Modernisation of the Energy Charter Treaty in Environmental Protection: Challenges and China’s Role

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Abstract: The Energy Charter Treaty is the only legally binding multilateral framework in the field of energy, playing a key role in energy investment protection, green energy, and climate change solution. However, it is difficult to address the issues that have arisen as a result of the regional concentration of States parties, vague expression of the provisions, and the treaty’s role in protecting the environment and promoting sustainable development of energy. Therefore, the modernisation of Energy Charter Treaty becomes the inevitable choice at present. Only through emphasizing the respect for multiculturalism and concentrating on the industry’s interests can the right way to modernisation be found. During this process, China, a new major energy investor, seeks green development and clean energy, with the goal of sustainable development that is consistent with the principles of the Energy Charter Treaty. As a result, China plays a crucial role in the modernisation of the Energy Charter Treaty.

1. Introduction
Energy is a key component of sustainable development. Therefore, the global mission is to conclude economic, efficient, and environmentally energy treaty. The European Energy Charter Treaty (EEC) is the only legally binding multilateral energy legal framework, which includes the provision of energy investment protection, dispute settlement, sets trade and energy transit rules and provides suggestions for enhancing energy efficiency. Signed in 1990s, the treaty aimed to provide funds and technology for the relevant countries. In May 2015, the Declaration of the International Energy Charter Treaty (IEC), a new generation of the EEC, was signed. Collectively, the two treaties were named as the Energy Charter Treaty (ECT).

The global energy environment is currently facing new challenges. It is imperative to ensure that more countries, especially the developing and less developed countries, participate in equal dialogue. In addition, in the two decades since the ECT has come into effect, certain countries, including but not limited to Russia, have not been very satisfied with the role of the ECT in practice. These countries appeal for a more efficient, environmental-friendly and sustainable treaty. Therefore, the modernisation of ECT which aimed at solving the various existing problems has received considerable attention.

At present, emerging economies such as India and Brazil are developing rapidly, and their participation in global energy issues has also become important, especially in the case of China. Currently, China has become the world's second largest economy and is investing abroad, building oil pipelines and gradually accelerating market-oriented reforms in the energy sector. Therefore, it is necessary to discuss the issue of modernisation’s function on the ECT in terms of environmental protection for sustainable development as well as China’s role. First, the challenges of the ECT should
be identified such as the fact that the current provisions of the ECT are vague. Secondly, the value of the modernisation of the ECT should be clarified. Thirdly, China's role and choices in this modernisation process should be explained.

2. Challenges

The task of modernisation of the ECT mainly focuses on the part of "promotion and protection of investment", which specifically includes promotion and protection of investment and its treatment, expropriation, compensation for losses, transfer of investments, transfer of related rights, and relations with other treaties. The challenges in modernisation of the ECT include:

2.1. Limited members

Up to now, the European Energy Charter has 53 contracting states (in addition to the European Community as a regional economic integration organization (REIO). The members of the modernisation of the ECT come from regions including western, central and eastern European countries and other independent countries. The Commonwealth countries, as well as Australia, Iceland, Japan and Turkey, are all founding states to ECT, meanwhile most of them have actively participated in the modernisation of ECT.

According to the text of ECT, it focus to strengthen the protection of investors and promotion the liberalization of international energy investment. At the same time, ECT also has a positive impact on the realization of sustainable development goals. As a relatively "young" multilateral international treaty, ECT is working hard to expand its international influence. In recent years, ECT has strengthened cooperation with Asian and African countries, hoping to gain recognition and accession from more developing countries, giving more attention to Sustainable Development Goals (SDG), and constantly improving its own investment rules. How to recruit more new members and expand the influence of the ECT is difficulty encountered in the current modernisation process, and it's a key issue that should be resolved in the next step of modernisation.

2.2. Vague provisions

There has always been controversy over whether international investment treaties can promote international investment flows. The main points of dispute are the vague expressions of treaty clauses, which cannot respond to the special national conditions and actual needs of different states. According to a joint survey conducted by the internationally renowned "The Economist" magazine and the Columbia University International Investment Reporting Project, 67% of the respondents said that an ambiguity expression of international investment treaties in a certain investment market has a significant or certain degree of impact when they make investment decision. Moreover, there have been too many cases of direct or indirect expropriation in the energy sector in recent years. More importantly, the financial status of many sustainable clean energy projects is inseparable from the host government's subsidies and incentive measures, which makes the stability of the host country's relevant laws have a very significant impact on the success of other projects. Therefore, ECT's investment protection rules are rigorous in logic, expressed accurately and defined in scope clearly, which have a potential positive impact on promoting sustainable development.

| Table 1. Vague provisions related in ECT cases *
|-----------------|----------------|
| Vague provisions | Ratio          |
| Vague definition | 48.33% in cases awards published |
| Award rendered   | 46.66% in all cases |
| Expropriation    | 58.89% in cases awards rendered |
| Expropriation breached | 15.15 in expropriation cases |

* The data are collected and counted from the Energy Charter Website: List of ECT Dispute Cases
To specific problems, ECT has given a broad, non-exclusive and property-based definition of "investment". According to Clause 1(b), "investment" means every kind of asset, owned or controlled directly or indirectly by an Investor (of course such property must be related to the energy sector). Following this is a list that does not exclude other things, which specifically stipulates tangible and intangible assets, movable and immovable properties, any property rights, a company or business enterprise, shares, stock or debt rights. They will not change because of its changeable investment form. Obviously, definition of investment in ECT goes far beyond the traditional international investment, and it is difficult to limit which assets and rights related to business, economic, and financial activities are not investment. Therefore, there is an urgent need for ECT to issue clear applicable standards and scope permissions in terms of scope definition, so as to improve the legal compliance of the system and framework[1].

2.3. Existing problems

Although ECT have broken through the scope of Europe currently, it is still concentrated in Europe. All countries that signed the IEC will be invited to participate in the revision of the various provisions of the EEC and reach a consensus on the new IEC. This puts forward higher requirements for the modernisation of ECT as a result, that is, to improve the role of existing institutions, but also to establish new mechanisms to solve problems in a targeted manner[2].

The Yukos v. Russia case has aroused heated debates, and attention to the integrity of the energy charter mechanism, especially its withdrawal mechanism[3]. It is true that a treaty must be obeyed is a basic principle of international law, as signing is the right and freedom of a state. However, the ECT does not provide for its withdrawal mechanism, which makes the rights of the states that have signed it is inextricably bound, and also creates obstacles for other non-signatory countries to join the treaty.

The mediation mechanism has played an increasingly prominent role in the settlement of international disputes and has received more and more attention in the international community. The formulation of the Singapore Mediation Convention proves it obviously. Therefore, within the ECT, referring to the existing mediation mechanism, the establishment of a special mediation organization to resolve disputes with energy characteristics quickly and diversified is also a key issue in the current modernisation reform of the ECT.

3. Value

3.1. Achieving unity at the multilateral level

Bilateral investment agreements (BITs) are investment-related treaties signed between two countries, which have great differences in the content due to the large differences in the economic development level, domestic political situation, and national interests of each state. For example, if state A and state B has not signed BIT, then the investors of this two states are uncertain about the process and results of investing in the other state. Although the host country’s attitude and position on a certain issue can be inferred by referring to the BIT signed between the host country and other countries and its national rules, there is still a lot of uncertainty, which becomes an obstacle for investors to invest[4]. As the ECT is a multilateral treaty, the content of the treaty is definite for investors not only in signatory countries but observer countries or non-observer countries. It will not be changed and not affected according a state’s policies or economic factors but can achieve the expected target in the investment.

The EEC radiates in Europe, mainly considering the reconstruction of Central and Eastern European countries and the Soviet Union. But now, Japan, Mongolia, and Afghanistan have all become official members of the ECT, the cooperation between ECT and Asian countries has been gradually strengthened. Moreover, the cooperation between ECT with African countries is also increasing with the increasing demand of African countries for energy storage and energy development and the continuous improvement of technical capabilities[5]. ECT is striving to form a benign regional development model with Europe-Asia-Africa participation and comprehensive development.
3.2. Paying more attention to industrial interests
Industrial interests have received more and more attention from the ECT. The energy industry is affected by the origin and quality of its raw materials and has obvious regional attributes, energy products show the characteristics of single type and single purpose. As to this characteristic in energy industry, the interests of the industry should be considered carefully, beside the formulation and implementation of rules like ordinary laws and rules.

The value focused on "combination" in order to balance the interests of each state when the EEC came into being, it was to stabilize the development of the energy industry. Nowadays, only emphasizing "cooperation" can no longer meet the needs of the multilateral market as the situation in the world has undergone important changes. The ECT should pay more attention to individual differences states, that is "distribution". According to the basic values of international relations, national interests are always the key when they choose rules. Only balancing the interests of policymakers and the overall energy market, and balancing the interests between "combination" and "distribution", it can be called an appreciate ECT provisions which meet the needs of the current situation.

3.3. Formulating strict and accurate rules
The secretariat of ECT drew attention of all walks to the new trends of international investment agreements in the notice of consultation on the modernisation of the ECT, including clarification of the definition of investment, and covering investment that must meet specific characteristics. For example, capital investment and effectiveness contribution in the host country, a certain duration, and also obeying the laws of the host country, including anti-corruption and anti-bribery. In addition, the definition of "economic activity in the energy sector" is also recommended for further clarification. The precise definition of investment and economic activities is one of the goals of the modernisation of the ECT.

The Secretariat of ECT also drew attention to the definition of eligible investors. Some new BITs have included additional standards in the definition of eligible investors. For example, companies must have their own "domestic" and be engaged in the "substantial business" activities, excluding dual-national natural persons with the nationality of the host country and excluding investors whose ultimate beneficiaries are nationals of host country. The definition of eligible investors has not been finalized although investment activities continue to occur and investment dispute are solved by arbitration tribunal. An explicit goal of modernization of the ECT is to make the text clearer, more rigorously expressed, and more precise in definitions[6].

4. China's Role
In the report of the 19th National Congress of the Communist Party of China, China confirmed the goal of promoting green development and clean energy, emphasized that China should achieve a sustainable development model, and focused on green technology innovation, green finance, energy conservation and environmental protection industries. As an observer country, China's energy policy is highly consistent with the principles of the ECT[7].

China is an active proponent of establishing an innovative mechanism. China puts forward the "Belt and Road" initiative, with the aim of promoting common development and realizing a win-win road of cooperation and prosperity. China has always advocated the establishment of a new international economic order and has worked hard for it. Chinese government supports the modernisation of the ECT, have actively responded by conducting research activities, holding seminars, and advocating the establishment of innovative mechanisms to make the ECT more complete.

China is a staunch supporter of the modernisation of ECT. As an observer state of the ECT, China earnestly participates in every conference of the modernisation of ECT since it signed the new IEC in 2015. The National Energy Administration of China is actively following the progress of the modernisation of the ECT, and has hosted many seminars on this process in China. Its direct unit, the
China Electricity Council, established the China Electric Power Development Research Institute as a think tank of the National Energy Administration provides intellectual support for the development of Chinese national energy and the modernisation of the ECT.

China is an executor to apply the reform results. China actively advocates the establishment of a new mechanism for the ECT, promotes the modernisation reform of the ECT, and has no question accepting the results of its reform results in the international community. Words must be believed and deeds must be fruitful is a traditional Chinese proverb. There is no coercive force in the implementation of international law but depends on the conscious implementation of the state. In the modernisation of ECT, China will obey international law and actively fulfill its international obligations.

In order to achieve the goals of China, combining with the essence of the transformation of the ECT, which lies in "strengthening, expanding and promoting", the following approaches should be adopted.

4.1. Responding to multicultural needs
A sound energy cooperation legal mechanism is conducive to building consensus and promoting the orderly development of energy cooperation. At the same time, it will also cause reflections on the domestic legal systems of various states. Various civilizations have their own strengths and weaknesses, gaps in social systems can be bridged, ideological interference can be avoided, and cooperation remains the norm. Free trade has brought universal benefits, so as economic integration is an indisputable development reality. China and other countries work together to expand the pie of common interests and constantly seek the greatest common divisor of national interests in the fields of energy, food, oceans, networks, major infectious diseases, climate change, etc.

The modernisation of the ECT is to forge a wide range of partnerships. States should respect each other, seek common ground while shelving differences, cooperate for a win-win situation, seek multi-party cooperation in international cooperation, strive to maintain world peace and security, and take the road of peace and common prosperity. The representative limitation of the ECT is one of the driving forces for its modernisation. Now it lacks sufficient enforcement, coercive power and influence comparing with the International Energy Agency, which represents developed countries in OECD, and OPEC, which represents oil exporting countries.

The field limitations of the ECT can also be seen from the leadership of the Secretariat of the ECT. The ECT paid too much attention to developed countries, ignored exchanges with developing countries previous. At the same time, the ECT has an overweight post-Cold War color, too much emphasis on digesting the legacy of the Cold War, but ignoring broader regions such as Asia-Pacific and North America. For example, the working language of the Secretariat of ECT is English, and its website is only available in English and Russian. In order to better reflect the latest realities of the energy industry, especially the growth of developing countries (including emerging economies), and to accommodate the interests of existing and potential participants in the ECT constituency, the modernisation of the ECT should pursue inclusiveness and diversity and internationalization.

4.2. Solving new problems generated
Resourcing states not only export fossil energy, but also hope to improve resource utilization efficiency, extend the industrial chain, and develop renewable energy to achieve economic and social sustainability. If these problems cannot be resolved, resource nationalism is likely to occur, which is not conducive to long-term stable cooperation. In addition, China's foreign direct investment has just started, but its proportion in some countries is already very large just because of the huge volume. For example, China's energy investment in exceeds 30% of the host country's foreign investment in the energy sector, and Kazakhstan is beginning to worry about national security issues. In this respect, China needs to strengthen coordination and communication with the host country, but more important is to establish multilateral cooperation mechanisms and platforms to alleviate the host country’s misgivings.
A large part of the existing energy cooperation agreements are correct reflections of social practice, so the interpretation of existing legal provisions must be paid attention to. All parties should thoroughly interpret the existing agreement, integrate the same or similar principles and rules, remove the rough and precise, refine the cooperation content of the existing agreement, and deal with unreasonable provisions. A special energy cooperation agreement should clarify the rights and obligations of the contracting parties under the guidance of the basic principles of energy cooperation.

4.3. Integrating industrial considerations in the legal framework

Energy cooperation agreements should be targeted in different industries, and this depends on the refinement of existing agreements. In the upstream sector, foreign capital should be regulated by the laws of the resource country after entering the resource country. Due to the particularity and complexity of the energy industry, the possibility of nationalization and expropriation of foreign-funded energy companies and joint ventures is relatively higher than that of other industries. Energy investment protection is particularly important in the upstream field. Therefore, the energy cooperation agreement should make detailed agreements on the definition of energy investment, investment protection treatment, compensation for losses, and expropriation.

In the midstream sector, the risk factor of energy transportation increases according energy transport from the production place to the consumer market. The safety of transit is related to whether energy can reach the consumer market smoothly. A relatively large risk is that the transit country may intercept transit energy privately as a diplomatic method or negotiating. Therefore, energy exporting countries, transit countries and importing countries must clarify the definition of transit transportation, and agree on the principles to be followed in transit and the rights and obligations of all parties, so that energy transit transportation behaviors are rule-based and law-based.

In the downstream sector, energy trade is the main activity at this stage. Energy trade behavior has a certain degree of vulnerability, and the "turmoil" in the international financial market or energy market will damage energy trade. Therefore, the contracting states need to formulate energy trade rules to regulate the trade behavior of both parties. The ECT provisions can learn the principles of trade liberalization, non-discrimination and transparency in GATT to reduce the opportunity for one party to unilaterally increase energy trade prices and adjust energy trade terms due to the threats, inducements, or changes in the international environment, and avoid increasing trade costs and losses of the other party.

5. Conclusion

The modernisation of the ECT is an inevitable step when facing the current economic and environmental situation and sustainable development. When solving the challenges encountered, while simultaneously looking forward to determine the value of the modernisation of the ECT, finding an appropriate response strategy becomes a crucial decision. China is a major exporter, importer and consumer of energy construction. Combining China's domestic energy policy with the modernisation goals of the ECT, while actively advocating the establishment of innovative mechanisms and implementing the reform results are China's current appropriate choice. In terms of refining and implementing the rules at the level of rules, further research is needed.

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