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# Case Comment on “Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador”

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## ABSTRACT

*There are many international disputes which are categorised as public international disputes and private international disputes. The Duke Energy and Electroquil SA V. Republic of Ecuador is one of such cases of international dispute over the issue of fair and equitable treatment. The just, fair and equitable treatment towards company carry out operations internationally is one of the basic structures for collaboration of two or more international companies for globalisation. There has been claims by the company which stated that the government failed to follow the procedure of state as well as international law and also violates the bilateral treaty of investment (BIT) under the international law. Within the scope of this case, we can also understand the that arbitration agreement and international treaties such as BIT, both cases can be base for jurisdiction of the case.*

## I. INTRODUCTION

Fair and equitable treatment is one of the most common methods of protection in any kind of investment arbitration disputes. This concept is involved in most of the bilateral investment treaties (BIT). This standard was incorporated when World War II was over. The first treaty to include “just and equitable treatment” was the Havana Charter of 1948 for and International Trade Organisation.

The concept of fair and equitable treatment contains several ways to protect foreign investors through customs, international law, conventions and fair treatment as well. According to the international tribunal for investment on arbitration stated “*that the foreign investors cannot be unjustly treated and this common standard of treatment in fair and equitable manner will ensure justice to foreign investors*”.

Electroquil S.A. is a private company incorporated on 6<sup>th</sup> February, 1992 by a group of businessmen in Guayaquil for supply of electricity as there was shortage of electricity. Duke Energy Corporation is an electric power and natural gas public holding company located in

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Charlotte, North Carolina incorporated in 1904. It is ranked as 141<sup>st</sup> largest company in USA. Lynn J. Good is the current (CEO) of the company.

In present case *Duke Energy v. Ecuador*, there were grounds for legitimate expectation and reasonable timeframe for investment by the investor was required to protect the investor. It was stated that certain criteria such as investor's conduct, foreseeability, time when representation was made, authority to make representation, expertise in assessing the representation, whether investor sought to protect himself was observed.

## II. CASE BRIEFS

### (A) Factual Background of the Case

1. There are 2 claimants in this case. The first claimant is "Duke Energy Electroquil Partner Ltd." which is incorporated and registered under State of Delaware, USA. The other claimant is "Electroquil" which is company for generation of electricity incorporated; registered under Republic of Ecuador.
2. The Government of Ecuador established "Instituto Ecuatoriano de Electrificación" (INECEL) for carrying out facilities to power generation, transmission and distribution. It was owned by the state under Ministry of Natural Resources and Energy.
3. On 7<sup>th</sup> February 1992, the first state emergency was declared due to shortfall in power generation because of scarcity of rainfall. On 9<sup>th</sup> February 1992, Electroquil was the first power generator private company established to overcome this crisis.
4. On 31<sup>st</sup> October 1995, INCEL and Electroquil entered into an agreement for purchasing of power, its assembling, installation and supply to overcome the crises of shortage of electricity. This agreement between INCEL and Electroquil was valid for 5 years and an amount was fixed to be provided to Electroquil as a charge. There were certain conditions which were mentioned in PPA (Power Purchase Agreement), failing of which could lead to penalties.
5. On 3<sup>rd</sup> May 1996, INECEL and Electroquil signed a letter of intent, wherein Electroquil installed a new power generation unit and INECEL was selling additional electricity generated by Electroquil.
6. On 12<sup>th</sup> November 1997, signed a LOI for controlling the interest of Electroquil and in a few months i.e. by 23<sup>rd</sup> February 1998 it acquired 51.5% ownership of Electroquil. Shares of Duke Energy of Electroquil capital increased over the time.
7. On 30<sup>th</sup> September INCEL enter into liquidation process and cease to exist as of 31<sup>st</sup>

march 1999 by settling up with the amount they owe to Electroquil for purchase of power.<sup>2</sup>

8. It was on June 1, 1999 Ecuador through the Ministry of Mines and Energy entered into 2 subrogation agreements with Electroquil. Rights and obligations of Ecuadorian states are assumed through this agreement.
9. On 30<sup>th</sup> May 2000, the MEM (Ministry of Mines and Energy) along with Electroquil entered into 2-identical agreements also called as MED-ARB agreements over disputes arising between them on fines and performances.
10. On 19<sup>th</sup> December 2000, Electroquil's and MEM mediation process failed. Therefore, Electroquil started an arbitration proceeding against MEM and mediation centre of Guayaquil Chamber of Commerce.
11. On 27<sup>th</sup> November 2001a liquidation agreement was signed between MEM and Electroquil for termination of PPA 95 and PPA 96 during the arbitration proceeding. Both the agreement shows the final balance in favour of Electroquil.
12. On 11<sup>th</sup> March 2002, the local tribunal held that according to Ecuadorian Arbitration Law, as there was no arbitration clause, the arbitration is held to be null and void.
13. On 3<sup>rd</sup> September 2002, the Ecuadorian Bank on request of MEM paid the debt amount to Electroquil.
14. On 30<sup>th</sup> May 2003, the Electroquil and Petrochemical entered into a so-called "Reciprocal Obligation Agreement". This contract stated MEM due towards Electroquil by PPA 95, Electroquil due amount towards Petrochemical for purchase of fuel and Petrochemical's payment obligations towards the State of Ecuador.
15. After a year later, this agreement of reciprocal obligation was signed by Electroquil, the Ecuadorian Government and Petrochemical on 23<sup>rd</sup> April 2004.
16. On 26<sup>th</sup> April 2004, Duke and Electroquil was held to be "Investors". State of Ecuador entered into an arbitration agreement over the disputes that has not been addressed by the Duke and Electroquil before ICSID.

## **(B) Issues**

1. Whether Ecuador has failed to meet its obligation and duty of just and fair treatment

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<sup>2</sup> International Centre for Settlement of Investment Disputes, <https://www.acerislaw.com/wp-content/uploads/2022/01/Duke-Energy-v.-Ecuador.pdf>

under Article 2 (3)(a) Bilateral Investment Treaty (herein referred as “BIT”)?

2. Whether Ecuador has performed any acts to impair the claimant’s investment through arbitrary or discriminatory conduct?
3. Whether Ecuador has failed to meet it any and all obligations to pay penalties and custom duties under Article 2 (3)(c) of BIT?
4. Ecuador breached Article 2 (7) of BIT in enforcing and asserting rights with respect to their investments.<sup>3</sup>

### **(C) Law Applicable**

- Article 42(!) of the ICSID Conventions specifies that tribunal shall settle a dispute in accordance with such rules as may be agreed upon by both the parties.
- Article 9 of the Arbitration Agreement makes it clear that parties have chosen both Ecuadorian as well as International Law.
- Article 2(7) of BIT states that obligations to pay and uphold the rights are applied.
- Article 3(2)(a) of BIT states is obligation and duty to treat every foreign investor with fair and equitable treatment.
- Article 3 (2) (c) of BIT states that obligations to pay penalties and custom duties.

### **III. MERITS OF THE CASE**

- It was concluded by the tribunal that INECEL (state owned company for producing and distribution of electricity) breach the PPA as they did not establish Payment Trust according to the agreement and commenced their commercial operations. INCEL and respondent did late payments to claimants i.e. Electroquil and Duke.
- The tribunal considers that Undisputed Amount interest agreement specifies that payments due under PPA 95 that are compliment with liquidation process are not liable under interest claims. Therefore, the interest of late payments of Electroquil cannot be claimed as a right according to article 1611 of Ecuadorian Civil Code and so Duke cannot claim for interest on late payments.<sup>4</sup>
- It was held by the local tribunal that arbitration agreement was invalid as parties not

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<sup>3</sup> Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, <https://www.italaw.com/cases/documents/363>

<sup>4</sup> Duke Energy and Electroquil v. Ecuador, <https://www.iareporter.com/arbitration-cases/duke-energy-and-electroquil-v-ecuador/>

consult to Attorney- general prior to the proceedings according to Article 1724 of Ecuadorian Civil Code. But, the acts of Attorney-General are attributable to Ecuador. The tribunal cannot observe the violation of Ecuadorian Law as MEM and Electroquil while entering into agreements and PPA's did not mention Med- Arb agreement in 2000 when signature of attorney general is not mandatory. There is no violation of PPA's because they do not have any arbitration clause. It was held by the tribunal that attorney-general did not break any clause and Med-Arb Agreements and Ecuadorian Law are also not violated.

- The performance of contract in good faith is mentioned in Article 1562 of Ecuadorian law. The tribunal has observed that Ecuador has complied with all the principles and laws of Ecuadorian state. It was held that Med-Arb Agreement was not breached by the attorney-general because even though his conduct was improper but it was in complying with the Ecuadorian Laws. <sup>5</sup>
- There are 3 essentials of this Article 2(3)(c) which is any obligation, with regard to investment and has not been observed. The state of Ecuador has obligation towards the Electroquil and Ecuador did not undertake his obligation to perform. The PPA 95 and 96 have clear arbitration agreement clause regarding dispute arising with regard to investments between them. Therefore, there is a direct link between investment and the respondent. The tribunal also observed that respondent violated its obligation towards Electroquil by late incorporation of Payment Trust, its poor implementation, irregular imposition of fines, etc. Therefore, Ecuador breach article 2 (3) (c) of ICSID convention i.e. umbrella clause.
- Duke Energy claims there were fines to deceive them and denied rights in due process. But it was observed by the tribunal that Duke Energy has knowledge of fines that were imposed on Electroquil for non-performance of acts and so such fines did not amount to deceive them but to impose punishment for no performance as it was mention under normal contract.
- It was observed by the tribunal that there was a little breach of Med-Arb Agreements in case of just and equitable treatments as there is an event to give rise of protection of foreign parties under investment while making this agreement.
- The International tribunal held that Ecuador did not break Article 2 (3)(b) of BIT

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<sup>5</sup> OGEL Energy Law Journal on Duke Energy v. Ecuador

because neither the attorney-general and MEM who follows the procedure of law cannot be considered arbitrary in any manner as well as Med- Arb agreements are attributable to both the partis.

- Article 2(7) of BIT states that each party has right to claim and enforce its legal right over investments, it's agreements and authorization of investment. Electroquil did not challenge the final award of local arbitral tribunal before courts of Ecuador. ICSID held that claimant failed to provide any effective and adequate reasons or grounds which were existing and there Ecuador didn't breach Article 2(7) of BIT.

#### **IV. CONCLUSION**

In the present case, the tribunal concluded INECEL is held liable for breach of PPA by not establishing the payment trust but is not liable for the for paying the interest on late payments as liquidation agreement clearly states that there should be no interest paid for pending amounts.

It was held by the tribunal that the state didn't breach the PPA, State Law, nor the PPA or Med-Arb Agreements because signature of attorney-general was not mandatory when Electroquil and MEM entered into agreement and so rest relevant agreements could not be held voidable. As the attorney general performed in accordance with the state laws i.e. could not held liable for improper conduct.

According to the tribunal Ecuador did not breach the umbrella clause under article 2 (3)(c) because it was concluded that Ecuador performed all his obligations and liabilities. The state has performed in good faith and with fair equitable treatment as the imposition of fines were done for improper performance as punishment under normal contract clause. Therefore, state did not breach Article2(3)(a) of BIT.

Therefore, in case of Duke Energy v. Ecuador, Ecuador was not held guilty of fair and equitable treatment by ICSID as on the grounds of argument it cannot be proved that Ecuador breach or violate neither IT nor Ecuadorian law.

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