

# STATE RESPONSIBILITY For Non-Enforcement of Arbitral Awards

6th DIS Baltic Arbitration Days 2017  
June 02, 2017  
Riga

## AGENDA

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- 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

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### 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  

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RESPONSIBILITY

# STATE RESPONSIBILITY

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## GROUND 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 v. UZBEKISTAN (PCA 2009)

- 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 v. INDIA (UNCITRAL 2011)

- 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



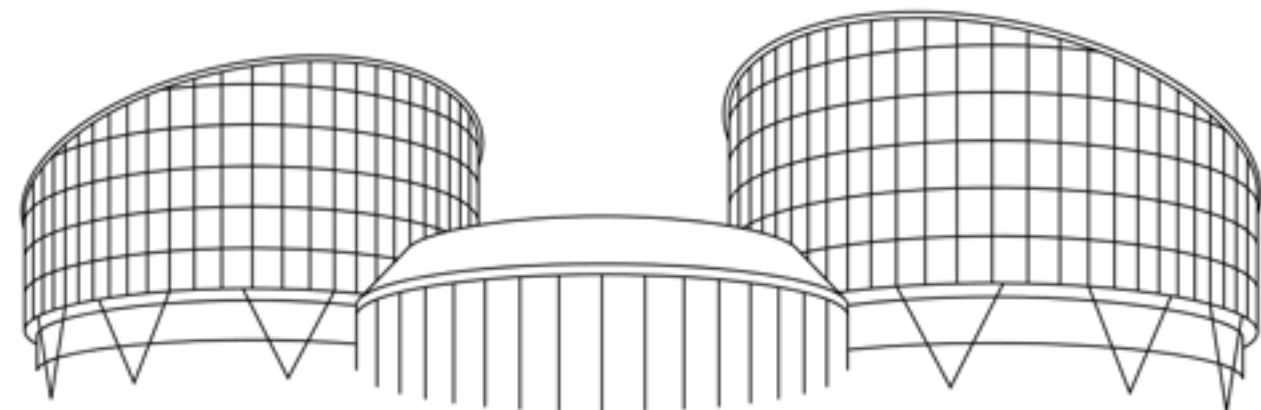
## NEGOTIATIONS TO SETTLE



- 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<sup>14</sup> issues

# D. EUROPEAN CONVENTION ON HUMAN RIGHTS

## ECHR - WIDER APPLICATION COMPARED WITH BITs



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

- 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



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ANY QUESTIONS?