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INTERPRETATION OF RECENT DEVELOPMENTS IN THE LITHUANIAN ENERGY SECTOR UNDER THE FOREIGN INVESTMENT PROTECTION REGIME

Master Thesis

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CONTENTS

INTRODUCTION

Independence in energy sector is one of the key aims of every modern state; therefore, energy law, including international treaties and national regulation, has significance importance. However, small states (eg the Republic of Lithuania) may face economic difficulties and lack of experience while implementing huge energy projects (eg Visaginas Nuclear Power Plant project). Thus, foreign investment is one of possible solutions to mitigate the financial risk as well as to receive relevant know-how in order to perform significant important energy projects. In such cases, foreign investment protection obligations become relevant.

The Republic of Lithuania is contracting party of ECT[1] as well as have concluded 53 BITs. Therefore, recent developments in the Lithuanian energy sector should conform to obligations provided in BITs (as legal source of general investment protection) and ECT (as legal source of investment protection in energy sector). The essence of this Master Thesis is to analyse the most significant energy developments in the light of investment protection regime and provide respective conclusions.

The problem of this Master Thesis is the following: *"Do recent energy developments in Lithuania conform to foreign investment protection obligations?"*. Due to implementation of EU energy policy the Republic of Lithuania had performed material amendments in Lithuanian energy sector which could influence rights of foreign investors. Furthermore, in order to achieve independence in energy sector, the Republic of Lithuania initiates particular developments (eg Visaginas Nuclear Power Plant Project) as well as some developments were initiated by foreign investors in regard to energy resources located in Lithuania (eg Shale Gas Project).

Nonetheless, the aforementioned energy developments should be implemented in line with investment protection obligations which were undertaken by the Republic of Lithuania under international treaties as well as rights of foreign investors should be ensured. Moreover, the rights of foreign investors should be ensured in all phases of investment (ie including pre-establishment phase). The comprehensive analysis of recent developments in Lithuanian energy sector will lead to respective conclusions regarding the aforementioned problem.

The relevance of this Master Thesis reveals by analysis of the most significant recent developments in Lithuanian energy sector. The importance of the energy sector in Lithuania as well as in all over the world is constantly increasing. However, at the moment the Republic of Lithuania has no sufficient financial capacity to implement most significant energy developments; therefore, foreign investors are actively engaged. Thus, it is necessary to analyse

[1] Law on Rectification of Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environment Aspects No. VIII-803, dated 23 June 1998, Official Gazette, 1998, No. 66-1908.

whether rights of foreign investors are not infringed and the recent energy developments are performing in line with investment protection obligations which were undertaken by the Republic of Lithuania.

The object of this Master Thesis is the possible infringements of foreign investment protection obligations while implementing the most important energy projects in Lithuania. Particular rights of foreign investor in Lithuania may be restricted by legal acts which implement the EU energy law policy. In case of such restrictions, investors may defend their rights in court or arbitration institutions; therefore, analysis of relevant case law will reveal some of possible collisions of EU energy law and foreign investment protection in Lithuania. Moreover, instability in Lithuanian political life may cause not sequential decisions which may result in infringement of the foreign investment protection obligations already in pre-contractual stage. Thus, pre-contractual rights in recent energy developments will be analysed in the light of foreign investment protection.

The Visaginas Nuclear Power Plant Project, implementation of the third EU energy package and the Shale Gas Project were selected as currently the most significant developments in Lithuanian energy sector. The aforementioned selection was made in regard to international obligations[2], capacity of developments[3] and level of independence in energy sector which may be created[4].

The novelty of this Master Thesis and the level of previous research. The novelty of this Master Thesis is comprehensive analysis of recent developments in Lithuanian energy sector where both investment phases (ie pre-establishment and established investment) are covered. Furthermore, rights of particular investors as well as applicable investment protection regimes are identified.

Issues regarding investment protection in Lithuania previously was not much analysed and, therefore, more comprehensive studies of this field is required. In regard to previously made analysis, studies and works written on investment protection in Lithuania, the doctoral dissertation by Loreta Šaltinytė – *Foreign Investment Protection in the Energy Sector: Problems of Interpretation and Application of Law* should be named. The aforementioned dissertation analyses the problems of interpretation and application of foreign investment law in the energy sector. Moreover, there is one master thesis where investment protection in pre-contractual relations is analysed and one master thesis where liberalisation models of the third EU energy packed are analysed and, therefore, controversially nature of ownership unbundling is covered.

[2] Under the Natural Gas Directive, one of unbundling models for transmission system operator should be selected by the Republic of Lithuania.
[3] eg Visaginas Nuclear Power Plant would be the biggest energy development in Lithuania as of recovery of independence of the Republic of Lithuania (please see more information http://www.vae.lt/faktai/#!/pradzia).
[4] eg the Shale gas project possibly would satisfy the demand of natural gas in Lithuania fort approximately 30 years (please see more information http://www.enmin.lt/lt/apie_energetika/detail.php?ID=2833&sphrase_id=28174).

However, this Master Thesis is the first one where particular developments are analysed in the light of foreign investment protection regime.

Analysis in this Master Thesis is mostly based on provisions of ECT, BITs, national regulation, relevant case law, books, articles, reports of international bodies and other public available data. Hence, the analysed literature may be divided into the following main groups:

1. *International treaties and national regulation.* Due to the comprehensive analysis of the object of this Master Thesis relevant provisions of ECT and BITs as well as the Law on Investments are analysed in detail. Moreover, legal framework of investment protection regime are identified.

2. *Case law of arbitral tribunals.* As the novelty of this Master Thesis was not a new approach of already analysed issues but analysis of energy developments which were not analysed before, the decisive factor for selecting relevant case law was not a date of respective decision but formulated precedents and explanations which are widely used in further cases and articles of scientists.

3. *Respective books and articles.* Books on investment protection and energy law issues were analysed due to appropriate understanding of general principles on investment protection in energy sector (eg Dolzer R., Schreuer C. Principles of International Investment Law[5], Jones C. EU Energy Law[6]). Moreover, relevant articles were analysed due to more detail understanding of possible issues in recent energy developments (eg Hoffmann A. K. Indirect Expropriation[7], Reinisch A. Legality of Expropriation[8], Schill S.W. Mulitilateralizing Investment Treaties through Most-Favoured-Nation Clauses[9]).

4. *Reports and working papers of international bodies.* All relevant material provided by the Energy Charter Secretariat (eg A Reader‘s Guide of the Energy Charter Treaty[10], Expropriation Regime under the Energy Charter Treaty[11]) were analysed due to perform comprehensive analysis of ECT. In addition all other relevant material, including communication between EU bodies, was analysed.

[5] Dolzer R., Schreuer C. Principles of International Investment Law, Oxford, 2008.
[6] Jones C. (ed.) EU Energy Law, The Internal Energy Market – The Third Liberalisation Package, Claeys & Castels, 2010.
[7] Hoffmann A. K. Indirect Expropriation. Standards of Investment Protection, New York: Oxford University Press, 2008.
[8] Reinisch A. Legality of Expropriation. Standards of Investment Protection, New York: Oxford University Press, 2008.
[9] Schill S.W. Mulitilateralizing Investment Treaties through Most-Favoured-Nation Clauses, Berkeley Journal of International Law, volume 27, 2009.
[10] A Reader‘s Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002.
[11] Expropriation Regime under the Energy Charter Treaty, Energy Charter Secretariat, 2012.

The significance of this Master Thesis. This Master Thesis provides comprehensive analysis of recent energy developments whereby possible infringements of foreign investors' rights are identified or denied. Thus, conclusions and proposals of this Master Thesis may be used to identify and mitigate potential risks of the analysed developments. Moreover, the respective conclusions and proposals may be used in the future developments with similar circumstances as it was analysed herein. Finally, this Master Thesis will form part of Lithuanian literature on investment protection.

The goal of this Master Thesis is after analysis of legal regulation, including international treaties and national laws, of foreign investment protection in Lithuania as well as relevant case law, to identify weather recent energy developments do not infringe the foreign investment protection obligations which are undertaken by international treaties and established in national regulation.

The objectives of this Master Thesis. In order to achieve the aforementioned goal the following objectives were formulated for particular sections of this Master Thesis:

1. To analyse applicable legal regulation of foreign investment, including national legal acts and international treaties, and to identify its interaction (section 1 of the Master Thesis).
2. To analyse relevant case law regarding foreign investment protection in both – pre-contractual and contractual relations and apply it for analysing conformity of recent energy developments to the investment protection obligations (section 2 and 3 of the Master Thesis).
3. To analyse whether measures adopted in the Republic of Lithuania in regard to the implementation of the third EU energy package conform to foreign investment protection obligations (section 2 of the Master Thesis).
4. To analyse the Visaginas Nuclear Power Plant Project and the Shale Gas Project and identify whether any possible infringements of applicable foreign investment protection regime were done or could be possibly done during the performance of these energy developments (section 3 of the Master Thesis).
5. To analyse the draft Concession Agreement and identify whether it conforms to the applicable investment protection regime as well as to identify potential risks which were mitigated or which should be mitigated in the light of applicable investment protection regime (section 4 of the Master Thesis).

The method of the Master Thesis. The logical dogmatic, comparative, document analysis and summarizing methods are used herein as specified further. The logical dogmatic method was used to determine relevant definitions and its content. The comparative method was used to compare provisions of ECT, BITs and national regulation and to identify interaction between these applicable legal sources. The document analysis method was used for identifying and applying relevant case law as well as to identify possible infringements of investors' rights under the applicable investment protection regime. Finally, the summarizing method was used to provide respective conclusions and proposals.

The structure of this Master Thesis consists of introduction, list of abbreviations, four sections of analysis, conclusions and proposals, summary and annotation (both in Lithuanian and English languages). The sections of analysis are divided in the following order:

1. *Regulation of foreign investment protection in Lithuania* where applicable investment protection regime, including ECT, relevant BITs and national regulation, is analysed. Moreover, interaction between legal sources of applicable investment protection regime is identified.

2. *Possible infringement of investment protection by ownership unbundling* where analysis of the implementation of the ownership unbundling in the Republic of Lithuania is provided. Moreover, the definition of investment as scope of investment protection and expropriation as infringement of investment law are analysed. Finally, in respect to analysis provided in previous parts of this section, the possible infringement is revealed.

3. *Investment protection in pre-contractual relations* where the rights of investors are analysed in the pre-establishment phase. Furthermore, the Visaginas Nuclear Power Plant Project and the Shale Gas Project are analysed in regard to applicable investment protection regime.

4. *Investment protection under the draft Concession Agreement on Visaginas Nuclear Power Plant Project* where division of responsibilities between the investor and the host state are analysed. The focus on liability and its limitation of the Republic of Lithuania is made due to identify whether investor's rights are not limited in the manner which could constitute an infringement of applicable investment protection regime.

The hypothesis of this Master Thesis is the following: *"Recent energy developments in Lithuania conform to foreign investment protection obligations under the applicable investment protection regime"*. The recent energy developments shall mean the developments which are analysed herein, particular the Visaginas Nuclear Power Plant Project (in respect of pre-

establishment phase and draft Concession Agreement), implementation of the third EU energy package and the Shale Gas Project.

ABBREVIATIONS

BIT – Bilateral investment treaty.

Blue Book – Non-Conforming Measures Maintained by a Contracting Party and any Commitments with Regard to Them, Energy Charter Secretariat, Brussels, 2013.

Concession Agreement – Draft concession agreement between the Republic of Lithuania, the Strategic Investor (SPV of Hitachi, Ltd.) and project company in relation to the Visaginas Nuclear Power Plant Project.

ECT – The Energy Charter Treaty.

EU – European Union.

ICSID – International Centre for Settlement of Investment Disputes.

Law on Investments – Law on Investments of the Republic of Lithuania No. VIII-1312, dated 7 July 1999, Official Gazette, 1999, No. 66-2127.

Law on Natural Gas – Law on Natural Gas of the Republic of Lithuania No. VIII-1973, dated 10 October 2000, Official Gazette, 2011, No. 87-4186.

Natural Gas Directive – 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, OJ L 211, 2009.

OECD – The Organisation for Economic Co-operation and Development.

TSO – Transmission system operator.

Shale Gas Project – means tender for the exploitation (prospecting, exploration and extraction) of hydrocarbon resources in the Šilutė-Tauragė and Kudirka-Kybartai fields.

Visaginas Nuclear Power Plant Project – means project of developing new nuclear power plant in Visaginas, including all initial investigation work, selecting and negotiating with strategic investor, concluding the concession agreement.

1. REGULATION OF FOREIGN INVESTMENT PROTECTION IN LITHUANIA

The aim of this chapter is to introduce the legal regulation which was analysed herein as well as to reveal its importance and possible collisions in the light of the problem of this Master Thesis. Moreover, the interaction of the analysed legal sources will be identified in respect of the object to this Master Thesis.

1.1. Energy Charter Treaty

On 14 September 1998 Lithuania has deposited respective instrument of ratification of ECT with the depository and, therefore, become contracting party of ECT. Since this moment ECT become one of the main legal instruments which ensures foreign investment protection in Lithuanian energy sector.

ECT was concluded by affirming that contracting parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the making of investments.[12] The contracting parties enter into ECT having regard to the objective of progressive liberalization of international trade and to the principle of avoidance of discrimination in international trade as well as to removal of technical, administrative and other barriers to trade in energy materials and products and related equipment, technologies and services.[13] The aforementioned background of ECT reveals the necessity of legal instrument which ensures the investment protection in energy sector.

The signatories were desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.[14] Thus, Article 2 of ECT provides the aim of ECT – to establish a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits. Such aim *inter alia* leads to improvement in investment protection regime.

Performing the abovementioned aim, ETC assists by offering binding protection for foreign energy investors against key non-commercial risks, such as discriminatory treatment, direct or indirect expropriation, or breach of individual investment contracts.[15]

The basic elements of ECT are the following:

- Investment protection;

[12] Preamble of the Energy Charter Treaty, dated 17 December 1994, 34 ILM 360 (1995).
[13] Ibid.
[14] Title I(1) of the Concluding Document of the Hague Conference on the European Energy Charter, dated 17 December 1991, 34 ILM 360 (1995).
[15] Energy Charter Secretariat Annual Report 2012, P. 4.

- Trade in energy, energy products and energy related equipment, based on the World Trade Organisation rules;
- Freedom of energy transit;
- Improvement of energy efficiency;
- International dispute settlement, including investor-state arbitration and inter-state arbitration;
- Improved legal transparency.[16]

In respect to the object of this Master Thesis, detail analysis of investment protection, as core element of ECT, will be provided in following sections of this Master Thesis. Moreover, investment protection provisions provided in ECT will be compared with similar provisions in relevant BITs as well as in national regulation.

It should be emphasized that ECT has a pioneer role for treaty-based international energy co-operation, it:

- Is unique instrument in covering all forms of international energy co-operation simultaneously (ie investment, trade, transit and energy efficiency);
- Have created an intermediary step towards the World Trade Organisation membership for those ECT countries that were not yet the World Trade Organisation members;
- Was the first binding multilateral agreement on the promotion and protection of foreign investment, covering all important investment issues and providing high standards of protection, including a fully developed dispute settlement mechanism;
- Was the first multilateral treaty on energy transit issues and energy efficiency;
- Established a permanent discussion forum between members concerning all aspects of international energy co-operation.[17]

In the light of all of the above, it may be concluded that ECT is significant complex international agreement which promotes investment in the energy sector as well as open energy market based on non-discriminatory principle. Moreover, ECT mitigates investors risks related to a host state, including political crisis and expropriation.

[16] A Reader‘s Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 9.
[17] Ibid P. 10.

1.2. Bilateral investment treaties

There were 53 BITs concluded by the Republic of Lithuania and other states at the moment of drafting this Master Thesis. In respect to the object of this Master Thesis, seven BITs were analysed. Five BITs (ie BITs concluded by the Republic of Lithuania with the Kingdom of Sweden, the Republic of Poland, the Federal Republic of Germany, the Kingdom of Netherlands and the Kingdom of Norway) were selected according to the amount of foreign direct investment made in Lithuania.[18] In respect to the further analysis of potential dispute between the investors from the Russia Federation and the Federal Republic of Germany[19] the BIT with the Russia Federation was also selected. Moreover, BIT with the United State of America was selected due to analysis of pre-contractual rights of the investor from the United State of America.

Analysed BITs were concluded with general aim to promote economic co-operation between the contracting parties and protect foreign investment.[20] BITs have very similar aim as ECT; however, BITs are applicable only between two parties and BITs regulates general investment protection (ie not exclusively investments in energy sector) while ECT is multilateral convention particularly for energy sector. Nonetheless, in cases when there are a BIT between Lithuania and other state which is also contracting party of ECT (eg Albania, Latvia, Portugal), competition between the particular BIT and ECT appears.

After detail analysis of the aforementioned BITs, following core elements may be identified:

- Investment promotion;
- Compensation due to lost investment;
- Subrogation;
- Dispute settlement (ie disputes between an investor and a contracting party and disputes between the contracting parties).[21]

[18] Picture 1 of Annex to the Press release regarding direct investment on 2012 made by the Bank of Lithuania and Statistics Lithuania, dated 2 April 2013.
[19] Germany is also among top five countries of the nature of the foreign investments in Lithuania.
[20] eg Preamble of Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 28 September 1992, Official Gazette, No. 25-403, 1994, Preamble of Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, dated 26 January 1994, Official Gazette, No. 22, 1995.
[21] eg Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments, dated 16 June 1992, Official Gazette, No. 5, 1993, Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments, dated 17 March 1992, Official Gazette, No. 117 -5508, 2011.

There are several opinions regarding importance of BITs to foreign direct investment. United Nations Conference on Trade and Development states that BITs' participation in host developing countries and transition economies plays a role in making a final decision on where to invest.[22] Nevertheless, some authors criticizes the aforementioned opinion and state that BITs undoubtedly play a role in some investment projects, they are highly unlikely to be a determining factor for the vast majority of foreign investors determining where, and how much, to invest.[23] While there is such a legal instrument as ECT in energy sector, it is not likely that BITs could play a decisive role in planning where to invest (eg even though there is no BIT between the Republic of Lithuania and Japan but both countries are contracting parties to ECT, Hitachi (the investor from Japan) intends to make a huge investment by constructing a nuclear power plant in Lithuania). However, this approach applies only to energy sector, while BITs covers investment to all sectors.

To sum up, BITs constitutes the part of investment protection regulation in Lithuania. Moreover, under the Law on Treaties[24], ratified international treaty prevails against the national regulation of Lithuania. Thus, in respect to the object of this Master Thesis, it is significantly important to identify whether obligations under the BITs are not infringed by implementation of the third energy package in Lithuania.

1.3. National regulation on foreign investment protection in Lithuania

Core national legal source which regulates investment as well as provides mechanisms for investment protection in Lithuania is Law on Investments. The aim of the Law on Investments is to set forth the terms and conditions of investment in Lithuania, the rights of the investors and investment protection measures for all types of investments.[25]

The main subject matters regulated by the Law on Investments are the following:

- Definitions of investment, investor and making investments[26] as well as other relevant definitions;
- Possible types of investment;

[22] The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, UNCTAD Series on International Investment Policies for Development, United Nations, New York and Geneva, 2009, P. 111.
[23] Lauge N. Poulsen S. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. Yearbook on International Investment Law and Policy 2009/2010, New York: Oxford University Press, 2010, P. 539-574.
[24] Article 11(2) of the Law on Treaties of the Republic of Lithuania No. VIII-1248, dated 22 June 1999, Official Gazette, No. 60-1948, 1999.
[25] Article 1(1) of the Law on Investments.
[26] The Law on Investments uses the definition of Investment to define making of investment and investment as such defines as Investments.

- Investor's rights and investment protection measures, including dispute settlement mechanism for disputes regarding violations of investor's rights;
- Framework of Lithuania's investment policy.

As the Law on Investments is the fundamental legal act in Lithuania which regulates investment, it should be analysed and compared with the requirements of the ownership unbundling[27] provided in the third energy package due to confirming or denying the hypothesis of this Master Thesis. Moreover, it is necessary to analyse recent energy developments in respect to investment protection measures provided in the Law on Investments.

1.4. Interaction between ECT, BITs and national regulation in Lithuania

ECT, BITs and national regulation in Lithuania ensures foreign investment protection in Lithuania; however, particular measures are provided in different levels of protection as well as there may be some collisions between the aforementioned legal instruments. Thus, in respect to object of this Master Thesis, it is important to identify the interaction between ECT, BITs and national regulation in Lithuania due to properly analyse whether the recent energy developments in Lithuania confirms to the foreign investment protection obligations.

Article 16 of ECT provides that if there exist (ie was concluded before ECT entered into force or will be concluded in the future) any agreement between the contracting parties on investment protection, ECT may not limit the investment protection level of such agreement as well as such agreement may not limit the investment protection level established by ECT. Thus, under the provisions of ECT, a legal instrument which provides a higher level of foreign investment protection should prevail. The same principle is also established in BITs by supplementing it that more favourable provisions may also be established in national legislation.[28]

Under Article 15(2) of the Law on Investment, it is stated that if ratified international agreement provide other terms and conditions on foreign investment, those provisions of international agreement should prevail. It means that provisions of international agreements which are ratified by the Republic of Lithuania prevails the provisions of the Law on Investments notwithstanding whether it provides lower or higher protection of foreign investment level.

Hence, investment protection established in ECT and BITs prevails the provisions of national regulation and if BIT provides higher level of protection than ECT, provisions of BIT prevails to

[27] As Lithuania has chosen the ownership unbundling model for electricity and natural gas sectors, it is the only one relevant unbundling model which should be analysed in respect to foreign investment protection in Lithuania.
[28] eg Article 8(1) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403, or Article 9 of the Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 28 September 1992, Official Gazette, 1994, No. 25-403.

provisions of ECT. Despite this, BITs refers to national regulation if it grants more favourable provisions for investment protection. Even though interaction between ECT, BITs and national regulation seems complicated, it ensures that highest possible investment protection that could be applied notwithstanding in which legal source it is provided. Therefore, in respect to this Master Thesis, provisions of foreign investment protection will be treated as those provisions which establish the highest protection level of foreign investment protection in Lithuania.

2. POTENTIAL INFRINGEMENT OF INVESTMENT PROTECTION BY OWNERSHIP UNBUNDLING

The European Commission in its communication to the European Council and the European Parliament has provided the opinion, based on the Internal Energy Market Communication[29] and the final Report on the Competition Sectorial Inquiry[30], that the present rules and measures have not achieved Europe's energy challenges (ie competitiveness, sustainability and security of supply).[31] Therefore, the second energy package has been amended due to the achievement of competitiveness, sustainability and security of supply in European energy market.

The European Commission has examined the unbundling issue closely and concluded that only strong unbundling provisions would be able to provide the right incentives for system operators to operate and develop the network in the interest of all users.[32] Nonetheless, strong unbundling (ie ownership unbundling) may infringe the rights of investors, including foreign investors, which have made an investment in the energy production or supply as well as to transmission system. Thus, an investor, due to the lost possibility to perform full scope of ownership rights, may have only one reasonable solution (ie to transfer the assets where the investment was made) and, therefore, there is open question whether such situation could be qualified as an expropriation? If yes, than whether the legality conditions of expropriation are fulfilled? Further these questions as well as possible disputes regarding infringement of foreign investors rights in Lithuania will be analysed in detail and respective conclusions will be provided.

2.1. Interpretation of the ownership unbundling and its implementation in Lithuanian natural gas sector

The European Commission in its communication to the Council and European Parliament has stated that economic evidence shows that ownership unbundling is the most effective means to ensure choice for energy users and encourage investment.[33] The aforementioned opinion is based by argument that separate network companies are not influenced by overlapping supply/generation interests as regards investment decisions as well as it avoids overly detailed and complex regulation and disproportionate administrative burdens.[34]

[29] Communication from the Commission to the Council and the European Parliament – Prospects for the internal gas and electricity market, COM(2006) 841, 2007.
[30] Communication from the Commission – Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851, 2007.
[31] Communication from the Commission to the Council and the European Parliament – An energy policy for Europe, COM(2007), 2007, P. 6, 7.
[32] Communication from the Commission to the Council and the European Parliament – Prospects for the internal gas and electricity market, COM(2006), 2007, P. 11.
[33] Ibid, P. 12.
[34] Ibid, P. 12.

Article 9(1)(a) of the Natural Gas Directive provides the general obligation of undertaking which owns a transmission system to act as a transmission system operator. Therefore, the transmission system owner is responsible among other things for granting and managing third-party access on a non-discriminatory basis to system users, collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism, and maintaining and developing the network system.[35]

Main principle of the ownership unbundling is stipulated in Article 9(1)(b) the Natural Gas Directive which states that the same entity cannot directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system as well as directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply.

The control in respect to Article 9(1)(b) of the Natural Gas Directive should be understood as rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking as well as rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.[36] Moreover, Article 9(1)(c) of the Natural Gas Directive prevents for possible indirect control and forbids to the same to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a TSO or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply. The aforementioned restriction may be criticized due to possibility to restrict minority shareholding in unreasonable level.[37] Different investors may be faced with this question, for example financial investors (ie which have diversified portfolios, including participation in energy transmission, generation, production and/or supply activities, located in different places) such as pension funds, insurance companies and infrastructure funds with participations in the energy sector.[38] Thus, control should be understood in broad meaning,

[35] Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in the natural gas – the Unbundling Regime, European Commission, Brussels, 2010, P. 8.
[36] Article 2(36) of the Natural Gas Directive.
[37] Jones C. (ed.) EU Energy Law, The Internal Energy Market – The Third Liberalisation Package, Claeys & Castels, 2010, paragraph 4.151.
[38] Ownership unbundling – The Commission‘s practice in assessing the presence of a conflict of interest including in case of financial investors, European Commission, SWD(2013) 177, Brussels, 2013, P. 2.

including *de iure* and *de facto* control, direct and indirect control as well as control through appointed administrative or management entities.

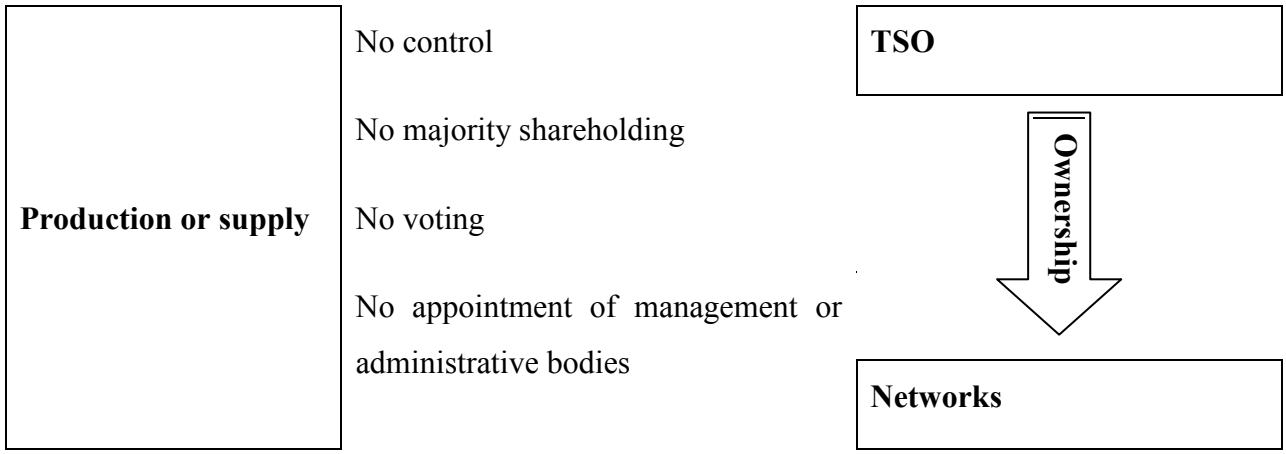
The exercise any right in respect to Articles 9(1)(b) and 9(1)(c) of the Natural Gas Directive includes the power to exercise voting rights, the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking or the holding of a majority share.[39] However, it is not an exhaustive list of rights.[40]

Essence of the ownership unbundling is that the vertically integrated undertaking has the obligation to divest its controlling shares in the TSO (ie the vertically integrated undertaking should not maintain control over the TSO and in fact has no influence over it)[41], except following cumulative conditions are meet:

- There is no direct or indirect control as it is defined above;
- There is no majority shareholding;
- The voting rights are not performed directly nor indirectly;
- The rights to appoint bodies such as members of the supervisory board or the administrative board are not performed directly or indirectly.[42]

Picture No. 1 – Ownership unbundling, provided below, visualizes the essence of the ownership unbundling.

The Picture No. 1 – Ownership unbundling.



[39] Article 9(2) of the Electricity Directive and the Natural Gas Directive.
[40] Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in the natural gas – the Unbundling Regime, European Commission, Brussels, 2010, P. 9.
[41] Jones C. (ed.) EU Energy Law, The Internal Energy Market – The Third Liberalisation Package, Claeys & Castels, 2010, paragraph 4.30.
[42] Ibid, paragraphs 4.141-4.145.

The Natural Gas Directive was transposed into the Law on Natural Gas. Article 40(1) of the Law on Natural Gas provides that the transmission activity of natural gas should be unbundled from the activities of natural gas production and supply by unbundling the ownership of the TSO from the undertakings which perform production or supply activities. Natural gas undertakings[43] should comply with ownership unbundling requirements stipulated in the Law on Natural Gas till 31 October 2014.[44] Moreover, if the undertaking fails to perform unbundling provisions stipulated in the Law on Natural Gas, the fine up to 10 % of the annual turnover of the undertaking may be applied.[45]

Discussions regarding implementation of the Natural Gas Directive in Lithuania (selection of the most properly unbundling model) have started at the date of adoption of the conception concerning the amendment of the Law on Natural Gas. Although there are some opinions that ownership unbundling model was selected without the proper assessment of positive and negative effects, nor the positions of neighbouring countries which (like the Republic of Lithuania) have the sole external supplier of natural gas and are similar in the form of governance and legal system, it is agreed that implementation of ownership unbundling model in a long run might have positive effects on competitiveness of natural gas market, consumers, natural gas prices, investments, other energy sectors, various types of economic activities, and overall to the state economy.[46]

To sum up, Lithuania has chosen the ownership unbundling for natural gas sector as the most efficient unbundling model which provides the highest level of unbundling as well as ensures the competitive energy market. However, implementation of the ownership unbundling may cause the situation when the investor's rights will be restricted[47] and, therefore, such restriction may be try to be treated as an expropriation.

[43] Under Article 2(7) of the Law on Natural Gas, natural gas undertaking means an undertaking which is engaged in at least one of the following functions: natural gas, including among them liquefied gas, production, transmission, distribution, supply, purchase and storage and is responsible for the commercial, technical and (or) maintenance tasks related to those functions.

[44] Article 8.2 of the Unbundling Plan for Activities and Control of the Natural Gas Undertakings which do not Comply with the Requirements of the Law on Natural Gas of the Republic of Lithuania, approved by the Resolution of the Government of the Republic of Lithuania No. 1239, dated 28 October 2011, Official Gazette, 2011, No. 130-6170.

[45] Article 5 of the Law on Implementation of the Law on Amendment of the Law on Natural Gas No. XI-1565, dated 30 June 2011, Official Gazette, 2011, No. 87-4187.

[46] Kanapinskas V., Urmonas A. Changes of Legal Regulation on Natural Gas Market in the Context of the Third European Union Energy, Jurisprudence, 2011, 18(1), P. 246, 247.

[47] The investor cannot have (i) the direct or indirect control over undertaking; (ii) majority shareholding; (iii) the voting rights; (iv) the rights to appoint bodies such as members of the supervisory board or the administrative board.

2.2. Definitions of investment as scope of protection

The main obligation under ECT[48] and BITs[49] is to protect as well as to create stable, equitable, favourable and transparent conditions for investors of other contracting parties (ie the contracting party of ECT or particular BIT) to make investments. The importance of definitions *investment* reveals in case law because it should be deemed as condition precedent for application legal protection.[50]

In the light of investment law the definition of investment may be divided in following models:

- Asset based model – wide list of specified assets that fall under the investment protection;
- Transaction based model – underlying capital transfer is protected;
- Enterprise based model – business organization of the investment through an enterprise is protected.[51]

Further the possible definitions of investment will be analysed and compared as it is defined in ECT and Law on Investment as well as in BITs concluded by the Republic of Lithuania and other states. Such analysis will allow identifying the scope of protection which falls under the foreign investment protection in Lithuania.

2.2.1. Investment interpretation under ECT

The asset based model definition of investment is provided in Article 1(6) of ECT. This provision establishes a non-exhaustive list of assets' forms which shall be deemed as an investment. Under Article 1(6) of ECT, *investment* means every kind of asset, owned or controlled directly or indirectly by an investor, including:

- *tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
- *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;*

[48] Article 10(1) of ECT.
[49] eg Article 2 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, dated 26 January 1994, Official Gazette, 1995, No. 22-508.
[50] eg Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002.
[51] Schlemmer E.C. Investment, Investor, Nationality, and Shareholders. The Oxford Handbook of International Investment Law, Oxford University Press, 2008, P. 52.

- *claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
- *Intellectual Property;*
- *Returns;*
- *any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*[52]

Interpretation of the definition of investment under ECT in broad sense was emphasized in *Plama Consortium Limited v. Bulgaria* case where the tribunal has stated that Article 1(6) of ECT provides a broad, non-exhaustive list of different kinds of assets encompassing virtually any right, property or interest in money or money's worth.[53] Such interpretation of the definition of investment establishes the broadest possible meaning of investment as well as establishes high protection of foreign investment.

Moreover, Article 1(6) of ECT states that the change of form in which assets are invested does not influence the investment as such (ie ECT provides definition of investment which covers any type of asset, including cases when the asset changes its form). Despite broad meaning of the investment, Article 1(6) of ECT provides specific requirements for the investment – investment should be associated with an economic activity in the energy sector.[54] It means that those activities which are not directly related with an economic activity in energy sector (eg acquisition of the office premises for company which implements the particular energy development) also shall be deemed as investment under ECT.[55]

In order to protect the investment, examination whether the investment is controlled by the investor should be performed in respect to all relevant circumstances, including the investor's financial interest, investor's ability to perform substantial influence over the management and operation of the investment.[56] If there are any doubts whether the investor is controlling the investment, including direct and indirect control, the investor has the burden of proof that control over the investment exist.[57] The investor which claims that investment where made and which

[52] It is original wording of ECT; therefore, all definitions (ie words started in capital letters) have the meaning as it is provided in ECT.
[53] Decision on jurisdiction of Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, dated 8 February 2005, paragraph 125.
[54] Under Article 1(5) of 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 with exceptions provided in ECT.
[55] A Reader's Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 21.
[56] Final Act of the European Energy Charter Conference, Understanding No. 3, 34 ILM 360 (1995).
[57] Ibid.

requires for protection of investment should prove that the control (direct or indirect) over the investment (ie particular asset as defined above) exists.

Under Article 1(8) of ECT, investment is made when there is established new investment, acquired all or of existing investment or transferring investment in different energy activity. Pursuant to existing case law of the investment disputes in energy sector, an investor may use the benefits of investment protection only after an investment is made as it is understood in ECT.[58]

Hence, ECT provides broad and non-exhausted definition of investment which emphasizes the protective philosophy of investment in energy sector.[59] The definition of investment provided in ECT reveals the intention of the contracting parties of ECT to apply broad approach of investment as well as to ensure high protection of investment.

2.2.2. Investment interpretation under BITs

Most of analysed BITs provide the asset based definition of investment and define investment as all kinds of assets, invested by an investor of one contracting party in the territory of the other contracting party in accordance with legislation of the latter contracting party.[60] Similarly as in Article 1(6) of ECT, BITs provide not exhaustive list of items which should be deemed as asset.[61]

Only some of analysed BITs provide the explicit requirement for an investor to hold the control over the invested asset.[62] However, BITs require that an investment should be made in accordance with national laws and regulations of contracting parties[63] or states that the

[58] eg Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002.
[59] Ribeiro C. Investment Arbitration and the Energy Charter Treaty, JurisNet, LLC, 2006, P. 73.
[60] eg Article 1(2) of the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, dated 29 June 1999, Official Gazette, 2000, No. 59-1763; Article 1(1) of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments, dated 16 June 1992, Official Gazette, 1993, No. 5.
[61] eg Article 1(a) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, dated 26 January 1994, Official Gazette, 1995, No. 22-508, provides such not exclusively list of assets:
i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
iii. title to money, to other assets or to any performance having an economic value;
iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
v. rights granted under public law, including rights to prospect, explore, extract and win natural resources.
[62] eg Article 2(1) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403.
[63] eg Article 1(1) of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments, dated 16 June 1992, Official Gazette, 1993, No. 5.

investment protection should be performed in respect to national regulation[64]. It means that provisions of the Law on Investments regarding requirement to hold the control over the invested asset should be applicable.

After analysis of BITs it may be concluded that BITs intends to provide broad and non-exhaustive meaning of the definition of investment. Nonetheless, comprehensiveness of the definition of investment, including its extension, differs from BIT to BIT.

2.2.3. Investment interpretation under the Law on Investments

Under Article 2(1) of the Law on Investments, the definition of investment covers funds and tangible, intangible and financial assets. Further, Article 2(3) of the Law on Investments states that investment shall be deemed made when the investor acquires the right of ownership, the right of creditor's claim against the object of investment or the right to manage and use the object of investment. Among other investment making possibilities establishment of new legal entity is specified in Article 4(1) of the Law on Investments. Therefore, the Law on Investment provides transaction and enterprise based model definition of investment and similar like Article 1(6) of ECT provides requirement to control asset where the investment was made.

Furthermore, Article 2(1) of the Law on Investments specifies that the investment should be done due to the aim – to obtain profit or to achieve social result (eg in the areas of education, culture, science, health and social security, etc) or to ensure the implementation of the state functions.

Thus, the Law on Investment does not provide such comprehensive and illustrative list of assets which falls under the investment definition under ECT. Nevertheless, the Law on Investments as well as ECT provides non-exhaustive definition of investment.

2.2.4. Conclusions on interpretation of the definition of investment

While ECT and analysed BITs provides asset based definition of investment, the Law on Investments provides transaction and enterprise based definition of investment. Despite that ECT provides definition of investment which is applicable only in energy sector, definition of investment stipulated in ECT is more comprehensive than definitions provided in the Law on Investments and analysed BITs. As ECT provides most sufficient definition of investment, pursuant to Articles of ECT, Law on Investment and BITs which regulates interaction between

[64] eg Article 2 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, dated 26 January 1994, Official Gazette, 1995, No. 22-508.

the sources of law[65], investment should be understood as it is defined in ECT and, therefore, further in this Master Thesis it will have such meaning.

Moreover, it should be noted that all analysed legal sources (ie ECT, BITs and Law on Investments) provide requirement for the investor to have direct or indirect control over asset in order it could be deemed as investment. Thus, the control over an investment can be indicated as mandatory precondition for qualifying particular asset as investment and, therefore, applying investment protection.

2.3. Expropriation as infringement of investment law

It is essential to protect rights of foreign investors in case of expropriation and even though the risk of politically motivated expropriations has decreased substantially during the last twenty years; however, such risk still exists as well as there is a possibility of an expropriation for non-political reasons (eg construction of a new road or a building).[66] Expropriation of investment infringes provisions ECT, BITs and the Law on Investment and, therefore, core issues regarding expropriation and its legitimation are analysed below. Expropriation may be interpreted in narrow and in broad sense, which includes regulatory takings;[67] therefore, in order to analyse the conformity of recent energy developments in Lithuania to the investment protection regime, the broad understating of expropriation is provided in this section of the Master Thesis. Bellow provided analysis will allow evaluating whether implementation of ownership unbundling in Lithuanian natural gas sector can be deemed as expropriation.

2.3.1. Expropriation under ECT, BITs and Law on Investments

Article 13(1) of ECT states that investments of investors of a contracting party in the area of any other contracting party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation. Moreover, Article 13(3) of ECT specifies that expropriation includes situations where a contracting party (ie host state) expropriates the assets of a company or enterprise in its area in which an investor of any other contracting party has an investment, including through the ownership of shares. Thus, ECT directly forbids expropriation of investment made by foreign investor and any measures which have the same effect as expropriation, except legitimation conditions are achieved.

[65] Article 16 of ECT, Article 15(2) of the Law on Investment and examples of BITs provisions – Article 8(1) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403, or Article 9 of the Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 28 September 1992, Official Gazette, 1994, No. 25-403.
[66] A Reader‘s Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 24.
[67] Van Harten G. Investment Treaty Arbitration and Public Law, New York: Oxford University Press, 2007, P. 94.

All analysed BITs directly forbid expropriation[68] or at least state that it can be performed only if legitimate conditions are achieved[69]. However, only some of analysed BITs[70] provide such comprehensive forbidden as it is in Article 13(1) of ECT and directly state that not only direct but also indirect expropriation is forbidden as well as all measures which have the same effect as expropriation.

Under Article 7(1) of the Law on Investments, expropriation of the object of investment is allowed only in the cases specified and according to the procedure set forth in the laws and only for public needs, paying the investor/investors appropriate compensation in the manner prescribed by the Government. Therefore, the Law on Investments not only forbids expropriation and provides legitimate conditions of expropriation but also indicates that the expropriation could be made only in cases which are directly provided in laws.

2.3.2. Direct and indirect expropriation

Generally direct expropriation can be understood as governmental taking or modification of an individual's property rights.[71] However, nowadays direct expropriation of investment is not so usual and more common form of expropriation is indirect expropriation, where the formal title to the property remains with the investor but the investor's right to use and control the particular property is restricted or eliminated.[72] Thus, this section of the Master Thesis will mostly focuses on indirect expropriation as it will allow to identify in further sections of this Master Thesis whether the Republic of Lithuania had indirectly expropriated investments by implementing the third energy packed.

It was emphasized in *Metalclad Corporation v. The United Mexican States* case that expropriation includes not only open, deliberate and acknowledged takings of property (ie direct and obligatory transfer of title to property in favour of the host state), but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of

[68] eg Article 6 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Lithuania and the Government of the Kingdom of the Netherlands, dated 26 January 1994, Official Gazette, 1995, No. 22-508; Article 6 of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments, dated 16 June 1992, Official Gazette, 1993, No. 5.

[69] Article 4(2) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403.

[70] Article 4 of the Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 28 September 1992, Official Gazette, 1994, No. 25-403.

[71] Black's Law Dictionary, ninth edition, Thomson Reuters, 2009, P. 662.

[72] Expropriation Regime under the Energy Charter Treaty, Energy Charter Secretariat, 2012, P. 9.

property even if not necessarily to the obvious benefit of the host state.[73] It means that an investment can be expropriated without transfer of the title to a particular asset, it is enough that a host state issue significantly interference the investor's right to use, control or receive benefits from the investment. Therefore, in the light of indirect expropriation it is essential determine what are the main criteria under are which the decisions regarding expropriation are based.

OECD in its Working Paper on International Investment has provided an opinion based on arbitral tribunals decisions that indirect expropriation may be determined by following three criteria:

- The degree of interference with the property right;
- The character of governmental measures (ie the purpose and the context of the governmental measure);
- The interference of the measure with reasonable and investment-backed expectations.[74]

The degree of interference with the property right should be substantial;[75] thus, regulation may constitute expropriation when it substantially impairs the investor's economic rights (ie ownership, use, enjoyment or management of the business, by rendering them useless).[76] The same opinion was provided in the *Nykomb Synergetics Technology Holding v. The Republic of Latvia* case where the arbitral tribunal has stated that the decisive factor on evaluating whether expropriation was performed by disputed measures is determining the degree of possession taking or control over the particular enterprise.[77] Moreover, it was provided in *PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey* case that the degree of interference may be determined by analysing whether there were any form of deprivation of the investor in the control over the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.[78]

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[73] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, dated 30 August 2000, paragraph 130.
[74] Indirect Expropriation and the Right to Regulate in International Investment Law, Working Papers on International Investment, No. 2004/4, OECD, 2004, P. 10.
[75] AES Summit Generation Limited and AES-Tisza Erömükft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Dated 23 September 2010, paragraph 14.3.1.
[76] Indirect Expropriation and the Right to Regulate in International Investment Law, Working Papers on International Investment, No. 2004/4, OECD, 2004, P. 10, 11.
[77] Nykomb Synergetics Technology Holding v. The Republic of Latvia, The Arbitration Institute of the Stockholm Chamber of Commerce, dated 16 December 2003, P. 33.
[78] PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, dated 19 January 2007, paragraph 278.

In context of analysing whether indirect expropriation was performed it is important to analyse the purpose and the context of the measures taken by a host state (ie whether the particular measure refers to the state's right to promote a recognised social purpose or the general welfare) because the existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no expropriation.[79]

It may be argued that it is doubtful whether loss of investor's right to control an investment due to public welfare could deny existence of indirect expropriation. Such approach would be based on the *sole effects* doctrine which focuses solely on the effect of the governmental measures to the investment and mean that the investors are entitled to compensation because they have been deprived of the property regardless the aim of such governmental measures.[80] Application of such approach would mean that governments will have to pay investors in the form of compensation to undertake public interest measures, including measures which ensure governmental health and environment protection.[81] Hence, solution to clarify the legal regulation of investment by identifying particular measures which would be outside the scope of expropriation (eg health and environment)[82] could be deemed as compromise between measures which are necessary for public interest and investment protection regime.

While analysing whether the investor's reasonable expectations were not violated, the investor has to prove that investment was based on a state of affairs that did not include the challenged regulatory regime (ie the claim must be objectively reasonable and not based entirely upon the investor's subjective expectations).[83] A legitimate expectations is assumed more readily if an investor obtains specific formal assurance from the state authorities under which the investor may rely and make an investment.[84] In *Parkerings-Compagniet AS v. Republic of Lithuania* the arbitral tribunal has stated that the expectation could be deemed legitimate if the investor received an explicit promise or guaranty from the host state, or if implicitly, the host state made assurances or representation that the investor could rely on making investment.[85] It means that the investor should undertake the risk that legal regulation could be amended and that such amendments could have an effect to the investment.

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[79] Indirect Expropriation and the Right to Regulate in International Investment Law, Working Papers on International Investment, No. 2004/4, OECD, 2004, P. 16.
[80] Expropriation Regime under the Energy Charter Treaty, Energy Charter Secretariat, 2012, P. 55.
[81] Ibid.
[82] Ibid.
[83] Indirect Expropriation and the Right to Regulate in International Investment Law, Working Papers on International Investment, No. 2004/4, OECD, 2004, P. 19.
[84] Yannaca-Small K. Fair and Equitable Treatment Standard: Recent Developments. Standards of Investment Protection, York: Oxford University Press, 2008, P. 126.
[85] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, dated 11 September 2007, paragraph 331.

Moreover, the requirement of proportionality should apply to measures which are adopted by the state authorities and which are challenged as an expropriation. The requirement of proportionality means that when the investor carries too big a burden in comparison with the aim which the host state intends to achieve, the adopted measures by state authorities must be deemed to be disproportionate and, therefore, are more likely to be acknowledged as a deprivation of property which entitles its owners to compensation.[86] The requirement of proportionality was established in *Technical Medioambientales Techmed S.A. v. The United Mexican States* case where the arbitral tribunal stated that regulatory actions and measures will not be initially excluded from the definition of expropriation.[87] In addition to the negative financial impact of such actions or measures, the arbitral tribunal has considered, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.[88]

Even though there are no mandatory criteria for indirect expropriation to be proved and conclusions regarding performed expropriation come on the case by case basis, the aforementioned criteria were used by many arbitral tribunals[89] and, therefore, it could be used as guideline for evaluation whether investment was expropriated indirectly.

2.3.3. Legitimation of expropriation

As this Master Thesis have an objective to analyse whether the implementation of EU energy policy conforms with foreign investment protection obligations and possible expropriation case will be analysed in this Master Thesis it is important to analyse grounds for legitimation of expropriation. Even though expropriation of investment is directly forbidden by ECT, BITs and the Law on Investment,[90] the abovementioned legal sources provide legitimate conditions for expropriation. Therefore, expropriation is not illegal *per se* under the existing investment protection regime. In particular circumstances legitimate need to take private property for a purpose to ensure public interest may exist. Further, legitimate conditions of expropriation will be analysed in the light of investment protection.

[86] Hoffmann A. K. Indirect Expropriation. Standards of Investment Protection, New York: Oxford University Press, 2008, P. 163.
[87] Technical Medioambientales Techmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, dated 29 May 2003, paragraph 122.
[88] Ibid.
[89] Please see detail cases summarized in Indirect Expropriation and the Right to Regulate in International Investment Law, Working Papers on International Investment, No. 2004/4, OECD, 2004.
[90] Detail analysis provided in Section 2.3.1 of this Master Thesis.

Under Article 13(1) of ECT expropriation of investment may be legitimate if all following conditions are meet:

- for a purpose which is in the public interest;
- not discriminatory;
- carried out under due process of law; and
- accompanied by the payment of prompt, adequate and effective compensation.

The same conditions for legitimation of expropriate are established in all analysed BITs[91] as well as in Article 7(1) of the Law on Investment[92].

Even though the meaning of public interest is not specified and could have the broad meaning, the host states are not absolutely free to determine whatever they wish to be deemed as public interest.[93] This approach was provided in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* where the arbitral tribunal stated that a requirement for *public interest* requires some genuine interest of the public.[94] Furthermore, the arbitral tribunal provided that if mere reference to public interest can put such interest into existence and, therefore, satisfy this requirement, then this requirement would be rendered meaningless since it could be meet in every single case.[95]

The requirement do not discriminate as well as to comply with public interest are broad and unclear.[96] Thus, arbitral tribunals should interpret it on the case by case basis and in respect to previous decisions of arbitral tribunals.

The requirement of due process of expropriation is typical legality requirement for an expropriation.[97] Despite this, the requirement of due process should be deemed not so much

[91] eg Article 4(1) of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments, dated 17 March 1992, Official Gazette, 2011, No. 117-5508; Article 6(1) of the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, dated 29 June 1999, Official Gazette, 2000, No. 59-1763.
[92] Article 7(1) of the Law on Investment does not provide requirement for non-discrimination; however, Article 5(1) of the Law on Investment ensures the same conditions for national and foreign investors.
[93] Reinisch A. Legality of Expropriation. Standards of Investment Protection, New York: Oxford University Press, 2008, P. 185.
[94] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, dated 2 October 2006, paragraph 432.
[95] Ibid.
[96] Reinisch A. Legality of Expropriation. Standards of Investment Protection, York: Oxford University Press, 2008, P. 186.
[97] Ibid, P. 191.

substantive requirement but rather a procedural.[98] On the other hand, fail to meet due process of law should be deemed as material violation of investment protection regime.

It is specified in Article 13(1) of ECT that compensation for expropriation should amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment. Moreover, it is provided in Article 13(2) that the investor affected by expropriation have a right to prompt review, under the law of the host state making the expropriation, by a judicial or other competent and independent authority of that host state. The same right of investors is also provided in BITs[99] as well as in Article 7(2) of the Law on Investment. Thus, if value of expropriated investment (eg company shares) has decreased due to the expropriation the amount of compensation should be equal to the amount of property value which was before it was affected by expropriation.

The analysis above shows that all analysed legal sources establish investment protection which ensures that the expropriate investment should be appropriate compensated. However, as it is specified in Section 2.2 of this Master Thesis, investment is only such asset which is directly or indirectly controlled by the investor. It means that compensation for expropriation will cover not all investor's costs to make an investment but only those which can be deemed as investment (eg financing of construction or reconstruction of a public road which is owned by the state and which is necessary for proper functioning of a power plant). Therefore, current legal regulation, including national and international legal sources, does not ensure that all costs which were incurred while making investment would be compensated to the investor. Compensation of all costs which were incurred due to making investment could be next step which would increase the level of foreign investment protection.

2.4. Possible infringement by the Republic of Lithuania

Analysis of possible dispute against Lithuania due to implementation of ownership unbundling provided below. It will cover description of factual background, applicable investment protection regime, identifying whether investment has been done and whether ownership unbundling implementing measures could be deemed as indirect expropriation. Moreover, respective conclusions regarding aforementioned issues are provided.

[98] Ibid, P. 192.
[99] eg Article 4(1) of the Agreement between the Republic of Lithuania and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 28 September 1992, Official Gazette, 1994, No. 25-403; Article 4(2) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403.

2.4.1. Factual background

AB Lietuvos dujos, a vertically integrated undertaking, *inter alia* was performing transmission of natural gas as well as its supply. Thus, to achieve the unbundling of TSO from undertaking which acts as the producer or supplier, the new undertaking (AB Amber Grid) was established. Property which is necessary for activities of TSO was transferred[100] from AB Lietuvos dujos to AB Amber Grid and, therefore, AB Amber Grid acts as the TSO under the license issued by National Commission for Energy Control and Prices[101]. AB Amber Grid has the same shareholders' structure as AB Lietuvos dujos (E.ON Ruhrgas International GmbH (the Federal Republic of Germany) 38.9 %, OAO Gazprom (the Russian Federation) 37.1 %, UAB EPSO-G 17.7 % and small shareholders 6.3 %). As E.ON Ruhrgas International GmbH and OAO Gazprom are the biggest shareholder of AB Amber Grid and AB Lietuvos dujos, further investment protection issues will be analysed from their perspective.

Under Article 41(1) of the Law on Natural Gas it is forbidden to the same person or group of persons:

- directly or indirectly control an enterprise, which engages in production or supply of natural gas, and at the same time directly or indirectly control TSO or transferring system or perform control or management rights to TSO or transferring system;
- directly or indirectly control TSO or transferring system and at the same time directly or indirectly control an enterprise, which engages in production or supply of natural gas, or perform control or management rights to such enterprise;
- appoint members of the supervisory board, management board or representative bodies and directly or indirectly control an enterprise, which engages in production or supply of natural gas, or perform control or management rights over such enterprise.

It is specified in Article 41(3) of the Law on Natural Gas that control and performance of management rights *inter alia* covers use of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares. Therefore, it is forbidden to As E.ON Ruhrgas International GmbH and OAO Gazprom at the same time to control AB Amber Grid and AB Lietuvos dujos.

[100] Please see http://www.ambergrid.lt/lt/news/esminiaiivykiai/pranesimasapieabambergridturtoteisiuirpareiguatskyrimanuoablietuvosdujos [Date of connection 12 October 2013].

[101] Please see http://www.regula.lt/lt/naujienos/index.php?full=yes&id=25283 [Date of connection 12 October 2013].

Furthermore, Article 41(2) of the Law on Natural Gas provides the prohibition to directly or indirectly control TSO for an undertaking performing production or supply of natural gas in any other state which has connected its transfer system with the natural gas transfer system of the Republic of Lithuania. The natural gas transfer system of the Republic of Lithuania is connected with the natural gas transfer systems of the Republic of Belarus and the Russian Federation (Kaliningrad) which is owned by OAO Gazprom (or related persons). It means that Article 41(2) of the Law on Natural Gas forbids to OAO Gazprom directly or indirectly control TSO (ie AB Amber Grid). Hence, possible case of indirect expropriation will be analysed as possible indirect expropriation of AB Amber Grid shares which are owned by As E.ON Ruhrgas International GmbH[102] and OAO Gazprom.

2.4.2. Investment made by the foreign investors in Lithuanian natural gas sector under applicable investment protection regime

Due to appropriate evaluation weather implementation of ownership unbundling in Lithuania has caused indirect expropriation of shares owned by E.ON Ruhrgas International GmbH and OAO Gazprom, investment should be identified as well as expropriation criteria analysed in the light of applicable investment protection regime.

While the Federal Republic of Germany is a contracting party to ECT, the Russian Federation[103] is not. It is noteworthy that the arbitral tribunal in *Yukos Universal Limited v. The Russian Federation* case has concluded that ECT applied provisionally in the Russian Federation until 19 October 2009 and provisions on investment protection could be applied until 19 October 2029 for any investments made prior to 19 October 2009.[104] Thus, ECT may be applied only for investment made by E.ON Ruhrgas International GmbH. Moreover, relevant BITs[105] and the Law on Investment may be applied for investment made by E.ON Ruhrgas International GmbH and OAO Gazprom. In this case, relevant case law of arbitral tribunals will have the significant importance in order to identify whether current circumstances may constitute the indirect expropriation.

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[102] Please note that E.ON Ruhrgas International GmbH could not necessary sell shares of AB Amber grid in order to comply with requirements of the Law on Natural Gas, it could sell shares of AB Lietuvos dujos; thus, this investor has a possibility to choose which shares to transferred.

[103] Please see http://www.encharter.org/index.php?id=414#c1338 [Date of connection 25 February 2014].

[104] Yukos Universal Limited v. The Russian Federation, Interim Award on Jurisdiction and Admissibility PCA Case No. AA 227, dated 30 November 2009, paragraph 395.

[105] For the investment made by E.ON Ruhrgas International GmbH Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403, shall apply and for the investment made by OAO Gazprom Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, dated 29 June 1999, Official Gazette, 2000, No. 59-1763, shall apply.

E.ON Ruhrgas International GmbH and OAO Gazprom owns and directly control shares of particular companies which are incorporated in Lithuania and its more than obvious that the aforementioned shares are hold due to receive of profit.[106] Hence, it could be concluded that ownership of shares by E.ON Ruhrgas International GmbH and OAO Gazprom should be deemed as investment in the light investment protection regime in Lithuania and, therefore, should fall under the investment protection under the Law on Investments, relevant BITs and ECT (in respect to investment made by E.ON Ruhrgas International GmbH).

2.4.3. Possible indirect expropriation of the foreign investment in Lithuanian natural gas sector

As it is analysed in section 2.3.1 of this Master thesis, ECT and relevant BITs[107] directly forbids expropriation of investment made by foreign investor and any measures which have the same effect as expropriation (ie indirect expropriation). Even though the Law on Investment does not explicitly prohibits indirect expropriation, following the conclusions made in section 1.4 of this Master Thesis, applicable investment protection regime in Lithuanian forbids expropriation as well as all measures which cause the similar effect and which constitutes indirect expropriation.

Nonetheless, under Article 41 of the Law on Natural Gas, E.ON Ruhrgas International GmbH and OAO Gazprom are restricted to perform its rights as shareholders of AB Amber Grid. This restriction includes use of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares.

As it was concluded in section 2.2.4 of this Master Thesis, control over particular asset is precondition for qualifying such asset as an investment and, therefore, deprivation of control over investment means that investment is deprived at all. Case law provided below will confirm that deprivation of control over investment constitutes indirect expropriation.

Legal restrictions which impede investor's possibility to control and obtain profit from its investment may by qualified as regulatory takings in the light of investment protection. In *Nykomb Synergetics Technology Holding v. The Republic of Latvia* case the arbitral tribunal stated that regulatory takings may under the circumstances amount to expropriation or the

[106] Please see Section 2.2 of this Master Thesis for detail analysis of investment definition under applicable investment protection regime and its features.
[107] Article 6(1) of Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, dated 29 June 1999, Official Gazette, 2000, No. 59-1763; Article 4(2) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403.

equivalent of an expropriation.[108] For determination whether regulatory takings could constitute expropriation the decisive factor is the degree of possession taking or control over the enterprise the disputed legal restrictions.[109] In *Nykomb Synergetics Technology Holding v. The Republic of Latvia* case no possession taking of enterprise or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise were identified, therefore, no expropriation was identified too.[110] However, in AB Amber Grid case there is significant interference with the shareholder's rights (ie prohibition to use of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares).

Furthermore, in *PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey* case the arbitral tribunal once more confirmed that there is no doubt that indirect expropriation can take many forms.[111] In this case, the arbitral tribunal has make a reference to *Pope and Talbot Inc. v. The Government of Canada* [112] case where it is stated that there must be some form of deprivation of the investor in the control over the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.[113]

The approach that loss of investment's control should be deemed as expropriation was also supported in *AES Summit Generation Limited and AES-Tisza Erömükft v. The Republic of Hungary* case where the arbitral tribunal has stated that for an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control over its investment.[114]

Hence, following the aforementioned case law[115], restriction for E.ON Ruhrgas International GmbH and OAO Gazprom to control AB Amber Grid shares could be deemed as regulatory

[108] Nykomb Synergetics Technology Holding v. The Republic of Latvia, The Arbitration Institute of the Stockholm Chamber of Commerce, dated 16 December 2003, P. 33.
[109] Ibid.
[110] Ibid.
[111] PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, dated 19 January 2007, paragraph 278.
[112] Pope and Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, dated 10April 2001.
[113] PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, dated 19 January 2007, paragraph 278.
[114] AES Summit Generation Limited and AES-Tisza Erömükft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Dated 23 September 2010, paragraph 14.3.1.
[115] Nykomb Synergetics Technology Holding v. The Republic of Latvia, The Arbitration Institute of the Stockholm Chamber of Commerce, dated 16 December 2003; PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, dated 19 January 2007; [115] Pope and Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, dated 10April 2001; AES Summit

taking which constitutes indirect expropriation. It could be argued that E.ON Ruhrgas International GmbH and OAO Gazprom just can simply sell shares of AB Amber Grid without any restrictions to any other person who complies with the requirement provided in the Law on Natural Gas and to receive the amount of investment. However, it does not eliminate the circumstance that the control over the investment was restricted by deprivation of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares. In addition, the investor could have a long term strategy and, therefore, inopportune sell of shares could cause damages to the investors.

As evaluation of possible expropriation should not rely only on *sole effects* doctrine, it is necessary to analyse the purpose and the context of establishment of legal restrictions under which E.ON Ruhrgas International GmbH and OAO Gazprom should loss control over AB Amber Grid. Lithuania as well as other countries which have chosen ownership unbundling for unbundling of TSO has done it because it is the most effective solution to ensure choice for energy users and encourage investment in natural gas sector.[116] It is noteworthy that Lithuania had a possibility to choose any other TSO unbundling model (ie independent system operator and independent transmission operator models) which would not impede investors' right to control its investment. Thus, it is doubtful whether the aforementioned legal restrictions are proportionated in respect to capacity of possible infringement of investors' rights.

Even though under the case law an investor should undertake the risk that legal regulation could be amended in future and that such amendments could have an effect to the investment,[117] it is doubtful whether an investor should expect and undertake the risk that its shareholder's rights will be deprived in significant part.

Nevertheless, the indirect expropriation of AB Amber Grid shares could justified under completion of legitimation conditions which are analysed in section 2.3.3 of this Master Thesis. If it would be acknowledged that there was an indirect expropriation all legitimating conditions should be meet. The most sensitive issue in this case would be determination of adequate compensation because it could be that pure market price of AB Amber Grid shares would not be fair and adequate from E.ON Ruhrgas International GmbH and OAO Gazprom perspective.

Generation Limited and AES-Tisza Erömükft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Dated 23 September 2010.

[116] Please find analysis of ownership unbundling implementation in section 2.1 of this Master Thesis.

[117] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, dated 11 September 2007, paragraph 336.

2.4.4. Conclusions regarding possible infringement by the Republic of Lithuania

Pursuant to the above analysis, it may be concluded that E.ON Ruhrgas International GmbH and OAO Gazprom acquired and directly control respective parts of AB Amber Grid shares with aim to receive profit; therefore, investment was made and it should be protected by applicable investment protection regime in Lithuania.

However, control over investment was deprived from E.ON Ruhrgas International GmbH and OAO Gazprom by implementing the third energy packed in Lithuania. It may be concluded that entirety of regulatory takings (ie prohibitions use of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares) should be deemed as loss of whole or significant part of the control over investment and, therefore, could potentially constitute the indirect expropriation of the investment.

3. INVESTMENT PROTECTION IN PRE-CONTRACTUAL RELATIONS

The following section of this Master Thesis provides issues regarding investors' rights in pre-contractual relations under the applicable investment protection regime. As the object of this Master Thesis is the possible infringements of foreign investment protection obligations while implementing the most significant energy projects in Lithuania, pre-contractual relations will be analysed only in the light of investment protection regime and will not cover general issues of pre-contractual relations[118] between the contracting parties.

Moreover, the pre-contractual phase of Visaginas Nuclear Power Plant Project and the Shale Gas Project will be analysed in order to identify whether investors' rights were not infringed in the pre-contractual phase of these projects.

3.1. Rights in pre-contractual relations under the investment law

Essential investors' rights in the pre-contractual relations will be analysed under ECT and Law on Investments as well as under relevant BITs concluded by the Republic of Lithuania and other states. Such analysis will allow identifying the full scope of investors' right in pre-contractual relations under the foreign investment protection regime in Lithuania.

The application of the principle of non-discrimination to the pre-contractual relations is of significant importance to the investments made in the energy sector where often a licence or concession is required before investors can start their operations.[119] Thus, the principle of non-discrimination to the pre-contractual relations as well will be analysed in the light of investment protection regime in Lithuania.

3.1.1. Admission and establishment of investment

Pre-contractual relations between a host state and an investor start when a host state is admitting an investment. There are two main concepts in legal doctrine:

- admission of investments in accordance with the legal regulations of the host state; and
- investor's right of establishment granted in accordance with the relevant treaty (BIT or multilateral investment treaty) through the provisions of national and most favoured nation treatment at the pre-establishment phase.[120]

[118] It means that analysis of section 3of this Master Thesis shall be limited by rights and obligations of an investor and a host state established in investment protection legal sources and do not cover general rights and obligations of pre-contractual relations (eg obligation to negotiate in good faith).
[119] A Reader's Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 23.
[120] Joubin-Bret A. Admission and Establishment in the Context of Investment Protection. Standards of Investment Protection, New York: Oxford University Press, 2008, P. 9.

Treaties which apply the admission model encourage the contracting parties to promote favourable investment conditions between them but leave the conditions of entry and establishment up to the legal regulations of each contracting party.[121] Such model ensures rights of a host state; however, it not so favourable for investors.

Treaties which apply pre-establishment model ensure foreign investors a right to national treatment and most favoured nation treatment not only after the investment is done but also in investment establishment phase.[122] Hence, this model is more favourable to investors and limits the right of a host state to regulate requirements for investment establishment.

3.1.2. Pre-contractual rights under ECT

It is provided in Article 10(2) of ECT that each contracting party should endeavour to provide the investors from other contracting parties with treatment which is no less favourable than that which is applicable to its own investors or investors from any other state, whichever is the most favourable. Therefore, ECT has established a non-legally binding clause (ie based on best efforts) for host state to ensure foreign investors non-discriminatory treatment for making investments.[123] Despite Article 10(2) of ECT applies pre-establishment model, it is limited by stating that contracting parties should endeavour to apply most favourable nation treatment.

Article 10(5) of ECT provides that each contracting party should make its best efforts not establishing new legal restrictions for foreign investors as well as to reduce current restrictions. ECT requires the contracting parties to provide a list of measures that do not conform to non-discriminatory treatment and which are registered with the Blue Book.[124] The existing non-conforming measures have been divided into following five categories:

- land and real estate restrictions;
- privatisation;
- measures regarding registration and screening;
- reciprocity requirements; and
- other non-conforming measures.[125]

[121] Joubin-Bret A. Admission and Establishment in the Context of Investment Protection. Standards of Investment Protection, New York: Oxford University Press, 2008, P. 11.
[122] Ibid, P. 13.
[123] A Reader's Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 23.
[124] Please see http://www.encharter.org/index.php?id=33 [Date of connection 7 March 2014].
[125] The Blue Book, P. 5.

Furthermore, Article 10(6)(b) of ECT establishes right of the contracting parties to make a commitments at any time on voluntary basis regarding higher protection of foreign investment in whole energy sector or in particular energy activities.

To sum up, investors' rights in pre-contractual phase or as it is named in ECT – investment making, is protected only by a loose best efforts obligation[126] and it is based on voluntary grounds rather than obligations which are applicable when investment is made. Nevertheless, the Blue Book provides a list of measures which do not conform with the obligation to make best effort due to ensure non-discriminatory treatment in making an investment (ie pre-investment phase) and in such way discriminatory measures are trying to be managed and even reduced by the contracting parties.

3.1.3. Pre-contractual rights under BITs

Under analysed BITs, host states should permit the investments and treat it on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is most favourable, with exceptions directly provided in particular BIT.[127] Such provision, so called most-favoured-nation clause, increase level of performing particular activities for foreign investors and ensures equal competition among them as well as to equal position with national investors.[128] Moreover, it covers not only the most favourable treatment under national legislation but also most favourable conditions which are offered under BITs with other states.[129]

While some analysed BITs directly provide that the host state should not in any way to impair by discriminatory measures the acquisition of investment[130], some analysed BITs forbid discriminatory measures only to investments which are already made[131].

Such provisions of BITs ensures equal possibility to make an investment; however, if negotiations does not lead to concluding an agreement and no investment are made, the potential

[126] Rubins N. The Notions of 'Investment' in International Investment Arbitration. Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, P. 301.
[127] eg Article 2(1) of the Treaty between the Government of the Republic of Lithuania and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment, dated 14 January 1998, Official Gazette, 2000, No. 59; Article 3 of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments, dated 16 June 1992, Official Gazette, 1993, No. 5.
[128] Schill S.W. Mulitilateralizing Investment Treaties through Most-Favoured-Nation Clauses, Berkeley Journal of International Law, volume 27, 2009, P. 518.
[129] Ibid.
[130] eg Article 2(3)(b) of the Treaty between the Government of the Republic of Lithuania and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment, dated 14 January 1998, Official Gazette, 2000, No. 59;
[131] eg Article 2(2) of the Agreement between the Republic of Lithuania and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, dated 28 February 1992, Official Gazette, 1997, No. 60-1403.

investor should not be entitled to claim for any compensation for damages.[132] The aforementioned statement could be based by *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* case where the arbitral tribunal has constituted that costs suffered by the investor due to preparation for a project of investment should not be deemed as investment.[133]

Hence, analysed BITs provide admission model for making of investment. The admission clauses create filter to the protection of the investment protection regime to ensure that no investments made in violation of the national regulation of the host state could benefit from investment protection.[134] However, most favoured nation treatment and requirement of non-discriminatory access to make investments are provided. Despite this, it should not mean that preparation for project of investment could be constituted as investment if there is no investment as such.

3.1.4. Pre-contractual rights under national regulation

Article 5(1) of the Law on Investments provides that national and foreign investors should be ensured equal conditions for investment activities. This provision should also include non-discriminative possibilities for foreign investors to make investments. However, the Law on Investments does not establish any most-favoured-nation clauses.

Thus, the Law on Investments ensures non-discriminative treatment for foreign investors in pre-contractual relations but do not provide any additional protection (eg remuneration for costs which were suffered in preparation for making investment if an investment was not made due to no fault of the investor or due to fault of the hosting state or its institutions).

3.1.5. The principle of non-discrimination to the pre-contractual relations

Even though under ECT the legally binding obligation to ensure non-discriminatory treatment applies only after an investment is done (ie in post-establishment phase)[135] and analysed BITs ensures non-discriminatory treatment in accordance to national regulation which may be amended at any time, non-discrimination in pre-contractual (ie while making investment) have a significant importance. Nonetheless, such tools as Blue Book allow managing the risk regarding discriminatory treatment and identify particular discriminatory regulation which is acknowledged by international community.

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[132] Dolzer R., Schreuer C. Principles of International Investment Law, Oxford, 2008, P. 70, 71.
[133] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002, paragraph 61.
[134] Joubin-Bret A. Admission and Establishment in the Context of Investment Protection. Standards of Investment Protection, New York: Oxford University Press, 2008, P. 11.
[135] A Reader‘s Guide of the Energy Charter Treaty, Energy Charter Secretariat, 2002, P. 22.

The principle of non-discrimination states that contracting parties to particular treaty (eg ECT) should not treat national investors more favourable than foreign investors (ie principle of national treatment) and provide different treatment to foreign investors in respect to their origin (ie principle of most favoured nation).[136] Thus, the principle of non-discrimination consists two core elements – first, comparison between the investors which are subject to different treatment and second, to assess whether one investor is treated less favourable than the other one.[137]

Identifying whether legal measures adopted by a state are not discriminatory in context of investment making may lead to analysis of purposes of the adoption and application of particular national legal measures.[138] However, it is essential to identify and explicitly name the criteria which allow establishing not equal treatment and, therefore, restrict investors' right to make an investment.

To sum up, if not equal treatment will be provided in pre-contractual or in investment making phase, foreign investors will not have possibility to make an investment at all. Thus, in the light of investment protection regime it is significant important to ensure non-discriminative treatment in pre-investment phase.

3.1.6. Conclusions regarding investors' rights in pre-contractual relations

Pursuant to the analysis above, mandatory obligations which are established by the investment protection regime in Lithuanian come into effect as of an investment is made (ie in post-establishment phase). However, ECT, BITs and the Law on Investments ensures, except explicitly indicated circumstances, for foreign investors an equal treatment as it is for national investors in pre-contractual or investment making phase. Moreover, all foreign investors should be treated equally and without any discrimination due to its origin.

Thus, it may be concluded that in pre-contractual or pre-establishment phase the essential investors' right is non-discriminatory treatment (ie national treatment and most favoured nation treatment). Division of ensured interest between an investor and a host state depends on investment making model (ie admission model and pre-establishment model) provided in particular treaty.

The further step for increasing foreign investors' rights in pre-contractual relations may be establishing that cost which were suffered due to preparation for making investment should be subject of compensation in case of fail to make an investment due to the fault of the host state.

[136] Diebold N. F. Standards of Non-Discrimination in International Economic Law. International and Comparative Law Quarterly, 2011, P. 831.
[137] Ibid, P. 834.
[138] Orellana M. Investment Agreements & Sustainable Development: the Non-Discrimination Standards. Sustainable Development Law & Policy, Volume 11, No. 3, 2011, P 8.

However, such increase of investors' rights in pre-contractual rights could cause imbalance between interests of a foreign investor and a host state. Therefore, the mechanism for compensation of preparation of making an investment could provide particular circumstances (ie specific burden of proof for the investor) under which the foreign investor could claim for compensation.

3.2. Possible infringements of pre-contractual rights in Lithuanian energy sector

Visaginas Nuclear Power Plant Project and the Shale Gas Project will be analysed in the light of investment protection regime in Lithuania. The analysis below will allow identifying whether foreign investment protection obligations were infringed during Visaginas Nuclear Power Plant Project and the Shale Gas Project in pre-contractual relations.

3.2.1. Visaginas Nuclear Power Plant Project

Lithuania has closed the last reactor of Ignalina Nuclear Power Plant which had been producing the vast majority of electricity demand in Lithuania; therefore, it was decided to construct the Visaginas Nuclear Power Plant as the best alternative for electricity generation in the Lithuania.[139] After basic technical preparatory work was completed, a Japan company, Hitachi Ltd. was selected as the strategic investor.[140] After more than 6 months of intensive negotiations with Hitachi Ltd. an agreement was signed regarding the key conditions of the Visaginas Nuclear Power Plant Concession Agreement.[141] Moreover, the Law on Granting the Concession and Assuming the Essential Property Obligations of the Republic of Lithuania in Visaginas Nuclear Power Plant Project[142] was adopted. Despite this, draft of Visaginas Nuclear Power Plant Concession Agreement is not signed for almost 2 years. It is noteworthy that that a consultative referendum regarding construction of Visaginas Nuclear Power Plant was performed on 14 October 2012 whereby 52.52% of the electorate has participated (34.07% of participants were in favour of Visaginas Nuclear Power Plant Project and 62.70% - against).[143] Therefore, in respect to the problem of this Master Thesis, it is significant to analyse potential refusal of the Republic of Lithuania to sign the Visaginas Nuclear Power Plant Concession Agreement as possible infringement of Hitachi Ltd. rights under the investment protection regime in Lithuania.

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[139] Please see http://www.vae.lt/lt/pages/apie-projekta [Date of connection 8 March 2014].
[140] Please see http://www.vae.lt/lt/pages/apie-projekta [Date of connection 8 March 2014].
[141] Please see http://www.vae.lt/lt/pages/apie-projekta [Date of connection 8 March 2014].
[142] Law on Granting the Concession and Assuming the Essential Property Obligations of the Republic of Lithuania in Visaginas Nuclear Power Plant Project of the Republic of Lithuania No. XI-2085, dated 21 June 2012, Official Gazette, 2012, No. 73-3780.
[143] Please see http://www.enmin.lt/en/activity/veiklos_kryptys/strateginiai_projektai/Visaginas_npp.php?clear_cache=Y

Due to appropriate analysis of potential infringement of investors' rights in pre-contractual relations, applicable legal regulation should be identified. The Republic of Lithuania and Japan has not concluded BIT; however, Japan is contracting party to ECT.[144] Thus, potential infringement of Hitachi Ltd. interest in pre-contractual relations should be analysed in accordance to the investment protection regime provided by ECT and the Law on Investments.

As it was analysed and concluded in section 3.1 of this Master Thesis, ECT and the Law on Investments provide investment protection only as of investment[145] is made (ie post-establishment phase). Despite this, the national treatment and the most favoured nation treatment should be ensured.

Even though the most favoured nation treatment was not infringed as Hitachi Ltd. has been selected under tender procedures and any legal measures which could cause infringement of national treatment were not initiated; it is still open question whether rights of Hitachi Ltd. would not be infringed if the Republic of Lithuania refuse to sign the Visaginas Nuclear Power Plant Concession Agreement.

Similar to the above described circumstances were analysed in *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*[146] case where the investor has signed the letter of intent which should lead to the agreement on construction of a power plant.[147] In accordance to the letter of intent the investor has started the preparation for the project (ie obtaining financing, negotiating relevant documents, engaging consultants for feasibility study); nonetheless, the Democratic Socialist Republic of Sri Lanka has refused to enter into the project agreement. The arbitral tribunal in *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* case has stated that letter of intent and similar tools does not mean that pre-investment and development expenditures could automatically be admitted as investment without explicit consent of the host state to proceed with the particular project.[148] Thus, following *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* case, the agreement on the key conditions of the Visaginas Nuclear Power Plant Concession Agreement should not be deemed as sufficient background to state that it was agreed on investment making.

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[144] Please see http://www.encharter.org/index.php?id=61&L=0L%200%201%C2%A47%206%201%C2%A47%200%201%C2%A47%201%C2%A47%3ESite%20Map%3C%2Fa%3E%20-%20%3Ca%20class%3D%5C%27tvf7tquf%5C%27%20href%3D [Date of connection 8 March 2014].

[145] Please see section 2.2 of This Master Thesis for detail analysis of investment definition and prerequisites which are necessary due to acknowledge that an investment has been done.

[146] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002.

[147] Rubins N. The Notions of 'Investment' in International Investment Arbitration. Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, P 301.

[148] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002, paragraphs 59, 60.

Furthermore, the arbitral tribunal has provided that if the negotiations had come to fruition, it could have been the instance that cost suffered during the period of negotiations may have been deemed as part of the cost of the project and, therefore, become part of the investment.[149] In *PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey* case the arbitral tribunal has developed further that before reaching final stage an investment can be performed in many forms, including expenses of negotiations and preparation for project even in pre-investment phase if there is a valid and binding agreement between the parties.[150] It means that expenses which Hitachi Ltd. had during the pre-establishment phase could be deemed as investment only after entering into the Visaginas Nuclear Power Plant Concession Agreement.

The aforementioned opinion was once more confirmed in *Zhinvali Development Ltd v. the Republic of Georgia*[151] where the dispute arises from negotiations regarding concession to privatize and reconstruct hydroelectric power plant in the Republic of Georgia.[152] Zhinvali Development Ltd has suffered expenses in negotiations and preparation works for the project which are equal to USD 26 million; however, the arbitral tribunal has stated that such negotiation and ground-preparation expenses do not qualify an investment.[153]

Pursuant to above analysis of applicable investment protection regime and relevant case law, until the Visaginas Nuclear Power Plant Concession Agreement will be sign all costs incurred by Hitachi Ltd. shall not constitute an investment. Thus, if the Republic of Lithuania will refuse enter into the Visaginas Nuclear Power Plant Concession Agreement, Hitachi Ltd. shall not be entitled for compensation due to violation of investment protection obligations by the Republic of Lithuania. To sum up, the Republic of Lithuania follows its obligations of investment protection in the Visaginas Nuclear Power Plant Project.

3.2.2. Shale Gas Project

Lithuanian Geological Survey (ie responsible state authority) has announced the tender for the exploitation (prospecting, exploration and extraction) of hydrocarbon resources in particular areas of the Republic of Lithuania – Šilutė-Tauragė and Kudirka-Kybartai fields.[154] An investor from USA – Chevron which is one of the world's leading energy company have participate in

[149] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, dated 15 March 2002, paragraph 50.
[150] PSEG Global Inc. and Konya Ilgin Elektrik Uretim v. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, dated 19 January 2007, paragraph 304.
[151] Zhinvali Development Ltd v. the Republic of Georgia, ICSID Case No. ARB/00/1, dated 24 January 2003.
[152] Rubins N. The Notions of 'Investment' in International Investment Arbitration. Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, P 303.
[153] Ibid.
[154] Please see http://skalunudujos.lt/apie-projekta/ [Date of connection 9 March 2014].

the aforementioned tender through a Lithuanian subsidiary. Moreover, Chevron acquired a 50 % stake in UAB LL Investicijos, a local Lithuanian oil and natural gas company, which holds a license to explore for oil and natural gas.[155]

The decision to recommend for the Government of the Republic of Lithuania to issue a licence to UAB Chevron Exploration & Production Lietuva (Chevron subsidiary in Lithuania) was taken.[156] Nonetheless, Chevron has decided to withdraw from further participation in tender procedures and development of the Shale Gas Project.[157] Such decision was based by uncertainty in Lithuanian regulation related to exploitation of hydrocarbon resources (ie relevant regulation was amended during the procedures of tender by establishing additional restrictions and still some amendment proposals are pending).[158] Such uncertainty in national regulation impedes investors' possibility to properly evaluate environment where the investment will be done. Furthermore, additional restrictions increase the price of implementation of particular project.

Due to appropriate analysis of potential infringement of investors' rights in pre-establishment phase, applicable legal regulation should be identified. USA is just an observer of the Energy Charter Conference; therefore, ECT could be applied only provisionally. However, USA and the Republic of Lithuania have concluded BIT.[159] Thus, potential infringement of Chevron interests in pre-establishment phase should be analysed in accordance to the investment protection regime provided by relevant BIT and the Law on Investments.

Applicable investment protection regime provide investment protection only as of investment[160] is made (ie post-establishment phase); nevertheless, the national treatment and the most favoured nation treatment should be ensured. Amendments in relevant regulation by establish additional restrictions have not discriminated Chevron due to the facts that Chevron is foreign investor or particularly from USA. Thus, the Republic of Lithuania has not infringed its obligation to provide the national treatment and the most favoured nation treatment for foreign investors.

As it was analysed in section 3.2.1 of this Master Thesis, investor's expenses in pre-establishment phase due to preparation of the project shall not constitute an investment and,

[155] Please see http://www.chevron.lt/about/ [Date of connection 9 March 2014].
[156] Please see http://skalunudujos.lt/naujienos/vyriausybei-siuloma-pripazinti-chevron-exploration-production-lietuva-nugaletoja/ [Date of connection 9 March 2014].
[157] Please see http://skalunudujos.lt/naujienos/chevron-traukiasi-is-angliavandeniliu-konkurso-silutes-taurages-plote/ [Date of connection 9 March 2014].
[158] Please see http://skalunudujos.lt/naujienos/chevron-traukiasi-is-angliavandeniliu-konkurso-silutes-taurages-plote/ [Date of connection 9 March 2014].
[159] Treaty between the Government of the Republic of Lithuania and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment, dated 14 January 1998, Official Gazette, 2000, No. 59.
[160] Please see section 2.2 of This Master Thesis for detail analysis of investment definition and prerequisites which are necessary due to acknowledge that an investment has been done.

therefore, shall not be compensated if final agreement is not reached. However, in this case there is not a fail to conclude an agreement but a host state has changed legal regulation and established additional requirements after the announcement of the tender (ie has changed an investment environment).

Amendment of relevant regulation was analysed in *Parkerings-Compagniet AS v. Republic of Lithuania* where the arbitral tribunal has stated that it is each state's undeniable right and privilege to exercise its sovereign legislative power and every state has the right to enact, modify or cancel a law at its own discretion.[161] Moreover, the arbitral tribunal provided that any businessman or investor knows that laws will evolve over time.[162] Thus, Chevron should take a risk of amended legislation and it should be evaluated before bidding to the tender.

Nevertheless, in *Parkerings-Compagniet AS v. Republic of Lithuania* the arbitral tribunal has stated that it is prohibited for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[163] However, all amendments of the legal regulation which are relevant to the Shale Gas Project were initiated due to environmental protection.

In accordance to the above analysis of applicable investment protection regime and relevant case law, costs that Chevron had due to participation in the tender does not constitute an investment and shall not be compensated under applicable investment protection regime. Even though the Republic of Lithuania has changed legal regulation which has an effect to the Shale Gas Project, such amendment of regulation does not constitute *per se* that it was done with unfairly, unreasonably or inequitably intention. Moreover, the Republic of Lithuania has not infringed its obligation to provide the national treatment and the most favoured nation treatment for foreign investors. Hence, the Republic of Lithuania follows its obligations of investment protection in the Shale gas project.

[161] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, dated 11 September 2007, paragraph 332.
[162] Ibid.
[163] Ibid.

4. INVESTMENT PROTECTION UNDER THE DRAFT CONCESSION AGREEMENT ON VISAGINAS NUCLEAR POWER PLANT PROJECT

The last section of this Master Thesis provides analysis regarding issues of investment protection regime which may be created between a host state and an investor by concluding a particular agreement. In respect to the object and problem of this Master Thesis it is significant important to analyse contractual obligations whereby the Republic of Lithuania extends and clarifies particular rights of foreign investors. For this purpose the Concession Agreement of Visaginas Nuclear Power Plant was selected because it would be the Concession Agreement on the biggest development in Lithuanian energy sector as of recovery of independence of the Republic of Lithuania. Even though at the date of drafting this Master Thesis the Concession Agreement is not signed yet but the text of the Concession Agreement is approved[164] and, therefore, it should be analysed in the light of investment protection.

The following analysis consists of general obligations of the Republic of Lithuania, interaction between claims under the Concession Agreement and claims under investment protection treaties, liability and its limitation under the Concession Agreement as well as damages for termination. However, the Concession Agreement was analysed only in respect of investment protection regime, including general obligations to create necessary environment; thus, related agreements (eg shareholders agreement of project company) were not analysed.

4.1. General obligations of the Republic of Lithuania related to the investment

This section provides general obligations of the Republic of Lithuania which would be undertaken in respect of establishing necessary and favourable environment for making investment in the Visaginas Nuclear Power Plant Project. Nonetheless, obligations which are relevant to all type of contracts (eg duty to cooperate between the parties) are not covered.

Clause 7.1.1 of the Concession Agreement provides that the Republic of Lithuania shall transfer ownership title, including relevant access, of the construction site[165] to the project company (ie company which is established to implement the Visaginas Nuclear Power Plant Project). Moreover, the aforementioned clause ensures that ownership or appropriate licence to the intellectual property of relevant material, including reports, environmental impact assessment, all

[164] Please see the Law on Granting the Concession and Assuming the Essential Property Obligations of the Republic of Lithuania in Visaginas Nuclear Power Plant Project of the Republic of Lithuania No. XI-2085, dated 21 June 2012, Official Gazette, 2012, No. 73-3780.

[165] The construction site is comprehensively described in Annex 5 of the Concession Agreement.

relevant analysis etc,[166] will be transferred to the project company. It is provided that value of transferred asset will be not less than 50 million Euros.

Furthermore, Clause 7.1.2 of the Concession Agreement provides that the Republic of Lithuania performs particular obligations in relation to the works required to the permanent main haul road from Klaipėda seaport to the construction site. It means that the Republic of Lithuania as a host state undertakes to develop necessary infrastructure on its own costs.[167]

Nonetheless, duties of the Republic of Lithuania to transfer the construction site and relevant documentation as well as duties related to construction of the main haul road from Klaipėda seaport to the construction site have particular exceptions because Clause 16.3.2 of the Concession Agreement expressly states that the Republic of Lithuania is not liable for any claim in respect of these duties.

It is noteworthy that under Clause 7.3 of the Concession Agreement, the Republic of Lithuania ensures that all shares of the project company owned at any time by the Republic of Lithuania or its nominee will not be transferred to the investor's competitor or any person in which a competitor is a direct or indirect shareholder.

The Concession Agreement as well as other sources of investment protection regime ensures the principle of non-discrimination. The principle of non-discrimination which is established in Clauses 4.1.7 and 4.1.8 of the Concession Agreement ensures that electricity produced in Visaginas Nuclear Power Plant will not be discriminated. Clauses 4.1.7 of the Concession Agreement provides that the establishment and maintenance of arrangements under which the transmission system operator for the electricity system in the Republic of Lithuania does not discriminate against the Visaginas Nuclear Power Plant. Moreover, under Clause 4.1.8 of the Concession Agreement, the Republic of Lithuania undertakes to support, in so far as it is able, the planning and implementation of the transmission capacity and dispatch arrangements within the Republic of Lithuania so that they do not discriminate against the export of power generated by the Visaginas Nuclear Power Plant to jurisdictions outside that of the Republic of Lithuania. Thus, the Republic of Lithuania ensures non-discrimination in internal electricity marker as well as possibility to export.

One of the material obligations of the Republic of Lithuania in the light of investment protection is the one stipulated in Clause 20.1.2 of the Concession Agreement which states that a

[166] The list of material s specified in Annex 7 of the Concession Agreement.
[167] Obligations of the Republic of Lithuania related to development of the road from Klaipėda seaport to the construction site is specified in Annex 2 of the Concession Agreement.

fundamental change[168] should not occur until the final investment decision will be taken as it is provided in the shareholder agreement of the project company. As it is provided in Schedule 8 of the Concession Agreement, the fundamental change covers material changes in national regulation, withdrawal from international treaties (ie specified nuclear energy treaties, ECT, the New York Convention) as well as negative decision on use of nuclear energy. However, the aforementioned fundamental changes may justified *inter alia* by any laws, directives, regulations, decisions, standards or requirements which are required under relevant EU law or required or recommended under international law.[169] It means that justification background is very wide and it is likely that in case of fundamental change it could be justified without major discrepancies.

To sum up, general obligations of the Republic of Lithuania under the Concession Agreement ensure that favorable environment for the investment would be established, including non-discrimination in internal market as well as to export of electricity. Moreover, stability in investment environment (ie national regulation, nuclear energy policy, etc) should be ensured till the final investment decision will be made.

4.2. Interaction between claims under the Concession Agreement and claims under investment protection treaties

Further, interaction between claims under the Concession Agreement and claims under investment protection treaties[170] will be identified.

Pursuant to Clause 16.2.1 of the Concession Agreement, if a party to the Concession Agreement seeks to relief under any applicable investment protection treaty in respect of an event for which it would also be entitled to redress under the Concession Agreement, when deciding the level of compensation to be awarded to the relevant party, any arbitral tribunal seized of such a claim should be guided by any relevant levels of compensation agreed in respect to limitation of liability[171], damages payable by the Republic of Lithuania in respect of wasted costs[172] and the event of mandatory transfer of shares[173]. It means that obligations on investment protection of the Republic of Lithuania are clarified and limited under the Concession Agreement.

It is specified in Clause 16.2.2 of the Concession Agreement that where a particular circumstance gives rise to a dispute for which a party to the Concession Agreement may initiate

[168] The fundamental change should be understood as it is provided in Schedule 8 of the Concession Agreement.
[169] Clause 2.1.4(A) of Schedule 8 of the Concession Agreement.
[170] Under the Concession Agreement, the investment protection treaty means any investment protection treaty between the Republic of Lithuania and one or more other countries, including ECT.
[171] Please see Clause 16.3 of the Concession Agreement.
[172] Please see Clause 24.1 of the Concession Agreement.
[173] Please see Clause 26 of the Concession Agreement.

international arbitration proceedings under an investment treaty or make a Claim under the Concession Agreement. The aforementioned clause of the Concession Agreement provides three options to the relevant party to bring a claim:

- Simultaneously – based on particular investment treaty and the claim based under the Concession Agreement under a single arbitration proceeding in accordance with the ICSID Convention and such claims may be heard concurrently in the same proceedings by the same arbitral tribunal;
- On the relevant parties election based on particular investment treaty or the claim based under the Concession Agreement;
- Under separate proceedings, if the relevant party brings the claim based on particular investment treaty and the claim based under the Concession Agreement under a single proceeding at the ICSID arbitration tribunal, but for any reason those claims cannot be heard in a single proceeding and by the same tribunal.

Furthermore, Clause 16.2.2 of the Concession Agreement provides that if the relevant party does not bring the claim based on particular investment treaty and the claim based under the Concession Agreement under a single proceeding at ICSID arbitration tribunal, then if the relevant party first makes a claim based under the Concession Agreement, it should not be entitled to bring a claim based under the investment protection treaty to the extent that the relief sought in any claim based under the investment protection treaty directly or indirectly seeks the enforcement of the specified consequences in limitation of liability[174], damages payable by the Republic of Lithuania in respect of wasted costs[175] and the event of mandatory transfer of shares[176], but not otherwise, until the arbitral tribunal constituted to determine the claim, issues its final award or the proceedings are otherwise terminated. However, if the relevant party first makes a claim based under the investment protection treaty, it should not be entitled to bring a claim based under the Concession Agreement to the extent that the relief sought in the first claim directly or indirectly seeks the enforcement of the same specified consequences as would be invoked in the claim based under the Concession Agreement, but not otherwise, until the arbitral tribunal constituted to determine the first claim, issues its final award or the proceedings are otherwise terminated.

Thus, the Concession Agreement establishes mechanism which provides possibility to bring a claim based on particular investment treaty and the claim based under the Concession

[174] Please see Clause 16.3 of the Concession Agreement.
[175] Please see Clause 24.1 of the Concession Agreement.
[176] Please see Clause 26 of the Concession Agreement.

Agreement. The Concession Agreement directly provides provisions which should be evaluated (ie limitation of liability, damages payable by the Republic of Lithuania in respect of wasted costs and the event of mandatory transfer of shares). Moreover, rules on concurrence of claims are provided.

4.3. Liability under the Concession Agreement

This section provides analysis of provisions of the Concession Agreement which regulates liability between the parties. It is important to object of this Master Thesis to evaluate the provisions of liability which would be undertaken by the Republic of Lithuania as a host state and a potential investor.

Clause 16.4.1 of the Concession Agreement provides general provision that nothing restricts or limits the general obligation at law of each of the parties to mitigate any losses which they may suffer or incur as a consequence of any breach of any provision of the Concession Agreement. Moreover, Clause 16.4.2 supplements that liability provisions apply notwithstanding any other provision of the Concession Agreement to the contrary and should not cease to have effect as a consequence of any rescission or termination of any other provisions of the Concession Agreement.

It is noteworthy that Clause 16.5.3 of the Concession Agreement provides that the Republic of Lithuania should indemnify and hold harmless the investor, and any associated company of the investor from and against any and all which may be instituted, made, threatened, alleged, asserted or established from time to time in any jurisdiction against or otherwise involving an investor and from all losses which the investor may suffer or incur from time to time, in any such case arising out of, based upon or in connection with, whether directly or indirectly, any breach or failure to observe by the Republic of Lithuania. Moreover, Clause 16.5.5 of the Concession Agreement states that the strategic investor has no liability for any act, omission, decision, breach or failure to observe by the Republic of Lithuania in respect of its obligations to comply with all applicable laws and regulations. The aforementioned provisions emphasize that the investor should not be harmed due to action or omission of the Republic of Lithuania and should be indemnified from such harm.

However, in respect to Clauses 16.4.1 and 16.5.3 of the Concession Agreement, it is stated in Clause 16.5.4 that the liability of the Republic of Lithuania should be reduced to the extent that the indemnified person has not taken all reasonable steps to mitigate its loss.

It is noteworthy that the Concession Agreement provides list of events (ie the Republic of Lithuania Event[177]) which should be deemed as depend on the Republic of Lithuania and which entitles the investor to terminate the Concession Agreement. Under Clause 20.1 the aforementioned event includes:

- Any action, suit or proceeding initiated by the third party regarding selection and concluding respective agreement with the strategic investor if such action suit or proceeding last longer than 3 month and/or the amount which should be paid by the Republic of Lithuania as breach of warranty[178] exceeds 5 million Euros;
- Occurrence of the fundamental change[179] prior the final investment decision;
- The Republic of Lithuania performs material breach of the Concession Agreement;
- The Republic of Lithuania fails to make an undisputed payment in amount of 5 million Euros.

In case of the aforementioned event the investor may perform its respective buy-out right (ie the mandatory transfer of shares[180]) under Clause 20.3.1 of the Concession Agreement.

To sum up, the Concession Agreement ensures investor's rights in respect to a violation of the Concession Agreement by the Republic of Lithuania or any other illegal action or omission made by the Republic of Lithuania. Nonetheless, the Concession Agreement directly states that the investor should take all necessary measures to mitigate the losses. Even though such provisions are likely to be relevant to any type of contracts, it would be very important to the investor by proving its damages in a dispute against the host state. Moreover, the investor is entitled to the mandatory buy-out rights, in case of occurrence of particular events which were agreed by the parties.

4.4. Limitation of liability

Analysis of provisions of the Concession Agreement on limitation of liability provided below. It is significant important in respect of investor's rights because legal sources which were analysed in previous section of this Master Thesis does not provide such limitations. The limitation of liability will be analysed from the perspective of liability of the Republic of Lithuania and from

[177] Please see Clause 20.1 of the Concession Agreement.
[178] Please see Clause 16.5.3 of the Concession Agreement.
[179] Please see Schedule 8 of the Concession Agreement.
[180] Please see Clause 26 of the Concession Agreement.

the perspective of the strategic investor's rights to apply remedies if the Republic of Lithuania infringes[181] its contractual obligations.

4.4.1. Limitation of liability of the Republic of Lithuania

Clause 16.3.1 of the Concession Agreement provides that except where such losses are caused by a party's fraud or deliberate default, the parties should have no liability under the Concession Agreement in any circumstances whatsoever in respect of any actual or expected:

- Special, indirect or consequential loss;
- Loss of profit;
- Loss of revenue, loss of goodwill, loss of opportunity or loss of business;
- Increased costs or expenses;
- Wasted expenditure including pre-contract expenditure (except as expressly provided in provisions of the Concession Agreement regarding damages for termination[182]);
- Punitive damages.

Moreover, Clause 16.3.2 of the Concession Agreement provides that the Republic of Lithuania shall have no liability under or in connection with the Concession Agreement whatsoever for any claim in relation to general obligations of the Republic of Lithuania to provide the construction site and relevant documents[183] as well as to obligation regarding co-operation in relation to the power at cost structure[184].

Nevertheless, Clause 16.3.3 of the Concession Agreement provides that the limitations on liability set out in the Concession Agreement should not exclude or limit:

- Any party's liability to an individual (or to the estate of a deceased individual) for the death of, or personal injury sustained by, such individual to the extent such death or personal injury was caused by that Party's negligence, or the negligence of that Party's employees, agents or subcontractors (as applicable);
- Any Party's liability to the extent any such limitation or exclusion of liability would be in contravention of applicable law;

[181] In this case infringement has a meaning which is provided in Clause 20.1 of the Concession Agreement.
[182] Please see Clause 24 of the Concession Agreement.
[183] Please see Clause 7.1 of the Concession Agreement.
[184] Please see Clause 42.2 of the Concession Agreement.

- Any Party's obligation to pay any amount due and payable under or in connection with damages for termination of the Concession Agreement[185];
- The liabilities of the Republic of Lithuania in respect of its obligations to make the payments referred to the event of the mandatory transfer of shares of the project company[186], to shareholder put option[187] and to breach of warranty[188];
- The liabilities of the Republic of Lithuania in respect of its obligations under or in connection with transfer of shares of the project company to a competitor[189], nuclear liability[190] and particular clauses regarding breach of warranty[191].

To sum up, the Concession Agreement provides limitation of liability of all parties. Even though the limitation of liability of the Republic of Lithuania could be deemed as restriction of investor's rights, investor's liability is also limited in particular cases; moreover, the aforementioned limitation of liability is directly expressed in the agreement between the parties and, therefore, legal expectations of the host state and the investor will be not violated.

4.4.2. Sole remedies for default by the Republic of Lithuania

Further, particular remedies which may be applied by the strategic investor in case of default by the Republic of Lithuania will be analysed.

Clause 19.2.2 of the Concession Agreement provides further remedies:

- If the Republic of Lithuania infringes a of a payment obligation (including under an indemnity), the strategic investor has a right to enforce and receive payment of the relevant sum;
- The strategic investor has a right for payable damages by the Republic of Lithuania in respect of wasted costs[192];
- The strategic investor has a right to receive a respective payment from the Republic of Lithuania due to the mandatory transfer price[193];
- If there is a breach of confidentiality obligations[194] by the Republic of Lithuania, the strategic investor has a right to brink a claim in respect of such breach.

[185] Please see Clause 24 of the Concession Agreement.
[186] Please see Clause 26 of the Concession Agreement.
[187] Please see Clause 32 of the Concession Agreement.
[188] Please see Clause 16.5 of the Concession Agreement.
[189] Please see Clause 7.3 of the Concession Agreement.
[190] Please see Clause 15 of the Concession Agreement.
[191] Please see Clauses 16.5.1 and 16.5.3 of the Concession Agreement.
[192] Please see Clause 24.1 of the Concession Agreement.
[193] Please see Clause 26.4 of the Concession Agreement.

Thus, the Concession Agreement provides specific remedies for particular defaults made by the Republic of Lithuania and the strategic investor has no additional rights of remedies against the Republic of Lithuania in those particular cases.

4.5. Damages for termination

The Concession Agreement provides the specific mechanism for compensation losses in case of termination. Thus, it is significant important in respect to problem of this Master Thesis to analyse the mechanism for compensation as guarantee of the strategic investor's rights under the Concession Agreement.

Clause 24.1.1 of the Concession Agreement states that if the Concession Agreement is terminated[195] and the strategic investor is entitled to have its shareholder's interest acquired by the Republic of Lithuania[196], the strategic investor may, within two months of the date of termination or entitlement (as applicable), invoice the Republic of Lithuania for the strategic investor's wasted costs together with supporting documentary evidence for all wasted costs claimed; and the Republic of Lithuania should pay the aforementioned invoice. In regard to the Concession Agreement, the wasted costs should mean those reasonable costs and expenses reasonably and properly incurred by the strategic investor, during the period from 14 July 2011 up to the day of signing the Concession Agreement, including the costs and expenses of activities, works or services performed to progress the project and the costs and expenses incurred in negotiating this Concession Agreement. However, in accordance to Clause 24.1.2 of the Concession Agreement, liability for wasted costs is limited to the amount of 10 million Euros.

Therefore, as of the day of signing the Concession Agreement the strategic investor becomes entitled to pre-contractual expenditures which do not exceed 10 million Euros. Such entitlement expands applicable investment protection regime and, therefore, leads to the assumption that foreign investment are well secured under the Concession Agreement.

4.6. Conclusions on investment protection under the draft Concession Agreement

The Concession Agreement provides specific obligations of the Republic of Lithuania as the host state and Hitachi Ltd. as the investor in the light of investment protection regime.

Part of obligations under the Concession Agreement is similar to those which are established under relevant investment protection regime; however, the Concession Agreement provides such

[194] Please see Clause 13 of the Concession Agreement.
[195] Please see Clause 26.5.1 of the Concession Agreement.
[196] Please see Clause 26.4.1 of the Concession Agreement.

obligations in more detail (eg to ensure favorable environment for the investment, ensure non-discrimination in internal market as well as to export of electricity).

Moreover, the Concession Agreement provides mechanism under which a claim can be based on particular investment treaty and under the Concession Agreement.

Contrary to ECT or relevant BITs, the Concession Agreement provides limitation of liability. Even though the limitation of liability of the Republic of Lithuania could be deemed as restriction of investor's rights, investor's liability is also limited in particular cases. Furthermore, the Concession Agreement provides specific remedies for particular defaults as well as possibility for the investor to claim for pre-contractual expenditures which do not exceed 10 million Euros.

To sum up, the Concession Agreement specifies, in some cases expands (eg entitlement for the pre-contractual expenditures) and clarifies applicable investment protection regime. In respect to the problem and object of this Master Thesis, it is even more important that the Concession Agreement are not likely to be in confrontation with any investment protection obligations which are undertaken by the Republic of Lithuania.

CONCLUSIONS AND RECOMMENDATIONS

Pursuant to above provided analysis, it may be concluded as follow:

1. Investment protection under ECT and BITs prevail the provisions of national regulation; however, if BIT provides higher level of investment protection than ECT, provisions of BIT prevails to provisions of ECT which also may be referred to national regulation if national regulation grants more favourable provisions for investment protection. Such mechanism of interaction between legal sources ensures the principle – most favourable legal source shall prevail in the light of investment protection.

2. According to analysed legal regulation and relevant case law, the control over an investment can be indicated as mandatory precondition for qualifying particular asset as investment and, therefore, applying investment protection. Thus, legislative measures (ie regulatory takings) which deprive control (whole or in significant part) over the investment shall be deemed as expropriation. However, existence of generally recognised considerations of the public health, safety, morals or welfare which are proportionate and do not violate legal expectations of an investor will normally lead to a conclusion that there has been no expropriation. Appropriate balance between interests of investors and public interest could be achieved by explicitly establishing exhaustive list of regulatory takings which shall not be deemed as expropriation.

3. E.ON Ruhrgas International GmbH and OAO Gazprom (foreign investors) had made an investment in Lithuanian natural gas sector by owning the shares of AB Lietuvos dujos as well as the shares of AB Amber Grid. However, Lithuania has chosen the ownership unbundling for natural gas sector as the most efficient model of transferring system operator unbundling and, therefore, the same entity cannot engage in production or supply of natural gas and at the same time directly or indirectly control TSO. Legal measures which have implemented the third energy package possibly deprive foreign investors' (ie E.ON Ruhrgas International GmbH and OAO Gazprom) control (ie to use of voting rights, appointment of members of supervisory, management and representative bodies, management and dispose of majority of shares) over the shares of AB Amber Grid. Thus, such regulatory takings may constitute the indirect expropriation of the investment.

4. Obligations established by the investment protection regime in Lithuanian come into effect as of an investment is made. However, the national treatment and the most favoured nation treatment which ensures foreign investors possibility to make an

investment without discrimination should be indicated as the main rights of foreign investors in pre-contractual phase.

As further step of investment protection in pre-establishment phase, mechanism for compensation of costs of foreign investors which were made in pre-contractual stage could be established. Nonetheless, such mechanism should not infringe the balance between interest of investors and the host state.

5. All costs incurred by Hitachi Ltd. shall not constitute an investment until the Visaginas Nuclear Power Plant Concession Agreement will be sign. Thus, if the Republic of Lithuania will refuse to enter into the Visaginas Nuclear Power Plant Concession Agreement, Hitachi Ltd. shall not be entitled for compensation due to violation of investment protection obligations by the Republic of Lithuania. It leads to the conclusions that Visaginas Nuclear Power Plant Project conformed to foreign investment protection obligations undertaken by the Republic of Lithuania.

6. Expenses that Chevron had due to participation in the tender do not likely constitute an investment and, therefore, could not be compensated under applicable investment protection regime. Even though the Republic of Lithuania has changed legal regulation which has an effect to the Shale Gas Project, it is not likely to be done with unfairly, unreasonably or inequitably intention. Moreover, the Republic of Lithuania has not infringed its obligation to provide the national treatment and the most favoured nation treatment for foreign investors or any other obligation under applicable investment protection regime.

7. Detail analysis of the Concession Agreement has revealed that current investment protection obligations which are undertaken by the Republic of Lithuania under ECT could be specified, in some cases expanded (eg entitlement for the pre-contractual expenditures) and clarified by the aforementioned agreement. Thus, it is not likely that performance of the Concession Agreement of the Visaginas Nuclear Power Plant Project could violate any investment protection obligations which are undertaken by the Republic of Lithuania.

8. Pursuant to the analysis of applicable investment protection regime, relevant case law and recent developments in Lithuanian energy sector, it may be concluded that the hypothesis of this Master Thesis was confirmed partially. While the Republic of Lithuania follows its investment protection obligations in the Shale Gas Project and the Visaginas Nuclear

Power Plant Project, including draft of the Concession Agreement, it is likely that implementation of the third energy packed may violate rights of foreign investors.

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ANNOTATION

The essence of this Master Thesis is to analyse recent developments in the Lithuanian energy sector in the light of foreign investment protection regime and to identify whether potential infringements of foreign investors' rights exists. Moreover, respective conclusions and recommendations regarding conformity of recent energy developments to foreign investment protection obligations are provided after comprehensive analysis of legal regulation, including international treaties and national laws, of foreign investment protection in Lithuania as well as relevant arbitration case law.

Key words: Energy Charter Treaty, energy developments, indirect expropriation, investment protection, investors' rights.

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ANOTACIJA

Šio magistro baigiamojo darbo esmė yra esamų Lietuvos energetikos projektų analizė pagal užsienio investicijų apsaugos rėžimą bei užsienio investuotojų teisių potencialių pažeidimų identifikavimas. Išsamiai išanalizavus investicijų apsaugos teisinį reguliavimą, įskaitant tarptautines sutartis ir nacionalinius teisės aktus, Lietuvoje bei aktualią arbitražo teismų praktiką, pateikiamos išvados ir rekomendacijos dėl esamų energetikos projektų atitikmens užsienio investicijų apsaugos įsipareigojimams.

Reikšmingi žodžiai: Energetikos Chartijos sutartis, energetikos projektai, netiesioginis nusavinimas, investicijų apsauga, investuotojų teisės.

SUMMARY

In order to achieve independence in energy sector and comply with EU energy policy, the Republic of Lithuania has initiated particular energy developments. However, the implementation of the most important energy developments (eg Visaginas Nuclear Power Plant Project) requires huge financial capacities and know-how in particular field. Thus, foreign investment is used as possible solution to mitigate the financial risk as well as to receive relevant know-how in order to perform significant important energy developments. In such cases, foreign investment protection obligations become relevant.

This Master Thesis consists of 4 sections which provide analysis of legal regulation, including international treaties and national laws, of foreign investment protection in Lithuania as well as relevant case law, in order to identify weather recent energy developments do not infringe the foreign investment protection obligations which are undertaken under international treaties and established in national regulation.

Analysis of applicable investment protection regime, including ECT, relevant BITs and national regulation, reveals that mechanism of interaction between applicable legal sources ensures that the most favourable legal source shall prevail in the light of investment protection.

Implementation of TSO ownership unbundling in the Republic of Lithuania is analysed due to identify whether rights of foreign investors which had made an investment in Lithuanian natural gas sector could be infringed. Legal measures which have implemented the ownership unbundling possibly deprive foreign investors' control over the shares of a company and, therefore, deprive control over the investment. Thus, such regulatory takings potentially could be constituted as indirect expropriation of the investment.

Investment protection in pre-contractual relations are also analysed in this Master Thesis due to perform comprehensive analysis on foreign investors' rights in all investment phases. For this purpose the Visaginas Nuclear Power Plant Project and the Shale Gas Project were selected as the biggest developments which are still pending or were terminated in pre-establishment phase. As it is likely that the Republic of Lithuania has not infringed its obligation to provide the national treatment and the most favoured nation treatment for foreign investors, it possibly could be stated that the Republic of Lithuania has duly performed its investment protection obligations in the aforementioned developments.

Finally, the analysis of the Concession Agreement has revealed that current investment protection obligations which are undertaken by the Republic of Lithuania under ECT could be specified, in some cases expanded (eg entitlement for the pre-contractual expenditures) and

clarified by the aforementioned agreement and, therefore, do not infringe applicable investment protection regime.

SANTRAUKA

Siekiant nepriklausomumo energetikos sektoriuje bei tinkamai įgyvendinti ES energetikos politiką, Lietuva iniciavo atitinkamus projektus energetikos sektoriuje. Nepaisant to, svarbiausių energetikos projektų, pvz.: Visagino atominės elektrinės projekto, įgyvendinimas reikalauja didžiulių finansinių išteklių ir patirties atitinkamoje srityje. Todėl užsienio investicijos naudojamos kaip galimas sprendimas, leidžiantis sumažinti finansinę riziką, o taip pat gauti atitinkamos patirties, įgyvendinant ypatingos svarbos energetinius projektus. Tokias atvejais užsienio investicijų apsaugos įsipareigojimai tampa aktualūs.

Šis magistro baigiamasis darbas susideda iš 4 skyrių, kuriuose pateikiama užsienio investicijų apsaugos teisinio reguliavimo Lietuvoje, įskaitant tarptautines sutartis ir nacionalinius teisės aktus, o taip pat aktualios teismų praktikos, analizė. Siekiama nustatyti ar esami energetikos projektai nepažeidė užsienio investicijų apsaugos įsipareigojimų, kurie yra prisiimti pagal tarptautines sutartis ir įtvirtinti nacionaliniuose teisės aktuose.

Esamo investicijų apsaugos rėžimo, įskaitant ECS, aktualias DIS ir nacionalinį reguliavimą, analizė atskleidžia, kad taikytinų teisės šaltinių sąveika užtikrina, jog palankiausias teisės šaltinis turėtų pirmenybę, siekiant investicijų apsaugos.

Šiame darbe yra analizuojamas PSO nuosavybės atskyrimo įgyvendinimas Lietuvos Respublikoje, siekiant identifikuoti ar užsienio investuotojų, kurie investavo į Lietuvos gamtinių dujų sektorių, teisės nebuvo pažeistos. Teisinės priemonės, kuriomis PSO nuosavybės atskyrimas buvo įgyvendintas, apribojo investuotojų turimą įmonės akcijų kontrolę, o tuo pačiu ir investicijos kontrolę. Todėl tokie teisniai suvaržymai potencialiai gali būti laikomi netiesioginiu investicijos nusavinimu.

Taip pat šiame magistro baigiamajame darbe yra analizuojama investicijų apsauga iki sutartiniuose santykiuose, siekiant atlikti išsamią užsienio investuotojų teisių analizę visose investavimo stadijose. Šiuo tikslu Visagino atominės elektrinės ir skalūninių dujų projektai buvo pasirinkti kaip didžiausi projektai, kurie vis dar nėra pradėti įgyvendinti arba buvo nutraukti dar iki įgyvendinimo pradžios. Kadangi, remiantis šiame darbe atlikta analize bei aktualia teismų praktika, tikėtina, jog Lietuvos Respublika nepažeidė įsipareigojimo suteikti nacionalinį ir palankiausios tautos traktavimą, galima manyti, jog Lietuvos Respublika tinkami atliko investicijų apsaugos įsipareigojimus minėtuose projektuose.

Galiausiai, Visagino atominės elektrinės projekto Koncesijos sutarties analizė parodė, kad esami Lietuvos Respublikos įsipareigojimai pagal ECS galėtų būti detalizuojami, išplečiami ir patikslinami minėtoje sutartyje, todėl manytina, kad investicijų apsaugos rėžimo nepažeidžia.