International arbitration and energy disputes
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Abstract:
Arbitration is currently central to the fabric of settling international energy disputes, whether in its commercial or its investment modes. When arbitration is applied to energy disputes, it needs to consider the presence of certain distinct features that can influence the arbitration process. This article identifies and examines eight such features, such as its complexity, scale, duration of projects, their cross-border character, market volatility, strategic concerns, asymmetry, and the pervasive roles of the state. It notes the various efforts at reform of energy arbitration, it argues that such features are likely to strongly influence any regime that evolves from the present one.

Key words: Arbitration, energy, disputes, treaty, contract, state.

1. INTRODUCTION

Legal scholars have sometimes asked themselves if a particular economic sector or industry exhibits features in its approach to settling disputes that are unique to that sector or at least are shaped by the sector’s specific features. If they turned to disputes arising from the energy sector, they would immediately see that where they have a dimension that is not purely domestic, the parties have a strong preference for arbitration as the means of settling their

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1 I am grateful to Laurence Shore and the late Daniel Behn for their comments on an earlier draft of this paper, and to my colleague, Ernesto Bonafe, for his suggestions. Responsibility for the final text is my own.


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disputes, rather than having recourse to the relevant national courts. This article will identify and critically assess the features of international energy arbitrations that arise out of transactions, projects, and operations in or related to the energy sector. It seems timely to do so as public policy around the world grapples with the challenges of Net Zero goals. This rapidly evolving process is unlikely to prove linear or consistent among the nearly two hundred nation states it involves. Indeed, it is likely to lead to greater volatility among the legal regimes that support international energy transactions, projects and operations, a context in which disputes may well proliferate in the coming decade.

2. SETTLING DISPUTES IN THE ENERGY SECTOR

Energy disputes with an international element have yielded awards that are often influential and a source of much comment. To date, there have been several indicators of this influence. The one found most often is a volume-based indicator: that is, by calculating the proportion of known disputes concerning different kinds of energy vis-à-vis the total number of known disputes, usually relying on data from an arbitral institution. Statistics regularly appear from ICSID, the ICC and other distinguished bodies that confirm a relatively high proportion of disputes that originate from this sector of the international economy: among the investor-state cases before ICSID, those concerning energy amount to around 46 per cent of the total, even without the inclusion of energy-related cases in sectors such as those in construction, transportation and finance. Another indicator of influence is jurisprudence-based: the propensity of energy disputes to generate individual awards or groups of awards and decisions that have an impact on jurisprudence in the arbitration world generally. Early examples of this impact were the Aminoil and Libyan oil cases from the last century. An indicator of attention or comment rather than impact on case load or legal doctrine is the

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3 ICSID Caseload - Statistics (2022-2), 12. The figures for Fiscal Year 2022 represent new cases registered. Year-on-year the statistics vary but with respect to the share accorded to the two energy categories, electricity/energy and oil/gas/mining, the percentage is consistently in the low to mid-40s. By comparison, the ICC receives about 19 percent of its total caseload from the energy sector, with construction being the only larger sector at 23 percent (2017 figures, from the ICC Dispute Resolution Bulletin 2018, Issue 2: ICC Practice and Procedure, ‘Extract’, at p 61).

4 Texas Overseas Petroleum Co (TOPCO) v Libya, 17 ILM (1978); The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL), Final Award, 24 March 1982, 21 ILM 976 (1982). I have discussed these (and other early cases) in Chapter 4 of my book, International Energy Investment Law: the Pursuit of Stability (2021), 140-181. A notable feature of these contract-based awards is that they preceded the advent of BITs.
scale factor that is evident in some energy disputes. The controversial award in the Yukos case of around $50 billion against the Russian Federation is one example of this, being the largest award ever made in terms of quantum. There are other examples of very high-value awards in energy disputes. Among groups of influential cases arising from similar fact-patterns, there are the clusters of arbitrations on utility pricing arising from default by a sovereign state (Argentina/gas and electricity utilities), realignment of state energy policies (Venezuela/oil and gas assets), changes in policies on support for renewable forms of energy (Spain and Italy, mostly), or the various waves of changed circumstances that have triggered waves of gas price arbitrations. Whichever criterion is applied, evidence of the wider impact of energy disputes on international arbitration is considerable.

Some forms of energy have had a greater impact on international arbitration than others. To date, the hydrocarbons sector (oil and gas) has generated by far the most arbitrations of any form of energy, whether the arbitrations are commercial in character (involving a dispute between commercial parties) or investment treaty based (in which one of the parties is a state) or indeed between states. Within the hydrocarbons sector, there is a subset of highly influential cases involving the repudiation of sovereign obligations to pay for energy products or services. The controversial award in the Yukos case of 2006 is one example of this, being the largest award ever made in terms of quantum. There are other examples of very high-value awards in energy disputes. Among groups of influential cases arising from similar fact-patterns, there are the clusters of arbitrations on utility pricing arising from default by a sovereign state (Argentina/gas and electricity utilities), realignment of state energy policies (Venezuela/oil and gas assets), changes in policies on support for renewable forms of energy (Spain and Italy, mostly), or the various waves of changed circumstances that have triggered waves of gas price arbitrations. Whichever criterion is applied, evidence of the wider impact of energy disputes on international arbitration is considerable.


7 There are many cases that arose from Argentina’s default: for example, CMS Gas Transmission v Argentina, ICSID Case No ARB/01/8, Award, 12 May 2005; Enron Corporation Ponderosa Assets, LP v Argentina, ICSID Case No ARB/01/3, Award, 22 May 2007; L&G Energy Corp and Others v Argentina, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006; Sempra Energy International v Argentina, ICSID Case No ARB/02/16, Award, 28 September 2007; BG Group plc v Argentina, UNCITRAL, Final Award, 24 December 2007; National Grid plc v Argentina, UNCITRAL, Award, 3 December 2008.

8 Among the many cases, the better known are Phillips Petroleum company Venezuela Limited, ConocoPhillips Petrozuata BV v Petroleos de Venezuela SA, ICC Case No 16848/JRF/CA (C-16849/JRF), Final Award, 17 September 2012; Mobil Cerro Negro Ltd v Petroleos de Venezuela SA and PDVSA Cerro Negro SA, ICC Case No ARB/15415/JRF, Final Award, 23 December 2011.

9 Among the six or seven dozen cases, examples include: Charanne and Construction Investments v Spain; Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, Case No 062/2012, 21 January 2016; and Blusun SA Jean-Pierre Lecorcier and Michael Stein v Italian Republic, ICSID Case No. ARB/14/3, Award, 27 December 2016.

10 There is an extensive literature on gas price arbitrations and the background to them. Its value lies in the fact that few of these commercial awards are publicly available. For example, James Freeman and Mark Levy (eds), Gas and LNG Price arbitrations (2020, 2nd edn); Paul Griffin, ‘Principles of Price Reviews and Hardship Clauses in Long-term gas contracts’ (2017), in Liquefied Natural Gas: the Law and Business of LNG (3rd edn), 89-131.
technical, complex arbitrations concerning gas pricing, mostly commercial in character and arising from contract performance. In recent years, renewable forms of energy (wind, solar, hydropower, biomass, tidal, geothermal, green hydrogen) have in some contexts been the focus of multiple arbitrations between investors and states, mostly brought under the sector-specific investment treaty, the Energy Charter Treaty (ECT). Concessions to operate electricity networks have generated a fair number of arbitrations in the light of programmes of liberalisation in which some states opened these up to foreign investors. The nuclear sector has generated several notable arbitrations, mostly concerned with construction issues arising from delays and cost-overruns. By far, however, the energy sectors with most impact on international arbitration have been the hydrocarbons and wind and solar forms of renewable energy.

The evidence of a link demonstrating the influence of energy disputes and international arbitration is clear. The existence of a dedicated treaty for the settlement of energy disputes between investors and state in energy – the ECT - has been a way in which energy arbitrations have grown considerably in the past decade. Whether this influence is the result of anything legally significant about the production, supply and storage of energy is less clear. Many lawyers, arbitrators and scholars have asked whether there is anything genuinely special or different about an energy dispute that has implications for arbitral proceedings, and if so, what that is. This article will argue that such distinctiveness does indeed exist and will seek to demonstrate this by identifying and examining eight features common to energy disputes that can influence their resolution by international arbitration. At the same time, it seeks to provide an overview of those areas of international arbitration in which the energy sector plays a major role, both in terms of substantive impact and in terms of procedure.

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3. WHAT MAKES AN ENERGY DISPUTE?

The subject matter of an energy dispute concerns energy materials and products, energy related assets such as hydrocarbon exploration and production rights, power generation facilities, processing structures such as LNG terminals, transport or distribution facilities, or an economic activity such as exploration, generation, extraction, production, refining, storage, transportation by land or sea, transmission, distribution, trade, marketing or sale of energy materials or products. The rights and obligations at issue in energy disputes can arise from a wide range of instruments such as contracts, concessions, or licences. Where these disputes have an international character, the mode of settling them typically preferred by the parties – whether private or public in terms of their ownership and control - is international arbitration, arising from a contract or an investment treaty or in some cases, both. The spectrum is therefore a wide one, encompassing investor-state disputes, construction/industrial plant disputes, commercial disputes involving performance and price revisions and insurance disputes. Litigation and the use of courts for enforcement purposes plays an important secondary role. As yet, mediation plays no significant role in this sector.

3.1 The Energy Transition

A functional approach to definition of an ‘energy dispute’ carries the risk of underplaying two very influential social processes that have a growing impact on energy disputes. The first is the impact of what is often referred to as the ‘energy transition’, a shorthand phrase that refers to among other things public policies that combine to discourage use of fossil fuels due to their association with rising CO2 levels and favour the use of less carbon intensive forms of energy. An early impact of this energy transition is the shift in energy disputes from arbitrations overwhelmingly concerned with hydrocarbons issues to a mixture of energies that have led to disputes in international arbitration. This is a development of no more than ten years' vintage, but one that continues apace. At least two interpretations are possible of the growth in disputes about non-fossil fuel forms of energy. The fact of disputes might

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13 ECT Art. 1 (4), (5).
14 The International Renewable Energy Agency (IRENA) describes it in these terms: “The energy transition is a pathway toward transformation of the global energy sector from fossil-based to zero-carbon by the second half of this century. At its heart is the need to reduce energy-related CO2 emissions to limit climate change: https://www.irena.org/energytransition
underscore that irrespective of the energy source and indeed even when an energy source has a socially ‘benign’ character, arbitral disputes can still arise. However, it may also be interpreted as a sign that the framework of international arbitration works to support parties that seek to slow down the implementation of energy transition policies. The latter view will be discussed in section 5 below.

Although the notion of an energy transition is future-oriented, its present or short-term impact is to cast doubts upon the long-term future of hydrocarbons and invite or force a reassessment of investments under consideration or already made and partnerships already concluded. It is also responsible for an emerging category of energy and energy-related disputes as various minerals increase in value due to their role in batteries for electric cars, bringing deep-sea mining and novel, lower carbon forms of energy into the picture. We might conclude then that the shift toward less carbon-intensive forms of energy is both disruptive of traditional categories such as ‘oil and gas arbitration’ and unifying since it has impacts upon the marketability of all forms of energy, and seems likely to have this impact for some time to come. It also creates a new set of political risks arising from policy shifts, as governments take measures to promote low carbon with no prior experience of tackling this sort of problem, applying still-evolving technologies. This is a factor that is increasingly found in another major sector, banking and finance, where climate finance is growing as are attempts to combat a ‘greenwashing’ of lending practices.

3.2 The Energy Access Issue
A second aspect of energy disputes that may be overlooked in a narrow functional definition, that is, one which ignores or downgrades wider social processes, is the transformational character of energy for middle- or low-income countries. For countries that lack a diversified economic base, the development of energy, usually understood as the extractive forms of energy, carries with it the hope of rapid economic growth and the prospect of ‘catching up’ with better-off, high-income economies. For many countries this is in line with the UN Sustainable Development Goals, especially Goal No. 7 on energy access. However, there are at least two risks from this emphasis on energy resources as a panacea for lack of economic growth. The first is that it will trigger policies often characterised as ‘resource nationalism’, where a host government takes actions against investors already heavily committed to their
country to secure a larger share of the economic benefit, risking international arbitration and a breakdown in their relationship with the investor. There are many examples of this. A second and more recent risk arises from the energy transition: the host government may neglect or underestimate the need for policies that diversify the economy in the medium to long term in preparation for a possible contraction in the market for hydrocarbons, and even sooner for a contraction in the availability of finance for hydrocarbons projects.

4. THE EIGHT FEATURES OF AN ENERGY DISPUTE

Several writers have observed common features of energy disputes, although not all agree on the same features or their importance in relation to any single arbitral dispute\textsuperscript{15}. The list below can act as a starting point for an ordering of these features, as well as a brief general assessment of what they are and might entail. It is less likely that all of them will be present in a single dispute.

4.1 Overview

In summary form the list of features commonly identified in energy disputes comprises:

- The relationship at the core of the dispute has a long-term character, reflected in the term of the contracts, extending over a minimum of 20 and 30 or more years.
- The state is often a party, either directly or indirectly, via a state enterprise. Even when not a party to the relationship with the investor, it is likely to have a role as regulator, grantor of exclusive rights, and enforcer of them.
- The subject matter often has a high degree of complexity arising from industry practice, technical aspects of the energy project or valuation of assets that require the assistance of experts in arbitral proceedings, at the merits as well as the quantum stage.
- The project at the heart of the dispute is likely to be highly capital intensive, so the amounts claimed will tend to be large, and potentially so will the size of the award.
- Valuation of the assets in the dispute may be affected by sudden and dramatic market volatility.
- The dispute is often international in character, evident in the structure of the investment and locations of the parties.

\textsuperscript{15} For example, Peter D Cameron and Brandon Malone, Dispute Resolution in the Energy Sector: Initial Report from the International Centre for Energy Arbitration (2015).
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- The subject matter often has strategic significance for the state concerned.
- Asymmetry in the relationship between the parties can be reversed over time as the investor’s capital commitments are made and its vulnerability to the host state’s legislative measures increases, making stability commitments of great importance and a potential source of dispute.

Few would argue that any of the above are unique to the energy sector or parts of it. However, what may be claimed is that in the energy sector they are more pronounced and more prevalent than in any other economic sector, such as banking or construction.

4.2 Specifics

[1] Duration

Energy investments tend to be long-term in character, often with a duration of 20-25 years or more. This is a feature common to electricity concessions as much as in the remarkably high incidence of long-term contracts evident in petroleum, natural gas, power, and many energy-related mining activities. For example, in 2019 a petroleum agreement awarded in 1966 to a US oil company, American Oil, was permitted to continue in force subject to a change in form from production sharing to a so-called gross split form of contract in Indonesia. Commercial contract design is therefore challenged by the need to provide the investor with assurances that the legal instrument or package of measures makes the project viable and also allows for adjustments or termination that may be required in the light of changed circumstances at unknown points in the life of the contract. The OECD has produced a set of non-binding *Guiding Principles for Durable Extractive Contracts* which declare that such contracts need to be “anchored in a transparent, constructive long-term commercial relationship and operational partnership between host governments, investors and communities, to fulfil agreed and understood objectives based on shared and realistic expectations that are managed throughout the life-cycle of the project”.

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16 The term of a typical energy or natural resource project will normally be much longer than the term of office of the host state government that welcomed the initial investment and committed the state to its terms and conditions. Achievement of the investor’s objective is therefore vulnerable to the effects of a change of policy by a successor government, or a broader political realignment in the host country, perhaps following some dramatic economic change of circumstances, prolonged conflict or even an abrupt regime change.

[2] **The State**

The State is present as participant, regulator, and monitor or overseer, as well as protector of investments. The extremely high (and volatile) degree of public interest in most or all phases of energy activity means that the state’s presence – directly, or through one or more of its agencies - is ubiquitous. Moreover, the public interest may be concentrated on a single investment since in many countries a single hydrocarbons field, a nuclear power plant or a mine may have overwhelming importance for the national economy. A policy or legal measure may therefore be cast in general terms but in practice it may be relevant only to one or very few investments. If negative in character, it can easily appear to be discriminatory. This is exacerbated by the fact that an energy project is often legally based on a long-term contract linked to a physical location, making production or generation facilities hard to move and therefore vulnerable to discriminatory action. This pervasive role of the state is given recognition in multilateral treaty instruments such as the ECT provision on sovereignty over energy resources (Article 18) and the Chapter on Energy in the Treaty for the Functioning of the European Union (TFEU). For the investor, it creates a high level of political risk.

[3] **Complexity**

Complexity of subject matter or the technical character of knowledge in an energy dispute is a feature typically evident at both merits and quantum stages of energy arbitrations. By ‘technical’, this means more than the sort of engineering knowledge that is a familiar feature in a construction case. This can extend to industry-specific contractual practice, patterns of industry-government behaviour as well as many economic issues to do with quantum which will involve reports from experts appointed by each side. Its influence is both substantive and procedural. Energy industry practices often have a long history and may well be unfamiliar to a tribunal versed in the law but not in the specifics of commercial practice in the energy sector. This is where a role for party-appointed experts can be found, and sometimes for experts appointed by the tribunal. This need to assist or ‘educate’ the tribunal is not limited to the tribunal’s analysis of quantum or the highly complex calculations that often arise in gas pricing disputes and sometimes the geological and engineering complexities of petroleum reservoirs, for example. The reliance on expertise can extend to matters that concern industry practice,
given the widespread use in petroleum agreements of terms such as ‘good international petroleum industry practice’. The lack of standardization or limited recognition of commonly used terms means that there is scope for differences of view. The trend towards climate and energy transition policies means also that how ‘good international industry practice’ or shared industry understandings about practice are characterized will change, and in ways that are likely to increase uncertainty.


The amounts invested and correspondingly claimed and sometimes awarded in international energy cases are relatively high, and players are often large too. Irrespective of the kind of energy investment that is envisaged, from a nuclear or even a solar energy plant to an LNG liquefaction terminal or oil processing plant, the capital commitment will be significant. Expectations about profits can also be high given the very long period in which the established project can be expected to run. The Yukos award is a dramatic example of how such factors can affect the calculation of damages in a final award, amounting to around US$50 billion. In another, recent case, involving Nigeria, the interest on the award escalated from US$6.5 billion in 2013 to around US$10 billion in 2020. These amounts are untypical in the world of international arbitration, but in energy cases billion-dollar claims are common, even if damages awards are usually much less.

The investors themselves are also likely to be large, in the oil and gas, and the nuclear segments at least. Examples of large investors ranging from private companies such as Shell, Exxon and Westinghouse to state companies such as Aramco (Saudi Arabia), EdF and the China National Petroleum Corporation. For example, Shell’s capital investment in a single year reached US$25 billion. In the renewables sector, where large investment funds are...

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18 See Note 6 above.
19 More than 90 percent of energy investment is financed from the balance sheets of investors (using retained earnings from business activities, including those with regulated revenues) “suggesting the importance of sustainable industry earnings, which are based on energy markets and policies, in funding the energy sector”: IEA (2017) 13. Project finance (which involves external lenders that share risks with the project sponsor and depends on cash flows for a given asset) has a small role but is especially significant in integrated LNG projects, some oil refining projects and a growing amount of power generation investment, including the use of solar PV and wind.
frequently active, the Norwegian Government Pension Fund Global has a legal mandate to invest up to US$20 billion21.


Valuation of energy assets and behaviour by investors and states is subject to dramatic change triggered by commodity price volatility. For many years the rise and fall in the oil price was a common source for arbitral disputes, but the linkage of the gas price in many contracts to that of oil and politically created shortages of gas in 2022 have given a new aspect to this feature of volatility. Conversely, a sharp fall in price can lead to default, invocation of force majeure defences, reductions in capital expenditure plans, disagreements over obligations in work programmes and a triggering of disputes among a wide variety of parties involved in the investment chain. As an International Monetary Fund report has stated during one of the recent downturns in price: “Commodity prices are highly volatile and unpredictable, posing significant challenges to policymakers in resource-rich economies. Shocks to commodity prices are often large and persistent. Booms and busts can involve prices moving by as much as 40-80 percent for as long as a decade.”22

[6] International

Energy arbitrations can be multi-jurisdictional, with parties from different countries joining to spread risk and structuring their investments to take advantage of legal and fiscal benefits in a third country. A cross-border feature of energy investment has persisted for many decades and has an important north-south feature to it, even if that is more nuanced by south-south capital flows in the 21st century than it was two or three decades ago23. Among

23 There has been a growth of investment by entities based in China, India, Russia and the Middle East which challenges the north (and largely Western) flows of investment to the global south. However, statistics show that where such flows can be described as ‘south-south’, they remain significantly less than those from the north to the south. Indeed, UNCTAD data reveals that a significant part of the FDI between developing countries is ultimately owned by developed country multinational enterprises: United Nations (2019) World Investment
the newer forms of energy, investment in renewable sources has begun to follow a similar pattern, with capital and expertise exported from a limited number of countries and regions in response to welcoming signals from governments keen to broaden their energy mix. Here, the necessity might lack geological roots, but the economic ones are just as compelling a driver to cross-border investment. Similarly, with nuclear energy, the international aspect of the industry is less related to the uneven geographical distribution of its raw material, uranium, than the limited distribution of the necessary technical and commercial expertise, requiring multi-national consortia to be assembled for bids to construct and operate a plant. For the UK’s Hinkley Point C nuclear plant, the project required two competing state nuclear entities to develop nuclear infrastructure in a third state. Not surprisingly, enforcement and asset seizure for non-compliance with an award has taken on an international character.

The uneven spread of investment locations follows from necessity as much as investor choice. A mix of high-, middle- and low-income countries holds a large share of the world’s natural resources, including about 90 percent of crude oil reserves and 75 percent of copper reserves. This uneven distribution of resources creates a necessity for cross-border cooperation in almost all cases if economic development of these resources is to occur on a scale that brings maximum advantage to the countries concerned. Nor should it be assumed that the ‘resources model’ is the sole driver here. In an international pipeline project, such as one transferring oil from the Caspian Sea area to Turkey and beyond, the project crossed the borders of three countries, involved 78 different parties from several countries, and required 208 finance documents along with 17,000 signatures.

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Report 2019, Geneva. Whatever its scale, the south-south axis of investment has impacts on energy disputes: for example, India’s Oil and Natural Gas Corporation (ONGC) registered a claim against Sudan in 2018 to recover funds lost from an oil project when part of Sudan seceded in 2011, the first arbitration claim ever filed by ONGC against a government: GAR, ‘Indian state energy company brings claim against Sudan’, 17 April 2018.

24 The IEA statistics suggest much variation here among the different forms of energy, with overall a large proportion (90 percent) of total energy investment concentrated in high- and upper-middle income countries and regions. This category includes Brazil, Mexico, China, parts of the Middle East and some Southeast Asian countries.

[7] Strategic Concerns

National security concerns are evident in the energy sector, although these vary a great deal from one country and one region to another. They are most evident in countries with import dependence on another or others, and in M&A transactions. However, even for net exporters of energy, certain materials and data can be officially classified as a state secret couched in broad language with impacts on operations for foreign business. The energy-specific character of this feature is arguably not unique since such concerns arise in other economic sectors, such as IT/telecoms, which are central to the workings of a modern nation-state economy.

If ‘strategy’ is defined more broadly to apply to the economic role of an energy source or mix within a nation-state, this consideration may prove the source of increased tensions if that state finds itself a respondent to an arbitral claim.

[8] Asymmetry

Changing dynamics in the relationship between the investor and host state over the life of the investment make stability commitments especially important and create potential friction as the relationship evolves. As the investor’s capital commitments are made, there is a risk that the sunk character of its investment will encourage a future government to take advantage of the improved bargaining position and introduce taxation measures or regulatory changes. This is a feature much commented upon in the literature on energy sector investment and applies to many forms of energy project, large and small, where one of the parties is a state.

The other side of this asymmetry is that in almost all cases an investment will not be made until guarantees or assurances have been offered to investors by the host state through its laws and/or contractual arrangements for sufficiently long periods to allow for recovery of their costs and a pre-calculated expected gain. This gives investors – and those willing to lend funds to them – a reasonable expectation that their calculations of financial viability should prove robust over the long-term. Without a dispute settlement mechanism that allows differences to be addressed away from the national courts of the host country, any such
assurances are likely to be treated as hollow. Historically, the paradigm case of the international energy investor was the hydrocarbons company, driven by high returns, able to manage a high cost of capital and willing to tackle a high degree of price volatility. This has shifted to a more diverse group of energy investors in line with a growth in the more capital-intensive power industry, characterized by lower profitability and lower cost of capital and less market volatility, as is common among regulated assets. Yet, one of the above features has a continuing, special significance for a potential investor in calculating the risk profile of an investment. The state will nearly always have an extensive set of roles in the life of a project, as regulator, owner, and participant, either directly or through one of its agencies or through local components as are common in devolved or federal systems. For foreign investors, this often-overlapping series of roles implies a higher than usual degree of vulnerability to policy reorientations and indeed to policy inconsistency.

These eight features are not in themselves unique to the energy sector, even if collectively they have a presence in this sector that contrasts with most, and perhaps any other sector. Many of them generate legal responses, principles, and procedures applicable to the sector that are designed to mitigate the risk of a dispute emerging.

5. HOW DO ENERGY DISPUTES SHAPE INTERNATIONAL ARBITRATION?

Energy disputes have at least three main ways of influencing international arbitration. The first is to impact on the evolution of doctrine through decisions in individual cases. The second is to contribute to the development of procedure by virtue of the impact that cases with these characteristics, such as the complexity commonly found in a gas price arbitration, have on conventional procedures. For example, in many energy arbitrations the role of the expert in proceedings plays an important role, not only at the quantum stage but at the merits stage too. This is not unique to energy arbitrations, but it is so widespread in commercial and investment cases that it requires consideration. The question can also be asked if this high level of technical, financial, and industry-specific knowledge should encourage parties to appoint arbitrators with specialist knowledge. A third source of influence derives from the international investment treaty dedicated exclusively to energy, the ECT. In the past decade,
it has been the vehicle for more claims by investors against states than any other international treaty including NAFTA. With many of the awards published, this offers a still-evolving source of insight into how tribunals understand legal doctrine in relation to the energy sector. Arising from this fact of increased use, is the question whether such frequency is indicative of its potential as a tool to resist or slow down policy measures that are aimed at bringing about an energy transition.

An obstacle to an authoritative examination of this question is that many arbitral awards are still not published. Interesting cases with energy content at the ICC for example may be available only in a bare summary form. Others are not published in any form at all. A notable exception is the invaluable trove of awards from ICSID disputes, and the awards that emerge from attempts to use national courts to enforce or set aside an award. Importantly, given the very high value of many energy cases and the long-term relationships that the parties may wish to preserve, perhaps among parties to a joint operating agreement or between an investor and a host state, there are disputes that go to arbitration only to be settled by the parties. Sometimes such settlements can be reached at a very late stage, when an award has already been drafted and shared with the parties; sometimes they can be the result of negotiations that have been taking place in parallel with the arbitral proceedings. If a settlement is reached, perhaps by extending the term of a concession, offering an investor new opportunities or a migration to a new contractual relationship, the award will not be published and the settlement agreement itself will in most cases not be published either. Any research into international energy arbitration therefore faces this challenge of incompleteness in the primary source materials. One response to this problem is to tap the widest possible range of sources, from institutional data (ICC, ICSID, etc.), published awards of which there are an increasing number (including ones on media outlets such as OGEL, Investment Claims Online, and various publishers’ outlets), and summaries released by the parties or provided in specialist outlets like Global Arbitration Review, the Investment Arbitration Reporter. Another trend in this field is the published contributions of practitioners of law which, though often lacking in precise references to cases for obvious reasons, can provide valuable insights into arbitral processes.
5.1 Why Prefer Arbitration?

In the international energy industry, arbitration is the preferred mode of settling disputes. The preference will be expressed at an early stage when the investment is being structured, either in the design of a long-term contract or the choice of availability of an international treaty. The principal goal is to avoid a dependence on the national courts if the relationship is with a host state or its agent such as a national energy company, and if the relationship is with a private party, to achieve the efficiency and confidentiality benefits of arbitration as opposed to litigation. Where one of the parties is the host state or a state entity, the investor is likely to take a critical view of recourse to the national courts in the event of a dispute, questioning the independence and accessibility of domestic courts in the host state, as well as having familiar concerns with the duration and cost of litigation, the public character of the process and the adjudication of the dispute by persons who may have no familiarity with the specific characteristics of the energy business involved. For the foreign investor, the option of recourse to international arbitration means that it can counter one part of the political risk that “is within the control of the host state”\(^{26}\). At the same time, the state party will usually have little enthusiasm for submission of the dispute to the courts of another state. Whether the energy project has a predominantly commercial or investment character, international arbitration of disputes has long been the favoured instrument for settling disputes in the international energy industry. It offers moreover a promise of finality as well as predictability.\(^ {27}\)

Energy arbitrations also have a dedicated international treaty instrument, the ECT, under which many claims have been lodged by energy investors against states parties to the ECT.

\(^{26}\) TW Waelde, ‘Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, 12 Arbitration International 4, 429-466 at 432. He adds rightly that “the prospect of international arbitration can often quite effectively discourage host states against using sovereign powers for abrogating legal and contractual rights granted to an investor”.

There is no similar international treaty for construction or finance or sports disputes. The ECT exists within a framework of public international law, and energy disputes have a propensity to generate wide ranging questions about such law as well as about the interaction between treaty and contract, the principles and calculation of damages and the enforcement of awards (for example, the various cases associated with the Russian company, Yukos). Following lengthy discussions among the parties to the ECT, a ‘modernised’ text has emerged for possible approval. However, many of the respondent states in recent claims made under the ECT have expressed their opposition to the new text and have indicated their wish to withdraw from it: for example, France, Germany, The Netherlands, Poland, Slovenia, and Spain. To date, these have been states from within the EU, while the original impulse behind the ECT was to provide safeguards for investors from such states into the countries of Central and East Europe as they transitioned to a market economy. Among the arguments made by the withdrawing states, there is the argument that the protections to investors in the ECT are ones that in use by claimants if not in actual design are likely to prevent states from implementing measures to combat climate change as required by the Paris Agreement. It is hard to see how such arguments make sense unless they are part of a wider critique of the principles of international investment law and the arbitration mechanism. Despite the energy content of the ECT, its provisions rely heavily in their design on pre-established ones in international law. Their origin lies in the consent of states to such principles and to the use of arbitration by aggrieved claimants as a mode of redress. To the extent that investment is sought and promoted by states, these commitments make sense. Given the high degree of uncertainty that is present about the pace, path and parameters of the energy transition, noted in countless corporate annual reports, filings to oversight boards, and media releases, it would seem counter-productive to be withdrawing from such commitments to prospective investors at this time.

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28 This is discussed by Dr Ernesto Bonafe in his Blog at Edinburgh University Press, “The second life of the Energy Charter Treaty”: https://euppublishingblog.com/2022/10/13/energy-charter-treaty/
5.2 Procedural Impacts of Energy Specific Features on Arbitration

There are some procedural impacts of energy disputes on international arbitration that cannot be said to have roots in their energy character, but which are influential, nevertheless, and which seem to justify discussion under this heading.

An example is the role of technical knowledge. Given the importance of industry-specific practices in most parts of the energy sector, from the natural gas industry and renewables to oil and nuclear energy, there is a need to introduce expertise into the arbitral proceedings. This specialised body of knowledge can extend to evidence about energy markets, value, quality, or underlying economics, as well as quantum of damages, all typical of energy-related matters. There are several ways of doing this. The first is using party-appointed experts to assist the tribunal, although this will be done in the context of an adversarial approach to expert evidence. There is also the possibility that the tribunal itself will appoint an expert to assist it in its deliberations. The latter is however an unusual occurrence. An alternative way of introducing expertise about the energy sector is to appoint a person with expertise to the tribunal itself, or even to seek a tribunal composed entirely of persons with energy expertise. In this way, the tribunal might become less dependent upon expert evidence of varying quality. Some have even proposed a distinct set of procedural rules to govern energy disputes. It is possible to envisage such a tribunal in a commercial dispute, with gas pricing disputes leading the way. However, it is highly unlikely to be adopted in an investment treaty case where the politics of appointing a three person tribunal is likely to lead to a priority given to other, non-specialist considerations: a particular type of person will be appointed by the claimant, and similarly by the respondent as wing arbitrators, with technical expertise not being what the parties are likely to give most weight to when making their respective appointments. For the chair role, it is unlikely that technical expertise will be what the parties are seeking. The result will usually be the appointment of professional international arbitration practitioners. In such circumstances, dependence upon party-appointed experts increases.

29 B Malone and P Cameron (2015) see Note 15 above.
6. CONCLUDING REMARKS

Arbitration is currently central to the fabric of settling international energy disputes, whether in its commercial or its investment modes. Such energy arbitrations encompass disputes arising from wind power, solar energy, nuclear, oil sands and shale oil and gas, as well as electricity and infrastructure, such as offshore and on-land pipelines, grids and terminals. When arbitration is applied to energy disputes, it needs to take into account the presence of certain distinct features that can influence the arbitration process. This article has argued that there are eight of these. However, its centrality in energy disputes should not be taken for granted. Wide-ranging criticisms of the investment treaty regime have been common for many years, leading for example to the recently concluded process of ‘modification’ of the ECT. While the implications of these wider processes of reform, occurring principally in the investment treaty domain, are still very unclear for future energy disputes, it seems probable that any reform will have to adapt to and accommodate the basic features of the sector that have been identified and examined in this article.