



ECT investment arbitration: facts, problems and proposals

***Presentation by
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24th Meeting of the Energy Charter Conference

Ministerial Session

5 December 2013

Facts about past/pending cases



- First case: Registered on 25 April 2001. **At least 2 cases/year** since then, except in 2002. A **boom in 2005 (6 cases) and 2013 (8 cases)** have been detected).
- **41 cases** have been detected to date.
- **Final Award: 16; Settlement: 6; Pending: 18 + 1 case** (*Hrvatska*) where the specific claims under the ECT were dismissed
- **Some of the claimants are companies without substantial activities** owned/controlled by nationals of a non-Contracting Party. Each **Contracting Party can expressly deny benefits to those entities based on Art. 17 ECT: *Liman, Plama* and *Yukos*** cases have adopted a uniform approach requiring an express statement and no retroactive application of the denial of benefits.

Outcome of (16+1) concluded cases



- **Jurisdiction denied:** 4 cases (including 2 where the claim was found to be fraudulent). The amounts claimed in 3 of those cases were US Billion 10; 4.6 and 3.8
 - **Additionally**, in the *Hrvatska* case the tribunal dismissed the investors claims under the ECT (though still the case is pending regarding other claims).
- **Tribunal examined the merit:**
 - **Some compensation** by the state to the investor: **4 cases**
 - **Investor lost the case** (mainly due to **lack of evidence**): **6**
 - **State is liable but the investor either failed to prove the damages** (*Mohammad Ammar Al-Bahloul v. Tajikistan*) **or its claim for damages was considered premature and unfounded** (*AES v. Kazakhstan*): **2 cases**
 - **Additionally**, a partial decision dismissed most of the Electrabel's claims but still 1 issue is pending.



- **How much of the claimed amount was awarded?**

	Claim	Award	Ratio
<i>Nykomb v. Latvia</i>	7,097,680 Lats	1,600,000 Lats	22.5%
<i>Petrobart v. Kyrgyzstan</i>	4,084,652 USD	1,130,859 USD	27.7%
<i>Kardassopoulos v. Georgia</i>	350 M. USD	90.25 M. USD	25.8%
<i>Remington v. Ukraine</i> *	36 M. USD	4.5 M. USD	12.5%

* Information based on an unofficial report. The award is not publicly available.



Costs

- There is **no uniform practice** in awarding costs, though **normally**:
 - (i) **procedural costs are shared**
 - (ii) **other costs** (lawyers, experts, translations...) are **normally not completely recovered** by the winning party.
- In the ***Libananco case*** (claimant asked US 10 Billion) **even if Turkey was successful, still had to cover part of its own costs** (lawyers, experts, translations out/into Turkish...): **only recovered 15 US Million out of USD 35.7 Million incurred.**

According to the tribunal (§566): ‘... ***there needs to be some proportionality in the award (as opposed to the expenditure) of legal costs and expenses. A party with a deep pocket may have its own justification for heavy spending, but it cannot expect to be reimbursed for all its expenditure as a matter of course simply because it is ultimately the prevailing party.***’



Main issues

- **Lack of internal cooperation:** increases legal costs, reduces effective defence
- **Lack of transparency:** states lose vital information for their defence & for informed policy making
- **Lack of control over the interpretation** of ambiguous articles
- **Increasing number of arbitrations** (some of them groundless or without enough evidence)
- **Lack of recovery of high legal costs** incurred to defend from groundless claims
- **Need for increasing awareness of states' rights** under the treaty
- **Increase consistency of awards and impartiality of arbitrators**

1. Cooperation and sharing of information



- **Facilitate the informal exchange through a network of State lawyers.** Similar to the Legal Task Force set up by the Secretariat in 2001, the idea is to organize an **informal forum** of State lawyers involved in the defence of their state in investment arbitrations. It would be coordinated by the Legal Counsel outside the subsidiary bodies of the ECC.

It would allow State lawyers to **informally exchange experiences** on experts-lawfirms-arbitrators... in order to identify good experts, better handling arbitral proceedings... It could also help them advancing a common legal defence when the underlying dispute is based on similar grounds.

- Direct source of information on cases + helping the states to better prepare their defences
- Increase states' awareness of their rights under the ECT
- Reduces costs of legal defense of states
- Coordination of the ECS and Contracting Parties will suffice (no need for Conference decision or any legal instrument)



2. Transparency

- **Incorporation of the 2013 UNCITRAL Rules on Transparency** in relation to all future arbitrations under the ECT and appointment of the **Energy Charter Secretariat as the repository** receiving and recording information about the arbitrations. The Secretariat could charge an **administration fee** for handling such task. Such administration fee would be **advanced by the party instituting the arbitral proceedings** and could be recovered later as a cost to the arbitration.
 - Direct source of information on cases + source of income + reducing the misuse of ECT arbitration by investors
 - Protocol incorporating the UNCITRAL Rules, appointing the ECS as repository and identifying the documents to be disclosed & procedure to be followed
- **Commentary** to the ECT + **summaries** of known ECT cases (included in the programme of work)

3. Reducing arbitration

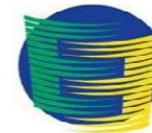


➤ Conciliation expressly covered by the ECT, but not yet been used:

- Currently, the **investor can opt for conciliation** but there is some **ambiguity** about what happens if conciliation is not successful; can the investor go to international arbitration? SCC has no rules for conciliation. 7 concluded ICSID conciliations (not ECT cases): 3 disputes were settled and 2 failed and transformed into arbitration. Art. 35 of ICSID prohibits a party to conciliation to use any statement/admission/offer in a later arbitration. An interpretation and a conciliation mechanism would help to clarify the situation and facilitate the use of conciliation.
- Furthermore, the **3 months cooling off period** could be used by the **state to propose conciliation**. If no amicable settlement is reached, the investor could move to arbitration.
- Art. 26 ECT allows the Contracting Parties to **include specific dispute settlement mechanisms** in their agreements with investors: the agreements could require conciliation before moving to arbitration.

➤ In order to **discourage frivolous claims** by investors, enable arbitral tribunals to dismiss such claims quickly and to require that **all litigation costs are borne by the losing party** → this would require a Protocol.

4. Reducing ambiguity



- **Increasing the contracting parties' role in interpreting the ECT** increases **predictability** of ambiguous articles and **conformity of the interpretations with the intentions** of the Contracting Parties
→ around 30% of the appointed arbitrators (interpreting the obligations of the ECT) are from non-Contracting Parties:
 - (i) **unanimous interpretative declarations** adopted by the Contracting Parties on ambiguous articles to be applied non-retroactively (eg. ongoing work on low carbon; NAFTA countries used a declaration for interpreting confidentiality and the limits of 'fair and equitable treatment');
 - (ii) **facilitating** interventions by the non-disputing contracting parties (***amicus curiae***): Art. 37 ICSID Rules of Arbitration ('*the tribunal may allow*'); SCC and UNCITRAL Rules on Arbitration do not expressly provide for *amicus curiae*, but tribunals have allowed it in some cases (under general procedural powers of the tribunal). The EU has already submitted *amicus curiae* in 2 ECT arbitrations (*AES, Electrabel*).
- Reorganize, catalogue, digitalize and make accessible the ***travaux préparatoires***

5. Permanent tribunal for ECT cases



- Art. 26 ECT allows the inclusion of specific dispute settlement mechanisms in the agreements with investors.
 - Investment agreements could agree to refer to a permanent tribunal in case a dispute under the ECT arises. Such proposed tribunal could consist of several arbitrators without any current link to law firms, appointed by the Conference for a fixed term without possibility of re-election. This would increase independence and impartiality of the arbitrators deciding on the dispute.
- It would require a Protocol establishing the Permanent Tribunal and including its Statute

Thank you
for your attention