

Today, UK Chancellor of the Exchequer Rishi Sunak has announced a 25% windfall tax on oil and gas companies in the UK, “extraordinary profits” made in the sector due to surging global commodity prices driven in part by the war in Ukraine. Earlier this week, news emerged that a similar measure may be introduced to also encompass UK power generators.

The windfall tax may constitute a breach of investment treaties by, inter alia, violating the legitimate expectations of foreign investors in the United Kingdom in the petroleum sector. Moreover, international law requires that tax may not be discriminatory and may not be confiscatory. As details of the scheme emerge over the coming days, investors should look carefully at lessons from previous instances where similar laws were passed. For example, when previously a country reacted to a similar extraordinary energy price windfall by enacting a windfall tax of 50% on the revenue derived from the increase in oil prices in the mid-2000s, investment treaty tribunals generally did not consider it to fall afoul of the applicable bilateral investment treaties, although they did hold that subsequent higher tax of 99% did amount to a breach of fair and equitable treatment (see *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/6; and *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5). In the latter case, one arbitrator dissented, indicating that there are factors that, in specific circumstances, may lead to a different outcome in future cases.

The oil and gas producers who stand to be affected by the tax include numerous companies from the United Kingdom, China, France, the Netherlands, Norway, Spain, and the United States. It is notable that following the exit of the United Kingdom from the European Union, these companies will be able to rely on BITs entered into between the United Kingdom and members of the European Union, as they are no longer considered intra-EU BITs.

Squire Patton Boggs has a leading BIT arbitration practice. If you have any question regarding the subject matter of this bulletin, please contact the author.

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