

# KAZAKHSTAN AND TRISTANGATE



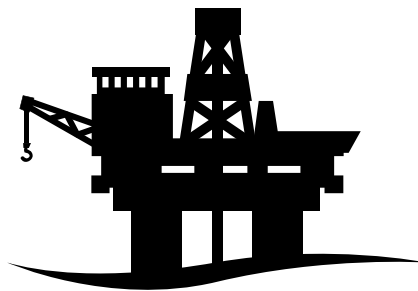
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The Government of Kazakhstan continues to challenge an arbitration award now worth around US\$545 issued by an arbitration panel of the International Chamber of Commerce in Stockholm in 2013 under the Energy Charter Treaty. The Svea Court of Appeal and the Supreme Court of Sweden have both upheld the award.

The dispute has become known 'Tristangate' because the claimants owned Tristan Oil, a company established to fund the development of oil and gas assets in Kazakhstan. The owners were two Moldovan businessmen (the Statis) who invested in oil production in Kazakhstan and began building a new facility for processing liquefied petroleum gas.

In July 2010, the Statis' assets were forcibly nationalised by the Kazakh authorities following a coordinated harassment campaign. This campaign

began in October 2008 and included multiple false accusations of criminal conspiracy, pressing of legal charges against local management, continuous unannounced inspections and audits, withdrawal of necessary licenses, and a massive unjustified tax bill. Kazakhstan's national oil and gas company KazMunayGas (KMG) took over the assets.



The Statis sought recovery of their losses via Swedish arbitration using the Energy Charter Treaty dispute

resolution mechanism. In December 2013, a Swedish arbitration tribunal ruled in favour of Tristan's owners.

The tribunal acknowledged that the allegations levelled by the Kazakh government against the Statis had no foundation and were designed to construct a pretext for the illegal take-over of the company. The tribunal ordered Kazakhstan to pay approximately US\$500 million in damages to the investors.

**According to a sharing arrangement between the award claimants and international bondholders signed in 2012, 70% of the award proceeds are owed to bondholders.**

Kazakhstan has attempted to avoid its obligation to pay the award by arguing that the investors allegedly obtained the award by fraud by making misrepresentations to the arbitral tribunal.

However, it was only after the first Svea Court's ruling upholding the award in 2016 that the Ministry of Justice brought the fraud arguments to the Swedish courts which have supervisory jurisdiction over the award. After extensive submissions from the parties on the issues, in October 2017 and May 2020, the Swedish Supreme Court rejected Kazakhstan's fraud arguments and upheld the award in full.

The arbitration award has been confirmed by the US District Court for the District of Columbia and affirmed by the DC Court of Appeals while the US Supreme Court has denied certiorari. The Arbitration has also been confirmed by the Supreme Court in Italy.

***The award was based on the arbitration panel's unanimous finding that in this case, Kazakhstan violated the ECT's protections of "fair and equitable treatment" of foreign investors by expropriating assets and engaging in harassment of investors including incarcerating local management, pursuing pre-textual tax investigations and similar tactics.***

Rather than complying with the award and the judgements of the courts in Sweden and the US, Kazakhstan has litigated not only against the Statis but more recently against international bondholders who originally invested in the Statis' oil and gas business in Kazakhstan.

In Belgium, Kazakhstan has made much of a decision issued by a Court of Appeal in Belgium in 2021 reversing



a prior confirmation of the award and finding that the Statis committed fraud in obtaining the award. This ruling by a one-judge court is being appealed and has no impact on the validity of the award in Sweden, the seat of the arbitration.

In New York, Kazakhstan's efforts to frustrate the enforcement of the award extended to a civil claim, against one of the bondholders, the investment firm Argentem Creek Partners (ACP), alleging that financing of attempts to enforce the award constituted fraud. However, in August 2022, the Supreme Court, State of New York granted a motion to dismiss the claim as an 'impermissible collateral attack' on a confirmed arbitration award.

In January 2023, the Svea Court of Appeal court ruled that approximately \$75m of cash held in a Swedish bank on behalf of the National Bank of Kazakhstan belongs to the Republic of Kazakhstan and may be collected by the owners of Tristan Oil.

Kazakhstan claims that it complies with the decisions of international arbitral tribunals and that the Tristan Oil case is exceptional. However, the country has previously contested arbitral awards against it, for example in the cases of AIG (2003) and World Wide Minerals (2019). In both cases, Kazakhstan challenged enforcement in the English courts.

Since the January 2022 disturbances in Kazakhstan that the government describes as an attempted coup,

several of the individuals responsible for directing and overseeing the litigation related to Tristan Oil have been removed from their positions, and, in some cases, incarcerated. For example, the Prime Minister at the time of the expropriation is currently in detention on treason charges.

***The ambition of Kazakhstan's President, Kassym-Jomart Tokayev, re-elected for a seven-year term in November 2022, is to attract US\$ 150 billion of foreign direct investment by 2030. His promotion of 'Just and Fair Kazakhstan' is intended to mark a break with the corrupt practices that took hold during the decades of rule by his predecessor.***

Foreign investors will be watching Tristangate closely to see if words are matched by deeds.

