



Remedies under the Energy Charter Treaty

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Remedies under the ECT: the law

Article 26(8) ECT

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.

- The 2nd sentence was introduced into the treaty to address Canada's constitutional concerns
- Not restricted to monetary damages and restitution of property – Cf. Article 1135(1) NAFTA, proposal by Canada

Remedies under the ECT: the law

Restitution

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.

Discussions on restitution in investment arbitration under the ECT

- *Al-Bahloul v. Tajikistan* (award of 8 June 2010)
- *Nykomb v. Latvia* (award of 16 December 2003)

Remedies under the ECT: the law

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 Kardassolopoulos 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: methods of calculation

Methods of Calculating the Amount of Compensation

- Three approaches
 - (a) income-based
 - (b) market-based
 - (c) the asset-based
- Wide discretion of arbitral tribunals in the determination of the amount of compensation
- Partial compensation
 - (a) equitable considerations
 - (b) failure to mitigate damages
 - (c) principle of 'contributory negligence' (*Yukos awards* (2014))

Remedies under the ECT: case analysis

- Compensation was awarded to the investor in **8** 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: case analysis

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

	Claim	Award	Ratio
<i>Nykomb v. Latvia</i> (award of 16 Dec 2003)	7,097,680 Lats	1,600,000 Lats	22.5%
<i>Petrobart v. Kyrgyzstan</i> (award of 29 March 2005)	4,084,652 USD	1,130,859 USD	27.7%
<i>Kardassopoulos v. Georgia</i> (award of 3 March 2010)	350 million USD	90.25 million USD	25.8%
<i>Remington v. Ukraine</i> (award of 28 April 2011, not public)	36 million USD	4.5 million USD	12.5%
<i>Ascom v. Kazakhstan</i> (award of 19 December 2013)	5 billion USD	506 million USD	9.9%
3 Yukos Cases (awards of 18 July 2014)	113 billion USD	50 billion USD	50%

Source: the ECT Secretariat (work in preparation)

Remedies under the ECT: issues for further analysis

- Limitations on restitution – Article 35 ILC Articles; *LG & E v. Argentina* (award of 25 July 2007); *Al-Bahloul v. Tajikistan*
- 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?