



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.

Mitigating Political Risks on Energy Projects

A Growing Concern in Energy...

- Recent peak in commodity price has generated a new movement of "Resource Nationalism"
 - Instability in existing E&P permits and licenses
 - Sharp increase in Tax and Duties over producing project
 - Discriminatory treatment between national "Champion" / Flagship companies and foreign investors
- Generating a threat over investment
 - Recent lack of funding put a strong pressure on investment program
 - That even local "Flagship" companies haven't been able to solve

...Requesting Various Mitigants

Mitigants

Adequate Due Diligence

- Strong commitment on the DD phase
- Get access to local counsel
- Clarify any outstanding issues with public authorities (license / tax...)

Energy Charter Treaty

- Providing a framework for discussion
- Providing a "last resort solution" through arbitration

EBRD's Preferred Creditor Status

- Providing umbrella under EBRD
- Loans not subject to moratoria
- No restrictions on convertibility or transferability of hard currency





Trade-Related Investment Measures

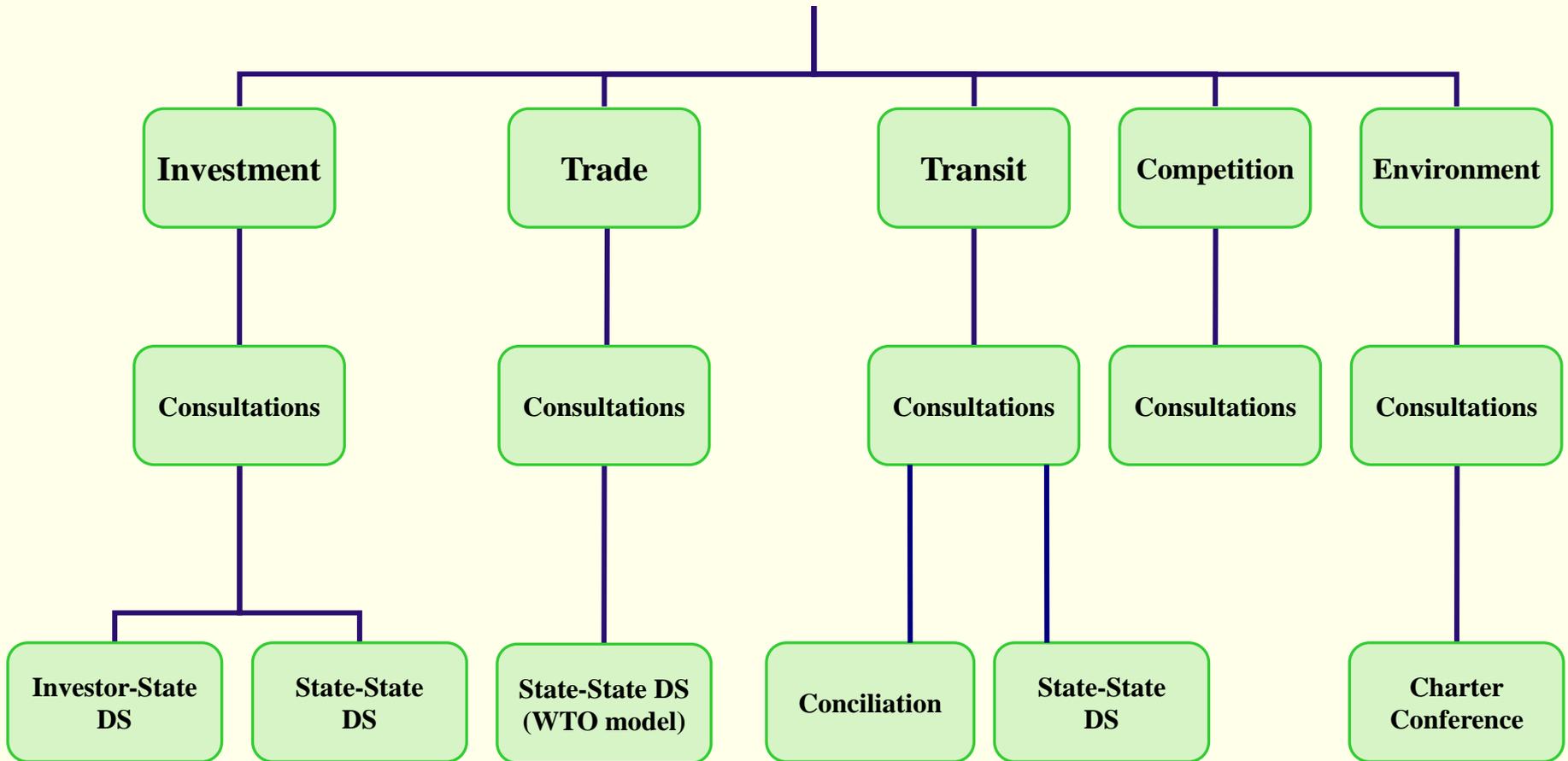
- A CP shall not apply any investment measure which requires:
 - (a) the purchase or use of products of domestic origin or from any domestic source; or
 - (b) the limitation of purchase or use of imported products in relation to the volume/value of local products that it exports;

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



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's claims but still 1 issue is pending.



■ How much of the claimed amount was awarded?

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

* 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

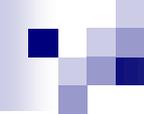
→ **Proposals** to help both investors and contracting parties to:

- 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