INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Arbitrating Energy Disputes: Hot Topics

Commission(s) in charge of the Session / Workshop:

International Arbitration, Energy and Environmental Commissions

Munich 2016

Catrice Gayer, Heuking Kühn Lüer Wojtek, Düsseldorf, Germany
Marc Krestin, Linklaters LLP, Amsterdam, The Netherlands
Pablo Cubel, Cuatrecasas, Gonçalves Pereira, Valencia, Spain
Lucy Gordon, MME Legal AG, Zurich, Switzerland

29 April 2016

DISCLAIMER

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter: "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute? Do you see arbitration clauses in the agreements executed in the development of power plants? Do you normally include arbitration clauses in EPC and O&M Contracts? Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package? What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?[1]

All countries reporting on this question affirm that arbitration is the preferred dispute resolution method concerning long-term contracts in the energy sector and that arbitration agreements in EPC and O&M Contracts are (quite) common practice. According to the statements made, arbitration is preferred over state court proceedings mainly because of its neutrality, flexibility, speed, and the possibility to appoint arbitrators with a certain expertise and confidentiality.

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

In the majority of the reported countries, parties use recourse to institutional arbitration more frequently than to ad hoc proceedings. Also in the energy sector, specialized institutions such as the Hungarian Energy Arbitration Court have been constituted to facilitate and improve proceedings. Institutional arbitration is often judged to be more suitable. But also ad hoc proceedings are seen as a material part of arbitration and should not be ruled out, since in some cases they can be more appropriate.

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

The majority opinion in the reporting countries tends to be that international disputes are of such complexity that no individual would be able to master all possible fields that could be involved. As all arbitrators have a certain expertise and have different qualifications, a choice can be made on a high level. Most arbitrators would moreover be able to acquire the necessary knowledge to solve the problem. Assistance for further in-depth knowledge could be found in expert opinions.

[1] Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

According to the countries responding, arbitrators with a non-legal background are not very common. If arbitrators are appointed who are not trained in law, they can enhance certain discussions.

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines 2014") states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that "The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

It seems to be common understanding in the countries reporting that the circumstances laid down in the relevant provisions of the IBA Rules are helpful guidelines, but do not have to be interpreted as a presumption of bias when they are present. Switzerland reports that Swiss judges in case of a challenge would consider the circumstances of the Orange List to be present. In Hungary, the Energy Arbitration Court has provisions and lists similar to the IBA Rules, but there is little public information on the circumstances under which these can be invoked by a party as an objection to the appointment of an arbitrator.

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

As to the question whether the nationality of arbitrators is a more important factor when it comes to the revision of long-term contracts than in other commercial arbitrations, most reports come to the conclusion that this is probably true. This is because long-term contracts are often revised as a result of the economic or political changes in a specific country. Some of the reporting countries, on the contrary, attribute the same weight to the factor of nationality in any arbitration.

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

Some of the reporting countries note that a revision process includes various unpredictable elements. Therefore, the parties should rather consider a settlement instead of an award. The general mindset still has not turned in favour of mediation.

Reasons for a settlement would be that a ruling by the tribunal might not live up to the expectations of the parties. Others report that parties involved would prefer settlements over arbitral awards, because they can decide which factors should be considered when adapting the formula, because a settlement can be faster and cheaper than arbitral proceedings and also because the parties themselves know best how to handle their relationship and their business.

1.5 "Price Review Clause" or Price Re-Opener Clauses"

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

All reporting countries have stated that price formulae were and are usually indexed, also to alternative competing fuels such as oil or coal. According to the Hungarian report, the historical background is that until the 2000's Russia was the exclusive gas source. Gazprom applied oil-based prices towards the importer, which then applied the same formula to contracts with its partners. This recently changed due to other competing sources and probably due to Gazprom's now greater flexibility to apply spot prices to some extent.

1.5.2 What is the difference between a "Price Review Clause" or a "Price Re-Opener Clause" in contrast to a "loyalty"- or "hardship-clause"? In your jurisdiction: Is the "Price Review Clause" a provision specialis in contrast to a general hardship clause?

Most of the reporting countries do not consider a price review provision as lex specialis to a general hardship clause. In Switzerland, the function of a general hardship clause is to cover only cases in which unforeseen events occur that fundamentally alter the equilibrium of the contract, leading to an excessive burden for one of the parties. A Price Review Clause will usually identify 'trigger' criteria which cause or permit a review procedure to be invoked, set out a procedure for arriving at the adjusted price and, in case this is unsuccessful, provide for a dispute resolution procedure. Furthermore, it provides for a description on how to apply the adjusted price under the contract. Applying the clause does not necessarily cause an excessive burden to the parties.

1.6 "Trigger events" / Significant Change of Circumstances

1.6.1 Please give examples of a simple[2] and of more complex[3] trigger mechanism.

As an example for simple trigger mechanisms, all reporting countries indicate a right to initiate periodical price reviews or the right to initiate a limited number of price reviews at a time they deem appropriate. Likewise, objective benchmarks such as the change of the reference price rather than a certain percentage are mentioned as a simple trigger mechanism. More complex trigger mechanisms may be less precisely defined.

Examples for complex trigger mechanisms were:

- The price must be reviewed in the event that any of the below in respect of the Purchase Prices listed below becomes true:
  - the justified costs and the fair margin of the Supplier incurred in relation to the performance of the Agreement are not reimbursed;
  - the fuel costs of the Buyer cannot be reasonably built into the [output] prices;
- "[…] if at any time either party considers that economic circumstances in [country] beyond the control of the parties, while exercising due diligence, have substantially changed as compared to what it reasonably expected when entering into this Contract […]";

or

- "The revision of the price shall consist in adapting it in a reasonable and fair manner to the economic circumstances then prevailing on the imported Natural Gas Market and on the market for the other imported energy supplies competing with this production in [...] The parties shall take into account the individual characteristics of each of the above products including the quality, the continuity of deliveries, the production and transportation costs, etc. […]"

1.6.2 Does any definition of the term "significantly" exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

The term 'significantly' exists in all reporting countries and its meaning has to be drawn from case law. It is used in statutes, but often with a differing meaning, so that case law is needed to reliably assess the situation. It is often understood as exceeding the normal or expectable value.

2 E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

3 E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed[4]:

In most of the countries reporting, to prove the significance of the change a claimant would have to adduce evidence regarding the change of economic circumstances (e.g. unprofitability), changes in law, structural changes of the underlying market or that the price formula no longer reflects the market as it was intended before.

1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?

All countries report that the question whether the requirement of a significant change is fulfilled was a question of law as well as a question of fact if the curial law was the substantive law of their jurisdiction and/or if the place of arbitration was in their jurisdiction.

1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 ("IBA Rules") a party may rely on a "Party-Appointed Expert" or the arbitral tribunal may appoint an independent "Tribunal-Appointed Expert". What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?

In the countries which have reported on this question party-appointed experts are more frequently chosen than tribunal-appointed experts. This is despite the fact that all reporting countries were civil law countries.

1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the "translation" of a decision into a new price formula possible/desirable?

All countries reporting regard the use or appointment of consultants by the arbitral tribunal as possible. Whether it is also desirable is disputed under the responding countries.

1.7 If the "Price Review Clause" or the "Price Re-Opener Clause" does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

In Switzerland, clausula rebus sic stantibus provides for the unenforceability of a contract due to fundamentally changed circumstances. The prerequisite is that there is a subsequent change of circumstances, serious disruption in equivalence, no

[4] E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative completing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

possibility of foreseeing/avoiding the change of circumstances and an absence of contradictory conduct by the requesting party. In Hungary, Section 6:192 of the Hungarian Civil Code sets requirements for the revision of price formulas in the absence of a stipulation by the parties in the clause. The prerequisites under this provision are similar to those of the clausula rebus sic stantibus in Switzerland. The parties must be in a long-term relationship and circumstances that have occurred after the conclusion of the contract harm one party's lawful interests. The change in circumstances must not have been foreseeable at the time the contract was concluded, the party harmed must not have caused the change and it cannot be regarded as a normal business risk.[5]

1.8 Confidentiality

1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?

Most reporting countries came to the conclusion that a claimant would most likely have to disclose sensitive business information to prove that the price formula needs to be adapted. A claimant would probably have to show that retail prices are such that the sourcing price would make it impossible / harmful to market the gas or it could rely on end user prices or on upstream /midstream market developments leading to a significant alteration of prices. Thus it would have to reveal sensitive business information or business secrets to substantiate its claim. As mentioned by the Swiss report, the parties might have to agree on how to treat sensitive business information to increase the level of protection. The tribunal could also contribute by taking measures it deems appropriate to assure the highest level of protections possible.

1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt

[5] Section 6:192 of Act V of 2013 on the Civil Code

"[Amendment of contract by the court]

(1) Either of the parties shall be entitled to request to have the contract amended by court order if in the long-term contractual relationship of the parties performing the contract under the same terms is likely to harm his relevant lawful interests in consequence of a circumstance that has occurred after the conclusion of the contract, and:
   a) the possibility of that change of circumstances could not have been foreseen at the time of conclusion of the contract;
   b) he did not cause that change of circumstances; and
   c) such change in circumstances cannot be regarded as normal business risks.

(2) The court shall have powers to amend the contract as of the date it has determined, at the earliest from the date of enforcement of the right to amend the contract before the court, in a manner to ensure that neither of the parties should suffer any harm in their relevant lawful interests in consequence of any change in the circumstances."

arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party's request to produce?

Several reports indicate that document production is accepted as common practice in international arbitration. It appears that the approach to document production varies with the legal system. In some places, for example Switzerland, arbitrators will be rather cautious in admitting extensive document production requests and certainly handle the question regarding relevance of the requested information rather strictly. In some reports it is also stated that arbitration is already confidential itself so that additional confidentiality was not needed.

1.9 Scope of arbitral tribunal's mandate to revise the price formulae

1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal's power to change/revise the price formula be specifically mentioned in the contract? If not, can arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

Powers of the tribunal regarding amendment of contract terms also vary from country to country. As for Switzerland, the remedy available pursuant to Swiss case law is the clausula rebus sic stantibus (for its requirements see above section 1.7). Section 6:192 of Act V of 2013 on the Civil Code of Hungary allows for contractual amendments. A price formula can be revised in Hungary when the price review clause allows a revision of the formula and the claimant has requested it.

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

Most countries report that price formulas are usually linked to benchmarks such as existing indexes or the prices of the market for alternative sources of energy, which offer a point of orientation for the amendment of price formulas, but that price revision is not the only disputed element under long-term agreements. If the mandate is limited, state courts might have to be addressed, as reported by Switzerland. On the other hand, the parties maintain predictability with regards to the scope of arbitration.

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks, but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary "tools" (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have "res judicata effect"?

According to most of the reports, ascertaining an entirely new price formula involves extensive information gathering. Countries reporting mentioned that evidence of the

market or contracts concerned and the relationship between the parties as well as expert evidence concerning the price based on that evidence will be needed. This would lead to time-consuming proceedings. Furthermore, due to the complexity the tribunal might exceed the parties' suggestions and pleadings and in the end ascertain a formula not fitting their expectations. In Switzerland, the res iudicata effect is limited to the conclusions of the award.

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

All of the reporting countries are signatories to bilateral investment treaties (BITs), with Germany being the first state to have signed a BIT and leading the race (amongst the reporting countries but also more generally) with approximately 140 BITs concluded (around 130 of which are in force). Switzerland comes second with 124 concluded BITs, of which 120 are in force and Spain is in third place with 89 BITs concluded, of which 72 are in force[6]. Finland (82 concluded BITs, 65 of which are in force), the Ukraine (75 concluded BITs, 72 of which are in force), Sweden (69 concluded BITs, 66 of which are in force) and Greece (43 concluded BITs, 39 of which are in force) also have a significant array of BITs in place.

2.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

The dispute resolution mechanisms found in the BITs of the reporting countriesvary, with some of those BITs allowing investors to initiate arbitration proceedings under the ICSID, the ICSID Additional Facility or the UNCITRAL Rules (and more rarely under the ICC Rules). The majority of the BITs of the reporting states allow investors to initiate proceedings either before the domestic courts of the respective host state or before an arbitration tribunal. Some of those BITs require investors to initiate court proceedings for a certain period of time before initiating arbitration proceedings. Others require investors to attempt to resolve disputes amicably before submitting them to arbitration .

Explicit fork-in-the-road provisions are rare, while the majority of BITs of the reporting countries that provide for proceedings either before a state court or an arbitral tribunal do not expressly state that the investor's choice to submit a dispute to the state courts or to arbitration will be final. However, in investment treaty cases it has frequently been decided that forum-selection clauses in BITs should be interpreted as fork-in-the-road provisions.

---

6 The Spain – Bolivia and the Spain – South Africa BITs were terminated in 2012 and 2013 respectively, although the investments made prior to termination will be protected under these BITs for a 'sunset' period of 10 years (i.e. until 2022 and 2023 respectively).

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

It seems that, in the majority of the reporting countries, no cases have been initiated by foreign investors against the host states before their respective domestic courts. The only reporting countries where state courts had to decide on claims of (foreign) investors against the respective country would be Germany (with the Vatenfall claim being pending before both the Constitutional Court as well as in arbitration proceedings on the basis of the Energy Charter Treaty) and the Ukraine (with several cases initiated by foreign investors in Ukrainian state courts under BITs).

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

In Germany, the Vatenfall claim is still pending before both the Constitutional Court and in arbitration, with no certainty of outcome.

In the Ukraine, in 2013 an American investor filed claims against the country in an administrative court in the territory of Crimea with reference to the US-Ukraine BIT. The investor claimed that penalty measures imposed on its subsidiary were in violation of international obligations undertaken by the Ukraine. The court of first instance in that case ruled that the investor failed to prove that Ukraine violated its international obligations, which decision the investor appealed. However, a decision on appeal was never rendered as a result of the occupation of Crimea.

Another case was initiated by a foreign investor against the Ukraine in July 2015. A British legal entity filed claims for recovery of more than £8.5 million, alleging expropriation of its investment in the Ukraine, namely monetary funds and immovable property of the company Kherson Airport LLC. Both the courts of first and second instance ruled in favor of the Ukraine, noting that the investor had purchased its share in Kherson Airport LLC from a person with no rights over the property. The case is currently pending before the High Commercial Court of Ukraine.

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

All reporting countries have stated that they have signed and ratified the ICSID Convention.

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a

certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

The majority of the BITs concluded by the reporting countries require investors to try to reach an amicable settlement with the respective host state before initiating arbitration proceedings. Usually, such so-called cooling-off period is set at 6 months with some BITs limiting said period to 3 months and certain others requiring 12 months of amicable settlement discussions.

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

There have not been many investor-state arbitrations initiated against the majority of the reporting countries. However, on the basis of existing arbitration cases, and also more generally, it can be stated that the advantages and disadvantages when choosing between ICSID, SCC, ICC or ad hoc arbitration proceedings (usually under the UNCITRAL Arbitration Rules) must always be assessed on a case-by-case basis.

It is perceived that one of the main advantages of the ICSID Convention is the obligation of the national courts of Contracting States to the ICSID Convention to recognise and enforce ICSID awards as if they were final judgments of a court in that state.

Compared to ICSID arbitration, the main advantage of SCC, ICC or ad hoc UNCITRAL arbitration proceedings is that these latter institutional arbitration rules provide for a less stringent jurisdictional test. While ICSID arbitration requires a so-called "double-barreled test", meaning that that the 'investment' in question must be covered by both Article 25 of the ICSID Convention as well as the applicable BIT, the SCC, ICC and UNCITRAL Arbitration Rules do not contain any such additional jurisdictional requirement. This may in turn result in lighter jurisdictional scrutiny by non-ICSID arbitral tribunals, preventing the host state from raising additional or more complex jurisdictional objections. We understand that this difference is attenuating under current investment arbitration practice.

On the contrary, the main disadvantage of SCC, ICC or ad hoc UNCITRAL arbitration proceedings lies with the fact that they are not delocalized arbitrations. Therefore, any non-ICSID award would be under judicial scrutiny, typically by the national courts of the seat of the arbitration, in annulment proceedings.

Arbitration costs and confidentiality may be other factors when choosing between ICSID or non-ICSID arbitration, depending on the different options available.

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

All reporting countries have stated that they are members of the ECT, which they have all signed and ratified. No reporting countries but Germany have exempted the ECT's provisional application prior to its ratification.

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

No reporting country has withdrawn from the ECT. All reporting countries remain parties to the treaty.

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

While only a limited amount of investment arbitration cases involving or relating to one of the reporting countries have been brought under the ECTto date, it is fair to say that it is quite difficult to establish any preference among investors because the particularities of each case generally determine the most suitable solution. However, there are certain aspects to be taken into account when it comes to choosing a proper arbitration forum.

Cases under the ECT brought against Spain seem to be mostly brought before ICSID tribunals, which could be the result of the delocalized character of ICSID arbitration, and consequently the fact that an ICSID award will not be subject to review by national courts.

As can be seen from the cases brought against the Ukraine, investors seem to frequently opt for arbitration under the arbitration rules of the SCC, mainly due to the fact that the SCC – unlike ICSID – is known for publishing only limited information on pending arbitration proceedings. Furthermore, Swedish investors also seem to naturally be very familiar with the SCC and its arbitration rules and they are likely to opt for the SCC in case of an investment arbitration against a state.

Finally, there has been a case brought by a Greek investor on the basis of the ECT.[7] Such claim was based on the Greece-Georgia BIT, as well as on the ECT. While the ECT provides for arbitration under various rules, the BIT between Greece and Georgia provides either for arbitration under the ICSID Convention or ad hoc arbitration. The case was heard together with another case,[8] in which the applicable BIT between Israel and Georgia provided only for arbitration under the ICSID

---

7 *Ioannis Kardassopoulos v. the Republic of Georgia* (ICSID Case No. ARB/05/18).

8 *Ron Fuchs v. the Republic of Georgia* (ICSID Case No. ARB/07/15).

Convention. It can be presumed therefore that the choice for ICSID arbitration was made for the purposes of procedural economy.

2.4.3 Has your country declared a reservation under Article 26(3)(b(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?

Finland, Greece, Spain and Sweden have all declared a reservation under Article 26(3)(b(i) ECT, as stated in Annex ID of the ECT. This means that the abovementioned reporting countries do not allow investors to resubmit the same dispute to international arbitration when such dispute has already been submitted to the domestic courts, to domestic administrative tribunals or to any applicable, previously agreed, dispute settlement procedure. The rest of the reporting countries (Germany, Switzerland and the Ukraine) have not declared a reservation under Article 26(3)(b(i) ECT.

2.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

When it comes to the concept of "Investor", a distinction has to be made between natural persons as investors and legal entities as investors.

With regards to natural persons as investors, the majority of the BITs of most of the reporting countries seem to apply the concept of nationality in order to determine whether such natural persons can be qualified as investors under the applicable BITs. However, Spanish BITs seem to also be using other criteria for the definition of investors, such as domicile and usual place of residence. Swiss BITs typically deny coverage to investors that have both Swiss nationality and the nationality of the other contracting state to the respective BIT.

As far as legal entities as investors are concerned, the prevailing definition in the BITs of Greece, Spain and the Ukraine allows for investment protection of legal entities incorporated or constituted in one of the contracting states to the respective BITs. Some Spanish and Ukrainian BITs also cover local companies in the host state if they are owned by nationals of the home state. Additionally, some Greek BITs require investors to have significant economic activity within the contracting states to the respective BITs.

Swedish BITs typically require legal entities to have their business seat in one of the contracting states to the respective BITs or in a third country with a predominant interest in an investor of either contracting state to the respective BIT.

Finnish BITs typically require legal entities to be incorporated or constituted within the contracting states to the respective BITs and to have a registered office or central place of administration or principal place of business within the contracting state to the respective BITs for the purposes of investment treaty protection.

With regards to "denial of benefits" clauses, these are rarely found in the BITs of the majority of the reporting countries with the exception of Spanish BITs, in which such. "denial of benefits" clauses are typically found.

With regards to the notion of "Investment", most BITs concluded by the majority of the reporting countries provide for a broad definition, defining "investments" as "any asset" or "every asset invested by investors of one contracting party in the territory of the other contracting party" and include a non-exhaustive lists of assets that are deemed to be protected investments under the respective BITs.

Swedish and Finnish BITs typically require investments to be made "in accordance with the laws and regulations of the other contracting party".

Finally, Swiss BITs usually require investments to have "characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

None of the reporting countries seem to be planning on withdrawing from previously signed BITs. However, Sweden has officially stated its willingness to do so, provided that (i) all member states of the EU do the same, (ii) such withdrawal takes place on a coordinated basis and (iii) foreseeability and protection of investors continues to be guaranteed. Sweden does not share the view of the EU Commission on intra-EU BITs, but it is nevertheless prepared to withdraw from such BITs on the basis of the abovementioned conditions.

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

In the majority of the reporting countries, there seems to be no indication that the issue of the intra-EU treaties conflict is affecting the commercial relationships among the reporting countries and between the reporting countries and third countries.

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

In principle, an adequate solution might be seeking enforcement outside the EU, wherever the host state may have attachable assets (e.g. in the United States of America, as in *Micula v. Romania* ICSID case), in order to minimize confrontation between EU law and investment treaty law at the national courts' level.

As far as domestic courts of the EU member states/reporting countries are concerned, they seem not to have ruled in enforcement proceedings concerning an award rendered in an intra-EU controversy to date.

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

No adverse investment treaty awards have yet been rendered against the majority of the reporting countries. The only reporting countries against which adverse investment treaty awards have been rendered are Spain and the Ukraine.

The only investment case in which an award has been rendered against Spain is *Emilio Maffezzini v. Spain*. In that case, an ICSID arbitral tribunal found Spain liable for breaches of Article 3(1) (non-impairment of investments) and 4(1) (fair and equitable treatment) of the Argentina-Spain BIT of 1991.

Spain was ordered to pay ESP 57,641,265.28 plus interest to the claimant investor. Payment was made voluntarily by Spain some months later: this was done by forwarding the award to SODIGA, a venture capital company founded by the Regional Government of Galicia, whose actions were attributed to the state under international law as breaches of the BIT. SODIGA included the amount of the award in its budget and made payment to the Argentinean investor.

The Ukraine has complied voluntarily with the award in *Joseph C. Lemire v. Ukraine* awarding the investor compensation in the amount of $8,717,850. Other adverse awards were complied with upon final judgments in enforcement proceedings or are still being challenged by the Ukraine before relevant state courts.

2.9 To what extent have local courts been supportive of investment treaty arbitration?

In general, the courts in all of the reporting countries have been very supportive of arbitration generally. However, in the majority of the reporting countries, domestic courts have to date hardly encountered issues related to investment treaty arbitration proceedings.

Relevant case law can be found in Spain, where in 2009, the claimant in the *Sempra Energy International v. Argentina* ICSID case attempted to obtain provisional measures to secure payment of a $128 million award plus interest in its favor in several jurisdictions while a request for the annulment of that award (submitted by Argentina) was pending before an ad hoc committee. On July 31, 2009 the Court of First No. 83 of Madrid denied jurisdiction to hear the claimant's request on provisional measures. An appeal against this decision was ultimately dismissed by the Provincial Court of Madrid on July 22, 2010, after the award had been set aside in its entirety by a decision of the ad hoc committee.

In another case, on March 6, 2013 the Court of First Instance No. 101 of Madrid granted leave for enforcement against the Republic of Chile for an award rendered in

Víctor Pey Casado and President Allende Foundation v. Republic of Chile ICSID case without requesting the submission of any previous exequatur for the award, as provided for by Article 54(1) of the ICSID Convention. The Court of First Instance finally ordered the seizure of Chilean assets in Spain worth more than € 3 million.

In Sweden, the domestic courts have been very supportive of investment treaty arbitration in general.

Finally, in the Ukraine, an issue that has arisen relates to the domestic rules pursuant to which the same procedure is in place for the recognition and enforcement of both commercial awards and investment awards, even if the latter are ICSID awards, which could potentially lead to problematic situations.

3. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

3.1 Legal Framework

3.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc?

All reporters have coincided on the following. The legal framework is not composed of a single law, but of myriad heterogeneous legal instruments. Most of the regulation was passed in the 2000s decade. Some countries sooner, such as Germany and Spain, and others later, such as Finland or Ukraine. The mechanisms used to foster renewable energy projects are similar. Most countries reported a feed-in tariff mechanism. This feed-in tariff varied in the reporting countries. Differences mainly occur in the amount of the feed-in tariff, the number of years during which the owner can benefit from it, and the potential decrease of the feed-in tariff depending on factors such as technical progress and cost reduction. To a lesser extent, countries also use additional support mechanisms such as the so-called green certificates, tradeable certificates of renewable origin, customs and VAT exemption, and a favorable tax treatment. Poland also establishes an obligation for certain obliged energy companies to purchase electricity from renewable sources. Most countries involved have created an administrative regulatory institution, which is usually responsible for regulating network operations and the electricity market.

3.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

Except for Finland, the regulation in the rest of the reporting countries has been unstable. There have been many changes to the regulations, some of which have been considerable. This is unquestionably a highly complex legal environment. So far, changes have affected not only the regulatory procedures for developing and operating a power plant, but also the supporting mechanism. Spain, for instance, introduced restrictive measures in 2010 (limitation of payable operational hours) and 2012 (7% levy on power generation), and in 2014 it substituted the old system for a

new one that (i) entitles producers to receive a specific remuneration that caps the return on investment at a certain rate, and (ii) is subject to a long list of remuneration parameters subject to review every three and six years. Between 2014 and 2015, Ukraine (i) cancelled VAT and customs duty exemptions, (ii) significantly reduced its corporate income tax favorable treatment, and (iii) significantly reduced the feed-in tariff (55% for solar energy and 50% for other technologies). Poland has recently approved a change to its Act on Renewable Energy Sources and Act on Energy Law, which will come into force on July 1, 2016. It is worth noting that this new regulation will introduce a support system based on an auction process where the lowest price offered wins, and for which the bidder will be required to pre-qualify and meet certain requirements. Poland it is currently going through the transitional period.

3.1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

Some countries have reported a single legal framework (Finland, Italy, Spain and Ukraine) whereas others (Germany) have reported different schemes.

3.1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

Some countries have notified and approved such incentive schemes (Finland, Germany and Spain), whereas others have not (Ukraine). Others have notified the European Commission of them, but the result of this notification is not yet known (Italy). Poland did not notify of its initial support mechanism that applied until it approved the new one that will come into force on July 1, 2016. Poland considered its support mechanism to be state aid that did not require notification because it fell within certain categories of aid that were compatible with the internal market in application of articles 107 and 108 of the TEU. In late 2015, however, Poland notified of the new support mechanism that will come into force on July 1, 2016. The EU authorities have not yet responded to this notification.

3.1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

The EU Commission has not adopted a decision regarding all the notifications it has received. Some countries, such as Poland and Spain, have not received any feedback yet. Others, such as Finland, Germany and Italy, have only received basic observations. In the case of Italy, the EU Commission's decisions have not raised any objections against the Italian incentives to renewable energy projects, save for some measures related to power consumption and the photovoltaic section, where the EU Commission has considered that the aids were greater than the rates dictated by the Community guidelines on state aid for environmental protection.

3.2 Law-making process

3.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

All countries have reported the same message in different words. Companies and sectorial business associations lobby to influence the law-making process and formally participate in legal preparation work and by submitting voluntary statements and opinions to the relevant public authorities on the proposals for new legislation.

3.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

No agreements between the states and the renewable energy subsector appear to have been concluded. Ukraine has nevertheless passed a regulation that seems to be the result of a negotiation between the Ukrainian government and the renewable energy sector**.**

3.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

Generally speaking, any agreements that have been concluded are likely to crystallize into either an administrative instrument reflecting the contents agreed, or a purely bilateral or multilateral agreement.

In July 2015, the Ukrainian government approved a resolution to refund shortfalls to producers of electricity from renewable sources as a compromise between market players and the state.

3.3 Development objectives

3.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

With some exceptions, countries reported figures indicating that they will meet the 2020 renewable energy targets. In 2014, Ukraine passed an action plan to meet a renewable energy generation target of 11% of the gross final energy consumption by 2020. Spain reported that it is also likely to meet this target. In 2014, the EU Commission fixed Spain's renewable energy share at 15.8%, underlining that a stable framework is required to keep up with the 2020 objectives. In Italy, the most recent government report is from 2015 and states that, at the end of 2014, Italy reached the target assigned by the EU Directive of 17.1% of the final power consumption covered by renewable sources. In Finland, the current regulation will enable it to

achieve the 2020 targets. The main scheme Finland uses to promote the generation of electricity by wind, biomass and biogas is a feed-in tariff. The government has favored the development of offshore wind projects and wind projects in harbor areas, and estimates that wind production in 2025 will be 9TWh, the target for 2020 being 6TWh. The Finnish government has set some other noteworthy objectives. The transport sector will have a renewable energy sources target of 20%, instead of the 10% established by the EU. And it has established a 25MW target for the use of forest chips in the production of electricity and heating by 2020. The Polish report also considers that Poland will meet its target, providing a figure of 15% in 2015. Germany also seems to be ahead of its required goals.

3.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

All countries have fostered the proliferation of renewable energy projects and many have taken two kinds of measures: legislative measures and institutional promotion. Some legislative measures also focus on related areas such as energy efficiency and the building sector, which indirectly foster the proliferation of renewable energy.

3.4 Grandfathering policy

3.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

Some countries, such as Germany, include transitional provisions to safeguard investments. Changes introduced regarding remuneration of plants have not applied to previous plants. Poland has a grandfathering provision in its constitution and in its civil code preventing regulations from having retroactive effects unless they result from their wording. It is worth noting that none of the main Polish energy regulations includes such retroactive effects.

Other countries, such as Finland, Italy and Spain, do not have an equivalent protection. In these countries, the new law establishes how the amendments affect the relevant existing operators and the general sense is that this new law may impinge on preexisting plants.

In Spain, the Supreme Court has determined that national producers do not have an enduring right to an unaltered remuneration regime because no legal obstacle exists for the government to modify the remuneration, as long as it preserves a reasonable profitability. No grandfathering policy has been endorsed from the perspective of national case law. In Italy, the Constitutional Court is currently dealing with a case involving the compatibility of the law that reduced the feed-in tariff to plants that were already producing energy. In 2015, the Italian government approved the addition of a so-called 6.5% Robin Hood tax to corporate income tax for companies operating in the energy sector. The Constitutional Court declared this tax unconstitutional, but maintained its effect until the declaration was passed.

3.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

In Germany, the only country reported to include (but not always) transitional provisions to safeguard preexisting plants, each regulation should contain its own grandfathering provision. Otherwise the most recent act would apply.

3.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

Yes. Most countries have reported considerable changes. Changes in Ukraine mainly derive from the country's unstable political situation. Nevertheless, the feed-in tariff was unsustainable and probably lacked sufficient economic grounds.

In Spain, there has been a profound change to the regulation, mainly as a result of defraying the public expenditure and tackling the tariff deficit. While Spanish legislation requires the government to set retail consumer tariffs that recover regulated costs, including generation costs, Spain has consistently set retail consumer tariffs that recover less than the total costs. Italy is also in the same situation. The government approved a new law in 2011 and a package of decrees in 2014 that had the practical effect of reducing the feed-in tariff and postponing payment. The reduction of the feed-in tariff has been recalculated with effects as of 2015. There are three options: (i) extending the feed-in tariff period from 20 to 24 years so that the shorter the remaining periods, the higher the reduction of the feed-in tariff; (ii) reducing the feed-in tariff for an initial period, taken from the 20-year term, and subsequently increasing the feed-in tariff by the same amount previously reduced; and (iii) reducing the feed-in tariff over the 20 years with a cut-off that depends on the plant's power capacity.

In Finland, the feed-in tariff scheme for wind developers has been closed to new investors because the ultimate limit for aggregate capacity for which the feed-in tariff may be granted has been nationally achieved.

3.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

Most changes have been justified on the basis that the economic scheme was not sustainable and that the cost of production and operation of the plant had decreased.

3.5 Dispute resolution

3.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

The situation is diverse. In Germany, Poland and Ukraine there are no pending claims before the state courts. In Finland, the state courts and arbitral tribunals do

not have competence to consider changes in the regulations. Claims are not publicized or recorded.

In Italy and Spain, the situation is rather contentious. In Spain, there are approximately 350 claims filed and pending before the Supreme Court. On an international level, 23 investment cases have been filed before the ICSID, 4 before the Arbitration Institute of the SCC and 1 under the UNCITRAL Rules of Arbitration. In Italy, one case has been brought before the ICSID, but reporters estimate that many more are planned. It is worth noting that Italy withdrew from the Energy Charter Treaty in January 2016, despite being bound by so called sunset provision of article 47.

3.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

Two countries have reported final decisions by state courts. In Ukraine, local courts have already ruled that the reduction of the feed-in tariff was contrary to applicable law and obliged the regulator to consider a compensation. In Spain, the state courts have decided that changes in the law may affect preexisting plants to the extent that the economic regime of a preexisting plant, despite being modified by the new regulations, ensures the owners of the plant a reasonable profitability for the plant's technical characteristics.