

Investment Arbitration and Remedies under the Energy Charter Treaty

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The dispute settlement mechanism under the Energy Charter Treaty (ECT)

General overview of investor-state arbitration under Article 26 ECT

- Amicable settlement (Article 26(1))
- Choices of dispute settlement forums, including investor-state arbitration (Article 26(2))
- Consent to investor-state arbitration by Contracting Parties (Article 26(3))
 - Annexes IA (umbrella clause) and ID (fork-in-the-road)
- Forums of investor-state arbitration (Article 26(4))
 - (a) ICSID arbitration
 - (b) Arbitration under the ICSID Additional Facility Rules
 - (c) A sole arbitrator or ad hoc arbitral tribunal established under the UNCITRAL Arbitration Rules
 - (d) Arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce.

Remedies under the ECT: the law

► Forms of reparation in international law

Article 34 of the ILC Articles on State Responsibility

(a) Restitution

- material restitution (restitution in property)
- juridical (legal) restitution

(b) Compensation

(c) Satisfaction

[Controversy over the availability of restitution in investment arbitration]

- Sovereignty of States
- *Sui generis* character of the investor/State regime
- Case law (*TOPCO v. Libya*, *BP v. Libya*, *LIAMCO v. Libya*, *Micula v. Romania* etc.)

Remedies under the ECT: the law

[Restitution - Article 26(8) ECT as *lex specialis* (Article 55 of ASR)]

Article 26(8)

The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

- Drafting History - The 2nd sentence was introduced into the treaty to address Canada's constitutional concerns

Remedies under the ECT: the law

Restitution

[Article 26(8) of the ECT as *lex specialis*]

- Article 26(8) does not limit the forms of reparation to monetary damages and restitution of property – Cf. Article 1135(1) NAFTA

- De Luca, 'Non-Pecuniary Remedies under the Energy Charter Treaty' Energy Charter Secretariat, Occasional Paper (May 2015)

'By only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of Contracting States, the provision vests, as a rule, arbitral tribunals instituted under the ECT with the authority to grant ... non-pecuniary remedies'



Restitution (material or juridical) is an available type of remedy under the ECT

Remedies under the ECT: the law

Article 35 ILC Articles on State Responsibility

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Limitations on awarding restitution

- The principle of *nec ultra petita*
- *Al-Bahloul v. Tajikistan* (award of 8 June 2010); *Nykomb v. Latvia* (award of 16 December 2003)
- Enforcement – Article 54(1) ICSID Convention ‘(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the **pecuniary obligations** imposed by that award within its territories as if it were a final judgment of a court in that State.’

Cf. Article 26(8) ECT: ‘[e]ach Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of awards’

Remedies under the ECT: the law

Compensation

■ Principles of Compensation

- Article 13(1) ECT: compensation for lawful expropriation shall amount to the fair market value (FMV) of the investment
- No specific treaty provisions on the amount of compensation in case of non-expropriatory breaches and for unlawful expropriation (see *Ioannis Kardassopoulos v. Georgia* (2010)): the principle of full reparation in customary international law (*Chorzow Factory* case, Jurisdiction, 1927; ILC Articles on State Responsibility, see also Article 26(6) ECT)

Remedies under the ECT: in practice

Compensation

- Compensation was awarded to the investor in **11** cases
- In **2** cases, the host state was found to be liable, yet no compensation was awarded because:
 - a. The investor failed to prove the damages (*Mohammad Ammar Al-Bahloul v. Tajikistan*);
 - b. The investor's claim for damages was considered premature and unfounded (*AES v. Kazakhstan*)

Remedies under the ECT: in practice

Cases in which compensation was awarded to the investor(s)

		Claim	Award	Ratio
<i>Nykomb v. Latvia</i>	(16 Dec 2003)	7.097.680 Lats / 3.686.188 Lats + specific performance	1,600,000 Lats + Specific performance	43.5%
<i>Petrobart v. Kyrgyzstan</i>	(29 March 2005)	4.084.652 USD	1.130.859 USD	27.7%
<i>EDF International SA v. Hungary</i>	(4 Dec. 2014)	Estimated US100 million	Eur. 107 million	(estim.) 100%
<i>Kardassopoulos v. Georgia</i>	(3 March 2010)	350 million USD	30.2 million USD	8.63%
<i>Energoalliance v. Moldova</i>	(08 July 2010)	More than 70 million USD	195.547.212 MLD	21.8%
<i>Khan Resources v. Mongolia</i>	(10 Jan 2011)	200 million USD	80 million USD	40%
<i>Remington v. Ukraine</i>	(28 April 2011)	36 million USD	4.5 million USD	12.5%
<i>Ascom v. Kazakhstan</i>	(19 December 2013)	1 billion USD	497.685.101 USD	49.8%
<i>3 Yukos Cases</i>	(18 July 2014)	114,174 billion USD	50,02 billion USD	43.8%

Source: the ECT Secretariat (work in preparation)

Remedies under the ECT: issues for further analysis

- ▶ Restitution/Compensation at the selection by the investor?
Arif v. Moldova (Award of 8 April 2013, based on France-Moldova BIT)
- ▶ The absence of guidance faced by arbitrators in terms of calculation of compensation – is there the need for parameters? e.g. is there any need to provide guidance on how to ‘approximate’ the amount of compensation?