Kluwer Arbitration Blog

2021 in Review: Ukraine Marks its 30th Known Investment Arbitration Case on its 30th Anniversary

Mariana Antonovych (Visiting Lawyer at Linklaters) and Viktoriia Tolochko, Kristina Mysenko (AVELLUM) · Friday, February 11th, 2022

The year 2021 has been the busiest year for Ukraine since 2008, with four investment arbitrations initiated against Ukraine. The odds were not always in Ukraine's favour. Having secured the dismissal of the case for lack of jurisdiction in *Littop and others v. Ukraine*, Ukraine was defeated by the investor in *Olympic Entertainment v. Ukraine.* Another six cases remain pending. This post will examine Ukraine's track record of concluded and pending investment arbitration cases and shed light on new proceedings initiated in 2021.

Investment Arbitration Involving Ukraine: Background

In 2021, Ukraine was hit with four investment treaty arbitration cases, with the most recent case registered on 28 October 2021. According to UNCTAD, as of 2020, Ukraine had the fourth-highest number of known investment treaty arbitration cases (26) among European countries with only three countries ahead: Spain (53), Czech Republic (41), and Poland (32). Out of the concluded investment arbitrations in which Ukraine was involved as of 2020, it prevailed in eight, lost in eight, and settled four.

Most cases decided in favour of Ukraine dealt with the issue of denial of justice (*Krederi v. Ukraine*, *Amto v. Ukraine*, *GEA v. Ukraine* and *Bosh v. Ukraine*). Another two (*Tokios Tokelés v. Ukraine* and *Generation Ukraine v. Ukraine*) dealt with expropriation. One case – *Global Trading v. Ukraine* – was dismissed outright as manifestly without legal merit, whilst another – *Littop and others v. Ukraine* – was reportedly resolved in favour of Ukraine in 2021 recognizing the unclean hands doctrine. However, the award was not made public.

Amounts awarded to the investors in cases lost by Ukraine were considerably smaller than initially claimed by investors. For instance, in *Lemire v. Ukraine*, a claimant was awarded only 15.80% of the requested amount. Another example of shattered expectations is *JKX Oil & Gas and Poltava v. Ukraine*, where the claimant was awarded less than 5% of the amount claimed.

Cases Lost by Ukraine

In cases lost by Ukraine where the awards have been entirely published, the most frequent basis for awarding compensation to investors was the breach of fair and equitable treatment ("FET") standard and the breach of the expropriation clause.

The most recent case – *Olympic Entertainment v. Ukraine* – concerned Ukraine's gambling ban imposed in mid-2009, resulting in the cancellation of licenses granted to various gambling facilities, including the claimant's subsidiaries, and subsequent cessation of their activities in Ukraine. Whilst the Tribunal accepted that the gambling ban was based on reasons of public health and morality, it found the measure to be disproportionate. Considering the Tribunal's decision regarding Ukraine's unlawful expropriation, the panel determined it was not necessary to rule on the alleged breach of the FET and full protection and security ("FPS") standards; however, it still determined that the gambling ban and its effect of destroying the claimant's investment, evidently supported the conclusion of the breach of the FET standard.

Similarly, indirect expropriation and breach of the FET standard were found in *Alpha Projektholding v. Ukraine*, *Inmaris Perestroika v. Ukraine*, and *City-State v. Ukraine*. The two former cases concerned the investors agreements' performance with the non-State actors, and Ukraine's interference with their operation through implied (in *Alpha Projektholding*), or explicit (in *Inmaris Perestroika*) instructions of its authorities was found critical by both tribunals.

Moreover, in *Inmaris Perestroika v. Ukraine* and *Lemire v. Ukraine*, the tribunals refused to interpret the term 'fair and equitable treatment' in accordance with the international minimum standard of treatment required by customary international law (*i.e.*, only gross unfairness or actions that shocks one's sense of legal propriety could be considered unfair and inequitable). Consequently, having studied the administrative procedure defined in Ukrainian law for the issuance of radio frequencies, in *Lemire v. Ukraine*, the tribunal concluded that some of the decisions of the Ukrainian broadcasting agency in relation to Gala Radio, owned by Mr Lemire, breached the FET standard. In view of the exceptional nature of the annulment remedy provided by Article 52 of the ICSID Convention, the Annulment Committee dismissed Ukraine's application for annulment based on the Tribunal's allegedly wrongful finding on causation.

The issue of the interpretation of the FET standard also arose in *Tatneft v. Ukraine*, in which the tribunal was primarily tasked with examining the conduct of Ukrainian courts as engaging in the State's liability. The tribunal disagreed with Ukraine's interpretation of the FET standard as prescribing no more than a prohibition of a denial of justice when applied to judicial decisions. It held that Ukraine was liable for a breach of the FET and FPS standards because of the deprivation of the Claimant's management and control of Ukrtatnafta, a Ukrainian oil company, and, subsequently, the seizure of its ownership rights coupled with questions of due process rights and legitimate expectations.

Compliance with Adverse Awards

Ukraine has complied with most of the adverse awards either voluntarily or following recognition and enforcement proceedings. Only three awards have not been enforced yet.

First, Ukraine resisted enforcement of the award in *JKX Oil & Gas and Poltava v. Ukraine* on the grounds of (**1**) violation of due process, (**2**) lack of jurisdiction, and (**3**) violation of internal public order. However, on 21 November 2019, the Supreme Court of Ukraine resolved to partially

enforce the award; nevertheless, there is no information available on effective compliance with the award.

Second, instead of seeking enforcement of the award in *JSC Tatneft v. Ukraine* in Ukraine – Tatneft sought enforcement in Russia, the US, and the UK, where Ukraine failed to overturn the enforcement of the award.

Finally, the award in *Olympic Entertainment v. Ukraine* was rendered relatively recently, in April 2021, and, naturally, has not been complied with yet.

Pending Cases

Leaving aside cases that were reportedly initiated in 2021, there are six cases yet to be decided. According to UNCTAD, the collective value of these claims exceeds USD 4.7 billion, and the awards are forthcoming, except in *Wang and others v. Ukraine* which was initiated by Chinese investors in late 2020 and is only gathering speed.

Of the rest of cases pending, most of them were initiated by Russian investors on various unrelated grounds (*Tatarstan v. Ukraine*, *Emergofin and Velbay v. Ukraine*, and *VEB v. Ukraine*). All of them, including *Gilward Investments v. Ukraine* – which is, reportedly, pursued by Ukrainian businessman, Mr Igor Kolomoisky – have passed the jurisdictional stage.

Finally, the case *Boyko v. Ukraine* brought by the Russian-US businessman in relation to an alleged expropriation of the claimant's chocolate factory, is nearing completion with hearings on the merits held in February 2021.

New Cases

The 2021 figures show a rapid increase of investment treaty arbitration cases against Ukraine compared to previous years. In 2021 four cases were initiated, whilst many more threatened, but not commenced yet. These new and forthcoming cases are diverse by nature, that is, involving investors of different nationalities and economic sectors.

In the beginning of 2021, eight Philip Morris affiliates initiated an ICSID arbitration against Ukraine. The dispute arose out of the fines imposed in 2019 by the Antimonopoly Committee of Ukraine (the "**AMC**") on four tobacco manufacturers and one tobacco distributor for alleged anti-competitive behaviour. The AMC decision resulted in numerous litigation proceedings initiated separately by all five companies subjected to fines. Having lost the first instance court proceedings in Ukraine, Phillip Morris reportedly paid the UAH 1.2 billion fine and initiated the ICSID arbitration against Ukraine. This decision was later overturned, which might explain Philip Morris's decision to discontinue the proceedings on 28 January 2022.

Further, in March 2021, *Misen Energy AB* and its subsidiary Misen Enterprises AB, followed through on their threats raised since 2015 to initiate investment arbitration against Ukraine in response to the imposition of a 70% subsoil use charge for the production of natural gas.

Another two known cases (*SREW N.V. v. Ukraine* and *Modus Energy International v. Ukraine*) concern 2019-2020 legislative changes made to the Ukrainian feed-in tariff ("**FIT**") regime, which was introduced in 2009 and gave renewable energy producers ("**RES**") the right to sell energy to the state at a special preferential price until 1 January 2030. However, it soon became clear that the FIT regime required an overhaul: the increasing generation capacity of RES producers has seen an exponential growth of FIT payments, resulting in the deficit and subsequent retroactive reduction of the FIT. Some investors adversely affected by such changes did not take it lightly and, like SREW and Modus, threatened to recourse to the same remedy (investment arbitration). In fairness, Ukraine is not the first state that faces difficulties meeting expectations of RES producers. Given that the tribunals' practice in Spanish, Italian and Czech cases is far from being uniform, it is too early to jump to conclusions.

At least three more potential disputes derived in 2021, but arbitrations were not initiated yet. Notices of dispute were reportedly filed by Arricano Real Estate Plc, Mr Tamaz Somkhishvili and, most recently, by Wellcome Limited.

Undeniably, 2021 was one of the most 'fruitful' years when it comes to the quantity of investment treaty arbitration cases initiated against Ukraine. Some investors fulfilled their threats to commence arbitration proceedings against Ukraine, whilst others chose to take a more cautious approach. Thus, in addition, to the long-awaited rulings in pending cases, 2022 would likely bring more investment arbitration cases against Ukraine.

This entry was posted on Friday, February 11th, 2022 at 8:30 am and is filed under 2021 in Review, International Investment Law, Investment Arbitration, Investment Disputes, Investment law, Investment protection, Investor-State arbitration, Ukraine
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.