

The complexity, intensity of capital, long-term and cross-border nature of energy agreements and projects are the main reasons for arbitration being the preferred method of dispute resolution in the energy sector.

According to the ICC, energy disputes represented 19 per cent of the total number of cases in 2017, positioning energy as the sector that created the highest number of arbitration disputes after construction and engineering. Similar statistics are noticeable in all other large arbitration institutions. For example, 24 per cent of the recent decisions of the International Convention on the Settlement of Investment Disputes (ICSID) relate to oil, gas or mining disputes, with other energy sub-sectors, such as electricity, accounting for an additional 17 per cent.

In most countries of the world, the energy sector is still dominated by government enforcers. Southeast Europe is no different. In view of this, the neutrality of arbitration proceedings compared to national courts and the enforceability of arbitral awards in comparison with the decisions of national courts are further important reasons why parties decide to resolve energy disputes by arbitration.

The diversity and complexity of the energy sector means that this paper cannot consider all types of energy disputes that are settled by arbitration. Instead, this paper seeks to briefly consider the nature and role of arbitration on investment agreements in the resolution of energy disputes involving states and state-owned enterprises in the Western Balkans – WB6, as the number of such disputes in this region is expected to increase in the future.

All WB6 countries have concluded bilateral investment agreements (BITS) with most EU Member States, as well as with many other countries around the world. Moreover, all countries except Serbia and Kosovo are parties to the Energy Charter Treaty (ECT), the first multilateral treaty that specifically promotes investment in the energy sector.

The key rights granted to investors under BITS and ECT are: the right to fair and equitable treatment, the right to the most favourable national treatment, the right not to be expropriated without proper or fair compensation, and most importantly, the right to institute arbitration proceedings against the state in the event of a breach of contractual rights.

The right to fair and equitable treatment obliges the state with regard to investing in energy to: (i) act consistently and transparently, (ii) harmonize fair treatment, (iii) refrain from arbitrary and/or discriminatory measures, and (iv) ensure stable and fair conditions.

The right to the most privileged national treatment ensures that the host country grants the investor the same rights as investors from third countries.

The right not to be expropriated without proper or fair compensation is a right that is

particularly valued by investors in the energy sector where expropriation is a multi-year feature. Usually, under treaties, law is broadly defined to include not only direct expropriation and nationalization, but also indirect expropriation. Accordingly, regulatory measures adopted by states may constitute indirect expropriation and thus breach of contract.

To date, only three investment disputes concerning energy projects in the Balkan region have been resolved under the auspices of ICSID.

The latest settlement of this case was brought against Serbia in accordance with the BIT between Belgium/Luxembourg and Serbia regarding waste for the energy plant. In November 2018, the arbitration tribunal ruled that Serbia had to pay damages, the amount of which was not publicly disclosed, because it denied fair and equitable treatment to the Belgian waste management company for failing to implement its environmental and veterinary laws, allowing local competitors to delay cheaper animal waste without compliance with Serbian regulations (amounts requested and allocated are not available to the public).

There are currently four energy cases pending before ICSID against WB6 countries, two against Bosnia and Herzegovina and two against Albania. These cases are related to the construction of a hydroelectric power plant, a thermal power plant, as well as a renewable energy and waste energy project.