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International Energy Investment Disputes Settlement Involving Asian States

Zhengyi Zhang[1,*], Qiwei Wu[2]

[1] *Zhengyi Zhang, Advocate Professor of International Law, Deputy Director of International Affairs Office, Shanghai University of Political Science and Law; Secretary General, "One belt, One road" Research Association of Shanghai Law Society; Doctor of International Law, East China University of Political Science and Law.*
[2] *Qiwei Wu, Master of International Law, Shanghai University of Political Science and Law.*
[*] *zhangzhengyi@shupl.edu.cn*

ABSTRACT

This article aims to describe a comprehensive map of the legal framework for investor-state relations in the international energy industry, since it has been re-established by the tremendous growth of international investment law in recent years. It would then proceed to provide assessment of the emergence of international energy investment disputes involving Asian states, whether international investment law had developed only limited tools for the protection of investors in energy sector. However, recent arbitral awards have shown an increasing awareness of the need to protect investors as well as states. Arbitrators have not only considered investment related values in the context of international energy investment disputes, but also balanced the different values at stake. This article asks whether in this legal setting the extensive protections in international energy law are able to keep stability for Asian states by means of case studies of disputes between investors and contracting parties of Energy Charter. This article seeks to provide a possible look forward and a concluding assessment, albeit provisional one. It addresses new challenges that are emerging in investor-state relations in areas of Asia. Finally, the concluding assessment to this study consider whether the various steps taken have in fact lead to an improvement of international energy investment disputes settlement among Asian states.

Keywords: *Asian States, Settlement of Investment Disputes, Energy Charter, Energy Investment.*

1. INTRODUCTION

With the development of the international investment legal system, the number of international energy investment disputes has gradually increased, and Asian countries have begun to gradually participate in it. The number of Asian countries covered by the investment dispute settlement mechanism under the energy charter treaty has reached one-fifth. Recent arbitral awards demonstrate a balance between investor protection and the interests of the host state. Through the case study, the focus of investment disputes between the host state and investors gradually emerges, which will also provide reference for Asian countries to participate in the settlement of energy investment disputes in the future, especially the arbitration. Both as host states and home states of investment, Asian states should be fully prepared to deal with the challenges that may arise from international disputes over energy investment.

2. ENERGY INVESTMENT DISUPTES AND THEIR RESOLUTION BODIES

As one of the most rapidly developing fields of international direct investment, energy investment has attracted the close attention of legal professionals worldwide and produced a large number of practical cases in recent years. The settlement mechanism of energy investment disputes emerges as the last line of defense for international investment.

2.1 Overview of Energy Investment Disputes

In spite of the declining total international direct investment, the energy industry represented by oil, electricity, natural gas, water resources as well as other energies still firmly ranked top among major investment industries in greenfield investment and cross-border M&As. [1]Energy investment is directly associated with over 30% of international investment disputes, which highlights the key role of energy infrastructure investment in international direct investment. As one main field of overseas investment, energy investment is

prone to disputes and also accompanied by business, political and other risks.

In this article, energy international investment disputes refer primarily to the disputes between states and investors taking companies as the main body and mainly involving the settlement mechanism of international investment disputes. From the perspective of the parties involved in the case, the main bodies of international energy investment disputes are energy investment companies as advanced states' nationals and developing host state. The latter are mostly developing states which are rich in energy resources, but unable to independently engage in developing energy and raw material resources under capital and technical pressure.

2.2 Energy Charter Conference and Investment Dispute Resolution

The Energy Charter rooted in a political initiative which was launched in Europe at the beginning of the 1990s when a golden opportunity to get over previous economic disputes was provided by the end of the Cold War. Mutually-beneficial cooperation in the energy field had more bright prospects than any other field. In addition, people found it necessary to establish a generally accepted foundation for the development of energy cooperation among Eurasian states.

Nowadays, net importers and energy exporters become increasingly interdependent. It is universally accepted that multilateral rules are able to provide international cooperation with a more balanced and effective framework compared with non-legislative instruments or bilateral agreements alone. As a result, the Energy Charter Treaty (hereinafter referred as "ECT") is of importance to establish a legal basis for energy security as part of international efforts according to the principles of sustainable development and market openness and competitiveness. The principal aim is clearly to establish a level playing field throughout the ECT contracting parties and to limited as much as possible the non-commercial risks that may affect an energy investment.[2]

Through the creation of a fair competitive environment of rules to be followed by all participating governments, the ECT fundamentally aims to strengthen the legal construction of energy issues, which thus mitigates energy-related investment and trade risks. In May 2015, the political declaration of the International Energy Charter was adopted in the Hague.[3]

A balanced method is adopted by the Energy Charter Treaty to take control over states and enable investors to acquire resources. For one thing, states have sovereignty over energy resources in accordance with the treaty: Member states are entitled to decide the degree of developing their sovereign energy resources and accepting foreign energy investment. For another thing, national rules governing resource exploitation, development and access are required to have openness, fairness and transparency.

Statistics showed 135 investment disputes under the current Energy Charter Treaties, of which 45 had been publicly adjudicated. [4]The Stockholm Chamber of Commerce (hereinafter referred as "SCC"), the International Centre for the Settlement of Investment Disputes (hereinafter referred as "ICSID"), and the United Nations Commission on International Trade Law (hereinafter referred as "UNCITRAL") are dispute settlement bodies under the mechanism for the arbitration between states and investors. Energy investment arbitration had been instrumental in increasing the types of foreign corporate investors protected by International Investment Law.[5]

3. OVERVIEW OF ENERGY INVESTMENT DISPUTES IN AISAN STATES

Asian states are gradually increasing their participation in international energy investment despite their significantly higher frequency as claimants than claimants in investment disputes under the Energy Charter.

3.1 Asian States and Energy Investment Disputes

The Energy Charter originated in Europe. However, Asian states[6] gradually got involved in international energy investment with the expansion of overseas investment. At present, the Energy Charter contains 55 members, including 15 Asian states which take up 27%. 12 out of 41 observer states were from Asia, accounting for 29 percent.[7]

According to statistics, Asian states were involved in a total of 27 energy investment disputes, among which 24 cases were raised while Asian states serve as respondents and 11 cases were applied by Asian states as claimants. Turkey and Kazakhstan were the first two states to be accused and Turkey and Japan were the first two states to claim allegation.

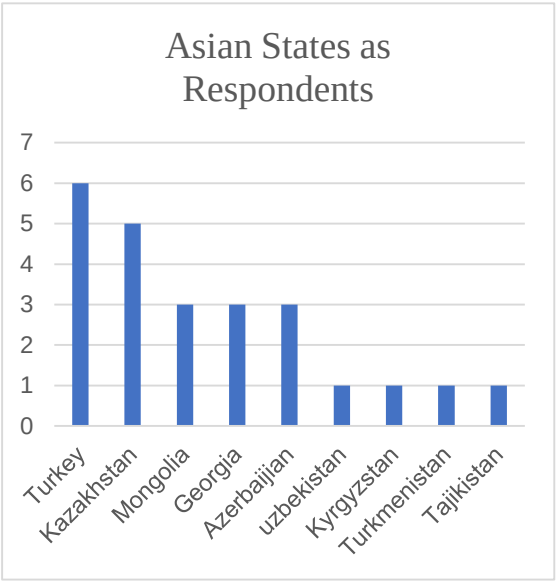

Figure 1 Asian States as Respondents

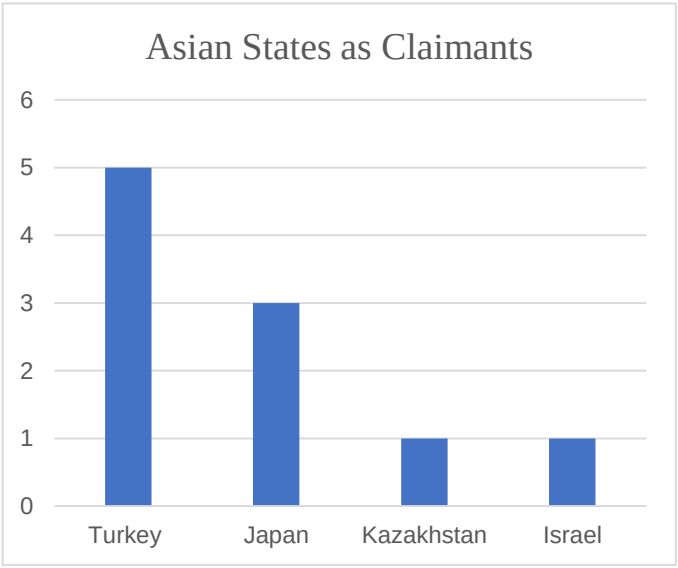

Figure 2 Asian States as Claimants

3.2 Cases involving the adjudication of Asian states

It will take some time for the arbitral tribunal to settle energy-related investment disputes. To better statistically analyse the legal issues on energy investment disputes in Asian states, the author has sorted out the basic cases decided by the settlement mechanism of investment disputes under the Energy Charter, namely 12 cases.

Table 1 Cases Involving Asian States as Respondent

No.	Claimant	Respondent	Subject Matter	Case Registered	Forum& Reference
1	Petrobart Ltd.(Gibraltar)	Kyrgyzstan	Gas delivery contract	2003	SCC-Case No.126/2003
2	Ioannis Kardassopoulos (Greece)	Georgia	Oil and gas distribution enterprise	2005	ICSID Case No. ARB/05/18

3	Libananco Holdings Co. Limited (Cyprus)	Turkey	Electricity generation and distribution concessions (expropriation)	2006	ICSID Case No. ARB/06/8
4	Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands)	Azerbaijan	Oil and gas distribution, trade, storage and transportation enterprises	2006	ICSID Case No. ARB/06/15
5	Cementownia "Nowa Huta" S.A. (Poland)	Turkey	Electricity concessions	2006	ICSID Case No. ARB(AF)/06/2
6	Europe Cement Investment and Trade S.A. (Poland)	Turkey	Electricity concession	2007	ICSID Case No. ARB(AF)/07/2
7	Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands)	Kazakhstan	Exploration and extraction of hydrocarbons	2007	ICSID Case No. ARB/07/14
8	Mohammad Ammar Al-Bahloul (Austria)	Tajikistan	Hydrocarbon exploration licences	2007	SCC - Case No. V (064/2008)
9	Alapli Elektrik B.V. (the Netherlands)	Turkey	Electricity concession	2008	ICSID Case No. ARB/08/13
10	AES Corporation and Tau Power B.V. (the Netherlands)	Kazakhstan	Power facilities and trading companies	2010	ICSID Case No. ARB/10/16
11	Cem Uzan（Turkey）	Turkey	Electricity generation and distribution concessions	2014	SCC V 2014/023
12	Mohammed Munshi（UK, Australia）	Mongolia	Mining project	2018	SCC EA 2018/007

4. FOCUS ANALYSIS OF ENERGY INVESTMENT DISPUTES

Three common options of solving energy investment disputes are composed of ICSID or its additional facility rules, an arbitrator or an ad hoc arbitral tribunal under the UNCITRAL rule as well as an application of an SCC arbitrator for arbitration. Investors could settle disputes through courts or administrative dispute settlement procedures of the host state. A dispute can be friendly settled in three months from the date of its beginning. If the dispute cannot be resolved, the investor may turn to a local court or an arbitration tribunal, dispute resolution agreed before or ECT arbitration. Disputes shall be

adjudicated by the arbitral tribunal on the basis of ECT and applicable international law rules and principles. The international arbitral award shall have the binding force to the parties involved in the dispute and providing the validity and enforceability of the award in their territory.[8] In addition, the arbitration between states is stipulated in Article 27, encouraging the use of diplomatic channels between states when ECT is applied or interpreted. The matter is not limited to investment disputes. The focus of investment disputes mainly consists of jurisdiction and merits disputes.

4.1 Jurisdiction disputes

Jurisdiction disputes in existing cases mainly lie in the definition of 'investment' and 'investor' which is also the precondition for deciding the jurisdiction of the arbitral tribunal over cases.

4.1.1 The Notion of Investment

'Investment' has become an indispensable legal concept in international investment agreements. The traditional understanding of 'investment' including 'property, rights and interests' had not been applicable anymore with the continuous expansion of "investment" scope, which provided an open and flexible scope for the definition of 'investment'.[9] Investor-state arbitration is jurisdictionally limited to a peculiar subject matter, namely investment.[10]

In the case of Petrobart v. Kyrgyzstan, Article 1 of Foreign Investment Law in Kyrgyzstan set up foreign investment rules: Foreign investment in economic activities within the object for a long time was a donation to any business entity, socioeconomic organisation or reform program for the purpose of obtaining revenue by the legislation of the Republic of Kyrgyzstan and the imagination of various forms of interests to obtain tangible or intangible investment such as money, equity, property rights, real and personal property and other forms of participation in legal entities, and based on legal permission from the profits of foreign investment or tax. In the eyes of the claimants, public law transactions between two commercial entities were represented by the provision of goods or services and the purchaser had an obligation which was valid under the definition of 'foreign investment' to pay for the goods or services provided.[11] In this connection, the arbitral tribunal affirmed that the genuine content of 'universally recognised principles in international law' was certain and indeed frequently controversial apart from well-known rules. Foreign investment generally refers to transferring physical or non-physical assets between states under the control of asset owner for the benefit or at least for the benefit of the state transferring and using the assets. Such a shift is distinguished from more frequent export transactions where products are sold by vendors or other owners to merchants in one state or to users in another. Compared with international sales transactions within the jurisdiction, foreign investment contains more long-term relationships between foreign investors and host states. Without doubt, contracts fall into the latter category, thereby confirming the jurisdiction over substantive issues.

In the case of Libananco v. Turkey, the definition of 'investment' again mentioned five elements. Namely, 'investment' must: (i) Have a certain time limit; (ii) Provide profits and returns regularly; (iii) Have risks; (iv) Have the investor's substantial commitment; (v) Make an important contribution to developing the host state.[12]

According to the arbitral tribunal, it was necessary to extend the respondent's approval of jurisdiction to investments where principal transactions violated Kazakhstan law and were therefore invalid in the case of Liman et al. v. Kazakhstan. The investment of the claimant was not beyond the jurisdiction agreed by the claimants since the transfer permitted in this case was not void from the beginning. However, an investment ultimately found to have violated Kazakhstan law from the outset was still in force in this case. The question of legality might concern the rights of the parties, but it would not have an obstructive effect on the jurisdiction.[13]

4.1.2 The Notion of Investor

It was complicated by the need of referring to other relevant documents for the identification of investors although 'investor' was defined in the ECT.[14]

In Europe v. Turkey case, the tribunal was faced with an unusual situation where both parties claimed that the case should be terminated due to the lack of jurisdiction. The only core issue between the parties was examined by the tribunal, namely whether shares of Turkish CEAS and Kepez were held by the claimant during the relevant period. Finally, the arbitration tribunal decided to reject the claim of the claimant for the lack of jurisdiction.[15]

In the case of Cem Uzan v. Turkey, the parties to the application maintained that 'investors' in the ECT were classified into three mutually exclusive categories, including 'domestic investors', 'investors from another contracting state' and 'third-state investors'. The tribunal found that the claimant must demonstrate compliance with investor standards so as to obtain personal jurisdiction. According to the ruling of the tribunal, a natural person has to meet two requirements to be considered as an investor under the standards of permanent residence, including the need for factual and legal elements. There was no doubt that the latter supplemented the domestic law of state parties. The tribunal has to determine the claimant's eligibility of permanent residence in the state concerned according to the domestic law of relevant state parties. However, decisions of domestic authorities were not absolutely

decisive while extremely persuasive. Thus, the tribunal was entitled to examine basic facts to determine whether the claimant had been permanently resident there in line with applicable domestic law. Regarding the factual part, the tribunal decided that the term 'permanent residence' meant the necessity of confirming the actually permanent residence of investors within the territory of the state party, which is evident in the ordinary and natural senses of the text. The permanent residentmay be used in the text if the intention under Article 7 (a)(I) in the ECT merely refers to the legal status of a natural person as defined in domestic law. It seems that the use of permanent residence requires a natural person to permanently reside in a state party (a de facto requirement) and get such a situation recognised in local domestic law (a legal requirement). This explanation avoids the situation in which a natural person can be protected by the state through obtaining a residence permit from multiple jurisdictions without actually having to reside in any of those states. In accordance with the ECT, the factual and legal links between investors and parties were therefore of great importance.[16]

4.2 Merits Disputes

Energy investment disputes mainly focus on the fair and equitable treatment and expropriation. Fair and equitable treatment can be generally asserted over the scope of expropriation.

4.2.1 Expropriation

Developed from customary international law, legal standards of expropriation are due, compensation and non-discrimination processes with a public purpose. [17]However, indirect expropriation has no universally accepted definition. According to the preliminary judgment criteria of the ICSID tribunal, [18]the host state took a series of measures to deprive investors of investment use and interests, however, failed to acquire investment ownership, which deprived the enjoyment and economic use value of investment property substantially, basically and illegally.

In the case of Petrobart v. Kyrgyzstan, the claimant asserted that investment was subject to expropriation or equivalent measures in accordance with Article 13 of the ECT. However, it was found by the tribunal that the claimant had not formally expropriated the investment of Petrobart. In spite of the negative impact on Petrobart, the Kyrgyzstan government or state institutions took no actions to directly target the investment of Petrobart or attempt to transfer the economic value of Petrobart to the Republic of Kyrgyzstan. The tribunal took into account that legitimate expectations of Petrobart were not considered in the steps taken by the Republic of Kyrgyzstan as an investor, which did not constitute a de facto expropriation.[19]

In the case of Ioannis Karadassopoulos et al. v. Georgia, the tribunal discussed whether the investment of Mr. Karadassopoulos had been expropriated. From the perspective of the claimant, Mr. Karadassopoulos was materially deprived of his property, which demonstrated clearly discriminatory expropriation and ran counter to due process. Through recalling Article 13(1) of the ECT, the tribunal held that indirect expropriation was typically manifested in the situation claimed by Mr. Karadassopoulos and that Decree No. 178 deprived Mr. Karadassopoulos of his interest in early oil pipelines without exercising state power in good faith. In terms of the tribunal, the case was an attempt made by the Georgian government to deal with a variety of foreign investors, which met non-discrimination standards and whose due process review was transparent at least. However, the tribunal maintained that the provision would be violated by any violation of a standard for expropriation and therefore considered the expropriation under Decree No. 178 unlawful and inconsistent with Article 13 (1) of the ECT.[20]

4.2.2 Fair and Equitable Treatment

Fair and equitable treatment were stipulated by bilateral investment treaties in various models: [21]individual provisions combining with principles of international law enumerated violations and referred to arbitrary and discriminatory practices and adequate protection and security. To support the violation of fair and equitable treatment, it was essential to meet the following conditions: An act of the host state violated the applicable clause of fair and equitable treatment and caused direct losses to investors. [22]

In the case of Ioannis Karadassopoulos v. Georgia, a fair wage level was contained in Article 2 (2) of the bilateral investment treaties between Mr. Fuchs Georgia and Israel while different measures of Georgia were in violation of obligations from 1997 to 2004, including violating the legitimate expectation of investors, taking arbitrary, neglected or invalid actions, lacking due process in administrative decision and disagreeing with foreign investors. Under Article 31 (1) of Vienna Convention on the Law of Treaties (hereinafter referred as "VCLT"), the arbitral tribunal generally explained the contents of the bilateral investment treaty according to its objectives and cited previous relevant cases. Through combining with all the evidence, the tribunal maintained that the claimant was not treated fairly and justly in the process of compensation and the applied party violated the provisions of Article 2 (2) of the bilateral investment agreement between Georgia and Israel.[23]

In the case of AES v. Kazakhstan, the tribunal recognised the necessity of determining three key issues on the claimant's claim of fair and equitable treatment: First, it was the issue of stability, namely whether the claimant was stable and whether stability guarantee was

violated by promulgating and applying the changes in Kazakhstan competition law. Second, it was the issue of legitimate expectations, namely what the legitimate expectations of the claimant were, whether those legitimate expectations were disappointed and to what extent such failure resulted in a treaty claim. Third, it was the issue of other violations, namely the feasibility of seeing the application of Kazakhstan law as a violation of relevant treaty standards and the impact of the first two provisions on the question. According to the final decision of the arbitral tribunal, the implementation of 'tariff exchange investment' policy options under restrictions from January 1, 2009 to just all the time of the day of the decision made by the law of electric power tariff amendment in 2009 and 2012 violated the standards of fair and equitable treatment in Article 10 (1) of the ECT and rejected other requests on fair and just treatment.[24]

5. PROPOSALS FOR ASIAN STATES ON INVOLVEMENT IN THE FUTURE SETTLEMENT OF ENERGY INVESTMENT DISPUTES

In retrospect, the number of Asian states involved in investment disputes in accordance with the ECT. Meanwhile, the arbitral tribunal still follows the present development tendency of international investment arbitration and appropriately balances the protection of investors and the interests of the host state in spite of supporting the claims of some investors. In view of this, the participation of Asian states in resolving future energy investment disputes should be well addressed from the different identities of the host state and investment home state.

5.1 Participation of the Host State in Energy Investment Dispute Settlement

Host states and investors have long focused on arguing about investment protection standards. The standard of fair and equitable treatment contained in the majority of investment agreements usually involved the legitimate expectation of investors:[25] The objective behavior of the host government made foreign investors generate and trust legitimate expectation while the unilateral behavior of the subsequent host state destroyed the legitimate expectation of investors and led to their losses. Therefore, the host state could at least make improvements and responses from the following aspects.

First, ensure the stability of domestic legal systems and policies for a certain period of time. There is no clear standard for the protection of reasonable expectations of investors under ECT, whether the change of laws or policies of the host state damages the reasonable expectations of investors depends on the specific case facts. In practice, the arbitral tribunal tends to protect the interests of investors, while the host state's amendment of domestic law and adoption of administrative measures are considered to violate reasonable expectations. In cases as Ioannis Karadassopoulos et al. v. Georgia and AES and other cases v. Kazakhstan, the claimant proposed that the change of domestic measures of the respondent undermined the reasonable expectations of investors, thus violating the fair and equitable treatment clause of ECT, and this claim was supported by the arbitration tribunal. However, not all changes to legislation violate reasonable expectations. In Isolux Infrastructure, B.V. v. Spain and Charanne v. Spain, the arbitral tribunal did not support the proposition of reasonable expectation of investors. It was believed that the changes of domestic legal system should be considered as a whole over a period of time rather than for a single legislative change. [26]If investors had the possibility of understanding the changes of legislation of the host state when investing, they would no longer had reasonable expectation. Instead, the revision for domestic laws and policies should take into account the predictability of investors and ensure the openness and transparency of laws, regulations and policies to ensure their stability in a certain period of time.

Secondly, improve the compensation system due to expropriation and other measures. Even if investors have reasonable expectations, it does not mean that the host state cannot change its legal system and policies. The host state still has the power to change its domestic legislation in accordance with the public interest, however, it should compensate for the damage to the interests of the investors. Although the standard of compensation may vary, the host state should still improve the system in its laws promoting and protecting foreign investment and make it clear that fair and reasonable compensation should be given after legal amendments or changes in administrative measures cause harm to investors.

Thirdly, the host state should establish a good mechanism for resolving the disputes of international investment arbitration. Once the arbitral tribunal filed a complaint about the standard of investment treatment, it proved the tribunal has to rule the host state's violation of the standard of fair and equitable treatment. Currently, Asian states are involved in about 20% of investment disputes under ECT, some of which may not make good preparations for dealing with this issue to some extent. Even the host state should be active in responding to and refuting the claims of the complainant from procedural and substantive aspects. Most bilateral investment treaties make themselves feasible to effectively utilise possible bilateral negotiations before arbitration and fully probe into the use of dispute settlement mechanisms in accordance with the ECT.

5.2 Participation of the Investment Home State in Energy Investment Dispute Settlement

At present, some Asian states have witnessed a marked growth in outward investment, expanded outward investment fields and diversified outward investment entities. These phenomena gradually promote the state from the traditional status of the host state to the home state of investment, forming the phenomenon of "identity confusion". To this end, if Asian states are to be the home states of investment in the future, they have to focus on the following aspects to deal with the settlement of energy investment disputes.

On the one hand, states should establish and improve unified laws and norms for foreign investment. Throughout the world's major developed economics, all states have a perfect overseas investment legal system, from the perspective of legislative guiding thoughts, Asian states urgently need to form a good overseas investment legal protection system. Under the guidance of a unified foreign investment law, states may consider setting up a single agency to take charge of the supervision and service of overseas investment, which will uniformly issue national policies on overseas investment and coordinate the functions of institutions involved in overseas investment under its leadership. The management model of a single institution could reduce the uncertainty of multiple policies, further improve administrative efficiency, and provide clear guidance for overseas investment. At the same time, Asian states should pay attention to the coordination and unification of their domestic laws with bilateral investment protection treaties, regional investment treaties, industrial investment treaties, and ECT in particular, and urge and strengthen the consultation and revision of bilateral investment protection treaties.

On the other hand, in order to deal with the political risks in overseas investment, overseas investment enterprises from Asian states could first fully consider carrying out pre-investment investigation activities and establish a scientific risk management system. The trend of energy investment from short term to long term development is obvious. In the process of overseas energy investment, investors should not only blindly make decisions in pursuit of short-term profits, but have to make a comprehensive study of the political, economic, legal environment and other elements of the investment region, so as to rationally judge investment or make scientific predictions for investment. Secondly, actively communicate with the government from the macro level through the government platform. Overseas investors should strive to build a good platform for investment cooperation in the macro field through active communication and consultation between the government of the home state and the government of the host state, so as to properly resolve specific disputes at the micro level through their own efforts. Thirdly, further give play to the guarantee function of the overseas investment insurance system. Political risk insurance policy aims to protect foreign investment from political risk. The investors and insurance institutions sign contracts to determine the insured risks and scope, and the insurance company promises to compensate for the loss caused by the host state's interference in the project. [27]From the perspective of the home state of the investment and the investors, the industries related to overseas investment are always faced with strong political and commercial risks due to their sensitivity and particularity, so it is particularly important to insure overseas energy investment. In addition, the establishment of the overseas investment insurance system will not only help to compensate investors for their losses, but also realize the function of opening up the market and facilitating financing.

6. CHINA'S PARTICIPATIOIN IN THE SELLTEMENT OF ENERGY INVESTMENT DISPUTES

In recent years, the core of international investment treaties is to balance the interests of investors and host states. Previous bilateral investment treaties, in which developed states were mainly capital exporters, emphasized the interests of the home state and its own investors while often ignoring the interests of the host state. However, with the development of economy, the capital importing states, mainly developing states, have gradually embarked on the road of overseas investment, so there is a development trend of balancing the interests of foreign investors and the interests of host states. As a result, China has moved from being a large importer of capital to being a large importer and exporter of capital. Therefore, China has begun to seek to balance the interests of the home state of investors with those of overseas investors and host states. Especially since the "going out" strategy was put forward, China's overseas energy investment has shown a gradual growth trend.

As the largest recipient of foreign investment and outbound investment among developing states, the introduction of foreign investment will continue to have a significant impact on China's economic development in the foreseeable future. In order to promote investment liberalization and facilitation, the Foreign Investment Law was passed on March 15, 2019, which complies with the requirements of investment liberalization and facilitation from the transformation of foreign management system, the promotion and protection of foreign investment, and the determination of the principle of competitive neutrality. [28]The Foreign Investment Law implements a new management system for foreign investment, namely pre-establishment national treatment plus a negative list, which replaces the previous restrictive national treatment of foreign investment. The system helps to enhance the transparency of China's foreign investment policy, especially when foreign

investment is entering, to ensure that its foreign investment laws and policies will not be arbitrarily changed due to various uncertain factors, so as to be more attractive to foreign investment. On June 30, 2019, the Ministry of Commerce (MOFCOM) released the latest version of the Special Management Measures for Foreign Investment Access (Negative List), which further promoted the openness of energy investment.[29]

The 2018 version of the Negative List liberalized the construction and operation of the power grid, allowing foreign ownership of the power grid. The 2019 version of the Negative List achieved a greater degree of "lifting" from the 2018 level, mainly in the energy sectors such as oil, natural gas and mining. As a host state, China's wider openness to energy investment is related to its transformation from a major capital importer to a major capital importer and exporter. Overseas energy investment in recent years, for example, the overseas investment of two major domestic power grid companies has been successfully practiced. For example, State Grid has become the second largest power transmission company in Brazil since it entered the Brazilian market in 2010 and has successively bought shares in Portugal, Italy, Greece and other states. In March 2018, China Southern Grid successfully acquired BIP's approximately 27.8% stake in Chile's Transelec for $1.3 billion. But more often than not, investors have repeatedly run into a wall when it comes to investing abroad. In the same month of the same year, State Grid's acquisition of 50Hertz, a German high-voltage network operator, failed. The reasons are still related to the opening of the domestic market and the application of rules.

At the same time, as a capital exporter, China's overseas investment started relatively late, and the legislation on overseas energy investment by Chinese investors is obviously insufficient. Although China has promulgated separate energy laws such as the Energy Conservation Law, the Renewable Energy Law and the Electricity Law, the current basic law regulating overseas investment is the Measures for the Administration of Overseas Investment issued by the Ministry of Commerce, however, it does not specifically cover overseas energy investment and investment protection. China's legislation on overseas investment originated at the beginning of the 21st century and lags far behind the practice of overseas investment. The legislation system, interrelations, functions and objectives have not been completely straightened out, and it is difficult to provide a complete and sufficient guarantee for overseas investment, especially energy investment. Compared with developed states, their overseas energy investment has a long history, which not only has complete domestic legal support, but also provides various guarantees in credit, tax and other aspects, so as to encourage domestic investors to make overseas investment.

ECT was created and developed to protect the interests of investors and limit the rights of the host state. For example, it has compulsory jurisdiction, stipulates that investors can unilaterally initiate arbitration without the consent of the host state, and stipulates the right of arbitration at any time without adopting the principle of exhaustion of local remedies. Currently, China is an observer state of ECT rather than a signatory state. In the past, China did not adopt the ECT mechanism in view of the imbalance in the development of capital export and import, and the dispute settlement mechanism in ECT would be unfavorable to China as the host state of investment. At present, the proportion of China's capital export continues to expand, and the overseas energy investment is growing gradually. The possibility of various energy investment laws and policies changing is greater, which may lead to investment arbitration disputes. In current Belt & Road Initiative, the overseas energy investment has a large market, should give full play to the investment dispute settlement mechanism of ECT for reference to overseas investment in China, to protect the legitimate interests of investors in overseas energy investment in China, for the future may seek to energy sector investment disputes settlement mechanism of relief to prepare.

7. CONCLUSION

With the rise of overseas energy investment, the laws and practices related to energy investment in international investment law are also making development. Especially in the transformation of Asian states from the host state to the investment home state it is forward-looking to think about and prevent energy-related international investment disputes in theory and practice. By studying the dispute settlement mechanism under the ECT, the arbitral tribunal ruled that the parties to the dispute over energy investment could fully grasp overseas energy investment in the face of legal disputes, and protect the interests of Asian states managing foreign investment and the legitimate rights and interests of overseas investors in the energy sector from the investment angle of host and home states ahead of corresponding preventive measures.

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