations of Glencore and its investment in breach of the non-impairment and fair and equitable treatment clause of the Colombia-Switzerland bilateral investment treaty (BIT).

Mitigating risks through the investment structure

When considering an investment in a foreign jurisdiction, it is important to consider the availability of investor protections and to structure the investment so as to take advantage of applicable treaties and domestic investment laws, and to ensure that the contractual framework is such that it supports and facilitates investor protections, particularly in politically unstable or developing

countries where there is a high risk of governmental or regulatory interference, or when investing in high-profile assets. Companies would be well advised to consider the crucial and valuable protections afforded by investment treaties, in addition to contractual rights, at an early stage in project planning, ideally before establishing project entities or making investments, and be open to investment treaty arbitration when it comes to protecting those investments. CD

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