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# **Alternative Dispute Resolution Mechanisms in the Energy Sector**

*The protection of the investor*

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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## ABSTRACT

This dissertation provides a comprehensive review of the alternative dispute resolution mechanisms in the Energy sector. It begins with the definitions of the terms “Energy Sector” and “Disputes” .

It is divided into two chapters. The first chapter refers to the disputes that may arise in the energy Sector and the dispute resolution mechanisms provided. This chapter begins by indicating the disputes that may arise in the Energy Sector and explains their complexity . The study further analyzes the alternative dispute resolution technics , that are more preferably used by the participants in the industry along with their respective advantages and disadvantages. This chapter concludes by referring to the alternative dispute resolution mechanisms in the Greek Energy Legislation and more specific it refers to arbitration next to RAE.

The second chapter is dedicated to the protection of the investment under the Energy Charter Treaty. It starts with a reference to ECT and more specific it refers to its aim. The study, also covers the issue of the promotion, protection and treatment of investments by referring to all ECT’s provisions that provide for such protection. A comprehensive analysis of article 26 ECT is made including the arbitration procedure that the latter provides to investors . Finally , important definitions such as those of the terms “investment” and “investor” are provided. The study concludes by highlighting the importance of alternative dispute resolution mechanisms in the energy sector in general and in case of “energy investments”.

**Key words** : ADR, Energy disputes, investment protection , ECT

Eleni Chatzoglou

14.01.2017

## PREFACE

When I attended the class of Energy Law , I had the chance to discover the particularities of this specific sector. That was the reason why I was motivated to select such a topic in order to indicate the various alternative dispute resolution mechanisms in this domain. Also, I am very interested in the energy law sector and through this dissertation I had the chance to deepen my knowledge in the specific area of the alternative dispute resolution mechanisms in the Energy sector.

The objective and target of this dissertation is to point out the need to resort to alternative dispute resolution mechanisms when a dispute arises in the Energy Sector and it is hoped to bring all the important information for those technics in order for the reader to get to know them.

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## **LIST OF MAIN ABBREVIATIONS**

ADR -> Alternative Dispute Resolution

BITs -> Bilateral Investment Treaties

ECT -> Energy Charter Treaty

ICC -> International Chamber of Commerce

ICSID -> International Center For Settlement of Investment Disputes

NAFTA -> North American Free Trade Agreement

RAE -> Regulatory Authority for Energy

USD -> United States Dollars

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## 1.INTRODUCTION

### 1.1 What is “Energy Sector”?

Energy is gaining increasing attention in the international template and no policy maker can ignore its importance for economy and wellbeing of citizens<sup>1</sup>. It is universally acknowledged to be the cornerstone of an industrial society. Without the adequate supply of energy , the stability of the economic and social order is in jeopardy<sup>2</sup>.Therefore, energy for those and for many more reasons is at the forefront of the global agenda<sup>3</sup>. But what is energy and more specific what does the term “energy sector” mean ? Generally, energy is not something we want *per se* . The importance of energy is shown in what we can do with it<sup>4</sup>. Nowadays this term has taken on a new significance beyond that of the laws of physics . Thanks to the global policies from being the province of scientists and engineers it has become a hot topic for lawyers as well. The issues involved are extremely complex due to the long term orientation that the Energy Sector has<sup>5</sup>. Energy sector is considered to be a category of stocks which are related to producing or supplying of energy. Therefore, companies involved in the exploration and generally in the development of oil and gas reserves , oil and gas drilling or integrated power firms are included in this Sector<sup>6</sup>.

### 1.2 Meaning of a “dispute”

The definition of the dispute is of high importance, especially for the determination of the jurisdiction and competence of an arbitral tribunal. The meaning of the term “*dispute*” was formed by arbitral tribunals over the years. In *Mauromatis case* <sup>7</sup> the tribunal in its decision, in paragraph 19, stated that “*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*”.

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<sup>1</sup> J.A. Vinois , *EU Energy Law the security of energy supply in the European Union Volume VI*, Claves and Casteels , (2012) , p. 1

<sup>2</sup> D.Goswami / F. Kreith, *Energy Conversion* , CRC Press (2008), p. 1

<sup>3</sup> E. Sussman , ‘A Multilateral Energy Sector Investment Treaty : Is it time for adoption by all nations?’ , *Int’l Law* (44), 2010 , p. 940

<sup>4</sup> D. Coley , *Energy and Climate Change creating a sustainable future*, John Wiley and sons Ltd (2013), pp. 9-10

<sup>5</sup> R. Heffron / G. Little , *Delivering Energy Law and Policy in the EU and the US, a reader*, Edinburg University Press, (2016), p. 1

<sup>6</sup> Webpage : [http://www.investopedia.com/terms/e/energy\\_sector.asp](http://www.investopedia.com/terms/e/energy_sector.asp) , accessed 4/1/2017

<sup>7</sup> *Greece vs. UK , Mauromatis Palestine Concessions Case* , 1924 , Int’l Court, available at [http://www.worldcourts.com/pcij/eng/decisions/1924.08.30\\_mavrommatis.htm](http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm)

Also, in other cases<sup>8</sup> the tribunals held that a dispute is “ a *disagreement or controversy on a legal issue or fact, referred to the existence or not of a right/obligation or on the obstacles to exercise such right/obligation*”. Finally, another definition of the term ‘dispute’<sup>9</sup> was the following “ *the condition where two parties express absolutely different opinions on the implementation or not of specific obligations deriving from a contract*”<sup>10</sup>.

At this point , it is important to mention that not all kinds of disputes can be solved through ADRs. The ADRs cannot apply in cases where a third person is being harmed by a tort , or in cases of environmental injuries. Furthermore, issues concerning taxation are also excluded. An exception can be made only in case of public contract , where the law provides accordingly<sup>11</sup>.

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<sup>8</sup> *Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 - See more at: <http://www.italaw.com/cases/641#sthash.fuSvD6VS.dpuf> and *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 - See more at: <http://www.italaw.com/cases/79#sthash.wGzXiAw9.dpuf>

<sup>9</sup>See : “*INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA* ADVISORY OPINION OF MARCH 30th, 1950”, available at <http://www.icj-cij.org/docket/files/8/1863.pdf>

<sup>10</sup> Th. Panagos , *Handbook of Energy Law*, The author (2015), pp. 67-68

<sup>11</sup> *Ibid*, p. 68

# CHAPTER I

## Disputes that may arise in the Energy Sector and the Dispute Resolution Mechanisms provided

### 1. Types of disputes in the energy sector

Generally, the disputes that may arise in the energy sector can be classified into four categories, thus those between states, between companies and states, between companies and finally, between individual and companies.

#### 1.1 State v. State disputes

Mainly when we talk about state v. state disputes we refer to disputes that concern oil and gas fields , which cross international borders and most of them are located in maritime waters. Governments are involved only in cases where they are able to claim sovereign title and resolve boundaries with their neighboring states<sup>12</sup>.

Before 1969, many BITs , such as the German – Liberia BIT (article 11) , provided for state- state arbitration exclusively. In recent years , those state-state arbitration clauses are included separately or they are found alongside investor-state clauses<sup>13</sup>. Generally, in those cases the oil and gas companies get indirectly involved, since they have been granted with concessions which straddle dispute boundary lines. Also, they are asked , many times, by developing states to fund the costs of the dispute and to provide them with data and legal expertise<sup>14</sup>. But, in general we can say that even in this golden age of investor-State arbitration, State-State interaction remains relevant when it comes to the resolution of investment disputes<sup>15</sup>.

At this point a quick reference to some state v. states disputes will be made. One recent case, thus Ecuador v. United States<sup>16</sup> made it clear that the subject matter of interpretive state v. state arbitration must be a “dispute” between the state parties. This state v. state case, was brought before the tribunal by the Republic of Ecuador.

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<sup>12</sup> T. Martin, ‘Dispute Resolution in the international energy sector : an overview’ , JWELB(4)(4), (2011), p. 334, available at <http://jwelb.oxfordjournals.org/>

<sup>13</sup> N. Bernasconi-Osterwalder , ‘State-State Dispute Settlement in Investment Treaties’ , IISD (2014), p. 3, available at <https://www.iisd.org>

<sup>14</sup> T. Martin ,o.p., p. 334

<sup>15</sup> J. E. Kalicki/Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, Brill Nijhoff. (2015), p. 393

<sup>16</sup> *Republic of Ecuador v. United States of America* (PCA Case no. 2012-5), 29-09-2012

It was arbitrated under UNCITRAL rules and concerned the interpretation and application of article 7 paragraph 2 of the Bit agreement<sup>17</sup>. This dispute engaged many important legal questions such as whether states are allowed to use state-state arbitration in order to impose a definitive interpretation of treaty clauses and if such an interpretation could affect the effectiveness of the award that already have been rendered by investor-state tribunals<sup>18</sup>.

Finally, another interesting state v. state case was the Italy v. Cuba case<sup>19</sup>. In this case, Italy started an ad hoc arbitration under the article 10 of the 1993 Cuba- Italy BIT and brought before the tribunal two types of claims thus a diplomatic protection claim in order to protect its investors and a direct claim to defend its own rights<sup>20</sup>.

## **1.2 Company v. State Disputes**

These type of disputes, most of the times, are called investor-state or state investment disputes. They arise in cases where the terms of the original deal are significantly changed by the governments or when the latter nationalize or expropriate an investment. In these cases, the investor is able to base its claim either on its investment contract or risk service agreement or in an investment treaty or he/she has the right to base its claims to both of them<sup>21</sup>. The settlement of disputes between investors and states can take various forms and either be settled through non-binding methods, such as negotiation or mediation, or through binding methods, such as judicial settlement and arbitration<sup>22</sup>. Those types of dispute resolution mechanisms will be analyzed below.

Most of the treaty claims are made under BITs, that's why companies have to structure their investments and negotiate their host government contracts in order benefit from the investment protection that these treaties provide them with. These disputes rarely happen to International Oil Companies, but when such a dispute

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<sup>17</sup> Article VII para . 2 of the Ecuador–United States BIT (1993): “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”

<sup>18</sup> N. Bernasconi-Osterwalder, o.p. pp. 11-13

<sup>19</sup> Italian Republic v. Republic of Cuba, Ad hoc state-state arbitration, Final Award, 15-01-2008, available at <http://www.italaw.com/cases/documents/582>

<sup>20</sup> N. Bernasconi-Osterwalder, o.p. pp.11-13

<sup>21</sup> T. Martin, o.p., p. 334

<sup>22</sup> E. De Brabandere/ T. Gazzini, *Foreign Investment in the Energy Sector, Balancing Private and Public Interests*, Nijhoff International Investment Law Series, (2014), Volume 2, p. 132

takes place it involves huge sums of money and therefore has a remarkable impact on the bottom line of the involving company<sup>23</sup>.

Many of the above mentioned claims were brought before arbitral tribunals. For example, in an ICSID Case<sup>24</sup> the Cementownia "Nowa Huta" S.A., a joint stock company, had a 4,6 million USD claim against Turkey. More specific, this Polish company started arbitration due to the seizure of Çukurova Elektrik A.S. ("CEAS") and Kepez Elektrik Türk A.S. ("Kepez"), assets along with the termination of two electricity concessions agreements of those companies, both companies were incorporated under the laws of Turkey, and the claimant had acquired their shares on May, 30 2003.

Also, another ICSID case<sup>25</sup> dealt with investor versus state dispute. More specific, in this case, which occurred between Azpetrol International, Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V and Azerbaijan and had to do with oil and gas distribution, trade storage and transportation enterprises, the Dutch holding companies' claim reached 300 million USD.

Finally, an investor v. state dispute<sup>26</sup>, that arose from an electricity sale agreement was brought before an arbitral tribunal. In this case, a Swedish investor in a Latvian generation plant, claimed that the Republic of Latvia had unlawfully discriminated against him in comparison to Latvian generators due to the different tariffs imposed to him compared with those imposed to the native generators.

All those examples, show that many disputes may arise between an investor and a state, and so companies in order to ensure their protection must seek for qualified legal advises in order to structure properly their investments and draft flawless dispute resolution clauses in their host government contacts<sup>27</sup>.

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<sup>23</sup> T. Martin, o.p., p. 334

<sup>24</sup> *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2 - See more at: <http://www.italaw.com/cases/228#sthash.DYssTRs0.dpuf>

<sup>25</sup> *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15 - See more at:

<http://www.italaw.com/cases/116#sthash.xmc4fjwu.dpuf>

<sup>26</sup> *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Rendered in Stockholm, Sweden on 16 December 2003 - See more at:

<http://www.italaw.com/cases/759#sthash.EOEeXj2C.dpuf>

<sup>27</sup> T. Martin, o.p., p. 335

### **1.3 Company v. Company Disputes**

The most commonly known arbitrated disputes , are those which arise between the energy players themselves and can be found in a form of business to business disputes or in recent years in consumer related arbitration cases. They mainly concern conflicts that rise from a business transaction such as tariff disagreements or they are stretched out to disownment disputes between pipeline , power plant or windmill constructor and landowners<sup>28</sup>. Nowadays, many disputes arise between the owners of different subsurface resources. Those disputes have their origins in the decision of the owner-current or former- of the entire estate to create severed or split estate in different resources<sup>29</sup>.

Generally, the disputes that occur between energy companies can be divided into two main subcategories, thus those that take place between joint venture participants in contracts -and deal with Joint Operating Agreements, Unitization Agreements, Study and Bid Agreements, Sale and Purchase Agreements and Confidentiality Agreements- and on the other hand , those that arise between operators and service contactors for agreements that inter alia have to do with Drilling and Well Service Agreements , Seismic Contracts, Construction Contracts, Equipment and Facilities Contracts, Transportation and Processing Contracts<sup>30</sup>.

### **1.4 Individual v. Company Disputes**

In many cases individuals initiate claims against oil and gas companies . Generally, those claims could be divided into three groups. The first group refers to claims , where an individual suffers a personal injury and so he/she starts a tort claim against a company. The second group of claims refers to those which arise when promoters –mainly of oil and gas deals- state that they have an interest in a host government company and its accompanying joint operation agreement . Not rarely, they allege they have such an interest in cases where the claim had arose due to a third party's tortious interference. Last, the final group of claims includes claims of agents or consultants , who demand their payment according to their agent agreements for winning a government contract for a company . The last five decades, many

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<sup>28</sup> Association for International Arbitration, *Alternative Dispute Resolution in the Energy Sector*, Maklu (2009), p. 12

<sup>29</sup> D. Zillman and others , *The Law of Energy Underground , understanding new developments in subsurface production, transmission and storage*, Oxford University Press (2014) , pp. 433 and 450

<sup>30</sup> T. Martin, o.p., p. 335

arbitrations have started due to the refusal of companies to pay their agents , and most of the times , companies based their refusal upon corruption allegations<sup>31</sup> ,<sup>32</sup>.

## 2 . Dispute Resolution Mechanisms

Myriad of dispute resolution mechanisms such as litigation, mediation and arbitration are used to resolve disputes arising in the oil and gas industry. Despite the fact that litigation seems to remain the most common method of dispute resolution, there is a remarkable trend in the above mentioned industry towards the resolution of disputes through ADRs<sup>33</sup>. Generally, the ADRs in the energy sector could be classified in two main categories, thus preliminary and final. The Technical Advisory Committee and the (Sole) Expert Determination belong to the first category while the arbitration is considered to be the final stage , given the fact that in cases where the arbitral tribunal is competent , the legal relationship is –most of the times- already breached<sup>34</sup>. In any case, whatever parties choose, they have to draft a clause in which they will refer to the dispute resolution mechanism they have chosen , in order for the different methods to work properly. If they do not draft such a clause , they might face unpleasant surprises when the dispute arises<sup>35</sup>. At this point , it is important to mention that before referring to the above mentioned categories there will be a reference to negotiation and mediation.

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<sup>31</sup> One ICC case , that was one of the first cases that dealt with corruption, was the *ICC Case No. 1110(1963)*. In this case , the claimant, an Argentinian engineer, had acted as an agent for a British company(the respondent), in Argentina. The respondent wanted to sell to the Argentinian government electric equipment for power plants, located in Buenos Aires. The claimant acted as the agent of the British company in Argentina and there was an agreement to receive 10% commission on the value of the order. The claimant acted as an agent until June 1955, when he left Argentina for health issues. At that time the respondent had made no sales to Argentinian government and so the company was forced to hire another agent. Despite that , the claimant demanded 10% of the total sales. Therefore, parties got engaged into arbitration proceedings. After many allegations, made by both parties the sole arbitrator concluded in his award that “ *a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilized country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case*”. (T. Martin, *INTERNATIONAL ARBITRATION AND CORRUPTION: An Evolving Standard* , available at <http://timmartin.ca/wp-content/uploads/2016/02/Int-Arbitration-Corruption-Martin2002.pdf> accessed 28-11-2016, An earlier version of this paper was presented in the International Energy and Minerals Arbitration, Mineral Law Series, Volume 2002 (Spring 2002).)

<sup>32</sup> T. Martin, o.p. , Dispute Resolution...., p. 336

<sup>33</sup> F.Lavaud/C.Gugler/M.Ubbens , Oil and gas arbitration in the MENA Region, (2016) ,p. 1 available at [www.ogel.org](http://www.ogel.org) , accessed 27-11-2016

<sup>34</sup> Th. Panagos , o.p. , p. 68

<sup>35</sup> T. Martin,o.p. ,Dispute Resolution...., p. 336

## **2.1 Negotiation**

Negotiation is an alternative dispute resolution mechanism, in which parties discuss possible outcomes directly with each other, and most of the times it takes place as a matter of course. A negotiation clause can be drafted into an agreement, but also negotiation procedures can take place even in the absence of such a clause. Generally, parties should not rely upon only to this mechanism given the fact that there is always the chance of resulting in no resolution. On the other hand, negotiation can be a part of a multi-step dispute resolution process, but in this case there must be a clear time-schedule in order for the parties to know when each step is finished. Negotiation is considered to be the cheapest dispute resolution method and the most “commercial-friendly” due to the fact that parties discuss directly their dispute and try to find a solution that will benefit both sides. For these reasons, negotiation requires the full co-operation of the parties in order for negative emotions and entrenched views to be avoided and so to reach a settlement<sup>36</sup>.

## **2.2 Mediation**

Mediation considers to be one of the fast growing forms of dispute resolution mechanisms<sup>37</sup>. It refers to a process, where an impartial third party facilitates negotiations between the disputing parties in terms of their needs and interest<sup>38</sup>. Mediation is not a legally binding process and its results become binding only if the parties sign the settlement agreement. In order for mediation to be an effective and successful dispute resolution tool, parties should be well prepared and committed to the process, and the mediator should have the necessary skills and knowledge<sup>39</sup>.

At first glance it is obvious that the benefits of mediation thus, its informality, flexibility, confidentiality and privacy, the fact that it offers cost and time efficiencies and it focuses on parties interests and encourages party autonomy<sup>40</sup>, make it a choice in the business community<sup>41</sup>. Unfortunately, despite those obvious advantages, it is used infrequently in international disputes due to lack of familiarity with the process, the differences in culture and language and the large distances that separate the parties. At this point it is important to mention that the most well-

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<sup>36</sup> Ibid, p. 336

<sup>37</sup> N.Alexander, *International and Comparative Mediation*, Kluwer Law International (2009), p. 1

<sup>38</sup> N.Alexander, *Global Trends in Mediation*, Kluwer Law International, 2<sup>nd</sup> edition, (2006), p. 2

<sup>39</sup> T. Martin o.p. ,Dispute Resolution..., p. 337

<sup>40</sup> N. Alexander, o.p. ,International and... , p. 1

<sup>41</sup> T. Martin o.p. Dispute Resolution..., p. 337



known international dispute resolution institutions<sup>42</sup>, such as ICC ,during a four-year period, thus from 2005 to 2009 administered only about 100 mediations a year in comparison to 1800 arbitrations<sup>43</sup>.

Despite that , recent developments showed that mediation could work in tandem and in many cases could replace arbitration due to the fact that many States increasingly incorporate in their investment treaties mediation as a form of investor-state dispute resolution mechanism. Also, the Energy Charter Treaty Conference adopted a “Guide on Investment Mediation” , so as to encourage States and Investors to resort to mediation in order to resolve a dispute that may arise<sup>44</sup>. In any case we have to wait and see how this trend will benefit mediation .

In my opinion, when it comes to disputes that arise in the Energy Sector mediation is one of the best dispute resolution mechanisms that an investor can resort in order to resolve a dispute that has arisen. First of all, due to the very expensive and long-term contracts that dominate in the Energy Sector mediation as an amicable resolution mechanism can help parties in order to continue a smooth co-operation and after the dispute is resolved, because this agreement will benefit both parties. On the other hand, mediation provides all the guarantees that other forms of ADR provide for, such as impartiality and confidentiality. So, parties enjoy all the benefits that the ADRs provide them with and they continue their friendly co-operation.

## **2.3 Preliminary ADR**

### **2.3.1 Technical Advisory Committee**

Technical Advisory Committee , as it was mentioned above , is a form of preliminary stage ADR , so it is usually agreed in long-term energy agreements in order to resolve circumstantial disputes that arise during the life of the agreement . That means that it does not stop the performance thereof. It is competent for the resolution of technical problems before an issue becomes a dispute , mainly in the hydrocarbon industry <sup>45</sup>.It is considered to be a permanent body , but it is not a joint management committee given the fact that the government does not contribute any funds to the petroleum operators , instead it is considered to be a forum of discussion where

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<sup>42</sup> The statistic refers to : the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR)

<sup>43</sup> T. Martin, *Dispute Resolution*...., pp. 337-338

<sup>44</sup> E. Shirlow , ‘ *The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration*,’ Kluwer Arbitration Blog , (2016), available at <http://kluwerarbitrationblog.com/> accessed 22/12/2016

<sup>45</sup> Th. Panagos , *Hydrocarbons Exploration and Expropriation*, Sakkoulas Editions, (2014),p.165

technical and any other kind of matters can be discussed both in formal and informal debates. Those debates take place between the technical and other experts from both the government and the International Oil Companies sides<sup>46</sup>.

In any case , the final decision should be in a written form and have a proper justification. The main issues that may arise during the life of the agreement and need to be solved , include inter alia , work programs and the budget program, geological plans and interpretation of data of those programs and issues concerning environmental protection. The function of the Technical Advisory Committee is crucial not only for any involving government , but also for the companies , who carry out businesses in the energy sector. There is a tendency of parties to refer to Technical Advisory Committee for the determination of any dispute that may arise , not only due to informality and speed that this ADR provides , but also because it has a particular expertise and the technical knowledge needed for the resolution of such disputes. Also, all those disputes are solved in privacy so the unnecessary publicity , that could be fatal for both parties, is avoided<sup>47</sup>.

### **2.3.2 Expert Determination**

Expert determination is classified in the first category of ADR , thus it is a preliminary resolution mechanism. The (Sole) Expert Determination is actually one step before arbitration. In practice, in the energy sector, where long – term agreements dominate, it is very usual for the parties to appoint an expert , who will be competent to resolve the disputes that may arise during the life of their agreement, while the latter is still in force<sup>48</sup>.

At first, expert determination was used as a valuation mechanism and more specific as property valuation mechanism .Increasingly , it has been used as a dispute resolution mechanism for technical disputes. Generally, the expert has three commercial roles , the expert as a valuer, as witness and the expert as a dispute-resolver . At this point a reference will be made only to the third role of the expert<sup>49</sup>.

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<sup>46</sup> T. Walde /M. Bunter, *The promotion and Licensing of Petroleum Prospective Acreage*, *Kluwer Law International* (2002), pp. 317- 318

<sup>47</sup> Th. Panagos , o.p., *Hydrocarbons Exploration...*,pp. 165-167

<sup>48</sup> *Ibid*, p. 169

<sup>49</sup> S. Stultz-Karim , 'Expert Determination in International Oil and Gas Disputes: The Impact of Lack of harmonization in Reserves Classifications Systems and Uncertainty in Reserve Estimates', *Society of Petroleum Engineers*, Available at [www.onepetro.org](http://www.onepetro.org) , accessed 21/11/2016

Expert determination is mostly used in economic valuations and technical assessments in oil and gas disputes in areas such as the development plan and the maximum efficient rate<sup>50</sup>. It is a contractual form of dispute resolution, so parties to a contract agree that certain disputes that may arise in connection with their contract, will be referred to an expert<sup>51</sup>. This agreement must be in a written form. The expert who conducts the process, is independent and most of the times chosen by the parties or he/she can be nominated from a professional institute<sup>52</sup>. Parties usually, choose to refer the dispute to an expert due to a very specific reason, that is the reason why such expert determination clauses could require the expert to have specific technical or industrial experience in this particular subject matter of the dispute<sup>53</sup>.

Parties are able to rely on a “standard” set of rules or determine in their clause the rules that will govern the process of expert determination. This reference can be binding or the parties can agree otherwise. Unlike litigation or arbitration the expert is allowed to apply its personal expertise to the determination<sup>54</sup>. Most of the times, though, many expert determination clauses in long-term agreements do not contain detailed provisions as to the process and so parties draw up separate agreements referring to these matters after the dispute has arisen<sup>55</sup>.

Expert determination is a quick and less expensive form of dispute resolution mechanism. It is confidential and the decision of an expert can be binding if the parties have not agreed otherwise<sup>56</sup>, due to the fact that the decision of an expert cannot be enforced as an award but only as a contract between the parties. On the other hand, expert determination is considered to be effective and suitable for those technical matters<sup>57</sup>, given the fact that such disputes most of the times are of high value and need high level of expertise<sup>58</sup>. This is the reason why many international institutions, such as ICC International Center for Expertise, provide lists of experts and administered services in this field<sup>59</sup>.

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<sup>50</sup> T. Martin, *Dispute Resolution*...., p. 338

<sup>51</sup> Arshust LL.P., 'A consideration of expert determination on energy and resources projects', (2015), available at [www.ashurst.com](http://www.ashurst.com), accessed 27/11/2016

<sup>52</sup> R.M.Young, 'Expert Determination', (2001), available at [www.findlaw.com](http://www.findlaw.com), accessed 28/11/2016

<sup>53</sup> R. King, *Dispute Resolution in the Energy Sector a practitioner's handbook*, Globe Law and Business, (2012), p. 102

<sup>54</sup> R.M.Young, o.p.

<sup>55</sup> R. King, o.p., p. 102

<sup>56</sup> Arshust LL.P., o.p.

<sup>57</sup> T. Martin, *Dispute Resolution*...., pp. 338-339

<sup>58</sup> Arshust LL.P., o.p.

<sup>59</sup> T. Martin, *Dispute Resolution*...., pp 338-339

In my opinion, expert determination is one of the most suitable resolution mechanisms for energy disputes, due to the fact that an expert has the technical knowledge needed in addition to an arbitrator or conciliator who might lack special knowledge, and also provides for certainty of law and confidentiality.

But, in any case, parties have to consider whether this form of dispute resolution suits their agreement, their projects and themselves, before they refer to expert determination<sup>60</sup>.

## **2.4 Secondary ADR- Arbitration**

One of the most widely accepted and used dispute resolution mechanism in the international energy sector is arbitration. It is a legally binding process, which provides flexibility to parties in how they want to resolve their disputes<sup>61</sup>. Actually, it is an alternative to recourse to the courts<sup>62</sup>.

International arbitration provides an effective means of resolving international disputes including inter alia, international investment and state to state disputes. Generally, all authorities accept that the term “arbitration” means a process by which parties consensually submit a dispute to a non-governmental decision-maker, who is selected by the parties or for them, in order to render a binding decision, which will resolve that dispute in accordance with neutral, adjudicatory procedures while affording each party an opportunity to present each case<sup>63</sup>.

It offers neutrality and autonomy to the parties in their choice of procedure, thus parties can either choose institutional or ad hoc arbitration. Also, parties are able to choose the place of arbitration in order to ensure a jurisdiction that would be favorable to arbitration, and as we mentioned above the arbitrators, in order to ensure that they have the proper qualifications<sup>64</sup>. Generally, this principle of party autonomy, that dominates in arbitration, reflects the private dimension of choice of law rules and allows parties to agree on a legal system to which their conduct will be made in case of a dispute<sup>65</sup>. On the other hand, it provides the parties with the right to select a country that is a party to New York Convention in order to make sure that

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<sup>60</sup> Arshust LL.P., o.p.

<sup>61</sup> T. Martin, *Dispute Resolution*....., p. 339

<sup>62</sup> R. Pritchard, “*Economic Development, Foreign Investment and the Law issues of private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*”, Kluwer Law International and International Bar Association, (1996), p. 209

<sup>63</sup> G. Born, *International Arbitration: Law and Practice*, Kluwer Law International (second edition), (2015), pp 1-2

<sup>64</sup> R.King, o.p., pp. 102-103

<sup>65</sup> H. Kjos, *Applicable Law in Investor-State Arbitration, the interplay between national and international law*, Oxford University Press, (2013), p. 68

the arbitral award can be enforced<sup>66</sup>. Due to the importance of forum selection, parties to international contracts most of the times include in their agreements contractual dispute resolution provisions. These provisions minimize the uncertainties that inherent in international disputes. These provisions, most of the times, take either the form of forum selection clauses, or arbitration agreements. Both forms, can be combined with a choice-of-law clause, in which parties select the substantive law applicable to their relationship<sup>67</sup>.

International arbitrations take place within a complex international legal framework. A specialized and highly-supportive enforcement regime for most international investment arbitrations can be found in contemporary international conventions, national arbitration legislation, and institutional arbitration rules<sup>68</sup>.

Despite the fact that all those advantages make arbitration a desirable choice, often arbitrators won't have specialized knowledge of the relevant energy markets or of the pricing mechanisms and of the practice in the industry. Therefore, the constitution of the arbitral tribunal is crucial. Thus, the appointment of a three-arbitrators tribunal as opposed to a sole arbitrator may allow the parties to nominate an arbitrator, who has relevant expertise in the light of the issues in dispute and on the other hand, parties' nominations can be balanced by a suitable and qualified chairman<sup>69</sup>.

Finally, it is important to point out that not all disputes are capable of settlement through arbitration. Given its consensual character and that it is a private method of dispute resolution, the law has carefully limited the types of disputes that it considers capable of resolution through such consensual means. So, law may requires settlement of disputes through a forum which would take into consideration the public interest and in that way an arbitral tribunal won't be competent to rule upon these matters<sup>70</sup>.

To my way of thinking arbitration is the best possible option for a party, given that the award is considered to be a binding decision and that it is the most easily enforceable decision of all the other ADR types due to the fact that there are

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<sup>66</sup> R.King, o.p., pp. 102-103

<sup>67</sup> G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Kluwer Law International (4<sup>th</sup> edition), (2013), pp. 1-2

<sup>68</sup> G.Born, *International Arbitration: Cases and Materials*, Kluwer Law International (2<sup>nd</sup> edition), (2015), p. 1

<sup>69</sup> R.King, o.p., p. 103

<sup>70</sup> M. Sornarajah, *The settlement of Foreign Investment Disputes*, Kluwer Law International, (2000), p. 174

Conventions and mechanisms providing the immediate recognition and enforcement of arbitral awards in other countries that have ratified those Conventions.

### **3. Advantages and disadvantages of ADR**

Usually, contacting parties refer the disputes that may arise in alternative dispute resolution mechanisms agreeing that they are the safest way for the resolution of their disputes<sup>71</sup>. Many advantages and drawbacks of ADRs were mentioned above, while discussing each type of ADR. In this chapter a more detailed presentation of the advantages and disadvantages of ADR will take place.

#### **3.1 Advantages of ADR**

Most of ADRs offer many advantages such as flexibility of procedure<sup>72</sup>, given the fact that most of the parties are able to describe in detail this procedure in their ADR clauses or even at the time when the dispute arises. On the other hand, ADRs offer certainty of laws, objectivity and impartiality during the procedure of hearings<sup>73</sup>.

Furthermore, most ADRs, such as arbitration, tend to be private procedures. This has a twofold advantage, thus the outsiders do not get access to any sensitive information, while the parties are protected from the risk of any damaging publicity that may arise out of the proceedings<sup>74</sup>. As it becomes obvious, this high confidentiality, that the nature of the energy sector needs, due to the great volume of business data that are presented during the hearings and the parties do not want to make public, is provided by the ADRs<sup>75</sup>. This kind of confidentiality may help the warring parties to maintain a business and friendly relationship after the dispute is resolved<sup>76</sup>.

On the other hand, the proceedings in ADR are less formal than those in litigation<sup>77</sup>. In ADR procedures there is the freedom of evidence, that provides the parties with the right to present their arguments without the formal restrictions that are set out in

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<sup>71</sup> Th. Panagos, o.p., Handbook of ..., p. 67

<sup>72</sup> V. Pernt / S. Lukic, 'Mediation on the Heels of Arbitration – Competition or Peaceful Coexistence?', (2016), available at <http://kluwerarbitrationblog.com/>, accessed 1-12-2016

<sup>73</sup> Th. Panagos, o.p. Handbook of ..., p. 67

<sup>74</sup> A. Conrad /K. Kakooza, 'ARBITRATION, CONCILIATION AND MEDIATION IN UGANDA: A focus on the practical aspects', (2009), pp. 11-12 available at <https://poseidon01.ssrn.com>

<sup>75</sup> Th. Panagos, o.p., Handbook of ..., p. 67

<sup>76</sup> A. Conrad/ K. Kakooza, o.p., p. 12

<sup>77</sup> Ibid

the Civil Procedure Code<sup>78</sup>. Also, ADR provide for time and cost efficiency<sup>79</sup>, given the fact that they are generally much quicker and cheaper than taking a case through the Courts<sup>80</sup>.

Furthermore, especially in Arbitration, Technical Advisory Committee and Expert Determination, the person(s) deciding the case have expert knowledge and are able to form their conclusions in line with accepted practices. Also, those impartial and high qualified persons can be selected by the parties due to their expertise. Finally, those specialists are fully focused on this particular dispute that has arisen where in litigation a judge may rule upon numerous cases per day<sup>81</sup>. So, parties can be sure that their case will be handled accordingly<sup>82</sup>.

Enforcement, is consider to be among the benefits that the ADRs offer. More specific, the arbitral award is enforced as a Court decision and it is binding for the parties. Especially when it comes to awards rendered and recognized in state-parties of the New York Convention on the Recognition and Enforcement of Arbitral awards, their enforcement and recognition is immediate. However, the arbitral award is consider to be the most binding and enforceable decision than other forms of ADR<sup>83</sup>. Finally, it is important to point out that the tribunal, during the ADR process, can avoid the misuse of national case law and so it can proceed to the case ad hoc<sup>84</sup>.

### **3.2 Disadvantages of ADR**

On the other hand, despite all those advantages mentioned above, ADRs have also drawbacks. First of all, in some instances ADRs and especially arbitration, can be time consuming and really expensive. Generally, Arbitrators have less powers than Courts to obtain evidence from the parties, to expedite the proceedings<sup>85</sup> and also, they are not entitled to take Interim Measures<sup>86</sup>.

Furthermore, as we have already mentioned, most of the times the impartial third party selected to resolve the dispute can be an expert in the disputing subject matter, that means that he or she may lack the necessary legal knowledge, in case

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<sup>78</sup> Th. Panagos, o.p., Handbook of..., p. 67

<sup>79</sup> V. Pernt /S. Lukic, o.p.

<sup>80</sup> A. Conrad/K. Kakooza, o.p., p. 12

<sup>81</sup> ibid

<sup>82</sup> Th. Panagos,o.p., Handbook of..., p. 67

<sup>83</sup> A. Conrad/ K. Kakooza, o.p., pp 12-13

<sup>84</sup> Th. Panagos,o.p., Handbook of .., p. 67

<sup>85</sup> A. Conrad/K. Kakooza, o.p., p. 13

<sup>86</sup> Th. Panagos, o.p. Handbook of..., p. 67

he/she is not an attorney at law , a judge or in any case familiar with law<sup>87</sup>.Also, the lack of procedural guarantees , provided in the Procedural Code may lead to lack of judicial independence<sup>88</sup>.

Finally, the essential weakness of some ADR types such as negotiation and mediation lies in the fact that despite they may lead to the resolution of the dispute , this does not necessarily achieve that. The main problem with these ADR types is that they have no binding power on the parties<sup>89</sup> and they do not always lead to an outcome<sup>90</sup>.

#### *-Remarks*

In my opinion , the positive aspects of ADRs far outweigh the disadvantages given the fact that litigation is a more time-consuming process and in case where the losing party believes that the court decision was false or that it has flaws he/she has the right to appeal and after that can also refer to the Supreme Court. We can understand that if this happens years may pass without the winning party being able to enforce the court's decision .So despite the obvious waste of time both parties will spend and a huge amount of money in attorneys' fees , court fees and everything else that might come up.

When it comes to ADRs parties do not have the right to appeal. The only right that they have and resembles to that is –in case of arbitration- where parties can go before the State Courts and apply for the annulment of the award, or in case where parties have agreed that they will have the right to an appeal against the award before another arbitral tribunal. In practice this rarely happens so in general it could be said that ADRs provide for more certainty given the fact that once a party has this binding decision – even in case of Mediation if parties sign the agreement- it can enforce it.

On the other hand, in my opinion the fact that there are multilateral treaties such as New York Convention , providing accurate enforcement mechanisms is another advantage. If the winning party to litigation wants to enforce Court's decision in another Country he/she has to bring this decision before the competent Courts of that country and seek for recognition of it. After this time consuming process he/she will be able to enforce it. As we see, this can take time and of course money. So,

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<sup>87</sup> A. Conrad /K. Kakooza, o.p., p.13

<sup>88</sup> Th. Panagos, o.p., Handbook of ..., p. 67

<sup>89</sup> Except in mediation , in case where the parties sign the agreement

<sup>90</sup> A. Conrad /K. Kakooza,o.p.,pp. 15-16



mechanisms , such as those contained in the provisions of NY Convention makes it easier for the winning party to enforce the award , given the fact that this will be immediately recognized in the counties which have ratified the Convention , so the party can immediately enforce this binding decision.

In my point of view , those are the main reasons that make ADRs the best option for resolution of disputes arising in the Energy Sector.

#### **4.The ADR in the Greek energy legislation- Arbitration next to RAE**

The Regulatory Authority for Energy (RAE) is an independent regulatory authority set up under the Greek Law 2773 / 1999, in the context of harmonization with the Directives 2003/54 / EC and 2003/55 / EC for electricity and gas, its main competence is the supervision of the domestic energy market, and its objective is to achieve the liberalization of the electricity and gas markets<sup>91</sup>.RAE's founding law provided for the adoption and organization of a permanent Court of arbitration<sup>92, 93</sup>.

So, according to article 37 of the Greek law 4001/2011, a permanent arbitration next to RAE was established. This provision is compatible with the relevant provisions of the Greek Procedural Code . The predecessor of this law , also made a reference to arbitration , but its provisions were incomplete and had some flaws. According to the new provisions the arbitration next to RAE is organized more properly and provides not only for the resolution of disputes that may arise between companies or natural persons activated in the energy sector , but also for those that may arise between eligible customers and their providers, and between companies for disputes that arise from the implementation of both the EU and national legislation. <sup>94</sup>

As we explained , the above mentioned arbitration is not mandatory, due to the fact that the legally binding nature of these rules has a conventional foundation, since once the arbitration agreement submits the dispute to RAE's arbitration , it is governed by the Arbitration Rules of the latter and the provisions of the Arbitration Rules are incorporated in the arbitration agreement. The Arbitration Rules become

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<sup>91</sup> Webpage : [http://www.rae.gr/site/categories\\_new/about\\_rae/intro.csp](http://www.rae.gr/site/categories_new/about_rae/intro.csp)

<sup>92</sup> Law 2773/1999,for the "Liberalization of the electricity market and regulation of issues concerning energy policy and other provisions", Government Gazette Issue 286/A/22.12.1999

<sup>93</sup> E. Kaldelis , 'Energy and Arbitration: The organization of permanent Arbitration Courts within Energy Regulatory Authority', Energy and Law Review, Sakkoulas editions , (2006), vol. 5 p.38

<sup>94</sup> Th. Panagos , *The Regulatory Framework Of The Energy Market*, Sakkoulas editions , (2012), pp. 66-68

therefore part of a procedural agreement, thus the arbitration agreement, and become binding for the parties<sup>95</sup>. That means that parties in case where they want to resolve their dispute through arbitration next to RAE they have to consent and mutually agree upon that. If they do that then, their agreement becomes binding and the resolution of their disputes through arbitration is mandatory. Thus, in order for the parties to avoid litigation and refer their dispute to arbitration, there must be a written agreement between them. Also, when it comes to disputes that arise in connection with the Contract on Trade on Electricity the arbitration that is mentioned in the relevant Code is not compulsory.<sup>96</sup>

Finally it is important to mention that the tribunal is consisted of three members, who are selected from RAE's arbitration List. This list is drawn up every two years. In case where the parties do not choose the arbitrators, the latter are appointed by the President of the Authority. The whole procedure must be conducted within six months. Finally, the arbitration next to RAE is governed by the Arbitration Regulation which is based on the parties contractual agreement.<sup>97</sup>

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<sup>95</sup> RAE, Decision no. 261/2012, *Adoption of RAE's Arbitration Rules*, p.6, available at

[http://www.rae.gr/site/file/categories\\_new/about\\_rae/actions/decision/2012\\_A0261?p=files&i=0](http://www.rae.gr/site/file/categories_new/about_rae/actions/decision/2012_A0261?p=files&i=0)

<sup>96</sup> Th. Panagos, *The Regulatory Framework Of The Energy Market*, Sakkoulas editions, (2012), pp. 66-

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<sup>97</sup> *ibid*

## CHAPTER II

### The protection of the investment under the Energy Charter Treaty

#### 1. Energy Charter Treaty

ECT is an international Agreement in the energy sector providing a multilateral framework for energy trade and investments under the international law<sup>98</sup>.

##### 1.1 Aim of Energy Charter Treaty

ECT aims to achieve several objectives, spread across various provisions such as compensation in case of expropriation, improvement of energy efficiency, international dispute settlement etc.<sup>99</sup>. ECT's main objectives are laid down in its article 2, thus it wants to promote a long-term co-operation in the Energy Sector through the establishment of a legal framework<sup>100</sup>. All those principles include secure energy supply and sustainable economic development<sup>101</sup>.

More specific, ECT mainly aims to establish an economic growth by means of measures to liberalize investment and trade in the energy sector and to protect the foreign investments by extending national treatment and protection against key non-commercial risks<sup>102</sup>.

Furthermore, it aims to apply non-discriminatory conditions in the trade of energy material, products and generally, to any energy related equipment in order to ensure the reliable cross – border energy transit flows. Also, one of ECT's main objectives is the resolution of disputes that may arise between the participating countries or between investors and host countries. The promotion of energy efficiency and the minimization of environmental impact of energy production and use is another ECT's aim<sup>103</sup>.

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<sup>98</sup> Th. Roe/M. Happold. *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, (2011), pp. 27-28

<sup>99</sup> S. Haghighi, *Energy Security the external legal relations of the European Union with major oil and gas supplying countries*, Hart Publishing, (2007), p. 193

<sup>100</sup> K. Talus, *EU Energy Law and Policy, a critical account*, Oxford University Press, (2013), p.235

<sup>101</sup> *ibid*

<sup>102</sup> Th. Panagos, *Handbook of Energy Law*, The author (2015), p. 54

<sup>103</sup> *Ibid*

Finally, it is important to point out that ECT has a complex structure and it tries to balance among diverse interests and many times the tribunals have to balance between those different aims of the ECT<sup>104, 105</sup>.

## **1.2 The promotion , protection and treatment of investments**

The third area of ECT deals with the protection and promotion of foreign investment , thus it refers to the regime of national treatment and the most favored nation treatment. Those provisions aim to reduce the non-commercial risk that is associated with the investments made in the energy sector<sup>106</sup>.

The protection of foreign investments is of high importance, especially in the oil and gas sector, due to the economic, environmental and physical security issues that may arise given the particularities of those sectors<sup>107</sup>.

Generally, for a foreign investor two aspects of investment are of high importance, thus whether he/she will be allowed an open access to another country and if there are rules applying to its investment after it is allowed entrance<sup>108</sup>.

As it was mentioned above , Part III of the ECT refers to the promotion and protection of investments in the Energy Sector. Host-states are obliged , under those provisions , to treat investors of other Contracting-parties , and thus their investments, in accordance with specific standards<sup>109</sup>. Generally, two types of investment protection are included in ECT. On the one hand, it contains “hard law” and thus

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<sup>104</sup> So, the approach adopted by the *Saluka* tribunal, despite the fact that it referred to Netherlands-Czechoslovakia BIT, seems to be the most appropriate, “*This is a more subtle and balanced statement of the Treaty’s aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.*” *Saluka Investments B.V. v. The Czech Republic*, Partial Award , 17 March 2006, paragraph 300 - See more at: <http://www.italaw.com/cases/documents/963#sthash.v77M58cV.dpuf>

<sup>105</sup> Th. Roe/M. Happold. *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, (2011), p. 31

<sup>106</sup> *ibid*

<sup>107</sup> J. Gladstone/N. Leslie, ‘Energy and investment security: protection under international law’, I.E.L.R. (4), 2013, p. 168

<sup>108</sup> S. Haghghi, *Energy Security the external legal relations of the European Union with major oil and gas supplying countries*, Hart Publishing , (2007), p. 195

<sup>109</sup> Th. Roe/M. Happold. *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, (2011), p. 15

binding obligations regarding the post-establishment phase of energy investment , such as the principle of non-discrimination and “soft law” obligations , on the other hand, applying in the pre-establishment phase , thus they apply in the stage where the investor makes its investment. ECT provides for protection against crucial political and regulatory risks , such as expropriation or nationalization. Those rules are reinforced by the provision of access to binding international dispute resolution mechanisms<sup>110</sup>.

### **1.2.1 Minimum standard of investment protection**

More specific, article 10 (1) of ECT sets out a minimum standard of investment protection by referring to some basic principles concerning the treatment of foreign investments<sup>111</sup>. So , according to the provision of article 10(1) each contracting State is obliged to encourage and create the most ideal conditions for investments made by investors of another Contracting party .As we can see, those provisions intent to ensure a minimum standard of treatment as the latter has been established in BIT practice, and it is based to a considerable extend on developments in international law<sup>112</sup>.

#### *(i) Fair and equitable treatment*

In the second sentence of paragraph 1 of article 10 the term “fair and equitable treatment” is mentioned. This standard derives from international law and it has frequently be applied by tribunals in BIT and NAFTA arbitration. It is considered to be one of the main principles of investment protection. The application of this principle requires in-depth factual assessment and the applications of standards concerning good-government contact. Tribunals, that apply this principle came up to the conclusion that it includes principles like that of the protection of legitimate investor expectations , good-faith and prohibition on arbitrariness<sup>113</sup> .

In this context it is acceptable that the denial of justice to an investor also constitutes a breach of a host- state's obligation to provide fair and equitable treatment. Also, maladministration and misadministration of justice both in a judicial

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<sup>110</sup> K. Talus, *EU Energy Law and Policy, a critical account* , Oxford University Press, (2013), p. 237

<sup>111</sup> K. Hober , ‘*Investment Arbitration and the Energy Charter Treaty*’, *Journal of International Dispute Settlement*, (1), (1) , (2010), p. 157 , available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

<sup>112</sup> M. Roggenkamp and others, *Energy Law in Europe, national , EU and International Regulation*, Oxford University Press , second edition , (2007), p. 152

<sup>113</sup> K. Hober , ‘*Investment Arbitration and the Energy Charter Treaty*’, *Journal of International Dispute Settlement*, (1), (1) , (2010), pp. 157-158 , available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

or administrative context can have as a result the denial of justice to the extent that it relates to serious inadequacies in the legal protection of foreign investors and their investments<sup>114</sup>.

(ii) *Most constant protection and security*

In the next sentence of paragraph 1 it is stated that investments must enjoy “*the most constant protection and security*”. The state’s obligation to protect investor’s ability to function its business in a level playing field, is included<sup>115</sup>. ECT like most BITs listed Fair and equitable treatment and constant protection and security side by side. In *Wena Hotels v. Egypt*<sup>116</sup> the tribunal dealt with those two standards jointly without distinguishing them, while in *Azurix v. Argentina*<sup>117</sup> the tribunal said that those two standards are separated and that the protection and security standard goes beyond protection against physical violence and extends to the obligation of providing a secure investment environment<sup>118</sup>. In my opinion, when a dispute arises we must examine very carefully if it will be based on the breach of fair and equitable treatment standard or on the constant protection and security standard, because in my way of thinking, those two standards must be considered and examined separately due to the fact that they refer to different host – state’s obligations.

(iii) *Discrimination*

Next, in paragraph 1 of article 10 there is a reference to unreasonable or discriminatory measures. This reference links to the principle of fair and equitable treatment, but those principles have been distinguished by arbitral tribunals. More specific in *Nykomb*<sup>119</sup> Case the tribunal held that Latvia had breached its obligation not to discriminate, by offering higher tariffs for electricity to other companies<sup>120</sup>. This specific standard is considered to be of a more general interest due to the fact that it can be found in a number of bilateral investment treaties, and most of the times in combination with at least some of the standards listed in Art.10(1) of the ECT<sup>121</sup>. In

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<sup>114</sup> J. Stone, ‘Arbitrariness, the fair and equitable treatment standard, and the international law of investment’, L.J.I.L. 25(1), 2012, pp. 84-85

<sup>115</sup> K. Hober, o.p., p. 157

<sup>116</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 - See more at: <http://www.italaw.com/cases/1162#sthash.5UCDIru8.dpuf>

<sup>117</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12

- See more at: <http://www.italaw.com/cases/118#sthash.hmHpDrle.dpuf>

<sup>118</sup> G. Coop/C. Ribeiro, ‘Investment Protection and the Energy Charter Treaty’, *Juris Net, LLC*, (2008), pp. 64-65

<sup>119</sup> *Nykomb Synergetics Technology Holding AB v the Republic of Latvia*, SCC, Rendered in Stockholm, Sweden on 16 December 2003 - See more at: <http://www.italaw.com/cases/759#sthash.EOEeXj2C.dpuf>

<sup>120</sup> K. Hober, o.p., p. 157

<sup>121</sup> V. Heiskanen, ‘Unreasonable or discriminatory measures as a cause of action under the Energy Charter Treaty’, *Int. A.L.R.*, 10(3), (2007), p. 106

my opinion , this standard sets the foundations in order for an investor to make an investment in the area of another Contracting state due to the high importance and protection that this standard provides him/her with.

(iv) *Umbrella clause*

Furthermore , in the last sentence of this paragraph , the principle of *pacta sunt servanda* is being emphasized . According to this umbrella clause the host state is obliged on the one hand , to honor its commitments to the foreign investor throughout the exploitation of this investment and on the other hand , it is prohibited to annul the contractual agreement concluded with the foreign investor . Also, host state undertakes the obligation not to oblige the investor to accept any change made to the original terms of the contract<sup>122</sup> .This is the umbrella clause that is contained in provisions of ECT and is considered to be among the most extensive umbrella clauses . However, Contracting States have the right to opt out of this umbrella clause of article 10 (1) ECT<sup>123</sup>. In any case, when we interpret this clause we need to be very careful given the fact that a wide interpretation of this clause could have as a result the contracting party to become responsible for a wide range of actions of the state enterprises in the fulfillment of the agreement , under the ECT<sup>124</sup>.

(v) *Most Favored Nation Treatment*

The Most Favored Nation Treatment provision is according to the tribunals' observations , one of the most controversial issues within the world of international investment law<sup>125</sup> . In article 10 paragraph 1, it is stated that a host state should not treat foreign investments in a manner that provides them with less privileges or in any case treat them less favorable than what it should according to international law provisions . According to this provision in case where the host – state is a party to another treaty in which a better treatment for investments is required , this treatment has to be imported into ECT<sup>126</sup>.

In paragraph 7 of the same article the principle of most favorable nation treatment is expressed. It is important to mention that this principle is established as a post-

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<sup>122</sup> N.Farantouris/T.Kosmidis, *Hydrocarbon Law*, Nomiki Vivliothiki , 2015, pp.371-372

<sup>123</sup> E. De Brabandere/T. Gazzini, *Foreign Investment in the Energy Sector, Balancing Private and Public Interests*, Nijhoff International Investment Law Series, (2014) , Volume 2, p. 162

<sup>124</sup> K. Hober , o.p., p. 159

<sup>125</sup> Trinh Hai Yen, *The Interpretation of Investment Treaties*, Brill Nijhoff (2014), p. 116

<sup>126</sup> K. Hober , 'Investment Arbitration and the Energy Charter Treaty', *Journal of International Dispute Settlement*, (1), (1) , (2010), p. 160 , available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

investment standard for the treatment of the investment<sup>127</sup>. This treatment applies to investments made by investors, but also to activities that are related to investments such as management. This standard implies non-discrimination due to the fact that the host-state must treat investments no less favorable than those of its own investors. So, this treatment provides that investors will benefit from the rights contained in other treaties or legislation or in any case they will be able to take advantage of any beneficial treatment afforded to other investors, since all those will be incorporated into the protection offered by ECT<sup>128</sup>.

### **1.2.2 Protection against Expropriations**

The guarantee against expropriations is considered to be the most important sought by investors<sup>129</sup>, that is and the reason why article 13 of ECT is considered to be the cornerstone of investment protection regime of ECT<sup>130</sup>. According to this provision, in case of expropriation, which must be made only for reasons concerning public interest<sup>131</sup>, the host state is obliged to compensate the investor immediately before the expropriation or in any case before the latter becomes known so as investment's value not to be affected due to the publicity<sup>132</sup>. This provision is so significant because it invites an expansion of the types of acts that are capable of being considered as takings<sup>133</sup>, including measures that may have equivalent effect to expropriation such as indirect or creeping expropriations<sup>134</sup>. So, every action of the host-state that could deprive investor of the use or enjoyment of its assets is included<sup>135</sup>. Finally, it is important to point out that those binding provisions included in Part III of ECT only protect investments once made<sup>136</sup>.

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<sup>127</sup> M. Roggenkamp and others, *Energy Law in Europe, national, EU and International Regulation*, Oxford University Press, second edition, (2007), p. 154

<sup>128</sup> K. Hober, o.p., p. 160

<sup>129</sup> Trinh Hai Yen, *The Interpretation of Investment Treaties*, Koninklijke Brill nv, Leiden, (2014), Volume 7, p. 186

<sup>130</sup> Ibid

<sup>131</sup> J. Gladstone and Nicola Leslie, 'Energy and investment security: protection under international law', *I.E.L.R.* (4), 2013, p.171

<sup>132</sup> K. Hober, o.p., p.161

<sup>133</sup> K. Sauvart, *Appeals Mechanism in International Investment Disputes*, Oxford University Press (2008), p. 68

<sup>134</sup> K. Hober, op., p.161

<sup>135</sup> T.H. Yen, *The Interpretation of Investment Treaties*, Koninklijke Brill nv, Leiden, (2014), Volume 7, pp. 186-187

<sup>136</sup> Th. Roe/ M. Happold. O.p., p. 16



## **2.Settlement of disputes under article 26 of the Energy Charter Treaty**

The foreign investment has now become more important than trade , given the fact that it involves the whole range of issues that are related to the production process<sup>137</sup>. Nowadays state interventions in the energy sector led to a significant increase in international investment disputes . Most of these disputes concern the oil and gas sector , power generation disputes follow and the disputes concerning energy transmission and distribution represent the smallest percentage of the total amount of disputes <sup>138</sup>.

ECT provides for dispute resolution mechanisms . One of the most powerful features of ECT is this provision of mechanisms which enforces the obligation and imposes them to the Contracting Parties. Despite its power , those mechanisms differ according to their subject matter and therefore some tend to be more efficient than others<sup>139</sup>.

### **2.1 The arbitration procedure as the protection of the investment**

The main aim of ECT is the protection of foreign investments . Most of investors' claims are based in the violation of ECT .That is the reason why the latter has played an important role in the development of the energy sector given the fact that it allows investors to bring claims in case where contracting states violate ECT provisions<sup>140</sup>. Article 26 is considered to be the most innovative aspect of the Treaty. The private enforcement of its provisions are provided by the same article. Also, according to its provisions , investors are allowed to seek monetary compensation in case they have suffered losses due to the fact that the State has breached its obligations under Part III ECT. The operation of this article will be covered in more detail below<sup>141</sup>. Generally, this right that article 26 provides to investors is of great importance as it removes investors from resort to the local courts that may fail to be neutral or being influenced by their government<sup>142</sup>.

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<sup>137</sup> K. Sauvant , o.p., p. 11

<sup>138</sup> E. De Brabandere /T. Gazzini, "*Foreign Investment in the Energy Sector, Balancing Private and Public Interests*", Nijhoff International Investment Law Series, (2014) , Volume 2, p. 19

<sup>139</sup> Th. Roe / M. Happold , o.p., p18

<sup>140</sup> B. Le Bars , "" Recent Developments in International Energy Dispute Arbitration", Journal of International Arbitration,(2015) , 32(5) , p. 543 available at :

<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-joia-320504>

<sup>141</sup> Ibid, pp. 18-19

<sup>142</sup> E. Sussman , '*A Multilateral Energy Sector Investment Treaty : Is it time for a call for adoption by all nations?*', Int' Law (939), 2010, p. 957

So, it creates a strong guarantee for investors in order to invest and in case of a host government's harmful activities investors are entitled to compensation for their losses without the involvement of their home state<sup>143</sup>.

As we mentioned above, article 26 ECT sets out the procedure in order for an investor to submit its dispute to arbitration under the Treaty<sup>144</sup>. According to the provision of paragraph 1 of this article the disputes that may arise between an investor and a Contracting party must, if this is possible, to be settled amicably. Furthermore, according to this provision there is a 3-month cooling period, thus the investor cannot submit its dispute for resolution until those three months from the date each party requested amicable settlement pass without settlement<sup>145</sup>.

In case where the dispute cannot be solved amicably the investor has a wide range of options given the fact that under paragraph 2 of article 26 may choose to submit its claim to the courts or to administrative tribunals of the host state, to any previously agreed dispute settlement procedure, or to International Arbitration under the Treaty<sup>146</sup>.

It is important to specify that, this dispute must concern a breach of investment protection set in Part III of the Treaty. Generally, article 26 is narrower than other arbitration clauses that may cover "all disputes that may arise out of an investment"<sup>147</sup>. Among those three forms of dispute resolution, international arbitration is the most important remedy in the hands of the investor in order for the latter to enforce its rights under the Treaty. According to the provisions of paragraph 4 article 26 if an investor avails itself of arbitration under the Treaty, he/she has the option of choosing among the following set of rules:

- ❖ ICSID-arbitration, provided that both the host state and the investor's state have ratified the ICSID Convention
- ❖ Arbitration under the ICSID Additional Facility Rules
- ❖ A sole arbitrator or ad hoc arbitral tribunal established under the UNCITRAL Arbitration Rules or

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<sup>143</sup> S. Haghighi, *Energy Security the external legal relations of the European Union with major oil and gas supplying countries*, Hart Publishing, (2007), p.204

<sup>144</sup> K. Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, (2010), p. 49

<sup>145</sup> R. Pritchard, *Economic Development, Foreign Investment and the Law issues of private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, Kluwer Law International and International Bar Association, (1996), p. 239 and K. Hober, 'Investment Arbitration and the Energy Charter Treaty', *Journal of International Dispute Settlement*, (1), (1), (2010), p. 162, available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

<sup>146</sup> Ibid

<sup>147</sup> K. Yannaca-Small, o.p., p. 49

❖ Arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce<sup>148</sup>

In all those cases , the relevant arbitration rules state that the tribunal is competent to decide the dispute in accordance with the rules of law that were designated by the parties. Thus, it becomes clear that the arbitral tribunal which will decide a dispute under article 26 ECT must not apply only the provisions of the Treaty , but it must also apply any applicable rules of international law<sup>149</sup>. As we understand this provision establishes the autonomy of the will of the parties when it comes to the choice of law or rules. Furthermore , it prescribes a balance between the applicable national and international law, in the absence of the parties' choice<sup>150</sup>. The choice of the investor among the above mentioned institutions and rules may have a great impact on its claim. For example, in case an investor refers its dispute to ICSID arbitration , has to satisfy the requirements set in Washington Convention and thus any challenge of the arbitral award has to be made before an ad hoc Committee and so the Courts of the State in which arbitration takes place are excluded. Generally, ECT does not designate an appointing authority in cases where the investor opts for ad hoc arbitration under UNCITRAL rules . So, in these cases the Secretary General of the Permanent Court of Arbitration will nominate the appointing authority<sup>151</sup>.

Signatory States have the right to make two types of limited reservations , thus they can exclude (i) disputes that have already been submitted by an investor to a competent forum and (ii) claims that have arisen under specific contacts between the relevant state and the investor<sup>152</sup> . So, in order for a dispute between a contacting party and an investor of another party for investment made by the latter in the area of the former, to be submitted to arbitration, the Contacting parties must have given their unconditional consent<sup>153</sup>. This unconditional consent of article 26(3), (a), means that a state cannot withdraw its consent or withdraw generally from ECT , in case where an investor requests to commence arbitration proceedings . Such withdrawal would not be legally effective. In case where a state withdraws from ECT it will

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<sup>148</sup> R. Pritchard , *Economic Development, Foreign Investment and the Law issues of private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, Kluwer Law International and International Bar Association, (1996), p. 239 and K. Hober , *Investment Arbitration and the Energy Charter Treaty*, *Journal of International Dispute Settlement*, (1), (1) , (2010), p. 163 , available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

<sup>149</sup> Th. Roe/M. Happold. *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, (2011), p.27

<sup>150</sup> A.F.M. Maniruzzaman , 'Energy Charter Treaty arbitration (investor state) in the Asia-Pacific context: an overview', *I.E.L.T.R.* , (4), (101), (2004) , pp. 102-103

<sup>151</sup> K. Yannaca-Small, o.p., pp. 50-51

<sup>152</sup> R. Pritchard , o.p., p. 239

<sup>153</sup> Th. Roe /M. Happold., o.p., p. 19

remain bound for a 20-year period following the effective date of its withdrawal , to honor its obligations concerning investment protection<sup>154</sup>.

An investor can resort to arbitration of article 26 without needing to exhaust domestic remedies in advance, since there is no such procedural requirement<sup>155</sup>. In my opinion this right provided is the cornerstone of the whole dispute settlement mechanisms of ECT because by resorting immediately to arbitration of article 26 , the investor gains money and time due to the fact that if he/she had to exhaust all domestic remedies in advance , many years could pass without any rendered decision and of course the investor could have consumed a great amount of money and energy. Also, by resorting immediately to arbitration ,and in that way skipping litigation, the investor avoids all the publicity and details of its dispute and probably any other confidential information that may be revealed in an open door litigation process . Especially, when it comes to disputes in the Energy sector where investors prefer industrial “secrets” or business practices to be kept secret the importance of this provision becomes obvious.

In conclusion , we can say that this article inspires two general comments. Firstly, it becomes obvious that in comparison to a number of other provisions in the Treaty , that are considered to be soft law and most of the times the result of political compromise, article 26 ECT is a very technical and precise article, that was drafted by persons who intended this mechanism to be reliable. Finally, it is clear that the scope of this provision is , through the creation of a regime that favors the use of neutral arbitration, to eliminate any procedural or jurisdictional wrangling. That is and the reason why this article provides claimant with a wide range of options<sup>156</sup>.

## ***2.2 The need for an alleged breach of an obligation of a Contracting State under Part III of ECT***

An investor has to overcome a number of jurisdictional requirements in order to bring a claim against a Contracting Party under article 26 ECT<sup>157</sup>. According to the first requirement set in this provision –that concerns jurisdiction under *ratione materiae*– an investor must base its claim on a breach of an obligation that this Contracting

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<sup>154</sup> K. Hober , “Investment Arbitration and the Energy Charter Treaty”, *Journal of International Dispute Settlement*, (1), (1) , (2010), p. 163 , available at <http://jids.oxfordjournals.org/content/1/1/153.full.pdf+html>

<sup>155</sup> Th. Roe/ M. Happold. , o.p., p. 19

<sup>156</sup> R. Pritchard , o.p., pp. 239-240

<sup>157</sup> G. Coop/C. Ribeiro , *Investment Protection and the Energy Charter Treaty* , Juris Net, LLC , (2008), p. 2

party undertook under Part III ECT<sup>158</sup>. Due to this limitation , ECT differs from other BITs that provide arbitral tribunals with the jurisdiction to determine all or any disputes that may arise between the parties and that are related to investments<sup>159</sup>.

This point was raised in several cases. *Nykomb Synergetics v. Latvia*<sup>160</sup> was one of them. In this case the tribunal had to determine whether or not the acts of Latvenergo, a Latvian state-owned company, could be attributed to Latvia. The claimant stated that the acts of this company should be attributed to Latvia arguing that according to the provision of article 22(1) ECT this company had to respect the provisions of the Part III ECT . Latvia responded that this provision is not contained in Part III , and so the tribunal had not the right to apply it. Despite this argument , the Tribunal avoided this discussion by referring to the attribution principles of customary international law. Therefore, it came up to the conclusion that this company's acts were actually attributable to Latvia<sup>161</sup>. As we can see, despite the limitations that article 26 imposes, the tribunal – if possible- finds a way to protect the investor.

But what is required in order for an award to be rendered in favor of the investor? First of all, the claimant has to allege a breach of obligation under Part III ECT but this is not enough. If the investor wants the tribunal to rule in his/her favor must allege true facts that amount to such a violation. But someone could not but wonder, Is this enough? Should the tribunal rule in favor of the investor requiring only the allegations of such facts? The obvious answer is no. The substantive law of investment protection is very complex , so in many cases the tribunal cannot determine more in a jurisdictional phase. Most of the times it can determine those facts only after a full hearing on the merits. However, in a clear case , if the tribunal – even in the jurisdictional phase- finds out that those allegations do not amount to a treaty violation , must state it. Tribunal should make that statement because , due to lack of the requirements set in the above mentioned provisions, the claimant is not entitled to arbitration under article 26 ECT<sup>162</sup>.

In my personal opinion , the tribunal should be obliged to stop arbitration proceedings at an early stage in case where it is crystal clear that the facts that the

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<sup>158</sup> V.Heiskanen , *Unreasonable or discriminatory measures" as a cause of action under the Energy Charter Treaty*, Int. A.L.R., (10)(3),2007,p. 104

<sup>159</sup> Th. Roe/M. Happold.o.p., , p. 45

<sup>160</sup> *Nykomb Synergetics Technology Holding AB v the Republic of Latvia, SCC* , Rendered in Stockholm, Sweden on 16 December 2003 - See more at :

<http://www.italaw.com/cases/759#sthash.EOEeXj2C.dpuf>

<sup>161</sup> E. De Brabandere / T. Gazzini, *Foreign Investment in the Energy Sector, Balancing Private and Public Interests*, Nijhoff International Investment Law Series, (2014) , Volume 2, p. 146

<sup>162</sup> Th. Roe/M. Happold. , o.p., pp. 45-46

claimant stated do not constitute violation of Part III ECT. Tribunal should do that for two reasons. First of all because in such a case the Tribunal would lose its competence to rule upon this case and secondly because if the proceedings stop at an early stage parties are not further involved into time and money consuming proceedings that may harm them both.

### **2.3 Definition of Investment**

The subject matter of the dispute is the second consideration relating to an investor-state dispute under the Treaty. So, an investor has to show that he/she has made an “Investment” in a Contracting Party<sup>163</sup>. The definition of the term investment is contained in the provision of paragraph 6 of article 1 ECT. According to it every kind of asset that is either owned or controlled both directly or indirectly by an investor falls within the scope of the notion of investment . This provision also makes a reference to some types of assets, that are included in the given definition , such as intellectual property. As it was stated by the Tribunal in *Plama Case*<sup>164</sup> , that was the first ICSID Tribunal which rendered a decision on jurisdiction under ECT, the list contained in article 1 paragraph 6 ECT is a broad but non-exhaustive list of assets that encompasses any right , property , interest in money or money’s worth.

Furthermore, any change in the form of those invested assets does not affect their character as investments. ECT’s definition of investment is very broad trying to cover every kind of asset, so the term ‘investment’ includes all types of investments , those existing or those made after the later of the date that this Treaty entered into force for the Contracting party in which the investor made its investment (effective date)<sup>165</sup>. So, as we see this provision tries to extend its coverage to every kind of asset , setting only this “effective date” restriction. Therefore, we can say that it is fully harmonized with the main aim of ECT , the investment protection, because , due to the broad , non-exhaustive list provided almost all types of investments fall within its scope and so are protected.

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<sup>163</sup> G.Coop/C. Ribeiro , o.p., p. 5

<sup>164</sup> ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005

<sup>165</sup> E. De Brabandere /T. Gazzini, Foreign Investment in the Energy Sector, Balancing Private and Public Interests, Nijhoff International Investment Law Series, (2014) , Volume 2, pp. 146-147

## **2.4 Notion of an Investment Associated with an economic Activity in the Energy Sector**

The notion of an economic activity in the energy sector is defined in article 1(5) ECT<sup>166</sup>. Like in case of the “investment” , economic activity is also given a wide definition , thus it refers to an activity concerning among others the exploration, storage transmission , distribution, sale etc. of energy materials and products. This provision only excludes those included in Annex NI or those concerning the distribution of heat to multiple premises<sup>167</sup>. So, this article by referring to energy materials and products refers to nuclear fuels, coal, natural and coal gas, petroleum and petroleum products and electrical energy. However, investments that are associated with an economic activity for oils used for purposes other than energy such as paints are excluded. But, the obvious question to be raised is how closely this investment has to be associated with an economic activity in the energy sector in order to fall within the scope of these provisions<sup>168</sup>?

*Amto v. Ukraine Case*<sup>169</sup> was the case where this issue was first discussed. In this case the tribunal held in paragraph 40 that the wording “associated with” refers to the factual and not to the legal association between the investment and an economic activity in the energy sector. So, a mere contractual relationship of an energy producer, where the subject matter of the contract does not have any factual relationship with the energy sector, is not sufficient as to attract ECT’s protection. Therefore, the tribunal stated that this activity must be energy related irrespectively if itself satisfies the definition set in article 1(5) ECT. In this case the tribunal said that the services that this company provided through multiple contracts over a substantive time period , were directly related to the production of energy and so they constituted an investment associated with an economic activity in the Energy sector<sup>170</sup>.

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<sup>166</sup> G.Coop /C. Ribeiro , *Investment Protection and the Energy Charter Treaty* , JurisNet,LLC 2008, p. 5

<sup>167</sup> R. Pritchard , *Economic Development, Foreign Investment and the Law issues of private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* , Kluwer Law International and International Bar Association, (1996), p. 241

<sup>168</sup> Th. Roe /M. Happold. O.p., pp. 47-48

<sup>169</sup> Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005 - See more at:

<http://www.italaw.com/cases/79#sthash.wGzXiAw9.dpuf>

<sup>170</sup> E. De Brabandere /T. Gazzini, *Foreign Investment in the Energy Sector, Balancing Private and Public Interests*, Nijhoff International Investment Law Series, (2014) , Volume 2, pp. 150-151

## **2.5 Definition of Investor Under the ECT**

Paragraph 7 of article 1 ECT refers to the second specificity of ECT which lies on the definition of the term 'Investor'. According to this provision ECT extends investor protection both to natural and legal persons. A natural person in order to enjoy this protection must have the citizenship or nationality of the Contracting Party or be a permanent resident of a Contracting Party, while a legal person has to be organized in accordance with the applicable law of a Contracting Party<sup>171</sup>.

It is important to mention that both in case of a natural and a legal person the "nationality test" will be determined by the law of the Contracting party whose nationality the investor claims. When it comes to companies or other organizations we understand that this "nationality test" is formalistic, due to the fact that we look at this company's or organization's place of incorporation<sup>172</sup>. In *Plama Case*<sup>173</sup> the Tribunal examined if the claimant was an Investor according to the provision of article 1 (7) (a) (ii) ECT. The Tribunal merely reviewed if there was evidence that this company was properly registered and remained registered in the relevant jurisdiction. Also, this tribunal stated that for the purpose of article 1(7) ECT it is not relevant who owns or controls the company at any material time<sup>174</sup>.

However, issues may arise in case where an Investor holds two or more nationalities. This situation is most likely to arise in case where the Investor is a natural person. In those cases either (a) the investor holds both the nationality of a Contracting to ECT party and of a state that is not a party to ECT or (b) the investor holds respondent's state nationality and that of another Contracting State.

Provision of article 1 paragraph 7 seems to refer to the first situation. As we mentioned since it permits a natural person who is just a permanent resident of a Contracting Party to enjoy all the protection and privileges under ECT, as it is considered to be a national of that Contracting party for the purposes of ECT, it would be difficult to assume that a person that holds the nationality of a Contracting party must be disqualified merely because he/she also holds the nationality of a third party. So, all that seems to be requested is the investor to have a valid and effective nationality of a Contracting party, irrespectively if it's his/hers dominant nationality. Finally, we should point out that article 25 of ICSID convention imposes its own

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<sup>171</sup> Ibid

<sup>172</sup> So, ECT adopts incorporation theory

<sup>173</sup> ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005

<sup>174</sup> G.Coop /C. Ribeiro, *Investment Protection and the Energy Charter Treaty*, JurisNet, LLC 2008, pp. 3-



criteria for investors holding two nationalities<sup>175</sup>. So, as we mentioned above an investor has to be very careful when selecting a forum.

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<sup>175</sup> Th. Roe/M. Happold. *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, (2011), pp. 64-65

## CONCLUSION

In conclusion , we must say that in this paper it became clear that the energy sector plays a crucial role in the broader context of international economy , so the disputes arising , raise fundamental issues. Due to its particularities, the energy sector needs a wide number of flexible mechanisms to resolve the disputes that may arise . As we mentioned above , there are many alternative dispute resolution procedures which are conventionally applied in the energy sector, and include inter alia negotiation, mediation , technical advisory committee , expert determination and arbitration. The energy sector is a rapidly evolving and complex industry ,consisting of large capital investments and many long-term contracts .These contacts often contain elements of private and public law and raise potential risks for the investors<sup>176</sup>.

Due to the major challenges of the long-term contracting process that dominates in the energy sector there is a need for a fair balance between predictability on the one hand, thus the terms of each contact have to be defined in a clear way and flexibility on the other hand , that allows for a fair adjustment of the said terms to the circumstances that evolve throughout times<sup>177</sup>. Also, nowadays the number of energy investments are on rise with large energy infrastructure projects taking place and need years of planning. It becomes obvious that there is uncertainty concerning future cash flows under current regulations and of course there is always the possibility of regulatory changes. Given the current economic circumstances and legal situation investors seek to attain suitable risk and thus they take into account the possibility that in case of a dispute, that may arise, the host state's law may have changed and so they will face uncertainty<sup>178</sup>.

For those reasons , alternative dispute resolution mechanisms are considered to be the safest way for resolution of disputes arising in the energy sector due to the fact that they offer certainty of law, experienced arbitrators and high confidentiality<sup>179</sup>.

In any case, if you ask me which , among all the ADRs mentioned in this paper , I prefer the most or which is the most suitable I cannot provide you with an answer given the fact that ,especially in the energy sector , each case is very specific and unique and of course a huge amount of money is involved. Therefore, in my opinion,

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<sup>176</sup> B. Le Bars , ' Recent Development in International Energy Dispute Arbitration', *Journal of International Arbitration* , (32), (5) , 2015 pp. 543-545, available at <http://www.kluwarbitration.com>

<sup>177</sup> K.Makuch/ R.Pereira, *Environmental and Energy Law* , Wiley-Blackwell , (2012), p. 243

<sup>178</sup> R. Heffron/G. Little , *Delivering Energy Law and Policy in the EU and the US, a reader*, Edinburg University Press, (2016), pp. 1 and 153

<sup>179</sup> B. Le Bars , o.p., pp.543-545

investors, states and in general each involving party should chose on a case by case basis the dispute resolution mechanism that they prefer, because due to each case's particularity a different type of ADR might be the most suitable.

Finally, as we pointed out , the energy sector gave rise to a huge number of disputes which have helped to shape case law in this area. The continuous development in technology will undoubtedly push limits that have not yet been tested<sup>180</sup>.

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<sup>180</sup> Ibid p. 548

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