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ENERGY CHARTER TREATY IS AN INSTRUMENT FOR THE PROMOTION OF COOPERATION IN THE ENERGY SECTOR AND PROVIDES THE LEGAL BASIS FOR AN OPEN AND NON-DISCRIMINATORY ENERGY MARKET

Shivanku Bhatt
Legal Consultant at Uttarakhand Electricity Regulatory Commission, India

ABSTRACT

"Mixed agreements create no great difficulties as long as their implementation runs smoothly." The ECT is a living proof of this fact. As it has been shown, certain problems of compliance of the ECT within the EC area have already aroused. Furthermore, the ECT case show how the recurrent problems regarding mix agreements and Laws can lead to problems of competence, and subsequently to highly problematic issues like the substantive fragmentation of International Law.

Key words: Retention, Work-life balance, Commitment, Motivation, Talent management.

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1. INTRODUCTION

1.1. Overview of the Energy Charter Treaty

With the growing population over the years the need for energy has taken a tremendous transition. Countries have realized that the fundamental principle for the development of infrastructure, better transportation facilities and protecting the territory of a state, one need to have surplus energy. From the very basic household work to making a nuclear bomb the requirement of energy is inevitable.

The topic of the study does not only help one to understand the demand for the energy and the tussle among the countries for the same but also gives a multidimensional approach to the

subject. The swell in the international market for energy demand has made the world to study the very intricacies of its generation, demand-supply and the agreements involved in it.

The importance of energy to the development of a nation's economy can hardly be over-flogged. The need to meet the international demand for energy is even more pressing; the incentive to use unorthodox methods of negotiation and control becoming attractive and therefore every country is trying to build up its energy competency. The presence of hydrocarbons and other sources of energy bring with it, political and economic relevance The interplay of states in the international energy market can result in friction, the only remedy being the introduction of internationally accepted standards. While international law is considered to be the most favoured solution in most circumstances, it is not without saying that like every other law, it is moulded and fashioned around the economics and politics of the world to which it applies.

Energy Charter Treaty is one platform where the international agenda for the growth and demand of energy is bolstered. The motive of ECT is to "*set up a legal framework for key dimensions of international energy relations – security of investment and security of supply and demand –*" still catered "*for the demands of the changing international energy market*."[1] The Energy Charter Treaty therefore plays an important role as part of an international effort to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development. The topic will make the researcher understand the whole legal concept of the flow of energy from one country to another. To understand the purpose of the study a thorough reading of various research papers were done, reports of the WTO were read and many articles of the various publications of international journals were referred.

During the study of the reports and articles it was found that although the Energy Charter Treaty has been very helpful for providing a legal backbone to the world energy market but there is a need to make policies which deal with the specific issues pertaining to the developed , developing and underdeveloped countries. The policies should be flexible in a way that they cater the need of all the players in the world energy market. The study purports to identify the lacuna in the legal framework of the International Energy Policies and address the methods to heal the same.

2. BACKGROUND & EVOLUTION

THE Energy Charter Treaty (ECT) was established as an extension of the European Energy Charter of (1991). The EEC was a political initiative creating a non binding agreement between the Eastern and Western European States to foster and encourage East-West co-operation in the energy sector.[2] As with the end of the cold war the nations started to realize the importance and need of the energy, an unprecedented opportunity arose for Eastern European States to develop energy co-operation with the western states. The idea of the charter sprouted when it was observed that the eastern European states possessed energy resource that western European states needed, and the western European states could provide access to much needed capital for energy and infrastructure development in Eastern Europe[3]. The thought of the interdependence was ignited but the major concern then was that the member countries realize the importance that the cooperation in this field is much needed. The most fundamental question was, whether the nations will compromise its right on its resources. The sovereign authority of any nation over its resources and even a minor doubt would create a threat and would lead to a suspicion was the major challenge.

The Energy Charter process started with the European Energy Charter initiated by the Dutch Presidency of the European Community in 1990. In December 1991, the European Charter Declaration was adopted with the aim of bringing about a new East-West economic relationship. Three years later, the Declaration evolved into a binding Treaty. After ten years ECT continues to be the first and only multilateral agreement on the promotion and protection of energy investment.

The ECT represents the first international regime in energy trade and transit, issues that are not addressed by the World Trade Organizations agreements[4]. In order to improve and clarify related transit provisions, the ECT contracting parties began to develop a Transit Protocol as a supplement to the Treaty. Although the Transit Protocol was never completed, with negotiations having stalled since 2009, there is a common understanding that a specific agreement on energy transit would be more effective than a general WTO-based framework.

The ECT's multilateral investment protection represents a positive move toward the unification of energy investment protection governance. The scope of the investment provisions covers fair and equitable treatment, 'constant protection and security' for investors as well as an obligation to respect any contractual arrangement.

Not only does ECT gushes out the investment clause and trade related provisions but also gives a platform to the contracting parties to settle their dispute arising in this arena. Arbitration is one of the key attractions of the treaty and has a flexible dimension of its own. The treaty holds that a member country does not necessarily need to have a separate clause or a separate agreement for Arbitration. A mere membership of the ECT gives the parties an option to go for an Arbitration settlement.

In spite of its goal to forge a global energy governance framework, the geographical scope of the ECT remains rather limited. Several energy export-oriented states have rejected the Treaty, including Organization for Petroleum Exporting Countries members, Norway and Australia. Moreover, the United States, which is one of the biggest energy importers in the world, has distanced itself from the process since the beginning of the Treaty negotiations. Washington's scepticism towards multilateralism is not unique in this case. Other countries, such as China, carefully considered the Treaty's implementation before acceding to it.

3. ENERGY CHARTER TREATY- TRADE & TRANSIT

Energy and hydrocarbons in particular is transported over increasingly large distances from producers to consumers. The demand supply chain has to be maintained through a defined, uninterrupted channel. The treaty tries to ensure that the free flow of the energy is maintained throughout the globe. Trade and transit although are two different terms but to understand the working of each one has to read them both together. Where Article 5 of the ECT seeks to address trade related investment measures that create discrimination and favor, generally towards the host state, Article 7 addresses matters relating to "Transit". Article 7(3), in turn, deals with a non-discrimination obligation of Contracting Parties towards treatment of Energy Materials and Products, which are "in Transit".

4. TRADE

One of the prime objectives of the ECT is to control and minimize political risks and also that the Contracting Party shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT[5]. This forms the backbone of the trade provisions of the ECT. It can also be deciphered from the treaty that an investor in the energy sector needs to be able to predict his ability to sell his product, therefore there is a need to

have a trade provision in treaty. The treaty also talks about the non-discriminatory provisions when it comes to trade. The Article 5 trade provisions are not a new set of trade provisions. Rather under Article 5 (1), the ECT trade provisions incorporate the TRIM provisions of Articles III and XI of the GATT. In case of natural gas, most of which is transported by pipeline, this often involves crossing different national borders. Bilateral disputes over energy transit can quickly have multilateral implications for gas supply, underlining the importance of standards, accepted by countries on a multilateral basis, to promote reliability of cross-border energy flows. One of the key issues that boil down is that the treaty is silent on the disputes relating to the member and non-member countries. This turns as a major concern when one deals in the energy market and that the application of the norms of the treaty turns futile.

The issue that comes on the surface while reading the trade provisions which propounds to ensure non-discriminatory approach towards the non-domestic investors. But there are certain exceptions which are given under Article 5 of the ECT which talks about the situations where a country gives certain preferences to its domestic investors. On the surface it appears to prevent national favour, and shows the contradiction which does not nurture the interest of the developing countries, rather make them more apprehensive. The thought that the treaty flows from the interest of the rich countries and that it is a tool of the wealthy nations, give a sense of suspicion to the countries which have been under the colonial rule. There are some arguments that the provisions of the treaty are neither comprehensive nor robust as they first appear. On one hand the treaty talks about the theory of national treatment and on the other it also gives a narrow escape to the member in some exceptional circumstances.

5. TRANSIT

Article 7(3) of the Energy Charter Treaty provides:

"Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise."

The study seeks to interpret Article 7(3) of the ECT. The attempt is to answer the question whether, along with an obligation not to discriminate energy materials and product in transit as compared to exports and imports of energy materials and products, the non-discrimination requirement contained in Article 7(3) of the ECT also includes an obligation not to discriminate such materials and products as compared to energy materials and products in domestic traffic. The treaty does not provide a clear reading on the subject and thus leaves some amount of ambiguity in the provision. There is a divergence in the view of the legal literature as to the proper interpretation of the text of Article 7 (3) with regard to the scope of non-discrimination obligation. On the one hand, some scholars, says that Article 7(3) both provides National Treatment and Most favored Nations Obligations, i.e. that the treatment of energy materials and products in transit shall be compared with the treatment of imports, of exports and of domestic traffic[6]. On the other hand, the Russian proposal on the new Understanding of Article 10 of the draft Transit Protocol[7] considers that no national treatment obligation exists in Article 7(3), or, put differently, that the treatment of energy materials and products in transit shall be compared with the treatment of imports and of exports, but not with the treatment of domestic traffic. The issue is particularly acute in countries that provide internal transport subsidies designed to keep costs for internal transportation of energy lower than the cost of transit of energy. This again has led to a

definite amount of discontentment of the member courtiers and those who completely rely on the principles of the ECT.

It is observed that there is no explicit obligation which supplements that domestic traffic must be included into the comparable standard for the purpose of Article 7(3).

One of the major concerns that the treaty does not address is of the transit through the countries which are not signatories of the treaty. This is one of the fundamental issue that the treaty fails to resolve. At this juncture where there is a dearth of conventional source of energy and the nation's rivalry, it is found that the treaty has not made an adequate effort to resolve the disputes. when the enemy country does not allow the use of its territory for the transit of the energy.

6. ENERGY CHARTER TREATY: INVESTMENT PROVISION

The investment chapter is a cornerstone of the ECT. Its provisions aim to promote and protect foreign investment in member countries. To this end, the Treaty grants a number of fundamental rights to foreign investors with regard to their investment in the host country. Foreign investors are protected against the most important political risks, such as discrimination, expropriation and nationalisation, breach of individual investment contracts, damages due to war and similar events, and unjustified restrictions on the transfer of funds. The dispute settlement provisions of the Treaty, covering both inter-state arbitration and investor-state dispute settlement, reinforce these investor rights. The perceived degree of political risks in the host country considerably affects the decision of foreign companies whether to make an investment in the first place or not, and what level of return it would require. The higher the perceived risk, the higher the return that the foreign investors demand. Vice versa, the lower the perceived risk, the more capital is likely to be invested and the more potential revenue the host country will gain. By reducing the political risks that foreign investors face in the host country, the ECT seeks to boost investor confidence and to contribute to an increase in international investment flows.

7. DISPUTE SETTLEMENT UNDER THE ECT

In the early 1990s ideas were discussed on how to develop the energy cooperation between Eastern and Western Europe. Russia and many of its neighbouring countries were rich in energy but in great need of investment to be able to reconstruct their economies at the same time as West European countries were trying to diversify their sources of energy supplies to decrease their potential dependence on other parts of the world. There was therefore a recognized need to set up a commonly accepted foundation for energy cooperation between the states of the Eurasian continent, out of which the Energy Charter Process was born.[8]

Dispute settlement is regulated in Part V of the ECT (Articles 26–28). Article 26 of the ECT governs investment disputes between private investors and contracting states, and extends to investors a right to arbitration of such disputes. Article 27 regulates resolution of state-to-state disputes between contracting parties concerning the application or interpretation of the ECT (not limited to matters of investments). The ECT also contains special provisions for the resolution of trade disputes, a conciliation procedure for transit disputes and consultation procedures for competition and environmental disputes.[9]

7.1. The Dispute Settlement Mechanism

- State – State Dispute Settlement, Art. 27 ECT
- Investor – State Dispute Settlement, Art. 26 ECT

- Transit Disputes, Article 7 (7) ECT
- Trade Disputes, Art. 29 ECT + Annex D (where one party is not a WTO member)
- Competition and Environmental Disputes
- Competition: Article 6 (5), Art. 27 (1) ECT
- Environment: Article 19 (2) ECT (consulation in the ECT Conference)

The right to arbitration or other dispute resolution mechanism (see Section 3C below)—of investment disputes set out in Article 26 is only one of many dispute resolution mechanisms of the ECT, but arguably the most significant. Article 26(1) covers: 'disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III'. The definitions of these terms and thus the scope of the investor's right to dispute resolution in accordance with Article 26 have been described in Section 2B above.

It should be emphasised that the right to arbitration or other methods of dispute resolution, under Article 26 arises solely out of the ECT and is not subject to any requirement of exhaustion of local remedies, or any contractual dispute resolution mechanisms.

7.2. Amicable Settlement

In accordance with the first paragraph of Article 26, investment disputes (as defined above) must, if possible, be settled amicably. The investor may not submit a dispute for resolution in accordance with Article 26 until three months have elapsed from the date on which either party to the dispute requested amicable settlement. However, if a dispute cannot be settled amicably within three months, the dispute shall be resolved in a forum elected by the investor, as set forth in Article 26.

7.3. The Investor's Choice of Forum for Dispute Resolution

The investor has the choice of submitting an unresolved dispute covered by Article 26 to one of the following fora under Article 26(2)(a)–(c):

- the national court or administrative tribunals of the contracting party where the Investment was made,
- in accordance with a previously agreed dispute settlement procedure, or
- international arbitration.

7.4. Applicable Law

Article 26(6) provides that an arbitral tribunal established under para 26(4) shall decide the issues in dispute in accordance with the ECT and the rules and principles of international law.

7.5. Local Companies Controlled by Foreign Investors

As regards the nationality of an investor, Article 26(7) ECT states that a legal entity which has the nationality of the contracting party to the dispute, but before the dispute between it and the contracting party arose, the local party was controlled by investors of another contracting party, the local party shall be treated as a 'national of another Contracting State' for the purpose of Article 25(2)(b) of the ICSID Convention, and a 'national of another State' for the purpose of Article 1(6) of the Additional Facility Rules. Hence, if the majority of shares of an investor of the same nationality as the host state are controlled by investors of another contracting state, the investor is to be viewed as an investor of another contracting party for purposes of establishing 'diversity' jurisdiction for an arbitral tribunal constituted under the ICSID Rules or the ICSID Additional Facility Rules. Accordingly, the ECT creates a

possibility for 'local companies', which are owned or controlled by investors of another contracting party, to request international arbitration under the ECT against their 'home states', and benefit from the investor protection of the ECT which may be more favourable than the protection available under national law.

8. THE ENERGY CHARTER PROCESS: LOST? OR NEW MOMENTUM?

Without doubt the Energy Charter Treaty is a "child" of the 1990s, when the consumer countries had made significant inroads into producing countries, and the oil prices had been comparatively low due to a relaxed supply situation and new independent sup-pliers in the Former Soviet Union entering the scene.

Since then, the market and producer-consumer relations have changed profoundly. Since the turn of the century, the OECD world has been losing relative consumer weight: Demand has been driven by China and India. It is also increasing in the Middle East and North Africa. Energy trade is related to enormous financial transfer but also to power shifts, and the strong demand between 2002 and 2008 had favoured producing countries in that respect. How-ever, the economic crisis and the gas glut (due to decreased demand, a shale gas revolution in the United States, and the freed liquid natural gas volumes available) have turned the gas markets around, especially in Europe. Climate change has become a pressing issue and the energy sector is at the heart of the problem. Energy savings, energy efficiency, and a rising share of renewable energy are more important than ever.

The Energy Charter Conference adopted the Road Map for Modernisation of the Energy Charter Process on November 24, 2010, thereby acknowledging the new developments. This was the first visible out-put by the Strategy Group established at the previous conference in Rome, which had paved the way for the modernization of the Process with the Rome Declaration. The Road Map for the Modernisation of the Energy Charter Treaty, which makes reference to seven crucial areas (among them promotion of the Energy Charter and the Energy Charter Treaty; transit and cross border trade; investment promotion and protection; energy efficiency, etc.), reflects the new environment pretty well.

Nonetheless, the Energy Charter Process is currently at a difficult stage. The Russian attitude toward the Treaty has contributed to that, but the EU has also favored its own instruments and mechanisms to deal with energy in the region, for example the Energy Community or the European Neighbourhood Policy, Partnership and Cooperation agreements, etc. Moreover, in a number of EU countries the ECT is seen as "sacrosanct" and not subject to modernization, which is denounced as renegotiation with Russia position that could perpetuate the deadlock. Moreover, the gas glut and the North Stream pipeline diminish the pressure in respect to the transit issues at first glance. However, policymakers should not be led astray by these developments.

9. CHALLENGES OF ECT

A successful international organization or treaty is one, which is able to foster co-operation among states beyond their political and economic alignments. The treaty needs to ensure that the political rights and the interest of the parties will be protected. That the parties should not feel a threat to their existence or to their autonomy over the energy resource. The fundamental principal of ECT is its inability to convince developing, oil developing ,oil producing states that their Economic and Strategic interest in their oil and gas resource are protected under the treaty. There are few examples like Libya, Algeria, Iran , Kuwait, Nigeria, Saudi Arabia,

United Arab Amirates and Venezuela which have not signed the treaty because of the same reason.

When comparing those who have signed and verified to those who have neither signed nor ratified, it is hard to escape the inference that the ECT is regarded favourably by countries which are primarily consumers, but the most producers have serious reservation about it.

There are many instances in which it is seen that ECT may not favour the interest of the developing countries. Also, it is observed that the developing countries lack in technical expertise for oil exploration enter into production sharing agreements or other contracts, with foreign oil companies usually from developed countries. Now, the foreign oil companies having the technical expertise in the sector have a de facto position to make important decision relating to investment which is binding on the developing countries.

There are certain provisions of the ECT which are subject to speculation and are apprehensive to the developing countries. Article 18(1) of the ECT, which says that "the contracting parties recognize State sovereign rights over energy resources…" whereas the United Nation General Assembly's Charter recognizes a state's sovereignty over its resources within its borders, but does not describes this sovereignty as permanent. This is not a very soothing provision for the developing countries and will look upon it with suspicion when they are seeking full control over their resources. This on its very face shows less security and sovereignty over their natural resources than the United Nations Charter.

10. CONCLUDING REMARKS

"*Mixed agreements create no great difficulties as long as their implementation runs smoothly*."[10] The ECT is a living proof of this fact. As it has been shown, certain problems of compliance of the ECT within the EC area have already aroused. Furthermore, the ECT case show how the recurrent problems regarding mix agreements and Laws can lead to problems of competence, and subsequently to highly problematic issues like the substantive fragmentation of International Law. The ECT example calls for a new way of approaching the international responsibility. The laws must never be stagnant but dynamic. The treaty needs some alteration and amendments, like any other laws the part of the documents have become irrelevant not in the literal approach but in its pragmatic implementation. The study itself has shown how the key features of the treaty faces challenges of implementation when goes through a complex situation. The need of the hour is to streamline the laws and that it must be in accordance with the concern of the developing nations as well. There are some major portion of the treaty which needs to be more pragmatic in its approach and should address the current crises of the energy demand. If it propounds the concept of "level playing field" then it has to consider the interest of the developing countries also. If its not done now then there will be a global disparity among the energy rich countries and the developing countries.

Now, there is a need to make a renewed effort that ensures that the document addresses all the major issues which pertains to the concern of the developing country. The result should be international and legally a binding framework, an energy charter plus and, takes the interest of the energy producers and transit countries more strongly into account in a number of areas and includes modification of several points that are already under discussion. However, it is seen that there are efforts to modernize and rescue the treaty but should not be done in under the influence of the political forces which will again deplete the whole idea of growth in the Energy market. So far the treaty has been a back bone for the development of the energy market which needs some more strength which could only be attained with a sincere revisit into the treaty.

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