

One Belt, One Road, One Treaty: China's Energy Security and the Energy Charter Treaty

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I. Introduction

Imagine a world where a rising world power's economy depends upon imported energy resources to produce commodities for export. The legitimacy of the government depends upon the stability of the country's economy. The state has an increasingly powerful but untested navy. However, five trillion dollars in world trade, including a majority of the nation's energy imports and commodity exports, travel through a nearby sea lane¹ patrolled by a global hegemon with the world's largest naval force. This exposes the nation's goods to the volatility of diplomatic relations between the two countries. In this situation, finding alternative routes is not only a priority, but a necessity to ensure the security of the country's economy. This hypothetical exists in east Asia, where the hegemon is the United States, the rising power is China, and the waterway is the South China Sea. The Belt and Road Initiative ("BRI") is China's solution to this pressing concern about the control of its commodity exports and dependency on energy imports.

China's urgent need for greater energy security is a major factor contributing to the development of the BRI. The BRI is a Chinese strategy promoting policy coordination, infrastructure construction, trade, financial integration, and energy investment abroad.² One of the major projects of the initiative is the China-Pakistan Economic Corridor ("CPEC").³ The CPEC addresses China's unease with Amer-

ican naval control of the South China Sea by connecting energy and goods from western China's Xinjiang province to the Indian Ocean.⁴ China is making a \$46 billion investment in the CPEC pipeline and other infrastructure projects to ensure that vital energy supplies from the Indian Ocean area are not subject to American naval patrols.⁵

Although investment in the CPEC is protected under a Bilateral Investment Treaty ("BIT") between China and Pakistan,⁶ the protections first negotiated in 1989 are not the strongest available under international law. Unfortunately for China, this is not an isolated situation, as many other investee countries do not have a BIT with China that could protect Chinese investments. There are sixty-five countries involved with BRI investments,⁷ and the Chinese government stated in 2016 that its initial investment plan for one part of the project would be forty billion dollars.⁸ Incredibly, twenty-seven of these countries have not signed BITs or any other multilateral treaties with China.⁹ Such a discrepancy exposes Chinese investment—particularly private investments—to expropriation, discriminative treatment, and little, if any, protection under international law.¹⁰ In order for China to entice billions in private sector contributions to complement its public investments and ensure the success of the BRI, it must move quickly to provide vigorous international legal protections for these private investments.

Fortunately, an international legal regime developed over the past twenty-five years contains legal protections for energy investments made in countries where there is a history of weak rule of law. This international legal regime

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1. This hypothetical sea lane refers to the South China Sea.
2. See generally Junhua Zhang, *What's Driving China's One Belt, One Road Initiative?*, EAST ASIA FORUM (Sept. 2, 2016), <http://www.eastasiaforum.org/2016/09/02/whats-driving-chinas-one-belt-one-road-initiative/>; see also William T. Wilson, *China's Huge "One Belt, One Road" Initiative Is Sweeping Central Asia*, THE NAT'L INTEREST (July 27, 2016), <http://nationalinterest.org/feature/chinas-huge-one-belt-one-road-initiative-sweeping-central-17150>.
3. See J. Zhang, *supra* note 2.

4. See *id.*
5. See *id.*
6. See *China-Pakistan BIT* (1989), INV. POLICY HUB (2013), <http://investment-policyhub.unctad.org/IIA/mappedContent/treaty/952>.
7. See Libin Zhang, *China's Belt and Road Initiative and the Energy Charter Treaty*, LEXOLOGY (Feb. 29, 2016), <http://www.lexology.com/library/detail.aspx?g=9a3a57ee-fc3f-4324-b2a0-67d06d9318e8>.
8. See, e.g., Wilson, *supra* note 2; *China's One Belt, One Road: Will It Reshape Global Trade?* MCKINSEY & CO. (July 2016), <http://www.mckinsey.com/global-themes/china/chinas-one-belt-one-road-will-it-reshape-global-trade>.
9. See L. Zhang, *supra* note 7.
10. *Id.*; see *China-Netherlands BIT* (2001), INV. POLICY HUB (2013), <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/946>.

is encapsulated in the Energy Charter Treaty (“ECT”), a treaty that could provide legal protections for China’s new energy infrastructure projects.¹¹ Provisions in the ECT allow member states’ private investors to bring investment arbitration cases against the host state for the investment.¹² These arbitration rights are fully reciprocal among member states.¹³ Chinese firms and the BRI would benefit from the investment protections of the ECT, but the Chinese government is not currently a member of this multilateral treaty.

Although not a member, China has increased its participation in the ECT by becoming an “observer country” as recently as 2015.¹⁴ However, the inconsistent application of jurisdictional rules currently prevents most arbitration claims from reaching the merits stage before a tribunal, thereby weakening the cautious Chinese government’s incentive to join the treaty. This Note argues that now is the time for changes to be made to these jurisdictional ambiguities in order to entice China to join the ECT.

This note proposes that member nations issue a declaration clarifying when a claim may be brought in an international arbitration court in order to incentivize China to become a member. Part II of this Note discusses the BRI and its importance in international energy infrastructure development. Part III discusses the dispute resolution protections in the ECT and how they can provide international legal protections for this trillion-dollar initiative. Part IV discusses why BITs are an insufficient substitution for the protections available under the ECT. Part V discusses the weakness which could be disincentivizing China from joining the ECT, and the reasons why the charter must be changed. Finally, Part VI discusses how clarifying the application of jurisdictional rules will strengthen dispute resolution issues within the ECT, thus providing China with incentives to join the treaty regime.

II. China’s Marshall Plan: The Belt and Road Initiative

A. The Belt and Road Initiative—A Primer

The BRI is arguably still in its infant stage. China’s President Xi Jinping introduced the BRI to the world during a visit to Southeast Asia in October of 2013.¹⁵ The plan is the first

of its kind—ambitious even for the world’s second largest economy¹⁶—and has been referred to by some as the “second Marshall Plan.”¹⁷ The project will affect 65% of the world’s population, one-third of the world’s GDP, a quarter of all the goods and services the world moves,¹⁸ and three-quarters of the world’s energy resources.¹⁹ It is the massive scope of China’s BRI that makes it both important to incorporate into the existing international legal regime and essential to protecting investments made in places where international investment protections do not yet reach.

The BRI is split into the Silk Road Economic Belt and the 21st Century Maritime Silk Road.²⁰ The former focuses on energy investments and will be the focus of this Note. The goal of the Silk Road Economic Belt is to connect the countries of the Asian continent with a modern energy infrastructure.²¹ In a State Council²² notice, the Chinese government indicated the purpose of the Silk Road Economic Belt was to, “. . . promote cooperation in the connectivity of energy infrastructure, work in concert to ensure the security of oil and gas pipelines and other transport routes, build cross-border power supply networks and power-transmission routes, and cooperate in regional power grid upgrading and transformation.”²³ To power continuing economic growth and ensure economic stability for its population, China needs to ensure continued and increasing access to energy. There is also a strategic subtext behind the push to develop new sources of energy: national security.

Although these underlying national security concerns are not officially listed as reasons for these new energy investments, they are easy to imagine. The Chinese are eager to ship energy resources and commodities through pipelines and land routes that are not controlled by the United States Navy. The United States Navy uses warships to safeguard Pacific shipping lanes like those in the South China Sea, but the Chinese see this as a strategic liability in the event the Sino-American relationship deteriorates. By contrast, the Silk Road Economic Belt covers areas not patrolled by the United States, thus offering an attractive alternative route for maritime trade through the South China Sea.

China additionally plans on increasing its options for sea trading routes. The 21st Century Maritime Silk Road will

11. See L. Zhang, *supra* note 7.

12. *Id.*

13. *Id.*

14. *Frequently Asked Question About the Energy Charter Process*, INT’L ENERGY CHARTER, <http://www.energycharter.org/process/frequently-asked-questions/> (last visited Jan. 19, 2017).

15. See *Full Text: Action Plan on The Belt and Road Initiative*, STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA [hereinafter *State Council Action Plan*], http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm [https://perma.cc/N657-4LXP] (last updated Mar. 30, 2015); see also L. Zhang, *supra* note 7.

16. See MCKINSEY & CO., *supra* note 8.

17. *Id.*

18. *Id.*

19. See Charlie Campbell, *China’s Xi Jinping Talks Up “One Belt, One Road” as Keynote Project Fizzles*, TIME (Aug. 18, 2016), <http://time.com/4457044/xi-jinping-one-belt-one-road-obor-south-china-sea-economic-trade-business/>.

20. See L. Zhang, *supra* note 7; see also J. Zhang, *supra* note 2.

21. See *State Council Action Plan*, *supra* note 15.

22. The State Council is the highest level administrative governing body in China. Although the Chinese Communist Party holds legislative decisionmaking power, the governing tasks of the state are delegated to the State Council and its supporting agencies. For more information about the dual nature of the Chinese government’s structure, see SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., UNDERSTANDING CHINA’S POLITICAL SYSTEM 28–31 (Mar. 2013), <https://fas.org/sgp/crs/row/R41007.pdf>.

23. See *State Council Action Plan*, *supra* note 15.

span from China's east coast to Europe through the Indian Ocean and the South Pacific sea lanes,²⁴ traversing routes that use ports such as a new one being dredged in Pakistan called Gwadar.²⁵ To date, the U.S. Navy has never blocked trade in the South China Sea, and claims that its goal is to keep sea lanes open.²⁶ However, the U.S. Navy has the capability of blocking shipping lanes that play a key role in supporting China's economic prosperity, pushing China to develop alternative routes.²⁷

The scope of the Silk Road Economic Belt project is quite large, and despite the challenges of implementing such a vast project, the program has enough financial and government support to be a serious, sustained initiative. When the initiative first launched in February 2014, China had already committed \$40 billion to jumpstart the Silk Road Fund.²⁸ Then, on March 28, 2015, several prominent Chinese agencies jointly released the "Vision and Actions on Jointly Building the Silk Road Economic Belt and the 21st Century Maritime Silk Road,"²⁹ further clarifying policy specifics relating to the initiative. On May 14, 2017, President Xi Jinping hosted the Belt and Road Forum for International Cooperation in Beijing, which was attended by Vladimir Putin and two dozen other national leaders.³⁰ During the summit, President Xi pledged \$100 billion for development banks in China to spearhead infrastructure spending in Asia, Europe and Africa.³¹

In addition to investment in energy projects, the plan intends to support the export of excess commodity and resource capacity in China by industries hurt during China's most recent economic slowdown.³² Other purposes of the initiative include economic diversification, political stability, and the development of global networks.³³ Although China has initiated regional groups before, this is the first attempt to invest so extensively across the entire Eurasian Continent.³⁴ According to China's President Xi, more than ten countries and international organizations have signed up to cooperate on the BRI Initiative.³⁵

B. Impact of the Belt and Road Initiative

Investment in the BRI could be massive, and by many counts, it already has surpassed expectations. Actions by domestic and international parties indicate a shared willingness to support promises with cash. Ever since President Xi first announced the BRI in 2013, Chinese companies acquired nearly a quarter of Kazakhstan's oil production and are involved in over half of Turkmenistan's gas exports.³⁶ China also signed a fifteen billion dollar gas and uranium deal with Uzbekistan.³⁷ The Singaporean state-owned Development Board is partnering with China Construction Bank to commit twenty-two billion dollars to finance a myriad of BRI projects.³⁸ The day after the United States' 2016 Presidential election, the China National Petroleum Corporation ("CNPC") announced a 30% stake in a new deal with Total, a French gas company, to develop a two billion dollar oil field in Iran.³⁹

Even so, the deals do not stop there. Joe Ngai of McKinsey Associates estimates that there is the potential for two to three trillion dollars of investments by both private and public entities.⁴⁰ An added factor pushing this investment could be that foreign investment is considered a safe place for Chinese to invest money during President Xi's anti-corruption campaign, where all large domestic investments are highly scrutinized for the taint of corruption.⁴¹ Chinese oil companies such as the CNPC have strong incentives to invest in a government initiative abroad until they can be sure they will not be accused of domestic corruption.⁴²

Investment in this initiative is vast. By November 2015, Chinese companies invested \$14.01 billion in forty-nine countries that border BRI routes.⁴³ In 2016, China acquired investments worth thirty-one billion dollars in sixty-eight countries.⁴⁴ By the time of the Belt and Road Forum for International Cooperation in May of 2017, that number jumped to a total of fifty billion dollars.⁴⁵

These investments stayed mostly in Southeast Asia, with a majority of investments going to Singapore, Indonesia, Thailand, Malaysia, Laos, and Russia.⁴⁶ Funds were committed through 4,191 contracted projects in sixty-one countries,

24. *Id.*

25. P. Singh, China's Strategic Gateway to the Indian Ocean, Center for Strategic and International Studies (May 24, 2017), <https://reconasia.csis.org/analysis/entries/chinas-strategic-gateway-indian-ocean/>.

26. See generally Steven Stashwick, *US Navy Expanding Ability to Sustain Operations in South China Sea*, THE DIPLOMAT (Oct. 19, 2016), <https://thediplomat.com/2016/10/us-navy-expanding-ability-to-sustain-operations-in-south-china-sea/>.

27. *Id.*

28. See Wilson, *supra* note 2; MCKINSEY & CO., *supra* note 8.

29. See L. Zhang, *supra* note 7; see also Moritz Rudolf, *One Belt, One Road: The Silk Road*, MERICS, <https://www.merics.org/en/china-mapping/silk-road-initiative> [<https://perma.cc/7EMG-6DKM>] (last visited Nov. 22, 2016).

30. Jane Perlez & Keith Bradsher, *Xi Jinping Positions China at Center of New Economic Order*, N.Y. TIMES (May 14, 2017), <https://www.nytimes.com/2017/05/14/world/asia/xi-jinping-one-belt-one-road-china.html>.

31. *Id.*

32. See, e.g., Erica Downs, *Mission Mostly Accomplished: China's Energy Trade and Investment Along the Silk Road Economic Belt*, CHINA BRIEF VOL. XV, ISSUE 6, 3-6 (2015), <https://jamestown.org/program/mission-mostly-accomplished-chinas-energy-trade-and-investment-along-the-silk-road-economic-belt#.V-bgCzWKQeI>; J. Zhang, *supra* note 2; Wilson, *supra* note 2.

33. See Rudolf, *supra* note 29.

34. See J. Zhang, *supra* note 2.

35. See Campbell, *supra* note 19.

36. See Wilson, *supra* note 2.

37. *Id.*

38. *Id.*

39. See Mahmoud Eskaf, *Iran: New Gas Deal With France Opens Way for More Trade Ties With EU*, MIDDLE EAST OBSERVER (Nov. 9, 2016), <https://www.middleeastobserver.org/2016/11/09/26444/>.

40. See MCKINSEY & CO., *supra* note 8.

41. See Downs, *supra* note 32.

42. See *id.*

43. See Ministry of Commerce of the People's Republic of China, Shangwu Bu Hezuo Si Fuze Ren Tan 1-11 Yue Woguo Dui Wai Touzi Hezuo Qingkuang (商务部合作司负责人谈1-11月我国对外投资合作情况) [MOFCOM Cooperation Officials Discussed China's Foreign Investment Cooperation from January to November 2016], Dec. 15, 2015, <http://www.mofcom.gov.cn/article/ae/ag/201512/20151201210928.shtml> (China); see also J. Zhang, *supra* note 2.

44. Kane Wu & Sumeet Chatterjee, *Exclusive: China's Belt and Road Acquisitions Surge Despite Outbound Capital Crackdown*, REUTERS (Aug. 15, 2017), <https://www.reuters.com/article/us-china-m-a/exclusive-chinas-belt-and-road-acquisitions-surge-despite-outbound-capital-crackdown-idUSKCN1AW00K>.

45. Perlez & Bradsher, *supra* note 30.

46. See Ministry of Commerce of the People's Republic of China, *supra* note 43.

totaling \$74.56 billion.⁴⁷ Looking to the future, Chinese companies have signed 2,998 new foreign-contracted construction project agreements in sixty countries bordering the routes worth a total of \$71.63 billion.⁴⁸ As the BRI progresses, there is sufficient groundwork for funding further initiatives.

Yet, these investments remain largely unprotected. With so much money at stake, the Chinese government and private investors cannot afford to leave their investments unprotected. Stakeholders in these projects include the Chinese and other countries' governments, individual investors, financial institutions, and corporations.⁴⁹ The initial investments were proposed when raw commodity prices were high, but prices today are much lower, thus the projected profit margins on these projects have decreased.⁵⁰ Decreased profit margins increase the need for investors to ensure that a strong legal framework will protect against catastrophic losses, and the existing BITs fail to comprehensively provide this essential protection.⁵¹ A better legal framework for investments will both protect investments in the case of a dispute and incentivize future investment.

III. The Energy Charter Treaty: A Means to Solve China's Problems

The ECT can provide China with a legal framework to protect its new investments in the BRI.⁵² The ECT was conceived after the collapse of the Soviet Union, when capital exporting western European states looked to find new sources of energy in the former Soviet states.⁵³ The ECT's purpose is to ". . . ensure sovereign equality of states irrespective of their levels of economic development and a fair balance of interests of energy production, energy consuming and energy transit countries in the context of energy security for all."⁵⁴ The ECT does this through the legal mechanisms discussed below.

The ECT encourages investment in energy resources through a procedural framework that gives investors access to dispute resolution and substantive legal protections associated with the treaty. If an investor and its investment qualify for protection under the definitions listed in the ECT, the investor will have access to arbitration in dozens of ECT member nations. Once a dispute qualifies for arbitration under the treaty, the investments will be protected by a body of international law developed over the past few decades.

As of May 21, 2015, at the signing of the new Charter for the treaty, seventy-five states and international organizations adopted the treaty, and sixty-five states and institutions signed the corresponding International Energy Charter, which is a political statement in support of the goals of the ECT.⁵⁵ As of 2010, investors in twenty-four cases had initiated disputes using the protections of the ECT.⁵⁶

A. China's Current Involvement With the ECT: Why Is It an Observer?

China's increasing involvement with the ECT and its investment protection regime indicates it supports the ideals behind the treaty. Although China is not a member of the ECT, it signed the International Energy Charter in May 2015, which is a "declaration of political intention aiming at strengthening energy cooperation between the signatory states . . . [but] does not bear any legally binding obligation or financial commitment."⁵⁷ China now has ECT "observer party" status,⁵⁸ although historically China has been reluctant to embrace investor-state arbitration.⁵⁹ Nonmember states obtain observer party status to a treaty so they may participate in its processes, but the status does not afford them rights under the treaty, nor does it bind them to any duties therein.

Even though China does not publicly explain its reticence to join the treaty, existing procedural barriers that prevent easy access to dispute resolution under the ECT may be the culprit. China's government is sensitive to foreign influence in any economically-related affair. This is because—as a governing body that is not elected through a democratic process—steady economic prosperity is an essential foundation of the Chinese Communist Party's legitimacy. Therefore, threats to economic prosperity amount to threats of the legitimacy of the government. If procedural ambiguities at the jurisdictional stage of arbitration under the ECT do not guarantee that a Chinese investor can easily litigate a claim, it limits the benefits China could acquire from joining the ECT. In light of these procedural barriers, China is likely under the impression that it would have little to gain from joining the ECT.

47. *Id.*

48. *See id.*; *see also* J. Zhang, *supra* note 2.

49. *See* Ministry of Commerce of the People's Republic of China, *supra* note 43.

50. *See* Campbell, *supra* note 19.

51. *See* Sheng Zhang, *The Energy Charter Treaty and China: Member or Bystander?*, 13 J. WORLD INV. & TRADE 597, 601 (2012).

52. Iuliana-Gabriela & Ramona-Elisabeta, *The Energy Charter Treaty and Settlement of Disputes—Current Challenges*, 6 JURIDICAL TRIB. 72-73 (2016).

53. *See id.* at 72; *see also* Iuliana-Gabriela Jacob & Ramona-Elisabeta Cirlig, *The Energy Charter Treaty and Settlement of Disputes—Current Challenges*, 6 JURIDICAL TRIB. 71, 73 (2016).

54. *See* Munir Maniruzzaman, *International Energy Charter as a Milestone for Global Energy Co-Operation in the 21st Century*, KLUWER ARBITRATION BLOG (Aug. 30, 2015), <http://kluwarbitrationblog.com/2015/08/30/international-energy-charter-as-a-milestone-for-global-energy-co-operation-in-the-21st-century/>.

55. *See id.*

56. *See* SHEARMAN & STERLING, *Yukos: Landmark Decision on the Energy Charter Treaty*, INT'L ARBITRATION GROUP: CLIENT PUBLICATION (Jan. 5, 2010), http://www.shearman.com/-/media/Files/NewsInsights/Publications/2010/01/Yukos--Landmark-Decision-on-the-Energy-Charter-T_/Files/Click-here-to-view-full-memo-Yukos--Landmark-Dec_/FileAttachment/IA010510Yukos-LandmarkDecisiononEnergyCharterTreaty.pdf.

57. *See The International Energy Charter*, INT'L ENERGY CHARTER (last visited Jan. 19, 2017), <http://www.energycharter.org/process/international-energy-charter-2015/overview/>.

58. *See Frequently Asked Question About the Energy Charter Process*, INT'L ENERGY CHARTER, <http://www.energycharter.org/process/frequently-asked-questions/> (last visited Jan. 19, 2017).

59. *See* S. Zhang, *supra* note 51. Most recently, China refused to participate in the arbitration case brought by the Philippines to an arbitration panel in the Hague regarding an island dispute in the South China Sea. *See* Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>.

China is not alone in its hesitation to participate in the ECT. Examples of capital exporting countries who have left the treaty include Italy, which withdrew from the ECT on April 23, 2015,⁶⁰ and Russia, which withdrew from the treaty in 2009.⁶¹ Italy faced pressure from many sources, and it is presumed that the myriad of cases against the country may have led it to withdraw from the ECT.⁶² Russia withdrew after the *Yukos* case, which signals that the *Yukos* case was an influencing factor in deciding to do so.⁶³ At the time of its withdrawal from the ECT, Russia was being sued for fifty billion dollars for alleged discriminatory actions against and expropriation of assets belonging to *Yukos*' shareholders.⁶⁴ The *Yukos* case stemmed from the Russian government's pursuit of the *Yukos* Corporation and its chief executive for tax evasion—a process that bankrupted the company.⁶⁵ Russia's state-owned gas company, Gazprom, also had a lot to lose from foreign investment due to its strategic control over both Russian gas reserves and its monopoly over gas routes from Central Asia into Europe. The *Yukos* case provided a convenient excuse for Russia to leave the ECT.

Yet an international forum remains for investors to bring disputes against both Russia and Italy in arbitration. Both Russia and Italy are still member states to the International Center for the Settlement of Investment Disputes ("ICSID"), a World Bank convention that facilitates the settlement of investment disputes.⁶⁶ Both China and the United States are also members of ICSID. The United States is an observer country to the ECT, and has never been a member.⁶⁷ Yet China has less to lose and more to gain from the ECT than Russia, Italy, or the United States.

B. Types of Dispute Resolution Under the ECT

The ECT protects energy investments because the treaty provides forums to litigate disputes and remedies for violations of international law. According to Article 2 of the ECT, the purpose of the treaty is to provide a legal framework to promote long-term cooperation between investors and energy-

60. See Jacob & Cirlig, *supra* note 53, at 72.

61. See Crina Baltag, *What's New With the Energy Charter Treaty?*, KLUWER ARBITRATION BLOG (June 13, 2015), <http://kluwerarbitrationblog.com/2015/06/13/whats-new-with-the-energy-charter-treaty/>.

62. *Italy No Longer Member of Energy Charter Treaty, Hopes to Avoid More Arbitrations*, GLOBAL INV. PROT. (June 1, 2016), <http://www.globalinvestmentprotection.com/2016/01/06/italy-no-longer-member-of-energy-charter-treaty-hopes-to-avoid-more-arbitrations/>.

63. See SHEARMAN & STERLING, *supra* note 56.

64. See Ben Knowles, Khaled Moeed & Nefeli Lamprou, *The US \$50 Billion Yukos Award Overturned—Enforcement Becomes a Game of Russian Roulette*, KLUWER ARBITRATION BLOG (May 13, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/>.

65. See Simon Shuster, *Why a Win in a Dutch Court Is Making Vladimir Putin So Happy*, TIME (Apr. 20, 2016), <http://time.com/4301475/russia-appeal-case-yukos-the-hague/>.

66. See generally *ICSID 2016 Annual Report*, ICSID, 10 (Sept. 2016), https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf; see also Jacob & Cirlig, *supra* note 53, at 72.

67. See generally *Constituency of the Energy Charter Conference*, INT'L ENERGY CHARTER, <http://www.energycharter.org/who-we-are/members-observers/> (last updated Jan. 25, 2018).

rich states.⁶⁸ This is accomplished by maintaining a forum for arbitration under Article 27.⁶⁹ State-to-state arbitration provides a neutral vehicle for dispute resolution among states because it prevents parties from bias in the host state's domestic court system. Similarly, Article 26 provides a forum for investor-state arbitration.⁷⁰ Without the ECT, a private party can only pursue a claim against a foreign sovereign through diplomatic channels in the private investor's home country.⁷¹ This method is circuitous, and dependent upon the party's relationship with their home country. The ECT's architects intended for the dispute resolution mechanism to be objective and neutral, providing an alternative for investors who were previously forced to lobby their home states to advocate on their behalf.⁷²

C. Substantive Protections Provided Under the ECT

The substantive protections of the ECT are similar to the international legal protections found in the over 3,000 BITs and International Investment Treaties worldwide.⁷³ The key to accessing these protections is through an investor's home country signing a treaty that incorporates those protections into the deals its investors make with other host states party to the agreement. China can skip the arduous process of signing dozens of treaties with dozens of host states and still gain the same access to international legal protections in all ECT member states by joining the ECT.

Historically, when a dispute related to an investment in a foreign country arose, a private investor or corporation was dependent upon its home government to advocate on its behalf against the investment's host state. Instead of forcing a private investor to rely on its home government, the ECT provides an alternative means for an investor to dispute a host state's treatment of its investment that is neither reliant on the investor's relationship with its home government nor the relative power the home government has in negotiating with another state. The resulting arbitration has the substantive legal protections of customary international law. Customary international law holds states to international legal protections, the most important of which are Most Favored Nation ("MFN") status to all contracting members, fair and equitable treatment ("FET"), and constant protection and security for the investment.

68. See The Energy Charter Treaty art. 2, Dec. 17, 1994, 2080 U.N.T.C. 95; see Ergen Ege, *The Unclear Role Yet Inevitable Application of Domestic Law Under the Energy Charter Treaty Arbitration*, INT'L BUS. L.J. 173, 174 (2012).

69. See The Energy Charter Treaty art. 27, Dec. 17, 1994, 2080 U.N.T.C. 95. There is an exception to this for competition or environmental concerns.

70. See *id.* at 72–78.

71. See Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 820 (2012).

72. *Id.* at 828.

73. *IIA Databases*, UNCTAD (last visited Jan. 8, 2018), [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx); *Database of Bilateral Investment Treaties*, ICSID (last visited Jan. 9, 2018), <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx>.

The first powerful legal protection afforded to an investor whose home state is a party to the ECT is MFN status.⁷⁴ MFN ensures “that neither contracting party will subject the investment of the other party to a treatment less [favorable] than that which it accords to investments of nationals from a third state.”⁷⁵ MFN status can also be contracted into BITs, but it is automatically included in the ECT.⁷⁶ MFN status ensures that any time a state consents to a protection in a treaty with any state that the MFN state’s investors are also afforded that same protection. MFN protections were discussed in *Plama v. Bulgaria* in the Decision on Jurisdiction, and many other ECT cases.⁷⁷ The provision is fairly common in international investment protection law.

Second, the ECT requires the host state to reduce non-commercial risks by providing fair and equal treatment (“FET”), as well as constant protection and security for the investment.⁷⁸ For example, if a natural gas pipeline runs through a member state’s boundaries, there is an obligation that security forces provide protection against the destruction of the pipeline by third parties. In *Petrobart v. The Kyrgyz Republic*, the Tribunal found that under the ECT, “[t]he Arbitral Tribunal does not find it necessary to analyze the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.”⁷⁹

IV. BITs as an Inadequate Alternative to the ECT

If China joins the ECT, it could protect its investments in the BRI. Currently, Chinese investments are protected by BITs, but are not consistently provided the same protections available under the ECT.⁸⁰

A. BITs as a False Alternative to the ECT

China signed 130 BITs between 1982 and 2011.⁸¹ However, up until its BIT with Barbados in 1998, most of these BITs did not have an effective arbitration clause, did not provide host state consent to arbitration, or solely provided consent

to disputes relating to compensation for an expropriation.⁸² Of the sixty-five countries receiving investments under the BRI, thirty-eight have signed a BIT with China.⁸³ The other twenty-seven countries provide no treaty protection for Chinese investments within their borders.⁸⁴ China has already signed a BIT with forty-nine ECT member states.⁸⁵ This group includes energy-rich central Asian countries like Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan.⁸⁶

Yet, these treaties provide fewer protections to Chinese investment than the ECT.⁸⁷ China signed many BITs in the 1990s before its economic success led it to become a capital exporting rather than importing country.⁸⁸ Before its economic rise, China had less diplomatic and economic clout than it does today, and the BITs formed during that period had decreased bargaining power. As a result, these BITs are shorter and do not provide comprehensive protection for Chinese investments to the degree that the ECT can.⁸⁹ Specifically, many of them do not even contain arbitration clauses necessary to access arbitration in a neutral forum in the case of a dispute.

Chinese BITs do not provide the same protection as the ECT in several respects. First, these BITs do not have MFN clauses, exposing China to the risk of discriminatory treatment, when compared with the treatment of other countries’ investors.⁹⁰ Second, most BITs do not include national treatment clauses that would grant Chinese investors the same protections as domestic investors.⁹¹ Instead, most Chinese BITs provide that an investor in the receiving state agree to submit all disputes to domestic adjudication, and be subject to domestic law.⁹² These clauses remove any international legal protections from Chinese investment. Third, many Chinese BITs require an investor to exhaust local remedies before initiating the provided dispute resolution mechanism.⁹³ The ECT does not require an investor to exhaust local remedies before initiating arbitration,⁹⁴ as many investors are apprehensive that domestic courts could be biased in favor of the host state. Fourth, many Chinese BITs are not comprehensive. For example, the Chinese BIT with Kazakhstan has only twelve articles, while more modern BITs run much longer and cover the more complex issues facing energy investments.⁹⁵ Finally, many Chinese BITs place limitations on what types of disputes can be submitted to arbitration, which is not an impediment to arbitration under the ECT.

74. See, e.g., Jacob & Cirlig, *supra* note 53, at 73; L. Zhang, *supra* note 7; Noriko Yodogawa & Alexander M. Petersonan, *Opportunity for Progress: China, Central Asia, and the Energy Charter Treaty*, 8 TEX. J. OIL GAS & ENERGY L. 111, 138–39 (2012–2013).

75. See Monika C.E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 11 J. INT’L ECONOMIC L. 3, 519 (2008).

76. *Id.*

77. See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 191 (Feb. 8, 2005).

78. See Jacob & Cirlig, *supra* note 53, at 73; see also Yodogawa & Petersonan, *supra* note 74, at 138–39; see also S. Zhang, *supra* note 51.

79. See *Petrobart v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, at 76 (Mar. 29, 2005).

80. See S. Zhang, *supra* note 51, at 13; Yodogawa & Petersonan, *supra* note 74, at 133.

81. RUDOLPH DOLZER & CHRISTOPH SCHRUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 7 (2d ed., 2012); *China BITs*, INV. POLICY HUB (2013), <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>.

82. See generally Elodie Dulac & John Savage, *China: BITs*, GLOBAL ARBITRATION REVIEW: THE ASIA PACIFIC ARBITRATION REVIEW (July 2, 2007), <http://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2007/1036458/china-bits>.

83. See L. Zhang, *supra* note 7.

84. *Id.*

85. Yodogawa & Petersonan, *supra* note 74, at 133.

86. *Id.*

87. *Id.*

88. See S. Zhang, *supra* note 51, at 610.

89. *Id.*

90. *Id.*

91. *Id.* at 602.

92. *Id.*

93. See Yodogawa & Petersonan, *supra* note 74, at 135–36.

94. *Id.* at 136.

95. S. Zhang, *supra* note 51, at 610–11.

In contrast, the ECT provides the advantage of strong legal protections, even if China has an existing BIT with the target investment country. This is because the ECT provides protections that are not uniformly concluded in its existing or nonexistent BITs. For example, some BITs limit what types of disputes may be submitted to arbitration. China's BITs with Australia, Singapore, Kazakhstan, Pakistan, Mongolia, and the United Kingdom limit qualifying disputes to investor-state disputes concerning compensation.⁹⁶ This means that Chinese investors with other types of concerns have no legal recourse under the BIT when a dispute arises. Without this protection, the risk and subsequent cost of doing business in that country rises. For example, in the case of the Pakistani pipeline where Chinese investors pledged forty billion dollars to the project,⁹⁷ China must ensure it has legal recourse in case a dispute arises during construction and operations. In other words, the ECT provides access to the protections of expansive investment-related customary international law, defines investors and investments eligible for protection more broadly, and provides reasonable insulation from domestic politics.

Many Chinese BITs lack fundamental protections such as the national treatment standard. Of the BITs with Australia, Singapore, Kazakhstan, Pakistan, Mongolia, and the United Kingdom, the national treatment standard is only provided for in China's BIT with the United Kingdom.⁹⁸ Even here though, it is limited in scope. National treatment is only required "to the extent possible," since local law will still be applicable.⁹⁹ The ambiguity in this language can be interpreted to exclude China from national treatment whenever there is an investor dispute. The vague standard fails to provide consistent, guaranteed protections for Chinese investment. Conversely, the MFN and national treatment protections of the ECT are expansive.

More broadly, the ECT incorporates protections in customary international law that were developed in treaties and applied in international arbitration tribunals over the course of several decades. Customary international law incorporated through treaties like the ECT imposes restrictions on host state behavior where domestic courts may not provide for those same protections and remedies.¹⁰⁰ Contrary to the exhaustion of remedies requirements of existing Chinese BITs, investors in an ECT member state may submit a dispute directly to arbitration, where decades of evolving customary international law protections will automatically apply to the investment. A domestic court's ability to apply international law depends on how the domestic legal system incorporates international law into domestic obligations.

Conversely, tribunals convened under a treaty like the ECT would use international law as a frame of reference for making decisions. A tribunal formed under the ECT is not limited to the restrictions of previous BITs that the host state

has negotiated. This allows for not only more expansive protections, but also more uniform protections. Thus, investors know what protections are available to them across all of the ECT host states and are encouraged to continue to invest in those states.

The scope of protection provided by the ECT is also larger than that provided by Chinese BITs. The language defining an investor and a protected investment under the ECT is much more expansive than in most BITs, which extends these legal protections to more Chinese private investors participating in the BRI. The ECT defines an investment in Article 1(6) as *every* kind of asset or legal right¹⁰¹—which is much broader than the language in China's existing BITs.¹⁰² A "legal entity" is also defined more expansively than in other treaties.

Other treaties may restrict the definition of an eligible investor by requiring a headquarters or effective place of management within a state that is party to the dispute.¹⁰³ More expansively, the ECT protects investments made by any "permanent resident" of a member state.¹⁰⁴ By contrast, Article 25 of ICSID, an international arbitration institution, requires a natural person to have the nationality of a contracting party for the protections to apply.¹⁰⁵ ICSID's Article 25 is therefore an even more restrictive standard by which countries can access ICSID's dispute resolution mechanism, when compared to the ECT standard. If China joined the ECT, China's investors would be able to more easily access the legal protections and dispute resolution mechanisms provided for in the treaty than they are able to under ICSID.

The final protection in the ECT that is not readily available in existing Chinese BITs is protection from domestic political change. The ECT can shield Chinese investment from political issues within its target investment countries. Chinese BRI energy investments might run into future obstacles from host states' restrictions based on national security concerns or domestic political instability,¹⁰⁶ and the ECT ensures that investors have a recourse if policies are arbitrary or unjustified.

A country will sometimes prevent a sale or investment due to national security concerns. For example, in 2006 a Dubai-owned company was forced to back out of a deal to manage several American port operations after the U.S. Congress threatened to block the deal on national security concerns.¹⁰⁷ Without the protections of an international treaty, countries might impose a strict national interest review on Chinese investments specifically. This may form a significant barrier to investment in countries where China becomes unpopular or may be seen as a too-powerful foreign influence on domestic affairs.¹⁰⁸

101. See The Energy Charter Treaty art. 1(6), Dec. 17, 1994, 2080 U.N.T.C. 95.

102. See S. Zhang, *supra* note 51, at 37.

103. *Id.* at 36.

104. The Energy Charter Treaty art. 1(7), Dec. 17, 1994, 2080 U.N.T.C. 95.

105. See S. Zhang, *supra* note 51, at 36.

106. *Id.* at 597–98.

107. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <http://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html>.

108. See S. Zhang, *supra* note 51, at 603.

96. *Id.*

97. P. Singh, *supra* note 25.

98. *Id.* at 603.

99. *Id.*

100. See Born, *supra* note 71, at 823 (2012).

Changing administrations or governments can easily lead to shifting views on protecting investors or policies towards investment. However, with treaty obligations, new governments remain liable for the promises made in a treaty by the prior government. Article 24(3) of the ECT maintains that a state may take action based on “essential security interests” relating to energy provided to a “military establishment.”¹⁰⁹ However, Article 24(3) is an exception, ensuring that any state which adopts national security measures against an investor must justify their concerns.

The strong protections in the ECT would probably be included in new BITs if China renegotiated all of its older BITs today. However, it would be a lengthy process to renegotiate these agreements. China needs to expend much more energy to negotiate dozens of agreements than they would expend by joining a multilateral treaty like the ECT. During the time it took to reopen discussions, debate over details, and submit new agreements for ratification by multiple government bodies, Chinese investment in the BRI would continue to lack the international legal protections ensured by the ECT.

B. Procedure in the ECT: Strengths and Weaknesses

Like any treaty that provides investment protection, there are first procedural jurisdictional requirements that an investor must fulfill to qualify for protection under the ECT. Procedural ambiguities in the ECT ensure that individual arbitrators¹¹⁰ have some discretion in determining which investors are eligible to submit a claim to the tribunal.

I. Arbitration Procedures Under the ECT

When a state joins the ECT, it consents to arbitration of disputes with investors from states that are party to the agreement, and this gives investors jurisdiction necessary to file a claim against that state.¹¹¹ The protections available under the ECT, and referenced above, are some of the strongest available under international law for energy investments. These protections are timely and necessary to meet the world’s upcoming energy demands, as the International Energy Agency estimates that the period from 2018 through 2035 will require \$48 trillion in investment in order to meet growing global demand for energy resources.¹¹²

When a dispute arises between an investor from an ECT member state and a signatory to the ECT, or between an investor and a nonstate entity from an ECT member country, the ECT protections are enforced through binding investment arbitration. States that sign the ECT consent to arbitration and dispute settlement proceedings in the event of a disagreement.¹¹³ When a dispute arises, Article 26 requires the parties to first attempt an amicable settlement through

conciliation for a period of three months.¹¹⁴ If a settlement is not reached, the aggrieved party may bring the claim in one of three ways. First, the party may bring the dispute to courts or administrative tribunals of the contracting party.¹¹⁵ However, this option is often unattractive for investors, as not all courts or administrative tribunals are independent from government interference. Second, parties may bring a dispute in accordance with any applicable, agreed upon dispute settlement procedure.¹¹⁶ This option allows for ad hoc tribunals or dispute mechanisms that the parties agreed to when they negotiated the contract. Finally, the parties may choose to proceed with international arbitration or conciliation, which is a nonbinding mediation process.¹¹⁷ The third option is often the most favorable to an investor, as it provides for a consistency in procedure in addition to the specific protections mentioned above.

In a case where a dispute is referred to international arbitration under the ECT, there are three types of arbitral bodies from which parties can choose. First, international arbitration can be referred to the ICSID, a World Bank arbitration organization that facilitates the settlement of investment disputes.¹¹⁸ Second, the parties can choose an “ad hoc” arbitration through a committee formed after the dispute under the United Nations Commission on International Trade Law (“UNCITRAL”).¹¹⁹ Finally, the parties can choose to arbitrate at the Arbitration Institution at the Stockholm Chamber of Commerce.¹²⁰ These options allow some flexibility in the rules governing the procedure and structure of the arbitration, while the substantive legal protections remain the same.

2. Procedural Ambiguities That Make the ECT Less Attractive for Investing Parties

However, the ECT does have some weaknesses. For instance, due to procedural ambiguities, the rights guaranteed in the ECT are not always uniformly applied. In a tribunal’s award decision, it is bound by ECT Article 17(1), which denies advantages to non-qualifying investors, and ECT Article 17(2), which denies advantages to non-qualifying investments.¹²¹ Article 17 is the “Non-Application of Part III in Certain Circumstances,”¹²² or the “Denial of Benefits” clause

114. The Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.C. 95. According to Professor Thomas Snider of the George Washington University Law School, parties use this as a mere formality and other than sending a letter requesting an amicable settlement, they simply wait out the three months before filing for official arbitration.

115. See generally Jacob & Cirlig, *supra* note 53, at 74.

116. *Id.*

117. *Id.*

118. See ICSID 2016 Annual Report, *supra* note 66, at 10; Jacob & Cirlig, *supra* note 53, at 74.

119. See Jacob & Cirlig, *supra* note 53.

120. *Id.*

121. See The Energy Charter Treaty, art. 17(1)–(2), Dec. 17, 1994, *supra* note 68, at 60–61; see also Loukas A. Mistelis & Crina Mihaela Balta, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, 113 PENN ST. L. REV. 1301, 1318 (July 1, 2009).

122. See The Energy Charter Treaty, art. 10–17, Dec. 17, 1994, *supra* note 68, at 53–61 (referred to as “Part III” of The Energy Charter Treaty discussing the Investment Promotion and Protection section of the ECT).

109. See The Energy Charter Treaty art. 24(3), Dec. 17, 1994, 2080 U.N.T.C. 95.

110. Arbitrators fulfill the role of a judge in an arbitral tribunal. Tribunals will most often consist of either one or three arbitrators who vote on the final judgement.

111. See Yodogawa & Petersonan, *supra* note 74, at 138–39.

112. See Maniruzzaman, *supra* note 54.

113. See L. Zhang, *supra* note 7.

which must be satisfied to deny jurisdiction to a party before a tribunal. The “Denial of Benefits” clause allows a host state to deny the benefits of arbitration to a shell corporation or other corporate party which lacks a sufficient nexus to be considered an eligible investor under the treaty.¹²³

The ECT does not provide clear guidance on whether a tribunal should make a factual determination on investment and investor status, or instead accept bare assertions of a party’s eligibility for arbitration under the charter.¹²⁴ This ambiguity ensures that the selection of arbitrators—rather than the law—will be a key factor in determining whether the investor can proceed with their claim. This is because the arbitrator will need to make a determination under Article 17 of whether the investor qualifies for protection under the treaty before even beginning arbitration of the dispute on the merits. These factors, combined with the fact that only twenty-four cases have been tried under the ECT by 2010,¹²⁵ indicate that the procedural barriers to access treaty protections may be too strong to incentivize China to join the ECT.¹²⁶

To be eligible for dispute resolution under the arbitration protocols of the ECT, a party must first prove its eligibility as an investor under the ECT. Several tribunals have weighed in on how to define eligibility under the ECT.¹²⁷ This determination is necessary before an arbitral tribunal can claim jurisdiction to hear a case under the ECT. International arbitrators have persuasively argued in favor of one definition over another, but no consensus has emerged. Additionally, the nonbinding nature of tribunal decisions provides little guidance as to the preferred method for determining eligibility, and whether the tribunal ultimately has jurisdiction to hear the claim. Discussions about Article 17’s “Denial of Benefits” clause do not definitively address whether it should be discussed as a requirement at the procedural or the merits stage of the arbitration.¹²⁸

The ECT’s greatest persuasive tool to incentivize China to join the treaty lies in its ability to afford Chinese investors equal standing with the host state for the investment. Statistics compiled by Susan Franck demonstrate that nonstate actors in arbitration (investors) generally face more obstacles in convincing a tribunal that they have the qualifications to pass the jurisdictional stage of the proceedings.¹²⁹

ICSID is a forum for the enforcement of all types of multi-lateral treaties, but it can be instructive in showing the types of issues investors face in overcoming procedural hurdles to gain jurisdiction to submit a claim. ICSID cases are not automatically published, but parties to the case can leak decisions to the public. Franck’s studies show that of the 144 publicly available investor-state dispute awards reviewed, states won eighty-seven cases, while investors won only fifty-seven.¹³⁰ Additionally, in 2013, ICSID published data showing that tribunals declined jurisdiction in 31% of cases, dismissed all claims in 32% of cases, and upheld 37% of the claim in part or in full.¹³¹

As of June 30, 2017, published statistics from ICSID reveal similar results. Results show that tribunals upheld 27.3% of the claims in part or in full, dismissed all claims in 25% of the cases, declined jurisdiction in 13.6%, and found that the claims made were manifestly without legal merit in 2.3% of cases.¹³² However, upon the request of both parties, 4.5% of cases settled through agreement, and 11.4% of cases were discontinued at the request of both parties.¹³³ This demonstrates that when a nonstate actor files a claim for arbitration against a state actor, the nonstate actor has only a one-in-three chance of winning at least some part of the claim. If a similar procedural barrier exists in the ECT, it would make the ECT a far less attractive protective mechanism for Chinese energy investment in the BRI.

V. What Is Keeping China From Joining the Energy Charter Treaty?

The upcoming discussion addresses three questions: (a) what problems with the ECT have dissuaded China from joining the treaty?; (b) what are the mutual benefits for China and the ECT if China joins the ECT?; and (c) what are the procedural issues to accessing dispute resolution under ECT Article 26? The ECT is relatively successful without China, and China is only one of many energy investors worldwide. Yet China’s joining the ECT would be mutually beneficial to the ECT and to Chinese investors.

A. What Problems With the ECT Dissuade China From Joining the Treaty?

There are possible issues may have dissuaded China from joining the ECT in the past, but these are surmountable obstacles. China’s first consideration might be the legal risks of joining the ECT in place of crafting BITs with investment partner states.

123. See Alejandro Lopez Ortiz & Michael P. Lennon Jr., *Investment Arbitration Under the Energy Charter Treaty*, MAYER BROWN: PRACTICAL LAW ARBITRATION, 6 (2015), https://m.mayerbrown.com/Files/Publication/28c75c6c-04bc-4af0-a99d-a30480f42c2a/Presentation/PublicationAttachment/1f2b3c20-ebb4-4942-b438-ac968709f00b/art_ortiz_lennon_inv-arb-under-energy-charter-treaty.pdf.

124. See Laurence Shore, *The Jurisdiction Problem in Energy Charter Treaty Claims*, 10 INT’L ARB. L. REV. 58, 60 (2007).

125. See SHEARMAN & STERLING, *supra* note 56, at 4.

126. See generally Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1 J. INT’L DISPUTE SETTLEMENT 153 (Feb. 1, 2010), <https://academic.oup.com/jids/article/1/1/153/879372>.

127. See Shore, *supra* note 124, at 60–61; The Energy Charter Treaty art. 17(1)–(2), Dec. 17, 1994, 2080 U.N.T.C. 95.

128. SHEARMAN & STERLING, *supra* note 56, at 3–4.

129. See Judge Stephen M. Schwebel, Keynote Address: In Defence of Bilateral Investment Treaties, at 6, http://www.arbitration-icca.org/media/2/14169776244680/schwebel_in_defence_of_bits.pdf.

130. *Id.*

131. *Id.*

132. See *The ICSID Caseload—Statistics (Issue 2017-2)*, INT’L CENTRE FOR SETTLEMENT OF INV. DISPUTES 30 (Aug. 1, 2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf). The author is grateful for the help of Jawad Ahmad and Judge Charles Brower in compiling these statistics.

133. *Id.*

I. Comparison of the Legal Risks of Joining the ECT and Creating Bilateral Investment Treaties With Investment Partners

What are the main drawbacks China perceives in joining the treaty, and why has it avoided membership thus far? Some analysts posit that China is reticent to consent to arbitration in an international forum with foreign investors, rather than using its own domestic courts.¹³⁴ If China joined the ECT, it would consent to arbitration with investors from several states that are not members of the World Trade Organization (“WTO”) regime.¹³⁵ This reticence seems like a plausible reason for China to distance itself from the ECT, since non-WTO member states and their investors cannot automatically obtain jurisdiction over an investment claim against China.¹³⁶ However, this should not be an issue, as China has been a WTO member since 2001 and became a “contracting party” to ICSID in 1993¹³⁷—giving China almost thirty years of experience defending itself in arbitration against alleged violations of international law. As China has already successfully defended itself in WTO disputes¹³⁸ and has a long history of ICSID membership, it would ostensibly be capable of defending itself against similar allegations of international law violations in dispute resolution under the ECT.

This is because international bodies such as ICSID (a platform for investor-state arbitration) and the WTO (a forum for state-to-state dispute resolution) provide platforms for implementing protections for investors and enforcing the various responsibilities of states. China is a member of both bodies and as a result it is already subject to international law in those forums. Notably, China has proven it can defend itself against other countries and foreign investors in these other forums. Therefore, it is capable of doing the same in an arbitral forum against foreign investors in China.

Some analysts point to the dispute settlement mechanism, transit, and energy efficiency requirements of the ECT as being too arduous to tempt China to join.¹³⁹ Yet these requirements are either already professed goals of the Chinese government or are similar to China’s other treaty obligations.¹⁴⁰ For example, on the environmental front, China is now implementing its strictest environmental policies yet, indicating that it is more interested in environmental compliance than avoiding environmental standards.¹⁴¹ China’s incorporation of arbitration clauses into BITs negotiated at

the beginning of the twenty-first century speaks not only to a new set of incentives based on rising outbound investment, but also shows that China is not going to uniformly avoid arbitration as a dispute resolution mechanism.¹⁴² Therefore, there must be a different factor keeping China from joining the ECT.

The Model Chinese BIT can be compared with the ECT to show what extra protections China has hesitated to incorporate into its international obligations. In the ECT, Article 10(i) provides that “each Contracting Party shall encourage and create stable, equitable, favorable, and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.”¹⁴³ These terms have specific and powerful meaning under international law, including the invocation of the FET standard.¹⁴⁴ Even the Model Chinese BIT, which is the modern template of a best-case scenario for new Chinese BITs, does not protect investment in this way. It instead only stipulates that “[e]ach Contracting Party shall *encourage* [italics added] investors of the other Contracting Party to make investment in its territory.”¹⁴⁵ Thus, the Model Chinese BIT does not provide the general, strong protections that the ECT gives all member states.

In addition, the standard Chinese BIT clause providing for “fair and equitable treatment” guarantees that foreign investors receive the same treatment as domestic entities but does not reference the protections of customary international law.¹⁴⁶ A vast body of customary international law (as incorporated by the ECT) provides for fair treatment, protection against discrimination, and protection against expropriation for international investors. As a result, Chinese investors are not protected by this greater standard afforded to investors of states that are party to the ECT. There is some dispute over whether the FET standard can provide as high of a standard of protection for international investments as other, more ambiguous language referring to customary international law.

Historically, China signed BITs to protect varying interests. On the one hand, BITs try to ensure protection for state-owned enterprises which act as conduits for investment.¹⁴⁷ On the other hand, the protections are aimed at alleviating the fears of foreign investors in China while maintaining the nation’s ability to exercise its sovereign police powers. Final decision-making control over investment in key areas remains extremely important to the Chinese government.

Yet as Chinese interests have changed, the Chinese government’s calculation of protections in bilateral agreements has also changed. The Chinese government now has an increasing incentive to protect outbound Chinese invest-

134. See Yodogawa & Petersonan, *supra* note 74, at 113.

135. See *id.*

136. WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT SYSTEM TRAINING MODULE: CHAPTER 5 (2018), https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c5s1p1_e.htm.

137. See generally *ICSID Membership*, ICSID, <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30> (last visited Jan. 9, 2018).

138. See Yodogawa & Petersonan, *supra* note 74, at 140.

139. *Id.* at 141.

140. China already has the same types of transit requirements under the General Agreement on Tariffs and Trade at the WTO and still adequately defends itself in WTO disputes. *Id.*

141. See Kenneth Rapoza, *China’s Tougher Environmental Policies Not Only Good for the Locals*, FORBES (Dec. 26, 2016), <http://www.forbes.com/sites/kenrapoza/2016/12/26/chinas-tougher-environmental-policies-not-only-good-for-the-locals/#2939961f7997>.

142. See Heymann, *supra* note 75, at 516.

143. See S. Zhang, *supra* note 51, at 613.

144. For a more in-depth discussion of the arguments in the case *Blusun v. Italy*, see <http://arbitrationblog.kluwerarbitration.com/2017/08/18/legitimate-expectations-absence-specific-commitments-according-findings-blusun-v-italy-inconsistency-among-tribunals-solar-energy-cases/>.

145. See S. Zhang, *supra* note 51, at 613.

146. See Heymann, *supra* note 75, at 515.

147. See Karl P. Sauvant & Michael D. Nolan, *China’s Outward Foreign Direct Investment and International Investment Law*, 18 J. INT’L ECON. L. 893, 915 (2015).

ment (rather than its previous trend of incentivizing foreign direct investment within China). As a result, China has changed the way it structures agreements with other nations. In the past few decades, the evolution of China's BITs demonstrates its gradual acceptance of more international norms that provide additional protections for its outward-bound investment. For example, at the start of the twenty-first century, when outward investment first began to increase, China started accepting ICSID jurisdiction in its BITs.¹⁴⁸ Examples of China incorporating international law and arbitration as a dispute resolution mechanism began in 2001. More recent BITs that provide for jurisdiction under ICSID include the BIT between China and the Netherlands (2001),¹⁴⁹ China and Bosnia-Herzegovina (2002),¹⁵⁰ China and Germany (2003),¹⁵¹ and China and Finland (2004).¹⁵² Each of these actions demonstrates that China is more willing to use arbitration as a dispute resolution mechanism, and is not specifically interested in avoiding arbitration to resolve disputes.

Chinese political culture also plays a role in shaping the risks the state undertakes in its international agreements. The Chinese political establishment dislikes uncertainty and is wary of giving up its strict one-party control of affairs—both foreign and domestic. The most recent example of this is their refusal to accept arbitration of the South China Sea dispute with the Philippines.¹⁵³

Chinese investors also need a strong regulatory atmosphere with clear laws and established procedures for dispute resolution when they invest in a foreign country where they are not the favored local investor. China's new position as a capital exporting country means that independent Chinese investors and Chinese state-owned enterprises have much to gain from participating in an investment treaty that provides clear and defined international legal protections for its trillion-dollar investments in the BRI. Yet statistics indicate that investors are often denied benefits under the ECT. As of June 2016, only one dispute relating to the regulatory measures of the host state was upheld for an investor on the merits, while seven cases were rejected at the jurisdictional or merits stages.¹⁵⁴

One of the reasons there can be such difficulty in establishing jurisdiction is that there is great ambiguity in the application of the ECT language in Article 17(1) to the jurisdictional stage of arbitrations. In its current state, China may not trust that the arbitration dispute mechanism is, in

fact, guaranteed to investors during times of difficult investment disputes. If the arbitration dispute mechanism is not a guarantee because disputes will be barred at the jurisdictional phase, Chinese investors will lack assurances of legal protection, thereby reducing the incentive to join the ECT. However, if the ECT can clarify the jurisdictional stage of an arbitration, it would not only make the ECT stronger, but also could remove the legal ambiguities which serve to prevent China from taking the ECT seriously as a dispute resolution mechanism.

A. Mutual Benefits for ECT and China

If China joins the ECT it benefits Chinese investors, Chinese state-owned enterprises, and the ECT as an international legal regime.

I. Legitimacy for the ECT

The ECT's reputation and influence on the world's energy markets is harmed when China is not a participant in the treaty. If China joined it would be a major boost for the scope and legitimacy of the treaty. China is the second largest economy in the world behind the United States, and it is planning to invest trillions in energy investments in the coming decades. If a major economic power like China used international arbitration as a means to solve disputes and protect its energy investments, other states and investors would likely also turn to the ECT as a mechanism to protect energy investments. A movement in this direction would strengthen the ECT's position as a preferred international institution that provides reliable international legal protections and dispute resolution for energy investment.

This is a critical time for the ECT, because several states have already withdrawn from the treaty, casting into doubt the ECT's future role in international energy investment protection. Italy and Russia's withdrawals may be for mostly internal political reasons, but they do not help the reputation of the ECT.¹⁵⁵ The exact reasons for Russia's withdrawal are unconfirmed, but some speculate that internal interests along with the desire to avoid payments for the *Yukos* affair could have contributed to this decision.

However, a big difference between Russia and China is that the BRI will cause the amount of China's foreign investments (exported capital) to greatly exceed the amount of investments it receives (imported capital). Investments in the BRI already are large and there are confirmed plans to increase Chinese outbound investment. These planned and current investments need protections that are absent from bilateral treaties. Chinese BITs fail to fit the needs of this level of investment.

148. See Heymann, *supra* note 75, at 516.

149. See *China—Netherlands BIT* (2001), INV. POLICY HUB (2013), <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/946>.

150. See *Bosnia and Herzegovina—China BIT* (2002), INV. POLICY HUB (2013), <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/598>.

151. See *China—Germany BIT* (2003), INV. POLICY HUB (2013), <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/905>.

152. See Heymann, *supra* note 75, at 516.

153. Ted L. McDorman, *The South China Sea Arbitration*, 20 AM. SOC'Y INT'L L. INSIGHTS 17 (2016), <https://www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration>.

154. See Stephen Jagusch QC, Anthony Sinclair & Philip Devenish, *The Energy Charter Treaty: The Range of Disputes and Decisions*, GLOBAL ARBITRATION REVIEW (June 9, 2016), <http://globalarbitrationreview.com/chapter/1036064/the-energy-charter-treaty-the-range-of-disputes-and-decisions>.

155. *Italy No Longer Member of Energy Charter Treaty, Hopes to Avoid More Arbitrations*, GLOBAL INV. PROT. (June 1, 2016), <http://www.globalinvestmentprotection.com/2016/01/06/italy-no-longer-member-of-energy-charter-treaty-hopes-to-avoid-more-arbitrations/>; see SHEARMAN & STERLING, *supra* note 56.

2. Substantive Protections for China: The Energy Charter Treaty as the Solution

By contrast, the ECT provides expansive protections for Chinese investment because it is the most comprehensive energy investment protection treaty currently available. The ECT would guarantee Chinese investment the benefits of fair and equal treatment, constant protection and security, and will reduce noncommercial risks.¹⁵⁶ If China were a party, its investors would receive MFN status comparable to any other party to the treaty when investing in its country's energy resources.¹⁵⁷ Chinese investment would be protected against expropriation, and discriminatory or unreasonable treatment.¹⁵⁸ This includes discrimination based on political instability, which could be an issue in many of the energy-rich states where China plans to invest.

China has historically resisted arbitration as a dispute resolution mechanism, as exhibited by its lack of consent to arbitration in early BITs.¹⁵⁹ Yet China has slowly begun to avail itself of standard arbitration mechanisms. For instance, China is already a member of ICSID, and therefore has shown its willingness to consent to arbitration in some cases. As far back as 2007, China participated in its first ICSID case in *Tza Yap Shum v. Republic of Peru*.¹⁶⁰ The change came as China switched from being a majority capital importer, where billions of dollars of foreign investment flowed into the domestic Chinese market, to a majority capital exporter, where Chinese capital now flows outside of the country.

In contrast, China's old BITs reflect an inward-looking economy. They have prohibitive restrictions before a dispute can be submitted to ICSID. First, a foreign investor must submit a dispute to administrative review in China.¹⁶¹ Then, after a dispute is brought before a Chinese court, there is only a limited ability for an investor to apply for international arbitration.¹⁶² The prerequisites are strict enough to severely limit access to international arbitration in the case of a dispute between foreign investors and China. Conversely, however, the ECT has a "fork in the road" provision allowing the investor to choose either domestic litigation or arbitration, while if they chose to proceed with domestic litigation, then arbitration is precluded. This choice between dispute settlement methods is unique to the ECT, and is unavailable in the old BITs.

Although China has insisted on these stipulations to govern foreign investors in China, it is unlikely that China would want similar restrictions on its own projects when investing abroad. If China wants to provide leadership and investment dollars to Eurasia, it must accept legal notions of fair play between nations. China's participation in the ECT incorpo-

rates it as a major stakeholder in an international system of legal rights and responsibilities.

B. China's Proposed Domestic Courts Are Insufficient to Protect the BRI

In February of 2018, news organizations began reporting about the Chinese move to establish domestic adjudicative bodies to hear disputes relating to the BRI.¹⁶³ These reports were based off of an earlier Belt and Road conference in October of 2017, where judges from the Supreme People's Court in China ("SPC") discussed establishing a BRI International Commercial Court.¹⁶⁴ By March of 2018, the SPC had clarified that they are indeed establishing an International Commercial tribunal, which will not be an arbitration body.¹⁶⁵

Domestic courts are not a viable alternative to joining the ECT. Domestic courts will have difficulty gaining jurisdiction and enforcement over host states when an investment dispute arises. In addition, these courts will have to build from scratch, while the ECT provides a tested foundation incorporating an entire body of international investment protection law to protect Chinese investors.

C. Procedural Issues in the ECT's Arbitration Proceedings: Cases

Article 17's denial of an investment protection mechanism aims to block non-member state parties and non-qualifying investments from accessing protection through dispute resolution while still at the jurisdictional phase.¹⁶⁶ One of the first tribunals constituted under ECT rules discussed whether Article 17 applied at the jurisdictional stage in *Plama Consortium Limited v. Republic of Bulgaria*.¹⁶⁷ In this case, Judge Higgins stated that the tribunal would take the claimants' factual assertions about the dispute as true when determining if the tribunal has jurisdiction to hear the claim.¹⁶⁸ This mirrors the procedure for a motion to dismiss in U.S. courts.¹⁶⁹ Judge Higgins suggests that the test should be applied during

156. See Jacob & Cirlig, *supra* note 53, at 73; see also Yodogawa & Petersonan, *supra* note 74, at 138–39.

157. See Jacob & Cirlig, *supra* note 53, at 73.

158. See Yodogawa & Petersonan, *supra* note 74, at 138.

159. Dulac & Savage, *supra* note 82.

160. Heymann, *supra* note 75, at 526.

161. *Id.* at 525.

162. *Id.*

163. Tianshu (Susan) Lu & Yisha He, *Recent Developments in China's Cross-Border Dispute Resolution Under the "Belt and Road Initiative,"* AM. REV. INT'L ARBITRATION (Feb. 1, 2018), <http://aria.law.columbia.edu/recent-developments-in-chinas-cross-border-dispute-resolution-under-the-belt-and-road-initiative/>; Sabena Siddiqui, *Beijing Plans New Mechanism for Belt and Road Arbitration*, ASIA TIMES, Feb. 7, 2018, <http://www.atimes.com/belt-road-arbitration-new-mechanism/>.

164. Susan Finder, *SPC Reveals New Belt & Road-Related Initiatives*, SUPREME PEOPLE'S COURT MONITOR (Oct. 7, 2017), <https://supremepeoplescourtmonitor.com/2017/10/07/spc-reveals-new-belt-road-related-initiatives/>.

165. Susan Finder, *Update on China's International Commercial Court* (Mar. 11, 2018), <https://supremepeoplescourtmonitor.com/tag/belt-road/>.

166. See, e.g., The Energy Charter Treaty art. 17, Dec. 17, 1994, 2080 U.N.T.S. 95; Thomas Roe & Matthew Happold, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 40 (James Dingemans cons. ed., 2011); Mistelis & Balta, *supra* note 121, at 1321; Shore, *supra* note 124.

167. See *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 149 (Feb. 5, 2005); see generally Shore, *supra* note 124.

168. See *id.*, *supra* note 116.

169. *Id.*

the early stage of the proceedings in order to determine the validity of a jurisdictional objection under Article 17.¹⁷⁰

The *Plama* tribunal also stated that a close reading of the ECT indicates that a party may only trigger Article 17 protections during the merits stage of the arbitration.¹⁷¹ This means that a party could not use Article 17 to dismiss the claim before the tribunal during the jurisdictional stage. The tribunal reasoned that denying the dispute resolution benefits of Article 26 through the use of Article 17, would allow the party invoking Article 17(1) to be its own judge, since the state could seek to dismiss the claim at the jurisdictional stage rather than allowing the claim to be heard by the tribunal on the merits.¹⁷² The *Plama* tribunal concluded that this is impermissible, as it “is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all.”¹⁷³

Unfortunately for investors, no treaty interpretation or international law compels this approach.¹⁷⁴ Therefore, Judge Higgins’ procedural clarification has no binding effect over subsequent cases. All arbitrations under the ECT are non-binding, creating no strict precedent to guide other tribunals.¹⁷⁵ As a result, there is no way for an independent tribunal decision to create a binding procedure for other arbitrations under the treaty. Although an argument exists that there is *de facto* binding precedent of prior decisions in certain types of arbitrations, no enforceable restriction against a tribunal judge exists.¹⁷⁶

Consequently, other tribunal decisions or arguments submitted to tribunals about the application of Article 17 can be just as persuasive as Judge Higgins’ argument. In the *Plama* case, Bulgaria argued that the ECT drafters intended to provide “a direct and unconditional right of denial [under Article 17] which may be exercised at any time and in any manner.”¹⁷⁷ The tribunal rejected this argument on the basis that access to Article 26 of the ECT as a forum for dispute settlement is essential to the analysis of whether Article 17(1) or (2) is applicable to their case.¹⁷⁸ In *Petrobart Limited v. Kyrgyz Republic*, Article 17 was seen as a jurisdictional defense because the tribunal referenced Article 10(2) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce to support its determination of when a jurisdictional objection may be heard.¹⁷⁹

However, as *Petrobart* is not a binding decision, it does not prevent other tribunals from determining otherwise. For example, a tribunal could use Article 31 of the *Vienna Convention on the Law of Treaties* to come to a different conclusion about whether to apply Article 17 on the merits or merely to its prospective effect.¹⁸⁰ The decision in *Yukos* proved extremely beneficial to investors in that case, but its determination on denial of benefits does not clarify this procedural ambiguity, but rather, only provides one example of how to apply the clause.¹⁸¹ This lack of clear precedent creates an unfortunate ambiguity. As mentioned before, the Chinese government dislikes ambiguity.¹⁸²

In cases with such ambiguity, international arbitration tribunals often reach varying conclusions regarding the issues before them, contrary to the idea of *de facto* binding precedent.¹⁸³ Several ICSID tribunals have considered Article 17’s provision to constitute a preliminary objection to a case.¹⁸⁴ These determinations were based on the fact that arbitration was offered to investors as a specific membership benefit. Without the right to arbitration, investors would not have access to the remedies provided in the ECT, and both membership and arbitration as a dispute resolution mechanism under the treaty would be useless. This becomes apparent in other cases where ambiguity exists in this part of a BIT. For example, in *Siemens v. Argentina*, the tribunal stated that access to arbitration under the Argentina-Germany BIT was part of the treatment and benefits afforded to foreign investors.¹⁸⁵

Even after the *Plama* case, other international tribunals did not establish a clear customary international legal standard for when Article 17 applies, and whether the facts presented in the claim should be presumed true. Some tribunals refer to contradictory cases as supporting their determinations. In two ICSID cases, bare allegations of a violation of an ECT protection were insufficient to bar the claim from moving forward.¹⁸⁶ In *Salini v. Jordan* under the Italy-Jordan BIT, the tribunal did not reference Judge Higgins’ test of accepting the facts presented by the claimant as true.¹⁸⁷ The same omission occurred in *Impregilo v. Pakistan*, again under the Italy-Pakistan BIT.¹⁸⁸ Neither of these cases was arbitrated under the ECT, but international arbitration cases occur so infrequently that trends are better determined by analyzing the development of customary international legal norms in arbitration generally.

170. See *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 149 (Feb. 5, 2005).

171. See *Shore*, *supra* note 124.

172. See *Roe & Happold*, *supra* note 166, at 42; *Mistelis & Balta*, *supra* note 121, at 1316–17.

173. *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 149 (Feb. 5, 2005).

174. *Shore*, *supra* note 124, at 62.

175. *Id.* at 64.

176. See generally Alexis Mourre, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions*, KLUWER ARBITRATION BLOG (May 28, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions/>.

177. *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 149 (Feb. 5, 2005); *Mistelis & Balta*, *supra* note 121, at 1318.

178. *Mistelis & Balta*, *supra* note 121, at 1318.

179. Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1 J. INT’L DISPUTE SETTLEMENT 153, 177–78 (2010).

180. See *Shore*, *supra* note 124, at 59, 62–63.

181. See SHEARMAN & STERLING, *supra* note 56, at 3–4.

182. Fu Ying, *Why China Says No to the Arbitration on the South China Sea*, FOREIGN POLICY, July 10, 2016, <http://foreignpolicy.com/2016/07/10/why-china-says-no-to-the-arbitration-on-the-south-china-sea/>.

183. See *Mistelis & Balta*, *supra* note 121, at 1321.

184. See *id.* at 1317.

185. See *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 102 (Aug. 3, 2004); *Mistelis & Balta*, *supra* note 121, at 1317.

186. See *Shore*, *supra* note 124.

187. See generally *Salini Costruttori S.p.A. & Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 15, 2004); see also *Shore*, *supra* note 124.

188. See generally *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005); see also *Shore*, *supra* note 124.

Unfortunately, these tribunals do not replace Judge Higgins' proposed standard with an alternate jurisdictional test.¹⁸⁹ Both tribunals refer to the International Court of Justice case regarding the legality of use of force in Yugoslavia,¹⁹⁰ where the court performed a clear, factual analysis at the preliminary stage of the proceedings, clarifying that bare allegations are insufficient for a claim to proceed.¹⁹¹ At the same time, these tribunals quoted other tribunals such as *Ambatielos*, and the *Oil Platforms case* (an arbitration at the International Court of Justice), which suggest a stricter test.¹⁹² This test demands that facts and law be presented with a more objective criteria standard before a decision can be reached on the tribunal's jurisdiction over the claim.¹⁹³ Unfortunately, this new test is still unclear, and *Salini* even relied on other parts of *Plama* to come to its conclusions, increasing the ambiguity of this issue rather than clarifying an alternative standard.¹⁹⁴ Thus, no clear standard exists under customary international legal norms that a tribunal under the ECT can use to clarify this confusion.

Despite China's seeming willingness to apply international law and use arbitration in its BITs to resolve disputes, China still remains a nonmember of the ECT. The question then becomes how can the ECT provide China with incentives to join the treaty, and, in the process, strengthen its existing arbitration regime?

VI. What Incentives Can the Energy Charter Treaty Provide China That Will Convince It to Join the Treaty?

The ECT should issue a 'Declaration' clarifying procedures during the jurisdictional stage of arbitration proceedings. If the ECT can transform itself into a guaranteed investment protection mechanism for the BRI projects, it would provide an attractive incentive for China to join the treaty. In return, with China's membership, the ECT would gain greater leverage mediating investment disputes in the global energy sector.

A specialty body within the ECT already exists to study and address this issue. The Legal Advisory Task Force ("LATF"), created by the Energy Charter Secretariat in 2001, assists member states in drafting Model Agreements for cross-border oil and gas pipelines.¹⁹⁵ As such, the originally intended parameters did not contemplate the LATF as commenting on questions relating to the jurisdiction of claims under the ECT. However, the task force seeks to ensure that member states enter into balanced and legally

coherent agreements.¹⁹⁶ Thus, as a contract-drafting body, the task force could clarify who has the right to utilize the dispute resolution provisions of the ECT in order to smooth out ambiguities in the process.

The LATF could start by clarifying proceedings at the jurisdictional stage. The LATF should adopt a 'Declaration' for the treaty that codifies Judge Higgins' decision in *Plama*. Specifically, the 'Declaration' could state the following:

Declaration on the application of Article 17 to Contracting Parties' rights under Article 26:

An arbitral tribunal acting on its authority under Article 26 will presume the claimant's assertions to be true when determining whether the tribunal has jurisdiction to hear the claim.

This declaration may be difficult to ratify, but worth the effort. The LATF has not been used for this purpose before. However, China's membership in the ECT will strengthen the treaty's prominence and provide all of the treaty members with clear adjudication standards for increasingly complex global energy disputes.

VII. Conclusion

China cannot afford uncertainty in its multibillion-dollar energy investments. The current procedural ambiguities in determining jurisdiction for arbitration under the ECT create uncertainty about whether Chinese investments will be protected under the existing international legal framework. After the country's political reform and economic opening of the 1980s, many foreign perceptions of the Chinese government's legitimacy have grown more favorable. This is largely due to breathtaking economic growth that has lifted more than 600 million people out of poverty. In a democratic system, a government would gain legitimacy in its dealings in the eyes of its population through elections. However, China is dependent on economic growth to maintain its legitimacy, and so cannot afford to allow its BRI investments to be unprotected by international investment law. Chinese leaders cannot afford to join BITs that provide insufficient investment protection to its BRI initiative.¹⁹⁷

The ECT needs to publish a 'Declaration' clarifying that ECT Article 17 should be applied to the merits stage of arbitrations, rather than merely to the jurisdictional stage. In order to solidify its standing as the universally accepted mechanism to settle investment disputes, the ECT cannot afford to have one of the world's major energy investor nations on the outside of its treaty jurisdiction. Instead, the ECT should take advantage of China's new BRI, and incentivize China into joining the treaty by providing more explicit access to its dispute resolution mechanism. As the Chinese government would say, this would be a "win-win" situation for both the ECT and Chinese energy investors.

189. See Shore, *supra* note 124.

190. *Legality of Use of Force* (Yugoslavia v. It.), Order, 1999 I.C.J. 481, ¶ 25 (June 2, 1999).

191. See *id.*

192. See *Roe & Happold*, *supra* note 166, at xviii, n. 43; Shore, *supra* note 124, at 61.

193. See Shore, *supra* note 124, at 61.

194. *Salini*, ICSID Case No. ARB/02/13, at 16 (Nov. 15, 2004); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 149 (Feb. 5, 2005); Shore, *supra* note 124, at 61.

195. See *Legal Advisory Task Force*, INT'L ENERGY CHARTER, <https://energycharter.org/who-we-are/legal-advisory-task-force/> (last visited Dec. 29, 2017).

196. *Id.*

197. See generally Yang Yi, *China's Economic Growth Remains Solid: World Bank*, XINHUA (Jan. 1, 2018), http://www.xinhuanet.com/english/2018-01/10/c_136884677.htm.