



Exasperation of States : Proposed Reforms of ISDS under Art. 26 ECT

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Facts and Statistics

- First case: 25 April **2001**
- **At least 2 cases/year** since then, except in 2002
- **Boom** in 2005 (6 cases) and in **2013 (16 cases)**
- **51 cases** to date
- **59 arbitrators**
 - Lawyers 50%, professors 30%, judges 13%, others 7%
 - 19 arbitrators appointed more from twice to six times



Outcomes

- **Final Award: 17**
 - **Jurisdiction denied : 4**
 - **Merits :**
 - **Responsibility for damages : 5**
 - **Responsibility but no compensation : 2**
 - **No responsibility : 6**
- **Settlement Agreement / Award : 6**
- **Pending: 27**



Damages Claimed and Awarded

- Amounts claimed : from 4 mln to 5 bln \$
- Damages awarded : average 25,11%

	Claim	Award	Ratio
<i>Nykomb v. Latvia</i>	7,097,680 Lats	1,600,000 Lats	22.5%
<i>Petrobart v. Kyrgyzstan</i>	4,084,652 USD	1,130,859 USD	27.7%
<i>Kardassopoulos v. Georgia</i>	350 M. USD	90.25 M. USD	25.8%
<i>Remington v. Ukraine*</i>	36 M. USD	4.5 M. USD	12.5%
<i>Ascom v. Kazakhstan</i>	5 Billion USD	506 M. USD	9,9%

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



Costs Awarded

- **Average arbitration costs :**
 - 411'975 €

- **Legal fees awarded :**
 - Up to 15 mln \$
 - **Costs equally shared** by the parties
 - **Costs follow event**
 - Claimants/defendant bears **75%** of the costs
 - **No statement**



Public Debate and Criticism



- **2012 UNCTAD IPFSD**
 - Balanced rights and obligations, policy space in IIAs

- **2012 OECD Freedom of Investment**
 - Costs, Consistency, Shopping

- **June 2013 : UNCTAD Roadmap**
 - ADR, access, appeal, permanent Court

- **November 2013 : CETA Investment Chapter**
 - Right to regulate and ISDS

- **March 2014 : TTIP**
 - Public consultation on ISDS



Preliminary Evaluation by ECS

■ Jurisdiction

- Art. 17 ECT : **Denial** of benefits
 - Consistent case law since 2005 Plama

■ Investment protection : balance of rights

- **No curtail** of national sovereignty
 - Regulatory powers not restricted
 - Mindful of discretion in setting public policy goals
 - No 'appeal' of national jurisdictions
- **Relief** to investors
 - Failure of due process
 - Unjustified non-performance
 - Unreasonable conduct

■ Procedure

- Lack of **transparency**
- Repeated appointments
- Convergence of case-law



Concerns to States

Balance of interest between investment protection and right to regulate

- Lack of **transparency**
- **Management** of disputes
- Shift of **interpretative power** from States to tribunals
- **Increase** in number of cases and in costs
- **Legitimacy** crisis and **consistency** of decisions

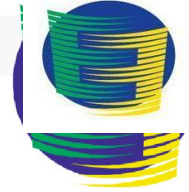


Proposals by the ECS

- **Transparency Rules**
- **Mediation** and conciliation
- **Interpretative Declarations**
- **Filters** and control of **costs**
- **Appeal** mechanism



UNCITRAL Transparency Rules



■ Incorporation of the 2013 UNCITRAL Rules on Transparency

- On a case-by-case basis
- Ratification of the UNCITRAL Convention

- Ad hoc Protocol
- Treaty amendment
 - All ECT arbitrations subject to transparency
 - Appointment of the ECS as Repository



Mediation and Conciliation



- Explore the potentials of Article 26(1)
 - Request for amicable settlement
 - Three months cooling-off period
- Article 26(3) : consent to submit to conciliation

- *Ad hoc* Protocol

- 2012 IBA Rules for Investor/State Mediation
 - Cost-efficient and timely settlement of disputes
 - Parties cooperate in good faith to advance mediation expeditiously and efficiently



Interpretative Declarations



- Interpretative power to ‘authors’ of the ECT
 - Protocols vs exchange of letters and official statements
 - Authoritative interpretation in or outside proceedings
- Art 10 ECT : FET and FPS
 - Denial of justice, breach of due process, arbitrariness, targeted discrimination, abusive treatment, legitimate expectations
- Indirect expropriation and right to regulate
 - Substantial deprivation, proportionality test
- Art. 26(3)(b) ECT : *ne bis in idem*
- Art 17(1) ECT : denial of benefits



Filters and Control of Costs



- Implications of **frivolous** claims
 - **Prima facie** test of title, nationality, non-discrimination
 - ICSID fast-track procedure Art.es 41 and 45
 - Unfounded claims, waivers, contractual claims, ne bis in idem

- **Costs** of arbitration proceedings and legal fees
 - Costs **follows the event**

- **Permanent Court**
 - Legitimacy and transparency, consistency and predictability



Legitimacy Crisis and Consistency

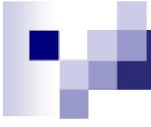


- **Appeal** mechanism (*US Model BIT, CETA, TTIP*)
 - ECT as a **multilateral** agreement

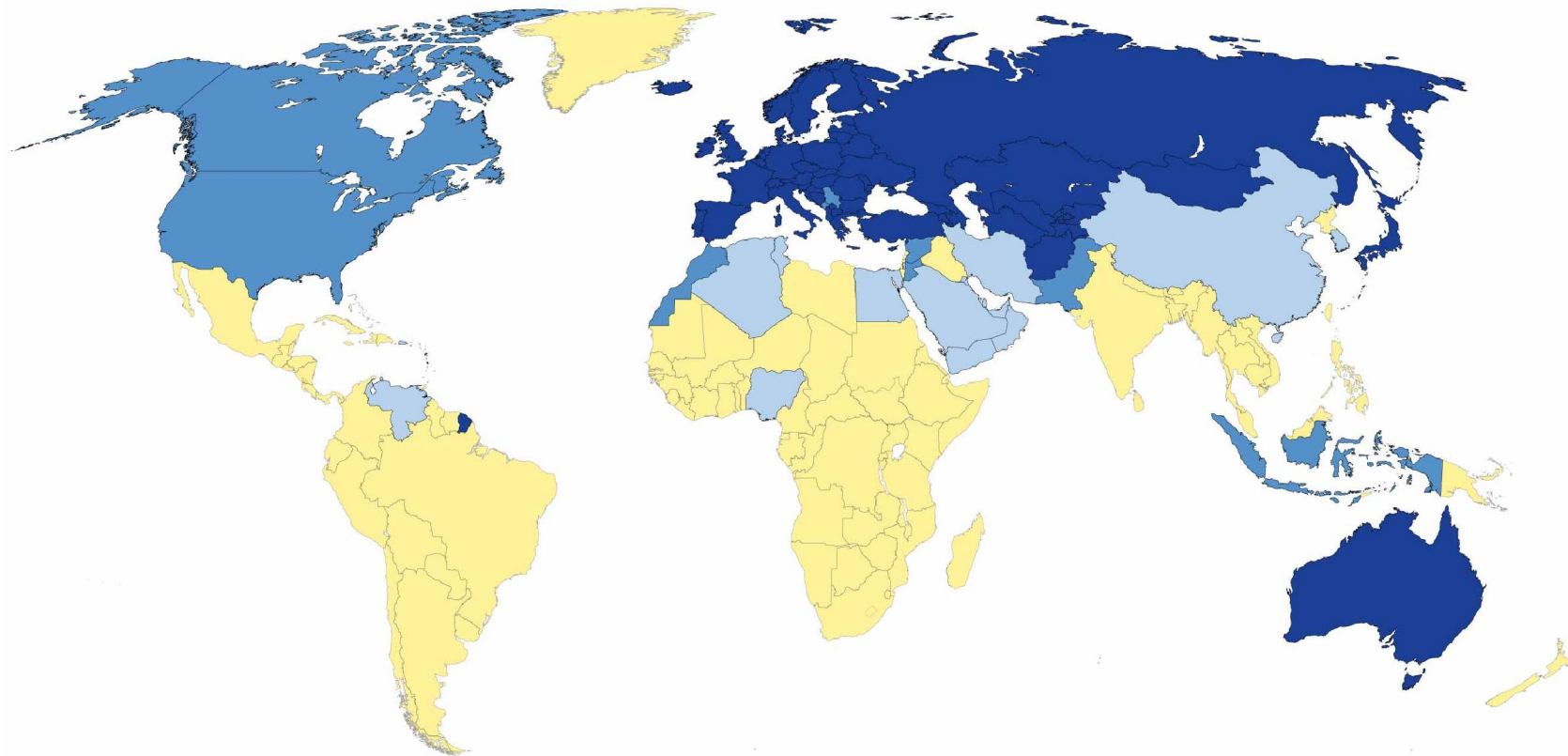
- **Scope** for revision
 - factual and/or legal, *de novo*

- **Remedy**
 - Annulment, remand

- **Standing** tribunal
 - Composition and costs

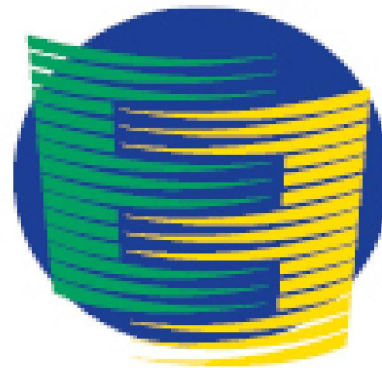
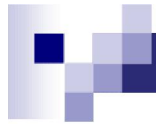


ENERGY CHARTER Constituency



■ Members ■ Observers (signed 1991 Charter) ■ Observers (by invitation)

This map is without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area



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Common rules for global energy security