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Investment Arbitration in the Nuclear Energy Sector: A Brief Note on Investors and Investments

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Every now and then the arbitration society witnesses the filing of investor-state disputes in fields previously 'unharmed' by the spotlight of investment adjudication. Perhaps the most recent example is the 'hydraulically fractured' shale gas dispute against Canada (see *Lone Pine v. Canada*). In a similar manner, the *Vattenfall II* dispute over Germany's nuclear phase-out has turned the spotlight to disputes in the nuclear energy sector. This post provides a brief note to some of the issues that are relevant when dealing with investor-state disputes in the nuclear energy industry and are associated with the potential investors and the nexus between their disputes and this industry.

Investors

The nuclear energy industry is a highly regulated sector that traditionally is dominated by state-owned enterprises (SOEs). Recent evidence indicates that to a certain degree, the expansive trends of foreign private investment have not left this industry intact. For example, the UK, having relaxed its regulations with regard to the involvement of private investors, is now competently financing nuclear energy projects in Anglesey and South Gloucestershire (see here and here). However, the notorious *Vattenfall II v. Germany* dispute (see here and here), initiated by Sweden's electric utility, indicates that SOEs are still the key players in this field. Indeed, nuclear power utilities are increasingly acting as foreign investors as recent examples from the activities of the Russian Rosatom in Turkey (see here and here) and the Italian Enel in Slovakia indicate (see here). Furthermore, as it is discussed below, investment claims that are directly connected to the nuclear energy sector have until today been filed only by SOEs. In this regard, an issue of particular importance is the standing of nuclear power utilities under the ICSID Convention. Generally speaking, jurisdictional objections on the standing of SOEs have not been upheld by ICSID tribunals (see *CSOB v. Slovakia* [20-21]; *CDC v. Seychelles* [12]; *Telenor v. Hungary* [20]; *Rumeli v. Kazakhstan* [325-328]). Nevertheless, the following lines examine whether the case would be different when dealing with nuclear power utilities.

Article 25 of the ICSID Convention is not absolutely clear with regard to SOEs and merely states that the jurisdiction of the Centre extends to disputes "between a Contracting State (…) and a national of another Contracting State" [Article 25(1)]. Authoritative guidance can perhaps be drawn from the sayings of Aron Broches, the

first Secretary-General of the ICSID who had stated that a SOE would have standing "unless it is acting as an agent for the government or is discharging an essentially governmental function" (Broches's test).[1)] Broches's test is a disjunctive one whereby the presence of either element suffices to defeat jurisdiction. While agency and the discharging of an essentially governmental function may not always be clear, it is important to notice that in *CSOB v. Slovakia* the tribunal applied Broches's test conjunctively and further took into consideration the "nature of the activities and not their purpose" [20] (CSOB's test). In other words, this tribunal did not stand on the fact that both elements of Broches's test were present but also examined whether CSOB's activities were commercial "rather than governmental in nature" [*id*.]. Lastly, Mark Feldman has proposed that not only the nature but also the purpose of activities should be taken into consideration when determining the standing of SOEs under the ICSID Convention (Feldman's test).[2)]

All the above tests are important when dealing with claims filed by nuclear power utilities inasmuch as they can affect the standing of such investors under the ICSID Convention. Thus far, the ICSID has been seized by two claims that were filed by SOEs and are related to the nuclear energy industry. These are *HEP v. Slovenia* and *Vattenfall II v. Germany* that were both filed under the Energy Charter Treaty (ECT) that does not provide any guidance as to the standing of SOEs under the ICSID Convention [see e.g. Article 1(7)]. More specifically, in *HEP v. Slovenia* there also existed a special treaty that governed the relations of the two countries with regard to the Krsko nuclear power plant, provided for investor-state arbitration under the ICSID and specifically listed Croatia's and Slovenia's electric utilities as potential investors [11 and Annex]. This treaty was invoked alongside the ECT and although the tribunal did not specifically examine the standing of HEP under the ICSID Convention, it appears that there was no real room for the application of one of the tests referred to above, since the parties had expressly consented to the bringing of claims by their electric utilities [166-168]. With regard to *Vattenfall II v. Germany*, the information that is presently known does not provide any evidence for submissions that touch upon the standing of Vattenfall under the ICSID Convention [see here and here]. Nevertheless, if such objection was raised and the tribunal applied Broches's test, this SOE would probably fail to meet the jurisdictional conditions of the ICSID Convention as it could be argued that Vattenfall is an agent of Sweden. If however CSOB's test or Feldman's test were applied, the answer could potentially be different. It is therefore important to bear into consideration that the filing of claims by nuclear energy utilities under the ICSID Convention may well be associated with the above jurisdictional hurdle.

Investment Disputes

Investor-state disputes that are connected or related to the nuclear energy industry represent only a scarce part of investment jurisprudence. In fact, only four cases appear to be directly or indirectly connected to the nuclear energy industry and have all been filed under the ECT, with the exception of *HEP v. Slovenia* that as referred to above also involved the parallel invocation of another treaty. In general, investment disputes in the nuclear energy sector can be classified to directly and indirectly related disputes. This can be done by conventionally characterizing as directly related those cases where the investment is closely connected to a nuclear power plant or is

the nuclear power plant itself. Under this category would fall disputes like the *HEP v. Slovenia* and *Vattenfall II v. Germany* cases that as said involve the filing of claims by SOEs for issues pertaining to the operation of nuclear power plants. On the other hand, *Amto v. Ukraine* and *Remington v. Ukraine* represent examples of investor-state disputes that are indirectly related to the nuclear energy sector. Both cases arose out of the same factual matrix and involved private investors who supplied electrical equipment to a state-owned Ukrainian nuclear power plant (see here, here, here and here). This nuclear power plant was eventually wound up yet its debts were claimed by Amto and Remington by the bringing of investor-state proceedings. What is however significant is that these tribunals parted in different ways. The tribunal in *Remington v. Ukraine* found that Remington's contractual claims qualified as an investment under the ECT and ruled that Ukraine had breached the fair and equitable treatment standard. Conversely, the tribunal in *Amto v. Ukraine* was not convinced that Amto's claims of contractual breach could be elevated to an investment under the ECT [112] and in any case ruled that claimant had failed to substantiate its claim by establishing any liability under the ECT for Ukraine [114]. The divide between these tribunals, comes as an addition to the long-standing debate on the scope of the umbrella clause, yet it is also of particular importance when dealing with disputes that are indirectly connected to the nuclear energy industry.

Lastly, a third conventional category of disputes that bear a connection to the nuclear energy sector may also be drawn. This involves peripheral disputes that become relevant in cases of nuclear disasters and responsive measures. For example, after the Fukushima Daiichi disaster, China, Hong Kong, Taiwan and Korea have adopted food import bans against Japan (see here). However, Japan fights these measures in the World Trade Organization (WTO) arguing that contaminated products are prohibited from trading in Japan and that there are no novel scientific findings that indicate the need of new risk and radiation control assessments (see here). This case principally involves public health issues and it involves disputes pressed in the WTO yet it would not be unlikely to imagine that such or similar disputes can also be pressed in investment *fora*. In the above example, an investor whose main operations were in the import of Japanese products in China or Korea could for example file an investment claim that would challenge the measures taken by these countries as a response to the Fukushima Daiichi disaster.

As a general and concluding remark, the measures that affect investments in the nuclear energy sector often will be justified by reference to among others environmental and public health concerns. This may be rare in indirectly related disputes that as said mainly involve cases of contractual breach that are somehow connected to the nuclear energy industry. Nevertheless, when host state measures affect investments in the nuclear energy sector by reference to the above concerns, it becomes particularly relevant to examine the exceptions and limitations that may be included in investment treaties. While this would go beyond the limits of this post, suffice it to say that investment treaties sometimes exclude the application of substantive provisions such as that of the national treatment from the nuclear energy industry [see e.g. Japan-Vietnam BIT, Annex I] and sometimes include specific exceptions that arguably enhance their regulatory interference in this field.[3)] The connection or nexus between investment disputes and the nuclear energy field may

therefore be important when ascertaining the scope and application of exceptions and limitations that specifically apply to this field.

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References

↑1 A. Broches, Selected essays, World Bank, ICSID, and other subjects of public and private international law, 1995, pp. 201-202.

↑2 M. Feldman, 'The Standing of State-Owned Entities Under Investment Treaties', in K. Sauvant (Ed.), Yearbook on International Investment Law and Policy 2010–2011, 2011, p. 630.

↑3 For a relevant discussion see J. D. Fry and O. G. Repousis, 'Investment Arbitration in the Nuclear Energy Sector: Environmental Protection versus Investor Protection', in Ige Dekker and Martijn Scheltema (Eds.), Bridging the Gap between International Investment Law and the Environment (forthcoming 2014).

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