STATE RESPONSIBILITY
For Non-Enforcement of Arbitral Awards

6th DIS Baltic Arbitration Days 2017
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Riga
AGENDA

A. Ukrainian Background
B. State Responsibility
C. BIT
D. ECHR
A. UKRAINIAN BACKGROUND
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MORATORIUM ON ENFORCEMENT

- Ukrainian law established moratorium on enforcement against all capital assets of state-owned companies.
- Moratorium covers all companies, in which the state owns at least 25% shares.
- Regent v. Ukraine (ECtHR 2008) - non-enforcement of arbitral award against state-owned oil refinery Oriana.
UKRAINIAN BACKGROUND

UKRAINIAN COURTS

- Ukrainian courts are not effectively independent from the Government

- Claimants often seek enforcement of arbitral awards against state-owned companies outside of Ukraine: e.g. in US courts — Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine
B. STATE RESPONSIBILITY
STATE RESPONSIBILITY

GROUNDS AND FORUMS

• ILC Articles on State Responsibility for Internationally Wrongful Acts (2001)

• NY Convention (1958)

• Bilateral Investment Treaties (ICSID, ICC, SCC or ad-hoc arbitration under UNCITRAL Rules)

• ECHR (ECtHR)
C. BILATERAL INVESTMENT TREATIES
DENIAL OF JUSTICE (and other substantive safeguards)

- **Denial of Justice** - manifest or gross injustice (a simple mistake or delays in judicial proceedings is not sufficient)

- **FET** - Fair and Equitable Treatment

- **Effective Means** - less strict standard compared to a denial of justice; included into US-Ukraine BIT and may be invoked under other BITs through application of MFN clause
ISSUE OF JURISDICTION

• Investor-state claims under BITs shall be related to protection of investment.

• What is “investment” (Salini Test): (1) capital in nature; (2) duration; (3) risks; (4) significant contribution.

• An arbitral award in itself does not appear to qualify as investment.

• But an arbitral award could be viewed as continuity of the underlying rights and shall follow the same qualification.
GEA v. UKRAINE (ICSID 2011)

- GEA (Germany) could not enforce in Ukraine an arbitral award against state-owned oil refinery Oriana
- GEA submitted claims to ICSID (denial of justice) against Ukraine
- ICSID Tribunal:
  - (1) an arbitral award in itself is not an investment
  - (2) no denial of justice - Ukrainian courts have not acted in “egregious” fashion
Romak (Switzerland) received GAFTA award for recovery of the debt from Uzbek state-owned companies for supplies of wheat

- GAFTA award was denied recognition and enforcement in Uzbekistan by Uzbek courts

- Romak submitted BIT claims against Uzbekistan: PCA tribunal concluded there was no investment and no jurisdiction
White Industries Australia (WIA) tried to enforce ICC award to recover debt for mining equipment and technical support supplied to state-owned Coal India.

After 7 years of unsuccessful proceedings in Indian courts, WIA initiated BIT arbitration against India:

1. For denial of justice - these claims were rejected (delays in court proceedings are not sufficient)
2. Under effective means standard - these claims were satisfied by tribunal
NEGOTIATIONS TO SETTLE

- Western NIS Fund v. Ukraine (ICSID 2006): claims arising out of alleged refusal of Ukrainian courts to enforce AAA award against a Ukrainian partner in sunflower oil production JV
- Western NIS Fund and Ukraine settled the case at procedural stage
- Early start of BIT proceedings and negotiations with Government during cooling-off period in parallel to enforcement proceedings can be effective for resolving enforcement issues
D. EUROPEAN CONVENTION ON HUMAN RIGHTS
ECHRs WIDERS APPLICATION COMPARED WITH BITs

- ECHR does not require “investment” compared with BITs - a failure to enforce an arbitral awards related to purely commercial matters can give rise to state responsibility under ECHR

- Article 6(1) of ECHR requires a state to ensure effective enforcement of arbitral awards by domestic courts
REGENT COMPANY v. UKRAINE (ECtHR 2008)

• COM s.r.o. tried to enforce an arbitral award against state-owned refinery Oriana during 8 years (1999 - 2007)

• ECtRH treated rights arising from the award as “possessions” protected under Article 1, Protocol 1 of ECHR

• ECtHR ruled that Ukraine violated fair trial obligations under Article 6(1) of ECHR due to continued non-enforcement
ANY QUESTIONS?