Analysis of the impact on sustainable development by investment regulations in the Energy Charter Treaty*

Qinglin Zhang**

The Energy Charter Treaty is an important multilateral treaty for promoting international energy cooperation. Sustainable development is one of its purposes. The investment regulations of the Treaty have emphasized protecting the investors' interests, which has potentially both positive and negative influence on sustainable development. To achieve the aim of sustainable development and to attract more countries' participation in the Treaty, the Treaty should increase its transparency and give differential treatment to developing countries. This article seeks to analyse these concerns and offer some wider conclusions regarding the particular improvement which can be carried out to increase the level of investment protection, while maximizing sustainable development simultaneously.

1. Introduction

Entering the 21st century, energy problems have increasingly become a key factor limiting sustainable development of the international community. The Energy Charter Treaty (ECT) is an important multilateral treaty for improving international cooperation in the energy field, it provides a multilateral framework for energy cooperation that is unique under international law, and the strategic value of these rules is likely to increase in the context of efforts to build a legal foundation for global energy security, based on the principles of open, competitive markets and sustainable development.[1] As the only treaty of its kind dealing specifically with intergovernmental cooperation in the energy sector, the ECT can and should make contributions to global sustainable development. Investment regulations are the very core of the ECT. In this study, we aim to analyse the

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** Qinglin Zhang, PhD in Law, Professor in International Economic Law, Law School of Wuhan University, China and EU Commission Marie Curie Fellow in the EPSEI Project at University of Turin Law School, Italy. I would like to thank Prof. Paolo Davide Farah and Dr Tivadar Otvoes for their insightful comments and suggestions to improve tremendously the quality of the manuscript. Without their help, this publication would not have been possible.

[1] Energy Charter Secretariat, 'Energy Charter Treaty and Related Documents' (September 2004) 13 <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf> accessed 21 June 2015.

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potential impact the ECT investment regulations may have on sustainable development, as well as provide some suggestions for their improvement.

2. The relationship between the ECT and sustainable development: sustainable development as one of the objectives of ECT

Currently, the definition of sustainable development commonly accepted by the world comes from *Our Common Future*, a report by the World Commission on Environment and Development. According to it, sustainable is the '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*'[2] Sustainable development is generally considered to consist of three components: economic factors, social factors as well as environmental and ecological factors.

A number of ECT provisions reflect support and respect for sustainable development and its related principles. In its Preamble, the ECT affirms the importance of energy efficiency; reviews the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Long-range Transboundary Air Pollution and its protocols and other international environmental agreements concerning energy; furthermore acknowledges the pressing need for measures of environmental protection. Mentioning the UNFCCC within these preliminary contents represents the most important gesture of the ECT to support sustainable development.[3]

Article 2 of the ECT, 'Purpose of the Treaty', is another article closely related to sustainable development. It stipulates that the ECT 'establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter'.[4] This means we must study the objectives and principles of the Charter to understand the relationship between the ECT and sustainable development. While the Charter's foremost purpose is to build a bridge for energy cooperation between the East and West in the post-Cold War era, it still has other purposes and principles found throughout the text and under its Title I 'Objectives', including security of energy supply, maximization of energy sector efficiency, enhancing safety, minimization of environmental problems and so on. The Charter upholds a market-oriented view and supports the creation of 'a climate favourable to the operation of enterprises and to the flow of investments and technologies', while also calling for full consideration to environmental issues. The Charter's Preamble also makes demands for sustainable development, which encompasses not only environmental protection, but also that 'broader energy cooperation among signatories is essential for economic progress and more generally for social development and a better quality of life'. Hence, according to Article 2 of the ECT and the full text of

[2] World Commission on Environment and Development (WCED), *Our Common Future* (1st edn, OUP 1987) 24.

[3] The preliminary character of these reflections does not reduce their importance. On the contrary, emphasizing them at the beginning of the ECT indicates their fundamentality as baselines carrying the main ideas of energy utilization and environmental protection. See Energy Charter Secretariat (n 1) 40.

[4] ibid 44.

the Charter, we cannot use its one objective—facilitating the flow of international investments in energy—as an excuse for depreciating its another legitimate objective: promoting sustainable development and environmental protection.[5]

In addition, the European Energy Charter Conference has always been dedicated to the promotion of long-term international cooperation in sustainable development, as evidenced by the drafting and signing of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).[6] This protocol not only associates energy efficiency[7] with sustainable development, but also enables its signatories to enforce more effective measures in accomplishing both goals. As its Preamble posits: 'improvements in energy efficiency reduce negative environmental consequences of the energy cycle including global warming and acidification'. Article 1 of the protocol expressly states that its objectives include 'the promotion of energy efficiency policies consistent with sustainable development'. Some of its specific provisions further demand participant countries to conduct cooperation in energy efficiency and environmental protection.

Returning to the ECT itself, its Articles 18 and 19 are both closely related to sustainable development. Article 18 affirms each state's sovereignty over its energy resources and recognizes that each state holds the rights to regulate the environmental and safety aspects of the exploration and development of its energy resources.[8] Article 19 is concerned with

[5] The latest progressive step towards broadening the cooperation in energy issues between states, while considering the elimination of environmental threats is a political declaration of an International Energy Charter (IEC) prepared for adoption by the Ministerial Conference on the International Energy Charter in the Hague on 20 May 2015. This concluding document evolves from all the objectives set by the ECT on the field of sustainable development, as well as energy cooperation, and sets the expectations needed to be achieved ambitiously even higher. Notably, the document itself having only political character, does not have any legally binding effects, but its purpose is to include more states worldwide into the ECT through the possible observation of achievements, methods and processes through which ECT objectives are carried out. This is supposed to motivate non-Member States to voluntarily become cooperative partners pursuing a tighter global energy partnership. For this to be feasible a governmental platform needs to be created to address contemporary global energy issues and search for generally beneficial solutions. Besides 'recruiting' new members, the signatories of the International Energy Charter bound themselves to lift their cooperation to a higher and more effective level. The key principles of the IEC reflect the original ones in ECT, putting more emphasis on the horizontal scope of applying them. For an overview see: IEC, 'Agreed Text for Adoption in The Hague at the Ministerial Conference on the International Energy Charter on 20 May 2015' (2015) <http://international.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf> accessed 21 June 2015; Daria Nochevnik, 'International Energy Charter: The Emergence of The New Global Energy Governance Architecture' *European Energy Review* (5 June 2015) <http://www.europeanenergyreview.eu/international-energy-charter-the-emergence-of-the-new-global-energy-governance-architecture/> accessed 21 June 2015.

[6] Tudor Constantinescu, 'The Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)' (23 February 2004) <http://www.encharter.org/fileadmin/user_upload/Conferences/2004_Feb/Constantinescu.pdf> accessed 21 June 2015.

[7] Energy efficiency is one of the key economic indicators of sustainable development. Thus, it is important to point out the significance of PEEREA and its relevance on the scale of building a global energy partnership respecting ecological values. See: International Atomic Energy Agency, UN Department of Economic and Social Affairs, International Energy Agency, Eurostat and European Environment Agency, 'Energy Indicators for Sustainable Development: Guidelines and Methodologies' (2005) <http://www-pub.iaea.org/MTCD/publications/PDF/Pub1222_web.pdf> accessed 21 June 2015.

[8] The general principle of sovereignty over the state's natural resources can cause contra productive results in relation to sustainable development, since global energy partnership always requires giving up part of the state's own sovereignty for a higher interest of several cooperating states. At the end of the day, this can lead to a consecutive shift of regulatory competences from the state to a transnational coupling, for which there might be little political will. In some cases, this significantly slows down the process of building wide-scale global partnerships and the coordination of mutual policies and measures taken towards improving sustainability. See: S Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All?' (2013) 14 Melbourne J Intl L Renewable Energy 6. For a more detailed analysis of art 18 of ECT and its broader impact see: MENA Chambers, 'A Bird's Eye View of Article 18 of the Energy Charter Treaty: Sovereignty over Energy Resources' (Series of Notes on the Energy Charter Treaty, Note 4, 11 March 2014) <http://www.menachambers.com/expertise/energy-charter-treaty/MCET_ECT_Note-4_11032014.pdf> accessed 21 June 2015.

the environmental aspects. It states expressly, 'in pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area'.

Based on the above analysis, we know that sustainable development should be one of the objectives that the ECT pursues.

3. ECT investment rules: reinforcing the protection of investors and promoting liberalization of international energy investment

The ECT's investment regulations[9] are mainly found in Part III—'Investment Promotion and Protection', which encompass the promotion, protection and treatment of investments, key personnel, compensation for losses, expropriation, transfers related to investments, subrogation, relationships to other treaties and the non-application of Part III in certain circumstances. In addition to Part III, Article 1 has provided definitions for 'investment' and 'investor', and Article 26 includes provisions on investment dispute settlement. To promote and protect the foreign investments of ECT Member States, ECT investment standards have awarded many basic rights to foreign investors, which include:

An extensive range of protected investments

The ECT's definition of 'investment' is wide-ranging, inclusive and based on assets. According to Article 1(6), '"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor' (said assets must of course be related to the field of energy). Following this definition is an all-inclusive list, which includes tangible and intangible, and movable and immovable properties and any property rights; a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; claims pursuant to contract and associated with an investment, intellectual property, returns and any right to undertake any economic activity in the energy sector, whose character as investments is not affected by the various forms they may take. Obviously, the ECT's definition of investment goes far beyond the conventional definition of international investment.[10] It is hard to imagine any assets and rights related

[9] At this point we would like to emphasize, that the ECT 'is the first multilateral treaty for the protection of investments, i.e. a binding source of international law. The fundamental aim of the ECT is to support foreign investment and provide protection against political risks, such as expropriation or discrimination. But the ECT also contains a wide range of rules, which concern energy transmission, energy efficiency and environmental protection. Last, but not least, the ECT sets forth generally binding rules for the resolution of disputes under international law'. AJ Bělohlávek, 'Institutionalized Promotion and Protection of Investments in the Energy Sector' in F Černý and others (eds), *Czech Yearbook of International Law* (Juris Publishing 2014) 103.

[10] A broad but precise definition of international investments/investors is utmost important mainly for marking the scope of protection—subject point of view (eligibility based on nationality, location of investments, public or private character of the investor etc), object point of view (aim of investments, limitation of asset protection, eligibility of claims in case of dispute settlement etc). For a detailed overview of contemporary approaches to the international investment definitions in different

to business, economic and financial activities that do not fall under this definition of investment.

Ensuring the proper treatment of foreign investors

First, the ECT sets a minimum standard for the treatment of foreign investors. According to Section 1 of Article 10,

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.

Secondly, the ECT establishes non-discrimination as a central principle of investment regulations. According to Section 7 of Article 10,

> Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.[11]

Protecting foreign investors from the impacts of major political risks

Expropriation

Standing at the core of investment regulations is the protection of foreign investors' interests in case of expropriations. According to Article 13,

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures

BITs, international legal documents and their application via case law see: Organization for Economic Co-operation and Development (OECD), 'International Investment Law: Understanding Concepts and Tracking Innovations' (2008) <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> accessed 21 June 2015.

[11] Besides the principles mentioned (most-favourable-nation treatment, transparency, non-discrimination etc), there is a general call for widening their list with expressive good faith requirements, as well as for the creation of a special developing country regime promoting sustainable development. Developing countries are being the most vulnerable when it comes to investments, which do not comply with general sustainability conditions and environmental requirements. Reasons for this are several from a less-developed regulatory framework, through higher level of corruption to the possible higher risk of a fragile political situation etc See: James Chalker, 'Making the Investment Provisions of the Energy Charter Treaty Sustainable Development Friendly' (2006) 6 Intl Environmental Agreements: Politics L Economics 435. (The particular issue of a separate ECT regime for developing countries will be dealt with below in Section 6.).

having effect equivalent to nationalization or expropriation except where such expropriation is: for a purpose which is in the public interest; not discriminatory; carried out under due process of law; and accompanied by the payment of prompt, adequate and effective compensation.

Investors can request the compensation to be paid in a freely convertible currency, and the compensation should amount to the fair market value of the investment immediately before the expropriation or before its value was affected by the impending expropriation.[12]

Breach of investment agreements

Most major investments related to energy are undertaken on the basis of a single agreement signed between an investor and the country in which the investment is made, and breaching an investment agreement constitute a violation of ECT principles. According to Section 1 of Article 10, each signatory country shall observe any obligations it has entered into with an investor of another signatory. This provision extends to all the contracts a country may enter into with the subsidiaries or parent companies of a foreign investor. If the country breaches the agreement, the foreign investor may resort to the ECT's dispute settlement mechanism.

War and similar events

According to Section 1 of Article 12, 'an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party because of war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area', may request the host country to compensate for its losses, and the restitution, indemnification, compensation or other mitigation should be the same as 'that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other contracting party, or the Investor of any third state'.[13]

Unjust restrictions on fund transfers

To a large extent, the ECT has limited the risks of restrictions on foreign investors that forbid them from transferring funds related to the investments into another country. Article 14 requires host countries to immediately proceed with such transfers at

[12] The criteria of expropriation set within the ECT reflect all the accepted and applied trends both on international and national level regarding investments and private property assets, nevertheless the vague terms and rather indirect addressing gives space to concerns to arise. Besides public interest, transparency, non-discrimination and adequate compensation, the dimensions of expropriation and their interpretation by different tribunals during dispute settlements are way deeper to be sufficiently covered by ECT framework. For a case-law analysis of different approaches to expropriation and its interpretation see: Graham Mayeda, 'International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards' (2008) 4 McGill Intl J Sustainable Development L & Policy 191.

[13] See also: A Cosbey and others, 'Clean Energy Investment: Project Synthesis Report' (International Institute for Sustainable Development, June 2008) <http://www.iisd.org/pdf/2008/cei_synthesis.pdf> accessed 21 June 2015.

contemporary exchange rates. These transfers include initial and addition capital, returns, payments under a contract, proceeds from a sale or liquidation, payments from the settlement of a dispute, compensations for losses or expropriations, etc.[14]

Authorizing investors to select key employees connected to the investment

According to Article 11, a signatory country should permit investors of other signatories to employ any personnel they choose to work and stay in their country, regardless of their nationality and citizenship, and the terms, conditions and time limits for such permissions should be clearly defined. This complies with the general principle of non-discrimination, on which the ECT undoubtedly rests. Furthermore, the ECT requires host countries to:

> subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith requests by Investors of another Contracting Party and key personnel who are employed by such Investors or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services.

These provisions ensure the overall quality of the project realization, while they serve another simple purpose as well: employing well-educated, morally impeccable experts creates extra space for thorough R&D focusing not only on profit maximization and the energy aspects, but also considering the sustainability dimension.

Improved provisions on the settlement of investment disputes

The Treaty's provisions on the settlement of investment disputes require all signatories to interpret and apply ECT provisions in a fair and consistent manner. If an investor from a signatory country believes that the government had not performed the duties stipulated by the provisions on investment protection, the investor can, under the signatory's unconditional consent, choose to submit the dispute to a national or international court or arbitration tribunal. The signatory should pledge to implement the arbitration decision promptly on a nationwide scale.[15]

[14] Regarding investment protection, developing countries face the most challenging issues, which require mutual solutions of a wide range of states based on shared experience, exports of legal institutions and principles etc. Currently, there is a paradigm shifting taking place related to African and Asian countries in light of the initiated creation of the IEC, which has the potential to culminate in an African–European and Asian–European Energy cooperation legal framework. See: Sheng Zhang, 'Energy Charter Treaty and China: Member or Bystander?' (2012) 13 J World Investment & Trade 597; Matteo Barra, 'Energy Charter Treaty: Multilateral Framework for Energy Investments in Africa' (UNCTAD ITAP ECS Training Program Casablanca, 12 January 2015)<http://www.finances.gov.ma/Docs/2015/DTFE/ DAY%201%20Matteo%20Barra%20ECS%20Energy%20Charter%20Treaty.pdf> accessed 21 June 2015.

[15] There is still inconsistency within dispute resolution related to international investments. This is a result of two essential factors fragmenting international investment arbitration. The first of these is the existence of multiple treaty regimes. The second is arbitral tribunals not having sufficient regard to the decisions of previous arbitral tribunals regarding the same dispute because of the existence of different regimes, rules to be applied, as well as different interpretations of regulatory terms by tribunals.

The ECT's investment regulations are clearly designed for reinforcing investor protection and promoting liberalization of international energy investment, with no direct mentioning of sustainable development. However, having a closer look, we can see the regulations to have both positive and negative potential impacts on sustainable development.

4. Potential positive impacts of ECT investment regulations on sustainable development

Environmental protection is a key factor in sustainable development, and it is well known that global warming is one of the greatest environmental problems of the present. The latest scientific reports by concerned international organizations have confirmed that global warming is caused by greenhouse gas emissions from humanity's use of fossil fuels. Therefore, as the only treaty of its kind dealing specifically with intergovernmental cooperation in the energy sector, the ECT should and can exert a positive influence on solving this issue. Of course, the important role in reducing greenhouse gas emissions, played by international investment in the energy sector of the developing world, has been discussed for many years.[16] However, we believe that enhancing investor protection and promoting the flow of international investments among the energy sectors is conducive, to some degree, to reduce greenhouse gas emissions and to fulfil goals of sustainable development.

As we all know, global warming at present is caused mainly by massive greenhouse gas emissions as a result of industrialization in both developed and developing countries.[17] Following the 'Kyoto Protocol'[18] and the principle that polluters pay for the damage they cause, developing countries do not have any specific restrictions on greenhouse gas emissions. This is a reasonable decision, as imposing too many obligations onto the developing countries would only hinder their economic growth and make sustainable development even harder to achieve.[19] Nonetheless, it is true that the ongoing

Nevertheless, the ECT has the potential to unify these fragmented regimes under a single system of investment dispute settlements. See: Justin D'Agostino and Oliver Jones, 'Energy Charter Treaty: A Step Towards Consistency in International Investment Arbitration?' (2007) 25 J Energy & Natural Resources L225.

16 Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' (2008) 14 ILSA J Intl & Comp Law 7.

17 According to statistics, among the leading countries in greenhouse gas emissions both developed and developing countries can be found (USA, China, India). However, some of the leading economies in the world managed to significantly reduce their emissions since 1990—Russia by more than 30 per cent. See: United Nations Statistic Division, 'Environmental Indicators GHGs' (July 2010) <http://unstats.un.org/unsd/environment/air_greenhouse_emissions.htm> accessed 21 June 2015.

18 UNFCCC, 'Kyoto Protocol' (1997) <http://unfccc.int/kyoto_protocol/items/2830.php> accessed 21 June 2015.

19 Such conflicts between economic and environmental interests can be found in case of all developing countries, economic growth serving in many cases as an excuse for justification of the insufficient measures taken to meet global ecological goals. Basically, pursuing headlong economic growth is the basis of developing countries. For several years, some of the top officials claimed economic interests to be more important than protecting the environment, not just because of their importance regarding maintaining stability, economic growth in these countries (China, India, but also countries of South America), but also because of several other reasons (political will, corruption and other deformations of their legal systems etc) See: AH Bagdadee and SA Rahaman, 'Assessment of Climate Change with Energy Expansion for Developing Countries' (2015) 3 Intl J Energy & Environmental Research 2, 5.On the other hand, it is without any doubt that recently these countries have become more and more ecologically aware and started making efforts, which have lead to the overall reduction of emissions by six developing countries (Brazil, China, India, Mexico, South Africa, Turkey) by 300 million tons a year. See: W Chandler

industrialization of developing countries has caused a sharp increase in their emissions, and failure to address this issue can only damage the common interests of humanity. For this reason, it has been the developing countries' hope that developed countries can assist them in saving energy and reducing emissions by way of technology transfers, technical assistance and investment in projects of sustainable development.[20] To this end, the 'Kyoto Protocol' has proposed the 'Clean Development Mechanism' and suggests funding should be provided to projects that can reduce total emission in developing countries. In the 'Bali Road Map', all signatory countries have accepted a proposal made by India, according to which developing countries agree to adopt 'measurable, reportable and verifiable' measures to reduce emissions, but these measures need the support of developed countries in technology, finance and capacity building, and such support should also be 'measurable, reportable and verifiable'.[21] Thus, a series of international documents have established a close connection between international energy investment and emissions reduction in developing countries.

The remaining question is whether the ECT is able to support international energy investment and contribute to global sustainable development? The answer is yes.

First, investing in energy-saving and emission-reducing projects usually involves a large number of technology transfers, possibly as a part of equity investments. The legal protection of these technologies is a great concern for foreign investors. The ECT's broad, inclusive and asset-based definition of 'investment' has included tangible assets, equities and debts, but also intangible intellectual property related to the investment. Therefore, the ECT's investment protection has covered all manners of investments, which should make foreign investments more attractive.

Secondly, advanced energy investment projects, in addition to being technology oriented, are also capital-intensive, which involves a large number of fixed-asset investments and long development cycles, making it impossible for investors to recover their costs in a short period. This necessitates the existence of a consistent legal framework for the host country to participate. At the G8 Summit in 2006,[22] the leaders expressed their support for the ECT principles, and for promoting international energy cooperation by establishing a consistent, transparent and just legal framework by the Member States. As the ECT is a legally binding, multilateral international treaty, joining it can help a country build a consistent legal system for energy investment so as to improve its investment environment, in turn encouraging investors to invest in clean-energy projects with high political risks and long cycles, which can indirectly help achieve the goal of saving energy, reducing emissions and protecting the environment.[23]

and others, 'Climate Change Mitigation in Developing Countries' (October 2002) <http://www.c2es.org/docUploads/dev_mitigation.pdf> accessed 21 June 2015.

[20] Sussman (n 16).

[21] 'The Bali Action Plan' (Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007) <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3> accessed 21 June 2015.

[22] For its most significant outcomes see: Official Website of Stephen Harper, 'The 2006 G8 Summit' (17 July 2006) <http://www.pm.gc.ca/eng/news/2006/07/17/2006-g8-summit> accessed 21 June 2015.

[23] An overall analysis of environmental issues, including the demand for clean technologies in energy production, climate security is included in: A Steiner, 'Environmental Security' (G8 Summit 2006) <http://www.unep.org/pdf/environmental_security.pdf> accessed 21 June 2015.

Finally, a decrease in political risks in the field of energy investment helps investors to reduce unnecessary expenditures and expand the scale of their investments. For instance, reduced political risks may save an investor the cost of expensive overseas investment insurances, or cause a gradual drop in the prices of such insurances. All of these items help investors save money and make more profits, thus attracting more investors to invest in clean-energy projects.[24]

Of course, there has always been controversy over whether international investment treaties can truly promote the flow of international investment. Some scholars are sceptical of the effect of international investment treaties on attracting foreign investments.[25] However, according to a joint survey on international investment projects by *The Economist* and Columbia University, 67% of those surveyed said that the existence of an international investment treaty concerning a specific market plays a major or notable role in making an investment decision.[26] The energy industry being an important sector that concerning national security, political risks such treaties have an even greater impact, as shown by the recent years' cases of direct and indirect expropriation in the global energy sector. More importantly, the subsidies and incentives offered by the host country governments are often inseparable from the finances of many sustainable and clean energy projects, so the consistency of relevant laws in the host country has a significant importance on whether a project can be successfully delivered.

Therefore, the ECT's investment protection regulations have potential positive effects on promoting sustainable development. If more countries, especially developing countries, would join the ECT, these positive aspects might become more prominent.

5. Potential negative impacts of ECT investment regulations on sustainable development

Foreign investment and international investment agreements can promote sustainable development, but only when proper respect has been paid to the special conditions of developing countries. This is due to the inherently negative properties of international investments. For a long time, Western capitalist countries have pillaged natural resources through international investments and controlled the economies of investment recipient countries, thus wreaking havoc on the economic growth of these countries and leaving them in poverty.[27] The fact that economic and social growth of developing countries lags

[24] Regarding the impact of political risks on Foreign Direct Investment Flows, see eg: Kyeonghi Baek and Xingwan Qian, 'An Analysis on Political Risks and the Flow of Foreign Direct Investment in Developing and Industrialized Economies' (Buffalo State College, SUNY 2012) <http://faculty.buffalostate.edu/qianx/index_files/PoliRiskFDI_Baek&Qian.pdf> accessed 21 June 2015; as well as Multilateral Investment Guarantee Agency, '2012 World Investment and Political Risk' (World Bank Group 2013) <https://www.miga.org/documents/WIPR12.pdf> accessed 21 June 2015.

[25] Zhang Xiaobin, 'Do Bilateral Investment Agreements Really Attract Foreign Investment: An Empirical Study of the Effectiveness of BITs' [2006] Contemporary Finance & Economics 4, 102–06.

[26] World Investment Prospects to 2011, 'Foreign Direct Investment and the Challenge of Political Risk: The Economist and the Columbia Program on International Investment' (2011) <http://ccsi.columbia.edu/files/2014/01/WorldInvestment Prospectsto2011.pdf> accessed 21 June 2015, 96.

[27] Y Jinsong, *International Investment Law* (Law Press China 2003) 4.

behind developed countries, as well as the widening gap between the global north and south both obviously stand in the way of sustainable development.[28]

While the ECT can potentially promote sustainable development, in the recent cases of investor–host country dispute arbitrations under the ECT, the arbitrators had often been overprotective towards the investors' interests based on their particular understanding of the ECT's objectives, which damaged the interests of the host countries, and could potentially have a negative impact on sustainable development. The most typical of these cases is the interpretation of the ECT's Article 2 given by the arbitrary tribunal in *Plama Consortium Limited v Republic of Bulgaria* (hereinafter the Plama case). In this case, one of the key points of the dispute between the plaintiff and the defendant was the interpretation of Section 1, Article 17. The tribunal's interpretation of the particular section was based on analyzing Article 2, 'Purpose of the Treaty'. According to this analysis, the tribunal had generally equated the objectives and purposes of the ECT with establishing a high standard for investor protection, which includes the principles of fairness and justice, non-discrimination and predictability, going so far as to equate the 'long-term cooperation in the field of energy' mentioned in Article 2 with an investor's long-term plan.[29]

As already shown by our analysis, the ECT has multiple objectives and principles besides the protection of investors, including the promotion of sustainable development. Putting a one-sided emphasis on investor protection while downplaying the role of other types of energy cooperation by the Member States is very likely to undermine the economic and social development as well as environmental protection of the recipient countries, and influence sustainable development in a negative way.

[28] Beyond the economic and social differences regarding developed and developing countries, between some of them there are cultural differences respectively, as well as differences of common understanding of legal institutes, traditions etc. Considering this, a primary cooperation between countries with similar interests on the field of energy should be created in the first place. Some scholars argue, that due to discrepancies and potential conflicts of general view there is no guaranty that the ECT regime of investment protection and dispute settlement would be suitable in its current state for every one of these countries. See AFN Maniruzzaman, 'Towards Regional Energy Co-operation in the Asia-Pacific: Some Lessons from the Energy Charter Treaty' [2002] J World Investment 12, 1121.

[29] *Plama Consortium Limited v Republic of Bulgaria* basic information: The Claimant (Plama Consortium Limited, or PCL) indirectly owns an oil refinery that used to be owned by Bulgaria following its purchase of capital in a local joint-stock company, Nova Plama AD, which owns a local oil refinery. PCL believes: Bulgaria's 2002 environmental protection law exempts the responsibilities for environmental pollution of the state-owned companies which had been privatized before 1999, while failing in exempting PCL's responsibilities for its historical environmental pollution, thus such act violates ECT provisions. Under ECT art 17(1), each Contracting Party reserves the right to deny the advantages of Part III of the treaty to a company owned or controlled by nationals of a non-Party State, when the company does not have substantial business activities in the Contracting Party involved. However, PCL does not have substantial business activities on Cyprus, where it has been founded, and the actual controllers are not nationals of an ECT Contracting State. So after the proceeding of the arbitration began, Bulgaria submitted a statement saying it denies PCL's rights under the ECT. However, the arbitration tribunal believes: the State's denial has no ground, because according to the principles under ECT art 2, the purpose of the Treaty is 'establishing a legal framework in order to promote long-term cooperation in the energy field'. So if the State denies the investor's rights when the dispute arises instead of when an investment is being made, it will go against the investor's expectations and anticipations. In this case, the decision on jurisdiction made by the Tribunal was obviously in favour of protecting the investor's interests, therefore raising a lot of controversy. Some people believe this actually equates the 'long-term cooperation in the energy field' with the investor's long-term plan; some believe art 17(1) intends to empower the State to counter the investor in the process of settling the dispute; for a complete case overview see: *Plama Consortium Limited v Republic of Bulgaria* ARB/03/24 (ISCID Rev – Foreign Investment L J) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC520&caseId=C24> accessed 21 June 2015.

In fact, failure of environmental, human rights and sustainable development-oriented policies caused by overprotection of investors, as an undesirable consequence is not limited to the ECT investment regulations. Many international treaties that stress investor protection and liberalization of international investments have run into similar issues during their application, such as the NAFTA and high-standard American BITs.[30] If we take Chapter 11 of the NAFTA as an example, many cases caused are directly connected to the host countries' laws and regulations concerning social development and environmental protection, eg by the Ethyl Case,[31] the Methanex Case,[32] and the Metalclad Case.[33] Therefore, the combination of high-standard investor protection regulations and an investor–host country arbitration mechanism is strong enough to exert huge impacts on the policy concerning sustainable development in the host countries. [34] In this case, even USA, the country that has the strongest support for investment protection and liberalization, has started to reconsider and revise some provisions in the BIT to leave more room for host countries to develop their own policies.

Many researchers had also paid attention to the relationship between international investment protection and sustainable development.[35] They believed that investor protection and sustainable development are not in conflict with each other, and the key is to give developing countries more room to improve their policies facilitating sustainable development. The International Institute for Sustainable Development (IISD) has also dedicated effort to create fairer and more reasonable international investment agreements, which resulted in the 'IISD Model International Agreement on Investment for Sustainable Development'.[36]

Some question the rationality of the arbitration system itself, believing that investment disputes are different from commercial disputes, as the former involve public interests in environmental protection, social development and public health of a society. These arguments state that the international commercial arbitration systems are not in a position to address disputes of this kind, nor are they equipped with adequate experts in these

[30] The general trend of including high standard investment protection rules (fair and equitable treatment, non-discrimination and maximization of investor protection when it comes to dispute settlement etc.) in BITs is present not only in the case of USA, but also regarding BITs, which were concluded by the EU. This tendency has been realized mainly during the EU–US negotiations related to the Transatlantic Trade and Investment Partnership (TTIP). One of the aims of both sides in this matter is to strengthen the state's 'right to regulate' in case of justified public interest. The European Commission has expressed this viewpoint in many of its policy documents and also during the public consultation on TTIP. See: Commission (EC), 'Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements' (March 2014) <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152273.pdf> accessed 21 June 2015; Commission (EC), 'Consultation on investor protection in TTIP' (27 March 2014) <http://ec.europa.eu/unitedkingdom/press/frontpage/2014/14_28_en.htm> accessed 21 June 2015.

[31] M Sforza and M Vallianatos, 'NAFTA & Environmental Laws: Ethyl Corp. v. Government of Canada' (April 1997) <https://www.globalpolicy.org/component/content/article/212/45381.html> accessed 21 June 2015.

[32] K Dougherty, 'Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation' (2007) 27 Northwestern J Intl L & Business 735.

[33] S Ripinsky and K Williams, 'Metalclad Corporation v Mexico: Case Summary' (BIICL 2008) <http://biicl.org/files/3929_2000_metalclad_v_mexico.pdf> accessed 21 June 2015.

[34] Zhang Qinglin, *Current Legal Issues on International Investment Law* (Wuhan University Press 2007) 370.

[35] For example, see G Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues' (2014) Bocconi Legal Studies Research Paper No 2445366 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445366> accessed 27 July 2015.

[36] H Mann and others, 'IISD Model International Agreement on Investment for Sustainable Development' (April 2005) <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 21 June 2015.

issues. Furthermore, some advantages of traditional international commercial arbitration systems, such as secrecy, immediacy and finality, as well as arbitrators' full discretion, have proven to be defective in judging acts of sovereignty and national policies of a country, as they one-sidedly emphasize the protection of investors' interests while neglecting public interests being unfair and unreasonable.[37]

6. Improving ECT investment regulations for the promotion of sustainable development

Transparency

As we have previously mentioned, energy investment projects and sustainable development are closely related, since energy sources and facilities may have huge impacts on the environment. Moreover, the current mechanism of investor–host country dispute resolution may also exert great impacts on a country's environment, social development and human rights policies. It is, therefore, important for the host country government to have accurate information regarding its investor. For instance, in the aforementioned Plama case, the final entity gaining control over the investment has become a key factor. The transparency obligation as provided by the ECT's Article 20 is aimed solely at the host country's government, similarly to provisions within most BITs. Such provisions have created a great discrepancy of information disclosure obligations between investors and host countries. Recently, more and more calls have arisen for disclosure by investors of basic information related to investments. For instance, *Guidelines for Multinational Enterprises* revised by the OECD in 2000, stipulates: 'Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation and performance.'[38] While not legally binding, the Guidelines still stress the importance of the disclosure of basic information by investors. Considering the importance of the energy sector and the long cycles of energy investment, energy investors' obligations for disclosure can only be more important. Therefore, we believe the ECT should draw from the Guidelines, and mandate investors to disclose information.

On the other hand, it is also necessary to increase the transparency of the investor–host country dispute resolution mechanism. 'The Rio Declaration on Environment and Development'[39] has pointed out that addressing environmental issues needs public participation, and calls for countries to encourage and facilitate public participation through widespread disclosure of information. In practice, the current mechanism often poses great challenges to environmental protection and social development policies of host countries, yet its traditional commercial arbitration rules have made the process secretive,

[37] Liu Sun, 'Recent Challenges Brought by International Investment Arbitration Against the Sovereign of Countries' in Zhang Qinglin (ed), *International Economic Law in the Era of Globalization* (Wuhan University Press 2009) 358–77.

[38] Working Party on the OECD Guidelines for Multinational Enterprises, 'The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications' (2011) <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> accessed 21 June 2015.

[39] United Nations Environment Progamme, 'Rio Declaration on Environment and Development' (1992) <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> accessed 21 June 2015.

and prevented the public from accessing the information, not to mention participation. This obviously goes against the UN advocacy for greater public involvement in addressing environmental issues. Many developed countries have noticed this problem, for instance, the recent foreign investment agreements[40] signed by USA have required the arbitration system to: (i) give the public to access documents related to the arbitration; (ii) allow third parties to participate in the arbitration process; (iii) allow the public society to attend the hearings. The latest American investment agreements have also enabled arbitration tribunals to adopt suggestions and comments offered by *amicus curiae* and third parties.[41]

Differential treatment for developing countries

As a multilateral international treaty, the ECT has included little provisions on differential treatment for developing countries (except for the WTO-related components). On the contrary, one of the reasons of the WTO's tremendous success rests in its provisions on differential treatment for developing countries. Some researchers had suggested that provisions on differential treatment for developing countries should be added in the ECT if it intends to increase its importance, attract participation of more developing countries and achieve sustainable development in a real sense. The following are some of the suggestions that can be considered.

Responsibilities of the investors' countries of origin, and counterclaims by developing countries

According to provisions in the ECT and most BITs, only an investor has the right to sue the host country in front of an international arbitration tribunal, while the reverse is impossible. This regulation is based on the assumption that an investor is a weaker entity that may be treated unfairly if the dispute is settled locally in the host country, while the host country is stronger, and should be capable of protecting its own rights through its own institutions. This assumption is not necessarily correct if the host is a developing country. As we all know, international energy investments are usually undertaken by large transnational companies through their strong economic power and political clout, which makes them the more influential party when it comes to dealing with developing countries. They can not only avoid fulfilling their responsibilities through their decentralized branches and their global clout, but also take direct control of certain host country authorities using bribery and other unlawful means. Therefore, developed countries

[40] For general transparency requirements in IIAs, see UNCTAD, 'Transparency: UNCTAD Series on Issues in International Investment Agreements II' (New York, Geneva 2012) <http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf> accessed 21 June 2015.

[41] Sun (n 37). According to some scholars, the investors would be able to benefit from this increased level of transparency within in dispute settling arbitrations. See eg M Gillard and L Dargan, 'Transparency is the New Black in Investor-State Arbitration: UNCITRAL's New Transparency Rules' *Clayton Utz* (1 August 2013) <http://www.claytonutz.com/publications/edition/01_august_2013/20130801/transparency_is_the_new_black_in_investor-state_arbitration_uncitrals_new_transparency_rules.page> accessed 21 June 2015.

with better developed economies and more robust legal systems should bear more responsibilities in supervising investors. Moreover, host countries should be allowed to prosecute investors in their countries of origin for their acts of severe pollution and human right violation.[42] In this way, the rights and obligations of both investors and host countries can be better balanced.

Establishing a special expert team for resolving investor–host country disputes in which the respondent is a developing country

As already mentioned, investment disputes are currently handled through traditional international commercial arbitration systems. However, these are designed for resolving disputes between ordinary businessmen. The arbitrators in various commercial arbitration bodies have rich experience in dealing with common commercial disputes, yet lack the expertise for investment disputes or capabilities to give proper consideration for the conditions of developing countries. Moreover, the majority of these arbitrators come from developed countries, having generally worked in large Western law firms, which may create conflicts of interest when handling these cases. We believe the ECT can also learn from the WTO's experience in this area. Since general bilateral investment agreements involve only two countries, there is no need for more sophisticated dispute resolution procedures; but as a multilateral treaty, the ECT needs to balance the interests of various parties, and can benefit from a Dispute Settlement Body (DSB) system modelled after the WTO. The DSB can nominate members for a special expert team, who should be fair-minded professionals with expertise in investment disputes and sustainable development. If the arbitration respondent is a developing country, the arbitrators should be selected from this list; if the respondent is a developed country, there could be no such restriction.

Legal assistance for developing countries

Developing countries with poor economies need legal assistance in at least two forms. First, the high costs of arbitration and hiring competent attorneys are insignificant to developed countries and their investors, but can be a heavy burden on a developing country government. In international investment disputes, there have been cases where developing countries suffered great losses due to the incompetency of their lawyers. Secondly, the lack of experienced legal experts in developing countries may also impact the development of their legislations and policies on energy and sustainable development. Thus the ECT could consider setting up a legal assistance fund using contributions of its Member States, and use the fund to finance developing countries in hiring regular legal consultants who can provide legal assistance in disputes and policy development.[43]

[42] Chalker (n 11) 435–58.
[43] Chalker (n 11) 455.

7. Concluding remarks

The arguments presented in this article underline that investment protection and sustainable development policies are closely connected, and there is an inevitable need for their correlation to fulfil different environmental goals. The regime of the ECT contains several provisions, which concern with sustainability and address obligations regarding solution for ecological problems.

However, international investment protection contains various problems requiring a balanced approach of policymaking authorities, to host states to comply with them. They need to create well-structured combination of rights giving both parties the means to protect their interests: (i) An effective and transparent dispute settlement system against the 'harmful' behaviour of the host state, flexible enough to react on the variable ratio of strength or influence (see multinational company vs. developing state, small investor vs. developed state); (ii) Granting the host state a sufficient scope of rights to regulate in case of necessary public interest (overprotection of investors can lead to abuse of the host countries natural, human and other resources, not to mention the need to react on unforeseeable objective events, in case of which the state needs to apply adequate measures based on its territorial authority).

The previous analysis of ECT articles in comparison with other international legal documents, treaties, bilateral agreements, case-law etc., confirms that there is a call for further improvements in dispute settlement, investment information disclosure and transparency with special attentions to the special features of states as members of ECT.

One of the basic, yet most complex things to improve the flow of investments is 'motivation'. Motivation of the investors shall conclude risk minimization, ensurement of asset protection, guaranty of stable long-term conditions especially regarding the national legal frameworks and policies.[44] Motivation regarding the quality of the investments from a sustainability point of view shall emphasize technology transfer on a mutually beneficial basis for both the host state and the owner of the assets considering both profits and improving environmental aspects of the state's energy mix. Last but not least, motivation for the host state by enhancing economic development through a constant flow of foreign capital and increasing the state's competitiveness on the field of clean energy technologies. An effective solution on this field would ensure a further expansion of foreign investments complying with sustainability requirements both in developed and developing countries, without unnecessary exploitation and would ensure the improvement of economic and social indicators—ie not ignoring the third tip of the triangle: the people, who are often in the crosshair of excessive utilization, but on the other hand can also benefit from the investment protection system becoming more and more eco-friendly.

[44] The issue of national energy policies providing energy security and independence to a country is key regarding the necessary international investment motivation. These policies, however, should not contribute to the further fragmentation of the existing international energy frameworks, but should be based on and be in compliance with the principles and objectives previously laid down by global interest couplings. See Paolo Davide Farah and Piercarlo Rossi, 'National Energy Policies and Energy Security in the Context of Climate Change and Global Environmental Risks: A Theoretical Framework for Reconciling Domestic and International Law Through a Multiscalar and Multilevel Approach' (2011) 20 Eur Energy Environmental L Rev 232.

All this, however, requires an improved partnership between a broader variety of states and further analysis of regimes created by different international treaties and agreements to form a wide multilateral coupling capable of guaranteeing protection and motivation to all the investments moving sustainable development forward. The International Energy Treaty could mean the first step towards such a coupling, despite its political character. Nevertheless, only future development will show its feasibility and impact on the global scale.