

# Some Issues of Investment and Mining Arbitration in Uzbekistan

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## Abstract

The article reveals the possibilities of the sphere of minerals in Uzbekistan, investment legislation that creates a favorable investment climate. The article also discusses international investment arbitration cases in the field of mining with the participation of the Republic of Uzbekistan as a respondent. In particular, several ICSID cases and one UNCITRAL case with the participation of the Republic of Uzbekistan on the resolution of disputes in the framework of investing in the extraction of minerals were considered. Analysis of the cases showed that such disputes arose most often due to the unfairness of the investor and practice showed that Uzbekistan is interested in settling disputes and cases amicably, also analyses of the legal bases showed the need of improvement of national legislation and practice in mining sphere, including concessions, PSA and Law on Subsoil.

## Keywords

Investment, Mining, International Arbitration, ICSID, UNCITRAL

## 1. Introduction

The Republic of Uzbekistan (Uzbekistan) is situated in the central part of Central Asia. It is one of two doubly landlocked countries in the world. Uzbekistan's mining industry is one of the country's most important and strategic industries. Uzbekistan is one of the world's largest producers of gold (ranked ninth) and of uranium (ranked seventh). Uzbekistan also produces copper, silver, coal, phosphate, molybdenum, potassium, tungsten, lead, zinc and other minerals (*Mining in Uzbekistan, 2022*). Uzbekistan is among the five countries of the world for proved reserves of gold, and among the ten leading countries for production level. For reserves and production of uranium Uzbekistan is among the first ten countries of the world. Uzbekistan possesses large raw materials basis of non-

ferrous, rare and diffused metals represented by the pure and complex fields. Tungsten raw materials basis is provided by the famous tungsten ore mines. There are some tens of ore shows and deposits of iron ([Miningmetals Uzbekistan, 2022](#)).

Uzbekistan's legal system is based on civil law, which is similar to the Romano-Germanic system (Civil Law system) of law.

Uzbekistan differs from many other countries where minerals in the soil are privately owned and landowners are entitled to all mineral resources located beneath their properties. All underground resources in the ground are owned by the state. Surface rights do not grant rights to natural resources in the ground and as such are clearly distinguishable from mineral rights ([Jabborov, 2014](#)).

Exploration and development of minerals are regulated under a number of national laws and regulations. The law of the Republic of Uzbekistan "On the Subsoil" adopted in 2002 is the key law that regulates the activities of mining and metals companies in the Republic of Uzbekistan. Under this Law, all subsoil resources are owned by the state. Subsoil-use rights are granted on the bases of subsoil-use licences awarded to subsoil users through tenders or direct negotiations. Any transfer of subsoil ownership rights (including the right of use) to a non-state party is subject to approval by the Cabinet of Ministers of the Republic of Uzbekistan (Government or Cabinet of Ministers).

Exploration and mining rights are granted on the basis of a subsoil-use licence awarded to the subsoil user, through tenders or direct negotiations, by the State Committee of the Republic of Uzbekistan on Geology and Mineral Resources.

Mining activities may also be conducted under production sharing agreements (PSAs) within the framework of the Law on Production Sharing Agreements dated 7 January 2001 (the PSA Law) and under concession agreements within the framework of the Law on Concessions dated 30 August 1995. However, as of June 2020, no concession agreements had been entered into for mining projects in Uzbekistan.

In addition, the Tax Code, Land Code, Labour Code and Environment Protection Law have regulations for mining industry and subsoil-use.

The industry is also regulated under a number of other regulations and in recent years, several regulatory acts have been adopted in Uzbekistan in the mining and geological sector. For example, Resolution No. 328 of the Government of the Republic of Uzbekistan which approves the lists of prospective areas of strategically important solid minerals; Decree No. PP-3479 of the President of the Republic of Uzbekistan "On Measures for the Stable Supply of In-Demand Types of Products and Raw Materials to Sectors of the National Economy"; Decree No. PP-3578 of the President of the Republic of Uzbekistan "On Measures to Improve the Activities of the State Committee of the Republic of Uzbekistan for Geology and Mineral Resources"; Resolution No. 849 of the Government of the Republic of Uzbekistan dated 18 October 2017 "On Measures to Improve the System of Collection, Delivery and Processing of Nonferrous Metals Scrap and Waste"; Resolution of the Government of the Republic of Uzbekistan "On

Measures to Improve the Procedure for Managing Nonferrous and Ferrous Metals Scrap and Waste”.

It should be mentioned that some regulations, public procurements and licensing, as among the main obstacles to foreign direct investment in mining sphere in Uzbekistan. Sometimes it is too much regulated that it is needed or the laws in the sphere are already not correspond to modern realities.

The principal regulatory bodies that administer the laws and regulations related to mining are the State Committee of the Republic of Uzbekistan on Geology and Mineral Resources (Geology Committee), the State Inspectorate of the Republic of Uzbekistan on Control over Industrial Safety of works in Industry, Mining, Geology and Public Utilities Sectors (Industrial Safety Inspectorate) and the State Committee of the Republic of Uzbekistan on Protection of the Environment (Environment Protection Committee).

The difference between the regulatory framework in Uzbekistan and that of other countries is in the absence of any separation between mining and petroleum law and a common approach towards regulation of the mining industry and the oil and gas industry.

## 2. Investment Legislation

Uzbekistan has progressive laws regulating investment activities. A new law “On Investments and Investment Activities” ([Law on Investments and Investment Activity 2020 \(UZB\)](#)) was adopted on December 25, 2019. This Law consolidates a number of previous legislative acts relating to foreign investments, investor rights and obligations and investment activity. In particular, the Law combines the main provisions of the previous laws “On Foreign Investments”, “On Investment Activities” and “On Guarantees and Measures to Protect the Rights of Foreign Investors”, which all lost their validity since coming into force of the new Law.

It also encompasses social rights issues, such as freedom of foreign labor, freedom of movement and insurance rights for foreign investors. However, the Law does not cover investment matters in relation to concessions, production sharing agreements, investment, equity and venture capital funds as well as other investment-related issues arising out of operations with securities, public-private partnerships and special economic zones, which are regulated by separate Laws.

The Law provides a general procedure of investment dispute resolution, which includes a gradual escalation of available mechanisms being negotiation, mediation and followed by adjudication by Uzbek courts. However, in the event of the exhaustion of the above listed steps, a dispute can be referred to an international arbitration, subject to the inclusion of corresponding arbitration clause into the relevant international agreements.

The new Law defines as main principles of this sphere are the rule of law, justice and equality of subjects of investment activity, non-discrimination against investors and the presumption of their good faith.

It should be mentioned that this law is also notable for the fact that investment relations are regulated by more specific rules, the guarantee of investor rights is increased, and additional requirements are included in the content of investment agreements as well.

In addition, it should be pointed out that previous laws do not distinguish between foreign and local investors whereas the Article 3 of the current law provides clear definition of local and foreign investors.

Article 63 of the Law regulates settlement of disputes and provides detailed procedure of investment dispute settlement. This article strengthens the new multi-stage mechanism for resolving investment disputes. The new Law introduces a new multitiered argument resolution mechanism for investment disputes related to foreign investment that arising during the investment activity of a foreign investor in the territory of the Republic of Uzbekistan. The first tier requires that both parties endeavor to settle the conflicts through negotiations. If the parties fail to resolve the dispute amicably, mediation is the next step. It is noteworthy that Mediation Law ([Law on Mediation 2018. \(UZB\)](#)) does not contain detailed provisions on the procedure for mediation in investment disputes. On mediation explicitly provides that mediation is based on a consensus between the parties to agree on mediation ([Law on Mediation 2018 \(UZB\)](#)) whether the refusal to mediate in a dispute will prevent the escalation of the conflict between the parties. Therefore, it is not clear to what extent mediation is mandatory for investment disputes and the transition of the dispute to the next level. The third level of the dispute resolution mechanism requires the parties to refer the dispute to the national courts of the Republic of Uzbekistan. If the parties are unable to resolve the dispute in court, the dispute may be submitted to arbitration.

Particularly in mining, the Resolution of the President of the Republic of Uzbekistan on Measures for Expediting Attraction of Foreign Investments on Geological Studies and Development of Strategically Important Types of Hard Minerals No. PP-3000 (Regulation PP-3000) dated May 24, 2017 provides investors with simplified procedures for discussing potential projects with the State Committee on Geology and accessing geological data, subsoil deposits and prospective areas.

Uzbekistan also creates special economic zones to attract foreign investment. At time in Uzbekistan established 21 special (free) economic zones. The legal base of functioning of special economic zones in Uzbekistan is the Law of the Republic of Uzbekistan “On special economic zones”. ([Law on special economic zones 2020 \(UZB\)](#)) Before adoption of this Law, the Law of the Republic of Uzbekistan “On free economic zones” ([Law on free economic zones 1996 \(UZB\)](#)) was in force. Also several Presidential Decrees were adopted in this sphere. Legal bases establishes the most favorable conditions for further development of free economic zones in the republic as the most important factor for expanding attraction of foreign direct investment for creation of new high-tech industries.

Also there were established special legal regime including tax, currency and customs regimes, simplified procedure for entry, staying and departure as well as obtaining the permission to carry out labor activity by non-residents of the Republic of Uzbekistan (Rustambekov, 2019).

According to the Law special economic zones can be formed in the form of free economic zones, special scientific and technological zones, tourist and recreational areas, free trade zones, special industrial zones.

The general requirements for investment projects proposed for implementation on the territory of special economic zones include:

compliance with legislation in the field of architecture and construction, technical regulation, ecology and environmental protection, labor protection and industrial safety;

availability of funding sources;

compliance with the functional and industry specialization of the special economic zone;

compliance of the parameters of technological equipment and technological processes with modern energy efficiency requirements.

At time, Uzbekistan undertakes reforms aimed at completely improving the system of attracting foreign investment and developing special economic zones in the country.

In international ground, the Republic of Uzbekistan in direction of regulation and protection of investments has signed such major conventions as Washington Convention of 1965 (Uzbekistan participates from August 25, 1995), the Seoul Convention of 1985 (Uzbekistan participates from November 4, 1993), the Treaty to the Energy Charter and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects signed in Lisbon on April 1995 (Uzbekistan participates from December 22, 1995) and others.

As well as, within the framework of activities on attracting foreign investment, the Republic of Uzbekistan pays special attention to Bilateral Investment Treaties. Uzbekistan is a party to 55 BITs, out of which 45 are currently in force. In the first years of independence, or more precisely in 1992, the first agreements on promotion and protection of investments between the Republic of Uzbekistan and Turkey, Finland, Egypt, China were signed. Every year the number of such contracts has increased.

In addition, the Republic of Uzbekistan has a large number of treaties in the tax sphere between the countries of the world, which led to the development of a number of universally recognized international standards. Contracts that are concluded and are being concluded by Uzbekistan are based on the model contract developed by the OECD.

Today in the Republic of Uzbekistan there are more than 50 agreements on avoidance of double taxation and prevention of evasion from payment of tax on income and capital. Such contracts concern the tax on incomes of legal entities, the tax on incomes of physical persons and tax to property. In accordance with

the Article 4 of the Tax Code of the Republic of Uzbekistan, the above agreements as an international document take precedence over the norms of the national legislation (Rustambekov & Isakulov, 2019).

The formed system of international treaties of the Republic of Uzbekistan promotes effective establishment of economic cooperation of the Republic of Uzbekistan with other countries, and above all attraction of mutual investments and growth of foreign trade turnover.

### 3. Arbitration Experience

Uzbekistan has faced a number of investor-state and commercial arbitration cases, which arose from mining activities.

One of the first investment cases in mining sphere was the ICSID case: Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan.

In August 2006, US-based Newmont and its subsidiary Newmont Uzbekistan notified its claim to Uzbekistan invoking Uzbek Foreign Investment Law No. 611-I as the sole basis for ICSID jurisdiction (*Newmont USA Limited and Newmont (Uzbekistan) Limited v Republic of Uzbekistan* [2020]). The parties settled the dispute in June 2007 and the ICSID proceedings were discontinued at their request on 25 July 2007 (Burnett & Bret, 2017).

In 2006, the Cabinet of Ministers (Government) requested the Constitutional Court of Uzbekistan to proceed with an official interpretation of Article 10 of the Foreign Investment Law, on the bases of which foreign investors claimed that Uzbekistan had consented to settle its disputes with foreign investors under the ICSID Convention (*Law On Guarantees and Protection Measures for Foreign Investors 1998 (UZB)*). That was a reaction to the position adopted by foreign investors, including Newmont.

The Court ruled that:

- the provisions of the first part of Article 10 of the Law of the Republic of Uzbekistan “On guarantees and measures to protect the rights of foreign investors” within the meaning do not include the concept of “consent of the party”;
- provided for in part one of Article 10 of the Law of the Republic of Uzbekistan “On guarantees and measures to protect the rights of foreign investors” the possibility of resolving investment disputes through arbitration in accordance with the rules and procedures of international treaties (agreements and conventions) to resolve investment disputes to which the Republic of Uzbekistan has joined is not expressing the consent of the republic in accordance with the ICSID Convention to refer an investment dispute for resolution to the ICSID<sup>1</sup>.

So it was mentioned that Article 10 of Law No. 611-I not only contains no

<sup>1</sup>*Interpretation of part one of article 10 of the Law of the Republic of Uzbekistan “On guarantees and measures for protecting the rights of foreign investors”* [2006] Constitutional Court of the Republic of Uzbekistan (Constitutional Court of the Republic of Uzbekistan).

reference to or designation of “ICSID,” but it requires a subsequent “mutual agreement” between the parties to identify the terms and conditions of arbitration, including the “body considering said dispute” (*Law On Guarantees and Protection Measures for Foreign Investors 1998 (UZB)*).

The second and one of the most popular cases are the ICSID case: *Metal-Tech Ltd v. Republic of Uzbekistan*.

In January 2010, Metal-Tech initiated an ICSID arbitration against Uzbekistan under the Israel-Uzbekistan BIT for the alleged expropriation of 50 percent of its shares in a joint metal venture. It should be mentioned, that in 2008, Uzmetal Company, which was jointly established by investor and state owned companies, was declared bankrupt by Uzbek courts after a series of actions were taken by Uzbek authorities, including the initiation of criminal proceedings against Uzmetal’s management for alleged abuse of authority and the suspension of Uzmetal’s exclusive right to purchase raw materials.

Uzbekistan’s principal defence was that the tribunal lacked jurisdiction because Metal-Tech’s investment was “made and operated corruptly” and in violation of Uzbek laws on bribery (para. 110). The tribunal ultimately found corruption to have existed with respect to two of the three consulting agreements. The investment was thus established illegally (*Metal-Tech Ltd v The Republic of Uzbekistan [2018]*). In an award dated 4 October 2013, the tribunal unanimously rejected Metal-Tech’s claim.

The award of *Metal-Tech v. Uzbekistan* is an example of a successful corruption defence.<sup>2</sup>

Third case is a UNCITRAL case: *Oxus Gold v. Republic of Uzbekistan*.

The dispute arose out of UK company Oxus Gold’s mining operations in Uzbekistan. Particularly in August 2011, Oxus Gold initiated arbitral proceedings against the Republic of Uzbekistan under the 2010 UNCITRAL Arbitration Rules, seated in Paris, alleging contract breaches and violations of the expropriation, fair and equitable treatment and full protection and security provisions of the UK-Uzbekistan BIT, claiming damages of approximately US\$1.2 billion. The investor based its claims in relation to the alleged expropriation of its investment in the Amantaytau Goldfields Joint Venture (AGF) and the Khandiza deposit on the UK-Uzbekistan BIT. The Tribunal dismissed most of the claims, except for the claim for breach of the fair and equitable treatment standard, relating to the modification of the taxation regime applicable to AGF by the Uzbek authorities.

In more detail, the tribunal upheld jurisdiction over Oxus Gold’s claims in early 2012. However, in an award dated 21 December 2015, the tribunal dismissed most of Oxus Gold’s claims on the merits, save for a finding that Uzbekistan’s modifications, in 2006 and 2009, of the applicable taxation regime constituted a violation of the fair and equitable standard under the UK-Uzbekistan BIT. The tribunal awarded Oxus Gold damages in excess of US\$10 million plus interest. The tribunal further found that it lacked jurisdiction over Uzbekistan’s

<sup>2</sup>Another example where tribunals accepted a defence based on corruption: *World Duty Free Co. Ltd. v. Republic of Kenya* [2006] ICSID, Case No ARB/00/7 (ICSID).

counterclaims.

Oxus Gold filed an application for the partial annulment of the award before the Paris Court of Appeal. A hearing was held on March 2019.<sup>3</sup> On May 14, 2019 Paris Court of Appeal announced its decision. The Court has rejected Oxus Gold's annulment request in full and has awarded the Republic of Uzbekistan's legal fees in the amount of EUR 300,000. In its decision the Paris Court finds that the Arbitral Tribunal's decision to accept the Contested Exhibits on the record impliedly accepted the Republic of Uzbekistan's argument that there was no breach of the principle of equality of arms given that Oxus Gold should have produced the Contested Exhibits in the context of the document production process, but failed to do so. The Paris Court concludes that Oxus Gold thus cannot allege that the exhibits' admission into the record was in breach of the principle of equality of arms. The Paris Court adds in passing that Oxus Gold cannot dispute that the Republic of Uzbekistan's document requests in the arbitration were indicative of the Republic of Uzbekistan's (alleged) inside knowledge, as Oxus Gold had not raised this argument at the time.

It is worth noting that to pursue its claim, Oxus Gold had entered into a funding agreement with Guernsey-registered Gretton Limited, an affiliate of third-party funder Claunius Capital. In 2012, Gretton was assigned all of the proceeds of the Oxus Gold arbitration, including the right to enforce the award and to collect from Uzbekistan all amounts owed thereunder.

Gretton firstly tried to enforce the award by applying to Swiss courts. However, a local Swiss court issued a judgment in February 2017 denying enforcement of the award. According to the court, the sufficient domestic connection requirement is a question of admissibility that has to be addressed first. Where the requirement is not met, the Swiss courts do not have jurisdiction to address whether the award can be recognized and enforced under the convention, and must close the proceedings without entering into the merits of the case (*Gretton Limited v Uzbekistan*, 2017).

The judgment was upheld on appeal by Gretton in October 2017. Gretton has lodged a further appeal with the Federal Supreme Court.<sup>4</sup>

The Supreme Court rejected Gretton's appeal on the ground that the underlying dispute lacked a sufficient connection (nexus) with Switzerland. The Court confirmed its jurisprudence going back over one hundred years that foreign States are immune from measures of attachment or execution with respect to property in Switzerland where the attachment is based on a foreign arbitral award or judgment and the underlying dispute lacks a sufficient connection with Switzerland – even if the underlying dispute concerned commercial (non-sovereign) activity of the State. The Court concluded, therefore, that the Swiss courts lacked jurisdiction in this case. The Court made its decision on the narrow legal basis

<sup>3</sup>“Funder seeks to enforce against Uzbekistan” (GAR 30 July 2018)

<<https://globalarbitrationreview.com/article/1172413/funder-seeks-to-enforce-against-uzbekistan>> accessed 24 March 2022.

<sup>4</sup>“Funder seeks to enforce against Uzbekistan” (GAR 30 July 2018).



upon which the case originated in the Swiss courts, which was Gretton Limited's attachment of commercial real estate owned by Uzbekistan, as a provisional means to secure the future execution of the award. The Court explicitly left open how it might decide in a proceeding concerning the recognition of an award that did not involve an attachment.

On 27 July 2018, Gretton applied to a US court to enforce the award against Uzbekistan in its capacity as Oxus Gold's assignee. On 7 February 2019, the US court decided to stay the enforcement proceeding in the US pending the outcome of the annulment proceedings before French courts (Ballantyne, 2019).

After the announcement of the decision of the Paris Court of Appeal on May 2019, the US court proceedings were renewed.

In Memorandum Opinion of the United States District Court for the District of Columbia dated 30 July 2019 the Court denied in part Uzbekistan's Motion to Dismiss and ordered a hearing to resolve disputed jurisdictional facts<sup>5</sup>. In 2020 Gretton and Uzbekistan negotiated on the case and solved the situation amicably by concluding settlement agreement.

There is also another ICSID case involving mining sphere: Visor Group v. Republic of Uzbekistan.

In March 2013, Claimants initiated an ICSID arbitration against Uzbekistan under the Kazakhstan-Uzbekistan BIT. The Claimants allege having suffered losses in their interests in two cement plants based on actions of the Respondent and its courts, including criminal and regulatory investigations and expropriation without due process.

In 2017, the tribunal, by a majority denied all jurisdictional objections raised by the Respondent<sup>6</sup> and moved forward to merits phase. First hearing on merits were held in May 2019 in Washington and next proceeding was suspended until September 16, 2020, pursuant to the parties' agreement and on December 9, 2020, The Tribunal issued an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) (*Vladislav Kim and others v. Republic of Uzbekistan [2020]*), because of the signing of settlement agreement.

Also in Uzbekistan experience was one commercial case in ICC (Paris) based on PSA in oil sector, in which Republic of Uzbekistan and Uzbekneftegaz state owned joint stock company were respondents. This case also was settled amicably.

#### 4. Conclusion

The Republic of Uzbekistan is an attractive market for investing in the mining sphere. In the bowels of the republic there are large reserves of various minerals.

<sup>5</sup>Memorandum opinion on Civil Action No. 18-1755 (JEB) Gretton Limited v Republic of Uzbekistan in United States District Court for the District Of Columbia" (2019) ITALAW <<https://www.italaw.com/sites/default/files/case-documents/italaw10702.pdf>> accessed 26 March 2022.

<sup>6</sup>"Decision on Jurisdiction ICSID Case No. ARB/13/6" (2017) ITALAW <<https://www.italaw.com/sites/default/files/case-documents/italaw8549.pdf>> accessed 26 March 2022.

Approximately 60% of the country's territory is considered promising for their production. Also, the stable political and economic situation in the country serves as a significant help for the inflow of foreign capital, mutually beneficial economic cooperation.

The adopted new law "On Investments and Investment Activity", as well as the country's participation in bilateral and multilateral international agreements, provides sufficient guarantees for investors to ensure their rights and legitimate interests. The experience in the field of dispute resolution in international arbitration and their results show that such disputes arose most often due to the unfairness of the investor. In addition, such practice shows that the Republic is interested in settling the issues and cases amicably, that is, also indicates benevolence of the country to the investors.

However, the main legal acts related to the field of mining and mineral resources are already outdated and require revision and improvement. In particular, legislation and practice in the field of concluding agreements on concessions, product sharing agreements, law on subsoil and others require revision based on world trends and best practices.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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