

Investment Protection under the Energy Charter Treaty

Doctoral (PhD) Dissertation

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SZEGED 2019

I. Background of the Dissertation

1. Abstract

Investment, particularly cross-border investment, is an unavoidable aspect of many economic sectors. Many countries lack the necessary domestic capital to fund their own business ventures, and thus require outside sources to finance their private sector. However, these same countries (most of which are former Eastern Bloc countries and developing countries) can often be prone to instability, internal divisions and sudden changes of policy by the country's highest authorities. During the 20th century, many examples of countries nationalizing industries or expropriating specific businesses can be observed. Domestic regulations and limits on such activities do not always suffice. Domestic law, after all, can always be changed to suit the whims of the current leadership. Given that cross-border investment typically involves a very substantial amount of capital, foreign investment is a massive risk for investors.

Hence, a need developed to provide a more substantial form of protection, especially through international investment treaties. In the author's particular case, the investment treaty in question is the Energy Charter Treaty, a highly influential agreement concerning the energy sector. The Energy Charter Treaty emerged after the end of the Cold War in the 1990's and came into force on April 12, 1998. During that time, European states found that they had robust economies, but lacked energy resources, while Russia and other post-Soviet states had energy resources, but lacked investment to rebuild their economy. Developing nations had a desire to modernize their energy sector while energy resources were and are one of the few sources of reliable, direct, foreign currency for these countries. This created the need for a new, mutual energy- and capital-based relationship, and so an international framework regulating foreign energy investment in this field of economy was deemed necessary to achieve this.

There were some precedents to this treaty. These precedents include the European Energy Charter. Its signing finally happened on 17 December 1991 in The Hague which showed a remarkably rapid pace of negotiations. The Dutch Prime Minister Lubbers' call was only in 1990, and yet the Commission finished its proposal, the European Union called its conference, and already a resolution of sorts was reached in a year's time. However, it must be stressed that this was a non-binding agreement that contained a set of guidelines, protocols as well as signposts, for the negotiation of the future Energy Charter Treaty. Despite it having only 15 signatories and being a non-binding agreement consisting of mostly polity goals and general goodwill, the Charter foreshadowed the increased negotiations to develop a more comprehensive and universal energy charter. Seeking to ex-

pand the protections of the Energy Charter to countries outside of Europe, these signatories began negotiating for a broader agreement that would include more nations. Much of the provisions in the European Energy Charter are included in the Energy Charter Treaty. Based on the latter mentioned the European Energy Charter can be considered the immediate predecessor of the Energy Charter Treaty. Despite its lax and ultimately non-binding nature, lack of precise rules, and being mostly based on hazy expressions of interest in further cooperation for mutual prosperity, the European Energy Charter can still be considered an important milestone, a landmark for the development of co-operation in the field of energy and investment.

Formal negotiations for the Energy Charter Treaty began in 1992, as some negotiation al-ready took place by the time of the signing of the non-binding European Energy Charter. The negotiating process was hampered by numerous struggles and problems, such as different perspectives between Western and Eastern countries, as well as differing opinions and conflicts within the OECD membership itself. All of these conflicts significantly lengthened the negotiation period.

In general, the goal of the Energy Charter Treaty is to provide a comprehensive and holistic legal framework for the production, transport, and delivery of energy products. It is a synthesis of what bilateral energy treaties were trying to achieve in the first place, such as definitions of what an investor is, safeguard clauses, and the proper method of settling disputes. This synthesis allows it to achieve a uniquely important position when it comes to energy-related investments.

It is also necessary to address the International Energy Charter. This 2015 treaty belongs to the same ‘family’ as the Energy Charter Treaty. However, this was mainly a political declaration, and not a proper, extensive treaty like the Energy Charter Treaty. It is not considered legally binding, and mostly contains declarations of intent. As such, the author felt it unnecessary to focus on it, since the provisions with actual, observable and quantifiable real-world effects are the provisions of the Energy Charter Treaty.

The particular focus of this research is thus the Energy Charter Treaty and the related case law. In studying this, the author used a wide variety of methods and examined the theoretical and practical (such as case law) aspects of the treaty’s investment protection segments thoroughly. The objective being to uncover the treaty’s potential application to Iraq by measuring its comprehensiveness, advantageousness and efficacy.

2. Identification of research tasks

Based on the aforementioned goal of exploring the comprehensiveness, advantageousness and efficacy of the Energy Charter Treaty, the author sought to answer three specific research questions:

- Whether the Energy Charter Treaty guarantees the protection of foreign investments, and if so, to what extent?
- Whether the compensation paid under the Energy Charter Treaty is comparable to international practice?
- Whether the Energy Charter Treaty has a “regulatory chill” effect?

The author formulated these based on the following logic. The fundamental issue that the author needed to first establish is that what guarantees for foreign investments exist in the Energy Charter Treaty and what is the extent of these. Without answering this question, the author could not progress to further examination. After establishing the fundamentals, the author moved onto specifics, to be precise, compensation, which is likely the chief concern of any foreign investor. Besides the text of the treaty, the author also determined that it is necessary to analyze general international practice on compensation in investor-state disputes, in order to determine whether the Energy Charter Treaty’s theoretical framework and extant case law shows a durable system of compensation or not. Finally, the specter of the so-called “regulatory chill” needed to be addressed. In the past ten years or so, investment-related international agreements have been increasingly accused of causing this supposed effect, and so the author determined that this too should be discussed as the final research question of the thesis.

However, there was also need for establishing a more general, all-encompassing foundation for these research question. Thus, the author identified the necessity of examining the Energy Charter Treaty’s history, evolution, aims and membership, as well as its specific provisions (especially with regards to expropriation). Furthermore, the significant body of case law around the Energy Charter Treaty could also not be ignored. Not to mention the horizontal issues surrounding energy-exporting countries. Only following all this data was collected and processed, could the author turn to answering the questions. Finally, after the questions have been answered, it is necessary to study their applicability to Iraq.

3. Reasons for doing research work in the field / Aims of the research

The Energy Charter Treaty is undoubtedly a well-established treaty, a gold standard of the energy sector from the perspective of investment protection at the very least, so there needs to be some justification for its further research, as the literature surrounding it is quite well-established. This justification is based on a specific perspective, connected to the author's personal background.

In recent years, the author's home country of Iraq, and specifically the Kurdistan Region of Iraq, has been attempting to modernize its energy industry and fostering its participation in energy trade. Iraq occupies a prominent place as one of the most important oil exporters in the world, ranking 3rd in crude oil exports worldwide. However, it is also a country with a difficult political climate, fraught with tension, and as explained in the beginning of the dissertation, one that could significantly benefit from foreign investment in their energy sector and infrastructure. After the fall of the pre-2003 regime, Iraq stands at the crossroads, as internal conflict and disagreements hamper efforts to rebuild and modernize. Due to the political situation, Iraq is also strongly in the United States of America sphere of influence, and this has an undeniable effect on domestic politics and economic policies as well. The best way to accomplish its economic objectives is undoubtedly through foreign capital. However, most foreign investors can be difficult to attract, and require several guarantees before they are willing to invest in the target country, due to their cautiousness. Domestic guarantees are easily revoked, therefore the author believes that international agreements would be the most efficient way of accomplishing this.

Iraq, is not a contracting party of the Energy Charter Treaty. Therefore, the author believes it is important to examine the Energy Charter Treaty based on the above, to determine whether it would be beneficial for his country to adopt it, as part of the country's transition into being a more open economy, with closer ties to the world market, especially in energy. Another reason for this research is that the author's home region, the Kurdistan Region of Iraq, is heavily reliant on Turkey as a transit country for exporting their energy resources. The author wished to examine whether the adoption of the Energy Charter Treaty (of which Turkey is a signatory party), would help stabilize energy relations. The Kurdistan Region is also an autonomous region in Iraq, and an area which could also significantly benefit from accession to the Energy Charter Treaty. Foreign investment attracted to the region could fuel an economic boom, which would ensure a steady increase in the economic sustainability. Due to the nature of legal framework and political agreements in Iraq, the Kurdistan Region is permitted to establish its own investment law regime. It has done it in 2006, and it is an important factor from the perspective of foreign investors. However, as noted in *supra*,

domestic guarantees are usually insufficient for foreign investors before they are willing to take the risk of investing in a host country. Thus, given this domestic situation, becoming a part of the Energy Charter Treaty would further help with the stability of the country. Foreign investors look for stability when deciding where to make their investments, and through the Energy Charter Treaty, Iraq could reinforce the image of stability. Therefore, the Energy Charter Treaty would make Iraq more attractive to foreign investments, and thus help in the development of the country towards a more prosperous future. Regarding the issue of transit, the author decided to focus his work purely on the investment aspects of the treaty as detailed above, due to transit having its own expansive body of practice and theory, which would thus be beyond the scope of the thesis.

Furthermore, as for the location of the author's research, it can easily be connected to Hungary. Hungary is member of the Treaty and it might happen that Hungary will seek alternatives to Russian natural gas. In this case, the Kurdistan Region of Iraq could provide an ample source of natural gas. However, these pipelines would naturally have to cross Turkey, which raises another transit issue that could be potentially solved through the Energy Charter Treaty.

4. Methodology

Regarding methodology, the author focused on using qualitative research. That is instead of raw numbers and measures, the author's focus has been on examining and detailing the specific theoretical and practical aspects of his subject, in order to establish the necessary background for drawing conclusions about the above-mentioned central premise. To list a few examples of his used sub-methodologies, the author used the historical method, as he considered it important to examine the historical background of the Energy Charter Treaty. In particular, he looked at the precedents of the Energy Charter Treaty, their formation, how the Energy Charter Treaty itself came to being, how it evolved after coming into force and what issues it faced since then. This was something the author believed to be quintessential to his dissertation, that it was a necessity in order to understand the real goals behind the establishment of the Treaty and the challenges facing it from its inception to its present. Thus, the author would be able to demonstrate how it developed and evolved over time.

Secondly, the author used descriptive methods. In subjects such as investment, investor, foreign investment, expropriation, compensation and dispute settlement, it was necessary for the logical structure of the author's research to describe these subjects in precise details. Besides the Energy Charter Treaty, the author also looked at other relatable definitions and concepts as defined by other

sources. This provided an opportunity to demonstrate differences and similarities between how general international thought, other treaties and the Energy Charter Treaty defined these subjects. For the purposes of the research, the author did not consider it necessary to indulge in a true comparative analysis, but that the different interpretations as demonstrated should serve the reader well enough in understanding the fundamentals of the subject matter at hand. However, the emphasis was fixed on the Energy Charter Treaty's interpretation, as per the central premise of measuring its comprehensiveness, advantageousness and efficacy from the perspective of Iraq.

Furthermore, the author relied on the analytical method to determine and understand the critical problems and issues of the Energy Charter Treaty (in relation to investment protection, of course), and whether it would be beneficial for Iraq to adopt the Energy Charter Treaty and whether such a treaty benefits energy exporting countries or not. In relation to this, the author undertook the analysis of several energy exporting countries, from the perspective of the Energy Charter Treaty, including Iraq itself.

Moving on, the author also examined the case law surrounding the Energy Charter Treaty. This, both showed him the general practice, and allowed him to demonstrate the common issues and questions surrounding the investment protection aspect of the Energy Charter Treaty. In particular, the author examined all available case law related to Articles 10 and 13 of the Energy Charter Treaty, so the focus was on expropriation from the perspective of cases.

Based on this case law, the author engaged in a bit of a conceptual research about why foreign investors sue host countries under the Energy Charter Treaty.

On a lesser note, the author also used a some quantitative research, regarding the issue of compensation in international practice, where he examined various statistics in order to compare compensation sums under the Energy Charter Treaty with compensation sums under other treaties and general international investment practice.

5. Terminology

Before explaining the structure of the research, some explanation is required for the basic concepts dealt with in the dissertation, especially in relation to the research questions.

5.1 Expropriation and compensation

In general, expropriation has social, economic and political aspects. During the last century it was closely tied to the process of decolonization, but today it is more tied to regulatory power of the state. When colonial countries got their full independence, their first action was to expropriate the properties of the monopolistic foreign companies that were supported by the old colonialist regime.

This caused foreign investors to desire security for their investments. Foreign investors take major risks when investing in a country outside of their domicile. As mentioned above, one of the biggest risks these investors take is the possibility that the host state's government expropriates or nationalizes their assets, thus depriving them of their investment. National investment protection laws of the investment recipient country might offer some protection. However, the problem with these laws is that they can be changed unilaterally by the host state. Thus, international instruments provide better guarantee for investors. Such international instruments can be bilateral or multilateral treaties or the above mentioned international agreements between the investor and the host state. Therefore, foreign investors use these treaties to restrict the host state's ability to expropriate (and of course, the host state voluntarily gives up its sovereignty in the specific field).

Furthermore, distinction should be made between direct and indirect expropriation. Direct expropriation occurs when the government takes or interferes with the property of a foreign investor, for example in the transfer of title, seizure of assets, or expulsion from the state. Throughout history, this has typically occurred when countries decided to nationalize industries from the foreign investor, in favor of the government or a government-linked 3rd party.

Indirect expropriation is more subjective as it can occur when measures taken by the host state lead to the foreign investor's property to lose significantly in value, or even deprivation of full management, use, or control of their own assets. In the OECD's Working Paper on Indirect Expropriation and the Right to Regulate in International Investment Law, three criteria were formulated to determine indirect expropriation: 1. the degree of interference with the property right, 2. the character of governmental measures, *i.e.* the purpose and the context of the governmental measure, and 3. the interference of the measure with reasonable and investment-backed expectations. The degree of interference with the property right is the starting point to assess the impact of a government action, and determine whether it meets the threshold of indirect expropriation. This requires the claimant to show that although they still have the legal title to their property, the rights to use their property have to be eroded as a result of the interference by the government.

Expropriation is legitimate, but only if it is in the public's interest, non-discriminatory, follows due process, and includes the payment of prompt, adequate, and effective compensation. Any expropriation, direct or indirect, that does not meet these requirements would constitute illegal expropriation under the Energy Charter Treaty, as well as customary international law. This is shown in the case of *Santa Elena*, where the ICSID Tribunal held that: “Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”¹

This means that a government's actions, no matter how noble or beneficial to the public, will still require the government to pay compensation if any kind of indirect expropriation occurs as a result of the action. On the other hand, in the case of *Methanex*, the Tribunal decided that: “... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alias*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”²

In general, there are three criteria that must be met for an expropriation to be lawful. First of all, public purpose. The requirement of the government measure being in the public's interest is defined differently by different treaties and tribunals. In the Canada-Colombia FTA (2008), it is stated in the footnote: “The term ‘public purpose’ is a concept of public international law and shall be interpreted in accordance with international law. Domestic law may express this or similar concepts using different terms, such as ‘social interest’, ‘public necessity’ or ‘public use’.”³

Indeed, the definition of public interest, or public purpose, is a broad one but there are some specific guidelines. The government's actions must be in the public interest at the time when the expropriatory measure was taken. If the goal of the measure is not achieved, it can still be considered part of the public interest.

¹ <<https://www.italaw.com/cases/3413>> accessed 27 December 2018

² <<https://www.italaw.com/cases/683>> accessed 27 December 2018

³ <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng>> accessed 27 December 2018

However, if the expropriation took place, and the public interest purpose did not start until a later date, then it cannot be considered to have originally been for the public's interest, as seen in *Siag and Vecchi v Egypt*. In that case, expropriation occurred by the government due to delays in construction of a project. Six years later, the property was transferred to another company for the purpose of building an oil pipeline. The public purpose requirement was not met as the measure was not originally for a public purpose, but only at a later date became for a public purpose.

The second requirement for lawful expropriation of property under international law is that it must be non-discriminatory. The expropriation is discriminatory if it is based on, linked to, or taken for reasons of the investor's nationality. Measures affecting only a portion of foreign nationals are not always considered discriminatory. There must be different treatment to different parties under the same measure. This can be seen in the case of *Eureko v. Poland*, where the Tribunal held that: "... the measures taken by [Poland] in refusing to conduct the IPO [purchase of additional shares] are clearly discriminatory. As the Tribunal noted earlier, these measures have been proclaimed by successive Ministers of the state Treasury as being pursued in order to keep PZU [the privatized state-owned insurance company] under majority Polish control and to exclude foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is blunt violation of the expectations of the Parties in concluding the SPA [Share Purchase Agreement] and the First Addendum. "⁴

Therefore, it can be concluded that non-discriminatory treatment requires that the government does not have a specific intention to expropriate from a certain nationality of foreign investors.

The third requirement for lawful expropriation under international law is that it must be done under the due process of law. The due process principle means that (a) the expropriation complies with the procedures of the domestic law and internationally recognized rules, and (b) that the investor affected has an opportunity to have his case reviewed before an independent and impartial body. The expropriation must be free from arbitrariness.

Common examples of breach of due process would be if the expropriation has no legal (whether in law or procedure) basis to be ordered, or if the investor cannot rely on domestic courts or tribunals to hear its case impartially. The case of *ADC v. Hungary* gives a more comprehensive overview: "... 'due process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about

⁴ <<https://www.italaw.com/cases/documents/413>> accessed 27 December 2018

to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that ‘the actions are taken under due process of law’ rings hollow.”⁵

The last requirement to lawfully expropriate (besides the previous three) is that there must be payment of “prompt, adequate, and effective” compensation. This is the so-called Hull standard. The Hull standard was originally formulated to provide a more satisfactory and agreeable compensation for the investor, whereas the appropriate compensation formula favors the state, as other factors and considerations may be taken into account to lower the amount of compensation. Specific considerations are rephrased as “just” or “appropriate” when the context is uncertain, such as the time frame of payment, the type of currency, and the transferability of the payment.

5.2 Regulatory Chill

The literature on regulatory chill is not consistent, and many researchers have developed particular notions of it, which are highly dependent on the field in which a researcher applies the concept. To put it in other words, environmentalists have developed and applied the concept of regulatory chill in terms of environmental studies, which is different from the policy related or investment related notions developed by political or legal scientists and researchers alike. In spite of this, it is possible to determine specific common and core elements that are common across the fields and use that to create a definition.

In international investment law and public policy space, the concept of regulatory chill is believed to cause a negative effect on sustainable development. And hence it is understood to be restraining a nation or state from enacting some particular public policy measure or regulatory measure because of arbitration, or fear of arbitration, under the investor-state dispute settlement (ISDS) terms or provisions, therefore constraining the state in terms of its rights to regulate.

⁵ <<https://www.italaw.com/cases/41>> accessed 27 December 2018

To understand regulatory chill, it is crucial to examine the essential ingredient, that is to say, the right of a state to regulate, especially, the right to regulate in relation to sustainable development. It has to be understood that all sovereign states have the right to regulate on their territory, and it is confirmed by international instruments like the Charter of the United Nations, where this is specifically recognized by Article 2(7) and 2(1). Examining sustainable development, it can be described as a normative principle, stating that it is an obligation of the state to manage the economic, natural, and social resources with the view that the same resources should be available to the present generation and future generations.

Returning to the concept of regulatory chill, its common elements have been outlined by Shekhar⁶: alteration in the application of domestic laws and regulation; a new kind of standard; *bona fide* nature of the laws or regulation (laws and regulations emphasize good faith); and fear or threat of arbitration. It must also be noted that the emergence of regulatory chill in policy can never be uniform. It is important to note that the response of policy makers, who have acted in public interest, which might be against the interests of a particular group of investors, against certain developments in the investment arena can cause the below stipulated types of regulatory chill:

Precedential chill: occurs when the policy makers respond to a finalized arbitration when considering future measures of public policy.

Response chill: affecting a particular regulation after the policy makers have become aware of risks related to state-investor dispute settlement.

Anticipatory chill: risk assessment that considers whether a future policy would result in state-investor disputes.

6. Structure of the research

In total, the author separated his dissertation into seven different chapters. In the first chapter, the author discussed the aim of the thesis, which also served the role of a traditional introduction to the work. Afterwards, the author went over the basics of the Energy Charter Treaty. In particular, he examined the history, evolution and aims of the Energy Charter Treaty, with focus on precedents

⁶ Kates Robert W, Thomas M Parris and Anthony a Leiserowitz, 'What is sustainable development?' (2005) *Environment* 47, no. 3 8.

(such as the European Energy Charter), the formation of the Energy Charter Treaty itself, and further developments. The author emphasized that the aim of the Energy Charter Treaty was fundamentally to satisfy mutual needs between parties (energy for importing countries, capital for exporting countries) and out of a general desire to create a new meaningful economic relationship between the West and the former Eastern Bloc, though the scope expanded significantly to include other developing countries as well. Some of the contracting parties to the treaty were detailed by the author next, with particular focus on Russia, who had several issues with the Energy Charter Treaty, especially in relation to transit. Finally, the author also addressed the structure of the Energy Charter Treaty in the first chapter.

In the second chapter, the author focused on presenting and examining dispute settlement mechanisms under the Energy Charter Treaty. First, he undertook a short comparative analysis of what makes investor-state dispute settlement (that appears in the Energy Charter Treaty) different from the regular and typical international commercial arbitration regime. Afterwards, he went onto details regarding what the Energy Charter Treaty says about such investor-state disputes, before concluding it with a short section on dispute settlement between the contracting parties themselves.

In the third chapter, the author addressed some horizontal issues and examined the Energy Charter Treaty from the perspective of energy exporting countries. He separated the group into contracting parties and non-contracting parties, with eight countries being examined in total. The author also attempted to conceptualize reasons and explain why these countries joined or did not join the Energy Charter Treaty, and whether the ECT has been beneficial to them or not.

In the fourth chapter, the author addressed the promotion, protection and treatment of investments and the issues of expropriation and compensation. In particular, the author examined the concept of investment and investor, and their definitions under the Energy Charter Treaty. Secondly, he went over expropriation, with focus given to the conditions of lawful expropriation under international law and the definitions given in the Energy Charter Treaty. The author then examined the standard of compensation for expropriation in investment treaties in a descriptive manner, with the focus being once more on the Energy Charter Treaty. Finally, in the second half of the chapter, the author examined in-depth the case law related to Articles 10 and 13 of the Energy Charter Treaty, and thus the case law relevant to the issue of expropriation.

In the fifth chapter, after laying the groundwork in the previous four chapters, the author sought to answer the three research questions. Whether the Energy Charter Treaty sufficiently guarantees the

protection of foreign in-vestments, and if so, to what extent? Whether the compensation paid under the Energy Charter Treaty is comparable to international practice? Whether the Energy Charter Treaty has a “regulatory chill” effect? In the first case, the author examined the situation before the Energy Charter Treaty briefly, before approaching relevant articles from a different direction than in the previous chapter, and analyzed the existing arbitral practice. In the second, the author separated his work into two segments: first, he examined compensation from a theoretical perspective, then sought to compare raw data between general international practice and the Energy Charter Treaty, with regards to success rate of claiming compensation and how much compensation is typically claimed, and rewarded by arbitration. And for the third question, the author examined regulatory chill and treaty law, the right to regulate, or the interplay between public policy issues and investor protection, and the overall recipe for regulatory chill.

In the sixth chapter, the author addressed Iraq’s position in the energy sector from an investment protection perspective, with specific focus on the Kurdistan Region of Iraq and its domestic law on investment.

Finally, in the seventh chapter, the author summarized his answers to the three research questions and addressed the central premise, that is: whether the Energy Charter Treaty would be a beneficial arrangement for Iraq and the Kurdistan Region of Iraq in particular.

II. New Scientific Results

This section will be broken up into four parts: the answers to each specific research question, and the general results and conclusions of the thesis.

1. Whether the Energy Charter Treaty guarantees the protection of foreign investments, and if so, to what extent?

After the author's examination of the question, he concluded that the Energy Charter Treaty plays an important role in the settlement of disputes in the energy sector. The disputes that arise in the energy sector will likely thus remain a subject of international arbitration for a long period. The demand for energy has been increasing globally, due to which foreign investment has become much more crucial to the development and the exploration of the states in possession of abundant energy resources. In this regard, the Energy Charter Treaty may provide a stable framework that also offers compulsory protection for the investors of other countries.

The Energy Charter Treaty has the ability to provide significant capital and advantages to the countries that have interests in the trade of energy products. It can also be said that the presence of the Energy Charter Treaty may have the ability to provide security to the investor of other countries. The Energy Charter Treaty can also provide resolutions for disputes between contracting parties, or disputes concerning foreign investors of contracting parties. The treatment standards of the Energy Charter Treaty have much resemblance to the practice established by the World Trade Organization, which provides a strong basis for this Treaty. The Energy Charter Treaty also provides protection to investors. This protection closely resembles the protection provided by Bilateral Investment Treaties. This is evidenced by the use of the Hull standard for compensation, or by the dispute resolution process in Article 26.

Furthermore, the theoretical protection provided by the Energy Charter Treaty is reinforced by the actual arbitral practice. Based on the findings of the author, the arbitral tribunals interpreting the Energy Charter Treaty tend towards a balanced approach, leveraging the correct extent of protection, especially in relation to questions of expropriation.

Therefore, the author can conclude that the Energy Charter Treaty definitely provides protection to foreign investments both in theory and actual practice. The real extent of this protection seems subject to change, as the theoretical extent can be considered average, no lesser or greater than the ex-

tent provided by other similar international treaties, while the arbitral practice shows different levels of strictness, based on what is appropriate in the given case.

2. Whether the compensation paid under the Energy Charter Treaty is comparable to international practice?

The answer is twofold, depending on the perspective. When it comes to the theoretical framework, the author observes that the Energy Charter Treaty does not follow the lead of international customary law, and lacks its more nuanced approach to compensation. Of course, it cannot be said that the tribunals would not consider such elements when arbitrating and interpreting the Energy Charter Treaty, but it is still not explicitly present. The concept of direct and indirect expropriation, the differentiation between compensation for lawful and wrongful expropriation, etc. are all missing from the Energy Charter Treaty. However, in this regard, it is quite similar to BITs (despite their synchrony with general international practice), which are today the most common source of investment arbitration, and can be considered ‘trendsetters’ in investment protection. By this logic, the Energy Charter Treaty is not much different from other investment-related international treaties, at least in connection with how compensation is formulated by its provisions.

The practical analysis of the data supports this position. Neither the ‘win rate’ of foreign investors, nor the claimed and awarded compensation deviates significantly from the current norms of investment arbitration practice. Obviously, as mentioned before, there are some outliers that are disproportionate and distort some numbers, but they cannot be considered the decisive factor. *Yukos* (the most important outlier), despite the importance of the cases attached to it, is still just a fringe case. Therefore, the Energy Charter Treaty is extremely similar to standard international practice in both theory and actual application. It can be considered a typical example of modern investment protection when it comes to compensation. It follows the same trends and norms that the other treaties do.

3. Whether the Energy Charter Treaty has a “regulatory chill” effect?

Based on the author’s findings, the primary goal of Energy Charter Treaty is geared towards ensuring that investments in energy are protected using international standards. The result of this is that the Energy Charter Treaty can have a huge impact on regulations touching on the environment and policies in many EU states including Germany, Italy, and Spain. This is true for those regulations

which have a negative impact on the foreign investors, and they can be put under litigation in the international tribunals and challenged on the grounds of 'fair and equitable treatment', or an investor can seek compensation for indirect expropriation. This causes a permanent tension between public welfare interest and investor rights under the Energy Charter Treaty. In principle, the arbitral tribunal can consider public welfare in its determination, but the investor-state arbitration is focused mainly on the interests of the investor, and hence the investor-state dispute is used as a tool for shielding the investors from political risks.

In that regard, the rights given to foreign investors in many countries are higher and more demanding. In fact, in countries like Germany, Spain, and Italy, it has been argued that rights under the Energy Charter Treaty surpass the protection of the national law like in the case of German Basic Law, which stipulates a balance of public interest and the state's role as a guarantor that these rights are well-balanced.

If an investor starts an action and the arbitral tribunal decides that the investor protection rights and standards under Energy Charter Treaty have been infringed, a particular state can be required to pay a hefty amount in terms of compensation. These mere threats of a claim of arbitration cause states to roll back on its intended promulgation of environmental standards, regulatory measures to protect the ecosystem and the environment. This kind of effect, a pre-emptive action, acts as a benefit to the foreign investors but to the detriment of the common good (chilling effect).

The author has shown that even if a state has two competing obligations, one under the EU law and one under the Energy Charter Treaty, the Energy Charter Treaty obligations would primarily take the leading position, as in the case of Germany. The selective application is also another manifestation of regulatory chill under the Energy Charter Treaty, as states are more likely to apply legislations in a selective manner favoring the foreign energy investors at the expense of its national law, to avoid arbitral proceedings and the payment of hefty compensation.

. Even though jurisprudence is developing, and some nations have favored applying their legislations selectively, the future of Energy Charter Treaty holds a high chance of regulatory chill given the conflict between the Energy Charter Treaty itself, the environmental conservation policy and laws in the EU.

However, regulatory chill is not easy to prove, and requires a significant length of time before its effects can be measured. In any case, it is the task of decision-makers to ensure that the public interest is protected from international corporate and other business interests, which requires a clear

commitment to pursuing public interest over economic gains and reject the chilling effect caused by the factors discussed in this part of the thesis.

4. General findings

Deciding whether the ECT was an advantage for energy exporting countries is a difficult task. As shown by the theoretical framework, the case law, and the practical considerations from the perspective of energy exporters, the Energy Charter Treaty's effects are difficult to gauge and are extremely multi-faceted. Therefore, in the author's opinion, the sensible solution would be for each energy exporting country considering becoming a contracting party in the Energy Charter Treaty, to weigh the specific advantages and dis-advantages of the Treaty before committing to it or abstaining. The given country might have a dire need of foreign investment, or it might have enough domestic capital or possesses other attractive factors to draw in investors. Transit might have already been solved, or it might be an urgent question. The question of whether the country is confident in its ability to enforce its sovereignty over its natural resources arises. These issues must be individually considered before the country makes its decision.

In the author's opinion, the Energy Charter Treaty cannot be simply classified as either a truly beneficial treaty, nor can it be dismissed as something chiefly concerned with serving the interests of energy importing developed countries. Instead, the author urges all readers to see the Energy Charter Treaty with all its nuances, with both the potential benefits and hindrances it can bring to an energy exporting country. It is impossible to draw a general conclusion about the overall effects of the Treaty; therefore, specific conclusions must be drawn on a country-by-country basis.

As outlined in the previous section, it was one of the primary issues during the author's research to find out what can be concluded in connection with Iraq, and the Kurdistan Region of Iraq in specific. As mentioned in the dissertation, Iraq, after its opening to the world economy, has significant energy resources, but is reliant on procuring foreign investment to develop proper exporting capabilities. As it has been reiterated multiple times, the most important factor for foreign investors is stability and legal guarantees that are actually enforced. When it comes to domestic law, as previously mentioned, Iraq's law is still far too inadequate to assuage the concerns of the investors. Furthermore, neither Iraqi law nor the Kurdistan Region's Law on Investment provides much when it comes to expropriation. And as we can see from the dissertation, expropriation is an overpowering concern for foreign investors.

Another issue that arises in relation to the Kurdistan Region, is transit, as mentioned in the introduction. Pipelines coming from the Kurdistan Region must necessarily go through Turkey, and thus exporters are reliant on Turkey's goodwill, in lieu of proper treaties.

Thus, the adoption of the Energy Charter Treaty would be highly beneficial for Iraq for multiple reasons. First of all, it would create a strong legal guarantee for foreign investors seeking to invest in the area. In lieu of proper domestic law, the various articles that were discussed in Chapter 4 and Chapter 5 could provide the necessary legal framework that foreign investors would feel comfortable with. And to be specific, the Energy Charter Treaty explicitly deals with the issue of expropriation, and thus its adoption would patch up a significant legal abscess in Iraqi law, and in a manner that is not only satisfactory, but also attractive to foreign investors (as mentioned in the thesis before, foreign investors typically consider international treaties more potent and secure than domestic laws, especially when it comes to developing countries).

And when it comes to the Kurdistan Region, the adoption of the Energy Charter Treaty would not only alleviate the inadequacies of the region's Law on Investment (that is discussed in Chapter 6), especially in regards to expropriation, it would also solve the issue of transit. As discussed at great length in Chapter 5, the Energy Charter Treaty provides provisions for transit disputes and issues. If Iraq, and by extension, the Kurdistan Region, becomes a contracting party of the Energy Charter Treaty, it would be able to use these transit provisions to protect itself against any potential problems caused by Turkey (which, as mentioned in the introduction, is a contracting party of the Energy Charter Treaty). Not only Turkey would be forced to respect the various principles of transit that are discussed in Chapter 5, it would also provide the Kurdistan Region with access to an effective and secure method of transit dispute resolution that Turkey would have to acquiesce to as a contracting party of the Energy Charter Treaty.

Thus, it can be stated without uncertainty that for Iraq, and the Kurdistan Region in specific, the Energy Charter Treaty would be a significant boon. It would not only boost the progress of economic development through attracting foreign investors, it would also lead to a more cohesive and secure relationship with nearby transit countries (Turkey, to be specific) that are contracting parties of the Energy Charter Treaty.

To conclude this section, the author believes that further integration in the field of energy law is imminent and inevitable. As the global economic relations strengthen, more and more integration and cooperation will be required to feed the ever-growing energy demands of the globe. The Energy

Charter Treaty can be considered an early forerunner of these intentions, and the legacy of which will be continued by such documents and events as the Road Map for the Modernization of the Energy Charter Process or the International Energy Charter. These remain reliant on the Energy Charter Treaty, and cannot be considered its true successors, but they represent the future that is to come. Further research on the subject should prove bountiful in a decade or so, as the speed of the integration greatly fluctuates.

III. The list of the candidate's publications written in the topic of the dissertation

- The promotion, protection, treatment and expropriation of investments under the Energy Charter Treaty – a critical analysis of the case-law, in Investment arbitration and national interest, *Council on International Law and Politics*, Csongor István Nagy ed, Chicago, 2018,(PP. 101-116).
- Fundamental issue of early oil concession contracts in Iraq. *University of Szeged journal; faculty of law and political science*, 2015, (PP196-203).

- Fundamental issue of early oil concession contracts in Iraq until 1950.

International Journal of Humanities and Management Sciences (IJHMS) Volume 3, Issue 2 (2015) ISSN 2320–4044 (Online), Abu Dhabi, 2015, (PP. 81-83).

Available at <http://www.isaet.org/images/extraimages/P315048.pdf>

- Development of oil contracts: joint venture contracts after experience of concession contracts. *International conference of PhD students in law 7 edition, faculty of law west university of Timisoara, Timisoara, 2015, (PP. 223-229).*

- Fundamental issue of early oil concession contracts in Iraq after 1950.

X. KHEOPS Nemzetközi Tudományos Konferencián, KHEOPS Automobil-Kutató Intéze, Mór, (PP. 205-211).

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