

## **IRAN'S LIMITATIONS IN ENERGY TRANSIT IN THE LIGHT OF ENERGY CHARTER TREATY**

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### **Abstract**

Energy charter treaty, ECT in short, is a sort of multilateral pact that was endorsed on 17th of December, 1994 in Lisbon. The most important part of the charter is related to transit the regulations of which have been embedded in 17 articles. The studies show that less attention has been paid in Iran to the issues beyond the transit and the treaty, as well, is essentially silent regarding the effect of extra-treaty factors. Security Council and EU's multilateral and the US's unilateral embargoes are amongst the factors that have been influential in the investors' exit from Iran and reduction in Iran's oil sales. The present study has been conducted to inter alia evaluate the extent to which ECT can provide sales' security for Iran; it will be also seen if this treaty can lift restrictions on Iran's sales of oil or not. The results of the investigation indicated that Iran's embargoes, especially oil sanctions, are contradictory to the explicit text of the transit regulations that have been inserted in article 17 thereof. In general, the international trade needs should be satisfied based on the aforementioned act through setting the grounds for access to the market resources disregarding the source, destination and energy ownership so Iran's embargo-based restrictions are in conflict therewith. Moreover, the states and the private sector investors follow US's economic power more than staying bound to the treaties in their relations with Iran.

**Keywords;** treaty, energy, transit, restriction, embargo.

### **Introduction**

Energy charter treaty, abbreviated as ECT, is a sort of multilateral pact that was signed on 17th of December, 1994, in Lisbon. This treaty was suggested by the former minister of the Netherlands, Ruud Lubbers. The primary and preliminary goal of the treaty was facilitating the cooperation between the energy sectors in western Europe, countries in the former Soviet Union (FSU) and the eastern Europe countries. The suggestion by Ruud Lubbers was supported by the European countries during June, 1990; the treaty lacked the political requirements but it was signed by a consortium made of 49 countries and EU. This European treaty was also welcomed by such other countries as the US and Japan; 1990's declaration became the main cornerstone of the later energy charter treaty (ECT). The countries participating in the negotiations related to this treaty knew that the success of any effort for opening the energy markets in eastern Europe as well as in the former Soviet Union's countries depends on the ability for supplying free energy transit. According to Jenkins, it is not exaggerative if it is stated that "the success of the whole western investments in oil and gas industries depends on the economic and sure energy transmission paths from the production point to the European markets" (Jenkins, D., 1996). Iran, as well, joined ECT in 2002 as a supervising member. In order to exploit its rich oil and gas

resources, Iran needs cooperation of the other countries, especially the west, in various areas like investment, technical knowledge and market. Moreover, Iran's geopolitical situation which is the result of its being situated in the distance between two of the world's largest energy areas has made it one of the goods and energy transit routes between Asia and Europe. Considering Iran's importance in terms of the geography of energy, particularly oil and gas, the question is that how much ECT can provide Iran with sales' security and also can this treaty lift the restrictions on Iran's sales of oil or not?

### **Historical Trend of Transit Freedom**

Transit means carrying goods from a country to another without paying anything as transit rights which is per se defined as customs' rights (Amid, 1995, under the same title); transit freedom is a subject that has been posited since 17th century and its traces can be also seen in business freedom convention that was concluded in Barcelona in 1921 as well as in New York convention in 1965 and also in general agreement on tariffs and trade (GATT) which had been prepared in 1948 by 23 countries in Geneva. The agreement was originally a part of a draft for international business organization's charter that was arranged in Berthon Woods Conference and introduced along with international monetary fund and world bank after

the world war. Transit freedom has never been an absolute right. In fact, the pivotal and undeniable principles of the states' governance are amongst the fundamental barriers extant on the path of the claims related to transit rights. These two principles cannot get along well. It is in the light of this reality that article 7 of ECT regulations tries to create a sort of reconciliation and balance between these two paradoxical concepts (Mokhber and Mehrasma, 2003, p.4).

The energy charter treaty features a specific structure that includes energy charter conference consisted of the business and transit workgroup, strategy workshop, investment workgroup and industry advisors' workgroup; the treaty also has a permanent and small secretariat in Brussels, Belgium's capital. Another part of the treaty's structure is comprised of the permanent and supervising members (Ghaffari, 2014, pp.6-8).

The most important part of ECT is related to transit the regulations of which have been mentioned in article 17 thereof. Transit is a business action that was conducted in the past through bilateral agreements or based on international laws. The charter's transit regime has created obligations for the member states with the followings being the most important of them:

- Principle of no discrimination was developed in the article 5 of GAAT and balanced the relationships between the producing, importing and transiting countries and, in general, equilibrated the international business's needs.
- Based on the aforesaid principle, the ground was set for access to market resources disregarding the energy source, destination and/or ownership.

### **Universal Importance of Energy Sector and Treaty**

The universal importance of energy and treaty is related to oil more than anything else because oil is a simple commodity which is not the product of industrial processing; due to the same reason, its strategic position in the international business goes beyond an ordinary commodity, especially in the countries that have single-product and oil-depending economy. Oil accounts for over 50% of the world's business. Besides having economic value, this commodity is also considered as a strategic commodity in many of the political equations and, due to the same reason, organizations like OPEC, oil treaties like ECT and investment and transit pacts have been formed to play a role in regulating the relations and trades between the producing and consuming countries and oil cartels. "Investment in oil is a sort of investment wherein the host and the capital-owning

countries share interests disregarding the profit-acquisition. Investment in oil industry of a country might not be very much following the market expediencies" (Shiravi, 2014, p.79). Amongst the problems of the countries possessing rich oil sources is their weak economic performance. Generally, they have weaker performance and lower economic growth in comparison to the countries that have little or no natural resources (Shirkhani, 2010, p.116). considering these countries' single-product economy, weak economic growth and oil's strategic nature, many problems can come about (Ibid, p.366). That is because the consuming and the developed countries follow business policies in international level in respect to the producing countries while the oil-producing countries generally lack the advanced discovery and extraction technologies and do not have sufficient capital for performing oil projects. Furthermore, considering the authoritativeness of the states and their creation of suppression in their countries as well as the non-participation of the oil-owning countries in financial supply of the oil contracts, including the partnership and the executive costs' supply contracts, the international oil companies are obliged to take measures in line with the project development and even oil sale, as well, at the same time with supplying the financial resources of the project (Shiravi, 2014, p.366).

### **Energy Transit Protocol and Iran's Position**

In order to take advantage of its rich oil and gas resources, Iran needs cooperation of the other countries, especially the west, in various areas like investment, technical knowledge and market. Also, Iran's geopolitical position (being situated in the distance between two large areas of the world's energy) made it one of the goods and energy transmission axes between Asia and Europe. It is due to the same reason that Ruud Lubbers, founder of ECT, emphasizes on the interests resulting from Iran's presence in this treaty (legal and political outcomes, 2002, p.34)<sup>1</sup>. Such a situation has made it Iran fall within the framework of all the region's transit plans, including Corridor TRACECA and ALTID Corridor. In addition, attentions should be also paid to the region's political status following the downfall of Saddam Hussein, Iraq's ruler, in the region. For example, reference can be made to the created opportunities one of which is the possibility of free traffic in Iraq and use of its infrastructural networks; a new land-based corridor that connects Iran with a relatively short distance to the Mediterranean coasts in Syria and, particularly,

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<sup>1</sup> Legal and Policy Implications of a relationship of two International Treaties in Natural Energy Resources CEPMLP/Dunde/Fobxuary, 2002, p.34

Lebanon. This path of energy and goods conveyance can exert a large deal of effect on the routes in the east and west of Asia as well as in Europe (Mokhber and Mehrazma, 2002, p.6). According to the experts, this new path is preferred to TRACECA in terms of distance, time and cost. Also, the oil and gas swap<sup>2</sup> with Azerbaijan and Turkmenistan and Iraqi governing council's expression of willingness for stretching an oil pipeline to Iran are amongst the other manifestations of the undeniable necessities of Iran's role in energy transfers (Mokhber and Mehrazma, 2002, p.8).

#### **Iran's Membership in Energy Charter Treaty**

Iran could join ECT in 2002 as a supervising member. Joining this treaty like the others was accompanied by opportunities and challenges for the member countries, including energy producers and consumers. Undoubtedly, Iran's presence in any international treaty for energy transmission from the Middle East region is necessary for both Iran and the world. Construction of gas-transmission pipelines to Turkey, decision for constructing gas-transmission pipelines to Pakistan and India and investment in the development of LNG fleet are testimonies conveying Iran's readiness and necessity of presence in these international treaties and enjoyment of the benefits of them; however, two bottlenecks of Iran's energy transmission are Russia and Turkey and It is imagined that Iran's presence in the treaty without the presence of one of the two foresaid countries can be so much resolving in energy transit problems. In other words, ECT's success in energy transmission demands the concomitant presence of two of these three countries (Mokhber and Mehrazma, 2003, pp.8-9)<sup>3</sup>.

#### **Iran's Embargoes and Energy Transit Problems**

Embargo is amongst Iran's old, i.e. Mosaddeq's time, and new problems. Energy transit from Iran is followed by the problem of case-specific and, occasionally, full-scale embargoes imposed by the US and this is a topic going well beyond the ECT's subject. The issue can be identified in global level and its cases can be defined; the rest of the energy, especially oil, transit problems are also influenced by embargoes; this is while the period ending in the establishment of ECT and the conditions and the

concerns of the various states were under the influence of:

- The political conditions existent in the former Soviet Union countries that essentially had no or imperfect transit regulations;
- Many of the potential energy transit routes' passing through the highly hostile territories: a lot of disputes between Russia, other FSU<sup>4</sup> countries and eastern Europe's countries with all of them being rooted in transit (Van Elsuwege, Peter, 2008, p.xxii);
- In addition to political issues, a number of special energy sector's economic concerns that caused the emergence of certain problems and concerns that, as Fatourwl puts it, energy, oil and, especially, gas transmission necessitates heavy investments reaching in size to the investments required for production and even occasionally more than its costs<sup>5</sup>.

As it was mentioned, Iran's problems in energy transit have been caused by restrictions that go beyond ECT. These restrictions can be termed "oil restrictions" and they even include financial limitations imposed by the US government on Iran in such a way that there is no possibility of foreign currency transfer even in case Iran sells oil. In fact, the sanctions against Iran include the series of measures taken by the world powers parallel to the punishment of Iran's government or coercing this country to the performance or non-performance of certain actions. Most of the embargoes against Iran have been imposed after the victory of Islamic Revolution in 1978 following the occupation of the US embassy in Tehran and they were intensified following the challenges over Iran's nuclear program. Iran's atomic program encountered various bans since 2006 and following the referring of this country's file by the international atomic energy agency to the security council. Iran's embargoes can be classified into four general sets from the perspective of the imposers

- Multilateral embargoes like the ones by UN's security council
- EU's embargoes
- Unilateral embargoes by various countries like the US and the bans imposed by the US congress (Haidar, J. I., 2015).

In regard of Iran's complete oil boycott, it has to be stated that there had been proposed several bills for

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<sup>2</sup> Literally, "swap" means a barter, exchange and trade commodities without money; it commonly means the receipt of goods in one point and delivery of exactly the same amount of goods in another spot.

<sup>3</sup> Of course, the discussions on energy transmission through Iraq to Mediterranean region and Europe entails separate studies and investigations.

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<sup>4</sup> Former Soviet Union was consisted of 15 independent states that separated from the socialist Soviet Union after its collapse in December 1991.

<sup>5</sup> Fatourwl, A. A., (1998), "Energy Transit and Investment in Energy Charter Treaty"

lowering Iran's exports through exertion of more pressures to below 500 thousand barrels and even complete cessation of oil exports till the end of 2013. The followings are but some of these bills:

- The plan for prevention of nuclear Iran in 2013 (H.R. 850)
- The law on the enforcement of bans on Iran in 2013 (S.965)
- The law on forbiddance of Iran's exports (S.1001) (Manzour and Mostafapour, 2013, p.25).

Based on its informed sources as well as the information it had acquired from marine transportation, Reuters News Agency reported on 15th of May, 2013, that Iran has exported less than 700 thousand barrels of crude oil during May, 2013, and that the Asian buyers, as the most substantial of Iran's oil customers, have actually reduced their oil imports from Iran for 12%. Such a reduction in imports made US grant import exemptions to these and several other countries. American officials have also stated that China's oil imports from Iran have been really decreased. On the other hand, Obama stated in the beginning of June that the amount of oil supply to the global markets by the other oil-exporting countries is to the extent that strict embargoes against the purchase of Iran's crude oil can be continued. The law on the prevention of Iran's nuclearization seeks driving Iran out of the list of the first four oil-producing countries through forcing Iran to reduce its oil exports to below 500 thousand barrels a day. On the other hand, elimination of Iran's oil exports via increase in the US's domestic production in line with the law on the imposition of embargoes on Iran in 2013 based on the idea that Iran exports 1250000 thousand oil barrels per day seeks increasing the US's oil production to reach 1250000 thousand barrels per day to make up for all Iran's oil exports in the global market. The law on the prohibition of Iran's exports is another bill seeking for limiting or stopping Iran's oil sales and, based thereon, all of the individuals entering oil purchase and sales directly or indirectly with Iran's government or government-dependent individuals and institutions will be faced with US's unilateral embargoes (Manzour and Mostafa, 2013, p.25).

### **Study Background**

Many of the studies performed on law and/or economy fields of study have paid attention to the benefits of ECT and these studies have predominantly concentrated on the treaty's structure and functions and nearly none of them has dealt with the extra-legal policies and the powerful countries' policy-making which go beyond the international treaties or organizations

and Iran's problems in goods and energy transit are related to embargoes and the treaty's articles are not promising in this regard. For instance, Alireza Mazloumi (2019) has investigated the legal outcomes of joining ECT in regard of energy transit for Iran and believes that ECT includes all the energy types and byproducts and that all of the countries, including the producing, transiting and consuming countries will benefit from the existence of a balanced framework for cooperation in energy sector; however, he has kept quiet about embargoes and the investing institutions and European countries' leaving of Iran's oil centers. Mortazavi and Shahsawari (2018), as well, have examined the private legal system of energy charter treaty in the area of oil and gas and Iran's joining of this treaty and considered ECT as a modern and internationally important treaty containing modern, comprehensive and pervasive regulations. They have concluded that this treaty is very notable for Iran that possesses abundant oil and gas reservoirs and enjoys a prominent transit position in the region but they have presented no discussions about the embargoes as the transit-limiting factor. Kaimifard (2017) has focused on ECT and Iran's membership and elaborates some of the matches and mismatches between Iran's and ECT's regulations.

Shafi'ei, Hashemi and Piltan (2016) have dealt with the comprehensiveness of the ECT in terms of energy-related subjects like investment, business, transit, productivity, environment and dispute-resolution methods in proportion to each sector; they announced that since a vast part of the aforementioned treaty's regulations in business domain have been drawn on GAAT and World Trade Organization's regulations, GAAT and WTO's agreements have been taken into account for elucidation of the free business principles and regulations in the oil and gas area. Considering the legal effects of the extra-charter embargos imposed on Iran's oil industry and emphasizing on the technologies in the high-level oil industry, Allahbakhshi (2016) has come to the conclusion that Iran's energy sector encountered challenges due to its technological dependencies on the international energy companies, particularly in upstream oil industries, including in the financial supply of energy plans and cessation of a great many of the projects for the dependencies on the international energy firms.

Focusing on this treaty, Aghababa'ei Dehkordi (2014) appraises as important the treaty's share in codification of regulations for encouraging and supporting foreign investors as well as liberation and elimination of the barriers in energy business but essentially overlooks the powerful countries' imposing of their will. In an investigation of the

globalization of energy sector through the path of GAAT and WTO, Sadeghi Shahedani (2013) concludes that the oil-exporting countries opined that they obtain little profit in joining GAAT and they will also become the importers of the other goods. Thus, they thought that their being required to enforce GAAT regulations would generally cause them to sustain losses considering their own policies in energy sector as well as their import system.

### Findings

Considering the historical records of transit that date back to 17th century, a legal structure and function has been obtained in energy trades and it includes business and transit workgroups, strategy, investment and industry advisors but it lacks legal regulations and executive warrants in respect to the matters beyond the charter. Additionally, the most important part of the charter is transit which is a business action regulated according to the importance of energy for the exporting and importing countries but no talks have been made regarding the pressure levers for coordinating a country with the international system; it can be seen based on the behaviors and systems of the US and Islamic Republic of Iran that the charter is silent regarding the oil crises stemming from the conflict between the states and continues and also supports the trade with the states lacking legal limitations.

Moreover, in order to balance the legal relations between the countries possessing rich oil resources but performing weakly in economic terms, ECT holds that the legal relationship between the consuming and developed countries should be based on the business relations and agreements but it is silent about the interferences of the extra-charter factors and there is also no articles in the treaty for restricting the powerful countries in their prohibitions and embargos of energy business. Furthermore, the treaty has not clarified the nuclear energy development limitations so that the producing and consuming countries can keep themselves bound to them.

The embargoes counted by Haidar (2015) such as the bans by the UN's security council, EU, USA and the boycotts by the US's congress (Haidar J. I., 2015) are amongst the embargoes influencing the prevention of energy business and transit so there is a need for new strategies and policies because the detrimental effects of these sanctions are contradictory to the human rights and humanitarian articles.

### Conclusion and Discussion and Interpretation

- The subject "Iran's membership in ECT" is of no use considering the limitations imposed

through the powerful countries' devising of policies regarding the embargos. ECT only serves membership and notification of the enactments and, possibly, declaration of ideas.

- In the area of oil and gas, the foreign countries' hostile treating of Iran and its mutual retaliation cannot be resolved through ECT which is basically silent in this regard.
- Security Council and EU's full-scale and US's unilateral embargoes are amongst the factors that have influenced the investors' exiting of Iran and reductions in Iran's oil sales. Therefore, the ECT's ineffectiveness is vividly clear in this regard.
- Some of the countries like China and Russia's accompaniment of and coordination with Iran regarding the treaty's subject has not resulted in the resolving of the problems rather it prevents the emergence of more problems and development necessitates elimination of all the problems.

The embargoes imposed on Iran, especially the oil sanctions, are in conflict with the explicit text of the ECT's regulations that have been inserted in article 17 thereof and are based on the principle of no discrimination as introduced in the article five of GAAT to serve creation of balance between the producing, importing and transiting countries and, generally, the international business needs. Additionally, based on the aforesaid principle, the grounds of access to market resources should be set without paying attention to energy source, destination or ownership hence Iran's embargo-induced restrictions are contradictory thereto.

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