



Dealing With Sovereigns in the Energy Sector: Some Salient Issues

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Disputes With Sovereigns in the Energy Sector: Practical Examples

Arbitral Proceedings under Bilateral Investment Treaty / Energy Charter Treaty

Arbitral Proceedings under Commercial Contract with State Involvement

Arbitral Proceedings under Host Government Contract

Arbitration under Production Sharing Agreement: Two Salient Issues

Interim Relief

Stablization Clauses

Interim Relief: Availability

Interim Measures by Arbitral Tribunal and/or National Courts

ICC Arbitration Rules, at Rule 23(2):

Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures.

ICSID Arbitration Rules, at Rule 39(6):

Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Importance of Provisions in Arbitration Agreement

Interim Relief: Freezing Orders

Purpose: prevent “*dissipation of assets*” during the course of the arbitration

Effect: defendant is ordered (1) not to remove from England and Wales assets located in this jurisdiction and (2) not to dispose of, deal with or diminish the value of any assets, regardless of location

Sanction: failure to comply places defendant at risk of being punished by criminal sanctions

Available in support of foreign court proceedings and arbitral proceedings sited outside England and Wales

Mobil Cerro Negro Ltd v PDVSA

Dispute arising from Venezuela's nationalisation of oil operations in the Orinoco belt

Three different remedies: ICSID arbitration against Venezuela, ICC arbitration under Association Agreement against PDVSA's subsidiary, ICC arbitration under Guarantee against PDVSA

On *ex parte* application, English court granted freezing order in relation to ICC arbitration under Guarantee sited in NY

Mobil Cerro Negro Ltd v PDVSA

Injunction discharged because:

No risk of dissipation of assets / urgency

In the absence of fraud, only "*just and convenient*" to grant a world-wide freezing order in case of connection with England and Wales in the form of substantial assets of the respondent located in this jurisdiction

Stabilization Clauses: Nature and Purpose

Mechanism to protect against unilateral exercise of state power to change contractual terms

Political risks in long-term, capital-intensive projects

But: not all Host States offer stabilization

Stabilization Clauses: Freezing Clauses

Example 1: Mozambique Model PSA

"The Government shall not revoke or amend the Authorisation granted to XYZ to explore for and produce Petroleum from the Contract Area without taking effective measures to ensure that such renovation or amendment does not affect the rights granted to the Contractor hereunder ... The Government will not without the agreement of the contractor exercise its legislative authority to amend or modify the provisions of this Agreement and will not take or permit any administrative action to prevent or hinder the Contractor from enjoying the rights accorded to it hereunder."

Limited or Comprehensive Scope

Some agreements protect also against new interpretations of existing instruments

Stabilization Clauses: Economic Balancing

Example 2: 2002 Concession Agreement between IOC and Egypt

"(1) In case of changes in existing legislation or regulations applicable to the conduct of Exploration, Development and production of Petroleum, which take place after the Effective Date, and which significantly affect the economic interest of this Agreement to the detriment of CONTRACTOR ... CONTRACTOR shall notify the NOC of the subject legislative or regulatory measure. In such case, the Parties shall negotiate possible modifications to this Agreement designed to restore the economic balance thereof which existed on the Effective Date. (2) The Parties shall use their best efforts to agree on amendments to this Agreement within ninety (90) days from aforesaid notice. ... (3) Failing agreement between the Parties during the period referred to above in this Article XIX, the dispute may be submitted to arbitration, as provided in Article XXIV of this Agreement."

Modern trend is towards economic balancing

Stabilization Clauses: Enforcement

Classical awards from the 1970s and 1980s (e.g., AGIP v Congo, Texaco v Libya, Liamco v Libya) confirm validity of stabilization clauses

Freezing clauses and events of targeted expropriation

Compensation or Specific Performance / *Restitutio in Integrum*?

No published awards dealing with enforcement of economic balancing provisions

Duke Energy v Republic of Peru (ICSID 2008): Applicable Law

No choice of law clause, accordingly Peruvian and international law applied pursuant Article 42 of the ICSID Convention

Stabilization clauses inherently internationalized?

Award, at para. 241: "*The DEI Bermuda LSA, as a legal instrument, is not a creature purely of domestic Peruvian law...*"

Duke Energy v Republic of Peru (ICSID 2008): Standard of Protection

Tribunal determined that the LSA in question guaranteed that:

Laws or regulations that form part of the tax regime at the time the LSA is executed will not be amended or modified to the detriment of the investor,

A stable interpretation or application that is in place at the time the LSA is executed will not be changed to the detriment of the investor; and

Even in the absence of (1) and (2), stabilized laws will not be interpreted or applied in a patently unreasonable or arbitrary manner.

Aguaytia Energy v Republic of Peru (ICSID 2008)

Investor in power transmission project complained that Peru offered certain incentives regarding the economics of the project that were not available to Aguaytia

LSA in question stated that the State undertakes to "*guarantee juridical stability*" for the foreign investor and that the agreement "*may not be amended by either of the parties individually, regardless of whether the national legislation could be eventually amended ...*"

Tribunal determined that LSA in question did not create an independent right against future discriminatory action but merely stabilized Peruvian law guarantees of non-discrimination.

Picture

Dispute resolution by arbitration outside of the country

Waiver of sovereign immunity

Protection of investment through bilateral or multilateral investment treaties

Obtain advance approvals for future Government actions



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