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ENERGY DISPUTES ARBITRATION: LEGAL ISSUES

Master thesis

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LIST OF ABBREVIATIONS

ECT – Energy Charter Treaty

ICSID – International Centre for Settlement of Investment Disputes

ICSID Convention – Convention on the Settlement of Investment Disputes between States and Nationals of other States

FET – Fair and equitable treatment

Ibid. – Ibidem

SCC – Stockholm Chamber of Commerce

EU – European Union

ECtHR – European Court of Human Rights

ECJ - European Court of Justice

TCA - The EU–UK Trade and Cooperation Agreement

CJEU - Court of Justice of the European Union

ISDS - Investor-State Dispute Settlement

MIC – Multilateral Investment Court

GSA - Gas Sale Agreement

PCA – Permanent Court of Arbitration

UNCITRAL – United Nations Commission on International Trade Law

BIT(s) – Bilateral investment treaty(ies)

UNCTAD – United Nations Conference on Trade and Development

Ibid. – Ibidem

IRENA - Economic Cooperation Organization, International Renewable Energy Agency

WTO - World Trade Organization

UNECE - United Nations Economic Commission for Europe

OECD - Organisation for Economic Co-operation and Development

INTRODUCTION

Statement of topic. Energy disputes consists the significant part of all disputes which are sold by arbitration as one of the methods of dispute resolution. Energy cases are large, complicated because of its corporate structure, including holding companies, subsidiaries, foreign control, determination of investors and their right for such protection as arbitration. The hugest arbitration cases were related to energy sectors. Such disputes arise from contracts between companies, therefore the commercial arbitrations are commenced, or investment arbitration, which appears, in general, after the changes of regulatory policy and legislation of the country by State, and the investors wish to protect their legally promised rights. Therefore, it is not obvious that the energy dispute will be on the favor of the investor. There are lot of factors which should be analyzed and determined before making the decision. Because the State still can change the regulatory policy and legislation if it required for the whole people of that State. Also, the energy disputes are complicated by its nature, because they involve the legal, economic and political sides as one complex.

Research problem. The problem of the master thesis will be to find which type of arbitration disputes arise in the energy sector, to determine the main similar factors in the similar energy arbitration disputes. To determine the parties and types of energy arbitration disputes. To analyze the energy arbitration cases and to make the conclusions and recommendations States what they should keep in mind before making the legislative changes in the country. To analyze and determine different situation under which the Investors can commence the arbitration proceeding. The specific attention has to be made for multilateral treaty – Energy Charter Treaty, which regulates the energy sector, including the dispute resolution method, such as arbitration. The research in that master thesis shall examine and analyze the question regarding the incompatibility of the European Union law and Energy Charter Treaty (hereafter referred as ECT), and Bilateral Investment Treaties (hereafter referred as BITs).

Relevance. The Energy Charter Treaty was adopted on December 17, 1991[1]. Thus, the arbitration cases which arise from the Energy Charter Treaty are not old and precedents or different decisions in different cases under the same circumstances are more than possible to be made by the Arbitration Tribunals. Taking into account the annexation of Ukrainian territory by Russian Federation, and therefore the nationalization of Ukrainian companies at the annexed territory by

1 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, p. 2, Accessed 30 March 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

Russia, it is important to research the outcomes and problems under the expropriation of energy disputes solved by arbitration which appeared and also may appear in the same territory or worldwide in future. Therefore, the topic: "Energy disputes arbitration: legal issues" is very relevant and important for research. Except this one, the European countries, especially Spain, Italy and Czech Republic, faced several renewable energy disputes under the investment arbitration, and Ukraine has to embrace the lessons from that arbitration experience after the legislation changes regarding feed-in tariff in Ukraine[2]. The energy sector grows rapidly, therefore the more arbitration cases appears.

Review of literature. In the research the arbitration awards in the energy sector made by International Centre for Settlement of Investment Disputes, Stockholm Chamber of Commerce, and Permanent Arbitration Court, have to be analyzed. Also, the articles of scholars and practical lawyers on the topic of energy arbitration have to be included, because they consist the significant opinions on developments of arbitration in the energy sector. The proper attention has to be given to the available "The Guide to Energy Arbitrations"[3], which contains different articles of distinguish scholars. And book: Scherer, Maxi "International Arbitration in the Energy Sector" (Oxford University Press, Feb 22, 2018)[4], which is fully enterer to the energy arbitrations.

Scientific novelty. As far as the energy disputes were solved in Arbitration Courts, the aim of this master Thesis is to make the comprehensive analysis of arbitration awards in the energy sector, both investment and commercial, and to find out and propose the recommendations for claimants and respondents for future energy disputes under the arbitration courts which have to be considered before the commence of arbitration. Also, the research requires to analyze the recent developments of European legislation, Energy Charter Treaty, bilateral investments treaties and their compatibility between themselves in the term of "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union"[5].

Practical significance. The arbitration disputes in the energy sphere are very complex and long by its nature, and the disputes will also arise, including the future proceedings on the ground of the full-scale war made by Russian Federation in Ukraine on February 24, 2022[6]. According to the

2 Reed Smith LLP and Sayenko Kharenko, "Green tariff in Ukraine: lessons from Spain and the Czech Republic," Sayenko Kharenko, Accessed 30 March 2022, https://sk.ua/wp-content/uploads/2020/06/green-tariff-in-ukraine.pdf.
3 The Guide to Energy Arbitrations [Third Edition] (2018), https://globalarbitrationreview.com/edition/1001292/the-guide-to-energy-arbitrations-third-edition.
4 Scherer, Maxi, "International Arbitration in the Energy Sector" (Oxford University Press, Feb 22, 2018).
5 "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," EUR-Lex, Accessed 16 April 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).
6 "Russia invaded Ukraine," Accessed 07 May 2022, https://war.ukraine.ua/.

"Distribution of New Cases Registered in FY2021 under the Convention on the Settlement of Investment Disputes between States and Nationals of other States and ICSID Additional Facility Rules, by Economic Sector"[7] the oil, gas and mining cases take 29% of all cases, and electric power and other energy – 14%[8]. Thus, the percentage among all new cases registered in 2021 by ICSID (hereafter referred as International Centre for Settlement of Investment Disputes) is significant. Regarding the "distribution of all cases registered under the ICSID Convention and Additional Facility Rules, by Economic Sector": the oil, gas and mining have 25%, and electric power and other energy – 17%[9]. It means that disputes in energy sector remain the significant parts of the cases. This research will be important for law school students, PhD law students, especially those who are interested in arbitration and energy sector, for young scholars and junior lawyers. In the following years the arbitration will be popular method of energy dispute resolution between companies, energy sector will develop and new disputes will arise.

Aim. The aims are:

- to analyze and research arbitration cases in the sector of energy, including the investment and commercial disputes. And to analyze the arbitration under the Energy Charter Treaty, and the compatibility of the European law toward the energy Charter Treaty especially after the termination of Intra-EU Bilateral Investment Treaties[10];
- determine the recommendations for Investors and States and to determine the factors, which have to be made before changing the regulatory policy, signing the Memorandums, investing into energy sector which determine the possible outcome of the future possible arbitration based on the energy arbitration awards and judgements;
- to determine the standards of protections used in energy arbitration disputes available to parties;
- to compare the European law and Energy Charter Treaty;
- to find out the recommendation for claimants and respondents before the arbitration;

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[7] "The ICSID Caseload — Statistics, Issue 2021-2," International Centre for Settlement of Investment Disputes, World Bank Group, page 25, Accessed 15 April 2022, https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf.

8 Ibid.

9 Ibid, page 12.

10 "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," EUR-Lex, Accessed 30 March 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

- to analyze ECT jurisdiction arbitration cases.

Research objectives. For achievement the aims of the research, the following statements have to be examined and analyzed.

1. To overview the Energy Charter Treaty.
2. To analyze the definitions of "investment", "investor", dispute resolution under the Energy Charter Treaty.
3. To examine the standards of protections.
4. To analyze jurisdictional issue of disputes under the Energy Charter Treaty.
5. To analyze arbitration awards in commercial and investment arbitration cases.
6. To overview the new Multilateral Investment Court.
7. To make the suggestions and recommendation for parties.
8. To overview the compatibility of the European Union law, Energy Charter Treaty and Intra-European Union Bilateral Investment Treaties.

Methods used in the Master thesis. Methods which have been used in the Master thesis:

1. Linguistic method was used to understand, to describe, and to interpret the definitions in the legal documents, agreements, treaties, and arbitration awards.
2. Logical method was necessary to be used during the whole research for understanding the topic, problematics, to make a clear structure of the research and follow step by the step in order to achieve the goals and aims of this research. Also, logical method was required not only in the beginning of the research, but during the whole process, while analyzing different cases, awards, and articles of agreements or articles written by scholars.
3. Historical method was applied when describing the signing, withdrawal from the Energy Charter Treaty.
4. Comparative method was used while analyzing the different arbitration awards in the energy sectors, comparing the decisions made by Tribunals, looking for similarities and distinguishes of them.
5. Systematic-analyzing method was applied in order to make the recommendation for parties, and to define the impact of the new agreements, arbitration awards, memorandums.
6. Assumption method was used in order to make the recommendation and conclusions in the research.

It is worth to mention, that all of the methods have to apply together, and none of them prevail during the research.

The structure of the Master thesis. Master thesis consists of introduction, two main parts (chapters). The chapters contain two subchapters. And all of the subchapters have several sections from two to four. After there are conclusions, recommendation, list of bibliography, abstract and summary.

The first part will contain the general and theoretical information, ore view, and analysis of energy arbitration disputes, Energy Charter Treaty, the standards of protections: "fair and equitable treatment", "legitimate expectations", and "expropriation", "nationalization". Also "umbrella clauses", "foreign control", determination of "investments" and "investors".

The second part will focus on practical issues of recent developments of energy disputes, implementation the energy arbitration cases and analysis of (in)compatibility of the European union law and Energy Charter Treaty, and Bilateral Investment Treaty, and the issue of Intra-EU Bilateral Treaties in the term of "Achmea case v. Slovak Republic"[11]. Also, the overview of possibility to set up the new arbitration court for disputes in the energy sector involving the future disputes connected to the destruction of the energy infrastructure in Ukraine during the war by Russian Federation.

The defense statements. Energy Charter Treaty and arbitration under the ECT require the modernization and minimalisation of opposite decisions in the cases under the same circumstances, for instance, the destruction of energy factories in Ukraine by the Russian Federation in the war.

The research has to give the reply about the necessity of establishing the new specific arbitration court regarding energy disputes, unified rules, or to transfer the energy disputes to the jurisdiction of the future created multilateral investment court.

11 "Judgment of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik v Achmea BV, Case C-284/16," EUR-Lex, Accessed 30 March 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284&from=en.

1. LEGAL FRAMEWORK OF ENERGY ARBITRATION

Energy disputes are very complex cases, and it is much better to solve the disputes under arbitration, than domestic litigation. Arbitration tribunals have more competence, independence, experience, and competence in complex energy and economic issues, they have not political pressures from any countries. Energy disputes have a significant part of all arbitration cases, therefore require deep research in this sector[12].

Energy arbitrations can come from multilateral treaties, as "Energy Charter Treaty"[13], bilateral investments treaties, or free trade agreements, like "North American Free Trade Agreement"[14].

Currently Ukraine has signed 78 bilateral investment treaties, but not all of them are in force[15].

1.1. Energy Charter Treaty

"Energy Charter Treaty" is the unique multilateral international agreement which involves 54 member countries currently. However, Norway did not ratify the Energy Charter Treaty. Belarus did not ratify the "Energy Charter Treaty, but applies it provisionally[16]. There is the inter-governmental organization called the "Energy Charter Conference", which consists of members and observers, which includes 44 observes countries and 13 international organizations with the observer status. Among the organizations there are Economic Cooperation Organization, International Renewable Energy Agency (IRENA), World Trade Organization (WTO), United Nations Economic Commission for Europe (UNECE), The World Bank, Organisation for Economic Co-operation and Development

12 "The ICSID Caseload — Statistics, Issue 2021-2," International Centre for Settlement of Investment Disputes, World Bank Group, page 12; 25, Accessed 15 April 2022, https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf.

13 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, p. 2, Accessed 16 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

14 "North American Free Trade Agreement," Italaw, Accessed 16 April 2022, https://www.italaw.com/sites/default/files/laws/italaw6187%286%29.pdf.

15 "Bilateral Investment Treaties (BITs)," Investment Policy Hub, Accessed 18 April 2022, https://investmentpolicy.unctad.org/international-investment-agreements/countries/219/ukraine.

16 "The Energy Charter Treaty," International Energy Charter, Accessed 27 March 2022, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

(OECD) and others[17]. There is the "International Energy Charter Consolidated Energy Charter Treaty with Related Documents"[18], not the legal document, and contains different documents, such as: document of the "Ministerial ("the Hague II") Conference on the International Energy Charter"; "International Energy Charter"; "Document of the Hague Conference on the European Energy Charter"; "Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects"; "Decisions of the Energy Charter Conference"; and "Energy Chapter Treaty" by itself[19].

Energy Charter Treaty plays the significant role, regulates and allows dispute resolution, including such option as arbitration provided in the Treaty as settlement of dispute. Energy Charter Treaty influences on the arbitration practice in the world, especially for investment arbitrations. Under the provisions of the Energy Charter Treaty exists the unconditional consent for arbitration proceeding.

1.1.1. Arbitration under the Energy Charter Treaty

Energy Charter Treaty is multilateral treaty[20] of promotion the international cooperation in energy sector[21], long term cooperation[22], investor's protection[23]. Energy plays significant roles in the economic. Thus, creation the multilateral document is significant step for one rule-based energy regulation.

17 "Members and Observers to the Energy Charter Conference," International Energy Charter, Accessed 27 March 2022,
https://www.energycharter.org/who-we-are/members-observers/.
18 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Accessed 27 March 2022,
https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.
19 "The Energy Charter Treaty," International Energy Charter, Accessed 27 March 2022,
https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.
20 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, p. 2, Accessed 04 June 2020,
https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.
21 Ibid.
22 Ibid, Article 2.
23 Ibid, Article 10.

Nowadays, there are 145 known cases under the ECT[24], except confidential proceeding, including Bilateral Investment Treaty in some cases[25]. The ECT was entered into legal force on 17 of April 1998.[26] Ukraine has been a member of treaty since 1998.

Speaking about dispute resolution, Article 26 of the ECT describes "settlement of disputes between an Investor and a Contracting Party"[27]. Paragraph one: the disputes should "be settled amicably", when possible. If not possible to settle "within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party has a choice to submit a resolution"[28].

Article 26(2) of the Energy Charter Treaty states:

"*if such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute, (b) in accordance with any applicable, previously agreed dispute settlement procedure; (c) in accordance with the following paragraphs of this Article*"[29].

It is necessary to note that the Investor can submit a dispute to the "International Centre for Settlement of Investment Disputes; ICSID Additional Facility Rules; a sole arbitrator; ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law; the Arbitration Institute of the Stockholm Chamber of Commerce"[30]. In addition, to select one, remember about differences parties into "Convention on the Settlement of Investment Disputes between States and Nationals of other States" (hereinafter referred as ICSID Convention). Thus, in ICSID both, investor's state and host state are the parties to ICSID Convention, but in "ICSID Additional Facility Rules" one is a party to ICSID Convention[31].

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24 "List of ECT Dispute Cases," Energy Charter Secretariat, Accessed 29 January 2022, https://www.energychartertreaty.org/cases/statistics/.

25 "List of cases," Energy Charter Secretariat, Accessed 04 June 2020, https://www.energychartertreaty.org/cases/list-of-cases/.

26 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, p. 2, Accessed 04 June 2020, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

27 Ibid, Article 26(1).

28 Ibid, Article 26(2).

29 Ibid.

30 Ibid, Article 26(4).

31 Ibid, Article 26, paragraph 4.

It is important to note about the "cooling-off period" before energy arbitrations and its influence on arbitration. The provision is concluded in Article 26 (1) and (2), paragraph 2 of that article was mentioned above, and paragraph 1 states: "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably"[32]. Arbitration tribunals do not agree on the same statements whether the "cooling-off period" is essential for jurisdictional issues and since which consequences follow for damages and costs[33]. There is no same approach regarding the interpretation of the "cooling-off period"[34]. This provision can be also called as "waiting period"[35].

The "cooling-off period" was addressed in the case "Limited Liability Company Amto v. Ukraine"[36], where the claimant sent claim letters to respondent, but the last did not reply on them, and the claimed told that the respondent was notified about the violation of the ECT. Also, the claimant told the question of "cooling-off period" is the issue of admissibility, not the issue of jurisdiction, since the Arbitration Tribunal has no option to dismiss the case on the ground of inadmissibility, since it would be possible on the ground of jurisdiction. The respondent told the claimant did not ask for settlement[37]. The Tribunal stated every single requires an assessment separately, there is no rule to that[38].

However, the Tribunal also stated that "Some previous awards have found that non-compliance with such clauses did not constitute a bar to jurisdiction (see, for example, Ethyl Corporation v. The Government of Canada, Award on Jurisdiction, June 24, 1998; 38 ILM 708, paragraphs 79-88 (Article 1120 of NAFTA); SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, paragraphs 183-184 (Switzerland-Pakistan BIT))"[39].

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[32] "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Art. 26 (1), Accessed 18 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

[33] Abeer Sharma, "The Cooling-Off Period in the Energy Charter Treaty: Existing Problems and the Way Forward," (April 24, 2018), SSRN, Chartered Institute of Arbitration (2019) 85 Arbitration Issue 2, p. 138, Accessed 18 April 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272322.

[34] Ibid, p.151.

[35] Siddharth S. Aatreya, Anastasiya Ugale, "Cooling-Off Periods," Jus Mundi, Accessed 18 April 2022, https://jusmundi.com/en/document/wiki/en-cooling-off-periods.

[36] "Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005," Italaw, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/ita0030.pdf.

[37] Ibid, p.26(d).

[38] Ibid, p.50.

[39] Ibid.

It is necessary to admit that international arbitration is the most using kind of dispute resolution.[40] Taking into account another point according to the Article 26 (3)(b)(i)) about "prohibition to submit a dispute to international arbitration under the ECT if it has already submitted that dispute to the national courts of the host state"[41]. However, a clause "fork in the road" can be used only when the contracting states listed in Annex ID of the ECT.[42] Article 17 (1) and (2) provides that

> "*Each Contracting Party reserves the right to deny the advantages of this Part to a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:*
> *(a) does not maintain a diplomatic relationship; or*
> *(b) adopts or maintains measures that:*
> *(i) prohibit transactions with Investors of that state; or*
> *(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments"*[43].

However, the author concentrates an attention about *"denial of benefits clause"* in order to prevent companies incorporated in a country, which is party to investment treaty with the host state from claiming under the ECT.[44] Consequently, if requirements are satisfied under Article 26, the protection still can be not granted under ECT.

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40 Alejandro López Ortiz, Michael P. Lennon Jr., and Mayer Brown, "Investment arbitration under the Energy Charter Treaty," Practical Law, Thomson Reuters, (2015): 1, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/03/investment-arbitration-under-the-energy-charter-tr/files/artortizlennoninvarbunderenergychartertreaty/fileattachment/artortizlennoninvarbunderenergychartertreaty.pdf.

41 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 26, Accessed 04 June 2020, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf

42 Alejandro López Ortiz, Michael P. Lennon Jr., and Mayer Brown, "Investment arbitration under the Energy Charter Treaty," Practical Law, Thomson Reuters, (2015): 8, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/03/investment-arbitration-under-the-energy-charter-tr/files/artortizlennoninvarbunderenergychartertreaty/fileattachment/artortizlennoninvarbunderenergychartertreaty.pdf.

43 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 17, Accessed 04 June 2020, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

44 "Investment arbitration under the Energy Charter Treaty," Practical Law, Thomson Reuters, (2015): 6, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/03/investment-arbitration-under-the-energy-charter-tr/files/artortizlennoninvarbunderenergychartertreaty/fileattachment/artortizlennoninvarbunderenergychartertreaty.pdf.

Firstly, to understand a terminology is rather important. Contracting Party is a state which has signed and ratified the ECT. There are examples when Belarus accepted to apply the ECT provisionally, and Russian Federation did not ratify it. Secondly, a third state is not a Contracting Party or Investor. Thirdly, Investor under ECT is *"citizen, national or permanent resident of a Contracting Party and company or other legal entity organised and incorporated in accordance with the laws of a Contracting Party*"[45].

Fourthly, Article 1 (6) of the ECT determines the investments:

"*Investment means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector"[46].

To sum up the definition of the investments, it is worth to mention that in the Energy Charter Treaty the investments described very broadly, because they include "*every kind of assets*". Also, all kind of assets which are "owned or controlled by investors", including directly or not directly, but through in that Article 1(6) of the ECT it is not mentioned about the investments which were made by the investors. It is worth to mention that paragraphs a-f of Article 1 (6) of the ECT has not exhaustive list of types of investments. Paragraph (c) of the mentioned Article 1 (6), any "*claims to money and claims to performance*" to all types of economic values and activities.

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45 Félix J. Montero and Laura Ruiz, "The concept of investor and investment under the ECT and the legal standing to bring arbitrations under the ECT," *Revista del Club Español del Arbitraje* №23 (2015): 81-82, https://www.perezllorca.com/wp-content/uploads/es/actualidadPublicaciones/ArticuloJuridico/Documents/150615-sar-the-concepts-of-invesor-and-investment-fmm-lrm.pdf.

46 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 1(6), Accessed 06 June 2020, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

According to Article 1(5) of the ECT: "*Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises*"[47].

It is worth to compare the definition of the "investment" in Bilateral Investment Treaties. In the "Agreement between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments"[48], the Article 1(1) defines that "the term "investment" means, in conformity with the laws and regulations of the Contracting Party in whose territory the investment is made, every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws"[49]. Also, further there is the not exhaustive list of what can be considered under the investments, like "property, shares, intellectual property rights, title to money, and business concessions"[50].

To sum up, comparing this definition to the definition in the ECT, difference is in that that investment has to be made under the bilateral investment treaty, though it is not mentioned in Energy Charter Treaty.

However, Article 1(8) provides the definition of the making the investment. Thus, "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity"[51].

According to the English Oxford Living Dictionary, the term "energy" is described as the "power derived from the utilization of physical or chemical resources, especially to provide light and heat or to work machines"[52].

To determine the party who can commence the arbitration under the ICSID, it is important to understand who is the investor under the ECT. Article 26(7) of the ECT states "an Investor other than

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47 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 1, Accessed 04 June 2020, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

48 "Agreement between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments," Foreign Trade Information System, Accessed 30 March 2022, http://www.sice.oas.org/bits/jamarg_e.asp.

49 Ibid.

50 Ibid, Article 1(1) (a-e).

51 "Final Act of the European Energy Charter Conference," Understandings, 4. With respect to Article 1 (8), p. 18, quoted in Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 1(8), Accessed 31 March 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

52 "Energy," Lexico Oxford English and Spanish Dictionary, Synonyms, and Spanish to English Translator, Accessed 29 March 2022, https://www.lexico.com/definition/energy.

a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State""[53].

Article 25(2)(b) of the ICSID Convention determines:

"National of another Contracting State" means any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention"[54].

It is important to compare this paragraph with the Art8icle 1(7) of the ECT:

""Investor" means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party"[55].

A foreign company has to be controlled by a foreign investor. Only the foreign company can be the investor. But under the Article 1(7) of the ECT, foreign company controlled by the investor which possess the nationality of the State against which the arbitration will start, cannot be considered

53 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 26(7), Accessed 09 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

54 "ICSID Convention, Regulations and Rules," International Centre for Settlement of Investment Disputes, Accessed 09 April 2022, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

55 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 1(7), Accessed 09 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

the investor, which is contradictory according to the Article 26(7) of the ECT. Under the general rule in case of investment treaty arbitration the claimant cannot sue his home State. But ICSID Convention allows the exception and the ECT refers exactly to that exception.

Regarding the duration of arbitration proceedings, in case of ICSID arbitration it takes in average around four years and eight months, as for as UNCITRAL arbitration – four years and 3 months[56]. Regarding the arbitration costs, it is ruled by the Chapter VI of the ICSID Convention[57]. According to the Article 59 of the ICSID Convention: "The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council"[58]. As for as UNCITRAL costs, the UNCITRAL rules in the Article 37 determines "the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case"[59].

To sum up, the claimant can bring a claim on behalf of the Company located in his home State, if the Company is majority controlled or owned by another Contracting State.

Come to the conclusion, the establishment of new multilateral treaty in energy sphere creates more opportunities for protection of investors. There is the feature that distinguishes Energy Charter Treaty from others treaties, is that a system for resolving disputes over violations of investment provisions. ECT determines the place of national courts and international arbitration. There is no need to go through national courts in order to start an arbitration procedure, but national litigation can be one of the dispute settlement available for investors. Thus, there is no obstacles to bring a claim in international arbitration in case of violation of the investor's rights. And ECT is the first multilateral document having general rule regarding binding dispute resolution involving arbitration. Energy Charter Treaty allows the parties to start the mandatory arbitration proceeding. The Energy Charter Treaty allows the oil and gas corporations to sue the State/s, once the State change the tariffs etc.

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[56] Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka, "Costs, Damages and Duration in Investor-State Arbitration," Allen & Overy, British Institute of International and Comparative law, p.5, Accessed 18 April 2022, https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.

[57] "ICSID Convention, Regulations and Rules," International Centre for Settlement of Investment Disputes, Chapter VI , Accessed 18 April 2022, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

[58] Ibid, Art. 59.

[59] "UNCITRAL Arbitration Rules," United Nations Commission on International Trade Law, Art.5, Accessed 18 April 2022, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf.

In order to start the arbitration, the claimant has to prove that requirements about the "investor" and the "investments" are met under the ECT. It means that the claimant meets the requirements regarding the jurisdiction.

1.1.2. Withdrawal from the Energy Charter Treaty

All countries have the right to withdrawal from Energy Charter Treaty. Some counties had already did it, for instance, Italian Republic, Russia. Also, France thinks to withdraw from Energy Charter Treaty recently.[60] Except of these, there are discussions regarding the withdrawal of the EU from ECT. [61]

Italy signed to Energy Charter Treaty on 17 December 1994, ratified on 5 December 1997, and withdrawal on 31 December 2014.[62] According to the paragraph 2, Article 47 of the ECT:

"*Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal*"[63].

The withdrawal took legal force from the 1st of January 2016.[64] It is necessary to note that also the questions about climate change and it's regulation under the ECT is questionable and civil society, some countries, like France, representatives of different organisations, including ClientEarth ask the EU about withdrawal from the ECT because of environmental issues like cessation of coal

60 Frédéric Simon, "France puts EU withdrawal from Energy Charter Treaty on the table," Euractiv, Accessed 27 July 2021, https://www.euractiv.com/section/energy/news/france-puts-eu-withdrawal-from-energy-charter-treaty-on-the-table/.
61 "EU must withdraw from Energy Charter Treaty," ClientEarth, Accessed 27 July 2021, https://www.clientearth.org/latest/latest-updates/news/eu-must-withdraw-from-energy-charter-treaty/.
62 See International Energy Charter, Members & Observers – Italy, "Italy," International Energy Charter, Energy Charter Secretariat, Accessed 27 July 2021, https://www.energycharter.org/who-we-are/members-observers/countries/italy/.
63 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Art. 47, p. 104, Accessed 27 July 2021, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.
64 See International Energy Charter, Members & Observers – Italy, "Italy," International Energy Charter, Energy Charter Secretariat, Accessed 27 July 2021, https://www.energycharter.org/who-we-are/members-observers/countries/italy/.

production.[65] Luxembourg wants to refuse from the ECT, through the Ministry does not think it is the best solution, as mentioned in his letter.[66]

It is important to note, that in case of withdrawal the "sunset clause" will apply. As already it is with Russian Federation, Italy. It means that investments made before the withdrawal will be protected for 20 years according to the paragraph 3, Article 47 of the ECT: "*The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date*"[67].

It is worth to note that France abandons from the perspective of the reforming the ECT. It was expressed in the letter which was signed by four French ministers and sent to European Commission. The reason was that the negotiations was very slow regarding the modernisation of the ECT. France urges the EU and all its Member States to withdraw the Treaty. France mentioned hostility by the EU towards the Investor State Dispute Settlement mechanisms and the beginning was from the judgment of the - European Court of Justice (hereafter referred as ECJ) in its "Achmea case" on 6 March, 2018 regarding Intra-EU BITs. After that case, many investment tribunals did not follow Achmea decision, because they do not recognise precedent case law by the ECJ, but from another side some countries started to change their decisions on the basis of Achmea case, because they wanted to follow the EU law. And EU Member Stated decided to terminate all Intra-EU BITs.[68] Also as the consequence of the Achmea decision the "Agreement for the Termination of Intra-EU Bilateral Investment Treaties between the Member States of the European Union" was signed.[69] According to the Article 3 of this agreement: *"Sunset Clauses of Bilateral Investment Treaties listed in Annex B are terminated by this*

65 "EU must withdraw from Energy Charter Treaty," ClientEarth, Accessed 27 July 2021, https://www.clientearth.org/latest/latest-updates/news/eu-must-withdraw-from-energy-charter-treaty/.
66 Frédéric Simon, "Luxembourg backtracks on Energy Charter Treaty withdrawal," Euractiv, Accessed 28 July 2021, https://www.euractiv.com/section/energy/news/luxembourg-backtracks-on-energy-charter-treaty-withdrawal/. See: letter by Claude Turmas, Ministry of Energy attached on website.
67 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Art. 47(3), p. 104, Accessed 28 July 2021, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.
68 Marie Stoyanov, Valentiv Bourgeois and Yassine El Wardi, "France urges the EU to withdraw from the ECT," Allen & Overy, Accessed 03 August 2021, https://www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/news/2021/03/france_urges_the_eu_to_withdraw_from_the_ect.pdf.
69 "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," EUR-Lex, Accessed 03 August 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

Agreement and shall not produce legal effects, in accordance with the terms set out in this Agreement".[70]

It is worth to note, that Belgium submitted a request to Court of Justice of the European Union regarding the interaction between the ECT and EU law according to the new draft of the ECT. Belgium wants to clarify legally how to apply the dispute resolution mechanism between the investor from one of the EU Member State from one side and the EU Member State from another one. Belgium and another EU Member States have different opinion if the decision of Achmea case will be applied and it is desired to have a clear legal response by the court in order to provide the stable legal decisions. The reason of the request to the court is "*to provide clarity and legal certainty*", that is why the request was made in neutral form without the legal opinion of Belgium.[71]

Also, the United Kingdom signed the The EU–UK Trade and Cooperation Agreement (hereafter referred as TCA) in which there is no mechanism of regulation of ISDS (hereafter referred as Investor-State Dispute Settlement).[72] Thus, arbitration was not changed as a method of dispute resolution for the UK, so the solution to exit the ECT to avoid consequences of the Achmea decision was not applied.[73] Moreover, even in case the UK leave the ECT, the sunset clause will apply. Thus, all investments made by investors before the withdrawal would have a protection under the ECT for 20 years.

Necessary to note that European Union and Euratom is the member of the ECT[74]. And the "20-year sunset clause" is applicable for the EU. Sunset clause will work in case of unilateral withdrawal[75]. However, 20-year rule possibly can be eliminated and not apply in the following situations:

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70 Ibid.

71 "Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty," Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, Accessed 24 August, 2021, https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions.

72 Chiraag Shah and Pietro Grassi, "From genesis to apocalypse: As Belgium heralds the end of the uncertainty on intra-EU BITs, has the UK missed an opportunity in a post-Brexit world?" Thomson Reuters Practical Law Arbitration Blog, Accessed 24 August 2021, http://arbitrationblog.practicallaw.com/from-genesis-to-apocalypse-as-belgium-heralds-the-end-of-the-uncertainty-on-intra-eu-bits-has-the-uk-missed-an-opportunity-in-a-post-brexit-world/.

73 Power Richard, "Brexit, the Energy Charter Treaty and Achmea: An Unexpected Ray of Light?" Kluwer Arbitration Blog, Accessed 24 August 2021, http://arbitrationblog.kluwerarbitration.com/2018/12/17/brexit-the-energy-charter-treaty-and-achmea-an-unexpected-ray-of-light/.

74 See the "members and observers of the Energy Charter Treaty and the Energy Charter Conference," "Italy," International Energy Charter, Energy Charter Secretariat, Accessed 18 April 2022, https://www.energycharter.org/who-we-are/members-observers/countries/italy/.

75 "Sunset Clauses in International Law and their Consequences for EU Law," European Parliament, Study Requested by the JURI committee, p.7, Accessed 18 April 2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU(2022)703592_EN.pdf.

"(i)remaining in the ECT, complying with the spirit of the Paris Agreement, and raising procedural and substantive objections before Investment Tribunals; (ii) mutual termination of the ECT; (iii) the amendment of the duration of the 20-year sunset clause; (iv) the revision of the ECT to make its substantive provisions more compatible with the spirit of the Paris Agreement, and (v) the unconventional approach of the modification of the sunset clause in ECT between certain of the Parties, namely between EU Members States and the EU, followed by their withdrawal"[76].

However, if the parties would like to amend the ECT and to change the duration of sunset clause, it is worth to mention that from egal point of view, the ECT is multilateral treaty, and the procedure of making the amendments is complicated, and requires the unanimity of all parties, mentioning that the members of the ECT are not only Member States.

European Commission suggests and prefers to modify the ECT, not to withdrawal the ECT since the sunset clause would apply for 20 years, and the risk of conflict of new rules, and mandatory application of the ECT will appear[77].

It is worth saying about Italy, that after its withdrawal, investments which were made before 1 January 2016 are protected for 20 years under Article 47 of the ECT.[78] According to Italy's statement, the reason of withdrawal the Ext was saving the state budget. It was mentioned that Italy will save approximately € 370.000 annually. Nevertheless, the government could have had a fear to spend much more money. According to the ECT, the investors can issue suits against Italy regarding their adopted "*Spalma incentive decree*" in 2014. In accordance with this Decree the government decided to cut the subsidies to photovoltaic plants which have more than 200 KW and also the subsidies were aplying to already existing projects.[79] At that momment Italy had a legal right to withdraw from the ECT far as five years past from the date of enteringn the Treaty into force.

According to the paragraph 1 of the Article 47 of the ECT:

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[76] Ibid, p.8.

[77] "Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission Question reference: P-005555/2020," European Parliament, Parliamentary questions, Accessed 18 April 2022, https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.html.

78 See the members and observers of the Energy Charter Treaty and the Energy Charter Conference, "Italy," International Energy Charter, Energy Charter Secretariat, Accessed 24 August 2021, https://www.energycharter.org/who-we-are/members-observers/countries/italy/.

79 Gaetano Iorio Fiorelli, "Italy withdraws from Energy Charter Treaty," Global Arbitration News, Accessed 25 August 2021, https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/.

"*At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty*"[80].

Thus, investors thought that Italy violates the Constitution of Italy, the main principles of law, such as non-retro activity of law, State's obligation under the ECT, for instance, Article 10 and 13. There should be no expropriation of the foreign investors, and the "fair and equitable treatment" must be respectful, as the protection of all made investments[81].

Also in 2009, Russia withdrew from the temporary application of the ECT, in which it had been since 1994.[82] Also, in April 2009, the Conceptual Approach to the New Legal Framework for Energy Cooperation was presented by Russian President. The proposals were about enhancing legal backgrounds of energy cooperation and changing the ECT.[83]

It is important to admit, that there are some countries which did not ratify the Energy Charter Treaty, such as Australia, Norway, Russian Federation and Belarus, but the last one applies it provisionally.[84]

However, new energy investments made by the investor from the EU Member State in another Member State of the ECT, or by the Member Sate of the EU made in the EU after the withdrawal from the ECT will not be protected under the ECT. Thus, the investors will not have a possibility of the ISDS dispute resolution mechanism under the ECT.[85]

According to the Article 41(1) of the "Vienna Convention on the Law of Treaties":

"*Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:*

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80 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Art. 47, Accessed 25 August 2021, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

81 Gaetano Iorio Fiorelli, "Italy withdraws from Energy Charter Treaty," Global Arbitration News, Accessed 25 August 2021, https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/.

82 See the "members and observers of the Energy Charter Treaty and the Energy Charter Conference," "Russian Federation," International Energy Charter, Energy Charter Secretariat, Accessed 24 August 2021, https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/.

83 See Road Map for the Modernisation of the Energy Charter Process of 24th November 2010 concerning Road Map for the Modernisation of the Energy Charter Process. "Decision of the Energy Charter conference, CCDEC 2010 10 GEN," Energy Charter Secretariat, p.2, Accessed 24 August 2021, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/2010/CCDEC201010.pdf.

84 "The Energy Charter Treaty," The International Energy Charter, Accessed 24 August 2021, https://www.energycharter.org/process/international-energy-charter-2015/overview/.

85 Martin Dietrich Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty?" Joint Center of Columbia Law School and the Earth Institute, Columbia University, Columbia Center of Sustainable Investment, p.7, Accessed 26 August 2021, https://ccsi.columbia.edu/sites/default/files/content/docs/blog/ccsi-european-union-energy-charter-treaty-ect-martin-dietrich-brauch.pdf.

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole"[86].

Thus, members of the ECT can conclude an agreement between themselves to modify their relationship under the Treaty. It is possible to add, or exclude some provisions, for instance modify the dispute resolution mechanism regarding ISDS, exclude it, or protect special types of energy, like fossil fuel, or to add some provisions[87].

Therefore, if there are opinions that the States must exit or withdraw the ECT, the solution can be made through the Vienna Convention, which allow to modify the relationship of the certain countries between themselves.

1.2. Standards of treatment in energy arbitration

Standards of treatment in Energy Arbitration are fundamental in the Energy Charter Treaty and other bilateral investment agreements. Once the investor invests, the state is required to follow the standards of treatments. They are: "fair and equitable treatment" (hereafter referred as FET), "full protection and security" (FPS), "national treatment" (NT) and "most-favored-nations treatment" (MFN)[88], "legitimate expectations", doctrine of which was recognized by Tribunal as the part of "fair and equitable treatment standard"[89].

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86 "Vienna Convention on the Law of Treaties 1969," United Nations Office of Legal Affairs, Art. 41, Accessed 26 August 2021, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

87 Martin Dietrich Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty?" Joint Center of Columbia Law School and the Earth Institute, Columbia University, Columbia Center of Sustainable Investment, p.7, Accessed 26 August 2021, https://ccsi.columbia.edu/sites/default/files/content/docs/blog/ccsi-european-union-energy-charter-treaty-ect-martin-dietrich-brauch.pdf.

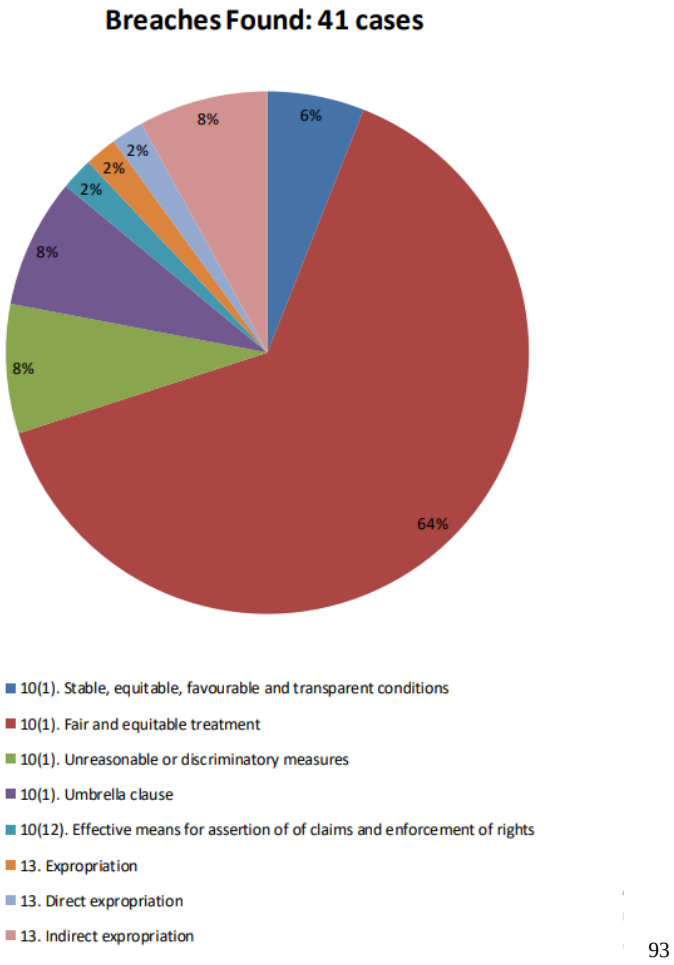
88 Alireza Ansari Mahyar and Leila Rais, "International Standards of Investment in International Arbitration Procedure and Investment Treaties," *Revista Jurídicas*, 15 (2), 11-35, julio-diciembre (2018), DOI: 10.17151/jurid.2018.15.2.2., ISSN 1794-2918.

89 Ioana Knoll-Tudor and Anastasiya Ugale, 'Legitimate Expectations," Jus Mundi, Accessed 27 March 2022, https://jusmundi.com/en/document/wiki/en-legitimate-expectations.

There are the dispute and debates whether the standards of protection of investors under the EU law are same as provided by ECT and BITs[90].

It is worth to note about the fork in the road as an umbrella clause. This clause contains in some treaties, and defines as fork in the road "provide that the investor must choose bietween the litigation of its claims in the host State's domestic courts or through international arbitration and that the choice, once made, is final[91]".

Standards of treatment are important as an initial ground to commence the arbitration. It is necessary to mention about the statistics of the found breaches under the ECT[92].



[93]

90 Maxi Scherer, "*International Arbitration in the Energy Sector"* (Oxford University Press, Feb 22, 2018), 183.
91 Dolzer, R. and Schreuer, C., "Principles of International Investment Law," Oxford University Press, 2nd ed., 2012, p. 267, quoted in Yusuf Islam Özkan and Antolín Fernández Antuña, "Fork in the Road," Jus Mundi, Accessed 29 March 2022, https://jusmundi.com/en/document/wiki/en-fork-in-the-road#:~:text=I.-,Definition,once%20made%2C%20is%20final%E2%80%9D.
92 "Statistics of ECT Cases (as of 1/12/2021)," International Energy Charter, Accessed 18 April 2022, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/All_statistics_-_1_December_2021_Rev.pdf.
93 Ibid.

1.2.1. Fair and equitable treatment

Dealing with energy arbitration disputes, it is inseparable to understand standards of investors and their investments protections, protections under the ECT, and international law, which are higher than protections under the domestic legislation.

Essentially to note about "fair and equitable treatment" in energy arbitration disputes. FET is a standard for protection of a foreign investment. FET arises in different arbitration proceedings. Arbitration claims focus on two protections: *"(1) the requirement that the host state extend fair and equitable treatment to foreign investors, and (2) the prohibition on expropriation"*.[94] Firstly, for determining the violating of FET depends on consistency, transparency and reasonableness in modifying the existing incentive regime of the state. Secondly, reasonable and legitimate expectations of the investors, which can be breach by state's actions[95].

First of them is "fair and equitable treatment" standard. FET is one of the most successful bases for investor - state arbitrations. FET protects investors from discriminatory, abusive behavior of the State[96].

Except of ECT, FET clauses is used also in BITs and international investment agreements, for instance, the Havana Charter for an International Trade Organization (1948), the Economic Agreement of Bogota (1948), and in the United States Friendship, Commerce and Navigation treaties. "Draft Convention on Investments Abroad proposed by Hermann Abs and Lord Shawcross" in 1959 used the first FET standard[97].

The concept of FET was interpreted very broadly in lots of arbitration awards, especially connected to investor's legitimate expectations. The result of broad interpretation can be "open-ended and unbalanced approach, which violate legitimate regulation in the public interest"[98].

As the result of arbitration practice, the breach of FET can be a result of legislative, judicial and administrative actions of the State.[99]

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94 Charles A Patrizia et al., "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty," *The Guide to Energy Arbitrations [Third Edition]* (2018): 62, https://globalarbitrationreview.com/edition/1001292/the-guide-to-energy-arbitrations-third-edition.
95 Ibid, p. 63.
96 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), 1, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.
97 Ibid, p. 5.
98 Ibid, p. 11.
99 Ibid, p. 12.

Controversially to the above, the modern FET is not so broadly interpreted. The old agreement consisted from unqualified provisions of FET, there were the lack of understanding of fairness and equity because of lack of legal clarification in international investment law. In order not to allow abuse of the FET, one of the BITs: Morocco's model establishes the exhaustively list of obligation in case of breaching them, the violation of FET will appear. Among them are deny of justice, discrimination and abusive treatment of investors, for example, coercion, pressure or harassment.[100] Indeed, FET is connected with international law. For example, "North American Free Trade Agreement" contained FET next to international law.

Defining the current implementation of the FET, standards are:

"(a) No FET obligation;

(b) FET without any reference to international law or any further criteria (referred to as unqualified, autonomous or self-standing FET standard);

(c) FET linked to international law;

(d) FET linked to the minimum standard of treatment of aliens under customary international law;

(e) FET with additional substantive content (denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, accounting for the level of development)".[101]

Two aspects regarding standard: "principle of good governance", for example, due process and correct decision making, and "threshold of liability", which show how serious violation should be.[102] Indeed, FET is connected with international law, for instance, in "North American Free Trade Agreement" it is noted next to.[103]

Talking about the ECT, the FET contains from "constant protection and security", "unreasonable or discriminatory measures", "treatment required by international law", "host state law", "expropriation", and "observance of contractual obligations"[104].

The FET includes:

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100 Hamed El-Kady and Yvan Rwananga, "Morocco's New Model BIT: Innovative features and policy considerations," *Investment Treaty News* 11, issue 2 (2020): 21, https://www.iisd.org/index.php/system/files/publications/iisd-itn-june-2020-english.pdf.

101 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), 17-18, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

102 Ibid, p. 12.

103 Ibid, p. 23-24.

104 Christoph H. Schreuer, "Fair and equitable treatment (FET): interactions with other standards," in "*Investment protection and the energy charter treaty,"* Graham Coop, Clarisse Ribeiro (New York: JurisNet, 2008), 64.

"*1) The obligation to treat investors and their investments in a transparent manner (see Micula v Romania ICSID Case No. ARB/05/20 (2013)).*

2) The obligation to act in good faith towards investors and their investments (see Oostergetel v Slovak Republic UNCITRAL, Final Award (2010)).

3) The obligation to refrain from taking arbitrary or discriminatory measures (see Electrabel).

4) The obligation to afford due process to investors and their investments (see AES Summit Generation Ltd v Republic of Hungary, ICSID Case No. ARB/07/22 (2010))"[105].

Talking about application of FET standards in energy dispute arbitrations, the ECT also contains this. Article 10(1) says:

"*Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*"[106].

ECT was a subject for discussions and changes, as one of the main topic FET. As a result, in 2018 the question about the level of protections provided and which level this standard must provide. As was determines, in different arbitration procedures, the FET was often connected to minimum standard of treatment under customary international law. There were questions regarding the interpretations of definitions: "fair and equitable", because these terms did not do the understanding very clear and as the result different arbitration outcomes followed. It was not so easy to discernable and the lack of clarity existed. That was a reason for the next modernization, debating and changing the ECT[107].

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105 Alejandro Lopez Ortiz and Michael P. Lennon, JR., Mayer Brown, "Investment arbitration under the Energy Charter Treaty," *Practical Law*, (2015): 3, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/03/investment-arbitration-under-the-energy-charter-tr/files/artortizlennoninvarbunderenergychartertreaty/fileattachment/artortizlennoninvarbunderenergychartertreaty.pdf.

106 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Aticle 10, para 1, Accessed 28 February 2021, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

107 Ylli Dautaj and Per Magnusson, "ECT Modernisation Perspectives: Reforming the Fair and Equitable Treatment Protection," Kluwer Arbitration Blog, Accessed 28 February 2021, http://arbitrationblog.kluwerarbitration.com/2020/07/23/ect-modernisation-perspectives-reforming-the-fair-and-equitable-treatment-protection/.

Indeed, mentioned two terms were not exhausted in debate. Such terms as "*regulatory chill*" and "*investor-bias*" appeared during discussions ant it was stated by scholars, different states and non-governmental organizations that "*regulatory chill*" must be the subject for changes as well. The author analyzed different cases regarding FET and found that the breach of FET consists in a little bit more than a half successful arbitration claims. There is no "*investor-bias*" in the ECT ISDS arbitrations, but at the same time investors used FET protection and successfully won.[108]

The State or subnational entities cannot know which actions can be considered as the breach of the treaty. That is why they cannot always organize their administrative decision-making policy and regulatory actions in that way in order to be sure that all actions will not violate the FET standard. It could create above mentioned regulatory chill and positive discrimination giving more opportunities for foreign investors than foe the national ones.[109]

At the beginning the FET was considered as general standard like indiscrimination, but nowadays the scholars and experts became to interpreted the FET as separate alone standard, which establish the negative right. It means the obligation of the State does not perform illegal, not allowed and prohibited actions. The EU has proposed the list of measures and their definitions in Comprehensive Economic and Trade Agreement the EU which have the violation of the FET obligations. Taking into account them, they were proposed to be also a subject to review but regarding the FET is ECT.[110] The questions were:

> "*The FET standard should include a list of measures that constitute a breach of the FET obligation?*
>
> *The list should be closed or open-ended?*
>
> *The FET provision should offer protection for legitimate expectations?*
>
> *The legitimate expectations sub-standard should only be breached if there has been a specific representation and reliance (i.e. a form of promissory estoppel)?*
>
> *The FET provision should be narrowed to align with the minimum standard treatment under customary international law, or whether it should offer more robust protection?*

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108 Ibid.

109 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), 12, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

110 Ylli Dautaj and Per Magnusson, "ECT Modernisation Perspectives: Reforming the Fair and Equitable Treatment Protection," Kluwer Arbitration Blog, Accessed 28 February 2021, http://arbitrationblog.kluwerarbitration.com/2020/07/23/ect-modernisation-perspectives-reforming-the-fair-and-equitable-treatment-protection/.

In conclusion, the correct understanding and interpretation of FET plays significant role for the final decision of the Tribunal"[111].

In conclusion, the FET is significant standard of treatment and ground to claim to the arbitration court.

1.2.2. Legitimate expectations

One of the key elements of the FET is legitimate expectations. When the investor does the investments, he has expectations regarding future income, but in case the government changes the legislation, the regulations or tariffs, expectations of investor become broken. Thus, the actions of the government have a bad influence on the investor, his economic activity, reducing its value, and as the result the appearing question about was it is expectations and also especially legitimate expectations for investor are[112]. The government should be consistent in their actions and making the investor is sure about the legal regulation and administrative policy which are stable and predictable in the future[113]. There are different approached to legitimate expectations under the FET standard. There is no stable standard under which the legitimate expectations can be fully determined and described. It should be evaluated in every situation separately. First approach requires the parties, investor from one side, and State from another one, to have a stabilization clause in their contract. Second approach demands the current regulation in national legislation and international applicable legislation. Regarding the third approach should, the requirements should be fixed in qualifying requirements, which should be violated to fix the breach of "legitimate expectations"[114]. They follow from the "UNCTAD paper Fair and equitable treatment UNCTAD Series on Issues in International Investment Agreements II (2012)":

"*1. Legitimate expectations may arise only from a state's specific representations or commitments to the investor, on which the latter has relied;*

111 Ibid.

112 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), P. 64, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

113 Ibid, p. 64-65.

114 Yaroslav Petrov, "*Legitimate Expectations under the FET standard: prospective of recent RES cases,*" Energy Community, P. 3-4, Accessed 27 August 2021, https://www.energy-community.org/dam/jcr:18ed986c-eee6-4321-b2a6-e664ea34784e/Asters,%20Legitimate%20Expectations%20under%20the%20FET%20standard:%20prospective%20of%20recent%20RES%20cases.pdf.

2. The investor must be aware of the general regulatory environment in the country and expectations must be reasonable, and founded on the political, socioeconomic, cultural and historical conditions prevailing in the state;

3. Investors' expectations must be balanced against the legitimate regulatory activities of the host country".[115]

And this conclusion was made from the arbitration decisions in "Duke Energy v. Ecuador and another cases"[116]. Tribunal in "LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic" described the legitimate (fair) expectations as following:

"*they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns*."[117]

Legitimate expectations are the term which is related to the term of "change".[118] In the case "Edf (Services) limited versus Romania" the Tribunal ascertained:

"*the idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance*

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115 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012*" (New York and Geneva: United Nations, 2012), P. 68, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf quotes in Yaroslav Petrov, "*Legitimate Expectations under the FET standard: prospective of recent RES cases*," Energy Community, P. 4, Accessed 27 August 2021, https://www.energy-community.org/dam/jcr:18ed986c-eee6-4321-b2a6-e664ea34784e/Asters,%20Legitimate%20Expectations%20under%20the%20FET%20standard:%20prospective%20of%20recent%20RES%20cases.pdf.

116 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012*" (New York and Geneva: United Nations, 2012), P. 68, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

117 "LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006)," Italaw, para. 130, Accessed 28 August 2021, https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

118 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), P. 63, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable".[119]

It is important to admit, that determination of violation of "legitimate expectations" does not separately exist from the political situation, economical, and social context, as far as the "public interest" from another side than legitimate expectations plays the important role in every case and it is rather important to find a right balance between the public interest and therefore the changes in regulation its investments' rules and public interests.[120] Thus, the investors should not expect that the regulatory policy will not be changes, as far as it can be made in the sense of "*food faith and non-abusive manner*". So, in the relevant cases the behaviour of the government can be justified.[121]

The investors have to understand under which conditions they are prior and during the investments. Changing the tariffs during the process by State after the investments are made by investor, and therefore the investor legitimate expect for the determined profit, can lead the State to arbitration proceedings, where the chances to win can be both on investors, or on the State side. Therefore, it depends on circumstances and actions made by both parties, for instance, it is important to note whether the Memorandum was signed between the parties, whether the treatment foreign and national investors is the same and there is no discrimination. Also, if the decision made by the State is justified in the interested of the people of country.

1.2.3. Expropriations

According to the Energy Charter Treaty there are direct and indirect expropriations. Article 13(1) of the ECT determines that

"*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect* ***equivalent to*** *nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:*

(a) for a purpose which is in the public interest;

(b) not discriminatory;

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119 "Edf (Services) limited versus Romania, ICSID Case Ase No. ARB/05/13, October 8, 2009," Italaw, p. 217, Accessed 28 August 2021, https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf.

120 United Nations Conference on Trade and Development, "*Fair and equitable treatment UNCTAD Series on International Investment Agreements II 2012"* (New York and Geneva: United Nations, 2012), P. 77, https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

121 Ibid, p. 77.

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation"[122].

Thus, the ECT expressly shows the direct and indirect expropriations. Talking about the claiming in arbitrations under the Energy Charter Treaty, the compensation for the expropriation was claimed in cases[123]. Nationalisation and expropriation are considered as equal terms. The "*direct expropriation*" can be found rarely nowadays. The "*indirect expropriation*" is used more often[124].

Also, it is must be mentioned that in the "EU text proposal for the modernisation of the Energy Charter Treaty" it is proposed to add the Annex X (Expropriation), according to which one:

"*Annex X (Expropriation)*

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

(a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

(b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.

(b) the duration of the measure or series of measures by a Party;

(c) the character of the measure or series of measures, notably their object and context.

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122 "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Art. 13, Accessed 20 December 2021, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

123 "Expropriation regime under the Energy Charter Treaty," Energy Charter Secretariat, 2012, p.8, Accessed 20 December 2021. https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation_2012_en.pdf

124 Ibid.

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of the environment, including combatting climate change, the protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations"[125].

Talking about the expropriation it is important to mention about one of the forms of the indirect expropriation - the "creeping" as one of the types. According to the World Investment Report UNCTAD (hereafter referred as United Nations Conference on Trade and Development) (2003): "Indirect takings include creeping expropriations, involving an incremental but cumulative encroachment on one or more of the ranges of recognized ownership rights until the measures involved lead to the effective negation of the owner's interest in the property"[126]. Creeping expropriation is prohibited by the international investment agreements. Actually, the creeping expropriation requires compensation. But in case that the State has to take good faith and non-discriminatory measures, the actions will not constitute the creeping expropriation[127]. Also, there are other types of indirect expropriation, such as: "tantamount", "de facto", "disguised", "equivalent" or "consequential" expropriation[128].

There is the debate regarding the timing of creeping expropriation, whether it is allowed to take into consideration the expropriation actions which were held before the international investment treaties entered into force. Most Tribunals decided that the expropriation made before the international investment agreement entered into force cannot be considered in arbitration case, but there are controversy opinions of the Tribunals as well[129].

One of the examples is the decision of the Tribunal in the case "Tecnicas Medioambientales Tecmed s.a. v. The United Mexican States": "It should not necessarily follow from this that event or

125 "EU text proposal for the modernisation of the Energy Charter Treaty (ECT)," European Commission, Accessed 20 December 2021,
https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.
126 "World Investment Report 2003, FDI Policies for Development: National and International Perspectives," United Nations Conference on Trade and Development, p.110, Accessed 15 April 2022,
https://unctad.org/system/files/official-document/wir2003light_en.pdf.
127 Juan Nascimbene and Jeremy Sharpe, "Creeping expropriation," Jus Mundi, Accessed 15 April 2022,
https://jusmundi.com/en/document/wiki/en-creeping-expropriation.
128 "Expropriation in Investment Arbitration," Aceris Law LLC, Accessed 16 April 2022,
https://www.acerislaw.com/expropriation-in-investment-arbitration/.
129 Ibid.

conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to identify conduct —acts or omissions— of the Respondent after the entry into force of the Agreement constituting a violation thereof"[130].

Also, there is the debate when the expropriation has to be evaluated as made. When some Tribunals decided that from the any first illegal action, the expropriation can be determined as made, the others tribunals stated that only after the finishing of expropriation[131]. It is more appropriate to evaluate the timing of the creeping expropriation from the first illegal action was made.

However, the valuation of the date in direct expropriation is easier than in the indirect expropriation[132].

As the consequences of creeping expropriation or direct expropriation, the investor can claim to the arbitration court to ask to compensate, pay, or reimburse the damages, or to return the expropriated investments. The example of creeping expropriation is the actions made by Russian Federation from 2014 when the Ukrainian territory, Crimea, Donetsk and Luhansk regions were occupied and annexed, as the result the illegal expropriation of Ukrainian owned assets, infrastructure, like factories etc.

The ECT uses the "equivalent to expropriation" to express the expropriation definition.

1.2.4. Foreign control

The question regarding investor was described in the paragraph 1.1.1. of this Master Thesis, specifically according to the Article 25(2)(b) of the ICSID Convention and Article 26(7) and Article 1(7) of the ECT. These articles were cited in the mentioned paragraph. To summarize, according to the Article 26(7) of the ECT the foreign control has to be established before the dispute. According to

130 "Tecnicas Medioambientales Tecmed s.a. v. The United Mexican States, Case no. Arb (af)/00/2," International Centre for Settlement of Investment Disputes, Accessed 15 April 2022, https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf quoted in Juan Nascimbene and Jeremy Sharpe, "Creeping expropriation," Jus Mundi, Accessed 15 April 2022, https://jusmundi.com/en/document/wiki/en-creeping-expropriation.

131 Juan Nascimbene and Jeremy Sharpe, "Creeping expropriation," Jus Mundi, para. 12,13, Accessed 15 April 2022, https://jusmundi.com/en/document/wiki/en-creeping-expropriation.

132 Fabian Zetina and Kabir Duggal, "Valuation Date," Jus Mundi, para.10, Accessed 15 April 2022, https://jusmundi.com/en/document/wiki/en-valuation-date.

the Article 25(2)(b) of the ICSID Convention the foreign control means the investor should possess the differ nationality than the state of issued claim.

According to the "**Eskosol s.p.a. in Liquidazione and Italian Republic**"[133], the question regarding the foreign control together with the effective and foreign control arose.

According to the "**Autopista Concesionada de Yenezuela, c.a v. Bolivarian Republic of Venezuela**": "*direct shareholding confers voting right, and, therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define "foreign control", direct shareholding is certainly a reasonable test for control*"[134].

According to the Article 26 of the ECT, the foreign control has to be determined "before the dispute"[135]. In the ICSID case "**United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia**" the Tribunal ascertained the foreign control: "*control is a flexible concept, which can only be determined case by case in the light of the particular facts*"[136]. The Tribunals stated that the determination of the "foreign control" having and constating the factors under which it is determined is unnecessary, otherwise the tribunal will not be able to assess the situation legally and de facto[137]. The Tribunal uses the concept of "direct or indirect" control and agrees that the control is flexible and shall to be determined in every case separately[138].

Thus, in case of energy arbitrations under the ECT, it is important to note that the investors from the home country have the possibilities to claim to his own home state, if they hold the foreign company.

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133 "Eskosol s.p.a. in Liquidazione and Italian Republic, ICSID Case No. ARB/15/50," International Centre for Settlement of Investment Disputes, Para. 52, 70, Accessed 22 March 2022, http://icsidfiles.worldbank.org/icsid/icsidblobs/onlineawards/C5106/DC10535_en.pdf.

134 "Autopista Concesionada de Yenezuela, c.a v. Bolivarian Republic of Venezuela, ICSID CASE NO. ARB/00/5, Decision on Jurisdiction," International Centre for Settlement of Investment Disputes, Para. 121, Accessed 22 March 2022, https://www.italaw.com/sites/default/files/case-documents/italaw6352.pdf.

135 Filippo Fontanelli, "Foreign control and ICSID jurisdiction on Energy Charter Treaty Claims of Local Companies: The Eskosol Case," EJIL: Talk! Blog of the European Journal of International Law, Accessed 27 March 2022, https://www.ejiltalk.org/foreign-control-and-icsid-jurisdiction-on-ect-claims-of-local-companies-the-eskosol-case/#:~:text=When%20Control%20Must%20Be%20Assessed%20under%20ECT%20Article%2026&text=Article%2026%20ECT%20requires%20foreign,the%20dispute%2C%20through%20foreign%20control.

136 "United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, award" Italaw, para 366, Accessed 27 March 2022, https://www.italaw.com/sites/default/files/case-documents/italaw10648.pdf.

137 Ibid, para 367.

138 Ibid, para 365 and 366.

2. ENERGY ARBITRATION CASES

There are different types of arbitration cases. Among them, State to State Disputes, Investor to Investor Disputes, Investor to State Disputes, Business to Business Disputes (B2B), and Business to Consumer (B2C) Disputes. Arbitration is very involved to everything above-mentioned except the B2C Disputes, which are less relevant to arbitration, and State to State Disputes, which are relating to the Natural Resources issues.[139] Investment and commercial arbitration in the energy sector will be discussed in this part. Arbitration remains the most popular method of dispute resolution for companies who have energy disputes, because only arbitration has the possibility of cross border enforcement and recognition according to "New York Convention - the Convention on the Recognition and Enforcement of Foreign Arbitral Awards"[140].

2.1. INVESTOR-STATE AND COMMERCIAL ENERGY DISPUTES

In this part mostly the investment energy arbitration cases will be covered including, jurisdictional issues, investor-state arbitration, arbitration involving renewable energy, and commercial energy arbitration.

2.1.1. Investor-State Arbitration involving renewable energy

To start with, investments in the energy sector have some particular features. States frequently make an energy resource one of the most important priorities in economic and even political policy. The investors in energy sector despite of risks, changing market, invest moneys, hoping to return and receive more from investments. In case of arbitration between State and Investors, the significant gain

139 Peter Kraft, "Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration in Germany in the Energy Sector," *Wolters Kluwer in Patricia Nacimiento,* Stefan Michael Kroll, et al. (eds), Arbitration in Germany: The Model Law in Practice (Second Edition), 2nd edition (Kluwer Law International 2015) pp. 847 – 873, pp.1-2, *https://www.energy-community.org/dam/jcr:d656a2e2-da47-4dac-9f62-ec89da8d8b7b/Kraft_Arbitration.pdf*

140 "Global arbitration in the energy sector," Corporate Disputes Magazine, Jan-Mar 2018 issue, page 4, Accessed 18 April 2022, https://www.vonwobeser.com/images/PDF_news/PDF_articles/2017/CD_HOT-TOPIC_Von-Wobeser_Jan2018.pdf.

and loses appear.[141] Investors desired to be secured, doing their investments. That is why a lot of governments improved their national legislation about investor's protection and rules more friendly for the investors. Also, a huge number of bilateral investment treaties and multilateral investment treaties, especially the ECT, were adopted.[142] Later on, the number of energy disputes increased, and, as a result, the arbitration proceedings too.

Speaking about increasing of energy disputes, it is necessary to note briefly about background and reason of it, taking Spain into consideration. Spain established a "Special Regime" for developing solar energy, and offer to investors a specified feed-in tariff for 25 years, there was no generation hours, generators would benefit from 80 per cent of the feed-in tariff, and the right of energy distribution, generated to the Spanish national grid.[143] But, because of the existing financial crisis, the government of Spain changed "Special Regime". During 2010-2014, the law imposed a 7 per cent tax on the value of all energy fed into the National Grid. There was no notification to investors. Also, the legislation eliminated the entire regime in respect of fixed tariffs and premiums, removed the distinction between the ordinary and special regimes.[144] It became a cause for some arbitrations by investors against Spain. Nowadays, having different conclusions in cases, some awards are, from one side, in favor of investors, and from another side, in favor of State, which will be discussed next. Therefore, in order to understand more about the specifics or approaches of some disputes to which the arbitrators drew attention, it is important to consider several of them. In this respect, the first investor-state arbitration after renewably energy reforms in Spain was "**Charanne B.V, & Construction Investments S.A.R.L vs The Kingdom of Spain**", which was in favor of Spain**.** The arbitration was under SCC (hereafter referred as Stockholm Chamber of Commerce) rules and under the ECT, in which arbitrators decided that investor's expectations were not violated and indirect expropriation was absent in modifying the feed in tariff regime in electricity generation systems based on photovoltaic solar energy.[145]

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141 Mark Friedman, Dietmar W Prager and Ina C Popova, "Expropriation and Nationalisation," *The Guide to Energy Arbitrations [Third Edition]* (2018): 17, https://globalarbitrationreview.com/edition/1001292/the-guide-to-energy-arbitrations-third-edition.

142 Margaret L. Moses, "*The Principles and Practice of International Commercial Arbitration"* (New York, United States of America: Cambridge University Press, 2008), 221.

143 Richard Power and Paul Baker, "Energy Arbitrations," Global Arbitration Review 2019 Special Report, Accessed 18 April 2022, https://jenner.com/system/assets/publications/18468/original/Lightfoot%20et%20al%20EAR%202019.pdf?1542741953.

144 Ibid.

145 Monica Feria-Tinta, "Where Does the First Investor-State Arbitration Award in the Spanish Renewables Cases Leave Us?," Kluwer Arbitration Blog, Accessed 07 June, 2020,

Firstly, the claimants based their position that the Kingdom of Spain violated that, illegally changed the special regime in energy sector and the legislation was not stable and predictable for their investments, in result they received a significantly negative effect.[146]

Secondly, Spain argued the corporation "T-Solar" presented their investment activity in Spain, in which "Charanne B.V. and Construction Investments S.A.R.L." were shareholders and filed a claim before the European Court of Human Rights regarding violation of property rights by Spain. Another point from Spain concerned the definition of "*Investor*", which was not properly in the meaning of Article 1 (7) of the ECT, because all corporations were "*corporate empty shells*" and were controlled by Spanish nationals, consequently, were not foreigners under the ECT. The last argument of Spain was about intra-EU disputes, because there is no energy issue outside EU under the ECT, as the investor and State were both from the European Union.[147]

Thirdly, the tribunal decided that European Court of Human Rights is neither under Article 26 (2) (b) of the ECT, nor Spanish court.[148] Important to note that European Court of Human Right also appeared in this case next to arbitration. The explanation for this is that shareholders of the company or company can apply to the European Court of Human Rights for protection of their right to peaceful possession of property, because according to the Court's practice, property within the meaning of the Convention is not only shares but also the shareholder's authority to manage the company. First of all, in order for the ECtHR to be considered, the application must be tested for admissibility accordingly to the Convention requirements.

Returning to the arbitration case, the SCC also sascertained in the decision that "*a substantial identity of parties*" was not enough between "T-Solar" and Charanne B.V. and Construction Investments S.A.R.L. According to the investors, the arbitrators decided that they were incorporated in Netherland and Luxemburg, thus under the ECT were foreign. The Tribunal reiterated the Yuko principle: "*The tribunal knows of no general principle of international law that would require investigating how a company or another organization operates when the applicable treaty simple requires it to be organized in accordance with the laws of a contracting party*". Principle of "Electrabel vs Hungary" in regarding to prevail EU law under the ECT in case of inconsistency was not used. The position of Spain was based on the Sovereign right to regulate legislative changes and

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http://arbitrationblog.kluwerarbitration.com/2016/04/19/first-investor-state-arbitration-award-spanish-renewables-cases-leave-us/?doing_wp_cron=1591529585.8056681156158447265625.

146 Ibid.

147 Ibid.

148 Ibid.

its measures were "*reasonable and foreseeable*" and fair and equal treatment standard do not mean prohibition to freeze laws. The Tribunal decided that there was no indirect expropriation because investments were made in shares, not in returns, and no violation legitimate expectations of investors, because of absence of stabilization clause or Spain's declaration with purpose to induce foreign investment and on which investors can rely on[149].

This decision could be the subject to debate and discussion, because next case "Eiser Infrastructure Limited and Energia Solar Luxembourg S.a r.l. v. Kingdom of Spain" about renewable energy reforms was different in outcome for State and investor, and was the first case in the favour of investors, but on the 11th of June, 2020 was annulled because of the violation the fundamental rule of the procedure and improper constitution, about which will be explained in the next paragraphs.

In the terms that the arbitration case "**Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain**" was annulled, the reasons of that decision should be reviewed. One of the Spain's arguments was "*the lack of impartiality and independence of an arbitrator warrants the annulment of the award due to the improper constitution of the tribunal*",[150] and not necessarily to declare about others arguments regarded annulation, because the Committee of International Centre for Settlement of Investment Disputes declared the annulment only on this one background of "*improper constitution*".[151]

Talking about the annulment, it is required to explain the reasons. Dr. Alexandrov was one of the arbitrators of the Arbitral Tribunal in the Underlying Arbitration[152], and with whom the annulment connected, because he was a partner and one of the heads of international arbitration practice at Sidley Austin's Washington, D.C. office. His team choose the Brattle Group at least nine known investor-state arbitration cases and also commercial arbitration cases. It is written that in four cases the testifying expert was Mr. Lapuerta[153]. Clarifying the circumstances, the Brattle Group was the regulatory expert in the Underlying Arbitration and quantum of Eiser's Parties (plaintiffs' experts).[154]

Indeed, the Committee examined that Arbitrators cannot sit in cases where they may not be perceived as independent and impartial. Otherwise, they could be challenged or disqualified or both. It does not matter even if the Dr. Alexandrov did not understand the consequences of this cooperation,

149 Ibid.
150 Ibid, para 9.
151 Ibid, para 256.
152 Ibid, See: Table of selected abbreviations/defined terms.
153 Ibid, para 53.
154 Ibid, See: Table of selected abbreviations/defined terms.

because the manifest appearance of bias still was.[155] Also, the Committee discovered that the duty to disclose must be because of the roles as damage expert and arbitration counsel.[156]

It is important to note the significant three questions so called three-step test taken by Committee from the annulment committee in "EDF v. Argentina" in order to determine the grounds of annulment:[157]

> "*a) was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?*
>
> *b) if not, has the party seeking annulment established that a third party would find an evident or obvious appearance of lack of impartiality or independence on the part of an arbitrator on a reasonable evaluation of the facts of the case (the Blue Bank standard)? And*
>
> *c) If so, could the manifestly apparent lack of impartiality or independence on the part of that arbitrator have had a material effect on the award?*"[158]

In the award of arbitration case "Charanne B.V, & Construction Investments S.A.R.L vs The Kingdom of Spain"[159] "the Tribunal rejects the objection to jurisdictional objection based on the fork in the road provision of the ECT, without it being necessary to examine the arguments of the Parties as to the subject identity and identity of legal basis, since it would not change the decision of the Arbitral Tribunal in this respect, not meeting the requirement to establish the identity of parties in the proceedings"[160].

In arbitration case: "Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36[161]" the Tribunal decided it has the jurisdiction under the ECT and ICSID[162].

To sum up last case, energy arbitrations remain not out of fundamental rules of the procedure and must be respectful very careful, because the damages from arbitration procedures are huge and a lot of time could be spent or even burnt, if the parties do not respect or departure the rule. Actually, there is still a possibility to review the dispute on the merits. "Eiser and Energia Solar v. Spain"

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155 Ibid, para 219.
156 Ibid, para 228.
157 Ibid, para 180.
158 Ibid.
159 "Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," Italaw, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.
160 Ibid, para. 410.
161 "Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36," Italaw, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf.
162 Ibid, para. 486(a).

establishes higher level regarding the disclosure of information by arbitrators, which will allow to receive more information regarding potential conflicts of law.

Spain was not the single country with such disputes. Also, the disputes in renewable energy industry appeared against Italy and Czech Republic. One of such cases where Italy was liable for violation the FET standard under article 10(1) of the ECT was "**Greentech Energy Systems A/S & Ors. v. The Italian Republic**". Investors told that Italy promised financial incentives to them in order to induce the investment and they must remain unchanged. One of such incentives was the Contro Energia decree, under which the tariffs were higher than market price during 20 years. But later as from 2012-2014 Italy approved new changes into legislation. Italy objected that intra-EU dispute under ECT has no jurisdiction and all measures were proportionate and reasonable.[163] The question regarding jurisdiction has a significant role, as well as the intra EU disputes under ECT especially nowadays.

Most important to understand the position of arbitrators. Thus, Tribunal decided that there was a breach of FET and investors' expectations, the particular reason for this circumstance is that claimants believed in the moment of their investments that the incentive tariffs will not be changed during 20 years. It was clear from the Conto Energia Decrees, agreements with Gestore dei Servizi Energetici (GSE) and from correspondence with GSE.[164]

Moreover, the Tribunal also identified that Italy's argument regarding the compensation the service provider and reduce costs borne by consumers are not satisfied any force majeure circumstances.[165]

In addition, the violation of umbrella clause was also mentioned, because Italy gave the investors some benefits of obligations, because the Tribunal considered obligation also as legislative instruments, which were obligations before the investors.[166]

In general, energy arbitrations are not the exceptions and dissent opinion also exist in process. So was in this case. The arbitrator disagrees with others[167] and told that that there were no breach the

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163 Shyam Balakrishnan, "Italy found liable for change in renewable energy policy in intra-EU arbitration," The International Institute for Sustainable Development, Accessed 21 February 2021, https://www.iisd.org/itn/en/2019/04/23/italy-found-liable-for-change-in-renewable-energy-policy-in-intra-eu-arbitration-shyam-balakrishnan/.

164 Ibid.

165 Ibid.

166 Ibid.

167 "Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA (Claimants) v. The Italian Republic (Respondent), Dissenting opinion of arbitrator Giorgio Sacerdoti, SCC Arbitration V (2015/095)," Investor-State LawGuide, Accessed 28 February, 2021, https://www.italaw.com/sites/default/files/case-documents/italaw10292.pdf.

fair and equitable obligation[168], no breach of the non-impairment obligation[169], no violation of umbrella clause.[170]

To sum up everything that has been stated, renewable energy disputes became more and more popular. As cases review shows, the decision could be made in favor of investors, as well as in favor of State. Important to understand, when the changes to national legislation were made, whether they were predictable, changing the legislation which led to changes of promises given for investors, can contribute for losses. Such disputes will disappear in the future too, for example, probably in Ukraine. It is noticeable that some arbitral awards can be opposite in results. It is important to balance legitimate expectations of investors regarding the stability of norms and regulation versus the public interest regarding which one the state can change legislation at the necessary time.

To summarize the above mentioned, in the case that the State decide to make some regulatory changes in legislation, to change the promised tariffs etc., the recommendations for the State can be like these:

1. The State can say that the income of investors is still high even after the regulatory changes made by the State.
2. The State can still make the regulatory changes, if is in the interest of people of that state and is not discriminatory. The burden of proof will appear. And the State has to explain the adopted measures for people, and for investors properly.
3. The State has to prove that both national and foreign investors are under the same circumstances and in the same position, and the State does not treat any of them in the better way, so therefore there is no discrimination between any of them.
4. The State has to be consistent for all investors.
5. The State has to prove the necessity of the regulatory changes.

2.1.2. Other Investor - State disputes

General principles in arbitration are also applied in energy disputes. The example of this is one case "**Petrobart Limited v. The Kyrgyz Republic**"[171], between these parties there were two

168 Ibid, para 48.
169 Ibid, para 57.
170 Ibid, para 67.
171 "Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003," Italaw, Accessed 25 July 2021, https://www.italaw.com/sites/default/files/case-documents/ita0628.pdf.

judgments already in the moment of the new arbitration proceeding under the ECT, one judgment was made in the national first instance court - the Bishkek Court, another one - under "United Nations Commission on International Trade Law" (hereafter referred as UNCITRAL) rules arbitration. Kyrgyz Republic claimed that regarding the international principal res judicata the claim should be rejected[172]. It is necessary to admit "*the doctrine of res judicata prevents re-litigation of a claim that was or could have been litigated in a prior action. Given (i) that the Show-Cause Case was fully litigated, (ii) that it resulted in a final judgment on the merits, (iii) that the parties thereto are the same as the parties to this arbitration, and (iv) that there existed in the Show-Cause Case no procedural, substantive, or practical impediment to Petrobart's asserting before the Bishkek Court its belief that it is entitled to relief from the Republic based upon the Treaty, this matter cannot now be relitigated*"[173].

In 2014, the Ukrainian Crimean Peninsula was illegally annexed by Russian Federation. Also, the annexation of Donbas territories, the borders were changing regarding the continues invasion of Russian Federation into sovereignty country - Ukraine. Consequently, the questions of expropriation of Ukrainian companies' oil and gas assets and transfer of these assets to state owned companies of Russian Federation have appeared[174]. And in October 2016 Ukrainian companies announced, and commenced the arbitration proceeding regarding the "illegal expropriation of energy investments".[175]

In case "**NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation, PCA Case No. 2017-16**" the claimant party consists of such companies:

"(i) NJSC Naftogaz of Ukraine (Ukraine) (Private entity);

(ii) National Joint Stock Company Chornomornaftogaz (Ukraine) (Private entity);

(iii) JSC Ukrtransgaz (Ukraine) (Private entity);

(iv) JSC Ukrgasvydobuvannya (Ukraine) (Private entity);

(v) JSC Ukrtransnafta (Ukraine) (Private entity);

(vi) Subsidiary Company Gaz Ukraiiny (Ukraine) (Private entity)"[176].

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172 Ibid, 2b, p. 38-39.

173 Ibid, 2b, p. 39.

174 "Naftogaz and others v. Russia NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya and others v. The Russian Federation (PCA Case No. 2017-16)," Investment Policy Hab, Accessed 07 March 2022, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/762/naftogaz-and-others-v-russia.

175105 "Hague Tribunal hearings underway on damages for the Russian seizure of Naftogaz investments in Crimea," Naftogaz, Accessed 07 March 2022, https://www.naftogaz.com/en/news/trybunal-v-gaazi-rozpochav-sluhannya-pro-rozmir-kompensatsii-yaku-rosiya-mae-splatyty-za-zahoplennya-investytsiy-naftogazu-v-krymu.

176 "NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation, PCA Case No. 2017-16," Permanent Court of Arbitration, Accessed 07 March 2022, https://pca-cpa.org/en/cases/151/.

The proceeding was commenced under the "Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998".[177] The current case is not public, but regarding the available information, Naftogaz is expecting the decision for over USD 10 billion, including interests on its favor. The decision is expecting not early than in the beginning of 2023.[178] Moreover, the question of execution of the judgement can appear, if the party does not want to fulfill the decision voluntarily. Regarding the enforcement, if there are any debts, it can be possible to collect money from Ukraine or other States[179].

According to the Article 5 of "Agreement between the government of the Russian Federation and the cabinet of ministers of the Ukraine on the encouragement and mutual protection of investments (Moscow, November 27, 1998)", expropriation is described as:

> *"1. The investments of investors of either Contracting Party, carried out on the territory of other Contracting Party, shall not be subject to expropriation, nationalization or other measures, equated by its consequences to expropriation (hereinafter referred to as expropriation), with the exception of cases, when such measures are not of a discriminatory nature and entail prompt, adequate and effective compensation.*
>
> *2. The compensation shall correspond to the market value of the expropriated investments, prevailing immediately before the date of expropriation or when the fact of expropriation has become officially known. The compensation shall be paid without delay with due regard for the interest, to be charged as of the date of expropriation till the date of payment, at the interest rate for three months' deposits in US Dollars prevailing at the London interbank market (LIBOR) plus 1%, and shall be efficiently realizable and freely transferable"*[180].

Taking into account the illegal annexation of Ukrainian territory and nationalization of Ukrainian companies 'assets by Russian Federation companies and the legal obligation under the Bilateral Investment Treaty, the arbitration decision has to be on favor of Ukrainian companies.

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177 Ibid.

178 "Hague Tribunal hearings underway on damages for the Russian seizure of Naftogaz investments in Crimea," Naftogaz, Accessed 07 March 2022, https://www.naftogaz.com/en/news/trybunal-v-gaazi-rozpochav-sluhannya-pro-rozmir-kompensatsii-yaku-rosiya-mae-splatyty-za-zahoplennya-investytsiy-naftogazu-v-krymu.

179 Oleksandr Kunytsky, "Russia in litigation siege. Can Naftogaz receive compensation for assets lost in annexed Crimea," UNIAN Information Agency, Accessed 07 March 2022, https://www.unian.info/economics/10641216-russia-in-litigation-siege-can-naftogaz-receive-compensation-for-assets-lost-in-annexed-crimea.html.

180 "Agreement between the government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the
encouragement and mutual protection of investments (Moscow, November 27, 1998)," Italaw, Accessed 08 March 2022, https://www.italaw.com/sites/default/files/laws/italaw7651_0.pdf.

Another case with the same background of the annexation Crimea is "**PJSC Ukrnafta v. The Russian Federation**"[181]. This is a maritime claim under the Annex VII of the UNCLOS Convention regarding the oil-water in the Black Sea, though the question of determining the jurisdiction in the sea appeared, despite the fact that the parties agreed for method of dispute resolution as arbitration which is mandatory[182].

The tribunal made a decision on favor of PJSC Ukrnafta. Russian Federation is obliged to compensate USD 44,455,012.00 because of expropriation of property, administrative buildings and 16 petrol stations in the Crimea. The Ukrainian company, which was investor, was trying to return the control under the licenses, buildings, offices, petrol stations, stores, equipment, but did not succeed[183].

Consequently, it is required to define the status of territory. Though, sometimes tribunals avoid the determination. Most of tribunals mentioned that territory is determined "covering de facto and de jure territory under the state affective control"[184].

To sum up, the cases connected to annexation of territories and company, property, assets there, are not common in the world and set precedents in the question of jurisdiction and expropriation.

In 2020 Ukraine has approved the law "On Amendments to Some Laws of Ukraine on Improving the Conditions for Supporting the Production of Electricity from Alternative Energy Sources (№ 810-IX)"[185], which has changed the energy tariffs under the law "About Alternative Energy Sources (№555-IV)"[186], which were promised by the government to be active till 2030.

On June, 2020, "Memorandum of Understanding on the settlement of problematic issues in the field of renewable energy" was approved and signed.[187] Before that the Ukrainian Parliament made

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181 "PJSC Ukrnafta v. The Russian Federation, PCA Case No. 2015-34," Permanent Court of Arbitration, Accessed 08 March 2022, https://pca-cpa.org/en/cases/121/.

182 Aceris Law LLC, "New Arbitration against Russia Arising out of the Annexation of Crimea," Aceris Law, Accessed 08 March 2022, https://www.acerislaw.com/new-arbitration-russia-arising-annexation-crimea/.

183 "Ukrnafta defeats Russian Federation in an international arbitration tribunal," Ukrnafta, Accessed 09 March 2022, https://www.ukrnafta.com/en/ukrnafta-defeats-russian-federation-in-an-international-arbitration-tribunal.

184 Mykhailo Soldatenko, "Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context," Kluwer Arbitration Blog, Accessed 09 March 2022, http://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/.

185 "The Law of Ukraine On Amendments to Some Laws of Ukraine on Improving the Conditions for Supporting the Production of Electricity from Alternative Energy Sources, (№ 810-IX)," Verkhovna Rada of Ukraine, Accessed on 16 March 2022, https://zakon.rada.gov.ua/laws/show/810-20#Text.

186 "The Law of Ukraine About Alternative Energy Sources, (№555-IV)," Verkhovna Rada of Ukraine, Accessed on 16 March, 2022, https://zakon.rada.gov.ua/laws/show/555-15#Text.

187 "The government has signed a memorandum with producers of "green" electricity," Government portal,

changes in legislation regarding "the renewable energy generation and model power-purchase agreement between renewable energy sources producers and state enterprises purchasing the electricity"[188]. Those parties – investors, who agreed on rules of Memorandum of Understanding, has less legal grounds to protect their investors' rights before the arbitration court because they accepted the Memorandum of Understanding and its regulated new renewable energy feed-in tariffs. Moreover, the investors still have the rights to commence the arbitration proceedings, though more chances to win at those who did not agree and did not sign the Memorandum. In the term of Memorandum of Understanding, Guarantee Buyer is state enterprise which is purchasing the electricity.

As the result of changed legislation, reducing the solar power plants feed-in tariff by 15%, the Lithuanian company, Modus Energy International has commenced the arbitration proceeding against Ukraine. Regarding the request, which has been received by Ministry of Foreign Affairs, the Modus Energy International sued 11.5 million euro against Ukraine. The mentioned company has 3 solar power plants in Ukraine[189].

One more case under the same circumstances, SREW N.V., Belgium renewable energy company, commenced the arbitration proceeding as well. The SREW N.V. stated that "Ukraine unjustifiably and inconsistently destroyed the legislative regulation in the field of renewable energy"[190].

Another one, significant arbitration case, was about expropriation was "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227"[191]. European Court of Humas Rights was involved, and the judgment in case of "OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04)"[192] was made. However, the procedure did

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The single web portal of the executive authorities of Ukraine, Accessed 21 March 2022, https://www.kmu.gov.ua/news/uryad-pidpisav-memorandum-z-virobnikami-zelenoyi-elektroenergiyi.

188 Oksana Karel, Daryna Hrebeniuk, "Arbitration is the new black: the Ukrainian perspective," International Bar Association, Accessed 21 March 2022, https://www.ibanet.org/article/A6B5AE82-8CD5-4349-8091-7091D943B43D.

189 "First international arbitration launched by renewable investor against Ukraine," Imepower, Accessed 22 March 2022, https://www.imepower.com/en/first-international-arbitration-launched-by-renewable-investor-against-ukraine/#:~:text=Modus%20Energy%20International%2C%20part%20of,under%20the%20Law%20810%2DIX.

190 Dylan Carter et al., "Belgian green energy producer launches arbitration to recover $79 million from Ukraine," The Kyiv Independent, Accessed 22 March 2022, https://kyivindependent.com/business/belgian-green-energy-producer-launches-arbitration-to-recover-79-million-from-ukraine/.

[191] "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227," Italaw, Final Award, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.

[192] "Case of OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04)," European Court of Human Rights, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw7752.pdf.

not stop on it, and the arbitration decision was appealed[193]. Furthermore, the decision of Hague District Court was appealed and changed by the Court of the Appeal by Hague again[194].

According to the Article 26 (3)(b)(i) of the Energy Charter Treaty there is an "fork in the road" provision: "The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)"[195]. The Arbitrational Tribunal decided it is not appropriate to use and approve the objection of respondent about the "fork in the road" provision[196].Yukos case changed the arbitration practice combining private law, public law, national legislation[197]. Yukos was a very successful oil company in the market[198]. But Russian Federation performed the next actions regarding the Yukos company: ": (i) the arrests of Messrs. Lebedev and Khodorkovsky, Yukos' CEO; (ii) the targeting, intimidation and/or prosecution of other highranking Yukos managers, employees and related persons; (iii) the harassment, prosecution and/or arrest of Yukos' in-house counsel and lawyers involved in various Yukos-related cases; (iv) the conduct of widespread and aggressive searches and seizures; (v) the seizure of the Claimants' shares in Yukos; (vi) the threats to revoke Yukos' oil licenses; (vii) the numerous mutual legal assistance requests and extradition proceedings to affect Yukos and entities/persons associated with the Company abroad; and (viii) the targeting and harassment of Yukos' auditor, PwC. These actions were taken in violation of the most basic standards of due process and fair treatment"[199]. Consequently, the private company and its management lost their right to manage the company[200].

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[193] "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227," The Hague District Court, Italaw, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf.

[194] "Judgment of the Hague Court of Appeal (Unofficial English Translation), Case number: 200.197.079/01," Italaw, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw11337.pdf.

[195] "Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 26 (3)(b)(i), Accessed 18 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.

[196] "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227," Italaw, Final Award, para. 1271 and 1272, Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.

[197] Yuliya Cabrera, "Mechanism for cancellation of the arbitration decision in the Yukos Case Consequences for Ukraine," National law journal: theory and practice, p.1, Accessed 18 April 2022, http://www.jurnaluljuridic.in.ua/archive/2019/2/part_1/30.pdf.

[198] "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227," Italaw, Final Award, para.108(4), Accessed 18 April 2022, https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.

[199] Ibid, para. 108(5).

[200] Ibid, para. 108(6).

The fundamental arbitration rule is to have the odd arbitrators, not even. Yukos case was proceeded under the "UNCITRAL Arbitration Rules (1976)"[201]. Article 5 of the "UNCITRAL Arbitration Rules" states that parties have the opportunity to agree previously on one or three etc., as number of arbitrators[202].

According to the opinion of the Attorney-General at the Supreme Court of the Netherlands that what happened with the Yukos case as well, when the role of secretary was involved significantly[203].

To sum up, when the investors analysis the possibility and chances to claim at arbitration court, they evaluate that if they signed the Memorandum, they still have the legal possibility to commence the arbitration proceeding, but the fact of signing the memorandum and therefore to agree on new rules, they reduce their chance to win the case.

2.1.3. Commercial energy disputes

Commercial arbitration disputes arise from disputes between two or more companies, then at least one of the party acts at their private and commercial purpose, controversy from investment arbitration where the parties are investor and a state, when at least one party is a public entity. The world knows lots of complex commercial arbitration cases, involving energy disputes. The largest arbitration cases were related to energy, such as "National Joint Stock Company Naftogaz of Ukraine (Claimant) versus Gazprom Public Joint Stock Company Gazprom (Respondent)" regarding two cases[204], supply and transit cases[205].

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[201] See: Applicable arbitration rules: UNCITRAL (1976), "Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227," Italaw, Accessed 18 April 2022, https://www.italaw.com/cases/1175.

[202] "UNCITRAL Arbitration Rules," United Nations Commission on International Trade Law, Art.5, Accessed 18 April 2022, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf.

[203] "Opinion of the Attorney-General at the Supreme Court of the Netherlands, Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227," Jus Mundi, Para. 3.190, 3.191, and 3.193, Accessed 18 April 2022, https://jusmundi.com/en/document/decision/en-yukos-universal-limited-isle-of-man-v-the-russian-federation-conclusion-of-the-attorney-general-at-the-supreme-court-of-the-netherlands-friday-23rd-april-2021.

204 "National Joint Stock Company Naftogaz of Ukraine (Claimant) and Gazprom Public Joint Stock Company Gazprom (Respondent), Final Award, SCC Arbitration no. V2014/129", Naftogas, Accessed 22 February 2022, https://www.naftogaz.com/en/news/naftogaz-publishes-stockholm-awards.

205 "National Joint Stock Company Naftogaz of Ukraine (Claimant) and Gazprom Public Joint Stock Company Gazprom (Respondent), Final Award, SCC Arbitration no. V2014/078/080", Naftogas, Accessed 22 February 2022, https://www.naftogaz.com/en/news/naftogaz-publishes-stockholm-awards.

In case "**NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation, SCC Case No V2014/078/080**"[206] the clause in contract regarding take or pay appeared and was the subject to dispute (Article 9.6). The provision of take or pay under Article 8.2.1.3. is private information and is not available for the public.[207] In general, the clause of take or pay means that the client is obliged to pay for the goods, in our case gas, even if the client does not need that gas. Client has the obligation to buy and pay regardless[208].

Among commercial energy arbitrations, the disputes regarding the gas price contracts remain very complex, valued, involves disputes regarding millions or billions or euros. First of all, the arbitrators have to decide about the requirements for arbitration. They include timing, and forms to meet procedural requirements of the claims[209].

In general, when the parties conclude the gas contract, often named as a gas sale agreement ("GSA"), the agreement is made for 10-15-20 years and provide the rule and obligation to amount of gas which has to be bought as minimum per certain period of time, for instance, each year[210].

In the disputes regarding the gas price, the Tribunal has to decide if the requirements about the gas was realized. Also, the arbitrators have to understand the gas market, gas pricing, which is a bit different by its context than in other commercial arbitration[211].

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206 "National Joint Stock Company Naftogaz of Ukraine v. Public Joint Stock Company Gazprom, Final Award, SCC Arbitration no. V2014/078/080," National Joint Stock Company "Naftogaz of Ukraine", Accessed 01 April 2022, https://www.naftogaz.com/rails/active_storage/disk/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaDdDVG9JYTJWNVNTSWhlSGh4YjJKbGNteG9jWE4wY21wNWEzbHJkSFpwYlhGbE4yUmhhd1k2QmtWVU9oQmthWE53YjNOcGRHbHZia2tpWTJsdWJHbHVaVHNnWm1sc1pXNWhiV1U5SWtacGJtRnNMVEl3UVhkaGNtUXRNakJTWldSaFkzUmxaQzV3WkdZaU95Qm1hV3hsYm1GdFpTbzlWVlJHTFRnbkowWnBibUZzTFRJd1FYZGhjbVF0TWpCU1pXUmhZM1JsWkM1d1pHWUdPd1pVT2hGamIyNTBaVzUwWDNSNWNHVkpaFJoY0hCc2FXTmhkR2x2Ymk5d1pHWUdPd1pVT2hGelpYSjJhV05sWDI1aGJXVTZDbXh2WTJGcGIsImV4cCI6bnVsbCwicHVyIjoiYmxvYl9rZXkifX0=--dbb228bb45bae0529e0c21867047dc10f1d0eb25/Final-20Award-20Redacted.pdf.

207 Ibid, Article 8.2.1.3.

208 Dag Mjaaland, "The Naftogaz - Gazprom Saga, debunking myths about the arbitration awards," Arbitration Journal, https://journal.arbitration.ru/analytics/the-naftogaz-gazprom-saga-debunking-myths-about-the-arbitration-awards/.

209 Rahul Donde, Laurent Lévy, and Lévy Kaufmann-Kohler, "The arbitrator's role," Gas and LNG, Price Arbitrations, Consulting Editors: James Freeman, and Mark Levy QC, Globe Law and Business, p.125, Accessed 15 April 2022, https://lk-k.com/wp-content/uploads/2020/04/DONDE-LEVY-in-FREEMAN-LEVY-Eds-Gas-LNG-Price-Arbitrations-2020-The-Arbitrators-Role-pp.-131-141.pdf.

210 Melanie Willems and Robert Blackett, "Pricing Arbitrations: It's a Gas, Gas, Gas," The Energy law Advisor, Institute for Energy Law, Accessed 12 April 2022, https://www.cailaw.org/media/files/IEL/Publications/2014/ela-pricing-arbitrations-vol8-no2.pdf.

211 Mark Levy, "Gas Price Review Arbitrations: Certain Distinctive Characteristics," The Guide to Energy Arbitrations, Global Arbitration Review [Third Edition] (2018): 210-211, https://globalarbitrationreview.com/edition/1001292/the-guide-to-energy-arbitrations-third-edition.

From the mentioned above, the clause "take or pay" appears most of all in gas supply agreements[212]. Also, it is possible to change the price with regard to inflation[213].

Speaking about the "take or pay" clause, necessary to mention that the provision is set up in "Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC"[214]. According to the mentioned Directive, Article 48 (1) provides that "If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, it may send an application for a temporary derogation from Article 32 to the Member State concerned or the designated competent authority"[215]. The Article of the Gas Directive does not describe "take or pay" provision, but allows the party to make a request for a derogation regarding "take or pay" obligations.

2.1.4. Jurisdictional energy disputes

The jurisdictional example of the energy dispute under the arbitration is "**Limited Liability Company Amto v. Ukraine**"[216]. The respondent – Ukraine stated that "AMTO's shares in EYUM-10 do not constitute a qualified 'Investment' under the ECT, since they are not 'associated with an Economic Activity in the Energy Sector', as required by Article 1(6) of the ECT"[217]. Ukraine told that the claimant's activities are only connected to technical issues, like electric repairing, installation, reequipment, and reconstructions, and therefore under the ECT, especially in the definition of "Economic Activity in the Energy Sector" under Article 1(5), as well as under the Energy Charter Conference, which consists the illustrative list of the "*Economic Activity in the Energy Sector*", the actions of claimant AMTO cannot be recognized as the investments under the ECT[218]. The Tribunal

212 Hamish Lal, Josephine Kaiding, and Léa Defranchi, "Take or Pay: Does the Law of Penalties Apply?" International Arbitration Alert, Akin Gump Strauss Hauer and Feld LLP, (July 27, 2020), Accessed 15 April 2022, https://www.akingump.com/a/web/r4XK3QgazYzivfP5fq16ud/ANpm5/international-arbitration-alert-take-or-pay-does-the-law-of-penalties-apply.pdf.

213 Melanie Willems and Robert Blackett, "Pricing Arbitrations: It's a Gas, Gas, Gas," The Energy law Advisor, Institute for Energy Law, Accessed 12 April 2022, https://www.cailaw.org/media/files/IEL/Publications/2014/ela-pricing-arbitrations-vol8-no2.pdf.

214 "Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC," EUR-Lex, Accessed 15 April 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0073&from=EN.

215 Ibid, Article 48 (1).

216 "Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005," Italaw, Accessed 12 April 2022, https://www.italaw.com/sites/default/files/case-documents/ita0030.pdf.

217 Ibid, paragraph 26 (a).

218 Ibid, paragraph 26 (a).

ascertained the agreements regarding technical services, mentioned above, are under the ECT because they foresee the services provided in and for energy sector[219].

The AMTO was incorporated in Latvia, though the selling the shares and different holding companies in the structure, company was held by other companies, there was the evidence that the Board consisted from Liechtenstein citizen and Russian citizen. The Company who held all shares of AMTO was Five Key Invest & Assets Limited Holding JSC, then the company was transferred to Key's Depositary Foundation, which had no owner, only the protector and the director. Also, the issue that the "ultimate beneficial are Russians nationals" arose[220]. Ukraine argued that it was one a ground that the dispute was inadmissible[221]. But the Tribunal ascertained the AMTO had substantial business activities in Latvia according to the Article 17(1) of the ECT and the Company is not owned by the third country citizens[222].

Ukraine claimed that tribunal had no jurisdiction "*ratione materiae*"[223]. The rule regarding the ratione materiae is described in the Article 26(1) of the ECT[224]. Also, this rule is about the specific subject of the jurisdiction of Tribunal, under which investment disputes are subjects to investment arbitration tribunal[225].

Another case which contains the jurisdictional issue is "**Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC**"[226]. Latvia stated that the contract between parties was commercial and not protected by the ECT, since ECT applies only to investment disputes, not commercial[227]. The contract was made for buying the electric power during 8 years[228]. However, the Tribunal decided that the contract "falls within the definition of investments in Article 1 of the Treaty" (ECT)[229]. Also, "Arbitral Tribunal cannot regard the purchase contract as purely commercial"[230]. Therefore, commercial contracts can be the subject to arbitration under the ECT.

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219 Ibid, paragraph 40.
220 Ibid, paragraph 66.
221 Ibid, paragraph 26.
222 Ibid, paragraph 26(h).
223 Ibid, paragraph 60.
224 Consolidated Energy Charter Treaty with Related Document," The International Energy Charter, Energy Charter Secretariat, Article 26(1), Accessed 12 April 2022, https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf.
225 Simon Weber, Charis Tan, "Jurisdiction Ratione Materiae," Jus Mundi, paragraph 1, 2. Accessed 12 April 2022, https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-materiae.
226 "Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC," Italaw, Accessed 16 April 2022, https://www.italaw.com/sites/default/files/case-documents/ita0570.pdf.
227 Ibid, 4.3.3.(d).
228 Ibid, 1.1.
229 Ibid, 4.3.3.(d).
230 Ibid.

One more issue regarding the jurisdiction was made in that arbitration award. The Contract between parties entered into force before the ECT entered into the force. And the Tribunal ascertained "the Treaty does not apply retroactively to situations established prior to the entry into force of the Treaty"[231]. Tribunal decided the Contracts signed when the ECT was not adopted cannot have the retroactivity.

The next case including the jurisdictional issue is "**Petrobart Limited v. The Kyrgyz Republic**"[232]. The Tribunal ascertained the term of "investment" is required to be separately interpreted in every treaty where it was used[233]. The issue of the dispute was described as "whether Petrobart's right under the Contract to payment for goods delivered under the Contract was an asset and constituted an investment under the Treaty"[234]. The Tribunal analyzed the term of "investment" under the ECT and ascertained that "definition is in reality a circular one which raises a logical problem and creates some doubt about the correct interpretation"[235]. The Tribunal made this decision from the question of definition the "claim the money" and "claim the performance"[236]. In the conclusion, the Tribunal found the "a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This must also include the right to be paid for such a sale"[237]. Therefore, regarding the jurisdiction question, the Tribunal rendered the award stated that the Petrobar was investor, had investments and was protected in the ECT.

2.2. RECENT DEVELOPMENTS IN THE SPHERE OF INTERNATIONAL ARBITRATION IN THE ENERGY SECTOR

There are discussions regarding the modernization of the ECT, including available dispute resolution method under the Article 26 of the ECT. The solution can be to transfer the energy disputes to the new created court in the future – multilateral investment court, or to establish a specific court for energy disputes. Also, one of changes in the world of energy arbitration is the compatibility of the

231 Ibid, 2.5.(a).
232 "Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003," Italaw, Accessed 16 April 2022, https://www.italaw.com/cases/documents/826.
233 Ibid, page 69.
234 Ibid, page 71.
235 Ibid, page 72.
236 Ibid.
237 Ibid.

ECT, intra-EU BITs, and the EU law. The following part will examine the recent trends in the global world of the energy arbitration.

2.2.1. Disputes involving EU Legislation, ECT, and Intra-EU BITs. Incompatibility

The question about the incompatibility EU law and ECT, BITs were popular among lawyers all over the world. Different countries raised that issue into debates. Several judgements were made regarding that problem. Among them, Slovak Republic v Achmea BV, Case C-284/16[238], and République de Moldavie v Komstroy LLC, Case C-741/19[239].

According to the Article 3(1)(e) the "Treaty on the Functioning of the European Union" has the "exclusive competence on common commercial policy"[240]. Article 207 (1) of the "Treaty on the Functioning of the European Union" defines that "the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action"[241].

In May 2020, the Member States signed the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union"[242]. There were terminated 132 intra-EU bilateral investment treaties between Member States[243]. After this legislative changes the question regarding the protection of investors in the Intra-EU remains unclear and legally

238 "Judgment of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik v Achmea BV, Case C-284/16," EUR-Lex, Accessed 29 March 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284&from=en.

239 "Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie v Komstroy LLC, Case C-741/19." InfoCuria Case-law. Para. 49. Accessed 29 March 2022. https://iaa-network.com/wp-content/uploads/2021/09/Republic-of-Moldova-v-Komstroy.pdf.

240 "Consolidated version of the Treaty on the Functioning of the European Union, Document 12012E/TXT" EUR-Lex, Accessed 29 March 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

241 Ibid, Art. 207(1).

242 "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," EUR-Lex, Accessed 29 March 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

243 Daniel Müller, "The fate of 132 intra-EU bilateral investment treaties: More or less (legal) certainty?" News and Resources, Accessed 29 March 2022, https://www.muellerdaniel.eu/post/eu-agreement-termination-bit-legal-certainty.

uncertain. Especially the standards of treatment, legitimate expectations, principle of rule of law. The intra-EU bilateral investment treaties were signed between parties when one of the parties was not the Member State, and before the EU asked the candidate for accession the EU to sign such treaties[244].

According to the judgment of the Court of Justice (Grand Chamber) of 2 September 2021 "**République de Moldavie v Komstroy LLC**", "the ECT itself is an act of EU law"[245]. And "arbitral tribunal is required to interpret, and even apply, EU law"[246]. In the judgements, the Tribunal stated that the Article 26 (2)(c) of the ECT has to be "interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State"[247]. Regarding the background of that case, the company from Ukraine Energoallians signed two contacts regarding the supplying of electricity and had to buy the electricity from the Ukrenergo, and after to resell to Moldtranselectro, the last one was state company from Moldova which was operating Moldavian electricity via Derimen. But the Moldtranselectro was defaulted and the Deriman commenced the arbitration proceeding to Energoallians because of the debt of Moldtranselectro[248].

The CJEU (hereafter referred as Court of Justice of the European Union) decided that "Article 1(6) and Article 26(1) ECT must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions"[249].

However, it is important to notice that in more oldest decisions, like "Eastern Sugar BV v. Czech Republic, the Tribunal" ascertained that the BITs and EU Treaties are not incompatible[250],

244 Ibid.
245 "Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie v Komstroy LLC, Case C-741/19," InfoCuria Case-law, para. 49, Accessed 29 March 2022, https://iaa-network.com/wp-content/uploads/2021/09/Republic-of-Moldova-v-Komstroy.pdf.
246 Ibid, para. 50.
247 Ibid, para. 66.
248 Peter Rosher et al., "Moldova v. Komstroy (Case C-741/19): Key lessons and takeaways," ReedSmith, Accessed 29 March 2022, https://www.reedsmith.com/en/perspectives/2021/09/moldova-v-komstroy-key-lessons-and-takeaways.
249 "Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie v Komstroy LLC, Case C-741/19," InfoCuria Case-law, para. 85, Accessed 29 March 2022, https://iaa-network.com/wp-content/uploads/2021/09/Republic-of-Moldova-v-Komstroy.pdf.
250 'Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004," Italaw, para. 168, Accessed 16 April 2022, https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf.

using the description "free movement of capital and protection of the investment are different, but complementary things"[251].

To sum up the recent awards, the CJEU governed that the intra-EU disputes are not compliant with the EU legislation and cannot be arbitrated. Important to note regarding the near future whether the ECT will follow the similar provision in the near future.

2.2.2. New arbitration court for energy commercial and investment disputes

There are the debates regarding reforming the investor-state dispute settlement into the new Multilateral Investment Court (hereafter referred as MIC)[252]. However, there is an advice to establish the new court system specifically for energy disputes. One of the examples can be taken is the "Court of Arbitration for Sport", as for future possible arbitration court in the energy sector[253]. It can be an example for the structure of the Court, for example, with the Secretary General, intercessors etc.[254] There are specific centers like the ICEA and "World Intellectual Property Organisation Alternative Dispute Resolution for Energy"[255]. To create the arbitration court which is specializes in energy disputes is a good idea, because setting up such court can prevent the opposite decisions in different disputes in different arbitration under the same circumstances, involving the future disputes after the destroyment of Ukrainian infrastructure by Russian Federation during the war.

One proposal is to establish the enforcements of the energy arbitration court awards similar to the procedure rules in the Article 54 of the ICSID Convention. According to the Article 54 (1) of the ICSID Convention: "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its

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251 Ibid, para. 169.

252 Issam Hallak, "Multilateral Investment Court, Overview of the reform proposals and prospects," *European Parliament*, Members' Research Service, PE 646.147 – (January 2020)": 1, Accessed 13 April 2022, https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf.

253 "History of the CAS," TAS/CAS Tribunal Arbitral du Sport, Court of Arbitration for Sport, Accessed 12 April 2022, https://www.tas-cas.org/en/general-information/history-of-the-cas.html quoted in Turgut Aycan Özcan and Dev Sareen, "Turkey: A New Suggestion For Resolution Of Energy Disputes Through A Unified International Arbitration Court For Energy Dispute," Mondag, Lexist, Accessed 12 April 2022, https://www.mondaq.com/turkey/oil-gas-electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes.

254 Ibid.

255 Turgut Aycan Özcan and Dev Sareen, "Turkey: A New Suggestion For Resolution Of Energy Disputes Through A Unified International Arbitration Court For Energy Dispute," Mondag, Lexist, Accessed 12 April 2022, https://www.mondaq.com/turkey/oil-gas-electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes.

territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state"[256]. It means that the award can be enforced in the territory of the Member State, unlikely under the arbitration rules of Stockholm Chamber of Commerce, the recognition and enforcement is required under the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards"[257].

Article 1 (1) of the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" specifies that "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"[258].

The suggestions is to make the ECT disputes applicable under the new "multilateral investment court"[259]. EU is interested in solution the international energy disputes effectively and quickly, producing the foreign investments[260]. According to the "multilateral investment court project made by the European Commission", the court will:

"- have a first instance tribunal;

- have an appeal tribunal;

- have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards, and a dedicated secretariat;

- be a permanent body;

256 "ICSID Convention, Regulations and Rules," International Centre for Settlement of Investment Disputes, Accessed 14 April 2022, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.
257 Turgut Aycan Özcan and Dev Sareen, "Turkey: A New Suggestion For Resolution Of Energy Disputes Through A Unified International Arbitration Court For Energy Dispute," Mondag, Lexist, Accessed 12 April 2022, https://www.mondaq.com/turkey/oil-gas-electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes.
258 "Convention on the Recognition and Enforcement of Foreign Arbitral Law," UNCITRAL, New York, 1958, Accessed 14 April 2022, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.
259 Simon Batifort, Diana Tsutieva, and Eleanor Erney, "ASIL DRIG: The Future of Investor-State Dispute Settlement under the Energy Charter Treaty," Kluwer Arbitration Blog, Accessed 17 April 2022, http://arbitrationblog.kluwerarbitration.com/2021/03/29/asil-drig-the-future-of-investor-state-dispute-settlement-under-the-energy-charter-treaty/.
260 "The Multilateral Investment Court project," European Commission, Accessed 17 April 2022, https://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

- work transparently;

-rule on disputes arising under future and existing investment treaties;

- only apply where an investment treaty already explicitly allows an investor to bring a dispute against a state;

- would not create new possibilities for an investor to bring a dispute against a state;

- prevent disputing parties from choosing which judges rule on their case;

- provide for effective enforcement of its decisions, and;

- be open to all interested countries to join"[261].

Energy sector is huge and involves all countries, including developed and developing, and this is an issue to find the consensus between all countries[262]. Creating the unified same rules can be the new step in solving complex energy disputes and be more predictable, regulated, expected for parties.

There are discussions regarding the necessity of the Energy Charter Treaty and possibility to exit from the Treaty. However, the is the issue and procedure for modernization of the Energy Charter Treaty[263]. Though, the Treaty has to be modernised regarding the investor state disputes mechanism for balancing the State's rights to change the regulatory policy, and rights of investors to have their investments protected.

The secretary general of the Energy Charter told "if the modernization process fails, I don't see a future for the Treaty. It would seriously hamper the ability of the world to meet the Paris climate targets. The Paris Agreement does not protect investment. The Energy Charter Treaty does. It's a complement to the Paris agreement"[264].

European Union pushes to set up the multilateral investment court and to transfer the energy disputes to that court, consequently reforming the ISDS mechanism under the ECT[265].

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261 Ibid.

262 Turgut Aycan Özcan and Dev Sareen, "Turkey: A New Suggestion for Resolution Of Energy Disputes Through A Unified International Arbitration Court For Energy Dispute," Mondag, Lexist, Accessed 12 April 2022, https://www.mondaq.com/turkey/oil-gas-electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes.

263 "Modernisation of the Energy Charter Treaty," International Energy Charter, Accessed 17 April 2022, https://www.energychartertreaty.org/modernisation-of-the-treaty/#:~:text=The%20Modernisation%20Group%20achieved%20good,scope%20of%20investment%20protection%20for.

264 Karel Beckman, "Interview: A new Energy Charter Treaty as a complement to the Paris Agreement," Borderlex, Unrivalled coverage of European trade policy, page 2, Accessed 17 April 2022, https://www.energycharter.org/fileadmin/DocumentsMedia/Other_Publications/A_new_Energy_Charter_Treaty_as_a_complement_to_the_Paris_Agreement.pdf.

265 Nathalie Colin, Nicholas Lingard, and Lee Rovinescu, "The future of investor-State dispute settlement," Accessed 17 April 2022, https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2021/future-of-investor-state-dispute-settlement/.

The disappointment with the ISDS of the ECT is connected to the opportunity to claim the state in case of reducing or elimination the usage of renewable energy[266]. However, the exit from the ECT can lead to even less energy investment protection.

To sum up, creation of the multilateral investment court and transferring the energy disputes to it can reduce the inconsistency in arbitration awards, can lead to more transparent approach, coherence, the parties can estimate the unified rules and a quicker process made by the arbitrators. The parties will have more predictability.

266 Peter Bekker and Jessica Foley, "Is the sun setting on the Energy Charter Treaty? An update on the modernisation process," CMC Law-Now, Accessed 17 April 2022, https://www.cms-lawnow.com/ealerts/2020/12/is-the-sun-setting-on-the-energy-charter-treaty-an-update-on-the-modernisation-process.

CONCLUSIONS

1. Article 1(6) of the Energy Charter Treaty defines the investments very broadly, named all types of assets the investments.
2. A claimant has to prove that he meets the requirements regarding the jurisdiction of dispute, therefore to be “investor” and to own the “investments”.
3. A claimant has to prove the violation and necessity of liability by a respondent. It is impossible to win the arbitration case without proving that one standard of the protections was violated at least. The most spread standard of the protection in the arbitration energy disputes is fair and equitable treatment, which includes the legitimate expectations, not consistent behavior, the lack of transparency, often changing legislation in the State.
4. A claimant has to prove that the mentioned violation caused the damages for the claimant’s investments itself.
5. Claimant is eligible to bring a claim on behalf of a Company located in his home State, if the Company is majority controlled or owned by another Contracting State. The claim can be made for the harm made to these foreign company which has the control of the company located in the home State of the claimant and to the company which controls the last one in majority.
6. Setting up the separate arbitration court which will deal only with the energy sector, both commercial and investment disputes, can prevent the opposite awards in the different cases under the same circumstances.
7. Energy disputes are very complex and develop rapidly. Arbitration will remain the most transparent, favorable, most used method of dispute resolution.
8. If the investors sign the Memorandum with the State on changing the tariffs, they still have the possibility to commence the arbitration proceeding, but their chances are reduced.
9. Instead of exit or withdraw the ECT, it is possible to modify the relationship between two or more states, making the agreement under the “Vienna Convention on the Law of Treaties”.
10. Energy disputes will remain the significant part of arbitration cases. The number of energy dispute will arise in the near future as the result of the global infrastructure and energy changes. The energy arbitration disputes involve international private and public law, and national legislation. The disputes are very complex by its nature, including complex corporate structure, and involving different aspects, legal, economical and political.

11. “Charanne B.V, & Construction Investments S.A.R.L vs The Kingdom of Spain” was first made award in the sphere of ISDS regarding renewable energies, when the Arbitration Tribunal focused on FET, however the further arbitration awards did not always follow the decision and awarded opposite judgment regarding the liability like “Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain”, which lead to the necessity of modifying the energy arbitration rules and consistent approach.
12. Consistent practice must be followed in disputes against Russian Federation after the destruction of energy infrastructure during the war made by Russian Federation in and against Ukraine.

RECOMMENDATIONS

1. It is worth to add to/amend/modify the Article 1(6) of the Energy Charter Treaty defines the investments, with the investments which were made by the investors, because in the current version of that Article investments are each kind of assets, which is a very broadly definition.
2. If the State wishes to change the regulatory rules, the rate of tariffs, it is recommended for State:
    1. to prove that income of the investors is still high and prove the necessity to make the changes;
    2. to prove that there is no discrimination of national and foreign investors;
    3. to prove that the changes are required in the interest of all people living in that State;
    4. to communicate with the investors, to sign the memorandum between State and investors;
    5. to be consistent in actions.
3. For investors who are under the issue to agree or not regarding the new rules/tariffs under the offering Memorandum by State: it will be possible to commence the arbitration proceeding, but the possibility to win is reduced in case of agreeing on new memorandum.

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ABSTRACT

This research is dedicated to the legal analysis of the energy disputes under the arbitration method of dispute resolution, involving both commercial and investment disputes. In addition, the overview of the general basics, such as standards of protections, fair and equitable treatment, legitimate expectations, which are the grounds of the possibility to commence the arbitration procedure. Except this, Master Thesis analysis Energy Charter Treaty, which is the unique multilateral agreement for energy sector and require a lot of attention from lawyers, arbitrators, judges, scholars etc.

Under the rapid changes, the ECT, EU legislation is not the exception, and the issue about the incompatibility of the EU law, Intra-EU BITs, and even the ECT arose. The Master thesis overviews the current developments, arbitration awards on these topics, influence on the arbitration awards.

In addition, there is the advice on establishment the specific arbitration court in the energy sector in order to avoid and prevent the contradictions in the final arbitration awards in the different cases under the same circumstances, as well as to create the same rules, and make the expectations predictable for parties.

Key words: energy arbitration, ECT arbitration, standards of protections, legitimate expectations, fair and equitable treatment, energy arbitration court, multilateral investment court, incompatibility of Intra-EU BITs, ECT, and EU legislation, energy investment arbitration, energy commercial arbitration.

SUMMARY

ENERGY DISPUTES ARBITRATION: LEGAL ISSUES

Liliia Beznis

The Master Thesis is aimed to research the legal issues of the energy arbitration cases. The analysis has to be made mostly for investment disputes, however also for commercial disputes.

During the research made in this Master Thesis, the author tries to find the answers on the fundamental issues of energy arbitration, such as standards of protection, including the fair and equitable treatment, legitimate expectations, indirect and direct expropriation, foreign control, to analyze the Energy Charter Treaty, which is unique multilateral treaty created specifically for regulation the energy sector, allowing the arbitrations under that Treaty, to examine the disputes involving the EU law, ECT and Intra-EU BITs.

The research shows that the breaches of the standards of protection allow the investor to claim to arbitration.

Therefore, in the research there are analysis of different arbitration cases, which are the core of that Master Thesis, which is required to find out the recommendations for parties and conclusions taking into account the approach to different situations made by Arbitral Tribunals. The overview includes the most significant cases in arbitration which pushed for changers and have changed the arbitration world for future, for instance: “Yukos Universal Limited (Isle of Man) v. The Russian Federation”, “Slovak Republic v Achmea BV”, National Joint Stock Company Naftogaz of Ukraine (Claimant) and Gazprom Public Joint Stock Company Gazprom (Respondent)”, “Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v the Kingdom of Spain”, and others.

The research examines the terms and definitions used in the legal agreements, and their application by the Arbitrators, and finds out the different interpretations.

In the Thesis, the author gives and examines the idea to establish the energy arbitration court in future.