

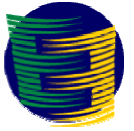
Dispute Settlement mechanisms under the Energy Charter Treaty

Graham Coop – General Counsel

Clarisse Ribeiro – Legal Counsel

Energy Charter Secretariat

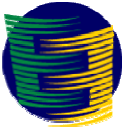
20 October 2005



Introduction

Dispute settlement and international energy projects

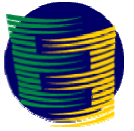
- The need for legal and financial security
- The need for a reliable dispute settlement mechanism
- Local courts or administrative tribunals
- Alternatives to litigation: conciliation, mediation and arbitration
- International arbitration: fundamental principles



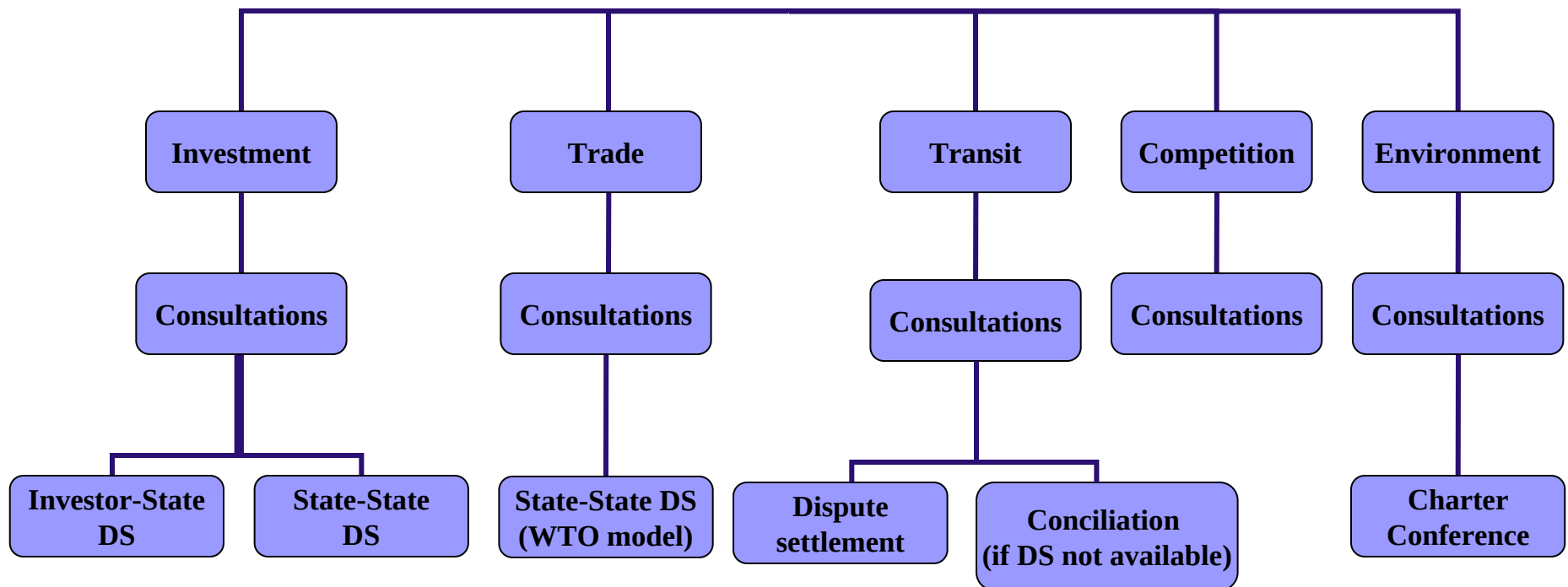
Session 1

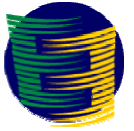
I - Overview of dispute settlement provisions of
the ECT

II - Role of the institutions in ECT dispute
settlement mechanisms



Overview of dispute settlement under the ECT

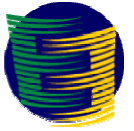




Article 26

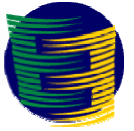
Settlement of disputes between an Investor and a Contracting Party

- Investor-State disputes
- Breach of an obligation under Part III
- Investor has direct right to bring a claim against Host State for alleged breach of Part III obligation



Enforcement of arbitral awards

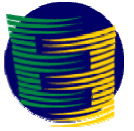
- Art.26(8) – States shall
 - ✓ carry out arbitral awards without delay
 - ✓ make provisions for the effective enforcement in their respective territories
- Enforcement of arbitration awards
 - ✓ the New York Convention 1958
 - ✓ the Washington Convention 1965



Article 27

Settlement of disputes between Contracting Parties (1)

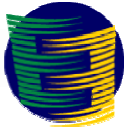
- Wider scope of application – ECT as a whole except for
 - ✓ Competition and environmental issues (Articles 6 and 19)
 - ✓ Annex IA listed states – contractual obligations (Article 10.1)
 - ✓ Trade-related matters and TRIMs (Articles 29 and 5)
- Diplomatic channels, failing which
- Submission to an international *ad hoc* tribunal



Article 27

Settlement of disputes between Contracting Parties (2)

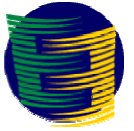
- Application of UNCITRAL rules (unless agreed otherwise)
- Dispute to be decided on the basis of the ECT and international law
- Finality of award
- Arbitration to be held in The Hague, seat of the Permanent Court of Arbitration, unless otherwise agreed



Article 29(7) & Annex D

Trade disputes

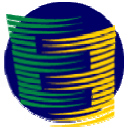
- Article 29(7)
 - ✓ Trade-related matters (art.29)
 - ✓ Trade-related investment measures (art.5)
- Annex D – amended by Trade Amendment
- Differences with the WTO system
 - ✓ Adoption of panel reports
 - ✓ No appellate body



Article 7(7)

Transit disputes

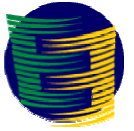
- Conciliation mechanism
- No interruption or reduction of flow of energy materials and products
- Role of conciliator
 - ✓ Seek to secure an agreement
 - ✓ Recommend a resolution or procedure to resolve dispute
 - ✓ Set interim tariff and other terms and conditions relating to transit for a limited time (not exceeding 12 months)
- Transit Conciliation Rules



Article 6(7)

Competition disputes

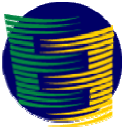
- Art. 6: no common competition regime
- Art. 6: mutual information and consultation mechanism
- Procedure under art. 6(5)
 - ✓ Notification of alleged anti-competitive conduct
 - ✓ Possibility for consultation of competition authorities
- Diplomatic channels under art. 27(1)



Article 19(2)

Environmental disputes

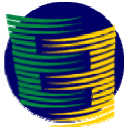
- Art. 19(2) – Role of Charter Conference
 - ✓ Review of disputes regarding application and interpretation of art.19
 - ✓ aiming at a solution
- Limitation – existence of arrangements for resolution of environmental disputes in other international *fora*



Session 1

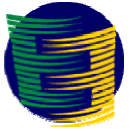
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II - Role of the institutions in ECT dispute settlement mechanisms



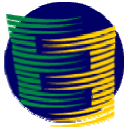
Arbitral organisations under the ECT

- International Center for Settlement of Investment Disputes (ICSID)
- United Nations Commission on International Trade Law (UNCITRAL)
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- Permanent Court of Arbitration (PCA)



The role of the Secretariat in ECT Dispute Settlement procedures

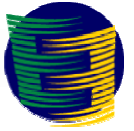
- Article 7(7) (transit conciliation mechanism)
 - ✓ Secretary-General receives notice and appoints conciliator
 - ✓ Secretary-General may elect not to appoint conciliator if same Transit (as defined) has already been submitted to conciliation without resulting in resolution of dispute
- Article 29(7) and Annex D (trade dispute settlement)
 - ✓ Secretary-General maintains dispute settlement roster and appoints panel
 - ✓ Secretariat administers proceedings before panels



The role of the Secretariat in ECT Dispute Settlement procedures

- Article 27 (disputes between Contracting Parties)
 - ✓ Copy of the award deposited with Secretariat which shall make it generally available

- Article 26 (disputes between an Investor and a Contracting Party)
 - ✓ No formal role for the Secretariat

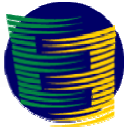


Conclusions

Investment arbitration as seen from different viewpoints (1)

From the viewpoint of investors:

- ✓ Reduces political risk associated with investment in Contracting Parties
- ✓ Enables investors to focus on manageable (and bankable) commercial/industrial risk and to evaluate investment opportunities accordingly...
- ✓ ...hence increasing investors' willingness to invest



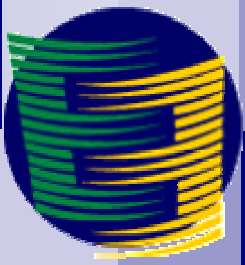
Conclusions

Investment arbitration as seen from different viewpoints (2)

From the viewpoint of States:

- ✓ Provides a check on arbitrary exercise of State power
- ✓ By increasing investors' willingness to invest, creates more competition for foreign direct investment opportunities in the host State...
- ✓ ...thereby enabling the host State to obtain more favourable terms and maximise benefits from national inward investment opportunities

Seminar on the ECT dispute settlement mechanisms



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