Towards a Repository of Policy Options for IIA Reform

Research Project
Do we Need Special Rules for Energy Disputes?[1i]

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Many arbitrators in the international investment law regime have experience of disputes involving different kinds of energy resources and infrastructure. The conventional wisdom is that in practice, most general practitioners can, if asked, be expected to apply their general skills to address legal issues arising from this specialist subject. There is, however, a small but growing body of literature that asks whether this sector raises any particular challenges to the international arbitration process, whether substantive or procedural or both.

For arbitrators and counsel lacking specialist expertise, it may be hard to avoid issues that arise from one or other aspect of the energy businesses, from renewable energy to fossil fuels. At the international level, there have been many claims lodged by investors against states in investment disputes in the oil, gas or mining industries, sometimes generically referred to as the 'extractive industries'. In the scale of claims filed, they are almost in a class of their own. **Individual claims have exceeded the GDP of many countries** in some disputes and the number of claims has mushroomed across the globe. For instance, a claim by ExxonMobil against Venezuela was for US$12 billion. Recently, there has been a sudden growth in cases concerning various forms of renewable energy, especially involving governments in the European Union. This widens the scope of energy subjects that are currently matters of dispute.

Few would deny that this is a field that often involves some very delicate non-legal issues: energy often has a **high degree of state participation or regulation**; it has an **economically strategic character**, and so much for some countries that it acquires political significance; it attracts a **high level of public interest** since in many countries the resources or infrastructure are ultimately owned by the 'state', and perhaps most obviously of all to a lawyer, the amounts of money at stake when disputes arise are often very large. Few if any of these features make energy unique but the combination of them perhaps does. Civil society groups have also been quick to note the public interest element in human rights and environmental aspects of certain energy-related disputes.

Some of us have decided to explore the question of whether arbitral disputes for the energy sector (understood in the widest sense to include fossil fuels, renewables and the infrastructure required to manage them) would benefit from having a set of specialist rules. This has been the first task of a new centre established in 2013 jointly by the Scottish Arbitration Centre and the Centre for Energy, Petroleum and Mineral Law and Policy at Dundee (UK). The International Centre for Energy Arbitration (ICEA) initiated an information gathering exercise, involving a questionnaire, addressed to its contact base of several thousand parties, including many corporate users. Special treatment or separate dispute settlement systems of some sectors have been discussed under fragmentation and uniformity issues of ISDS. Our research will not only provide an overview of private parties' views on ISDS but is also intended to contribute to the debate on these discussions. **It starts with the assumption that one possible conclusion is that no special rules are required or that only minor adaptations to existing sets of rules available to parties are desirable.**

Two Drivers

The questionnaire results are still being analysed and a full report will be available in 2015. In the meantime, we thought it might be useful to share with you our initial thoughts and preliminary findings about why we think the exercise is worthwhile. At its most basic level, there are two drivers. **Firstly, like all regional and national arbitral**

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

centres, the Scottish Arbitration Centre looks closely to its base to ascertain its strengths in a context where London is an established and world-leading centre for the settlement of commercial disputes. Energy is an obvious point of focus for the added value of an institution that is based in Scotland. Apart from oil and gas, Scotland has substantial resources of renewable energy such as wind.

A second driver is the existence of a specialist energy educational centre at the University of Dundee, which has attracted thousands of students from around the world since it was established in 1979. Apart from an alumni network which spans the globe, the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) has a network of almost 100 practitioners in its Global Faculty, and around 3,500 alumni. Of course, within the growing field of arbitration research, other universities have been active already, often partnering with law firms and/or accounting practices.

Phase One of ICEA Research

The main activity so far is our questionnaire, a multiple choice form with a consultation period of around three months. The longer term aim is to use the findings to draft dispute resolution rules for the energy industries if this appears desirable and appropriate. Among the respondents to the questionnaire are exploration and production companies, construction and engineering firms, energy traders and service companies, transportation and logistics specialists, and providers of legal services to the sector.

The kind of knowledge about dispute resolution that it focusses on includes contractual provisions for mandatory cooling off periods, high level negotiation and mediation; attachment of sanctions such as restrictions on recoverability of costs, when mandatory pre-action procedures are not followed and users' priorities. In the latter category, we are seeking to find out what degree of importance is given to factors such as: the expertise of the decision-maker; neutrality; confidentiality; the enforceability of the decision; flexibility of the procedure; speed; cost; recoverability of expenses; and the finality of the decision.

Specifically with respect to arbitration, users will be sharing with us their priorities about factors they consider as important when choosing a seat. The list of priorities includes: the reputation of local courts for probity and incorruptibility; the attitude of local courts towards arbitration; suitability of local arbitration act; transport links; appropriate venues for arbitration hearings; availability and reputation of local arbitrators; reputation of local lawyers; availability of local expert witnesses and cost; party to the New York Convention and experience of local counsel with arbitration. In moving forward with the design of a dedicated set of rules, the research will draw on findings that result from users' priorities about features such as nationality of arbitrators; ability of the parties to nominate an arbitrator to the tribunal; fixed time-scales for the delivery of an award and procedures for the expedited appointment of a tribunal.

Obviously, in all of this coverage of items that are familiar to an arbitration process, we shall be looking to identify specific features that are unique to or unusually important in an energy dispute. Initial feedback has encouraged us to believe that we can build on this early input and contribute to the ongoing body of research into arbitration. Among the features that have been noted in our results to date are: **the strong preference that energy practitioners have for high-level negotiation at the early stages of a dispute; the very strong preference among all parties for confidentiality, and the clear preference for arbitration as a form of dispute settlement** but perhaps surprisingly for the energy sector, the robust performance of **mediation as a second choice**. We are analysing the data further in relation to sector, and to in-house and external counsel.

At present our target audience for the questionnaire has been largely located in the private sector, rather than governments. Clearly, governments, state companies or sub-national entities often figure especially as respondents and we want to take this into account. Indeed, perhaps no other economic sector provides such fertile ground for tensions between states and foreign investors. This is one of the subjects that encourages us to believe that this research project will have several stages to it and will yield outcomes which we shall be very happy to share with colleagues in the global arbitration community.

[i] The original version of this document was written by Professor Peter D. Cameron, University of Dundee, CEPMLP and Co-Director ICEA; Andrew Mackenzie, Chief Executive, Scottish Arbitration Centre & Brandon Malone, Scottish Arbitration Centre and Co-Director, ICEA. It was revised by Ozge Varis, University of Dundee, CEPMLP, PhD. Candidate for the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead, 2015.