Dispute Resolution under the Energy Charter Treaty
Tool Box of the ECT

- Legally binding tools
  - Trade provisions
  - Transit provisions
  - Post-Investment protection
  - Based on enforceable dispute settlement

- Soft tools
  - Best efforts in pre-investment
  - Energy efficiency + minimize harmful environmental impact
  - Competition/investment climate
  - Access and transfer of technology (commercial, non-discrimin)
  - Access to capital

- Supported by non-binding model agreements
  - Intergovernmental agreements
  - Host government agreements

- International Policy forum, best practices exchange, cooperation with interested 3 parties
Investment Promotion

- Energy Charter Treaty as Risk Mitigation. Eg. MIGA, EBRD.
Trade-Related Investment Measures

- A CP shall not apply any investment measure which requires:
  (a) the purchase or use of products of domestic origin or from any domestic source; or
  (b) the limitation of purchase or use of imported products in relation to the volume/value of local products that it exports;

or which restricts:

  (c) the importation of products used in or related to its local production, generally / to an amount related to the volume or value of local production that it exports / or by restricting its access to foreign exchange; or
  (e) the exportation or sale for export of products
Overview of ECT Mechanisms for the Resolution of Disputes

- **Investment**
  - Consultations
    - Investor-State DS
    - State-State DS

- **Trade**
  - Consultations
    - State-State DS (WTO model)

- **Transit**
  - Consultations
    - Conciliation
    - State-State DS

- **Competition**
  - Consultations

- **Environment**
  - Consultations
    - Charter Conference
State-to-State Disputes

- **In general (Article 27)**
  - Diplomatic channel
  - Ad-hoc arbitral tribunal

- **[exception] Trade disputes**
  - Consultations + Simplified version of WTO’s DSU

- **[exception] Transit disputes (Art. 7)**
  - Consultations + Conciliation + state-state DS

- **[exception] Competition disputes (Art. 6)**
  - Cooperation between competition authorities

- **[exception] Environment (Art. 19)**
  - Consultations + Charter conference
Investment Protection

- Fully-fledged protection, including:
  - Fair and equitable treatment;
  - National Treatment or Most-Favoured Nation Treatment, whichever is more favourable;
  - Conditions for expropriation;
  - Compensation for losses;
  - Transfers related to investments;
  - CONTRACTUAL obligations with the state; and
  - Investor-State arbitration.

- Protection continues for 20 years after a state’s withdrawal from the ECT

- Key personnel
Investment Disputes (Article 26)

If no amicable settlement within 3 months from the notification of the existence of a dispute, investor can choose:

- Domestic courts or arbitration tribunals;
- Applicable pre-agreed DS procedure; or
- International arbitration.
  - ICSID
  - UNCTRAL Arbitration Rules
  - Arbitration Institute of the Stockholm Chamber of Commerce
First case: Registered on 25 April 2001. At least 2 cases/year since then, except in 2002. A boom in 2005 (6 cases) and 2013 (16 cases).

53 cases have been detected to date:
- **Final Award:** 17 (+Hrvatska where the specific claims under the ECT were dismissed but is still pending in relation to the BIT claims);
- **Settlement:** 6
- **Pending:** 30

Companies without substantial activities owned/controlled by nationals of a non-Contracting Party: **Denial of benefits based on Art. 17 ECT:** Liman, Plama, Yukos and Ascom cases adopted a uniform approach requiring an express statement + no retroactive application.
- **Jurisdiction denied**: 4 cases (including 2 where the claim was found to be fraudulent). The amounts claimed in 3 of those cases were US Billion 10; 4.6 and 3.8
  - Additionally, in the *Hrvatska* case the tribunal dismissed the investors claims under the ECT (though still the case is pending regarding other claims under BIT).

- **Tribunal examined the merit:**
  - **Some compensation** by the state to the investor: 5 cases
  - **Investor lost the case** (mainly due to lack of evidence): 6
  - **State is liable but the investor either failed to prove the damages** (*Mohammad Ammar Al-Bahloul v. Tajikistan*) or its claim for damages was considered premature and unfounded (*AES v. Kazakhstan*): 2 cases
  - Additionally, a partial decision dismissed most of the Electrabel´ś claims but still 1 issue is pending.
How much of the claimed amount was awarded?

<table>
<thead>
<tr>
<th>Claimant</th>
<th>Claim</th>
<th>Award</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nykomb v. Latvia</td>
<td>7,097,680 Lats</td>
<td>1,600,000 Lats</td>
<td>22.5%</td>
</tr>
<tr>
<td>Petrobart v. Kyrgyzstan</td>
<td>4,084,652 USD</td>
<td>1,130,859 USD</td>
<td>27.7%</td>
</tr>
<tr>
<td>Kardassopoulos v. Georgia</td>
<td>350 M. USD</td>
<td>90.25 M. USD</td>
<td>25.8%</td>
</tr>
<tr>
<td>Remington v. Ukraine*</td>
<td>36 M. USD</td>
<td>4.5 M. USD</td>
<td>12.5%</td>
</tr>
<tr>
<td>Ascom v. Kazakhstan</td>
<td>5 Billion USD</td>
<td>506 M. USD</td>
<td>9.9%</td>
</tr>
</tbody>
</table>

* Information based on an unofficial report. The award is not publicly available.
Remedies other than compensation

- Ensuring future payments under the existing contract (*Nykomb v. Latvia*).

- Declaratory relief for a fraudulent claim (requested by Turkey in two cases – accepted in *Cementownia v. Turkey*; rejected in *Europe Cement v. Turkey*).

- Specific performance (ordering the issuance of licenses and reinstatement of shares): rejected since it was considered impossible under the particular circumstances (*Al-Bahloul v. Tajikistan*).
Some of the main issues

- Lack of transparency
- Increasing number of arbitrations
- Need for increasing awareness of the rights and obligations under the treaty
- Lack of recovery of high legal costs incurred to defend from groundless claims
- Lack of control over the interpretation of ambiguous articles

→ Proposals to help both investors and contracting parties to:
  - have a better understanding of their rights and obligations,
  - make informed public policy choices in conformity with the obligations under the ECT,
  - and reduce the increasing number of arbitrations.
PROPOSALS UNDER DISCUSSION

- UNCITRAL Rules on Transparency
- Currently, the investor can opt for conciliation but there is some ambiguity about what happens if conciliation is not successful
- Clarification/interpretation of some provisions of the ECT. Amicus curiae
- Enabling arbitral tribunals to dismiss groundless claims quickly and to require that all litigation costs are borne by the losing party
- Appeal mechanism
- Establishment of a permanent tribunal for investment disputes under the ECT as an additional option to which the investor could resort.
Thank you for your attention