

ENERGY COMMUNITY WEBINAR SERIES

Energy Dispute Resolution

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In focus of this webinar

- Dispute Resolution in European Law
- International Energy Dispute Resolution: Arbitration etc.
- Dispute Resolution in the Energy Community
- Energy Community experience in mediation
- Q&A

I. Dispute Resolution in European Law

- ☀ **building a union on the rule of law: a choice with consequences**
- ☀ **the court of justice: an arbiter or an integration motor?**

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art 31 Vienna Convention)

☀ impact on energy policy: a few landmarks

- ☀ **costa v ENEL**
- ☀ **1997 infringement cases and VEMW**
- ☀ **campus_oil**
- ☀ **preussenelektra**



I. Dispute Resolution in European Law

☀ main remedies

- ☀ preliminary rulings
- ☀ infringement actions
- ☀ direct actions: the **OPAL** case

☀ how Kirchberg works

- ☀ demystifying judicial decision-making
- ☀ precedence vs the building blocks approach
- ☀ designing tests: the **PSO** cases
- ☀ establishing supremacy

II. International Energy Dispute Resolution

A multitude of energy resources, transactions, actors and stakeholders, as well as a fast-developing body of law, leads to increasingly complex disputes.

Three main options for resolving energy disputes: litigation, arbitration, mediation.

- ☀ commercial disputes (when all parties act in their private capacity);
- ☀ investment disputes (when at least one of the parties is a public entity not acting for commercial purposes);

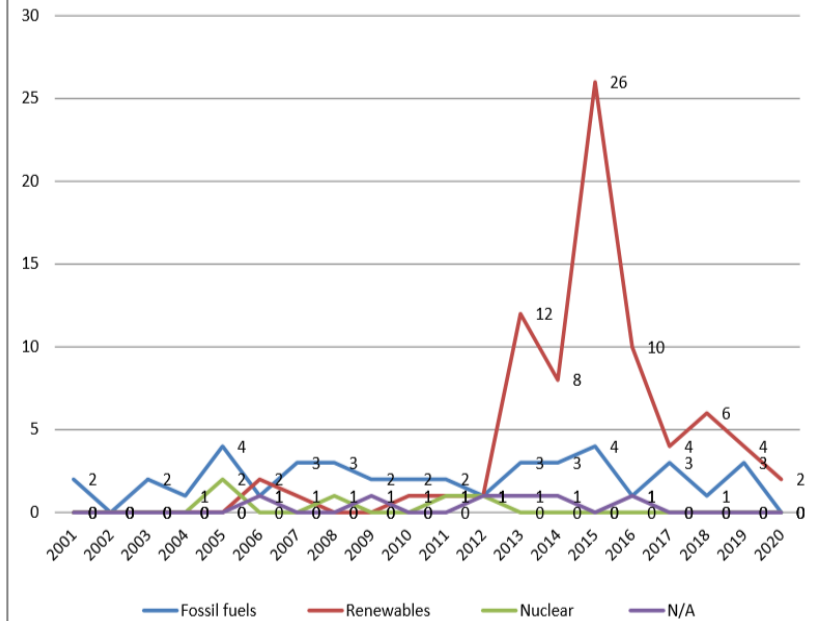
Oil and gas disputes

- ✿ The “traditional” energy sector;
- ✿ Investment disputes originated in concessions granted by governments to petroleum companies. When concessions were terminated or renegotiated, investors invoked the sanctity of contractual commitments in front of various courts or tribunals.
- ✿ Conocco Philips vs Venezuela:
 - ✿ measures adopted under President Hugo Chavez: increase of royalty rate and income tax for extra-heavy oil production; transferring exploration and production rights of investors were found in breach of the BIT;
 - ✿ US\$ 8,5 billion damages for the investor;
 - ✿ 12 years of arbitration proceedings.

Renewable energy disputes

- 2007: Spain implemented a number of regulatory measures with the purpose of incentivizing investment in renewable energy;
- Due to tariff deficits and the consequences of the financial crisis, Spain took a number of measures from 2010 onward, which retracted some features of the original framework;
- Almost 50 arbitrations have been initiated against Spain;
- Concepts like specific assurances and legitimate expectations are being interpreted differently by different Tribunals.

Distribution of Arbitration Cases under the ECT
by Energy Sources Involved: 130 cases*



source: ECT website, update of 1 June 2020

Climate change disputes

- ☀ As the body of climate change law continues to grow, so too does the risk to corporations active in the energy sector where environmental impact is inevitable.
- ☀ Peruvian farmer Saul Luciano Lliuya sued RWE AG, a German energy company, for its alleged contribution to climate change which is threatening his home in the Andes.
 - ☀ German court ruling: responsibility of a large emitter for damage or risks in foreign countries exists as long as science can prove partial causation
 - ☀ Currently delays in taking evidence due to hazardous situation on site
- ☀ 2001: PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment
- ☀ 2019: ICC report on resolving climate change disputes through arbitration and ADR

Dispute Resolution Checklist

✓ Take control: negotiate your dispute resolution clause

✓ Make sure you know the applicable laws inside out

✓ Pay attention to international agreements also – bilateral, multilateral, regional

✓ Have clarity on what you promise and what is promised to you

✓ See things in a broader context: what is likely to happen in the sector, how will that change the circumstances of your business?

III. Dispute Resolution in the Energy Community

- ☀ **dispute resolution in shared legal spaces**
 - ☀ the EEA experience
 - ☀ bilateral relations with the EU'
 - ☀ the importance of homogeneity and dialogue
- ☀ **the energy community experience**
 - ☀ a hybrid system
 - ☀ procedures and players
 - ☀ in particular: the advisory committee
 - ☀ from sanctions to penalties
 - ☀ the future of infringement procedures

III. Dispute Resolution in the Energy Community

☀ examples from case law

- ☀ yugorozgas
- ☀ destination clause in IGA
- ☀ ugljevik 3

☀ sui generis dispute resolution

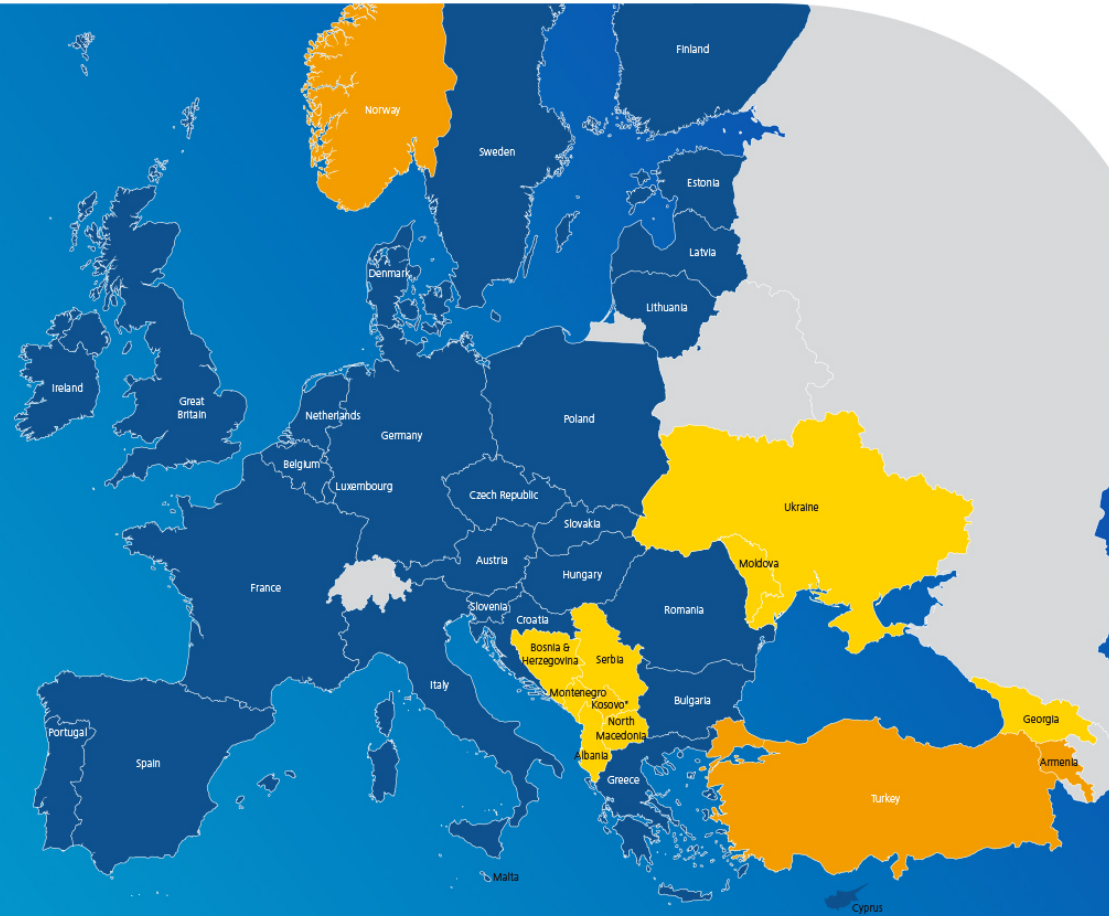
- ☀ preventing disputes through cooperation
- ☀ energy community law in arbitration
- ☀ mediating disputes

IV. Energy Community Experience in Mediation

- ☀ A forum where parties can reach quick, efficient and cost-effective solutions;
- ☀ Alternatives to long and costly litigation and arbitration proceedings;
- ☀ The preservation of the commercial relationship between the parties;
- ☀ Compliance with the applicable EU and Energy Community acquis;
- ☀ Careful balancing of various interests in order to reach the right outcome.
- ☀ Profound knowledge of the energy environments of Europe and beyond;
- ☀ No administrative fees;
- ☀ Confidentiality.

The Centre focuses on three pillars:

- mediation of third-party disputes
- facilitation for the swift closure of dispute settlement cases under the Energy Community Treaty
- negotiation support to national authorities in their negotiations with private parties.



Gas Natural Fenosa vs. Moldova

- The dispute between Gas Natural Fenosa, Moldova's largest supplier and distributor of electricity, and the Government of Moldova arose from deviations between the costs of purchasing electricity and the regulated electricity tariff.
- This happened largely because of a crisis in the Moldovan banking sector, which led to collapse of the local currency in November 2014. The national regulator failed to adjust the tariffs timely, so the Spanish investor incurred significant losses.
- Arbitration proceedings under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) instituted by Gas Natural Fenosa against Moldova were put on hold, and the parties entered into negotiations in February 2015.

Gas Natural Fenosa vs. Moldova

- Ultimately, the consumers were the most affected because of the risk of power interruptions: Gas Natural Fenosa was late in paying its suppliers and state-owned wholesale energy providers threatened to cut the power.
- The settlement agreement signed on 3 June 2016 brought the end to a months-long dispute and brought stability to a sector suffering from systemic vulnerability.
- As of December 2019, the historical tariff arrears have been recovered by the investor and there is no outstanding past tariff debt.



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