School of Economics, Business Administration and Legal Studies

LLM in Transnational and European Commercial Law & Alternative Dispute Resolution Programme


THESIS in

INTERNATIONAL INVESTMENT ARBITRATION IN ENERGY SECTOR
(investment protection, oil & gas and general commercial matters)


Dissertation Supervisor: Prof. Dr. Athanassios Kaisiss who is Professor at the Law Faculty of Aristotle University of Thessaloniki, Member of the Governing Board of the International Hellenic University and Scientific Director of the LLM programme.

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ABSTRACT

Recent developments on investment disputes in the field of international arbitration are analyzed in this dissertation. The violation of Bilateral Investment Treaties (BITs) in recent years has led to a remarkable rise in the number of investment arbitration. Substantive and procedural rules that are comprised in these treaties aim to purvey investment security and investment neutrality to any foreign investor. In most BITs are embodied dispute settlement provisions which provide investors with the right to sue Host States directly.

The purpose of this Thesis is to provide an overview of the world of international investment arbitration regarding investment protection, oil & gas and general commercial matters.

Significant reverberations of globalisation can be seen in all sectors with no exception in the field of law. Rapid resolution of many disputes is produced independently of national adjudication, specifically in the energy sector, as a result of international investors' and investments' mechanisms.

International investment law and arbitration which have risen sharply in the last decade, given the fact that, foreign direct investment has grown in the world, and investors whose reliance on investment treaties to appeal in arbitration versus Host States, is increased.

Today, the majority of investment arbitrations are placed under the basis of bilateral or multilateral treaties (BITs, NAFTA, the Energy Charter Treaty, etc.) and are directed under the ICSID Convention, UNCITRAL Arbitration Rules, or not so regularly also under the Arbitration Institute of the Stockholm Chamber of Commerce, ICC and LCIA arbitration rules.

It is unable, since the purpose of this Thesis is to provide a concise perspective on the ICSID arbitration, nor desirable, to discuss all issues raised in these cases thoroughly. A Review though, will be provided and selected prominent topics will be examined.

Which are the jurisprudential tendencies that formed below the light of investment arbitration? What can we learn from these cases? Is ICSID arbitration a world of its own?

The fact that, ICSID arbitration has an efficient system and various features from other types of international commercial arbitration, has led to integration of this type of arbitration into BITs' dispute settlement conditions. Basic characteristics of ICSID are examined by this
dissertation, where having analyzed the concluded and pending ICSID cases concerning energy sector, it is deduced that ICSID has a significant role for the international arbitration's evolvement on investment disputes.

This paper's conclusion is that, since future disputes between investors and Host States are unavoidable, there are rising tendencies, according to which Host States are considering choices to recover part of their regulatory independency.

Notwithstanding, it is upon author’s belief that facts and data, and remarks to be held, will give the reader some flavor of this kind of *Settlement of Investment Disputes* and, hopefully, provide some fresh perspectives.

**Key words:** International Investment Arbitration, ICSID, BITs, Investment Protection, Energy Disputes
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Meanwhile I do hereby declare that I owe every responsibility for any typographical or grammatical error that is contained in this work. My supervisor should not in any manner whatsoever be held responsible for such errors.
Dedicated to
my parents, as well as to my brother,
as a small token of recognition of the sacrifices and of the undivided love towards me,
as well as of tolerance and support to me,
in times of difficulty during writing and completion of this Thesis.
## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>ECT</td>
<td>Energy Charter Treaty</td>
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<tr>
<td>FET</td>
<td>Fair and Equitable Treatment</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>ICSID Arbitration Rules</td>
<td>International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings</td>
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<td>ICSID Convention</td>
<td>International Centre for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes between States and Nationals of Other States</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>IIA</td>
<td>International Investment Agreement</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>New York Convention</td>
<td>Convention on the Recognition and Enforcement of Foreign Arbitral Awards</td>
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<td>PPA</td>
<td>Power Purchase Agreement</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>WTO</td>
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CHAPTER I

INTRODUCTION

INTRODUCTORY REMARKS

1. Energy Requires Attention

The growing global demand for energy is in high need for new investments. Policy frameworks form an important risk to energy security, since capital investment can be prevented from being activated and directed towards the most efficient energy supply or energy-saving projects. The reduction of these policy risks, wherever possible, by creating a favorable investment climate based on openness, consistency and non-discrimination is the ultimate challenge.

A balanced approach to investors’ access to resources is taken by Energy Charter Treaty. On the one hand, the Treaty is explicit in confirming national sovereignty over energy resources: each member country is free to decide how, and to what extent, its national and sovereign energy resources will be developed, as well as to which extent its energy sector will be opened to foreign investments. On the other hand, rules are required concerning the exploration, development and acquisition of resources that must be publicly available, non-discriminatory and transparent.

Projects in energy sector tend to be long-term and highly capital-intensive creating a particularly strong need for stability in the relationship among investors and host governments.

Risks can be mitigated through binding rules contained in the Energy Charter Treaty. The protection of investors’ rights is provided by the possibility to toto the host government to international arbitration. Several investor-state disputes have been examined under the Treaty and felicitously decided, either by amicable settlement or by an arbitral award.

States are convincingly encouraged to monitor their liabilities under the Energy Charter Treaty due to an operating mechanism for the resolution of disputes. According to Charter's Industry Advisory Panel observation, dispute settlement provisions should normally be considered as a means of ‘’last resort’’, but due to the fact of their special value in creating a constructive frame to solve investment disputes, they contribute significantly to investor confidence and to a more reliable investment environment.
2. Key Elements of International Arbitration

Alternative to governmental adjudication is the creation of new, more rapid and transparent legal mechanisms because legal relations in social and commercial life presupposes solutions with increased complexity and for which technical expertise is needed. Arbitration is one of the appurtenances of this mechanism called ‘’Alternative Dispute Resolutions’’ that used more often.

The established method to determine international commercial disputes\(^1\) has become the international arbitration. Taking this fact in account, laws of arbitration have been modernized by states over the world.

International commercial arbitration remains faithful in the heart of its core, means a private method of dispute resolution that parties choose by themselves as an efficient way of terminating disputes among them, without recourse to the courts. Noticeable deficiencies in formality are observed in different countries and against different legal and cultural backgrounds. It does not give the impression of a legal proceeding. It would look as if a congress or workshop was in progress, to an outsider.

A complex system of national laws and international treaties keep in practice the resolution of disputes by international commercial arbitration.\(^2\) Even a comparatively simple international commercial arbitration may require reference to as many as four different national systems or rules of law.\(^3\)

\(^1\) Arbitral institutions generally keep a record of the number of requests for arbitration they receive each year. One of the leading institutions, the International Chamber of Commerce (‘’the ICC’’) recorded 580 requests in 2003.

\(^2\) The support of international treaties, such as the New York Convention of 1958 on the Recognition and Enforcement of Foreign Awards, is essential to the effectiveness of arbitration internationally.

\(^3\) See the comment of Richard Kreindler: ‘’Increasingly, the body or rules of law as agreed by the parties are different from those at the situs, from those at the place of principal or characteristic performance and in turn, from those at the place or places of likely enforcement’’, in ‘’Approaches to the Application of Transnational Public Policy by Arbitrators’’, the Journal of World Investment, Geneva, April 2003, Vol. 4 No. 2 at p. 239; this echoes the statement by Lord Mustill: ‘’It is by now firmly established that more than one national system of law may be bear upon an international arbitration’’; Channel Tunnel Group Ltd and another v Balfour Beatty Constructional Ltd (1993) A.C. 334 AT 357.
CHAPTER II

SETTLEMENT OF ENERGY DISPUTES USING THE METHOD OF
INTERNATIONAL ARBITRATION AND IN PARTICULAR ICSID ARBITRATION
PROCESS

1. Necessity of arbitration

As a private and binding dispute settlement method, arbitration, is conducted before an impartial Arbitral Tribunal. Parties may choose this form as an alternative to litigation before national courts and usually a clause, in an arbitration agreement, at the end of a contract is registered. Derived from parties' agreement but regulated and enforced by the states where the arbitration proceedings taking place and where the arbitral award is enforced. Parties' contractual promise to arbitrate is required from most states to be honored by them. Limited judicial supervision of arbitral proceedings is provided, as well as support enforcement of arbitral awards similarly to that of the relevant state's national court judgments.4

Complex and high-value disputes have increased in the international energy industry. Partners in joint venture may not agree over functions, sellers and buyers may manoeuvre to modify terms in pricing and states may request an improved used of investment projects due to economic and commercial changes. Significant consequences can be seen in the long-term prospects of companies operating in the sector.

The relativity easiness with which an award of an Arbitral Tribunal can be enforced, constitutes the ever-growing popularity of arbitration in international disputes, to a large extent. Generally speaking, it’s easier than enforcing a judgment of a court. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides an extensive enforcement regime for arbitral awards. Most industrialized nations are parties to the New York Convention (it has been ratified by 142 of the 192 countries which are members of the United Nations).

Having the New York Convention gained wide acceptance alongside with the increased proliferation of bilateral investment treaties, it is ensured that for complex cross-border disputes, international arbitration is not just a preferred option but a necessity.

If a single industrial sector might be called the cradle of international commercial arbitration, it would be the energy business.

2. Energy Disputes and Arbitration

Energy sector has a highly technical, capital-intensive and complicated composition by its nature, thus, when disputes concerning energy sector pursued to be solved within the scope of governmental adjudication, certain challenges are encountered, as this issue presupposes technical expertise. Consequently, arbitration is frequently preferred among energy companies for settling their disputes, notably in recent years.

Every major contract in the energy sector, be it oil and gas, electricity, wind or solar, now has arbitration clauses that steer disputes to the venue of binding arbitration instead of litigation. For six decades arbitration has been the energy world's crucial and preferred path for ironing out contractual disputes, especially in international dealings. Now it's enjoying a noticeable growth spurt.

Investments regarding energy sector in developing or underdeveloped countries are generally made by multinational enterprises. A certain risk is taken in that field by investors' activities in developing or underdeveloped countries, facing mostly reliability challenges with regards to the legal system of the invested country. International arbitration draws attention in this case, as one of the most common methods used by multinational investors ensuring equal, effective and rapid dispute settlement regarding their investments.
3. Types of Arbitration Applicable to Energy Disputes

As a method, arbitration is not only applied in international disputes, but also in national disputes. Thereby, arbitration can be reviewed under two headings: national arbitration and international arbitration. Apart from this classification, settlement of parties' disputes may be agreed through arbitration before an expert institution or by “Ad hoc” arbitration. In this context, arbitration can be classified as: “Institutional arbitration” and “Ad Hoc arbitration”. Disputes regarding energy are settled especially by institutional arbitration in practice. Although organizations with experience in institutional arbitration may vary, the most important ones can be listed as ICSID, ICC, LCIA, Arbitration Institute of Stockholm Chamber of Commerce. Many disputes regarding energy are nowadays resolved before ICSID or ICC.

4. Institutional arbitration

Institutional arbitration is when a specialized institution intervenes and assumes the role of administering the arbitration process. Each institution has its own set of rules providing a framework for the arbitration, and its own form of administration for the assistance of the process.

Most commonly institutions are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Dubai International Finance Centre (DIFC) and the Dubai International Arbitration Centre (DIAC). Selection process should be exercised in caution as some institutions may act under rules which are not duly drafted.

An arbitration clause is frequently contained in the contract between the parties, which will define a particular institution as the arbitration administrator. If parties are not concerned by institutional administrative charges, this approach is usually preferred to less formal methods of 'ad hoc' arbitration.

Institutional arbitration is frequently favoured in contract negotiations, thus, a "safety net" is provided, in case of anything going wrong, such as a hard party's refuse to participate in the process.

Several significant advantages offered by international arbitration in comparison with litigation, especially litigation in foreign courts, making it successful. Nevertheless, parties
need to take into consideration certain disadvantages to decide whether to enter into an arbitration agreement.

5. Dispute Settlement in ICSID Arbitration

A written claim (request for arbitration) is sent to the arbitration center by the state or the investment company that wishes to have its dispute settled by arbitration before ICSID, under Article 36 of ICSID Convention. In the arbitration claim, name and surname of the parties, dispute's subject, and consent of the parties to settle the dispute through ICSID, should be noted, constituting the arbitration clause. ICSID Secretariat sends a copy of arbitration claim to the counterparty when deciding judicial power for the dispute. One or more arbitrators, in odd numbers, are assigned by the parties according to Article 37 of ICSID Convention. If the assigned number of arbitrators cannot be agreed by parties, procedures performed by 3 arbitrators. In this case, one arbitrator is assigned by each party, and these arbitrators determine a third arbitrator by unanimity before arbitration begins. Conformity on jurisprudence that shall be applied is essential in the arbitration process. In case of failure to conclude an agreement on jurisprudence, the arbitration process shall be based on invested state's arbitration jurisprudence. Required observations and estimations compared to the dispute, are carried out initially by arbitrators who later decide unanimously on the application of arbitration.

CHAPTER III

MAIN FEATURES OF INVESTMENT ARBITRATION

1. Aspects of Investment Arbitration?

Investment arbitration is different from commercial arbitration in fundamental aspects:

- The basis for commercial arbitration is the arbitration agreement, while an investment arbitration can be based on either (a) an investment treaty, which can be multi- or bilateral (BIT), (b) the national investment law of the Host State, where protection of foreign investors is frequently provided or (c) an investment agreement in certain conditions;
In commercial arbitration, the contract among parties, i.e. its conclusion, performance and termination, is judged by Arbitral Tribunal, whereas in investment arbitration, the Arbitral Tribunal makes conclusions concerning Host State’s behavior towards a foreign investor.

In investment arbitration, the Host State’s behavior is judged by the Arbitral Tribunal, in the exercise of the Host State's sovereignty as provided for either by law, treaty or contract, under the prism of customary international law.

2. What is a Bilateral Investment Treaty (BIT)?

International agreements between countries granting corporations and private persons special rights and legal protections at time of investment in a foreign country that is known as a Host State, constitute Bilateral Investment Treaties (BITs). Terms and conditions for investing in one country by private companies and individuals of another country are determined by BITs. Promotion of investments in Host States is BITs main purpose.

The above is what we call foreign direct investment (FDI), with trade agreements being the founder power of BITs.

On November 25, 1959, the world’s first BIT between Pakistan and Germany, was established.5 High participation of countries around the world is observed, resulting to more than 2500 BITs in force.6

3. Typical Protections under Bilateral Investment Treaties (BITs)

Being an investor in a foreign State, and a bilateral investment treaty have been signed between investor's country and that State, protection under that treaty is entitled. The majority of bilateral investment treaties is providing as a basic protection in the occasion of an investment

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dispute, the choice of international arbitration, rather than forcing foreign investors to sue the Host-State in its own courts.

The following protection standards are typically provided by BITs to an investor:

- **Protection from expropriation**

  When foreign assets are confiscated by the Host State with little or no defrayment, depriving this way, foreign investor's reasonable expectations of profits and returns, is characterized as expropriation.

  Investor's right to prompt, adequate and effective compensation, is independent of whether an expropriation is ‘‘lawful’’, or ‘‘unlawful’’. Compensation is a prerequisite for the legality of the expropriation in the first case, while in the latter, equals to damages for the loss suffered by the investor, resulting of unlawful expropriation.\(^7\)

- **Fair and Equitable Treatment (FET)**

  The most common invocation template in investment disputes is FET, where states have to retain stable and predictable environments under investors' reasonable expectations. The concept’s breadth and scope may be diversified according to clause's wording.

  An in-depth appraisal of the facts [good faith, legitimate expectations' protection, due process (prohibition on arbitrariness, requirements of transparency), and proportionality] is required, as well as good-government's conduct application standards, regarding this principle.\(^8\)

  Differently, it is likelihood that a case will be decided on the basis of the arbitrators’ individual comprehension about what is fair and equitable under the conditions of the process.

  According to Professor **Kenneth Vandevelde**, FET is linked to theory of the Rule of Law.\(^9\)

  Various elements that could be said to be incorporated into the standard, having a relationship to protections usually included in international investment agreements, are the relationship between ‘‘legitimate expectations’’ and stabilisation clauses. This relationship have

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increasingly been touched in a number of awards by Arbitral Tribunals, but there is little in the way of sustained analysis.

- **National Treatment**

It is provided by this standard, that foreign investments shall be treated no less favorably by the Host State, than its own nationals and companies investments. Consequently, same potential competition is given to foreign investors as nationals, and any negative modulation between foreign and national investors when adopting and applying its rules and regulations, cannot be made by the Host State.

- **Most-Favored-Nation (MFN) treatment**

According to MFN treatment, all competing advantages that any other nation also receive, regarding matters to whom MFN clause is applicable, be it trade, investment, or any framework of economic cooperation, will be granted to the beneficiary State.

The beneficiary foreign investor shall be treated no worse than any other investor from another country, applying this MFN treatment.

Non-discrimination implied by this standard means that treatment of investments shall be no less favourable than to investments of its own investors. In any case, the concept of non-discrimination is less developed in investment law, compared to WTO law or EU law.\(^\text{10}\)

This favourable treatment can be accorded to a third state's investor by means of a national relevant legislation or by any other state act (judicial decision, administrative circular and so on).\(^\text{11}\) Supposing that documents embodying this treatment, are ‘integrated’ into the basic treaty through MFN’s operation clause, that would be wrong. It is the ‘treatment’ represented by these documents that investor can invoke claiming the MFN clause in the basic treaty.

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- **Freedom to transfer means and funds**

A clause can provide guarantees that transfers related to covered investments, such as gains on investments and other funds, are allowed to be made freely and without retardation inside and outside the territory, depending on interpretation.

Arbitral Tribunals have, in any case, rarely treated such rules.

- **Full protection and security**

Reassurance that a Host State takes active measures to protect a foreign investment from harmful effects of (a) the Host's State actions, (b) its organs or even (c) third parties, constitutes its dialectic definition.

4. **The umbrella clause**

The jurisdiction extent *rationae materiae* (subject matter) is not cognate with BITs, since only disputes concerning an ‘‘obligation under this agreement’’, i.e. only for claims of BIT violations, are covered by some of these, while others extend the jurisdiction to ‘‘any dispute relating to investments’’. An international law obligation created under the aforementioned latter clause\(^\text{12}\), is to compel any Host State to ‘‘observe any obligation it may have entered to’’; ‘‘continuously ensure the maintenance of the commitments made’’; ‘‘observe any obligation undertaken’’, and other configurations. Such provisions are commonly known as ‘‘umbrella clauses’’,\(^\text{13}\) although other configurations have also been used: ‘‘mirror effect’’, ‘‘elevator’’, ‘‘parallel effect’’, ‘‘sanctity of contract’’ and ‘‘pacta sunt servanda’’. Provision of additional protection to investors which is directed at covering investment agreements (including contracts) that often concluded by host countries with foreign investors, is a main objective.

\(^{12}\) The clause often appears in BITs concluded by Germany, the Netherlands, Switzerland, the United Kingdom and the US (based on previous models). Source UNCTAD ‘‘Bilateral Investment Treaties in the Mid-1990s’’, 1998, p. 56.

\(^{13}\) According to C. Schreuer, ‘‘they are often referred to as ‘umbrella clauses’ because they put contractual commitments under the BIT’s protective umbrella’’, in ‘‘Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road’’, J. World Inv (2004), pp. 231-256.
The idea of transmutation of an investment treaty from a simple contractual obligation among state and investor into an international law obligation, notably if such contract imposes the state to comply with it due to a clause included in the treaty, is presented by Prosper Weil.\textsuperscript{14}

The fact of violating the contract, each time a State is bound by a treaty to observe its conventional obligations towards foreign investors, it's also a violation of the treaty, as E. Gaillard noted. Clauses of this kind are characterized as “clauses with a mirror effect”. The treaty results de facto to reflection of what is analyzed at the level of applicable private law as simple contractual violation to the level of international law.\textsuperscript{15}

5. International Arbitration under Bilateral Investment Treaties (BITs)

Investors are unrestrained to bring arbitration actions in any of the arbitral institutions defined in the treaty, where commonly a bilateral investment treaty subsist, and the Host State is invited to submit to arbitration institution's jurisdiction.

Investors' disputes may be resolved before one of the following arbitration institutions:

- International Center for the Settlement of Investment Disputes (ICSID)
- International Chamber of Commerce International Court of Arbitration (ICC)
- Stockholm Chamber of Commerce (SCC)

\textsuperscript{14} “Il y a en effet, pas de difficultés particulières (en ce qui concerne la mise en jeu de la responsabilité contractuelle de l’État) lorsqu’il existe entre l’État contractant et l’État national du cocontractant un traité de ‘couverture’ qui fait de l’obligation d’exécuter le contrat une obligation internationale à la charge de l’État contractant envers l’État national du cocontractant. L’intervention du traité de couverture transforme les obligations contractuelles en obligations internationales et assure ainsi, comme on l’a dit, ‘l’intangibilité du contrat sous peine de violer le traité’; toute inexécution du contrat, serait-elle même régulière au regard du droit interne de l’État contractant, engage dès lors la responsabilité internationale de ce dernier envers l’État national du cocontractant”, Recueil des Cours III, 1969, pp. 132 and seq.

\textsuperscript{15} “L’arbitrage sur le fondement des traités de protection des investissements”, Revue de l’Arbitrage, p. 868, note 43.
CHAPTER IV

INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

Overview of ICSID

The World Bank Group is composed of five intergovernmental organizations and the International Centre for Settlement of Investment Disputes (ICSID or the Centre) is one them. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was the chargeable event. Establishment dated back in 1966, and till effective December 31, 2014, ICSID Convention had been signed by 158 States and validated by 150 States.

ICSID's reach has been prolonged by the additional capability for the administration of conciliation, arbitration and exploratory processes (optional) from 1978. This additional possibility enables non-contracting states of ICSID Convention (or nationals of those States) using of ICSID arbitration and conciliation systems and with regard to disputes, other than Investment Disputes. The additive facilitation also provides for concerned parties the feasibly of gaining access to an exploratory.

The increasing flows of international investment by providing a fair and effective international forum for resolving disputes between host countries and foreign investors is ICSID's dispatch. Arbitration and conciliation is managed under the ICSID Convention and the ICSID Additional Facility Rules by Center. Acting as the appointing under different arbitration rules and international treaties ICSID also managed the process of investor-State under other sets of rules, such as rules of the United Nations Commission on International Trade Law Arbitration.

The recourse to conciliation and arbitration process is completely voluntary and no non-Contracting State or a citizen of such a state, is not required to appeal to conciliation or arbitration, not having consented. By consent, the parties committed to continue their commitments and, in case of arbitration, to comply with the award. Recognition of rendered awards pursuant to the ICSID Convention shall be deemed binding all signatory states, even if not being parties to the dispute, and the enforcement of financial obligations imposed thereby. These awards are subjected solely to the remedy of annulment, provided for in the Convention itself.
In ICSID arbitration, one of the dispute's parties shall be ICSID Convention's signatory state, while the other is usually an investment company or companies in that contracting state and recorded in one of ICSID Convention's signatory states.

ICSID is recognized as head arbitration forum to resolve investor-state disputes. This arbitration system differs from each other arbitration, as outlined hereinbefore and in our days companies intended in investing in an unfamiliar country, should be aware of ICSID and other conditions enabling access to it as for instance, bilateral investment treaties (BIT) Energy Charter Treaty (ECT) and multilateral treaties (MIT).

**CHAPTER V**

*ICSID CASES CONCERNING ENERGY SECTOR ISSUES as of 14th January 2015*

A. Concluded Cases

1. **AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation)**
   v. Hungary (ICSID Case No. ARB/01/4)

Case registered: 25.04.2001

Subject matter: Electricity sale agreement

Status of proceeding: Settlement concurred by the parties and progressing ended at their solicitation (3 January 2002)

Comments

It can be concluded that, a State is not accountable for loss of property or for other financial disadvantages arising out of *bona fide* general taxation, regulation, seizure of crime, or other
activities, including ones that are generally accepted as within the official police authority of states, if not is discreet.16

2. *Plama Consortium Ltd. (Cyprus) v. Bulgaria (ICSID Case No. ARB/03/24)*

Case registered: 19.08.2003

Subject matter: Oil refinery investment

Status of proceeding: **Award rendered on 27.08.2008**

**Decision**

**Ethical Issues: Honesty is the best policy**

The *Plama Consortium Limited (PCL)*, a Cypriot company, was not entitled to protection provided under the Treaty on the Energy Charter Treaty (ECT), since the company itself, had fraudulently misinterpreted the situation, meaning an investment made in *Nova Plama AD*, a private refinery, as the Tribunal held in its judgment on August 27, 2008. Even if the *PCL* had the right to definite ECT protections, the Republic of Bulgaria did not fulfill its treaty obligations, as stated by the Tribunal. *PCL* was ordered to bear all Tribunal’s costs and charges and ICSID’s administrative costs. USD$ 7 million must be paid in legal expenses and other costs incurred by Bulgaria.

**The merits**

While from one point, Bulgaria’s falsification claims did not bereave Tribunal’s jurisdiction to examine the case, from the other side *PCL* that seek protection under the ECT was banned, since investing in *Nova Plama AD* was obtained by fraud. In conclusion, the Tribunal deduced that *Nova Plama’s* investment was the effect of fraud due to intentional concealment, estimated

16 Mostafa (2008) p 196; AES v. Hungary award, Supra note 62, ¶ 14:3:4, it was concluded that the effects of reintroduction of the Price Degrees do not amount to an expropriation.
to abet the Bulgarian authorities to authorize the transfer of shares of an entity that does not have the financial and management skills needed to continue actions.

As a result, the Tribunal found that the investments of PCL infringed not only the Bulgarian law, but international law, in particular the principle of good faith, the principle of *auditor propriam turpitudinem allegans* - that nobody can take advantage from its own fault and international public policy - and the agreement produced through illicit means shall not be imposed by a court.

**Comments**

Although, Tribunal proceeded to reject the claims of PCL against Bulgaria, the importance of this decision lies in the assertive rejection of claims by the Tribunal, which are delivered by unethical investors. Similarly to the proverb that originates in English courts of equity ‘’he who comes to equity must come with clean hands’’, the Tribunal confirms that, if investors seeking shelter below international treaties, then honesty is the best policy.

3. *Alstom Power Italia SpA, Alstom SpA (Italy) v. Mongolia*  
   *(ICSID Case No. ARB/04/10)*

Case registered: 18.03.2004

Subject matter: Thermal energy project, dispute relating to boiler rehabilitation

Status of proceeding: Settlement concurred by the parties and progressing ended at their solicitation

(Order taking note of the discontinuance according to Arbitration Rule 43(1) issued by the Tribunal on 13.03.2006)
4. *Ioannis Kardassopoulos (Greece) and Ron Fuchs v. The Republic of Georgia*  
(ICSID Case Nos. ARB/05/18 and ARB/07/15)

Case registered: 03.10.2005

Subject matter: Oil and gas distribution enterprise

Status of proceeding: **Award rendered on 03.03.2010**

**Decision**

**Georgia loses strife with Greek and Israeli oil investors.**

Two oil traders have received more than US$45 million each by way of compensation from the Republic of Georgia in an ICSID award, promoting a wide interpretation of the standard of fair and equitable treatment (FET).

**The merits**

In its decision of March 3, 2010, Tribunal reached the conclusion that *Kardassopoulos’* investment was illegally expropriated in contravention of the ECT, since Georgia did not provide ‘‘immediate, adequate and effective’’ remuneration nor carried out the compulsory purchase under due process of law. Investors do not have ‘‘reasonable likelihood within an appropriate time period’’ to be heard and claim their rights.\(^{17}\)

The Tribunal then veered to Fuchs’ fair and equitable treatment claim, expounding the standard widely as an infringement of investor’s reasonable expectations. Although the Georgia-Israel BIT came into force only after the acts of expropriation, the Tribunal held that Georgia’s compensation reassurances after the investment gave Fuchs legitimate expectations for a fair and equitable indemnity process.

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\(^{17}\) *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.
Comment

Because the FET infringement led to the same consistency as the illegal expropriation, depriving investors from their investment without indemnification, there was no need to distinguish between the losses caused to the two plaintiffs.

The Tribunal ruled that Kardassopoulos would be expected to have sold his shares in GTI in 1995, and thereby concluded that he should not be compensated for the value acquired between the dates for expropriation and decision.

Compensation has been granted to Kardassopoulos based on reasonable market value of his rights on November 10, 1995, several months before the final practice of expropriation, ensuring restoration of the investment’s market value before any act of expropriation.

5. Hrvatska Elektroprivreda d.d. (HEP) (Croatia) v. Republic of Slovenia

(ICSID Case No. ARB/05/24)

Case registered: 28.12.2005

Subject matter: Nuclear power plant

Status of proceeding: Pending

12.06.2009 - Decision on the Treaty interpretation issue and Individual Opinion

Decision

Arbitrators clash on question of interpretation

The partial decision, issued on June 12, 2009 by Tribunal’s majority was convoked on Request for Arbitration under ICSID Arbitration Rules, judging the Republic of Slovenia accountable to Hrvatska Elektroprivreda d.d. (HEP), the Croatian National Power Corporation, for the economic value of not delivered electricity from July 1, 2002 until April 10, 2003.
The merits

Pointing out, the proper context whereby 2001 Agreement is defined, in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), Tribunal’s majority concentrated on the provisions on financial settlement agreement. Specifically, the majority decided that solving of economic issues in the agreement, created an equilibrium between the parties concerning all other issues, comprising the allotment of electricity to the HEP, and removal of all financial requirements from June 30, 2002 regardless Treaty’s ratification.

The Tribunal’s majority seems to base its explication under implicit rather than explicit wording in the 2001 Agreement. Insofar, the majority assumes that under VCLT’s Articles 31 and 32 ‘’no more or less power lies in a [Treaty] term, provided the basis of the relative size of the clarity with which it has been, or not, written’’.

Jan Paulsson, in a dissenting opinion, strongly discards the most of the Tribunal’s decision to impose accountability in Slovenia (subject to further proceedings) to indemnify HEP for the economic value of undelivered electricity from July 1, 2002 until April 19, 2003. While Mr. Paulsson contests certain aspects of the majority’s decision, the dispute’s gist appears to be due to the approximation used by the Tribunal’s majority to construe the 2001 Agreement.

Comments

Quoting the majority’s hermeneutics approximation as ‘’nothing less than insurrectional’’, Paulsson notes that ‘’the majority divulges, de facto, that an outcome can be assumed and adjust it to text. Shades and shortcomings in the text have no time. Essentially, from Article 31 (1) of the VCLT, only the evidence corroborating their subjective shine (notions of good faith and object and purpose), are maintained by the majority, neglecting those that are objective in nature (terms of text and context )’’.

According to Mr. Paulsson, Slovenia would have no liability supplying electricity to HEP from June 30, 2002 considering the reality that the 2001 Agreement contains no such an express obligation.
6. **Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey**  
   (ICSID Case No. ARB/06/8)

Case registered: 19.04.2006

Subject matter: Electricity generation and distribution concessions (expropriation)

Status of proceeding: **Final Award rendered on 02.09.2011**

**Decision**

**Committee upholds stay of enforcement in Libananco’s strife with Turkey.**

*Libananco Holdings* was given an extension from payment of $15 million dollar award in favor of Turkey, as the Cypriot listed company had earlier lost US$10 billion in its request against Turkey on alleged infringements of the Energy Charter Treaty (since Tribunal found no ‘‘investment’’ under the ECT), whereas an *ad-hoc* ICSID committee, cogitate the implementation to invalidate the award.

**The merits**

**Tribunal equilibrates interests**

Each contracting party faces a possible encumbrance depending the decision’s way, as the committee recognized on 7 May, 2012, in its decision. *Libananco*, for instance, was afraid of not recovering the award, if it would have been canceled. Turkey likewise stated that *Libananco’s* supporters couldn’t be reliable to abide the award.

Nevertheless, in the final analysis, the committee has observed that *Libananco’s* interest in stay of enforcement offset those of Turkey. Also pointed the disqualifying actions were planned to proceed quickly, and thus the suspension of the execution can be kept short.

Drawing to a close, the committee denied Turkey’s argument over the stay of enforcement because of *Libananco’s* ‘‘unpleasant character’’, and a basis whereas the application for annulment is ‘‘unfair’’ was not found.
Turkey’s desire to bear ‘‘closing’’ of the case was also stated, but as it has explained ‘‘decision’s execution will not bear this process to a close’’.

Comments

Provisional measures dismissed

Relying on Turkey’s assumed spying, Libananco also called for interim relief ‘‘to retain [Applicants] entitlements, including the right to due process of law, right into a fair trial, the right to secrecy and legal prerogative and, ultimately the right to prepare and present the case without being disturbed by Respondent’s unlawful spying’’.

Turkey countered that the ICSID Convention does not grant the committee the power to grant provisional measures, apart from ordering a stay of enforcement.

On a separate decision, the commission contested that it held jurisdiction for granting interim relief, but it overlooked the matter by firstly examining the necessity of Libananco’s application. The committee specified that it had not seen a base for interim measures, since it does not had proofs that Turkey has, or will, reconnoitre on applicants.

7. **Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands) v. Azerbaijan (ICSID Case No. ARB/06/15)**

Case registered: 30.08.2006

Subject matter: Oil and gas distribution, trade, storage and transportation enterprises

Status of proceeding: **Award rendered on 08.09.2009**

Decision

**Disarray about Settlement Agreement leads to Rejection of Case Between Dutch Companies and Azerbaijan**
Following a dissent on the existence of a settlement agreement, an ICSID Tribunal concluded that it has no competence to hear disputes launched by three Dutch companies, *Azpetrol International Holdings B.V.*, *Azpetrol Group B.V.* and *Azpetrol Oil Services Group B.V.* against the Republic of Azerbaijan.

**The merits**

The Tribunal had been notified by parties, on December 19, 2008, that they had reached an *in principle* arrangement and requested for direct procedural stagnation of the case until December 31, 2008 for finalizing the accord. The disclosure came due to many discussions regarding advice for parties in this dispute and another differentiation pleaded by Azerbaijan, *Fondel Metal Participations B.V.* v. The Republic of Azerbaijan. Then, opinions differed raised between the parties, concerning the settlement’s communications nature.

Especially, controversy’s epicenter was the nature of emails’ interexchange between the parties in mid-December 2008. Although, investors and Azerbaijan accepted the fact that correspondence between them, had led to a legal agreement tying them, they contested over its scope. Azerbaijan argued that such communications have reached an agreement, to settle the case by agreeing subsequent stagnation, while investors argued that, it was simply a standstill agreement, to provide time for the parties to parley a solution.

Applying English law as agreed to by the parties, the Tribunal, composed of Judge Florentino P. Feliciano, Judge Charles N. Brower, and Sir Christopher Greenwood, sided with Azerbaijan. The Tribunal held that the language’s physical meaning in emails connoted that it had been reached a binding settlement agreement. Thereby, the Tribunal discarded a series of arguments formulated by Dutch investors, particularly that there was no binding agreement, because purpose to create legal relations was not existed, there was no mental encounter, and that the agreement was deficient.

**Comments**

The Tribunal rejected the investors’ endeavors to contend for a more constrained translation of the important email trade by depending on confirmation of earlier correspondence and resulting practice between the parties. Careful about considering such outward proof, the Tribunal repeated the appropriateness of English *versus* international law to the debate. It noticed that while extraneous proof may be acceptable under international law, this question was to be administered by English law which gives just exceptionally restricted response to outward
confirmation. Hence, the Tribunal found that there was no "legitimate question" between the parties as needed by Article 25(1) of the ICSID Convention, nor was there a "debate" as needed by Article 26(1) of the ECT. In this manner, it presumed that it didn’t have the competence to hear the case.

8. **Barmek Holding A.S. (Turkey) v. Azerbaijan (ICSID Case No. ARB/06/16)**

Case registered: 16.10.2006

Subject matter: Electricity concession

Status of proceeding: **28.09.2009 - Settlement concurred by the parties and recorded in the form of an award**

9. **Cementownia ‘’Nowa Huta’’ S.A. (Poland) v. Republic of Turkey**  
(ICSID Case No. ARB (AF)/06/2)

Case registered: 16.11.2006

Subject matter: Electricity concessions

Status of proceeding: **Award rendered on 17.09.2009**

**Decision**

**Claim ‘’apparently unfounded’’**

On September 17, 2009 the Tribunal rejected yet an alternate request launched against the Republic of Turkey by a substance, Cementownia ‘’Nowa Huta’’ S.A. (‘’Cementownia’’), managed by the Uzan family.
The merits

In the wake of considering the contentions of both Cementownia and Turkey, the Tribunal favored Turkey and chose to reject the request with bias. In this manner, the Tribunal made various discoveries that dispossessed Cementownia’s capacity to recommence arbitral processes against Turkey.

Given Cementownia’s inability to deliver unique offer endorsements proving its shareholdings in CEAS and Kepez, the conflicting proof regarding the exact date of Cementownia’s offer procurement, the circumstances in which the offer exchange happened (i.e. through phone and with simple contracts), and the way that Cementownia did not record the offer exchange in its own particular budgetary proclamations in 2003 and 2004, the Tribunal chose that Cementownia “… had not delivered any enticing confirmation that could demonstrate possibly its shareholding in CEAS and Kepez at the pertinent time or that it was an investor inside the significance of the ECT”.

Comments

The Tribunal found that Cementownia’s case was “manifestly poorly established” and noticed that the Cementownia “… deliberately and in lacking honesty mishandled the arbitration; it implied to be an investor when it realized that this was not the situation…” and was “’blameworthy of procedural offense: once the arbitration undertaking was initiated, it… created unnecessary postponements and accordingly expanded the expenses of the intervention’.

Disregarding this discovering, the Tribunal rejected Turkey’s solicitation for harms thinking that it was more suitable to endorse Cementownia concerning the assignment of expenses. Accordingly, Cementownia was requested to pay Turkey US $5,304,822.06, which introduce its lawful expenses and costs and its commitment to the expenses of the arbitral proceedings.
10. *Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey*  
(ICSID Case No. ARB (AF)/07/2)

Case registered: 06.03.2007

Subject matter: Electricity concessions

Status of proceeding: Award rendered on 13.08.2009

**Decision**

Claim dismissed by Tribunal; Claimant ordered to bear arbitration’s cost

An ICSID Tribunal has rendered a ruling in the wake of ending up in the uncommon position of confronting solicitations from both the Claimant and Respondent for a case to be rejected for absence of purview.

In its decision dated 13 August 2009, the Tribunal declined competence, on a premise adjusted to the solicitation of the Republic of Turkey, the Respondent, and opposed to the Polish Claimant, *Europe Cement Investment & Trade S.A.*

**The merits**

The Tribunal allowed Turkey’s appeal for a contemplated award, including thought of its demand for fiscal harms, clarifying that ‘‘the way that the parties concur on the result – rejection for absence of purview – does not imply that they must be esteemed to have concurred to discontinuance or that there is no question between the Parties’’.

In the wake of considering the contentions of both sides, the Tribunal inferred that the proof ‘‘directs emphatically toward the conclusion that Europe Cement did not preserve shares in CEAS and Kepez at the applicable time’’.

The Tribunal declined to adjudicate compensation to Turkey, nonetheless, clarifying that the conclusions arrived at, in its award, ought to cure any harm perpetrated on Turkey’s notoriety.

Anyhow, *Europe Cement* has been requested to shoulder the full cost of arbitration process, including Turkey’s legitimate charges, which run up to some US$3.9 million.
Comments

Counsel for Turkey, the law office Freshfields Bruckhaus Deringer, asserted before the Tribunal for this issue that the aggregate shares professedly held by petitioners in these cases add up to 130% of the shares of CEAS and 125% of the shares of Kepez.

‘’These numerous, covering and conflicting cases are, in the Respondent’s perspective, a supporting confirmation that the case by Europe Cement to claim shares in CEAS and Kepez is unjustifiable and false,’’ the Tribunal noticed.

11. Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan (ICSID Case No. ARB/07/14)

Case registered: 16.07.2007

Subject matter: Exploration and extraction of hydrocarbons

Status of proceeding: Award rendered on 22.06.2010

Decision

The Tribunal had purview to consider the Claimants’ cases. The Respondent is not accountable under the Energy Charter Treaty or under the License. All further requests presented by the Claimants seeking alleviation, are refused.

The merits

Considering the above discords of the parties, the Tribunal recognizes that the domestic courts of Kazakhstan are, from the point of view of international law, organs of the Republic of Kazakhstan. Consequently, their choices are attributable to Respondent and could be measures falling under ECT Article 13. Then again, it is additionally clear and undisputed that Claimants, insofar as they were liable to Kazakh law, were liable to the purview of the Kazakh courts. The simple fact that rulings of the Kazakh courts announced that Claimants did not win and were
not holders of rights they asserted to have, hence, is inadequate to derive an expropriatory measure coming under ECT Article 13.

In examining ECT Article 10(1), second sentence, the Tribunal found that the Kazakh court rulings were not discretionary, blatantly inequitable, unrighteous, idiosyncratic, biassed or lacking due procedure, regardless of the possibility that they may have been inaccurate as an issue of Kazakh law, and that respectively they should be acceptable from the point of view of international law and especially that of the ECT. Therefore, the nullification of the transfer of the License by the Kazakh courts must be acknowledged under international law and under the ECT.

Comments

Hence, it can’t be inferred that the conveyance was wrongfully abrogated as Claimants plead. The rulings of the Kazakh courts don’t form a confiscation.

Concerning the activity of the Ministry of Energy, the Tribunal concurs with the etiology of the Azinian18 Tribunal, holding that a gubernatorial power can’t be accused for conformity to its own judiciary ruling. So if, as found above, such judgments are faultless and should be acknowledged under international’s law light.

Therefore, the request of the re-conveyance of the License to [X], which just enforced the court ruling, does not recommend an action that may autonomously regarded a measure of expropriation under Article 13 of the ECT.

Recognizing that Kazakh law is pertinent to pretensions under the License, the Tribunal assumes that it can’t acknowledge LCO as a true blue holder of the License in light of the fact that the transfer of the License from [X] to LCO was nullified by the Kazakh courts. According to ECT Article 10(1), second sentence, and Article 13, these court rulings are faultless from international’s law viewpoint and the ECT specifically. Hence, this Tribunal needs to acknowledge that LCO did not turn into a contracting party to the License Agreement and can’t bring a case asserting violation of the License Agreement.

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18 Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID CASE No. ARB(AF)/97/2.
12. *Electrabel S.A. (Belgium) v. Republic of Hungary* (ICSID Case No. ARB/07/19)

Case registered: 13.08.2007

Subject matter: Power generation: statements of unlawful seizure, and ruptures of Articles 10(1) and 10(7). Claimant additionally requests the specification of damages in a further stage of the arbitral procedure.

Status of proceeding: **Pending**

30.11.2012 - Tribunal issues a ruling on competence, applicable law and liability

**Decision**

ICSID Tribunal further elucidates chain of command between EU law and ECT in investor-state energy conflicts

The Tribunal considered the relationship between EU law and the Energy Charter Treaty (ECT), regarding states who sanctioned the ECT before consenting to the EU. The Tribunal’s ruling examines issues identifying with Arbitral Tribunals’ competence, in connection to claimed violations of the ECT by EU member states, the relevant conflict’s law, specifically the position where there is a dispute between the ECT and EU law, and parties’ responsibility.

The Tribunal dismissed *Electrabel’s* expropriation claim.

**The merits**

The Tribunal rejected the EU Commission’s jurisdictional subjection that inquiries of elucidation of EU law, fell solely under the purview of EU courts.

As per the conditions of Article 26 of the ECT and Article 42 of the ICSID Convention, the law to apply, was that of the ECT and pertinent principles and standards of international law.

Despite the fact that it dismissed the presence of a general standard of international law, forcing the rendition of diverse treaties harmonically, the Tribunal found that the ECT and EU law were a *status quo* that could and ought to be construed congruous to this case.

In line with arbitral case law and doctrinal writings, the Tribunal considered that an ‘‘expropriation’’ implied a radical deprivation of rights or a destruction of an investment, its
value or enjoyment. In the Tribunal’s opinion, Electrabel did not meet the threshold because – save for the Power Purchase Agreement (PPA) termination – its investment in Dunamenti remained intact. With respect to the FET standard, the Tribunal found that Hungary could not be held liable for acts committed by the European Commission.

Comments

EU Member States had consented to submit inquiries of elucidation of EU law to the European Court of Justice (ECJ), now the CJEU. This, on the other hand, was not pertinent to the case, as the requirement, was brought for a rupture of the ECT not of EU law. In any occasion, the Tribunal dismissed the subjection, that the ECJ was mere competent to hear cases including EU law. International courts and Tribunals other than the ECJ, frequently translate and apply EU law, as for instance the International Court of Justice (ICJ).

The EU, by turning into a contracting party to ECT, had concurred itself to the subjection of conflicts emerging under the ECT to arbitration.

The Tribunal held that applicable law incorporated EU law, which shaped not just part of EU member states’ national law, yet international law.

Where a treaty was gone into between a non-EU member state and an EU member state before the EU member state’s incorporation to the EU, the contemplation of the prior settlement would win. This inference has been concluded on the premise of Article 307 of the EC Treaty. This, purvey that the rights and commitments which emerge from conventions superseded by EU member states and third nations preceding 1 January 1958 or, for joining states, before the date of their incorporation, won’t be influenced by the entrance into power of the EC Treaty.

Nevertheless, where a treaty was superseded between two EU member states before one of them joined the EU, the term of the posterior treaty (the EC Treaty for this situation) would dominate. Upon reaching its inference, the Tribunal depended on the guideline of pacta sunt servanda contained in Article 30 of the Vienna Convention on the Law of Treaties 1969, providing that, where posterior treaties are entered into which correlate with the same topic and the conditions of these are discovered to be contradictory, the terms of the later treaty will predominate.

Case registered: 13.08.2007

Subject matter: Electricity generation

Status of proceeding: **Award rendered on 23.09.2010**

**Decision**

**Tribunal discards claims against Hungary in ECT conflict about power stations**

The ICSID Tribunal rejected all requirements by British energy corporation *AES* towards Hungary in light of the fact that Hungary acted sensibly when it controlled the benefits of public energy utilities.

**The merits**

The Tribunal then evaluated Hungary’s actions against the protections provided to investors under the ECT. It held that Hungary had not infringed its liability for providing fair and equitable treatment, particularly since Hungary had not made any statements or reassurances in the sense that, after discontinuation of prices administration to the end of 2003, adjustable pricing would not again be inserted. Moreover, the Tribunal found that there was nothing ‘‘illogical or differently reasonableness’’ in Hungary’s political decision to restore centrally agreed prices in 2006, thus to infringes its ECT liability, in order to secure that investors were treated fairly and equitably and that their investments were not inhibited by preposterous or prejudicial measures.

The Tribunal likewise found that Hungary’s reintroduction of managerial valuing in 2006 was propelled mainly by broad concerns identifying with (and was pointed specifically at decreasing) exorbitant benefits earned by the generators and the freight on purchasers. It found that it was a ‘‘flawlessly legitimate and sane target for a government to address extravagance benefits’’. Contrasting it with the latest diffuse concerns about banks’ lucratively levels, it
held that ‘unnecessary benefits may lead to legitimate reasons for governments to directing or re-adjusting’.

In its 23 September 2010 ruling, the Tribunal presumed that Hungary was entitled to restore an adjustable prices system. Significantly, the PPA did not contain a ‘‘stability clause’’ that would provisionally constrain Hungary’s seigniorage to alter its legislation. Since Hungary did purvey no guarantees, AES cannot have legitimate expectations, the Tribunal deduced.

Additionally, Hungary’s actions were considered a legitimate, sensible and proportionate practice of administrative authority, steady with their normal public strategy goals. ‘‘Exorbitant benefits,’’ as per the Tribunal, ‘‘may well lead to legitimate reasons for governments to adjust’’.

Comments

The Tribunal’s finding that the ECT ought to be deciphered irrespective of EU law will make it more troublesome for states to depend on EU law to evade their investment settlement commitments. This should notably be in light of the Tribunal’s affirmation that EU law, ‘‘when established in domestic jurisdictions … is a piece of these legal orders’’ and ‘‘a state may not summon its national law as an excuse for affirmed infringements of its international commitments’’. In any case, the Tribunal additionally held that EU legislation ought to be considered by the Tribunal when figuring out if the state’s measures are rational, sensible, discretionary or diaphanous. EU law was subsequently granted extensive weight in the Tribunal’s examination of Hungary’s conformity to its investment settlement commitments.

The case was eventually settled on the ground that Hungary’s behavior did not provide any cause to legitimate expectation. The Tribunal held that, no legitimate expectations were made, that would block the restoration of regulated pricing. The ruling is, in this way, a reassurance of the host state’s entitlement, to direct financial activities inside its region.

AES additionally contended, that the consistent assurance and security standard likewise incorporated the commitment to guarantee lawful protection and security. The Tribunal dismissed this assertion, nevertheless, ratiocination that the standard does not exceed the level of investor’s protection against state regulations, on basis of rationalistic ordre public reasons, such as Hungary’s pricing decrees.
AES contended, that the decrees added up to confiscation, authorizing the corporation for indemnification from the Hungarian government. In rejecting this requirement, the Tribunal affirmed that, not every state regulation with negative impacts on a foreign investor, sums to confiscation. The pricing decrees, did not bereave AES of its proprietorship or control over its venture, nor did they engender a significant degrading of the investment, truth be told AES kept on making noteworthy benefits.

14. *Alapli Elektrik B.V. (the Netherlands) v. Republic of Turkey*  
(ICSID Case No. ARB/08/13)

Case registered: 27.08.2008

Subject matter: Electricity concession

Status of proceeding: Final Award rendered on 16.07.2012 (attached to the award is a dissenting opinion by arbitrator Marc Lalonde)

Decision

Contrasted conclusions on each of the components of the Tribunal’s competence, deduced that jurisdiction lacked.

After cautious thought of all contentions and confirmation, a ruling was rendered on July 16, 2012, where Arbitrators Stern and Park (the “Majority”) infer that the Tribunal needs competence to hear the conflict according to the ECT and the Netherlands-Turkey BIT.

The Tribunal issued a ruling supporting Turkey rejecting the requirements in their whole. Claimant is currently looking for abrogation.

The merits

Arbitrator Park held that the “Claimant never made any individual confluence and had not jeopardize, regarding the *Alapli* Project, ample to make for itself the status of an investor under
either the ECT or the Netherlands-Turkey BIT” (para. 337 of the Award), giving specific weight on attestation by one of Claimant’s witnesses to reach an inference.

The Claimant had not obtained any *dominium* over the money which transited its accounts, and that the whole monetary confluence originated from the General Electric Group, which likewise guaranteed the expertise aptitude, vital for the task.

Arbitrator Stern, then again, held that there was no *’bona fide investment,’* as ‘’it is clear that Claimant, as a Dutch enterprise, bought off its investment with the lone objective of structuring international competence, during a period when there were critical conflicts with the Turkish dominion, the exceptionally same dissensions that were at the heart of the conflict before the Tribunal’’. (paras. 416 and 417 of the Award). She consequently found, that the Claimant was blocked from relying the rights under the BIT or the ECT.

Arbitrator Lalonde’s Dissent opined that there was purview over both the ECT and the BIT ‘’concerning all occasions emerging after 30 March 2000, the date of the obtainment of half of the shares of Atam Alapli by Claimant’’.

**Comments**

As per Prof. William W. Park, completely uninvolved proprietorship is insufficient for petitioners to luxuriate investment settlement safeguard.

The Tribunal along these lines, expressly perceived that there was no accordance between Arbitrators Park and Stern, and ensued a jurisdictional dismissal which was ‘’effected by a notional ‘’dominant part’’ which concurred on no sole ground for its inference’’.19

Both Arbitrator Park’s and Stern’s legitimate investigations are in accordance with other ICSID awards that have embraced treaty’s rendering and practiced essentially suchlike law principles.

The ruling to abnegate jurisdiction where there is competence, may constitute overrun of powers, but a jurisdictional oversight is not perforce an obvious excess of powers. The terms of Article 52 (2) (b) of the ICSID Convention, have been pointed by many *ad hoc* committees, that contain no exemption for jurisdictional issues, by dismissing the contention that all jurisdictional errors are inherently ‘’manifest’’.20

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19 Applicant’s Memorial, para. 97.
20 *Luchetti* v. Peru, para. 101, and *Soufraki* v. UAE, paras. 118-119.
The wording of Article 48(4) of the Convention is wide and tolerant, empowering any individual from the Tribunal to provide a different assessment, if said part unites the majority or disagrees. This implies that arbitrators involving the larger part, are allowed to submit separate assessments with autonomous thinking.

An atomic conclusion is an assessment that is diverse in rationale from the award itself. Then again, as Article 48(4) makes clear, it doesn’t influence the legitimacy of the ruling to which it is affixed. At the end of the day, what is important for purposes of making up a dominant part is not the thinking of that lion’s share’s individuals, however their votes.

In its Annulment ruling of July 10, 2014, the ad hoc Committee dismissed the Applicant’s contention (filed by Alapli Elektrik B.V.) that the Award is the aftereffect of abuse of power, according to Article 52(1)(b) of the ICSID Convention.

15. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany* (ICSID Case No. ARB/09/6)

Case registered: 17.04.2009

Subject matter: Construction of a coal-fired power plant and environmental protection measures (expropriation)

Status of proceeding: *Settled by agreement among the parties embodied in an award by consent dated 11 March 2011*

16. *EVN AG (Austria) v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/10)

Case registered: 03.06.2009

Subject matter: Electricity distribution (expropriation)
Status of proceeding: Settled by agreement among the parties embodied in an award by consent rendered on 2 September 2011

17. AES Corporation and Tau Power B.V. (the Netherlands) v. Kazakhstan

(ICSID Case No. ARB/10/16)

Case registered: 20.07.2010

Subject matter: Power facilities and trading companies

Status of proceeding: Award rendered on 01.11.2013

Award: EXCERPTS of award since information not publicly available

Decision

Kazakhstan held liable but escapes damages

On 1 November 2013, the Tribunal partially granted the US energy company AES and its related company, Tau Power B.V. against Kazakhstan, but rejected the claim for compensation for damages.

The merits

The Tribunal upheld the plaintiff's argument that, the Kazakh reforms in the electricity sector violate the Energy Charter and the US BITs and Kazakhstan in terms of conditions of fair and equal treatment. Speech is for an amendment to the law that requires investors to reinvest all profits and defer payment dividends. The Tribunal decided that Kazakhstan should stop infringement, but rejected demands AES for damages (including non-pecuniary damage and loss of profits) in the amount of more than a billion dollars as premature and unfounded.

Truth be told, the Tribunal requested the Claimants to manage most of the expenses of the arbitral processes.
18. Türkçe Petrolleri Anonim Ortaklığı (Turkey) v. Kazakhstan  
(ICSID Case No. ARB/11/2)

Case registered: 14.01.2011

Subject matter: Oil exploration and production joint venture

Status of proceeding: 27.06.2014 - Parties filed the full and signed settlement agreement and requested the Tribunal to embody their settlement in an award

19. Slovak Gas Holding BV (the Netherlands) et al v. Slovak Republic  
(ICSID Case No. ARB/12/7)

Case registered: 05.04.2012

Subject matter: Natural gas services

Status of proceeding: Settled by agreement between the parties embodied in an award by consent rendered on 19 March 2013

B. Cases Still in Progress

20. Vattenfall AB (Sweden) et al v. Germany (ICSID Case No. ARB/12/12)

Case registered: 31.05.2012

Subject matter: Nuclear power plant

Status of proceeding: Pending

19.05.2014 - The Tribunal issues Procedural Order No. 6 concerning the confidentiality of documents.
21. EVNAG v. Republic of Bulgaria (ICSID Case No. ARB/13/17)

Case registered: 19.07.2013
Subject matter: Electricity supply and distribution operations
Status of proceeding: Pending

05.05.2014 - The Tribunal issues Procedural Order No. 2 concerning provisional measures.

22. RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain (ICSID Case No. ARB/13/30)

Case registered: 22.11.2013
Subject matter: Legal reforms affecting the renewable energy sector
Status of proceeding: Pending

23. Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain (ICSID Case No. ARB/13/31)

Case registered: 22.11.2013
Subject matter: Legal reforms affecting the renewable energy sector
Status of proceeding: Pending

Case registered: 05.12.2013

Subject matter: Dispute over gas pricing and distribution

Status of proceeding: **Pending**

09.06.2014 - The Tribunal issues Procedural Order No. 1 concerning procedural matters.

(ICSID Case No. ARB/13/36)

Case registered: 23.12.2013

Subject matter: Legal reforms affecting the renewable energy sector

Status of proceeding: **Pending**

26. *Masdar Solar & Wind Cooperatief UA* v. *Spain* (ICSID Case No. ABR/14/01)

Case registered: 11.02.2014

Subject matter: Legal reforms affecting the renewable energy sector

Status of proceeding: **Pending**
27. Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italy
   (ICSID Case No. ABR/14/03)

Case registered: 21.02.2014
Subject matter: Photovoltaic energy project
Status of proceeding: Pending
30.07.2014 - The Tribunal issues Procedural Order No. 1 concerning procedural matters.

   v. Spain (ICSID Case No. ABR/14/11)

Case registered: 23.05.2014
Subject matter: Legal reforms affecting the renewable energy sector
Status of proceeding: Pending

29. InfraRed Environmental Infrastructure GP Ltd. et al v. Spain
    (ICSID Case No. ABR/14/12)

Case registered: 03.06.2014
Subject matter: Legal reforms affecting the renewable energy sector
Status of proceeding: Pending
30. *Elektrogospodarstvo Slovenije - razvoj ininzeniring d.o.o. v. Bosnia and Herzegovina* (ICSID Case No. ABR/14/13)

Case registered: 16.06.2014

Subject matter: Thermal power plant project

Status of proceeding: **Pending**

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31. *RENERGY S.à.r.l. v. Spain* (ICSID Case No. ABR/14/18)

Case registered: 2014

Subject matter: Legal reforms affecting the renewable energy sector

Status of proceeding: **Pending**

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32. *ALPIQ v. Romania* (ICSID Case No. ABR/14/28)

Case registered: 2014

Subject matter: Termination of long-term energy delivery contracts

Status of proceeding: **Pending**
33. **RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain**  
    (ICSID Case No. ABR/14/34)

Case registered: 2014

Subject matter: Legal reforms affecting the renewable energy sector

Status of proceeding: **Pending**

34. **Stadtwerke München GmbH, RWE Innogy GmbH et al. v. Spain**  
    (ICSID Case No. ABR/15/1)

Case registered: 07.01.2015

Subject matter: Renewable Energy

Status of proceeding: **Pending**
CHAPTER VI

CONCLUSION

SUMMARY – EVALUATION

Although, general findings concerning case-law issues deriving from ECT, cannot be draw, because too few cases of such nature are resolved, the following, can be exported as final evaluations concerning energy investment disputes.

- Two points had to be defined by Court concerning the application and interpretation of Article 17, in Plama award. First question was, if Article 17 is going under Tribunal's jurisdiction or whether going with the substance. Bulgaria's argument that implementing Article 17 would impact Court's jurisdiction was rejected.

The second issue arisen in this case regarding Article 17, is derived from provision's interpretation that treaty's protection is excluded, as soon as conditions in 17 (1) are met, or if an additional express warning from State towards investor, before the emerging alleged wrongful acts, is necessary. The court, in Plama considered such an additional notice should be required.

There is presently no general approach to the application of Article 17. Only time will show whether it will ever be such a general approach.

- In Kardassopoulos, the Court found that the application of all the ECT's provisions, including provisions regarding dispute settlement, were imported from the provisional application, as were already applicable by then, even if the Treaty has not yet definitively occurred into force.

State-party's objections, accusing the investor of not having made an ‘Investment’ protected by the ECT, had to be laid down by Tribunals, as it commonly happens in arbitrations under BITs. Setting of these issues, could include questions about what subjects, duly belonging to Tribunal's judgment on Jurisdiction and what issues should be left for determining the substance, as demonstrated in Plama award.

Issues of common interest concerning the ECT's application, will possibly be related to future ECT awards. After a slightly ‘delayed start’ concerning the ECT's investment protection, it
should be observed in this context that investors have already begun to discover the treaty. A steadily stream of continuance of such cases, will possibly be seen in coming years, with the increased investors' awareness on the treaty.

- ICSID arbitral Tribunal examined whether plaintiffs fulfilled the requirements for being an investor, within the context of ICSID Convention, Energy Charter and BIT, during trial process, in cases Libananco, Europe Cement and Cementownia ‘‘Nowa Huta’’ against Turkey. It was decided, in these trials, that the ‘‘investor's’’ conditions specified in provisions, were not fulfilled from applicant investors. In accordance with national legislation, the applicant must have the nominal shares recorded, into company's shareholders registry by submitting endorsements and commercial papers. By failing to satisfy these requirements, plaintiffs were also found to have acted in bad faith.

- Counsels should be really attentive while doing and accepting settlement bids pursuant to enlightening Azpetrol case. Both counsels in Azpetrol case, were located in London, thus, applicable law was not an issue. However, in several jurisdictions, settlement tenders in international arbitration frequently appear between lawyers. Which law is applicable to any settlement bids, needs to be ensured precisely by counsel. Second, the award evidences the vagueness of the concept ‘‘agreement in principle’’. Its avoidance should probably be better. Third, clarity is highly important in any conditions as proved. Notably, consultants are recommended for guaranteeing the clarification, as Respondent’s counsel did, whether a condition subsequent provides benefits in one of the parties. It's the best way of avoiding to be in the witness box, since consultants are unwilling of providing evidence on the settlement negotiations.

- Within the framework of consent to jurisdiction of Arbitral Tribunals, in Liman Caspian Oil B.V. the Tribunal recognized that, it's commonplace that host state’s unilateral offer to domestic legislation, in order to submit a dispute under specified international arbitration rules to Arbitral Tribunal's jurisdiction, after due acceptance by the applicant, is an adequate and binding deposit to arbitration. The investor can accept the bid made, submitting its claim to the arbitration institution or Arbitral Tribunal. After application of this reasoning to ECT Article 10(1), it can be supported that an abstract one-sided pledge by the state into domestic legislation and specifically in its laws indicated to foreign investors is included from the ‘‘umbrella clause’’.
Decisions of the Kazakh courts, which have decided to implement Kazakh law, had to be admissible as valid according to Tribunal. Based on the above, an infringement of these laws, which would be a presupposition for disrupting the umbrella clause, has not been occurred by Claimants.

➢ *Alapli Elektrik B.V.* award concluded that in order to be defined whether a corporate restructuring took place in bad faith, one has to ascertain if, at that time, “a *de facto* dispute can be witnessed by the competent party, or a concrete future disagreement can be predicted with great probability and not just as a general future confrontation.”

- **A test for European solidarity**

**Intra-EU Bilateral Investment Treaties**

Core value in European Union's political and economic integration progress, constitutes solidarity between European countries.

The validity of these intra-EU bits that have been contracted between EU Member States, has been challenged by European Commission, together with Member States of Eastern and Central Europe. Meantime, the assertion that the undersigned bit with other EU Member States before accession, is no longer valid, finds contrast so far, on western European Member States. Defending big business, rather than building solidarity, remains still, ‘old’ EU’s Member States, main priority.

The fact that some of these actions, occurring as outcome of legislation's change that requested by the EC itself, constitutes insult.

All EU bits are not acceptable in accordance with EU law and thus, should be abolished or remained inapplicable according to Commission's approach, since the entity of intra-EU BITs, would direct to a not acceptable dispute concerning investors' treatment, who are nationals of a Member State that has a link with another Member State, and investors having nationality of a Member State who has not taken a position.

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21 Cecilia Olivet, *The case of intra-EU Bilateral Investment Treaties*, Transnational Institute, January 2013
EU law might prevail over BITs or international treaties as Arbitral Tribunal recognized. In AES Summit to Hungary (ICSID Case No. ARB/07/22) this was the case, as well as in the dispute opposing Electrabel to Hungary.

Both cases, related to power purchase’s agreements termination by Hungary, after concerns expressed by European Commission, that these agreements were infringing EU regulations concerning state aid prohibition. Claims submitted by investors, in both cases, under the Energy Charter Treaty (‘’ECT’’) (Such decisions are absolutely necessary for Intra-EU analysis by objecting to an investor of a Member State to another Member State).

The Tribunal noted in AES case, that the Hungarian decision made to tackle the Commission's concerns on state aid, would represent a streamlined measure of public policy, without extradition of a decision as to whether EU law took precedence over the ECT.

Hungary, by terminating the power purchase agreement, after a European Commission’s preliminary ruling that requested Hungary to inhibit any state aid in order to abide EU law, didn't violate the ECT, as the Tribunal held in Electrabel. The power purchase agreement as concluded between Electrabel and Hungary declared illegal state aid from the Commission.

Unexpectedly, notwithstanding the fact that Arbitration Tribunals, increasingly recognize the supremacy of Community law over BITs, these courts' jurisdiction is steadily challenged by the Commission itself, which interferes in any of these cases and queries on the Tribunal's jurisdiction. Rightly however, the Arbitration Tribunal has discarded the assertion that the ECJ is solely responsible for the implementation and interpretation of EU law (Electrabel SA v. The Republic of Hungary).

Briefly, the veneration of the legitimate expectations of EU investors within the European Union may not be ensured.

- Compliance with EU law as the source of the lawsuits

The EC, in AES and Electrabel cases, by interfering with a statement in writing (amicus curiae briefing), argued that the state aid was illegal and the country did not violate its contractual obligations, because policy changes were introduced to conform to EU legislation.\textsuperscript{22}

The Tribunals in such circumstances decided to favor Hungary, although not by the argument put forward by the EC.

The EC has consistently argued that bilateral investment treaties between EU Member States should be abolished gradually because it is at odds with EU law and is therefore contrary to EU single market.

The EC argued that intra-EU BITs lead to discrimination between EU investors from different Member States by granting in certain and not to others the right to initiate proceedings against Member States to international courts.

Additional, the EC expresses concern that investors in arbitration are bound and the procedure is not likely to scrutiny by the Court of Justice (ECJ). The EC realizes that the ECJ is the forum to decide questions of EU law relating an EU Member State.23

The Tribunal's decision, in Electrabel SA v. The Republic of Hungary, increases the likelihood that an investor can commence arbitration proceedings against EU in accordance with the ECT (EU is ECT's signatory party), in situations wherein a measure ordered by the Commission and imposed by a Member State, has unfavorably influenced protected investor's investments.

Although it is not currently clear, if it would be adequate to arraign solely the EU, investors should necessarily meditate to get engaged with lawsuits both at Member State and EU where the disputed act of an EU Member State is related to the EU, to ascertain the fact that the transaction and the subsequent action of a compound transaction, results to an ECT claim.

Nevertheless, this is a new strategy that shall be gingerly regarded in each individual case. One such course of action, for example, will be impossible when the process is conducted in accordance with the ICSID Convention, given the fact that EU is not a contracting party to the Convention.

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