CHARLES UNIVERSITY

FACULTY OF LAW

PROTECTION OF INVESTMENTS IN GAS SECTOR: PERSPECTIVES OF LEGAL RELATIONS BETWEEN EUROPEAN UNION AND RUSSIAN FEDERATION

2017

ELMIRA LYAPINA

Školitel autora disertační práce: Prof. JUDr. Pavel Šturma, DrSc.

Katedra mezinárodního práva

Datum vypracování práce (uzavření rukopisu) : [15.06.2017]

I hereby declare that I wrote this dissertation by myself, that all used resources and literature were properly cited, and that this dissertation has not been used in order to be granted another or the same academic degree/title.

Prohlašuji, že předloženou disertační práci jsem vypracovala samostatně a že všechny použité zdroje byly řádně uvedeny. Dále prohlašuji, že tato práce nebyla využita k získání jiného nebo stejného titulu.

Elmira Lyapina

V Praze dne 15.06.2017

I thank the God for giving me patience and energy for accomplishment of this dissertation, for guiding me to good ideas and solutions in hard times. I want to thank my family for a great support during my studies. I thank my husband Vugar for helping and supporting me.
I am thankful to professor JUDr. Šturma, CSc., supervisor of my thesis for his valuable remarks and effective help. I also thank docent JUDr. Balaš, CSc., for his advices and practical information.

Děkuji Bohu za to, že mi poskytl trpělivost a energii k dokončení této disertaci, za to, že mě vedl k dobrým nápadům a řešením v složitých časech. Děkuji své rodině za podporu během studia. Děkuji svému manželovi Vugaru za pomoc a podporu.
Děkuji panu prof. JUDr. Šturmovi,CSc., školiteli mé disertační práce za cenné připomínky a účinnou pomoc při zpracování. Zároveň děkuji za poskytnuté rady a praktické zkušenosti doc. JUDr.Balášovi, CSc.

Abstract

The absence of a relevant legal basis between huge commercial partners such as the EU as a single entity and the Russian Federation promoted the emergence of a legal vacuum. The long term cooperation between Russia and the EU has only one bilateral agreement – the Agreement on Partnership and Cooperation signed in 1994, which is however obsolete, and does not meet the contemporary needs. The adequate legal basis for Russia–EU cooperation in the gas sector is still missing. The protection of investments in the gas sector is being realized by bilateral agreements between Russia and EU member states, soft law and general international agreements, without any specifications for those two partners. The only international instrument covering the energy relations of these two partners – Energy Charter Treaty cannot be considered as a reliable mechanism, as Russia withdrew from it more than 8 years ago. The reasons of the withdrawal and the Yukos case as an illustrative example are discussed in this paper. In order to avoid uncertainty in such strategic area as gas investment relations and unpredictable decisions between the states represented by the commercial entities, there is a need to design a substantive legal basis, and a need to consider on the adequate dispute resolution body. In this thesis, key requirements are identified for the adequate legal framework and the dispute resolution body should meet.

Keywords

Protection of investment, gas sector, EU-RF gas relations, EU-RF legal relations, bilateral investment treaties, partnership and cooperation agreement, European Union and Russian Federation trade and investment cooperation, international investment law, protection of investment in gas sector, perspectives of the EU Russia relations, Energy Charter Treaty, *Yukos case, Sedelmayer case*, legal regulation of foreign investment in gas sector, EU RF investment relations

Anotace

Absence relevantního právního základu mezi takovými velkými obchodními partnery jako Evropská Unie (jako celek) a Ruská federace, vedla ke vzniku právního vakua. Dlouhodobá spolupráce mezi Ruskem a EU má jen jednu dvoustrannou dohodu – Dohodu o Partnerství a Spolupráci podepsanou v r. 1994, která nicméně je zastaralá, a neodpovídá současným potřebám. Adekvátní právní základ pro spolupráci mezi Ruskem a EU v plynovém sektoru stále chybí. Ochrana investic v plynovém sektoru je realizována prostřednictvím dvoustranných dohod mezi Ruskem a každým členským státem EU, *soft law* a obecnými mezinárodními dohodami bez jakýchkoliv specifikací pro tyto partnery. Jediným mezinárodním nástrojem pokrývající energetické vztahy těchto dvou partnerů - je Smlouva o Energetické Chartě, kterou však nelze považovat za spolehlivý mechanismus, navíc Rusko od ní odstoupilo víc, než před 8 lety. Důvody zmíněného a ilustrační *případ Yukosu* jsou diskutovány v této dizertaci. Za účelem předejíti nejistotě v takové strategické oblasti, jako plynové investiční vztahy, a také nepředvídatelným rozhodnutím mezi státy zastoupenými komerčními subjekty, je nutné zkoncipovat podstatný právní základ, a také je nutné uvažovat o adekvátní orgán řešení sporů. V této dizertaci jsou identifikovány klíčové požadavky pro odpovídající právní rámec a orgán řešení sporů.

Klíčová slova.

Ochrana investic, plynárenství, vztahy mezi EU a RF v oblasti zemního plynu, právní vztahy EU-RF, bilaterální investiční dohody, dohoda o partnerství a spolupráci, obchodní a investiční spolupráce Evropské unie a Ruské federace, mezinárodní investiční právo, ochrana investic v plynovém sektoru, perspektivy vztahů mezi EU a Ruskem, energetické právo, Smlouva o energetické chartě, *Yukos, případ Sedelmayer*, právní úprava zahraničních investic v plynárenství, investiční vztahy mezi EU a RF

Table of Content/Obsah

Declaration/Prohlášení……………………………………………………………………………….....3

Acknowledgement/Poděkování……………………………………………………………………......4

Abstract/ Anotace ....…………………………………………………………………………………5

Keyword/ Klíčová slova ………………………………………………………………………….....6

List of used abbreviations / Seznam použitých zkratek.................……………………….....………10

I. Introduction and methodology……………………………………………………………....13

1.1.Introduction, theoretical and practical significance of the research…….....13

1.2.Method and outline………………………………………………………………......18

1.3.Literature Review…………………………………………………………………....19

II. EU-RF gas relations…………………………………………………………………….....22

2.1.Importance of the natural gas………………………………………………………......22

2.2.EU-RF energy cooperation……………………………………………………………26

Summary………………………………………………………………………………....43

III. Investment relations between the EU and the RF…………………………………......44

3.1.International legal regulation of foreign investment protection between the EU and RF…………………………………………………………………………………44

3.1.1. Agreement on Partnership and Cooperation……………………….49

3.1.2. The Energy Charter Treaty……………………………………………55

3.1.2.1.The ECT and the EU……………………………………………57

3.1.2.2.The ECT and the Russian Federation…………………61

3.1.2.3.Yukos case in a frame of the ECT application………….66

3.2.Expropriation in international investment law……………………………………74

3.2.1. Justification of expropriation: public purposes…………………..76

3.2.2. Justification of expropriation: non-discriminatory basis………..79

3.2.3. Compensation of expropriation………………………………………81

Summary on international investment treaties between the EU and the RF………………………………………………………………………88

3.3. BITs between EU member states and the RF…………………..89

3.3.1. Standards of treatment under BITs…………………………………97

3.3.1.1.Fair and Equitable treatment………………………………98

3.3.1.2.National and Most-favoured nation treatment………...100

3.3.2. Definitions used in the agreements…………………………………108

3.3.2.1.Investor…………………………………………………………109

3.3.2.2.Investment……………………………………………………..113

3.3.2.3.Other definitions and terms…………………………………120

3.3.3. Jurisdiction and arbitration…………………………………………..123

3.3.4. Enforcement of the arbitration decisions……………….………..132

Summary…………………………………………………………………..135

IV. Perspectives of the EU-RF BIT…………………………………………………..137

4.1.Legal regulation of foreign investment in gas sector in the RF ……………..137

4.2.Legal regulation of foreign investment in gas sector in the EU…………..144

4.2.1. EU common investment policy……………………………………......144

4.2.2. The EU Energy Union…………………………………………………..156

4.3.Legal analysis of the relevant state the EU investment cooperation……...170

4.4.Perspectives of the EU –RF commercial investment partnership and cooperation……………………………………………………………………………..180

Summary………………………………………………………………………………..193

V. Conclusion……………………………………………………………………………………..195

Summary..…………………………………………………………………………………….....203

References/Seznam použitých pramenů a literatury…………………..………………….......206

List of used abbreviations and abbreviated names.

Seznam použitých zkratek a zkrácených názvů.

ACER	Agency for Cooperation of Energy Regulators
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CEE	Central Eastern Europe
CETA	Comprehensive Economic and Trade Agreement
CJEU	the EU Court of Justice
CIS	Commonwealth of the Independent States
CNG	Compressed natural gas, one of the states of the natural gas
Commission	the EU Commission
DSB	Dispute Settlement Body
EEU	Eurasian Economic Union
EC	European Community
ECSC	European Coal and Steel Community 1952
EURATOM	European Atomic Energy Community Treaty 1957
ECHR	European Court on Human Rights
ECT	Energy Charter Treaty
ENTSOG	European Network of Transmission System Operators of Gas
EU	European Union
FDI	Foreign Direct Investment
FL	Federal Law
FTA	Free-Trade Area

GATT/WTO	General Agreement on Tariffs and Trade/World Trade Organization
ICC	International Chamber of Commerce
ICS	Investment court system
IEA	International Energy Agency
IGA	Intergovernmental agreements
ICSID	International Centre for Settlement of Investment Disputes
IPPA	Investment Promotion and mutual Protection Agreements
ISO	Independent system operator
Lisbon Treaty	the Treaty on the EU and Treaty on the Functioning of the EU, signed 13.12.2007 in Lisbon, entered into force 01.12.2009
LNG	Liquefied natural gas
MIGA	Multilateral Investment Guarantee Agency
MFN	Most-Favoured Nation treatment
MS	the EU member state(s)
NAFTA	North American Free Trade Agreement
New-York Convention (1958)	New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958
OECD	Organization for the Economic Cooperation and Development
PCA	Partnership and Cooperation Agreement
PSA	Product Sharing Agreement
RF, or Russia	the Russian Federation

SCC	Stockholm Chamber of Commerce
TEP, or Third Energy Package	contains of: Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC)#714/2009, Regulation (EC)#715/2009, Regulation (EC)#713/2009
TFEU	Treaty on Functioning of the European Union
TIP	Trade and Investment Partnership
TRIMS	Trade Related Investment Measures
TTIP	Transatlantic trade and investment partnership
TSO	Transmission system operators
UGS	Underground gas storage
UNCITRAL	the UN Commission for International Trade Law.
UNCTAD	UN Conference on Trade and Development
UK	the United Kingdom
USA	the United States of America
USSR, or Soviet Union	the Union of the Soviet Socialistic Republics
USD	the United States Dollar
VCLT, or Vienna Convention 1969	Vienna Convention on the Law of Treaties 1969

Czechia and the Czech Republic will be used in the thesis interchangeably, as in several documents the name of the country remain the same.

I. Introduction and methodology

1.1. Introduction, theoretical and practical significance of the research

The EU – Russian commercial relations have a long history, particularly in the field of gas investment, where the cooperation experience lasted for more than sixty years. In the end of 1940, the first agreements on exchange of commodities to technology supports were concluded. The EU for the RF, as well as the RF to the EU – is a strategic and important partner. They are interdependent not only in the area of gas export and import, but also, in cooperation with joint projects of gas production, transmission, and delivery, as well as investment activity related to it. Such EU member states as Germany, France, Netherlands, the Czech Republic and Poland have been participating in the investigation of subsoil and gas production in Russia, supplying the innovative technology for the examination of the fields, construction of the pipelines, transportation of the gas, construction of gas storages, and CNG stations.

The legal foundation of the bilateral agreements consist of hundred documents from the Soviet or socialist period, including investment promotion and mutual protection agreements (IPPA). These agreements also being described as bilateral investment treaties (BIT), mutually profitable economic cooperation, intending to create favorable conditions for the realization of investments by investors of the one contracting party in the territory of the other contracting party. The promotion and mutual protection of investments are recognized as stimulation of the commercial activity development.

There is no sole definition of the bilateral investment treaties in the international law, as well as no sole universal legal document, which will provide the definition on investment law, investment, investor, or the proceeding, not even unified the customary international law. Definitions and frame in accordance which to behave are given by the jurisprudence or academic statements, as opinions, proceedings from the conferences, scientific publications.

Besides the bilateral agreements, also the regional multilateral treaties exist, which were enthusiastically signed by many states, but then left without ratification.

In turn, the EU, in a willingness to liberalize and harmonize its internal market, among its 27 member states, placed by the Lisbon Treaty the investment issue into the EU exclusive competence as a part of the Common Commercial Policy. Moreover, the EU obliged all member states to change their BITs not only with each other, but also with the third countries, or non-EU countries in accordance with the law.

Thus, many questions arise, such as, what are the rights and obligations based on the previous BITs and the principle *pacta sunt servanda*? EU member state is obliged to change BIT with a third country, but will that third country be willing to supply this agreement?

As the EU is concluding free trade agreements (FTA) with several third countries, as Canada, USA, China, states of ASEAN, as Singapore or Viet Nam, or Southern Mediterranean countries, in what state are its relations with the Russian Federation?

Due to the fact that between the EU and the RF does not exist a sole agreement which will cover the investment and energy cooperation, and various treaties are either not ratified, or obsolete, there is a need for multilateral dialogue. Moreover, the various definitions and references, sometimes mutually excluding provisions, used in BITs between the RF and each EU member states require careful reading and consideration of the specifics of each Member state history and particular relations with the RF.

The fragmentation of law, the absence of an adequate normative basis between the states leads not only to the advantages and wide range of possibilities to choose the better regime under some treaties, and at particular tribunal, but also to the problematic of *res judicata, lis pendens* and even *abus de droit.* The absence of a unified judicial system in the international law, with different approaches of the judicial bodies brings not only positive

effects of the cross-fertilization, but also antagonistic judgments, and high level of uncertainty, and thus limit the finality of decision and its enforceability.

Considering the necessity of building an adequate legal basis, there should be also the resolution of issues with the gas infrastructures, as made investments on one side, and expensive properties on the other.

In order to improve the current EU-Russia gas relations, given the importance of the energy security, transparency and transactional costs which have an impact on social welfare, there is a need to establish the dispute settlement body (DSB). Moreover, to avoid unpredictable decisions, a need to design substantive legal basis occurs. As far as the relations between the EU and the RF are not lying on the field of transactional, but – international cooperation, the DSB should be independent, but specialized institution, with the possibility to appeal.

Scholars[1] suppose that the existing legal basis and judicial or arbitration bodies in the EU-RF energy, in particular gas, relations are sufficient to cover and resolve the potential and real disputes, however, they state that few documents, which are basis of the cooperation are either obsolete, or incomplete. The author of this paper believes that there is a need for the development and improvement of the law between the sovereign partners, states and even institutions, and fully supports that "creation of a new law is a combination of a natural and purposeful process"[2]. The statement thus is the necessity of creation the EU – the RF Trade and Investment Partnership with a special chapter on energy and establishment of the Dispute Settlement Body. Further illustrated will be the examples and specific cases – why it is needed.

The structure of the paper is the following.

---

[1] See KALINICHENKO,I., GUDKOV, I., KONOPLYANIK,A., BELIY, A, SELIVANOV, Y., ENTIN, A.

[2] "Tvorba nového práva, včetně nových institucí v tomto system, je kombinací živelného a cílevědomého procesu" in ŠTURMA, P., HÝBNEROVÁ, S., ONDŘEJ, J., BALAŠ, V., BÍLKOVÁ, V., HONUSKOVÁ, V., *Konkurující jurisdikce mezinárodních rozhodovacích orgánů*, 2009, Praha: Univerzita Karlova, p. 95

The second chapter will highlight the importance of the gas sector, overview the relevant state of the EU-RF cooperation in the gas projects. The issue – the EU and RF companies operating in the territory of these actors in the energy market, which are also co-owners of the gas systems, pipelines and storages. The cooperation in the gas sector, common participation is in the following projects:

- The gas pipelines: *Yamal-Europe, Yamal-Europe 2, Nord Stream, Nord Stream 2*[3]
- The gas storages.
- In the RF gas exploration and producing projects: *Sakhalin, Sakhalin 2, Kovykta*.

The third chapter will discuss the current state of the international law, its fragmentation and the absence of the adequate normative basis between the EU and the RF, especially in the energy sector. Several related multilateral treaties will be illustrated, where the EU and the RF are parties, also the international agreements, which cover the relation and cooperation between the mentioned actors. The Energy Charter Treaty will be discussed as the only treaty related to the energy sector, and also the reason of its exclusion in the perspective relations between the EU and the RF, as a highlighting point will be discussed the *Yukos case*. Regarding the international legal framework in the investment field, the expropriation and compensation in the international law with the respect of the mentioned *Yukos case* will be analyzed.

Furthermore, the bilateral investment treaties between EU member states and the Russian Federation, with its various mutually excluding provisions will be overviewed. Also, based on them - controversial and unpredictable decisions of the arbitration institutions, due to the absence of the appeal body and the long period of the finality of decisions. The issues of the revision of the judicial tribunals, and problems with the enforcement of the decision will be mentioned in this chapter.

[3] As the company New European Pipeline AG, the shareholders are Russian Gazprom 51%, German E.ON 10%, UK-Dutch Shell 10%, German BASF/Wintershall 10%, Austrian OMV 10%, Italian ENGIE 9%.

The overviewed cases with EU investors on the territory of the RF, in particular *Yukos, Sedelmayer, Bershader, Noga*, will be summarized and will be questioned if they are real EU investors, or persons avoiding the legislation and using the possibility to be a foreign investor in order to get benefits as tax regime, better protection of investments and position in the market?

The fourth chapter will examine the current state in the national legislation of the Russian Federation and internal legislation of the European Union related to the issue of investment policy and the energy sector. The perspectives of the EU-RF trade and investment partnership will be discussed, through the discussions of the present free trade and investment agreements between the EU and its external partners as the USA, Canada, or states of ASEAN. The pros and cons of such agreements will be analyzed, and the threats and opportunities they might bring. Based on the analysis of the mentioned FTAs, preliminary conclusions will be made on the EU-RF cooperation, and discussed what steps should be done, or what should be avoided in order to prevent long-term negotiations as in a case with the Transatlantic Trade and Investment Partnership (TTIP) with the USA, and do not repeat bad experience with the ECT.

Further, the chapter will discuss the nature of the EU – RF commercial cooperation or partnership. The need of establishment an international independent, but specialized dispute settlement body will be emphasized.

In the last chapter, conclusions, regarding statements argued in previous chapters, will be made.

Theoretical and practical significance of the research

Over the past decades, the EU and the RF are not only interconnected, but also interdependent investment and energy partners. To ensure and effectively protect the interests

of the foreign investors, there is a need of clear understanding of the current realities as legal regulation of foreign investment. The regulation of the foreign investment has undergone significant changes in recent years, including in the practice of resolving investment disputes by international arbitration tribunals. In this regard, the results of this thesis are relevant both for the investors and the EU - Russia commercial relations as a whole.

The results of this study, in particular, can be taken into account for the future international agreement between the RF and the EU. This research may also serve as a basis for further research on international investment law, regarding the issues of international legal regulation of the energy relations.

The proposals and conclusions, made in the paper, can be used for the educational purposes.

1.2. Method and outline

The object of the research is the legal relations arising in connection with the assistance and the implementation of foreign investment in the gas sector.

The subject of the research is the system of legal rules governing the legal status of the foreign investor, the legal regime of foreign investments, legal forms of investment in gas industry.

The purpose of this thesis thus is, basing on a comprehensive theoretical and empirical study of the legal regulation of foreign investments, to develop proposals to improve the legal framework between the actors – EU and RF – in the gas sector.

This research paper is aimed at studying and analyzing the current practice of investment relations in the framework of the gas relations between the EU and the Russian federation. This aim is achieved by tackling the following:

- Studying the main sources of the international investment law applicable to investment relations in the implementation of foreign investment in the energy sector,
- Analyzing the current state of international legal protection granted to foreign investors, and the practice of the investment arbitration tribunals.
- Considering the key provisions of the EU and the RF law regarding the investment in the energy sector,
- Determination of the main challenges in the energy sector in the framework of the EU-RF cooperation, which may occur or already occurred for the investor.

The methodological basis of the research consists of the established general scientific methods and methods of cognition, in particular, the logical, systemic, as well as the method of analysis and synthesis, along with the formal legal and comparative legal methods, the use of which allowed the author to identify and assess not only the current state of the regulation of international investment relations, but also the possible challenges regarding the energy sector. The study is based on the analysis of conceptual provision of the theory of international law.

The scientific methods used in this study are combined with the presentation of several cases as an argument in support of a certain point of view and for highlighting the features of the study.

1.3. Literature review

The main theoretical basis of the study - are the academic legal and economical researches of the prominent scholars. These sources will be used as a primary basis for the formulation of starting position. The studies of the specialists in the international public law, international economic law, investment law, energy law, in particular: I. Brownlie, A. Cassese, J.Crawford, A. M.Shaw, R. Dolzer, Ch. Schreuer, M. Sornarajah, Koskiennemi, P.

Craig and G. de Burca, G. van Harten, G. Merrills, A. Dimopoulos,W. J. Davey and J. Jackson, J. S. Lowe, D. Carreao, P. Juillard, J. Schwarzenberger and others will be examined .

In the existing literature can be find deep analysis of the investment in the energy sector, including Peter D. Cameron's "International Energy Investment Law, the Pursuit of Stability", study of Alexander Bělohlávek, or several articles of Andrey Konoplyanik, on study of internal and external Russian investment and energy policy, or examination of the internal and external dimension of the EU energy policy, as Kim Talus' "EU energy law and policy, a Critical Account", or Martha Roggenkamp "Energy Law in Europe", some authors pay attention on the inter-relations between investment and transit through the energy point, as Rafael Leal-Arcas.

The sources available in Czech language by the prominent professors of international public law, in particular international economic law, P. Šturma, V. Balaš, A. Bělohlávek, also the young academic as T. Fecák, which developed the issue on the new common investment policy of the EU, are also used in the paper.

The sources from the Russian or Soviet academics - I. Farhutdinov, M. Boguslavskiy, D. Labin, N. Doronina, A. Danelyan, P. Kalinichenko, the energy experts A. Konoplyanik, A. Belyi, or academic I. Gudkov, and others.

The use of Czech and Russian sources is directed to introduce above mentioned experts and their interesting views to a wider audience of English speakers.

The empirical basis of the study are primary sources like Treaties, including UN Charter, Vienna Convention on the law of Treaties, Treaty on European Union, Treaty of Lisbon, Treaty establishing the Energy Community, Energy Charter Treaty, WTO/GATT documents, Agreements on Partnership and Cooperation, Investment agreements on promotion and mutual protection of foreign investments or Bilateral Investment Treaties between EU member states and the Russian Federation, Constitution and Civil Code of the

Russian Federation, as well as related Federal Laws on the foreign investments, New York Convention on enforcement and recognition of the foreign decisions.

The use of primary sources will allow to understand the nature of the State and States community, to analyze the conceptual regulations of the international community, to identify the essential legal basis, its goals and principles. Also, the choice to use mainly primary sources will help to examine the normative content of the fundamental principles as the principles *pacta sunt servanda* between two international actors, principles of non-discrimination and fair competition. At the same time it will enable to investigate the scope of legal authority of the EU in its independent foreign policy. In addition, the primary sources which will be used in the dissertation include the Agreement on Partnership and Cooperation, WTO trade-related measures, Energy Roadmap 2050. These documents will make it easier to understand which gaps should be fulfilled in order to find the appropriate alternative of the future legal basis for the energy cooperation between Russia and the EU.

In order to be as much specific as possible the author will use recent academic articles from journals, and at the same time in order to be as much relevant as possible the author will use internet sources such as the website of the European Commission.

Empirical basis of the research are the judicial practice, arbitration decisions, analysis of the cases and the separate opinions, statistical information on the state, structure and dynamics of the protection of the rights of foreign investors, as well as the information on the economic activities of the actors.

All these will help to analyze the arguments stated above.

II. EU-RF gas relations

2.1. Importance of the natural gas

Gas reserves of the European Union are limited and account less than 4 percent of the world's proven reserves. At the same time, the consumption of the gas in the EU is growing faster, than other fuels. According to the International Energy Agency is expected the demand growth above 2 percent till the year 2040.[4]

The needs of European countries are satisfied either by its own production of raw materials in the North Sea, either by supplies from the outside, mainly from Russia, Norway, and Algeria. States of Central and Eastern Europe are gas-deficit.

The prognoses of gas consumptions differ from one another, however in one thing the economists, scholars and prognostics agree – the natural gas is one of the cleanest, safest, and most useful of all energy sources,[5] and, due to its efficiency and sustainability, it is one of the most demanded non-renewable natural resources.

The gas is of a wide variety of use from the heating purposes of the households, to the industrial use as essential component of the energy mix of the state. There are several sectors of the natural gas use, including the residential purposes, industrial, commercial, as well for the electric generation, and other purposes, the exhaustive list of which cannot provide even the experts.

Due to the environmental characteristics of the gas and its utilization usage, there are several areas of application, as for joint production of electricity and heat. In the chemical industry the natural gas helps to expand the production of valuable chemicals, including the spirits, synthetic fibres, rubber, and other. The natural gas is used also in combination with the

[4] IEA statistics, available on http://www.worldenergyoutlook.org/

[5] World energy outlook 2016, Key world energy statistics, available http://www.iea.org/publications/freepublications/publication/KeyWorld2016.pdf http://www.iea.org/publications/freepublications/publication/WorldEnergyOutlook2016ExecutiveSummaryEnglish.pdf, p. 7, Natural Gas, educational portal, on http://www.naturalgas.org/overview/background.asp

renewable energy.[6] Due to the reason of its high efficiency, natural gas sector remains important, and according to the national authorities the total share of gas in the energy mix should rise.[7]

Taking into account the diverse forms of gas, it was proven that, the records of the liquefied (LNG) and compressed natural gas (CNG)[8] are growing. According to the European Commission, 53% of EU consumption depends on imports. At the same time, the EU's import dependency on <…> natural gas is up to 66%[9]. Eurostat's data provides following information about the natural gas supply in the EU: 30% is supplied from Russia, 28% - from Norway, 13% - from Algeria, 11% - from Qatar, 5% from Nigeria, and 13% from the other states. It should be mentioned, that these data are for the whole European Union, for its 27 member-states.[10]

According to the Energy Roadmap 2050, the gas consumption will increase up to 16% by the year 2030.[11] The EU satisfies its natural gas need by the import, and also from its own energy production, from four EU member states, namely Germany, France, Netherlands and Poland.[12] Some states, as Luxembourg, Netherlands, Italy or Sweden, are producing their electricity from the natural gas.[13]

---

[6] http://naturalgas.org/overview/uses/,https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_use, http://www.nytimes.com/2013/04/11/business/energy-environment/new-solar-process-gets-more-out-of-natural-gas.html

[7] Energy Roadmap 2050, or for example the Ministry of Industry and Transportation of the Czech Republic, with the reference to the EU assessments. http://www.mpo.cz/dokument158059.html, also see Haghighi, S., 2007, Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries, Oxford: Hart Publishing, pp. 10–11, quoting the International Energy Outlook of 2006 p.43.

[8] As of July 2016, the Czech Republic had 120 public CNG stations, 15 stations among them are owned by Gazprom Group. CNG is used as a fuel instead of gasoline, diesel, and propane. Moreover, in 2013 was established Czech - Russian consortium CNG CZ.

[9] TICHY, L., ODINTSOV, N., *The European Union as an actor in energy relations with the Islamic Republic of Iran*, 2015, CEJISS, 4/2015, p.59, SUPRA NOTE

[10] http://ec.europa.eu/eurostat

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Energy Roadmap 2050, 2011, Brussels, COM 2011, 885 final.

[12] It was also the UK, before its withdrawal from the EU.European Commission, 2011, Key Figures, Market Observatory for Energy, Directorate-General for energy, p. 18

[13] In the case of Luxembourg, it is 74% of the electricity derived from gas, Netherlands -63%, Italy – 53%. European Commission, 2011, Key Figures, Market Observatory for Energy, Directorate-General for energy, p.22

The RF is one of the largest states in the world, regarding its natural gas reserves, production and export. The main direction of the gas export now is the European Union, although the RF is developing its economic relations with Asian states (export of part LNG from the Sakhalin projects (company Sakhalin Energy, operator of the Sakhalin-2, owner of the LNG UGS), which is according statistics - 15 billion cubic meters per year). In total, EU states pay for Russian gas about USD 50-60 billion annually.[14] In 2014 the RF supplied to the EU about 160 billion cubic meters, where as 80% of the gas goes to the states of the Central Eastern Europe. [15] According to the European Commission on energy, the RF remains the most important natural gas supplier to the territory of the EU, which provides 52-24% of the whole EU gas imports.[16]

Whereas the natural gas from Russia and Norway is supplied through the pipelines based on the long-term agreements, the mentioned Arabic states are supplying liquefied natural gas (LNG) by the “spot transactions”. Between 2008 and 2011 liquefied natural gas (LNG) primarily from Qatar was seen as a major competitor to the pipeline gas. However, its market share in overall natural gas imports, after reaching its peak in 2010 at about 20%, went down to 15% in 2012, and during the next two years it continued in its rapid fall. This is primarily due to the much larger prices in the growing Asian market, to which LNG producers diverted their exports.[17]

Russian natural gas is supplied to the EU through the system of the pipelines, through the territory of the following EU states: Austria, Belgium, Bulgaria, Germany, Hungary, Netherlands, Poland, Romania, Slovakia, and the Czech Republic. There are the following main directions: Uzhgorod corridor, Balkan corridor, pipeline Yamal-Europe, Blue stream,

[14] World energy outlook 2016, Key world energy statistics, available http://www.iea.org/publications/freepublications/publication/KeyWorld2016.pdf
[15] World energy outlook 2016
[16] World energy outlook 2016
[17] World energy outlook 2016

Nord Stream. Besides that, there is functioning the system of the connecting pipelines on the territory of the Czech Republic and Germany (as MEGAL).

There are four routes, through which the natural gas is delivered from the RF to the territory of EU member states: two routes - through Ukraine (pipeline Brotherhood through Ukraine to Slovakia, and pipeline through Ukraine, Moldavia, Romania and Bulgaria to Turkey), one - Yamal-Europe through Belarus, one - Nord stream, through the Baltic Sea. In 2014-2015 were developing other routes, bypassing Ukraine, including the South Stream, Yamal-Europe, and the extension of the Nord Stream. However, due to the current unstable political situation between the RF, the EU and Ukraine as a transit state, the land extensions of the pipeline Nord Stream are still in development. Due to the lack of the consensus between the RF and the European Commission and Bulgaria, the initial idea to build the South Stream pipeline was replaced by the Turkish stream.

The International Energy Agency in its annual world outlook (2016) have stressed that the need of the investment in global energy supply is still growing, as for the oil, gas and coal extraction and supply, so for the renewable energies and also for the improvements in the energy efficiency.[18] The EU's overall LNG import capacity is significant – enough to meet around 43% of total current gas demand. However, in the region of southeast of Europe, central-eastern Europe and the Baltic, many countries do not have access to LNG and/or are heavily dependent on a single gas supplier, and would therefore be hardest hit in a supply crisis[19]. The Commission however preparing a comprehensive strategy for LNG, which will ensure, that the European gas market will rise. It shall also include the construction of the necessary infrastructure. The central elements of this strategy are building the strategic infrastructure to complete the internal energy market and identifying the necessary projects to

[18] World Energy Outlook 2016, p. 2, http://www.iea.org/publications/freepublications/publication/WorldEnergyOutlook2016ExecutiveSummaryEnglish.pdf,
[19] ibid

end single-source dependency of some Member States[20], to use storage facilities more efficiently, including optimization by the member states to use of gas storage across borders by creating regional preventive action and emergency plans, and to promote free, liquid and transparent global LNG markets.[21]

2.2. EU-RF energy cooperation

The EU-RF relations in the gas industry could be described as of complex character, due to interdependence and dissimilarity of the industries – vertically integrated in Russia, horizontally disconnected in the EU.[22] Currently the EU-RF gas cooperation is in a difficult period, due to several matters: the provisions of the EU Third Energy Package, which the RF brought to the WTO dispute settlement body, from the other side the EU claims regarding the content of intergovernmental agreements of the project "South Stream", and the shadow of the antitrust investigation in the case of Gazprom.

Although the situation in the EU gas market is and was auspicious, mostly due to the LNG supplies from the Arabic states (Libya, Algeria), nevertheless by cause of the political state in this region known as "Arab spring", the supplies to the EU were not that reliable, the other gas suppliers are developing their destination, and the EU has a competitor in the face of the Asian markets.

In 2013 the European Commission announced that bilateral intergovernmental agreements on the project "South Stream" concluded in period 2008-2010 between the RF

[20] http://europa.eu/rapid/press-release_IP-16-307_en.htm

[21]https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-gas-and-heating-and-cooling-strategy

[22] TALUS, K., *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 2011, Kluwer Law International, p. 45, GUDKOV, I., *The Energy dialogue of the RF and EU: relevant political legal problems*,2014, Zakon, No 7 (89) (Гудков, И, Энергетический диалог России и ЕС: актуальные политико-правовые проблемы, Закон)

and EU member states – Austria, Hungary, Slovenia, Croatia, Greece and Bulgaria[23] are inconsistent with the Third Energy Package (TEP), thus, they should be either revised or denunciated.[24] The violations are of the following character: the third-party access, as the South stream capacity is aimed for one customer, the separation of the vertically integrated gas companies, as the gas producer and gas supplier is the shareholder of the companies-operators of the South stream, and the regulation of the gas transportation tariffs, as the tariffs should be determined by the independent energy regulators, not the companies-operators of the South stream.

The RF argued that the agreements were concluded within the Vienna Convention on the Law of Treaties 1969, thus, regarding the main principle "*pacta sunt servanda*" and the article 26 "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*", together with article 27 "*a party may not invoke the provision of its internal law as justification for its failure to perform a treaty*". Regarding the denunciation the RF was referring to the article 42 (2) of the mentioned convention, where it is possible "as a result of the application of the provision of the treaty" or of the subjected convention. Also, should be borne in mind that VCLT convention is concluded between the states, and the EU – is not party of this convention.[25]

---

[23] Gas Pipeline Wars: The EU Threatens to Obstruct Gazprom's South Stream Project, Global Research. 10.06.2014 http://www.globalresearch.ca/gas-pipeline-wars-the-eu-threatens-to-obstruct-gazproms-south-stream-project/5386475

[24] South Stream bilateral deals breach EU law, Commission says, Euractive. 04.12.2013 http://www.euractiv.com/energy/commission-south-stream-agreemen-news-532120

[25] Which may be however referred to the article 3 of the relevant conventions, as the international organization should follow the general customary international law. The relations between the EU and convention illustrates the intra-EU case, Case C-118/07 Commission v Finland [2009] ECR I-10889, finding of the CJEU in para 39, " According to well-established case-law, an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Conventions of 23 May 1969 on the Law of Treaties and of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express, to this effect, general customary international law, stipulate in that respect that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose ", available on http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d62b4cb759d3134fb6a454f35066

EU law is in line with the international law, and regarding EU member states, when the international law provides broad provisions, EU law may be a priority following the rules *lex specialis* and *lex posteriori*. Moreover, from the view of international public law, there are some exceptions from the principle *pacta sunt servanda* – principle *rebus sic stantibus.* This doctrine applies with the unforeseeable change of circumstances, and regards the conditions, which were not taken into consideration by the parties, while concluding the agreement.[26] In a case of the disparity with the EU law, the European commission may initiate infringement procedures against the EU member-state, violator. However, there are some exceptions, which allow the derivation of the provisions of the TEP. Treaty on the Functioning of the EU, the article 351 (1) recognizes the priority of concluded treaties before the accession to the EU, further articles 106 (2), 194 (2) together with the article 36 of the Third Gas Directive assign exclusive competence of the member states regarding their energy mix and structure of energy supplies. Moreover, the special regime of Regulation 1219/2012 provides guarantees for the investment agreements concluded before 01.12.2009.[27]

However, the actions of the EU regarding the South Stream are aimed not to stop the relations with Russia, as some politicians may say, it is otherwise, the South Stream is of big importance for the EU.[28] In this project are involved several EU member states and states of

---

946144.e34KaxiLc3eQc40LaxqMbN4Pax0Qe0?text=&docid=73856&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=112363

[26]BĚLOHLÁVEK, A., *Rozhodčí řízení, ordre public a trestní právo*, 2008, Komentář, I. Díl, C.H. Beck,p.193

[27]Regulation (EU) No.1219.2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. OJ L 351/40.

[28] The project was described as of common interest. See: Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest, OJ L 349/28

the Energy community, which will develop the energy security,[29] diversify the supplies by the infrastructure systems and allow to establish reserve safeguard gas capacities[30].

Among the largest Russian industrial companies of the FDI in the EU is carried out by Gazprom, although there are rarely reported the amounts of transactions with its participation, the largest investments of it are located in Germany, Austria and the states of the Central Eastern Europe. Inside the RF, Gazprom is responsible for more than 80% of the Russian natural resources, acting in the field of gas production and transmission.[31]

The major investments from Russia are sent to Cyprus, Netherlands, British Virgin Islands (a total of USD 50 billion), Austria (USD 6 billion), Switzerland (USD 5 billion), Germany (USD 3 billion). Among the states to which are flown the FDI from RF are generally regarded as "tax heavens" or low tax jurisdictions. This offshore nature of the Russian investment has been repeatedly emphasized by the UNCTAD experts as a "round-tripping" example.[32]

At the present time, due to a number of geopolitical and economic reasons[33], the mutual investment flows in the energy sector of the two sides significantly decreased in both directions, as the amount of EU investments in the RF energy sector, so the Russian

[29] South Stream. Energising Europe. Presentation. Brussels, 25th May, 2011, http://www.south-stream.info/fileadmin/f/press/presentations/25.05.2011-brussels.pdf, South Stream pipeline project is designed to strengthen European energy security, http://www.gazpromexport.com/en/projects/6/

[30] Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295/1, 2010

[31] "…whereas foreign companies represent just for 0.2% of production". OECD "In 2006, foreign portfolio investment in the Russian oil and gas stocks was estimated at USD 50 billion (Ernst & Young, Overview of the Oil and Gas Industry in Russia, 2007), though the distinction between "foreign" and "local" is increasingly difficult in the context of global capital markets. In 2005, there were 10 Russian companies among the 50 world largest oil and extraction companies ranked by total production, in particular Gazprom (the 2nd largest), Lukoil (in which ConoccoPhillips owns some 20% of the shares, the remaining 80% is in hands of Russian partners), TNK-BP, Rosneft, Surgutneftegaz and Sibneft. (IHS data as reported in UNCTAD (2007), World Investment Report 2007, p. 11)". OECD further stresses the inadequacy and non-transparency of the investment in gas sector, as the authorities control investment decisions, and "in the case of Gazprom which seems to privilege outward expansion over development of domestic production and transit facilities."

[32] UNCTAD, World investment report 2016, available http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

[33] To reduction of the mutual investment flows in the 2014-2016 led the situation in the Ukraine, related to it EU financial and technological sanctions against the RF, at the same time strengthening the eastern direction of the Russian policy, and the EU policy on the reduction of the energy dependence on external suppliers.

investments in the EU energy sector. According to the RF Chamber of Commerce, in 2014 the foreign direct investments in the RF economy decreased up to 48%.

The present effective forms of development of the energy cooperation between the RF and the EU include:

- Purchase of shares of energy assets and the exchange of assets, mergers and acquisitions of the companies.
- Creation of multilateral strategic alliances and joint ventures.
- Leasing of equipment, project financing in a joint energy projects, product sharing agreement and concessions.

In the world practice and practice of the EU the most popular forms of international cooperation in the oil and gas projects are concession agreements, production sharing agreements, joint ventures, service contracts, and mixed agreements/contracts.

In the RF the concessions in the subsoil use are not legally permitted. Production sharing agreements are of limited use. The most common form of cooperation between Russian and foreign companies in the energy sector are joint ventures and strategic alliances. In the major oil and gas projects the international cooperation is made through the joint venture of the major Russian oil and gas state-owned company with the foreign company. In that case of the joint ventures the Russian side owns more than half of the share capital, and the foreign partner is a minor shareholder.[34]

As in the RF are legislative restrictions on the activities of foreign companies in the 42 strategic fields, including plants, and development of the shelf, cooperation in the form of the joint ventures help the foreign companies to move into the Russian market, participate in the production, transportation and export of energy resources, and in cooperation with the state-owned company to participate in the development of the Russian shelf and strategic fields. In

---

[34]Russian oil and gas state-owned companies are: Gazprom (51% shares of which has the state), Rosneft, Gazpromneft, Novatek, Lukoil and their subsidiaries.

this event, the foreign partner acts as an investor of capital and modern technologies, and also as an operator of the projects, and the Russian side remains the owner of the field and keeps the rights for the development of the shelf.

EU companies receive the part of the income from the project in accordance with the proportion of the capital invested, and also the raw materials, or fuels for further export to their states or for sale in the global markets.

Mostly, EU companies are invited to participate in costly and difficult projects in the remote regions of Eastern Siberia and Sakhalin, Arctic region, or in the shelves, where the RF did not limit participation of the foreign companies. EU member states and EU companies, and Norway, have been participating in the major energy projects in the RF. The companies master and develop the fields, participate in LNG projects and have assets in the oil and gas industry and in the electrical industry in the RF.[35]

There are several joint LNG projects in the gas sector. With the German legal entity Linde, Gazprom is cooperating in the project Amur GPP, which is expected to be the largest Russian and one of the world's largest enterprises for processing of the natural gas.

Russia's share in the global export of the pipeline gas is more than 25%, however the share of the Russian LNG export in the world is only 4,5%. It could be explained by the fact, that Russia developed the pipeline infrastructure for more than 50 years, and the main partners were EU member states.

In order to comprehend the scope of the needed investments in the development of the LNG, should be envisaged the scheme of related operations – from the moment of its exploitation to the moment of it distribution to the final consumer. Each of the operation needs the construction of the industrial complex, where the investment should be made, starting with the exploitation of the gas – gas liquefaction – gas storage – gas transportation

[35] British BP, English and Dutch Shell, Italian ENI, German BASF, Wintershall, E.ON, Ruhrgas, French Total, Norway's Statoil.

by the special tankers – gas storage in the receiving state – regasification, and ending with the gas supply to the pipeline. Thus, the LNG market, as well as the pipeline gas system, needs capital-intensive investments.

The only LNG plant was built in the framework of the project "Sakhalin-2", which was implemented by the international consortium with the participation of the Royal Dutch Shell (UK and Netherlands), since 1992. The other project (Shtokman) on the LNG plant was shelved, expecting implementation in 2020, on the basis of the cooperation of Gazprom and French Total. The current LNG plant in Russia – "Sakhalin - LNG" was termed in 2009 by the following shareholders: Gazprom (50% plus one share), Shell (27,5% minus one share), Mitsui (12,5%), Mitsubishi (10%). The other planned LNG plant is "Yamal LNG" (completion in 2016/2018), with shareholders Novatek (60%), Total (France, 20%), CNPC (20%). Novatek has already signed agreements for the supply of the LNG to Spain for a period of 25 years.

The project "Yamal LNG" is a cooperation between the RF and the EU companies in the energy sector, where are involved EU (including Netherlands project Delta) capital, investment and technologies. As it can be seen from the share division, the amount of the participation of the foreign investor in the joint-projects in the gas sector is minor. Project "Yamal LNG" includes the production in the field Yuzhno-Tambeysk, the construction of a deep processing plant (LNG), export to the European and Asian directions. In this project, 50,1% of the shares belongs to the Russian company Novatek, 20% - to the French company Total.[36] In the construction and commissioning of the complex in preparation and liquefying the natural gas engaged the other French company – Technip France,[37] which also supplied the turbine equipment for the LNG project Yamal LNG.

[36] Official page of the project Yamal LNG - http://yamallng.ru/, other – to the Asien companies, Chinese CNPC 20%, SRF 9,9%, news agency Vedomosti, article, 17.12.2015, http://www.vedomosti.ru/business/news/2015/12/17/621420-fond-shelkovogo-puti-yamal-spg,

[37] ibid

The other example is the development of the Shtokman gas field, where participate Gazprom (51%), French Total (25%) and Norway Statoil (24%). This project includes the construction of the underwater pipeline and gas liquefaction plants in the north (Murmansk) region. In these two projects EU partners have taken the risks and financing responsibilities, involving credits from the EU, they participated in the creation and operation in the mining process, development, processing and transportation of the energy resources, provided modern technologies of the development the offshore/sea fields, and in the production of the LNG. It should be noted that the condition of the projects was mandatory placement of the orders at Russian manufacturers, and also the use of Russian labor personnel.

The other form of cooperation between the Russian state and foreign investors is an exchange of assets, where the Russian and the EU companies have industrial cooperation in the field of production, storage and transport of gas.

German companies E.ON-Ruhrgas and BASF-Wintershall are Gazprom partners in the development of the Yuzhno-Russkiy and Urengoy fields, and also in the project Nord Stream, they were preparing to participate in the South Stream project. These companies own the shares/assets in the Russian oil and gas fields and main pipelines, and Gazprom as a response is an owner/co-owner of the several transport and distribution companies and underground gas storages in the EU.[38]

This exchange of assets applied in the joint construction of the pipeline Nord Stream, which shareholders had the opportunity to enter to the Russian market and work in the field Yuzhno-Russkiy. This mechanism of the assets exchange – entry into the gas distribution

---

[38] Official pages of Russia company Gazprom http://www.gazprom.com/about/production/projects/deposits/yrm/, http://www.gazprom.com/about/production/projects/deposits/germany/, also German company E.ON http://www.eon.com/en/media/news/press-releases/2008/10/2/yuzhno-russkoye-gas-field-e-dot-on-and-gazprom-reach-final-agreement-on-asset-swap.html, See also Aalto, P, The EU-Russian Energy Dialogue, Europe’s Future Energy Security, 2016, Routledge.

network in the EU in exchange for a share in the development of the Russian fields – is called as one of the perspective in cooperation between the RF and the EU.

Investment mechanism of the project financing applied in the construction together with the EU partners of the pipelines Blue stream and Nord stream, and in the projects Sakhalin-2, in the development of the Shtokman and Yuzhno-Tambeisky field, and planned to be used in the project Turkish stream.

In the territory of the EU, Gazprom has an extensive transport and distribution network, which includes transportation through trunk pipelines and gas outlet, local gas distribution networks together with the EU companies, and also the network of underground gas storages, especially in the Central Eastern European States.

There is also applied the mechanism of the public-private partnership, including the product-share agreements and concession agreements. Under the Production Sharing Agreements (PSA) are developing three projects: Kharyaga field (operator Total), Sakhalin -1 (operator Exxon-Mobil), Sakhalin-2 (operator – Sakhalin Energy). There are many discussions on the application of PSA – in the absence of transparent relations, foreign investors have the opportunity to inflate the costs, as the costs are compensated by the state, and to reduce the profit margins/income, and consequently the taxes, which are flowing to the budget of the host state (Russia). However, because of EU sanctions Gazprom is not able to buy the required high-tech equipment for the works in the deep shelf,[39] thus it is possible that these PSAs will return to the popular practice. The problem of purchasing the necessary

[39] as Yuzhno-Kirinskiy field in the Sakhalin, but the foreign partners can work with Gazprom and purchase that agreement, article in RBC new agency, http://top.rbc.ru/business/06/08/2015/55c22d269a79476bc257fcdd, 06.08.2015 "Но сильным аргументом в пользу дополнения «Сахалина-2» активами «Сахалина-3» служат санкции. «Газпром» не может сам купить оборудование для работы на шельфе (его глубина в проекте — от 110 м до 300 м), а его партнеры могут работать с ним только в действующих проектах."

equipment could be solved by the inclusion of a foreign investor to the existing project, such as it is in the planning project Sakhalin - 3.[40]

Besides, Gazprom constructs several underground natural gas storages in the European Union, including Czech Republic (Dambořice[41], the terminal in South Moravian Region. The operator of UGS is a joint venture of Gazprom export, Ltd, and company MND Ltd - Moravia Gas Storage, a.s., the storage is supposed to support the gas delivery to the market of Austria and Germany), Germany (Katharina), and it is a co-investors in the gas storages in Austria (Haidach), Netherlands (Bergermeer), and Germany (Etzel, Rehden, Jemgum).[42]

In this region the RF attempts to diversify routes to the EU, by operating the pipeline GAZELLE[43], with length of 166 km, connecting the Czech Republic with the pipeline Nord Stream passing under the Baltic Sea, and in the north, this pipeline is connected with the German pipeline OPAL, which is the extension of the Nord Stream. In the south, this pipeline is connected to the gas system MEGAL, through which Russian gas will be supplied to the southern Germany and to France. Thus, Gazelle *de facto* opens the way to the Russian gas to the South and South-East Europe.

The provisions of the Third Energy Package in 2009 had affected the construction of the Nord Stream and its sub-projects, by obliging Gazprom to use not more than half of the pipeline OPAL transit capacities.[44] The alternative solution for Gazprom was to provide "gas release program", by selling the gas at open auction. These requirements of the European Commission were regarded by the Russian side as disproportionate and unjustified. Gazprom

[40] Gazprom and Shell have offered to the RF government to develop the project Sakhalin-3 on the basis of the PSA, by entering to the project of the Sakhalin -2. However, due to the US sanctions on the Yuzhno-Kirinskiy field, the planning project stopped.
[41] Gazprom Export Global Newsletter, Blue Fuel, 2016, vol.9 issue 3, pp. 20-21, http://www.gazprom.ru/f/posts/18/478156/layout_rus_02.06_1.pdf
[42] http://www.gazprom.com/about/production/underground-storage/
[43] http://www.ceskatelevize.cz/ct24/ekonomika/210865-plynovod-gazela-startujeposili-energetickou-bezpecnost-zeme/
[44] Decision of the Commission on OPAL pipeline of 12.06.2009 http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/gas/2009_opal_decision_de.pdf

argued that the competitive environment should be regulated not by one of the competitors, but by the EU itself. As in the EU is a free movement area, so if there is possible violation of the competition in one state, the absence of borders provides the possibility to prevent it by transporting gas to the other state.[45] In 2016, Gazprom has dealt with the EU companies to sell its gas at auctions.[46] Gazprom considers it as an additional way to sell gas to the EU, and expecting to help download half empty pipeline OPAL, which Gazprom does not fully utilize.[47]

In some states of Central Eastern Europe the only gas supplier is Russia, namely Gazprom enterprise. Due to the fact that these states do not meet any appropriate and competitive alternatives in their gas market, the gas prices in CEE dramatically differ from the gas prices in the western EU member states. That is caused by the following factors: the geographical location of Central Eastern European states, and the historically set price policy: oil indexation pricing policy or the Groningen system.

That is also called as investment pricing mechanism, it is being connected with the building, caring and operating the infrastructure, the pipelines, and the dominant mechanism for the international gas trade, which originated in Europe in 1960s and spread to Asia. However, the historical oil indexed initial import gas price and the classical structure of the related long-term contracts (take or pay clause) remain a major worry in Europe. Prices of gas in these contracts do not reflect the reality of the markets[48].

---

[45] EC to agree on Russia's Gazprom access to OPAL pipeline. January 27, 2014, Oil and Gas Eurasia http://www.oilandgaseurasia.com/en/news/ec-agree-russia%E2%80%99s-gazprom-access-opal-pipeline

[46] Companies Greifswald NEL, Greifswald OPAL, Gaspool VP, Olbernhau II, article in news agency Vedomosti, 02.08.2015,http://www.vedomosti.ru/business/articles/2015/08/03/603148-gazprom-budet-prodavat-gaz-v-evropu-na-auktsione.

[47] The European Commission in 2009 demanded to sell the gas transported through OPAL in auction, when the Gazprom refused to do it that time and lost large sums, http://www.vedomosti.ru/business/articles/2015/08/03/603148-gazprom-budet-prodavat-gaz-v-evropu-na-auktsione, 02.08.2015

[48] ANDOURA, S., VINOIS, J.-A., DELORS., J., *From The European Energy Community To The Energy Union, A Policy Proposal For The Short And The Long Term*, 2015, Notre Europe

The contrasting mechanism based on hub pricing or spot pricing and traded markets developed in the United States and has spread to continental Europe via the UK. It is not a long-term, but a short-term pricing mechanism, acceptable for trade, however undesirable for project financing.[49] Today, EU is witnessing an unprecedented collision between these two pricing mechanisms and gas industry cultures[50]. In modern Central Eastern European states (the least liberalized, that is the least competitive part of the EU) oil product indexation covers 95% of the price formula in a more liberalized western EU states – it is 80%, and for the most liberalized, that is the most competitive in the European gas market of the United Kingdom (which is however already not EU member state) is only 30%, moreover unlike to states of CEE, the UK has its own gas reserves.

The dependence on the imported natural gas, in particular from Russia, varies from one EU member state to another. The large number of smaller markets in Central and Eastern Europe is characterized by fragmentation and high dependence on energy imports from Russia. The primary objective of these countries is to minimize the vulnerability of their gas imports by means of diversification of sources of supply and delivery systems through access to EU-based infrastructure and resources.[51] The recent un-diversified dependence on the external energy resources called concerns of the EU, as such situation "may translate into significant losses to competitiveness and GDP, inflationary pressures and trade balance deterioration'.[52] The "energy asymmetry", as it is often being called by some theorists, when the state gas-importer may dictate its conditions, disrupting the energy supplies, due to the

[49] KONOPLYANIK, A., *The EU versus Gazprom*. 2012, Energy Economist, Issue 372, October 2012, p.3-6.
[50] MELLING,A. J., *Natural Gas Pricing And Its Future, Europe As The Battleground,* 2010, Carnegie Endowment, Available On Http://Carnegieendowment.Org/Files/Gas_Pricing_Europe.Pdf
[51] BOYKA, M., STEFANOVA, M., E*nergy Security Article 7 European Strategies For Energy Security In The Natural Gas Market*, 2012, Journal Of Strategic Security, 3/5, The University Of Texas At San Antonio
[52] European Commission Directorate-General for Economic and Financial Affairs, 'Member States' Energy Dependence: An Indicator-Based Assessment, 2013, Occasional Papers 145,p. 5.

political reasons, as it was evident in the RF-Ukraine gas disputes in 2006 and 2009,[53] affects the quality of EU member states. This confirms the needs of, on the one hand the creation of a stable legal document with sanctions, and on the other – the securitization of the diversification of the gas suppliers.

In order to stop "unfair" pricing, and develop gas diversification on EU market, the European Commission has started the antitrust probe on Gazprom. The initiative had derived from eight Central and Eastern European member states: Lithuania, Latvia, Estonia, Bulgaria, Czech Republic, Slovak, Poland, and Hungary. As it has been mentioned, on their national markets, Gazprom has taken the dominant position of the gas supplier, and according to their claims, supplies gas to them on unequal conditions in comparison with the western EU member states. Russia, on the contrary, claims that the pricing is according to the external economic environment, and in a case of bilateral agreements with particular EU MS, not with the European Union as a whole, the company Gazprom would attempt to be as much profitable as possible, given the fact that Gazprom is a business entity – its main aim to maximize the profits and shareholders wealth. That case has been called in public as the "clash of the decade", due to its possible controversial consequences. The aporia hereby is also that the European Union, according to some authors, is trying to institutionalize the EU-Russian energy relations and to bring them in line with the market principles unilaterally.[54]

Interestingly, in the case *Acron OAO and Dorogobuzh OAO v Council*, the Court of the EU has called this pricing formula on the Russian gas in Weidhaus as "reasonable" and

[53] KOVACEVIC, A., *The Impact of the Russia–Ukraine Gas Crisis in South Eastern Europe*, 2009, The Oxford Institute for Energy Studies, p. 1; STERN, J., *The Russian-Ukrainian gas crisis of January 2006*, 2006, The Oxford Institute for Energy Studies,p. 8

[54] HELEN, H., *The EU's energy security dilemma with Russia,* 2010, POLIS Journal, available on http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ma-winter-10/helen-e.pdf

"free of market distortions" though it was regarding not the antitrust, but antidumping matters.[55]

The experts state that the disputes on the pricing mechanisms are of the difficult ones, as the understanding of the "fair pricing" differs, due to absence of sole definition.[56] In the case *United Brands v Commission* was stated that the unfair price is setting "in comparison with the competing goods",[57] however, there is no yet illustration on the energy sector. Still there are high thresholds in finding the pricing unfair, which is important to keep the balance between the regulation of competition and the administrative barriers for the investment activity.[58] For the purpose of the high level of competition and liberalization of the energy market, the European Union developing the idea of cooperation between the EU member states in the energy area, thus was established the Energy Union. This in detail will be analyzed in the forthcoming chapters.

Due to the objectives of the EU and the Energy Union to make the energy market more competitive, the result is the decrease of Gazprom market share in the territory of the EU, through the diversification processes. With the entry into force of the Third Liberalization Energy Package, the situation in EU gas sector has changed, and Gazprom as the only monopolist, cannot freely operate in EU energy market. Moreover, the RF still lacks the innovation technologies, as well as the development of the capacities and delivery of the LNG. Gazprom, a monopolist company and slow for the changing realities, being inflexible in its contracting policy, which is based on long-term agreements older than a decade, caused

---

[55] Judgement of the General Court (Eight Chamber) of 07.02.2013 in Case T-235/08 Acron OAO and Dorogobuzh OAO v. Council of the European Union

[56] WOUDE, M., *Unfair and Excessive Prices in the Energy Sector*, 2007, European Competition Law Annual, See GUDKOV, I., *Antimonopoly Regulation of Energy Sector in the European Union*, 2012, Energy Law, No.1. (Гудков И. Антимонопольное регулирование энергетической сферы в Европейском союзе Энергетическое право)

[57] Case 27/76 United Brands v. Commission [1978] ECR 207

[58] GLADER, M, KOKKORIS, I., *"Excessive Pricing" in EU Competition Law, 2013,* in Volume V Abuse of Dominance Under Article 102 TFEU ed. by GONZALEZ-DIAZ, F.,SNELDERS, R., CLAYES&CASTELs,pp. 615-665

itself a negative position in the EU gas market. Moreover, the political and economic relations in the global level have great influence on the stability and reliability of the gas supply.[59]

The excess of the gas prices in long-term contracts in comparison with the spot prices resulted in a wave of the gas conflicts, which began to change the gas contract-policy to decrease the period of the new gas contracts up to 10-15 years.[60] It also led to requirements for Gazprom to provide the price discounts and including in the contract formula of spot-indexation.[61] Although currently Gazprom is changing its policy, developing the LNG and CNG supplies, at the same time it is planning the construction of the pipelines "Turkish Stream", expansion of the "Nord Stream-2". However, the future of the pipeline gas is under the question due to the EU competition and liberalization policy.

The perspectives for big transnational companies in the liberalized gas sector are unclear. Due to the fact that in the gas industry are mostly operating big vertically integrated companies, which produce, explore and transport natural gas, separation of activities requires separation of legal duties, and conclusion of the new contracts: first - between the supplier/exporter and buyer/importer, and second - between the supplier/exporter and importer/owner of the transportation system for the gas transportation to the place of destination. At the same time, these contracts should be consistent with each other, which is very difficult to achieve in reality, and this reduces warranty and reliability of gas supplies.[62]

As it is a new field, the uncertain conditions make the capital investments in such infrastructure more expensive and uncertainty of the return may discourage investors, stress

---

[59] VOLOSHIN, V, *Position of Russia in the energy sector of the world economy*., 2009, Red. ALEKSEEV, A, Moscow, IE RAN, p. 6 (Волошин В. Позиционирование России в энергетическом секторе мирового хозяйства; отв. ред. А.В. Алексеев. ИЭ РАН).
[60] FRANZA, L., *Long-term gas import contracts in Europe: the evolution in pricing mechanisms*, 2014, CIEP Paper
[61] STERN J., ROGERS H. *The Transition to Hub-Based Pricing in Continental Europe: A Response to Sergei Komlev of Gazprom Export*, 2013, Oxford Institute for Energy Studies
[62] KONOPLYANIK, A., *The Europe is more than the Europe*, 2011, Neft' Rossii, #7, p. 53 (Конопляник А. Европа - больше, чем Европа. Нефть России)

some experts.[63] Moreover, the participation in the delivery chain of the third party may involve additional risks and costs.

The other risks are connected with the financing the spot or short-term gas projects as strategic suppliers of the non-renewable resource. For the RF is important the long-term contracts, as the spot trades cannot guarantee big investments in the national gas sector. Thus, the long-term contracts contained the take-or-pay clause.

Should be taken into consideration that the formation of the competitive EU gas market is occurring through the secondary legislation of the EU, and as there is no full consent on that point, there are some discussions on the current situation, as the formation of the common hubs inside particular state.

The RF made a claim against the EU and its member states based on the WTO rules[64] to the WTO Dispute Settlement Body in 2014, opposing the restrictions imposed by EU liberalization measures or the Third Energy Package.[65]

In addition, the basis of the system of the natural gas supply from the RF to the EU territory is the long-term contracts, which are designed for the period up to years 2020-2035. These contracts are fulfilling the functions of the contract for the supply of commodity (volume, price, timing, quality) and also contract for the provision of services (flexibility of supply, responsibility of the seller).[66] After lengthy discussions with the EU, the RF managed to defend the right to maintain the existing long-term contracts, also the right to determine the

---

[63] FEYGIN, V, GROMOV, A, *Formation and first results of the CSG in the context of Russian-EU gas relations*, 2014, Academic journal of the Russian gas society, # 1, pp. 39-48, p. 45 (Фейгин В.И. Громов А.И. Становление и первые результаты работы КСГ в контексте отношений России и ЕС в газовой сфере. Научный журнал Российского газового общества.)

[64] Articles II, VI, XVI, XVII of GATS, articles I,III,X,XI of GATT 1994, Trade-Related investment measures (TRIMs) article 2, agreement establishing the WTO, article XVI:4, and the subsidies and countervailing measures: article 3.

[65]WTO Case No DS476: RF v. EU and its member states – certain measures relating to the energy sector, available: www.wto.org/english/traptop_e/dispu_e/cases_e/ds476_e.htm, decision is expected in the May 2017.

[66] KONOPLYANIK, A*, Gas Market in the Conditions of Uncertainty*, 2014 (Конопляник А: рынок газа в условиях неопределенности. 03.02.2014 г.: http://www.pro-gas.ru/price/news/98_print.htm)

points for gas supply (not sending it to a virtual or physical hub).[67] For the new contracts will apply the rules of the Third Energy Package, in accordance with rules of access and distribution of the gas transportation facilities of the network/grid code.[68]

It is needed to mention that Gazprom has met the antitrust proceedings not only in the territory of the EU, but also in the Russian Federation itself. As in 2007, the Federal Antimonopoly Service held a decision on blocking Gazprom from acquiring 100% of an independent gas distributor, which also received a judicial confirmation. This, on its turn, confirms the liberalization of the internal Russian energy sector.[69]

Considering the high interdependence of these actors, and the increase of the energy dependence in the nearest years,[70] the better way of cooperation between the EU and the RF is of great significance.

The disputes on the gas sector are mostly based on the proceeding of the regulatory changes, as internal legislation, changed or increased taxation, elimination of the agreed and incentive schemes (Stockholm Chamber of Commerce, Arbitration Institute), and lack of the host state of investments willing to cooperate.[71] The Energy Charter Treaty claims registrations in the recent years, exposing that since 2012 there has been a fluctuating rise to 30 new case registrations in 2015, making it 88 cases till that year, where the half of these cases were settled amicably.[72] The International Center for Settlement of Investment Disputes (ICSID) in the first half of the 2017 registered cases, 25% of them are related to the gas or oil

---

[67] FEYGIN, V, GROMOV A, *Formation and first results of the CSG in the context of Russian-EU gas relations*, 2014, Academic journal of the Russian gas society, # 1, pp. 39-48, p. 45 (Фейгин В.И. Громов А.И. Становление и первые результаты работы КСГ в контексте отношений России и ЕС в газовой сфере. Научный журнал Российского газового общества.)

[68] KONOPLYANIK, A, *Gas market in the conditions of uncertainty, 2014* (Конопляник А: рынок газа в условиях неопределенности. 03.02.2014 г.: http://www.pro-gas.ru/price/news/98_print.htm)

[69] Federal Antimonopoly Service (FAS), Press Releases on "Gaspromregiongas," 18 May 2007, and "Gaspromtrans," 27 April 2007.

[70] European Commission, 2012, Renewable Energy: A Major Player in the European Energy Market, SWD 149, p.11

[71] http://www.sccinstitute.com/media/30005/magnusson_gasdisputes_thescc_experience.pdf, SCC Gas disputes 2012,Dolzer, Schreur,p.272

[72] ECT cases: http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/

sectors, 18% of cases under the ECT, and 57% of all cases are based on the BITs, with 46% from the states of the Central, Eastern and Western European Region.[73] The mentioned institutions – Energy Charter Treaty, ICSID, The Stockholm Chamber of Commerce will be analyzed in the next chapter III Investment Relations between the EU and the RF.

Summary

In this chapter the role of the natural gas, its specifics, and importance was discussed. It was shown the statistics of its use in the territory of the EU, and it was shown that the EU is dependent on the import of the natural gas, where one of the most important gas suppliers is the Russian Federation. The high inter-dependence of the EU and the RF in the energy, in particular gas sector was analyzed. In addition, the examples of the cooperation of the EU and the RF on the joint investment energy projects as in the territory of the EU, so in the territory of the RF, including exploitation, transportation and construction of infrastructure were illustrated. The specifics of the EU-RF energy relations, on particular projects, including goals and aims of the cooperation, as well as difficulties and disputes in this area were examined. The situation of the unfair pricing of the Russian monopolist gas supplier Gazprom on the territory of the Central Eastern European Union states, and the steps taken by the EU for liberalizing the EU gas market were illustrated.

[73] ICSID annual report, and statistics, 2016, 2017 https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf

III. Investment relations between EU and RF

3.1. International legal regulation of foreign investment protection between the EU and the RF

With a rapid development of international commercial relations across a wide range of sectors, involving a huge number of non-state business actors worldwide emerges the need for the homogeneous economic and legal conditions, regardless the international political situation. Also should not be underestimated the importance of a uniform legal regulation of international transactions, as well as a functioning uniform international legal framework. To ensure an efficient business, the major tasks should include the revenue increase as well as minimizing transaction costs and risks, which, in its turn, raises the question of the potential partners and marketability. Furthermore, confidence in the economic stability and transparent legal environment are crucial for prosperous and safe cooperation between the states.

Nevertheless, even on the national level, when the national law regulates and clarifies any misconceptions, still numerous conflicts may occur, including the ways of interpretation the law, jurisdictional issues and collision norms. However, in the national level there is a strict hierarchy of the judicial and arbitration institutions, where is no conflict of the finality of the decision and parallel proceedings. Although the field of investments is covered by the national law, in the case of the foreign investments, the international law may intervene the national regulations.

In the present conditions, there is a need to regulate the field of the foreign investment in the global, international level. In the constitutions of the most states, including EU member states and the Russian Federation, is enshrined the priority of the international law, or international law is part of the national legislation, where the norms of international law, and international treaties are part of the national legal system.

It is good to note that the market efficiency of the investments depends on the area of the trade and its legal regulation and the features of the economic inter-regional cooperation, in that case between the European Union and the Russian Federation.

With international treaties, regional agreements, the national legislation is being a source of the international law, according to the doctrine of the international law. Thus, the legislation of such international institution as the European Union is a source of the international law. Moreover, the internal legal norms of the EU apply for the other states, which are not the part of the EU.[74]

The international law is based on the principle of the power balance, giving the opportunity to the states act in the field of the international law as equal partners. However, depending on the weight of the state in the international area, there are distinguishing the treaties directed for protection of foreign investments and committing the states-participants take proper state measures to regulate foreign investments, which are aimed to regulate and protect foreign investments. Thus, academics are determining the gradual development from the international legal protection to the international legal regulation of investment.[75]

Multilateral treaties governing the investments are being classified to the universal and regional levels. As universal conventions are considered two international multilateral treaties, which were signed by more than hundred states - Seoul Convention, 1985, establishing the Multilateral Investment Guarantee Agency (MIGA),[76] and the Washington Convention, 1965, on the Settlement of Investment Disputes between States and Nationals of

[74] The states, which are not the member of the EU, are being called as the third states
[75] HIGGINS, R, *The taking of property by the State*,1982, p. 176, Hague Recueil, p. 259, ŠTURMA,P., BALAŠ, V, *Mezinárodní ekonomické právo,2013,2Ed, p.*310, BASYROVA, Z., KONISCHEVA, T., MELENTYEV, A., *Legal régime of foreign investment: legislative regulation and practice of relations between the state and investors in the RF*. 1996. Ekonomika and life #5, Moscow, p. 125 (Правовой режим иностранных инвестиций: Законодательное регулирование и практика отношений государства и инвесторов в РФ. Экономика и жизнь), DORONINA, N*.*, *Commentary on the Law of the Foreign Investment in the RF*, 2000, Justicinform, p.28(Комментарий к закону об иностранных инвестициях в РФ. М.: Юридический дом «Юстицинформ»).
[76] Hereinafter as a Seoul Convention

Other States (ICSID Convention)[77]. These conventions are of a great importance, due to the interest protection of foreign investments.

MIGA acts on the basis of the Seoul Convention 1985, members of which are 150 states. The RF signed the Seoul Convention in 1992 and became a member by ratifying it same year. The objective of MIGA is to promote the flow of investment for productive purposes among the member states, and especially in the developing states, and to regulate the activity of the World Bank, the International Finance Corporation and other international institutions. MIGA fills a gap in public international law in respect of counting the amount of compensation paid to a foreign investor in the event of political risk with the adoption of state measures on nationalization of foreign property and equivalent to its effect the regulations of foreign investment.

Another international instrument of protection of investments is the International Centre for Settlement of Investment Disputes (ICSID), established by the Washington Convention, and has not been yet ratified by Russia. Even though in some BITs between Russia and the EU member states is referring to the center as to one of instruments of the dispute settlement between the investor and the host state, based on the Additional Protocol to the Washington Convention.[78,79]

The ICSID brought innovative system of protection of foreign investment:

- foreign companies and individuals can directly bring a suit against their host state,
- state immunity is severely restricted,

[77] Hereinafter as a Washington Convention

[78] For example, BIT with Czech Republic

[79] This reflects also in the Russian legislation, namely Decree of government of the RF No 456, 09.06.2001, “On the conclusion of agreements between the Government of the RF with the Governments of the Foreign States on Promotion and Mutual Protection of Investments; DORONINA, N, *Multilateral International Treaties and Russian legislation on investments,* 2002, Journal of Russian law, #11, p.47-60,(Многосторонние международные договоры и российское законодательство об инвестициях. "Журнал российского права"), FARHUTDINOV, I., *International legal foundations of foreign investment in Russia: Coll. Of norm.acts and documents*, 1995, Moscow, p. 197-276 (Международно-правовые основы иностранных инвестиций в России: сб. норм. актов и документов).

- international law can be applied to the relationship between the host state and the investor,
- the local remedies rule is excluded,
- ICSID awards are directly enforceable within the territories of all ICSID member states[80].

As for regional instruments regulating the investments regarding the territory of the European Union and the Russian Federation, the treaties establishing economic alliances, as the European Union itself, regarding the Russian Federation – the Agreement on Cooperation in the field of investment signed between the Commonwealth of the Independent States (CIS) (1993). To the regional regulation of foreign investments, covering both sides mentioned above[81] - relates the Agreement on Partnership and Cooperation (PCA), establishing a partnership between the European Union and the Russian federation. It is the first and only legally approved long-term cooperation between Russia and the EU bilateral agreement signed in 1994 and entered into force in 1997[82]. The PCA covers the relations in political, economic and cultural areas, and provides some measures on the liberalization of trade between those two sides. Furthermore, it introduces the new provision on political dialogues, which should ensure the further cooperation in the sphere of free trade agreements. Besides it, this agreement obliges the Russian federation to follow the generally accepted rules of the WTO in the field of regulation of the international trade, and access the (investment) measures in accordance with the rules contained in the GATT/WTO.[83]

---

[80] DOLZER R., SCHREUER, CH., *Principles of international investment law*,2008, Oxford university press, New York, (p.433) p. 21, supra note 74 – LAUTERPACHT, E., Foreword to SCHREUER, CH.,*The ICSID- Convention*, 2000, xi. For the remaining role of state immunity, see SCHREUER,CH, IBID. article 55.

[81] DORONINA, N, *Multilateral International Treaties and Russian legislation on investments,* 2002, Journal of Russian law, #11, p.47-60,(Многосторонние международные договоры и российское законодательство об инвестициях. "Журнал российского права")

[82]Text PCA is available on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0149:EN:NOT

[83] Before the Russian Federation itself became a member of the WTO, in 2012.

Since the RF's accession to the WTO in 2012, the RF already submitted several cases under the WTO rules and in the WTO Dispute Settlement Body. The framework agreements of the GATT/WTO, or the General Agreement on Trade and Tariffs, World Trade Organization, related to the issue of investments are also included in the instruments of investment regulation in the universal level.[84] Instruments of the World Trade Organization, in particular TRIMs Agreement or Agreement on Trade Related Investment Measures, promote also the liberalization of trade and of the areas linked to it such as intellectual property and the trade in services.[85] The provisions of the GATT/WTO TRIMS regarding the investment measures, in accordance to which the state/contracting party undertakes to refrain to adopt such measures in regulation investments that might restrict the trade; some of the measures are incompatible with the national treatment, are also repeated in the Energy Charter Treaty.[86]

The European Union and Russia have been settling the disputes in the WTO Dispute Settlement Body (DSB), where the EU initiated four cases against RF[87], and the RF made four claims,[88] including the disagreement with the restrictions of the Third Energy Package.

Although, in these 8 cases between the RF and the EU, in some cases reports were adopted by the DSB and the Appeal Body with recommendation to bring measures into conformity, the addressee of the decision will have the choices either to eliminate the violation, or to make a compromise on mutually acceptable compensation, or to the injured

[84] *Many academics are classifying these treaties differently – multilateral, bilateral and regional (Šturma, Baláš, Boguslavskij), or universal, regional and bilateral (Labin), or multilateral and bilateral.*

[85] KOULEN, M., *Foreign Investment in the WTO*, 2001, in EC Nieuwenhuys and MMTA Brus, eds, Multilateral Regulation of Investment, pp. 181-203.

[86] Article III of the GATT. Such measures are the local requirement, requirement of the local share, trade balance, currency balance etc.

[87] WTO, EU v. RF, DS462 on recycling fee on motor vehicles, initiated in 2013 (GATT994, TRIMs), DS 475, measures on the importation of live pigs, pork and other pig products from the EU, initiated in 2014 (GATT 1994, Sanitary and Phytosanitary Measures), DS479 anti-dumping duties on light commercial vehicles from Germany and Italy, initiated in 2014 (GATT 1994), DS485 tariff treatment of certain agricultural and manufacturing products, initiated in 2014 (GATT 1994).

[88] WTO, RF v. EU, DS 474, cost adjustment methodologies and certain anti-dumping measures on imports from Russia, initiated in 2013, and in 2015 second complaint on the same matter (based on GATT 1994, subsidies and countervailing measures, Agreement establishing the WTO)

party would be approved proportionate countermeasures for the period of time, until the violation would be eliminated or reached the agreements on the compensation. Regarding the WTO rules should be however borne in mind, that they are not equipped with the enforcement mechanism, as they do not establish the unconditional duty of the proved violator to eliminate the committed breach of rules, as well as compensate the losses caused by such behavior. This mechanism seems logical from the technical side; however, it has more political, than practical effect.[89]

The documents regulating the EU-Russia relations in the investment and energy areas are the Agreement on Partnership and Cooperation, and the Energy Charter Treaty.

3.1.1. Agreement on Partnership and Cooperation

The Agreement on Partnership and Cooperation (PCA) is the only international basis in the EU-Russia bilateral cooperation, concluded in 1994, and came into force in 1997.[90] It was concluded for a period of 10 years with the subsequent annual automatic renewal, until one of the sides will declare its denunciation. Such agreements on partnership and cooperation were concluded by the EU with several former - Soviet republics, and the text of such agreements is almost identical, thus, the PCA is mostly called a "model agreement".[91]

[89] GUDKOV, I., *Problems of international legal regulation of energy relations using the example of cooperation between RF and the EU*, 2015, Zakon, No1 (Проблемы международно-правового регулирования энергетических отношений на примере взаимодействия России и ЕС, Закон)

[90] Was ratified by the RF, and by all national parliaments of the EU member states, the latter of which ratified this agreement – was Germany.

[91] With Republic of Armenia 1999, decision 99/602/EC, Republic of Azerbaijan 1999, decision 99/614/EC, Georgia 1999, decision 99/515/EC, Republic of Kazakhstan 1999, decision 99/490/EC, Kyrgyz Republic 1999, Decision 99/491/EC, Republic of Moldova 1999, decision 98/401/EC, Russian Federation, decision 97/800/EC, Ukraine 1998, decision 98/149/EC, Republic of Uzbekistan 1999, Decision 99/593/EC, Tajikistan, 2010, decision 2009/989/EC

The PCA establishes mainly economic relations,[92] and the detailed provisions concern mostly the area of trade of goods and services, and mutual access to the markets, as well as possibility of creating a "free trade area".[93] Nevertheless, it was only the topic of numerous discussions, as far as the RF was not a WTO member, and the process of the accession took more than a decade.[94] In spite of that, the agreement was developed with the full consideration of WTO provisions, taking into account the future accession of Russia to WTO (article 4). The PCA prism of WTO provisions apply *inter alia* on the cross-border activity (chapter III), "freedom of transit" (article 12) and were used by the Russian courts for the protection of the rights of the EU investors, on the basis of the treatment "no less favorable than that accorded to like products of national origin in respect of all laws <…>" (articles 5, 11), and in accordance with the articles 28-30 of the PCA.[95] In addition to the most favored nation treatment, there is a principle of non-discrimination, neither direct nor creeping (discriminatory taxation), restriction on the anti-dumping measure, and expressly stated absence of quantitative restriction on the import of goods (article 15).

Should be also mentioned the important article 55 of the PCA, according to which Russia undertakes the obligations to "achieve compatibility" of its legislation with the norms of the EU, in specific commercial areas, including the tax, accounting, environment, entrepreneurship, nuclear energy. The unilateral process of the convergence of the Russian legislation with EU norms indicates also the direction of the development of the Russian legislation and jurisprudence.[96]

---

[92] But also political cooperation, including political dialogues in the presidential, ministerial, parliamentary, and official authorities, including experts and academics, levels, cooperation in the issues related to the principles of democracy and human rights as it *mentioned in the articles 6-9 of the PCA.*

[93] PETROV, R., KALINICHENKO, P*, The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: the Cases of Russia and Ukraine*,2011, International and Comparative Law Quarterly, vol. 60

[94] The RF became a WTO member in 2012

[95] Terms "free trade area" and "most-favored nation regime" are used in the PCAs in the sense as they are described in articles I and XXIV of the GATT, respectively.

[96] KALINICHENKO, P, *Application of the PCA between the RF and the EU in Russian jurisprudence*, 2007, Zakon, #11 (Калиниченко П.А. Применение Соглашения о партнерстве и сотрудничестве между РФ и ЕС в

The fundamental nature of the partnership and cooperation between the RF and the EU, confirms the practice of Russian courts, in the decision of the Federal Arbitration Court of city Moscow on the *case Yukos* (2006), in accordance with the article 2 of the PCA, regarding the cassation appeal of the joint venture "Yukos oil company". The mentioned court issued a ruling on recognition and enforcement of the decision of the England and Wales High Court of Justice. The extensive interpretation of the article 2 of the PCA provides a possibility to apply to Russian courts for the execution and enforcement of the decision of foreign tribunals, and the other way around.

The case *Simutenkov v. Ministry of Education and Culture of Spain*[97] illustrates the interpretation of the Partnership and Cooperation agreement by the European Court of Justice, where the court specifically focused on the purposes of the PCA through its article 1 - "gradual integration between Russia and a wider area of cooperation in Europe". The case of *Simutenkov* became precedent on the application of the PCA on the EU and the EU member states legal orders. It also affected the application of the EU agreements with the third-countries, by stressing its direct action on the territory of the EU.[98] Parenthetically, regarding the dispute settlement, the PCA refers to the UNCITRAL rules.

Chapter IV of the PCA adjusts the provisions on entrepreneurship and investments. The agreement guarantees free movement of capital in a form of direct investments, however there is a clause giving the possibility to Russia to apply restrictions on investment on the Russian residents abroad. Further, the parties will be liberalizing the capital flows related to

---

российских судах, Закон), KALINICHENKO,P, *EU law in practice of Russian courts*, 2008, Zakon, # 11(Калиниченко П.А. Право Европейского союза в практике российских судов, Закон)

[97] Case C-265/03, Simutenkov v Ministerio de Educacion y Cultura. KALINICHENKO, P, *Protection of the rights of Russian individuals in the EU in the context of the CJEU decision on the Simutenkov case*, 2008, Zakon, #1, p. 211-220 (Калиниченко П.Защита прав российских частных лиц в Европейском Союзе в контексте Решения Суда ЕС по делу Симутенкова, Закон); HILLION C., *Case C-265/03 Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fúmbol, 2005, ECR I-2579*, 2008, Common Market Law Review, vol. 45, p. 815–833.

[98] KALINICHENKO, P, *The CJEU practice for consideration of application of Russian citizens and legal entities*, 2010, Lexrussica, vol. 5, p. 1086 (Калиниченко, П, Практика суда ЕС по рассмотрению обращений Российских граждан и юридических лиц).

portfolio investments. The treatment agreed on investment granted the most-favored nations. The article 58 identifies the sphere of cooperation on investment promotion and protection, in the conclusion bilateral agreements between the EU member states and Russia, as well as agreements to avoid double taxation, besides that it indicates the importance of technical exchange information on investment opportunities and its regulation.

Some academics call the cooperation of the EU and the RF of the "colonial structure"[99], emphasizing the asymmetric economic relations, where the main product the RF (about 80%) exporting to the EU – is the fossil fuel or energy resources, especially the natural gas and oil, while the EU exports towards the RF are the goods of the final use, as machinery or technologies.

It should be paid specific attention on what kind of provisions on the energy sector (article 65) contains PCA. This might be useful regarding the requirements on the Russian energy companies in the territory of EU market. It is expressly referring to the Energy Charter Treaty and EU community, it states in the article 65 (1) that "cooperation shall take place within the principles of the market economy and the European Energy Charter, against a background of the progressive integration of the energy markets in Europe". Further[100] it states on encouragement of energy trade and investment, given the priority to the energy efficiency, environmental side and consumption policy, highlights the market economy in the regulation of the energy sector, and expressly underlines the "modernization of energy infrastructure including interconnection of gas supply and electricity networks". That is pretty much about the energy sector in this agreement. Thus, Partnership and Cooperation Agreement was supplemented not only by the discussions on the free trade area creation, but

---

[99] ROMANOVA, T, ENTIN, K, *Russia and the EU: Political and Legal Aspects, in: Russia in Modern Integration Processes*, 2014, Moscow: MGIMO-University. (Романова, Т, Энтин,К, Россия и ЕС: политико-правовые аспекты, в кн. Россия в современных интеграционных процессах, М, МГИМО-Университет.)

[100] in para 2 of the same article

also by the projects of the Four Common Spaces and the relevant Road Maps, where *inter alia* was identified the cooperation in the energy sector.[101]

The basis of interaction now covers the Energy Dialogues, which were launched in 2000, aiming on "enhancing the energy security and closer relationship", via which the parties were expected to discuss the security of supply and demand, a rational use of infrastructure, and opportunities for the investments. In 2005 was even created the Permanent Partnership Council that comprises of the EU Energy Commissioner, the Minister responsible for Energy from the current EU Presidency and the next presidency, and the Russian Minister responsible for Energy. Furthermore, in the framework of the EU-Russia Energy Dialogue, there is a Gas Advisory Council, which assesses the development of the gas markets and provides recommendations for the long-term EU-Russia gas cooperation.

To enhance energy cooperation and harmonize market regulation has been signed another document for energy cooperation between Russia and the EU – Energy Roadmap 2050 based on the Energy dialogues, which reflected the projects on the issues of the energy efficiency, synchronized infrastructure and convergence of the commercial and legal regulations. It contains the plans for development of the EU-Russia energy cooperation, providing support for gas infrastructure projects and renewable energy, including the discussion on the perspectives of LNG and shale gas supplies from Russia. However, documents do not contain any firm obligations, they are of advisory nature and not legally binding. It is a "soft-law" in bilateral energy relations, notwithstanding it played an important

[101]EU-Russia Common Spaces. Progress Report 2007' (2008) http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report2007.pdf; 'EU-Russia Common Spaces. Progress Report 2008' (2009), http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report_2008_en.pdf; 'EU-Russia Common Spaces. Progress Report 2009' (2010), http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report_2009_en.pdf; 'EU-Russia Common Spaces. Progress Report 2010' (2010) http://eeas.europa.eu/russia/docs/commonspaces_prog_report_2010_en.pdf; 'EU-Russia Common Spaces. Progress Report 2012' (2013), http://eeas.europa.eu/russia/docs/commonspaces_prog_report_2012_en.pdf.

role in the regulation of Russia-Ukrainian gas conflicts.[102] The Energy Dialogues had an effect in resolving the issue of the destination clauses in the natural gas supply contracts.[103]

As has been mentioned, the PCA between the EU and the RF was developed as model or framework agreement, with presumption of the adoption of number documents with specific provisions. Notwithstanding, it has not been proven in most of the cases. Moreover, there are still on-going discussions on a new Agreement on Partnership and Cooperation, however without a final consent of the parties. There is a high probability of the negotiations on this agreement between the "blocks" – the EU and the Eurasian Economic Union, or Customs Union between the RF, Belarus, Republic of Kazakhstan, Kyrgyzstan and Armenia.[104] The assumed documents with a binding nature are also just in plans. Besides that, the Agreement on Partnership and Cooperation itself is obsolete, and does not reflect the current situation.

The most important argument explaining the need of the new PCA is the provision in the preamble of it, where is stated that Russia "is no longer a state trading country, that it is now a country with an economy in transition and that continued progress towards a market economy will be fostered" by the parties. That was a reflection on the Russian economic reforms in the early 1990s,[105] as well as the assessment by the EU and informal status of the

---

[102] BELYI, A., *The EU's External Energy Policy*, 2012, Polinares, EU Policy on Natural Resources, p.27

[103] EU –RF Energy Dialogue, 2008, The second progress report, available: http://ec.europa.eu/energy/international/bilateral_cooperation/russia/doc/reports/progress2_en.pdf

[104] See, The Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement, available: http://www.eu2008.si/en/News_and_Documents/download_docs/June/0627_eu_RUS-izjava.pdf; http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/, LEAL-ARCAS, R., *The EU and Russia as Energy Trading Partners: friends or foes?*, 2012, European Foreign Affairs Review, 14(3), p. 337-366, KONOPLYANIK, A, *A common Russia EU energy space (The New EU Russia Partnership Agreement, acquis communautaire, the energy charter and the new Russian initiative)*, 2010, in: TALUS, K., FRATINI P (eds), *EU-Russia Energy Relations* (Rixensart:Euroconfidentiel); BORDACHEV, T, *New strategical union, Russia and Europe challenged of the 21 century: possibility of the big deal*, 2009, M:Europa, p. 266 (Бордачев Т. В. Новый стратегический союз. Россия и Европа перед вызовами XXI века: возможности «большой сделки». М.: Европа). London, Chatham House: Russia and Eurasia Programme, August 2012. REP BP 2012/01; SHUMYLO-TAPIOLA, O. *The Eurasian Customs Union: Friend or Foe of the EU?* Carnegie Europe, 2012.

[105] KALINICHENKO, P, *Application of the PCA between the RF and the EU in Russian jurisprudence*, 2007, Zakon, #11 (Калиниченко П.А. Применение Соглашения о партнерстве и сотрудничестве между РФ и ЕС в российских судах, Закон)

RF as “a trading partner”. More than a quarter of the provisions of the agreement are not valid, and mostly the contemporary relations are based on the non-binding documents. This brings the situation of legal uncertainty, and low level of reliability of parties.

3.1.2. The Energy Charter Treaty

In the field of investment in energy sector, the culmination of the cooperation is the Energy Charter Treaty (signed in 1994 and entered into force in 1998), which included the development of the economic cooperation between the former socialist states and states-members of the OECD in the energy sector. It is the first international document on energy sector, and it is governing trade and investment issues related to energy and energy supplies.[106] The Energy Charter Treaty also falls into the category of the regulatory agreements, as it specifies the procedure for the application of regulatory measures for the energy sector. In particular, the ECT provides the procedure for dispute settlement caused by non-compliance by the contracting state international obligations, adopted in accordance with the ECT. Many consider the ECT as a model of global international arbitration mechanism for settlement of investment disputes. The Energy Charter Treaty is the basis, on which are going discussions between the EU and Russia. This is a multilateral agreement, which has been signed by 52 European and Asian states, including the states of the European Communities (EC and EURATOM), and ratified by 47 of them.

It is comprehensive that the energy sector requires long-term and capital intensive investments, which are supplied by the foreign investors, expecting the profits from their returns. At the same time these investments are exposed to many risks, including economic, political and legal, which host state may impose on the foreign investment in the post-

[106] ROGGENKAMP,M, *Energy Law in Europe*, 2000, Oxford, Oxford University Press, p.2-3

investment period.[107] Thus, many disputes occur between the investor and the host state, which needs to be efficiently settled without damage for the third parties.[108] The investor may seek to stabilize and secure their investments, by demanding specific clauses in the investment contracts, including umbrella or stabilization clauses, and the domestic investment laws of the host states.[109]

Due to the fact that the EU and Russia are connected by the fixed gas-pipeline system, which crosses several third transit states, the energy transit is one of the important issues. The Energy Charter Treaty consists of provisions on energy transits, and introduces the principle of the non-interference (article 7 of the treaty), nevertheless, due to the disparity between the EU and the RF, the additional energy transit protocol has not been concluded.[110]

Thus, the ECT developed the model of intergovernmental agreement (IGA) on the cross-border pipelines. It aims to create standard regulations which deal with legal issues in energy transit between investors and the state disputes and between states themselves. IGA deals mainly with issues along the pipeline infrastructure as a whole. IGA is a prototype for an international agreement or treaty among states through whose territories the construction

---

[107]BOUTE,A, *The Potential Contribution of International Investment Protection Law to Combat Climate Change,* 2009, Journal of Energy & Natural Resources Law, 27(3), p. 333 - 337

[108] There are several types of energy investment disputes, and experts classify them differently. As, BANKES, N., WHITSITT, E., *The Evolution of international investment law and its application to the energy sector*, 2013, in the evolution of international investment law, 51 (2), pp. 207-247, divide it into 4 categories of disputes (p.211-212): (1) involving economic and political structural adjustment in the host state, (2) triggered by the efforts of host state governments seeking to claim an enhanced share of resource rents, (3) in which host state governments seek to enhance the environmental or social regulatory regime within which existing investments operate, (4) in which the host state government seeks to withdraw economic support mechanisms for a policy measure that was introduced to support a particular energy or environmental policy; MARTIN, A.T., *Dispute resolution in the international energy sector: an overview*, 2011, Journal of World energy law and business, vol. 4, #4, p. 332-368, author divides it to (pp.334-336): state v. state disputes; company v. state disputes, company v. company disputes; individual v. company disputes; ZHUWEI W., *China, Central Asia and the Relevance of the ECT*, 2014,occasional paper, ECT, and HAN WANG in *Towards a cooperative framework for a China-central Asia energy transit community*, 2016, ECT secretariat knowledge centre, are talking about the types of the energy transit disputes, caused by: political, economic, technical reasons, by local community protection and environmental issues.

[109] CAMERON,P., *Stability of Contract in the International Energy Industry*, 2009, Journal of Energy & Natural Resources Law, 27 (3),p. 305 by the different legal techniques in order to achieve a degree of stability or security.

[110] LEAL-ARCAS, R., PEYKOVA, M., *Energy Transit Activities: Collection of Intergovernmental Agreements on Oil and Gas Transit Pipelines and Commentary*, 2014, Queen Mary School of Law Legal Studies Research Paper No. 177/2014, p. 1–54.

and operation of an identified pipeline system takes place. It deals with the broader issues surrounding the projects' realization, including co-operation, land property rights and tax harmonization, as well as other issues regarding project implementation[111].

Although the ECT established the common commercial practice in the energy area, nevertheless, there are several cases, where the parties of the ECT, including the EU and RF, are reluctant to apply, or even opting out the application of this treaty.

3.1.2.1. The ECT and the EU

According to the article 1 par. 3 of the ECT, the "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters. Thus, following that the decisions of the EU Commission are recognized as legally binding on all member states that are also parties of the ECT.

As has been mentioned, the parties of the ECT are not only EU member-states, but the EU as a whole. The EU had a significant role in the drafting and establishment of such instrument as the Energy Charter Treaty, in 1990s, and the EU, on its turn, used the ECT provisions in the establishing the EU common energy policy. Notwithstanding, the several cases illustrate, that the EU is unwilling to recognize the priority of the ECT in the relations with the EU member states.

The intergovernmental agreement introduced by the ECT the EU subordinated with its legislation. According to the Decision No 994/2012 EU, on establishing an information exchange mechanism with regard to intergovernmental agreements between EU member

[111] LEAL-ARCAS., R., PEYKOVA, M., CHOUDHURY, T., MAKHOUL, M., *Energy Transit: Intergovernmental Agreements on oil and gas transit pipelines*, 2015, RELP, 2/2015, 122-162, P. 123

states and third countries in the field of energy, the EU MS should *ex ante* inform about the content of the intergovernmental agreement they are signing, to ensure that such agreement is compatible with the EU law. It is obligation to check the compliance with competition rules and internal energy market legislation before the agreements are negotiated, signed and sealed. The member states should have to take full account of the Commission's opinion before signing the agreements, and the revised IGA Decision will extend its scope to non-legally binding instruments for an *ex-post* assessment (article 8) of the Decision.[112] Thus, the Decision on intergovernmental agreements is enhanced, and in line with the European Union law, namely articles 194(1)(b) TFEU – security of energy supply in the Union, and article 3(3) TEU – together with the article 194 (1) following the goal to establish a functioning internal energy market, in the spirit of solidarity between the member states.[113]

However, in a case of discrepancies between the ECT and the EU law, the priority has the EU law. There are several contradictions with understanding the ECT in the framework of the liberalization of the EU market. The third liberalization energy package of the EU brought the requirements on free third-party access to the pipelines and review of the long-term contracts, which apply not only inside the EU, but also on the third-states and third-parties as *acquis communautaire*, which are involved in the economic cooperation with the EU as a whole or the EU member-states. The mentioned European Energy Community (2005) besides the European Union, includes the European states outside the EU, on which apply some of the EU legislative acts.[114]

---

[112] http://europa.eu/rapid/press-release_MEMO-16-309_en.htm, Following the "old" Decision from year 2012, out of 124 IGAs, which were notified to the Commission, the Commission expressed doubts, that 17 subjected agreements are not in line with EU law.

[113] Proposal for a Decision of the European parliament and of the council on establishing and information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the filled of energy and repealing Decision No 994/2012/EU, Brussels, 16.2.2016 COM(2016) 53 final 2016/0031 (COD) available on https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v12.pdf

[114] countries from the South East Europe and Black Sea region – Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and the UN Interim Administration Mission in Kosovo, Energy

The application of the ECT by EU member states inside the EU illustrates the case *Electable (Belgium) vs. Hungary*, regarding the purchase prices of electricity.[115] In this case on the basis of the Belgium-Hungary BIT, the Hungary as a host state, undertook obligation to provide specific pricing conditions in the electricity sector, however due to the amendments into EU legislation, should follow the EU requirements. Thus, by attempting to fulfill EU MS duties, the state breached the obligations under the long-term contract, respectively the BIT terms and the obligations under the ECT. The *Electable*, investor from Belgium, made a claim against Hungary in ICSID under the ECT provisions.

The case brought several interesting points, and it is good to have a look at the EU Commission's opinions. Commission argued, that firstly, this arbitration tribunal has no jurisdiction, stressing, that the EU law has priority before the ECT, referring to the ECHR's approach on the principle of the "equivalent protection" of the EU and ECHR in the *Bosphorus case*.[116] Then, the Commission mentioned, as the EU was one of the active actors, drafting and promoting the ECT in the 1990s, then these two legal systems are based on the same international rules and principles, and thus, while interpreting the relevant provisions of the EU law and the ECT, it should be done in accordance with the Vienna Convention on the Law of Treaties (1969), article 31 (1), namely with consideration of the full context, and relations between the parties. Also, it states that in the agreements of the member states on accession to the EU, they agreed on the supremacy of EU law, and possible discrepancies between the ECT and EU law will not be resolved in accordance with the ECT article 16.

A tribunal had analyzed the case, and stated that, firstly, if possible, the ECT should be interpreted in line with EU law, secondly, the tribunal stressed that it has jurisdiction in this case. The tribunal substantiated it through the following arguments. EU law as a whole has

---

Community Treaty available on https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/Treaty

[115] *Electrabel v. Hungary*, ICSID case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 2012.

[116] judgement (30.06.2005) of the ECHR on the case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi vs. Ireland [GC]*, No 45036/98

the character of the international law. Moreover, if the EU decided to be the part of the ECT, knowing what kind of obligations it put on the parties, it should then make a reservation. If the obligations were incompatible with EU law, then the EU would not be a part of the ECT, thus, as the EU not just signed, but also ratified it, then there is no contradiction between the ECT and EU law. Further it states that the provisions of the ECT and the EU law might be interpreted harmoniously, as there is no contradiction between them.[117] Moreover, may be concluded that, as far as the whole EU is a signatory of the ECT, so the Commission's decision is obligatory to the EU member states, which are the signatories of the ECT.[118] This decision can be considered as a basis for the "long-term coexistence of the intra-EU ECT arbitration in accordance with the CJEU jurisdiction".[119] Interestingly, in 2014, Italy announced its withdrawal from the ECT,[120] with this in effect in 2016, thus, the future issue of the ECT and for some EU member states relations is uncertain.

Nevertheless, from this decision is not clear, what will be applicable in the case of the dispute between the EU or EU member state with the third country. Will the tribunals follow this decision, and recognize the priority of the EU law, as it is not contradicting the ECT? What will be the decisive factor – the investment made in the EU, thus the EU law should be applicable, or the international nature of the investment relations? It should be mentioned that the application of the ECT in the dispute with the third states does not bring the issue of incompatibility with the EU law, in comparison with the discrepancies within the intra-EU BITs.[121]

With the developing common investment policy as an EU exclusive competence, how would be resolved the issues of the long-term investment made previously on the ground of

---

[117] Compare the case *AES Summit v. Hungary* (Award, 2010), where the tribunal put priority of the EU, stressing that the ECT shall be interpreted in accordance with the EU antitrust law.
[118] FECÁK, T.*, Mezinárodní dohody o ochraně investic a právo EU*, 2015, Wolters Kluwer, CR, p. 189
[119] FECÁK, T., *Mezinárodní dohody o ochraně investic a právo EU*,2015, WK CR, p. 200
[120] http://www.energycharter.org/who-we-are/members-observers/countries/italy/
[121] KLEINHEISTERKAMP, J.,*Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty.* 2012, Journal of International Economic Law.15(1), p. 105-106.

the BIT with some EU member states? The tribunals show different, even competing approach. However, taking into consideration the nature of the ECT, the parallel participation of an EU member state and the EU as a whole is possible on the ground of the ECT.

What principle will follow the tribunals: *lex posteriori* related to the EU new provisions on the common investment policy, or *pacta sunt servanda*, regarding agreed provisions in the concluded agreements and treaties?

3.1.2.2. The ECT and the Russian Federation

The Russian Federation was one of the establishers of the Energy Charter Treaty in 1990s. The RF signed the treaty, and applied it provisionally, however has never ratified it.

The reasons for non-ratification of the ECT by Russia are seen by many academics different. On the one hand the ratification will accelerate the diversification of the EU energy supply. If Russia would ratify it, the gas supplies from Central Asia and the Caspian region (where the gas cost is lower, than in Russia) for the European market will increase.[122] But this would reduce the significance of Russian gas resources to EU market, what is economically unprofitable for Russia. On the other hand, in the case, if Russia would not ratify the ECT, it still could not prevent the diversification of the energy supply in the EU, inasmuch as in the EU already exist the real projects on this way. In addition, the need of the investments in Russia is higher than current demand on gas supply in the EU. The other academics[123] see this approach of the RF to the ECT, as inability to adapt, due to its inexperience with the free or liberalized market.

[122] KVOCHKO, LENSHINA,*Problems and perspectives of cooperation between Russia and the EU in the framework of the energy dialogue*. 2006, Moscow: Institute of international organizations and cooperation, p.9. See also: KONOPLYANIK, A., *Russian gas to Europe: from long-term contracts, on –border trade and destination clauses to…?*, 2005, Journal of Energy and Natural Resources Law, 23 (3), p. 282

[123] see above mentioned ŠTURMA,P., BALAŠ, V., *Mezinárodní ekonomické právo*, BĚLOHLÁVEK, A.*, Ochrana přímých zahraničních investic v energetice*, 2011, C.H. Beck, Praha, p. 10-11

Another opinion among the Russian experts, the proponents[124] of the ECT and its ratification is that they consider non-ratification of this treaty being caused by political structures, which have a share in the monopolist company Gazprom and misinterpret the provisions of the ECT. Proponents stress that the ECT is the best basis, which includes provisions on energy and investments, and it is significant for promotion and defense of the RF interests in the global energy sector. Besides the provisions on the protection of investments in the energy sector, breaches of contract, the tools of dispute resolution, but also the ECT offers the protection of the transit, as one of significant factors for the RF, due to the transit conflicts in energy, particularly gas, delivering to the EU.

Additionally, the history of the relations between the ECT, RF and the EU should be taken into account. Since the RF has signed the ECT in 1992, it has been an active participant of the treaty until the year 2003, when the EU adopted the second liberalization package. Since that time has started to diverse provisions of the ECT with the legislation of the EU and the RF. In 2009 was adopted the Lisbon Treaty and the third energy liberalization package, and this year the RF announced the termination of the provisional application of the ECT, due to the lack of the ECT in the RF-Ukraine gas conflict. In 2014, after the decision of Hague Permanent Court of Arbitration in the *Yukos case*, the RF suspended its participation in the ECT, although stating that it needs an adequate amendment by the new treaty – International Energy Treaty.

However, as the energy sector in the RF is being liberalized, and in order to have adequate and transparent relations with the liberalized or liberalizing the EU market, there is a need to form a single legal framework for the relations of these actors in the energy sector.

---

[124] TALUS, K., *EU Energy Law and Policy: a critical approach*, 2013, Oxford, Oxford University press,p .242; RUSNAK, U., KONOPLYANIK, A., *Energy Charter without Russia* (Энергетическая хартия без России. 12.04.2015. http://www.vedomosti.ru/opinion/articles/2015/04/13/energeticheskaya-hartiya-bez-rossii (01.03.2017)

For the RF there are as much benefits in the ECT as the risks, however, non-participation of the RF in the ECT will bring the difficulties in the "*integration process in the global energetics and the deprivation of opportunities to use protective tools to improve its energy security, for example to protect against the sanctions*", or the "*risks of the liberalization*". Many companies in the EU made their claims against the RF under the article 26 of the ECT. In respect to importance of the ECT, should be also considered the situation with the pipeline OPAL falling under article 13 of the ECT, and on the basis of which the *Yukos* shareholders have made a claim against Russia in 2004.[125]

Noteworthy, the Russian Federation did not ratify the ECT, however the state has applied the treaty provisionally until 2009, based on its article 45 (1). In 2008, in its overview of the Russian investment climate, the OECD stressed that "*despite its non-ratification of the Energy Charter Treaty (ECT), Russia takes part in its activities, providing for instance information on some aspects of its legal framework in the energy sector*."[126]

In 2009, Russia temporarily withdrew from the provisional application of the ECT, although remains a signatory of the treaty.[127] States, which have not ratified the ECT, reason their position as the ECT has secured a more favorable treatment for foreign investors in the existing contracts. The decisions in the cases *Plama v. Bulgaria*[128] or *Kardassopulous vs*

[125] "non-participation in the ECT will lead Russia to the margins of integration processes in the world energy sector and denial of the ability to use protective tools to enhance its own energy security, for example, to protect against sanctions" RUSNAK, U., KONOPLYANIK, A., *Energy Charter without Russia* (Руснак, У., Конопляник,А., Энергетическая хартия без России. http://www.vedomosti.ru/opinion/articles/2015/04/13/energeticheskaya-hartiya-bez-rossii (01.03.2017) 12.04.2015.

[126] OECD 2008 supra note 18. The Energy Charter Secretariat's Blue Book lists Russia's exceptions to non-discriminatory treatment of investors from ECT-member states, including limits on the ability of foreigners to own certain types of land, local content and services requirements. The latest Blue Book is available at: http://www.encharter.org/fileadmin/user_upload/document/Blue_Book_2007_ENG.pdf

[127] In summer 2009 the RF published the Decree of the Government of the RF No 1055-r on the notice of intention not to become a party of the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects. Since the 19.10.2009 the RF stopped to apply the Treaty on a provisional basis, in accordance with art. 45 (3) (a) of the ECT.

[128] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24

Georgia[129] confirm it, and for the RF as the energy producer and supplier, and most of the investors in this area being a part of the ECT seems risky. The claimant brought an action based on the ECT and the provisions of BIT between Georgia and the state of claimant – Greece.[130] The tribunal in para 693 of Decision confirmed the legality of such claim, and stated that the respondent state breached the fair and equitable treatment standard by expropriating and failing to compensate the loss. But important for Russia and the following issues brought the para 211 of this case decision, where tribunal stated "each signatory state is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so".[131]

Trade provisions of the ECT were supplemented in 1998 by the Trade Amendment, directed on the contracting parties, which are not members of WTO – to adapt the rules for the energy sector "by the reference". With the accession of the RF to WTO in 2012, trade relations with the contracting parties of the ECT refer to the rules of the WTO. These rules including the dispute settlement, applied for Russia as well.

The transit issues are for the RF of great importance, with which are associated significant volumes of Russian energy export supplies. Thus, the dependency on the transit states causes the high risks for the Russian export, which the RF is seeking to reduce, by the liberalization of the energy sector - developing the transport infrastructure and access of the foreign investors in pipeline and network infrastructure. However, the RF stresses that the WTO principles are not applying to the pipelines. Russia refers to the Protocol on its accession to WTO, where the state does not undertake any obligations and may enter restrictions up to closing the market access to the foreigners.

Article 7 of the ECT states "Each contracting party shall take the necessary measures to facilitate the transit of Energy Materials and Products consistent with the principle of

[129] *Ioannis Kardassopulous, and Ron Fuchs v The Republic of Georgia*, ICSID Case No ARB/05/18, ARB/07/15.
[130] Under art. 13 (1) and. 10 (1) of the ECT, and art. 2 (2) of the mentioned BIT
[131] *Ioannis Kardassopulous, and Ron Fuchs v The Republic of Georgia*, ICSID Case No ARB/05/18, para 211

freedom of transit and without distinction as to the origin, destination or ownership of such energy materials and products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges." This provision is of wide interpretations and in particular it was used in the international and regional negotiations as an argument in favor of the access to the Russian pipeline system.

One of the main tasks of the ECT is to avoid interruptions or reductions in the existing transit flows, in the event of the disputes arose from the transit, and article 7 para 7 offered the special conciliation mechanism, with the possibility of the arbitration settlement provided by the article 27. In the absence of the ECT, there is a possibility to apply the article V of the GATT. However, in practice, during the RF-Ukrainian gas conflict in 2009 the ECT mechanisms have not been used, as none of the parties has appealed to the Secretary General with the summarizing the dispute notice. Additional uncertainty was connected with the requirement of the mentioned provision to exhaust "*of all relevant contractual or other dispute resolution remedies previously agreed between the contracting parties*".

The ECT is of a great importance for the energy investments in the RF. In accordance with the article 45 (3) (b) of the ECT, the treaty will apply[132], in a full subject to the restrictions provided in article 45 (1), on the relations between the foreign investors and the RF as a host state, in respect with guarantees and settlement of disputes regarding the investments made in the territory of the RF in the period of its provisional application. In consideration of the international instruments applicable to the regulation of the legal regime of the foreign investments in the energy sector, it is worth to note that there were in parallel two regimes – bilateral investment treaties and the Energy Charter Treaty. While foreign investors, who made investments in the RF after its withdrawal from the ECT, can rely only on BIT, although a part of the energy investment projects will be under the protection of the

[132] From the date of termination of the provisional application.

ECT until the year 2029, in spite of the current opposite position of Russia. Thus, in practice, many investors base their claims under both the ECT and BITs, as they do not consider the ECT as a sufficient legal instrument for investment protection. Due to the fact that the ECT, in contrast to BITs, provides a wide range of guarantees in the energy sector, the RF deals and will deal in the next decade with the claims based on the ECT.

Moreover, within the framework of the ECT so far registered more than 30 (in 2016 - 50) arbitration proceedings, including the 3 formally separate proceedings investor versus host state – Russia, which collectively makes the largest known *case Yukos vs Russia*.[133]

The path of the RF, which withdrew from the ECT, follows the USSR history relations on discussion on the GATT/WTO, which however afterwards should comply with the new requirements and new realities of the market and states, most of which are the members of the WTO.

3.1.2.3. *Yukos case* in a frame of the ECT application

This case is interesting from the legal point of view on the application of the provisions of article 45 of the ECT on the investment agreement for a state that has signed but not ratified yet the Energy Charter Treaty, and at the time of the submission of a claim – applied the treaty provisionally. That provisional application of the treaty is considered by some Russian academics as the state is obliged to avoid such actions, which will deprive the treaty its purpose and aims until the time, the state will clearly express its intention to be or not to be the party of the treaty (article 18 of the VCLT). Also, that state agreed to temporarily

[133] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, See more at: http://www.italaw.com/cases/544#sthash.RQN6oov8.dpuf
Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, See more at: http://www.italaw.com/cases/1175#sthash.etvbGN7P.dpuf
Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, See more at: http://www.italaw.com/cases/1151#sthash.Uq1VdpMN.dpuf

apply provisions of the treaty and bear the international legal responsibility for the breach of its duties, followed from the provisionally applied treaty (provisional application under article 25 of the VCLT).[134]

The case *Yukos v. Russia* has started in 2003. The claimant is the company (70,5% of the shares in Yukos) owned by the foreign companies, registered in the areas with the economic benefits – in the United Kingdom's Isle of Man, and Cyprus. Yukos was operating in the RF since 1993, in the oil gas industry, on the basis of the state companies – Yuganskneftegaz and KuybyshevOrgSintez. In 1995-1996 the state privatized the Yukos, and until the year 2000 the Yukos was the largest energy company in the RF. Since the company has become an ownership of the foreign investors registered in the offshore zones, it used the possibility of the reduction of the costs, and tax avoidance in the territory of the host state. It is comprehensive, that foreign transnational corporations, which avoid paying taxes, have an advantage compared to local entrepreneurs' position. Understandably, that it is not only unfair, but also negatively affecting the country's economic growth. After several articles in the foreign newspapers on the Yukos' tax avoidance[135], the RF in 2003 started an investigation on the tax avoidance and evasion, which reflexed in the high amount of the fines, and led to the insolvency of the claimant in the upcoming years. The claimant argued that the actions of the state were not in compliance with law, and were based on the discriminatory basis as such fines were imposed only on Yukos, not on the other comparable companies operating in this sector. The claimant further stated that the respondent failed to treat company's investments in Yukos in a fair and equitable manner, thus breaching the articles 10 (1) and 13 (1) of the ECT, and claimed for USD 114 billion.

---

[134] OSMININ, B., *The conclusion and implementation of international treaties and domestic law,* 2010, monography, Moscow, Infotropic Media, p. 166-167 (Осминин, Б., Заключение и имплементация международных договоров и внутригосударственное право)

[135] BESSON, S., 04.03.2002*, La Suisse abrite les fonds évadés d'un géant russe, Swiss newsportal Le Temps*, https://www.letemps.ch/economie/2002/03/04/suisse-abrite-fonds-evades-un-geant-russe, and BESSON, S., 06.03.2002, *Yukos dément avoir eu des comptes en Suisse*, https://www.letemps.ch/economie/2002/03/06/yukos-dement-comptes-suisse

The *case of Yukos v. the RF*[136] is on the basis of the ECT, which is implemented by the Permanent Court of Arbitration at The Hague on the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The Hague Tribunal decided in 2014 that the RF should compensate unlawful expropriation of the investors' (Yukos) activities in the amount of USD 50 billion. Thus, the provisional application of the ECT started to question by many lawyers and academics. Some of them[137] argue that the RF has rejected application of the Treaty even provisionally. Šturma and Balaš[138] refer to the Report of the International Law Commission[139], in which was explained the international binding legal instrument, and the violation of this obligation may lead to the international liability, and this obligation is enforceable by default.

However, the government of the RF has declared that the RF has never applied the ECT only in 2009 when it was withdrawing from the ECT. The RF applied for the annulment of the decision of the Hague Tribunal to the District Court of the Hague, which in 2016 stated that as the RF has not ratified the ECT, as it is in the conflict with the Russian law, therefore, the previous court did not have the appropriate competence to decide in that case, thus, the RF is not committed to compensate.[140]

---

[136] *Hulley Enterprises Limited (Cyprus) v. the RF, PCA case No AA 226, Yukos Universal Limited (Isle of Man) v the RF, PCA case No AA 227, Veteran Petroleum Limited (Cyprus) v. the RF, PCA case No AA 228,* final award https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

[137] as KONOPLYANIK claims that the ECT has not entry into force. KONOPLYANIK, A., 2010, Russia's withdrawal from the temporary use of the ECT and the "YUKOS affair": commentary on the outcome of the procedural decision of the Arbitration Court in The Hague Neft', gas i pravo, 1/2010, pp.42-49.(Конопляник,А, Выход России из временного применения ДЭХ и «дело ЮКОСа»: комментарий по итогам процедурного решения арбитражного суда в Гааге, Нефть, Газ и Право) available on http://www.konoplyanik.ru/ru/publications/articles/461_Vyxod_Rossii_iz_vremennogo_primeneniya_DEX_i_delo_YuKOSa_kommentarij_po_itogam_procedurnogo_resheniya_arbitrazhnogo_suda_v_Gaage.pdf , also see BELZ, M, *Provisional Application of the ECT: Kardassopoulos v. Georgia and Improving Provisional Application in multilateral treaties*. 2008, Emorgy International Law Review, 22, pp.727-760.

[138] ŠTURMA, P., BALAŠ, V., SYLLOVÁ, J., JIRÁSKOVÁ V., *Vybrané problémy sjednávání mezinárodních smluv a jejich vnitrostátního projednávání*, 2010, závěrečná studie k projektu MZV, č. RM 05/01/10, available on http://www.mzv.cz/file/570095/Vybrane_problemy_sjednavani_mezinarodnich_sm_luv_res.pdf

[139] Report of the International Law Commission on the Work of Its Eighteenth Session, YILC 1966, Vol. II, p. 210, SUPRA NOTE 20, in http://www.mzv.cz/file/570095/Vybrane_problemy_sjednavani_mezinarodnich_sm_luv_res.pdf

[140] available on http://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf

The issue arises in the assessment of the Tribunal's jurisdiction, whether the inconsistency between the RF legislation and the provisions of the ECT was considered on the fragmented (piecemeal) or the universal (all-or-nothing) approach. The court took the "piecemeal" approach, where each provision of the ECT was compared to the RF national legislation and where the ECT should apply only when it is consistent with the law of the RF. Thus, the court concluded that article 26 should not be applied, as it is inconsistent with the RF law, and the decision of the arbitration court was annulled.

Some authorities[141] opine that this was incorrect approach and that these grounds should have not been dismissed and concluded that Hague District Court reached a correct outcome but for the wrong reasons, where it should pay closer attention to the articles 45 and 21 ECT specifically. With the emphasis on article 21(5)(b)(i) : "<…> bodies called upon to settle disputes <...> shall make a referral to the relevant Competent Tax Authorities". A requirement to exhaust local remedies, nevertheless the Yukos Tribunal overcame this by explaining such "referral <…> would clearly have been futile <...> and was therefore not required."[142]

Thus, an important issue for the investors and contracting states is whether the provisions of the ECT apply in the territory of the Russian Federation, and if yes, in what scope. One of the derivatives, is that the decisions on Yukos will have a significant impact on the other cases based on the ECT, where Russia is a part of the procedure, and on the cases, in which the other states have not ratified the ECT. The other derivative is that there are considered not only commercial interests of the investor, and even though the whole

[141] DILVEKA, S,Head of the Mena Chambers, speech in the Energy and Arbitration seminar in Brussels, organized by the Association for International Arbitration and The Vienna International Arbitral Centre, Arbitration Austria, Greek Energy Forum, 19.05.2016.

[142] On materials of the seminar Energy and Arbitration, panel Energy Arbitration, EU Law and Russia, 2016, organized by the Association for International Arbitration in partnership with the Vienna International Arbitral Centre, Arbitration Austria, and the Greek Energy Forum, 19.05.2016 in Brussels.

arbitration is based on the principle *lex mercatoria*[143] as investment arbitration under the article 26 of the ECT, and dispute reviewed on the rules of the UNCITRAL, but also the strategic interest of the host state, and it regarding the principle *lex public* or *ordre public*.

Professor Cameron[144] noted that there is a diverse range of claims filed under the ECT from across Europe, not limited by the territory of the European Union, stated that "the high profile of the state created difficulties in most energy disputes for informal or mediation based forms of dispute settlement despite their many attractions."

The article 11 being one of the fundamental documents of the international law, namely, the Vienna Convention on the Law of Treaties, states "*the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed*." As the convention is a part of the national system of the RF, in the Federal law "On the international treaties", article 6 para 1 is provided, "*the RF has agreed to be bound by international treaty, and it may be expressed by: signing the contract, exchange of instruments constituting a treaty, ratification of the treaty, approval of the contract, adoption of the treaty, accession to the treaty, use of any other means of expression of consent, on which agreed the contracting parties*", and the article 16 adds further "*such agreements (requiring a mandatory ratification) in particular, are those, modifying the provision of federal laws or requiring the adoption of the new laws*".[145]

---

[143] SORNARAJAH, M., 2010, The International Law on Foreign Investment. 3 ed., Cambridge university press, P. 38, supra note 19

[144] CAMERON,P., speech in the Energy and Arbitration seminar in Brussels, organized by the Association for International Arbitration and The Vienna International Arbitral Centre, Arbitration Austria, Greek Energy Forum, 19.05.2016.

[145] Federal Law from 15.07.1995 No 101-FL, amended on 25.12.2012. Федеральный закон от 15.07.1995 N 101-ФЗ,(ред. от 25.12.2012), "О международных договорах Российской Федерации", *"Выражение согласия Российской Федерации на обязательность для нее международного договора: Согласие Российской Федерации на обязательность для нее международного договора может выражаться путем: подписания договора; обмена документами, образующими договор; ратификации договора; утверждения договора; принятия договора; присоединения к договору; применения любого другого способа выражения согласия, о котором условились договаривающиеся стороны." "К таковым в*

Article 45 (1) of the ECT states "*Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*." The Treaty was signed and approved by the government, provided by the Government Decree on 26.08.1996 No 1016. However, should be differentiated on the one side "*obligation not to deprive the treaty of its object and purpose before it will entry into force*" under article 18 of the Vienna Convention and part II art. 31 of the RF Federal Law on International Treaties, which involves the signing of the contract, and on the other side "provisional application", in accordance with article the 25 of the Vienna Convention[146] and the article 23 RF Federal Law on International Treaties, which does not imply on signing the treaty. While signing the ECT the signatories commit themselves that they will abide by it provisionally, for the period between the signature and ratification, to the extent that it is not contrary to national law.

In the explanatory note to the draft law on the ratification of the ECT, made in 1996 by the RF government is mentioned that at the time of signing the ECT, on the provisional application, it did not contradict the Russian legislation, however, following the art. 45 (1) should be taken into consideration the phrase "the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Thus, the possible application of the ECT in the RF should be in accordance with the rules and law established by the Constitution of the RF (part III art. 15 on the need of official publications), and the law on international treaties (part II, art. 29), limitations of which however weren't taken into consideration. However, once the party signed the treaty, it should have declared all its

---

частности, относятся договоры, модифицирующие положения федеральных законов или требующие принятия новых законов".

[146] Article 25 (1) A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) The treaty itself so provides; or (b) The negotiating States have in some other manner so agreed. (2)Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

restrictions and limitations, based on the article 45 (2) (a) in the time of signing, or in the nearest time, not in 15 years from the signing.

The case of Yukos as it may seem is not that easy. Even though the shareholders of the company are registered in the offshore zones, the company was functioning according to the Russian legislation and positioned itself as a Russian company, with Russian nationals, thus, many lawyers suggesting it should request for the compensation in accordance with the Russian law. In addition, the shareholders had not used the possibility of the Russian judicial system, but directly applied for the international tribunals. To that conclusion came also the Swea Court of Appeal, abolishing the Stockholm arbitration court and District Court of Stockholm on same case, based on BITs between the Russian Federation and Spain (Spanish shareholders of Yukos).

There is an interesting connection between the ECT and the Agreement on Partnership and Cooperation, which was proposed by Russia. It referred to the article 17(1) of the ECT on denial of benefits, and provisions of the mentioned partnership agreement, when the company operating or investing in the host state should have the continuous link with the state of its registration, which in the case of Yukos was not proven.[147] However, the tribunal declined this argument, as the ECT and the PCA do not have obvious relations, and do not refer to each other.[148] In reality, the PCA expressly refers to the ECT in the article 105.

The *Yukos case* is also an illustrative example of the fragmentation of the judicial system in the international investment law. Taking into consideration that in the international law does not exist centralized judicial system, thus, there is no mechanism of appeal and abolition of the original decision. Moreover arbitration award should be final, according to the, in particular, UNCITRAL rules, or provisions in the bilateral investment treaties. Would

---

[147] Para 446-447 of the PCA interim award 2009 on admissibility and jurisdiction, available on http://cisarbitration.com/wp-content/uploads/2013/02/Yukos-v-Russian-Federation-Interim-PCA-Arbitration-No-AA-227-Award-dated-30-Nov-2009.pdf

[148] Ibid, Para 457

be the decision of the Permanent Court of Arbitration more powerful, and would be counted the decision of the District Court of Hague? Would the same apply to the Stockholm arbitration and the Stockholm's courts? In the above mentioned conflict of the international judicial organs – which court would have a priority? The revision of the arbitration awards by the judicial bodies can be disregarded by the other courts and institutions, as for example in the case of application the New York Convention 1958, some courts are recognizing the decision of the first tribunal or first instance. This in detail will be discussed in this thesis in the chapter 3.3.4.

By the above mentioned questions the author of the thesis wants to emphasize the fragmentation of the international law, and the consequences as for the parties of the dispute, so for the development of the international law itself. Although the decisions of the dispute settlement bodies, as arbitration tribunals or national and international courts shade into each other, to what extent will be the priority of the one or the other one decision, or what will be considered as the final binding decision is uncertain and varies from one to another case.

The other issue is the amount of the compensation. Is it a prompt, adequate and effective compensation for expropriation? The article 13 of the ECT states: "*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation")*". Further ECT repeats International Law standards, clarifies – "*except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation*". Before analyzing the compensation, it is good to understand, what is it an expropriation.

3.2. Expropriation in international investment law

Expropriation *de iure* means the depriving of investor's property by a court decision or on the grounds established by an international or national law, which however does not entail the termination of the property right. On the other side, expropriation de facto is when the property right terminated by a court decision on grounds of the international or national law for the state needs.[149]

Expropriation is known as lawful, where such measures are taken in accordance with the national and international law, and unlawful. Šturma and Balaš emphasize that should be differentiated the expropriation and the regulated taking of property, however on the basis of the before stated legal conditions.[150] The decision of the tribunal in a case *BP, Texaco Liamco v. Libya* (1977), indeed confirms that there is a sovereign right of the state to expropriate the concession, based on the investment contract in accordance with the national law of the host-state, thus the breach of the contract is not unlawful under the international law.[151]

Brownlie points out that "*state measures, prima facie an exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation."*[152] Sornarajah refers expropriation to the nationalization.[153] The OECD Draft Convention on the Protection of Foreign Property (1967) provides that "*no party shall take any measures depriving, directly or indirectly, of his property a national of another party*", unless the international conditions

---

[149] Civil Code of the RF defines it as nationalization, part III, art. 235 par. 2

[150] ŠTURMA, P., BALÁŠ, V., *Mezinárodní ekonomické právo*, 2013, 2 Ed., p. 311. as in case Emmanuel Too 1989,23, Iran-US CTR 378, ICSID, AMCO v. Indonesia, UNCTAD „Taking of property“, Geneva, 2000.

[151] ŠTURMA, P., BALÁŠ, V., *Mezinárodní právo ekonomické*, 2013, 2 Ed. ,2. p. 337-338

[152] BROWNLIE I., *Public International Law*, 2003, 6th ed. Oxford, Oxford Press, p. 509

[153] SORNARAJAH,M., *The International Law on Foreign Investment*. 2010 3 ed., Cambridge university press, p. 207

are complied with – in public interest, non-discriminatory, in accordance with law, with paid fair and proportionate compensation.[154] Šturma and Balaš add that such state action should be transparent, and in accordance with the international legislation, in a public interest, not in a private interest, or interest of any competitor on the market. Moreover, it should be also reviewed from the point of the valid international legal acts.[155]

Expropriation is known of two kinds: direct and indirect or "creeping" one. In the first case - the investor's property is transferred to the state ownership, in the second – the investor loses control of his property, however without transfer of ownership. Paragraph 3 of article 13 of the ECT provides that the expropriation "*shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares*."[156]

In the BITs between the RF and EU member states expropriation is determined differently, as "*expropriation, nationalization or subject to measures tantamount to expropriation or nationalization*"[157] or also "*measures de iure or de facto, in whole or in part, nationalization, expropriation, requisition or any measure having similar consequences*"[158], or "*measures depriving investors of the other contracting party of their investments*".[159] The main issue addressed in the BITs is the question of the application of state measures, which restrict the activities of the foreign investor or in the nature of expropriation or nationalization of the foreign property. In the BITs is mentioned the only reason of such restricting regulatory measures by the state – if it is in the "public interest", however there is no definition of the term and scope of this term.

---

[154] OECD Draft Convention on Foreign Property. Article 3, 12.10.1967. P. 23-25.
[155] ŠTURMA, P, BALAS, V, *Mezinárodní ekonomické právo*, 2013, 2. Ed, p. 312
[156]http://www.eurasiafinace.ru/naunye-stati/item/904-dekh-kak-istochnik-mezhdunarodno-pravovogo-regulirovaniya-inostrannykh-investitsij.html
[157] article 5 par. 1 BIT RF-Czech Republic
[158] article 5 BITs RF-Italy
[159] article 6 BITs RF-Netherlands

The issue of such regulatory measures is still relevant, and parties in multilateral treaties attempt to list all possible situations. However, that is hard to provide all occasions and possible reasons, when the regulatory measures of the state are violating the investor's property rights.

Taken into consideration the importance of the investments themselves, should be also taken into account strategic areas of the state policy, such as energy sector, connected with its infrastructure investment projects, based on concession contracts, where the investor seeks to obtain from the state corresponding guarantee of creeping nationalization to recoup the investments. However, should be taken into consideration the importance of the foreign investments, as they are mostly stabilizers of the national economy, stimulating the economy, thus, the state should better use the potential of the investment, and limit the use of the expropriation measures.

3.2.1. Justification of expropriation: public purposes

The right of any state to the compulsory withdrawal of foreign investment, private property belongings to foreign natural and legal persons, follows from the universally recognized principle of international law, as the sovereignty of the state. If the capital investors tend to insure in the widest possible extent from the risk associated with the nationalization, expropriation, political instability, etc., at the same time the host state concerned to eliminate the risk of economic, political and ideological enslavement, which may follow with the investment flow. In the case *Santa Elena v Costa Rica* the tribunal decided, that "*the international law allows the Government of Costa Rica to expropriate property belonging to foreign investors in its territory for public purposes with the timely*

payment of an adequate and effective compensation".[160] The public interest and the insurance of the priority of the society as a whole, its security and stability are the main factors, host states are considering while providing the opportunity to the foreign capital.[161] The case *Kardassopolous v Georgia*[162] based on ECT illustrates the importance of the public interest, as the development of the oil pipeline infrastructure, over the individual's property rights. Therefore, what are the public purposes or public interest, in accordance with the article 13 (1) ECT?

The definition of the public interest[163] is very broad, and it can be justified as saving or recovery of the state economic system. On the other side, the main issue is the compliance of the state with the legal procedure of expropriation, and provision of the adequate compensation. In this regard, the issue would be the legitimacy of the valuation of the expropriated assets, on the basis of which the amount of compensation is set.[164]

Two unbinding United Nations resolutions[165] reaffirm the right of the states "*to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent*". Also, to determine the form and amount of compensation, which shall be settled under the domestic law of the nationalizing State, and by its tribunals, unless, it is freely and mutually agreed by all States concerned, that other peaceful means be sought on the basis of the sovereign equality of States, and in accordance with the principle of free choice of means. Malanczuk

---

[160] *Santa Elena v Costa Rica* (above n. 80, par. 71)

[161] DANELYAN, A, *International economic law in the conditions of the globalization: problems of development*, 2014,Law and State, Theory and Practice,#1 (109) p. 131 (Данельян, А., Международное экономическое право в условиях глобализации: проблемы развития, Право и государство: теория и практика).

[162] *Ioannis Kardassopolous v Republic of Georgia*, ICSID Case No ARB/05/18, award 03.03.2010, para 391

[163] HARRINGTON, MATTHEW P., *Public Use' and the Original Understanding of the So-called 'Takings' Clause*, 2002, Hastings Law Journal 53,p. 1245–1301

[164] HOCKE M., *Have Measures Adopted by States to Cope with the Global Financial Crisis Been in Accordance with their Obligations under International Investment Law*, 2012, Goettingen Journal of International Law. Vol.4, #1,p. 177 - 197.

[165] Resolution of UN General Assembly 3171, Resolution 3281, article 2 para 2 - Charter of Economic Rights and Duties of States

further refers to the UN Resolution No 1803 (year 1962) on "Permanent Sovereignty over Natural Resources",[166] which provides *inter alia* that "states are free to restrict or prohibit the import of foreign capital."[167]

The public interest in some point could be seen as the situation of the necessity of a particular state. Chapter V article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[168] provides the condition of the "state of necessity", where the State is not liable for the internationally wrongful act, if it "is the only way for the state to safeguard an essential interest against a grave and imminent peril" and "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole".

Attempts to access the "state of necessity" are often in the investment arbitrations. In such cases, the arbitration tribunals mark an exception of the situation, and the necessity of such measures in order to protect the public/state essential interest. In the case *LG&E vs. Argentina* the exceptional situation was in the riots caused by the financial crisis and the action of the Argentine government. As a result, the tribunal held that the authorities were required to take an immediate and decisive action to restore the order, therefore the state of necessity was justified.

The other side took the tribunal in the other cases against Argentina[169], where the argument was that the state itself contributed to the occurrence of such "state of necessity", as only the state is responsible for the development and implementation of its economic and

[166] BROWNLIE, I.,*BDIL*, 1997, p. 235, SCHRIJVER,N., *Sovereignty over Natural Resources. Balancing Rights and Duties*

[167] MALANCZUK, P. 1997, *Modern International Law*, 1997, 7th Edition, Taylor & Francis e-Library, 2002, p. 236.

[168]International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,2001,Yearbook of the International Law Commission, 2001, vol. II, Part Two http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[169] See *CMS Gas Transmission Company v. The Argentine Republic,* ISID Case No ARB/01/8, *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, *BG Group Plc v Argentina*, UNCITRAL Award, 24.12.2007, *National Grid plc v The Argentine Republic*, UNCITRAL Award, 03.11.2008

decision-making policies.[170] Those cases were a consequence of the economic crisis in Argentina in early 2000s. The claims were mostly based on the legislation banning the companies to set tariffs for gas.

3.2.2. Justification of expropriation: non-discriminatory basis

The ECT clarifies, that expropriation should not be made on the discriminatory basis. The approach to the definition of the discrimination is based as on the basis of nationality, or on the basis of the prohibition against discriminatory treatment.[171] Should be differentiated the foreign companies and the companies with a foreign element.

The BITs between the RF and Italy, Ireland and Germany contain so-called "protection and security clause", which covers the legal entities that are wholly or partly owned by a foreign investor. For the other states applies mentioned Law "on foreign investment", where article 8 states "it will apply to the legal entities with foreign investment, if the BIT includes such clause, in accordance with which the national legislation applies, if it provides priorities in comparison with BIT". As the article 10 of the RF-Sweden BIT states that it "shall not restrict the rights and benefits accorded in respect of the investments of investors of a contracting party on the basis of the national legislation of the other contracting party or of other international agreements to which both contracting parties are parties".[172]

A similar opinion have Dolzer[173] and Sornarajah[174], stressing out the non-discriminatory approach. However, it is difficult to prove the discriminatory character of the

[170] *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25.09.2007

[171] DOLZER, R., SCHREUER, CH., *Principles of International Investment Law*, 2008, 1st ed, Oxford, Oxford University Press,p. 176-178

[172] http://investmentpolicyhub.unctad.org/Download/TreatyFile/2226

[173] DOLZER R., STEVENS, M., *Bilateral Investment Treaties*, 1995, ICSID,pp 98- 99.

[174] SORNARAJAH M., *The International Law on Foreign Investment*. 2010. 3 ed., Cambridge university press, p.283

expropriation measures, moreover in specific circumstances, as economic or financial crisis.[175]

But what is discrimination in the investment law, and against what it should be showed? In the case *RosInvestCo UK ltd v the RF*[176] in 2007, the SCC tribunal was analyzing the issue of discriminatory approach. The claimant company incorporated under English law, by registration in the Isle of Man, and one of the Yukos shareholders, claimed under the USSR-UK BIT, that against it was undertaken discriminatory approach by the host-state Russian Federation. The RF discriminated the British company by applying the tax assessment only against Yukos, and not in respect of any other oil companies, which led to the expropriation the assets of Yukos.[177] It further stated, that the RF is misinterpreting the use of the term "discriminatory" in article 2 (2) and article 5 (1) of the BIT.

The respondent argued that claimant does not provide the difference of the interpretation of the alleged articles, as the article 2 (2) prohibits discriminatory measures that impair the management, maintenance, use, enjoyment or disposal of investment in its territory of investors[178], and article 5 (1) "extends the prohibition of discriminatory treatment to expropriatory measures".[179] Respondent stated that the claimant has not shown that "measures complained were based on foreign ownership of Yukos' shares", and referred to the case *Noble Ventures v. Romania,* which required that "*the claimant has to demonstrated that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality*".[180]

---

[175] KEPPLER, J.H., SCHULKE, CH., *Investing in the Energy sector: an issue of governance*, 2009, Gouvernance europeenne et geopolitique de l'energie, available: http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/42/050/42050162.pdf

[176] SCC Case Ano. Arb. V079/2005 (UK/USSR BIT), Final Award, 12.09.2010, available on http://www.italaw.com/sites/default/files/case-documents/ita0720.pdf .

[177] Para 536-538, p. 229-230 of the case *RosInvestCo v. Russia*

[178] BIT USSR-UK, available on http://investmentpolicyhub.unctad.org/Download/TreatyFile/2235

[179] Para 548 of the judgement *RosinvestCo v. Russia* p. 232.

[180] Para 548-549 of the judgement *RosinvestCo v. Russia* p. 232.

The Tribunal carved up two conceptions of the discrimination, taking into account two interpretations by the parties. Firstly, respondent's explanation of the term that the measures taken by the Russian tax authorities were irrespective of its domestic or foreign shareholders. Thus, the discrimination on the ground of the nationality had not had a place. Secondly, the tribunal found, taking into consideration the claimant's interpretation that the discrimination was, but based on the competition area or between the competitors, where the tax assessments were made solely against Yukos.[181]

The tribunal further found that the measures taken by the RF, considering their cumulative effect on Yukos do not respond the requirement of the BIT of the fair and equitable treatment, do not pass the test on integrity, non-confiscation nature and non-discrimination and, thus, are considered as expropriation, in accordance with the provisions of the BIT.[182]

3.2.3. Compensation of expropriation

Compensation is one of the forms of the reparation for a wrongful act in accordance with the international law of state responsibility, and in international investment law, the monetary compensation is the most used type, which plays a practical role. Alongside with the compensation, the other form of reparation is the restitution, by which the violator should compensate the damage by restoring the existing state before the commitment of such violation.[183]

Mentioned article 13 (1) (d) of the ECT provision, are known as the Hull's doctrine or formula.[184] This doctrine based on the rule of the "prompt, adequate and effective"

---

[181] Para 553-557, o the judgement *RosinvestCo v. Russia*, p. 233-234
[182] Para 633 of the decision judgement *RosinvestCo v. Russia*, pp. 260-261
[183] DOLZER,R., SCHREUER, CH., *Principles of International Investment Law* , 2008, p. 271
[184] from the year 1938

compensation for nationalization and/or expropriation. A number of scholars has expressed the view, that this formula is a customary norm of the international law. However, historically state-importers of capital in the Latin America, Asia and Africa for a long time did not want to accept this formula. They argued that the issues of property rights are in the prerogative of the national legislation, which may allow withdrawal of property of foreign investors in a lower than market price. The same negative stand had some socialist states of the Eastern Europe, which objected this formula, however argumentation based on a different point – they brought a question, whether should be done any compensation in a case of the nationalization and expropriation of property of national or foreign investors, as it contradicts the aim of the expropriation itself.

Some scholars, such as Dolzer, referring to the Resolution of the General Assembly[185], stress that international law does not require the full compensation.

Brownlie believes that states while providing the nationalization should accept the principle of compensation not necessarily based on the "adequate, effective and fast" formula, especially when it comes to the most strategic state area as natural resources.[186]

The situation with award of compensation is controversial, even the jurisprudence illustrates many approaches to the assessment of the issue of damage and payment of compensation.

It is facilitated by the different legal content of the definition the term, as the compensation itself covers two types of actions: calculation operations and providing at the disposal the fixed amounts, which have been forced to withdraw by investor. Thus, there should be fulfilled the conditions, that will not lead to the emergence of a new form of

[185] Resolution of UN General Assembly 3171, Resolution 3281, article 2 para 2 - Charter of Economic Rights and Duties of States

[186] In the case *Shahin Shaine Ebrahimi v Iran*, Tribunal stated that "the standard of "fast, adequate and effective" compensation is prevailing in the international law."

property, by establishing an upper limit of compensation or payment by installments, or prohibition on conversion, remittances.[187]

The compensation shall cover any financially assessable damage, including the loss of profits insofar as it is established"[188], and must "*re-establish the situation which would, in all probability, have existed*" prior to the commission of the internationally wrongful act.[189] Norton[190] illustrates an approach of the tribunal regarding the unlawful expropriation in case of *Chorzow factory*, citing the decision of the Permanent Court of International Justice' (1928),[191] where was considered the possibility of restitution and compensation. It stated, that "*restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear <must be made>*". In contrast, the lawful expropriation "*did not require restitution, but only payment of "the just price of what was expropriated" measured as "the value of the undertaking at the moment of dispossession, plus interest to the day of payment*". In the decision on the case *BP, Texaco Liamco v. Libya*, the tribunal stated it should be paid only compensation, instead of the *restituio in integrum*, as that was lawful expropriation by the host state as a performance of its sovereign right.[192]

The approaches to calculation of such compensation are complex, and require careful assessment, whereas the plea of the investor to satisfy its oral damages can be rejected, as in the case *Lemire vs. Ukraine*, which was based on the ICSID. The Tribunal rejected the claimant's plea for US$3 million in moral damages and found that moral damages may only

[187] CARREAU D., JUILLARD P.,*Droit international economique*, 2013, Dalloz,pp. 435-436.
[188] CRAWFORD, J., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect,* 2001, online: American Society of International Law http://www.asil.org/ajil/ilcsymp7.pdf, articles on Reponsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001, article 36 (2)
[189] Decision of the Permanent Court of International Justice, in the case *Factory at Chorzow*, Merits, 1928, PCIJ, Series A, No.17, p.47
[190]NORTON, P., *A law of the future or a law of the past? Modern tribunals and the international law of expropriation*, 1991, The American Journal of International Law, vol. 85 #3, pp. 474-505
[191] *Factory at Chorzow* (Ger. v. Pol.) (Indemnity), 1928 PCIJ (Ser. A) no. 17 (Judgement of Sept. 13)
[192] ŠTURMA, P., BALAŠ, V., Mezinárodní právo ekonomické, 2013, p. 337-338

be awarded, where the host state has subjected an investor to grave physical duress or its equivalent and caused the investor to experience mental suffering or loss of reputation.[193]

In the case *RosInvestCo v. Russia*[194], instead of the requested[195] by the claimant amount USD 275 million, the tribunal ordered to pay compensation in the amount of USD 3,5 million.[196] The tribunal assessed the arguments of the Respondent, that "by the time claimant acquired beneficial ownership of the Yukos shares in 2007, virtually all of the allegedly wrongful acts complained of had already since long occurred", and thus claimant deserves no compensation, on the one side, and the claimants arguments on the other side - "claimant cannot claim damages for acts that occurred before it became an investor".[197] The tribunal further explained that claimants claim for compensation should be up to USD 3,5 million plus interest due to the fact that, that was the price of its shareholding at the time it gained beneficial ownership in 2007. The tribunal had not taken into consideration attempts to get a windfall and possible increase in value of the shares after 2007. It stated that the investor should not claim for damages it did not suffer.[198]

Therefore, the demand for compensation should meet the following points: (a) an investment must be actually done; (b) an investment must be made in the territory of the host/receiving state; (c) the expropriated object must correspond to the status of foreign investment, while the burden of proving is on the investor; (d) in a case of expropriation the measures should be the result of the actions of the host state.[199]

---

[193] *Joseph Charles Lemire v Ukraine* (2011), Case No ARB/06/18 (ICSID), Award. Review of the jurisprudence in this area see JARROD WONG, "The Misapprehension of Moral Damages in Investor-State Arbitration" in ARTHUR ROVINE, ed, *Contemporary Issues In International Arbitration And Mediation: The Fordham Papers 2012* [Leiden, Martinus Nijhoff, forthcoming in 2013]

[194] SCC Case Ano. Arb. V079/2005 (UK/USSR BIT), Final Award, 12.09.2010, available on http://www.italaw.com/sites/default/files/case-documents/ita0720.pdf .

[195] ZIEGLER, A.,*The assessment of "good faith" in the YUKOS saga – institutional overlap in times of political uncertainty.* 2011, Swiss NCCR working paper #2011/60

[196] RF appealed in the state Sweden courts, but RF's appeal was dismissed.

[197] Para 658, p. 270 judgement *RosinvestCo v. Russia*

[198] Para 658-660, p. 270 of the judgement *RosinvestCo v. Russia*.

[199] NESHATAEVA, T, *International law in a judicial practice of arbitration tribunals*, 1998, Zakon, # 7pp. 24-25 (Международное право в судебной практике арбитражных судов, Закон).

The article 13 (1) of the ECT states the compensation for expropriation "*shall amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment*". However, in the case of Yukos the fair market value increased during the process of the claim. Dolzer and Schreuer however stress that "market value may often be a fiction <…> and is determined often on the basis of future prospects or earning capacity of the investment".[200] Keynes emphasizes the necessity of the reasonable calculation. In his "General Theory of Employment", economist says, that the investor before entering market of the host-state, evaluates the risks, as "*the actual results of an investment over a long term of years very seldom agree with the initial expectation*", and "*all sorts of considerations enter into the market valuation, which are in no way relevant to the prospective yield. Rather than mathematical calculation, should be used such method of calculation, as a "considerable measure of continuity and stability in our affairs, as long as we can rely on the maintenance of the convention.*"[201]

There are different approaches for calculation of the compensation, which are primary valuation methods in the context of the investor-state disputes, provided by the World Bank.[202] At the same time the International Law Commission precludes compensation for speculative or uncertain damage.[203]

---

[200] DOLZER, R., SCHREUER, CH., *Principles of International Investment Law, 2008,* p. 274

[201] KEYNES, J., *General Theory of Employment, interest and money*, 1936, chapter 12 "The Definition of Incom, Saving and Investment", Atlantic publishers & distributors, Nice Printing Press, Sahibabad, India, 2008. Available on https://books.google.cz/books?id=xpw-96rynOcC&printsec=frontcover&hl=cs#v=onepage&q&f=false

[202] World Bank, Legal Framework for the Treatment of Foreign Investment Volume II Guidelines (1992), World Bank.http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf

[203] Article 36 (2)

The ECT formula brings solutions and issues, for the investments in politically or economically unstable regions, where it is hard to calculate the real fair market value.[204] The Arbitration uses the economical approach of “discounted flow”, which however may be used only in some cases. Thus, these calculation methods might be used as a direction or a guide. If the acts of the host state are of discriminative character, or unlawful, then investor may have at its disposal more means of influence during an investment assessment negotiations, and the tribunal may be more supportive to investor claims.[205]

The vast majority of BITs contain rules on the payment of the “prompt, adequate and effective” compensation in a case of expropriation. As the article 4 para 1 BIT between Denmark and Russia, states “the payment of prompt, adequate and effective compensation”, the BIT between USSR and UK and Northern Ireland, indicates the payment of “adequate and effective compensation”, article 5(1). In the Russian – Czech BIT, article 5 states accordingly that such measures “*are followed by adequate and effective compensation. The payment of compensation shall be processed without any unnecessary delay… and shall correspond to the real value of the expropriated investments immediately before the time when the actual or impending expropriation has become known*”, and transfer of payments of compensation “*shall be made in a freely convertible currency*,” article 6(2).[206] Nevertheless, there is no provision on how should be the compensation calculated, in a case of expropriation of investor’s investments. Uncertainty of legal provisions regarding calculation of compensation gives a possibility to arise uncertainty of payment and perspective of intra-state cooperation in the economical field. In the author’s opinion, issues regarding clear and concrete approach to compensation should be included into international legislative document or the BITs. Moreover, it is also significant, as in the rules of the Foreign Direct Investment Regulations

---

[204] FARHUTDINOV, I.,*International investment law and process*, 2014, Prospect (Фархутдинов, Международное инвестиционное право и процесс, Проспект).supranote 434

[205] ibid

[206] Same states article 4 par. 2 of the BIT between the RF and Austria or art. 5 par. 1 BITs Hungary -RF

stated that if the compensation is delayed, then on it should be applied "*reasonable, market-determined interest to deferred payments*". In the BITs between the RF and EU member-states the terms, period and interests of payments differ, and in some BITs the provisions about the rates and terms are absenting. For example, in the BITs between the RF and Italy[207] or Sweden[208], the interest is payable from the moment of expropriation up to the moment of payment of compensation, in this case in the BIT with Sweden the "*interest rate [which is] applicable in the territory of the expropriating contracting party*", in the BIT with Italy interest rate in accordance with the rate of the central bank of the contracting party in the territory of which the investment was made. In such cases apply the provisions of the host-state law, in case of the RF Federal Law on Foreign Investment, which states regarding nationalization that "*the value of the nationalized property and other losses shall be reimbursed*", and applies as for the foreign investors so for the companies/undertakings with the foreign investments. At the same time the BIT with Denmark[209] provides the application of "normal commercial rate established on a market basis".

From the arbitration practice we can see the different approach, as in the Case *Sedelmayer v. RF* on the basis of the USSR - Germany BIT, where the tribunal interpreted the phrase "the rate which is in effect", of article 4 para 2 the "*interest shall be calculated on the amount of the compensation in accordance with the interest rate in force in the territory of the Contracting Party concerned*". The Tribunal decided that as the investor is a resident of Germany, the "*relevant rate of interest ... would be the rate of interest which was used in Germany at the time in question shall, thus, be applied*".[210] However, considering the rate of interest and terms on which date it shall apply, the Tribunal refers to the national legislation

---

[207] art. 5 Par. 3
[208] art. 4 par. 1 letter d
[209] art. 4 par. 1
[210] SCC in *Sedelmayer v. Russia*, para 115 of the Decision.

of the RF (Civil Code).[211] Interestingly, regarding the amount of compensation, the tribunal states that "it has not competence to examine if compensation any such ground is justified".[212] The BIT with Croatia (1996), article 4 provides that "*from the moment of expropriation to the moment of payment, the interest will be calculated in the same freely convertible currency on the basis of the market interest rate, which must not be lower than the London interbank rate (LIBOR).*"

In the *Yukos case* the tribunal out of eight proposed methods of calculation the compensation by the claimants, chose the discounted cash flow, and the comparable companies methods, with the starting point for the valuation of Yukos. In consideration the contribution, tribunal took into account the RF's arguments regarding tax avoidance, or abuse of low-tax regions, which could lead to the decrease of the amount of compensation. Moreover, the tribunal reduced the total amount of compensation to 25 per cent, as a responsibility apportionment between the claimants and the respondents (para 1637 of the Decision). However, the whole amount of the compensation (USD 50 billion) seems arguable, especially how this was calculated, taken into consideration the company value in 2004 was USD 22 billion. The reason is counting the dividends that the investor could have received in years 2003-2007, but the company also could lose the dividends as well as investments.

Summary on international investment treaties between the EU andthe RF

To sum up, the international multilateral treaties oversee the performance of obligations in investment regulations by the states (parties of the agreements), and also by the implementation of the dispute resolution proceedings. Nevertheless, although offering key principles of international law, the mentioned international agreements still fail to constitute

[211] Ibid, para 115 of the Decision. *Sedelmayer v. Russia*
[212] P. 115 of Decision *Sedelmayer v. Russia*

an exhaustive body of rules, and do not provide solutions for all the problems which can originate from the international investment cooperation.

A conclusion regarding the ECT is unclear – The ECT can hardly be used as a platform for the EU and RF investment and energy relations, while both sides are not considering this treaty as the priority in their relations, including the issues of the dispute settlement. Moreover, as it is seen from the discussed, the application of the ECT will not necessarily provide the functioning protection, especially in the field of energy, which is a strategic issue for the states-producers and exporters, and this is a basis of the public interest. The protection through the arbitrational tribunals is ambiguous as well. There is also no guarantee that the violator will fulfill its obligation although the tribunal decided so. Thus, the ECT cannot be considered as an adequate legal basis between the EU and the RF in the area of protection of investments in the gas/energy sector. However, as it already acts as a normative basis, it could be included in the future cooperation.

3.3. BITs between EU member states and the RF

Due to the different national background and the fundamental differences of the most developed and developing states, these multilateral conventions, even though being called by some academics – universal,[213] are not effective on the global level. By now the most popular international investment agreement between the states are the Bilateral Investment Treaties (BITs), or as they are called between the RF and EU member states "Agreements on Promotion and Mutual Protection of Investments".

---

[213] see MANN, K. VON MOLTKE, A. COSBEY, L.E. PETERSON, *IISD Model International Agreement on Investment for Sustainable Development*, 2005, available at <http://www.iisd.org>. or mentioned DORONINA, N., DMITRIEVA, H.

Agreements on protection of investments started to be concluded since the year 1959, and in 1961 they became popular due to the establishment of the Organization for Economic Cooperation and Development. Then its state-founders signed the Code of liberalization of capital movements, in 1976, with the enlargement of the OECD with Japan, Australia and New Zealand, was signed the Declaration on foreign investment and multinational companies, and revised them in 2000.[214] At the same time the investment agreements between two developed states were not popular, exception was the new members of the OECD before their accession to the OECD (in Europe with Czech Republic, Poland, Hungary, Slovak Republic).

The OECD is a platform for the formulation of provisions and suggestions for investment agreements, based on the experience of member states. On the basis of the OECD[215] were developed unique international instruments in the field of the "responsible business" or due diligence, to which refer investment agreements.

The conclusion of agreements on Promotion and Mutual Protection of Investments has started in the middle of 1980s, during the time of the Soviet Union, when globally began to develop the foundations of the market economy. As a legal successor or continuator of the USSR[216], Russia acquired ratified agreements with Austria, Belgium and Luxembourg, United Kingdom and Ireland, Germany, Italy, Netherlands, Finland, France, Switzerland, outside of the EU – Canada, Republic of Korea and China. The forced move of the Soviet Union towards bilateral cooperation, was not only a desire to join to the global market as an equal partner, but also the lack of the adequate domestic investment legislation.[217]

---

[214] See TULLY, S., *The 2000 review of the OECD Guidelines for Multinational Enterprise*, 2001, ICLQ 394.

[215] Guidelines for multinational enterprises, OECD Declaration on International Investment and Multinational Enterprises

[216] In accordance with the Agreement establishing the Commonwealth of Independent States, signed in Minsk on 12 December 1991

[217] NAGAPETYANC, R., *Agreements on promotion and protection of investment*, 1991, Vneshnyaya Torgovlya #5, p. 10-14 (Нагапетьянц Р. Соглашения о поощрении и взаимной защите капиталовложений. Внешняя торговля.)

Together with the agreements on promotion and protection of investments, are functioning the other interstate and or bilateral agreements, which support the trade and commercial relations by, for example, facilitating the tax regime. In the Russian literature there is no consent regarding the bilateral treaties on the elimination of the double taxation. Some academics attribute them to bilateral investment treaties, as Dmitrieva considers such agreements as bilateral treaties in the field of investment, while the others, as Gavrilov,[218] do not relate such agreements even to the source of the international law, however, he points out their significant impact on the relationships in the investment field.[219] In the case of investments, agreements on the elimination of the double taxation would attribute rather as additional agreements, as they do not regulate foreign investments, but only indirectly affect them.

Bilateral investment treaties aimed to regulate investment relations regardless the sector of industry of investment flow, especially after the Russia's withdrawal from the ECT, are of greater significance. Thus, they become the only international legal instrument relating to such important issues, as regimes of investment activity in the host state. In accordance with the Vienna Convention on the Law of Treaties 1969, article 2, the "treaty" means an international agreement concluded between States in written form and governed by international law <…> whatever its particular designation.

The United Nations Conference on Trade and Development (UNCTAD) defines BITs as "agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country."[220]

---

[218] (указ.соч.с.48) Essay p. 48

[219] KUZBAGAROV, A., NEMCHENKO, S, *Bilateral treaties as the source of international legal regulation of the foreign investment*, 2003, Vestnik Saint-Petersburg University #1 (17) (Кузбагаров, А., Немченко, С., Двухсторонние договоры как источник международно-правового регулирования иностранных инвестиций.Вестник Санкт-петербургского университета МВД России. http://uristrus.narod.ru/articles/dvustoronnie_dogovori.htm)

[220] What are BITs?, UNCTAD Website. Retrieved on May 6, 2009. http://unctad.org/en/Docs/diaeia20102_en.pdf

The core issue of the BIT is the investment protection, including from the unlawful expropriation by the state.

In the science of the international law there is no opinion about the bilateral agreements on promotion and mutual protection of investments. Some academics consider BITs contribution to the formation of new principles of customary international law.[221] The other ones stress bilateral treaties reinforcing the effect of the principles of the customary international law, which loses nowadays its former significance.[222] In addition, analysing the international arbitral decisions of the recent years regarding the disputes arising from bilateral agreements on mutual protection of investment, can be concluded that the arbitrary tribunal considers such treaties rather as agreements between the parties, which are setting special rules of the conduct, than as agreements creating the new principles of customary international law.[223]

The main goals of the BITs are the protection of investments, simplification of investment procedures and a conduct of negotiations on projects, liberalization of norms, a simplification of possible judicial procedures. Although the main aims of the bilateral investment treaties are similar, however many BITs are of different content. Even in the bilateral legal relations it is impossible to avoid difficulties occurred from the different interpretation and the conflict of law, in regard of the collision of the various legal systems or legal orders.

Boguslavskiy states that BITs are established on the principle reciprocity, as seen even from the title of all BITs between EU member states and the Russian Federation is “agreement on promotion and mutual protection of investment”. In the international law, the

[221] MANN P. *British Treaties*. 1981.British Journal of International Law. No. 52. Sornarajah M.,2010, The International Law on Foreign Investment. P. 172

[222] DENZA E. BROOKS S., *Investment Protection Treaties:The United Kingdom Experience*.1987. London, p. 912

[223] SORNARAJAH M., *The International Law on Foreign Investment*,2010, p. 227. DOLZER, R., STEVENS, M., *Bilateral Investment Treaties*, 1996, CRAWFORD J, *International protection of FDI: between clinical isolation and systematic integration,* 2011, in HOFFMANN, R, TANS CH, J., (eds), international Investment Law and General international law, Nomos, Baden-Baden, p. 19-20

principle of reciprocity might be either material or formal. By material reciprocity to foreign citizens and legal entities is provided the same scope of specific rights as for the national citizens in their states of origin. The formal reciprocity means provision of the rights of the national, or the national treatment. In this regard, the foreign citizen can be granted the "new" or unfamiliar for them rights in a foreign state, and in the opposite, may be that the legislature of this particular foreign state does not know rights, which are granted to the foreign citizen in his own state of origin.[224]

But some academics are coincident with that the main characteristic of the bilateral investment treaties is that they are concluded between economically and politically unequal partners, where the purpose of the agreement is to frame investment promises to a legal form to provide adequate protection of the foreign capital.[225]

There are various risks for investments in the host state, due to its political regime, and specifics of the legal system. Therefore, there is a need, not only rely on the bilateral agreement, but also analyze the national legislation and in detail examine the state policy and current situation in the state. Thus, the conclusion of the bilateral investment agreements is due to the fact that foreign investors, making investments in the host state, consider the guarantees provided by the national legislation – insufficient, and unclear.[226] Moreover, the BITs have a direct reference to the rule and general principles of the international law. Bilateral investment agreements provide foreign investors a certain level of protection and guarantee of the stable environment, in which the investor intends or is engaged in economic

[224] BOGUSLAVSKIY, M, *International private law*, 2004, Jurist, p. 84 (Богуславский М. Международное частное право. Юристъ).
[225] LABIN, D, *Analysis of some aspects of international legal practice of the concluding state bilateral investment treaties*, 1999, Gosudarstvo i pravo, # 10, p. 60 (Лабин Д. Анализ некоторых аспектов международно-правовой практики заключения государственных двусторонних инвестиционных договоров. Государство и право.) FARHUTDINOV, I*, Function of the international treaties in the area of the foreign investment, Trudy Moskovskoy Akademii*,1999, #2, p. 51-57 (Фархутдинов И. Действие международных договоров в сфере иностранных инвестиций. Труды Московской государственной юридической академии.)
[226] DORONINA, N, SEMILYUTINA, N., *Legal regulation of the foreign investment in Russia and abroad*, 1993, Moscow, p. 92 (Доронина Н., Семилютина Н. Правовое регулирование иностранных инвестиций в России и за рубежом.)

activities. In particular, it provides the guarantee that investments will not be expropriated or subjected to other measures, and if so, this will be compensated in appropriate way, proportionally to the market value. In a relation to the investment area especially to the strategic energy sector, there is not only collision of legal norms, but also mostly unconsent of the states in the view of policy and economy.

Main provisions of the BITs are: fair and equitable treatment with non- discrimination ground, ensuring of adequate protection of foreign private property, ensuring smooth transfer abroad of income and profit from foreign investments, and agreement on the transfer of dispute with a foreign investor to international dispute settlement bodies.

EU member states and the EU as a whole are in the first place in terms of both – outgoing and incoming investments, and one of the most important fields is the investment in the energy sector.[227] The RF has signed 24 BITs with the EU member states, among which are important energy partners, including the Netherlands, Germany, France and former-EU members state- the UK. Before looking at the core of the perspective future legal cooperation between the EU as a whole and Russian Federation in the protection of investment field, we will overview the main provisions of BITs between Russia and the EU member states.

BITs between each EU member state and the Russian Federation can be analyzed from the time perspective. Relatively can be followed the periodization of the conclusion of BITs between the Russian Federation and EU MS, which helps to reveal the dynamics of their development. The first stage is during the Soviet Union, when the USSR concluded BITs in year 1989 with Finland, France, Germany, Netherlands, the United Kingdom and North Ireland, Belgium and Luxembourg, and in the year 1990 Austria and Spain. That is the time,

[227] Foreign direct investment in the EU STATISTICS http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics

when the state was entering into the market relations. The USSR has no experience in such bilateral treaties; thus, the title, structure and content of these agreements differ.[228]

In the bilateral agreements, concluded in 1992-1993 – with Poland, Slovakia, Denmark, Romania, Bulgaria – can be followed the unification of the structure. This is connected with the internal development of the national legislation of the Russian Federation – in 1992 was adopted RF Government Decree "On conclusion of agreements between the government of the foreign states on promotion and mutual protection of investments.[229] However the actual use of the decree has started during the third stage since 1994, when has begun the unification of the texts – in the agreements with the Czech Republic, Hungary, Switzerland, Italy, Croatia, Lithuania, Slovenia (2000).

The part of the Russian investment on the EU market is not high, except the energy sector, but many EU states, especially states of Central Eastern European Union, are highly dependent on gas supplies from Russia. The process of development of BITs in the territory of the Central Eastern European states as mentioned has started in the 1990s, when the states were attempting to attract more investments in their economy, when were offered not just favourable conditions on the market, but also cheap job force. There was a wave of the bilateral investment treaties Russia concluded in 1990 with most of EU member states, however many established instruments containing only formal provisions which do not provide effective incentives for increasing the foreign direct investments (FDI).

With the development of the international investment law was developing the law of the EU. Nowadays can be observed the conflict of international and regional legal systems, particularly, the European Union law – in accordance with the scope of its and its institutions'

---

[228] FARHUTDINOV, I, *About international treaties of the Russian Federation in the area of the foreign investment*, 1999, Vestnik of Bashkirskiy University, #1, p.67-70. (Фархутдинов И., О международных договорах Российской Федерации в сфере иностранных инвестиций. Вестник Башкирского университета).

[229]"Собрание актов Президента и Правительства Российской Федерации, from 1992, amended by Decree #992, from 30.09.2016 http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102071479&backlink=1&&nd=102412234

competence. The changes inside of the European Union, formation of a single internal investment market, Energy Union, sharing of competences, apply on the non-EU states, with which EU member states and the EU have already concluded agreements. The understanding of the future legal regulation of investment relations in the energy/gas sector with the non-EU states, in the framework of the international law is of great importance for all participants in such energy-investment relations.

Nowadays, in the process of world globalization, and at the same time integration within the EU, coerced states unify the attempts and bring the legislation on the common level. The Lisbon Treaty[230] gave the EU status of the subject of the international investment law, with its entry into force, was introduced a number of changes in the EU legal regulation of the international investments. Article 207 of the TFEU provides that regulation of foreign direct investments is part of the EU Common Commercial Policy. The main reason for the inclusion the investment to the sphere of the common commercial policy might be the strengthening of the EU role in multilateral negotiations on foreign investment.

In 2012 was adopted the regulation No 1219/2012 establishing transitional arrangements for bilateral investment treaties between member states and third countries. This regulation aims to replace the bilateral investment agreements between the EU member states and third countries by the agreement of the Union, in accordance with the EU’s investment policy.

Meanwhile, the Russian national legislation does not define the term bilateral investment agreement, and the only determination could be found of the international agreement[231], the subjected EU regulation provides such definitions. According to the article 1 chapter 1 of the EU Regulation No 1219/2012, the term “bilateral investment agreement”

---

[230] Treaty on the European Union and Treaty on the Functioning of the EU, signed 13.12.2007 in Lisbon, entered into force 01.12.2009, http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML

[231] In the Federal Law on international treaties of the RF, from 16.06.1995, amended from 12.03.2014 No 29-FZ, available on http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102412234&backlink=1&&nd=102036504

means any agreement with a third country that contains provisions on investment protection." It also contains the mechanisms for the investment dispute settlement, where the EU performs in the international tribunals as a subject or party of the agreement, acting on behalf of some EU member-state. Moreover, such exclusive competence of the EU in the area of international direct investments means that the EU is liable for the breaching of BIT by any of EU member state.

3.3.1. Standards of treatment under BITs

In the international agreements regulating investments, the standards of treatment of foreign investments are presented differently. The task of the lawmakers was to find a balance between the rights of the foreign investor and state sovereignty. Despite the legal documents, several cases illustrate the attempt of the tribunals to find more advantageous conditions for investors, by interpreting the standards of treatments of investment protection.[232]

Analysing BITs between Russia and each EU member state, it is hard to conclude, on what exactly treatment is based protection of investment. There is no one opinion among the academics.[233] The number of BITs between the RF and the EU MS contains provisions on the effective control, which in practice means regulation of the foreign investments on the territory of the host state. The national legislation of the RF does not include the criterion of the effective control, but in order to confirm the status of the legal entity as a foreign entity uses the criterion of incorporation, at the place of legal entity's establishment.[234]

---

[232] Review of the jurisprudence WHITSITT,E., *Application of the Most-favored-Nation Clauses to the Dispute Settlement Provisions of the Bilateral Investment Treaties: an Assessment of the Jurisprudence*, 2009, Journal of Energy & Natural Resources Law, 27 (4),527; WHITSITT,E., *Application of MFN Clauses to the Dispute Settlement Provisions of BITs: an Updated Assessment of the Jurisprudence since Wintershall*, 2011, Journal of Arbitration and Mediation, 2 (1), p.21.

[233] Guidelines for the treatment of FDI, IBRD, World Bank , also ŠTURMA, BALÁŠ, *Mezinárodní Ekonomické Právo*, 2013, p.342.

[234] VOZNESENSKAYA, N., *Legal regulation and protection of the foreign investment in Russia*. 2011,Wolters Kluwer, Moscow (Вознесенская Н, Правовое регулирование и защита иностранных инвестиций в России, монография), pp. 48-64

With regard to the energy sector, there are the following types of the regimes provided to foreign investors in accordance with the ECT and BITs: international minimum standard of treatment, a regime of the full protection and security, fair and equitable treatment, national treatment, and the regime of the most –favoured nation.

3.3.1.1. Fair and equitable treatment

Dolzer calls the Fair and Equitable Treatment (FET) as a regime of the greatest significance for foreign investors, which often serves as the basis of the investors' requirements in the host states. In the contemporary BITs – fair and equitable treatment is as an addition to the regimes of international minimum standard of treatment, and regime of the full protection and security. However, the issue of the relation of the fair and equitable treatment with the international law is not clear. Some academics[235] support the point that FET is developing the international minimum standard, the others[236]– believe that the FET is a repetition of that minimal standard. The judgment in the case *Genin v Estonia*[237] equals FET with the minimum standard. In the OECD draft convention on the protection of foreign property the FET does not possess any role in international investment law as it is equating to a national regime, and in 1999 the UNCTAD concluded that the FET is still a single standard.

The fair and equitable treatment as a regime of investment protection is mentioned in every BIT of Russia with each EU member state. However, there's no description of what it can mean. As for theory and practice in the international law – the investment regimes are being divided into absolute and relative types.

---

[235] VOZNESENSKAYA, N., *Legal regulation and protection of the foreign investment in Russia.* 2011. Wolters Kluwer, Moscow (Вознесенская Н, Правовое регулирование и защита иностранных инвестиций в России, монография)

[236] SORNARAJAH, M, *The International Law on Foreign Investment*. 2010, 3 ed., Cambridge university press

[237] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, See more at: http://www.italaw.com/cases/484#sthash.w1ygcjYI.dpuf

An absolute regime is based on full protection and security principles of non-discrimination, fair and equitable treatment, and obligation to comply with the obligations related to investment under international law. A relative regime includes national treatment and treatment of most-favoured nation (MFN).[238]

The Energy Charter Treaty in the article 10, Promotion, protection and treatment of investments encourages, the "stable, equitable, favourable and transparent conditions" with the "most constant protection and security", but a correct explanation of that is missing. The Russian academics draw attention to an interesting point that this is of a declaratory form and it does not include the substantive norms of the international law. They argue that it opposes to the principle of state sovereignty, as the states, and if they desire so, are free in promoting and opposing foreign investments.[239] Thus, the interpretation of categories as "fair" and "equitable" treatment should be given in accordance with the understanding of such categories, adopted in international law, and in the absence of reference to international law, to interpret it in accordance with the national legislation.[240] In the BIT between Russia and the Czech Republic is said: "*Each Contracting Party shall secure in its territory the fair and equitable treatment to the investment of the investors of the other Contracting Party and shall restrain from passing the illegitimate and discriminatory measures that might hinder the administration, use, ownership and disposal of investments",* article 2 (3).

In order to find out the violation of the fair and equitable treatment must be demonstrated that the actions or measures of the host state are arbitrary[241] (*Lauder vs. Czech*

[238] NAGAPETYANC, R., *Agreements on promotion and protection of investment*, 1991, Vneshnyaya Torgovlya #5, p. 10-14 (Нагапетьянц Р. Соглашения о поощрении и взаимной защите капиталовложений. Внешняя торговля.) See: Russian Federation II Guide to the Investment Regimes of the APEC Member Economies. Fifth Edition. 2003. P. 515-520.

[239] See FARHUTDINOV, I., *International investment law and process*, 2014, Prospect (Фархутдинов, Международное инвестиционное право и процесс, Проспект).

[240] OECD, Working Papers On International Investment, 2004/3, Fair And Equitable Treatment Standard In International Investment Law, available on https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf

[241] BANKES, N., WHITSITT, E., *The Evolution of international investment law and its application to the energy sector*, 2013, in the evolution of international investment law, 51 (2), pp. 207-247, identifies the arbitrary treatment (p.216-217), if the measure taken by state: - damage a foreign investor for no legitimate purpose;

Republic) or discriminatory (*RosInvestCo v. Russia*). Discrimination is assessed in a situation of same or equal circumstances. However, in the event of the economic crisis, it is very hard to prove and provide sufficient evidence that there was a violation of the international investment law, taking into account the ratio of the host state' government.

3.3.1.2. National and Most-Favoured Nation treatment

The discussion on the international law approach to the issue of investment protection got widespread in the end of the 19th and beginning of the 20th century. That was the period when the investments were made by the investors from the developed states to the territory of developing states. Rarely, the investment relationships went beyond the colonies' relations, the protection was afforded either by diplomatic means, or by force. Some cases applied the extraterritorial principle on the territories where the investments were made. However, the theoretical researches and discussions arose even in the 18th century, as Hugo Grotius or Vattel[242] supported the existence of the international standard that guarantees foreigners a higher level of protection than it is available under the national law of the host state. In contrast to mentioned, Vitoria[243] defended the view, that national treatment is the highest standard which is provided to a foreign investor, thus international law does not contain any guidance for investor or states in respect of investment relations. Vitoria's point of view supported Latin American states in the period of the nationalizations, and the position of them substantiate Calvo[244], who proclaimed that when the foreign investor is taking a decision to

---

not based on legal standards, but on discretion; without regard to due process or proper procedure; ostensibly implemented for public purposes but in fact intended to harm the investor.

[242] ČEPELKA, Č, ŠTURMA,P., *Mezinárodní Právo Veřejné*, 2008, 2nd ed, C.H.Beck, Prague, pp.3-4

[243] SORNARAJAH, M, *The International Law on Foreign Investment*, 2010, Cambridge, p. 19-20

[244] JUILLARD, P, *Calvo Doctrine/Calvo Clause*, 2007, Oxford, MPEPIL, also GARCIA-MORA, M, *The Calvo Clause in Latin American Constitutions and International Law*,1950, 33 MarqLRev 205–19

make investments in the foreign state, he does it on his own wish and recognizes the risks associated with such decision.

In this regard, the regulation of investment relations exclusively on the basis of the national law was justified, as well as investment disputes arose with the nationalization. The Calvo's doctrine later was supported by the African countries, states of the Soviet Union, and even was enshrined in the documents of the New International Economic Order. In oppose to the national treatment was argued that the national legislation of the host states provides the foreign investors less protection than it could be done in the framework of international law. The situation changed with the development of BITs relations, when in the provision of the national treatment were interested also foreign investors, especially on the pre-investment stage of the investment relations, or the stage of admission of the foreign investment on the market of the host state.

The preamble of the ECT states that the contracting parties "attach the utmost importance to the effective implementation to full national treatment and most favoured nation treatment, and that these commitments will be applied to the making of investments pursuant to a supplementary treaty". Article 10 para 3 develops this provision in the frame of the investment definition: "*treatment means treatment accorded by a contracting party which is no less favourable than that which it accords to its own investors or to investors of any other contracting party or any third state, whichever is the most favourable*." Further, by stating the possible expropriation measures by introducing evaluation categories "for public interest", "non-discriminatory", "in compliance with due legal procedures"[245], the ECT determines when the state regulatory measures are permissible.

The provisions of the ECT are following the GATT/WTO approach to the investment treatment. In article 5 the ECT also provides the list of investments measures related to the

[245] art. 13 par. 1

trade and that are incompatible with the granting of a national regime to the investor and which do not comply with articles III and art. XI of GATT, stressing that investments in the energy sector are more sensitive to various changes in the legislation, and the consequence of which is the occurrence of the large amounts of damage.

In the GATT/WTO,[246] the national treatment is formulated in the form of a general principle of the most-favoured regime treatment, stating "treatment no less favourable" regarding the internal taxation and state regulations.[247] The initial purpose of GATT was regulating external commercial relations, and the basis of the international legal regulation of the foreign trade was the most-favoured nation regime. The multilateral forms of trade cooperation mean a transition from the national regime to the treatment of most favoured nation, according to which the national regime was applied only regarding the issues of the good trades.

Moreover, the Agreement on Partnership and Cooperation between the RF and the EU as a whole uses this definition of the GATT as it follows from the article 10 (1) "*The parties shall accord to one another the general most-favoured-nation treatment described in article I paragraph 1 of the GATT*".

It should be taken into account the fact that although the national treatment is aimed to equate foreigners with nationals of the host states, de facto the real equality cannot be achieved – in practice the provision the national treatment to the foreign investors means provision a privileged position. Reasons are the following: the foreign investor has possibility to apply not only instruments on protection of investments on the national level, but also international instruments, in accordance with the agreement between the state of origin of investment and the host state; besides, a foreign investor may bring an action against the host state not only in the national courts, but also in the international tribunals.

[246] General Agreements on Tariffs and Trade 1947 § 4 of art. III
[247] A similar approach used in Trade Related investment Measures Agreement.

However, enshrining the national treatment in the BIT, the contracting states stipulate list of restrictions, regarding the sectors, to which the access of the foreign investor is restricted, in order to ensure the economic interests and security of the host state.

The principle of the national treatment is one of the fundamental regimes regarding the investment activity, based on which subjects of investment relations are in equal position.

In BITs between EU member states and the Russian Federation, particularly article 3 BITs Russia – Spain, is stated that "*each contracting party shall in its territory accord investments, returns and activities related to investments of investors of the other contracting party treatment which is no less favourable than that which it accords to investments and returns of its own investors*". Moreover, in some BITs, as with Belgium and Luxembourg, is also stated, that "the agreement cannot prevent investors to take advantage of more favourable provisions". The Declaration on International Investment and Multinational Enterprises prepared by the OECD[248] to the states provides "*treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises*".

Sornarajah notices that national treatment is provided to the states with a developed stable economy, where is no risk of economic intervention by the other states.[249] In comparison with some states, as the USA, which do not develop specific national legislation on foreign investment or investors and regulate such activity in the general legal norms, the contrary approach is in the Russian federation, where were accepted laws on foreign investments. The RF Federal Law on Foreign Investment provided just a general rule of national treatment, which initiated many discussions in the academic sphere, and some of

[248]http://www.oecd.org/investment/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm)recommends
[249] SORNARAJAH,M, *The international law on foreign investment*, 2010, 3 ed, Cambridge, p. 334

academics,[250] interpreting this provision as the actual principle of the international trade, fundamental rule of conduct of relations between the subjects of trading activity, especially states. The other ones argue that in that case national regime should be interpreted as the internal regime, as it is directed to the specific sectors of regulations, in particular – foreign investment.[251]

On the other side the national treatment is legally established as a norm of a preventive nature in the EU. In EU member states, the national treatment is based on the decision of the EU and applies in all member-states, therefore the unilateral withdrawal of the restrictive nature from the national statues granted to the foreign persons are restricted.[252]

The Energy Charter Treaty contains provisions relating to the promotion and protection of investments in the energy sector, on MFN and national treatment, payment of prompt, adequate and effective compensation for any expropriated assets; permit foreign investors to transfer freely from one country to another, in freely convertible currency, invested their capital and any income associated with it. Also, BITs include the provisions contained in the ECT regarding the transparency of the legal regulation (article 20 of the ECT), or the market access (article 9 of the ECT).

Regarding the regime of investments, which the states need to provide to investors and investments, the ECT include some limitations or exceptions, when the state is not obliged to act in full compliance with the mentioned regime. One of them is contained in the articles 24 para 4 and 25 of the ECT – where the states are not obliged to provide the investor MFN, if the membership of the host-state in the international organizations.[253] Such provisions of the ECT allow some investors to use the preferential regimes provided in accordance with such

---

[250] BOGUSLAVSKIY, M, *International private law*, 2004, Jurist, p. 95-118 (Богуславский М. Международное частное право. Юристъ).

[251] ZYKIN, I, *External economic operations: law and practice*, 1994, Moscow, p. 33-34 (Зыкин И. Внешнеэкономические операции: право и практика).

[252] HARTLEY, T., *The foundations of European Union Law*, 2010, Oxford University Press, Oxford, p. 143.

[253] in the free trade agreements, customs unions (24(4), or economic integration agreement (25) creates preferential treatment for investors from member states of such agreements

agreements on economic integration, free trade agreements, or custom unions. The grounds of such rights for the investor is the fulfilling the following conditions:

- Investor should be a natural person, coming from the state, which is not a member of the agreement on economic integration, free trade agreement, or custom union;
- Should have a registered office, central administration or a principal place of business activities on the territory of the parties-states of such agreements;
- In the event it has a registered office/seat only in that territory, it should have a/an fact/effective and continuous connection with one of the particles of such agreements.

The other type treatment of foreign investments is the regime of most-favoured nation, and it could be found in BITs with Italy, United Kingdom and Ireland, France. Mostly, in BITs between the Russian Federation and each EU member state is presented a combination of both regimes – of MFN and the national treatment. As in the Russian-Czech BIT: "*each contracting party shall in its territory accord investments, returns and activities related to investments of investors of the other contracting party treatment which is no less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third state*". The same content is in BITs between Russia and France[254]: *"each contracting party shall in its maritime zone accord investments, returns and activities related to investments of investors of the other contracting party treatment which is no less favourable than that which it accords to investments and returns of any third state".* Then paragraph 4 of the same article adds *"each contracting party shall in its territory accord investments, returns and activities related to investments of investors of the other contracting party treatment which is no less favourable than that which it accords to investments and returns of its own".*

[254] article 3, para 2

Such combination of treatments, particularly the wording might lead to the controversial situation, as to the point – who will determine what precisely type of regime and how it will be used in the particular case, should it be done by host-state, or by parties, or based on the most applicable regime at the moment?

No more lights about the treatment of investments gives the information of the national soft law, as the letter of the Presidium of the Supreme Arbitration Court of the Russian Federation[255]. The highest chamber of the arbitration court of the Russian federation came to the conclusion that there is no national regime in the Russian Federation in this area, but the regime of most favoured nation.[256]

However, regarding the mechanisms of regulation of the investment activity in Russian national legislation in investment area includes the Federal Law on Foreign Investment[257]. This act defines that the legal regime of the activity of foreign investors and the use of assets of such investments "*cannot be less favourable than the legal regime of the activity and the use of the assets resulting from investments, provided for Russian investors, with the exceptions established by the federal laws*."[258]

In the case *RosInvestCo v Russia* (Spain-Russia BIT), the SCC Tribunal determined the intention of an MFN regime is to ensure that "*protection not accepted in one treaty is widened by transferring the protection accorded in another treaty*."[259]

---

[255] No 58, 18.01.2001, "Overview of Arbitration Courts' practice of resolving the disputes regarding the protection of foreign investors"

[256] Herald of the High Arbitral Court of the RF, 2001 # 3 and #7, special attachment. Although in the Federal Law on Foreign investments in 1991 in Russian Socialistic Federative Republic, regarding which was formulated this review, was established national treatment.

[257] No 160, 09.07.199, "On Foreign Investments in the Russian Federation", part 1 art. 4

[258] Federal Law from 09.07.1999 #160-FL on foreign investment in the RF.

[259] Should be nevertheless mentioned, that the arbitration tribunals are inconsistent in the definition of the MFN treatment, especially in the discussed cases, where the RF is a respondent *Vladimir Berschader and Moïse Berschader v Russian Federation (2006)*, Case No 080/2004 (Arbitration Institute of the Stockholm Chamber of Commerce), Award [Berschader]; *RosInvestCo UK Ltd v Russian Federation* (2007), Case No V 079/2005 (Arbitration Institute of the Stockholm Chamber of Commerce), Award on Jurisdiction [RosInvest]; *Renta 4 SVSA v Russian Federation* (2009), Case No 24/2007 (Arbitration Institute of the Stockholm Chamber of Commerce), Award Preliminary Objections [Renta 4]

It is noteworthy, as was mentioned above, each bilateral treaty between the Russian Federation and EU member states is very specific, as it reflects to the nature of the investment policy and legislation of the both partners. Thus, in addition to the consolidation the principle of treatment that both states provide to the foreign investors, in some BITs they are particular fields, industries or activities, which are namely excluded from the agreement, and closed to the investor.

In order to find out if the national treatment was violated by the host-state, it is needed to demonstrate the existence of differences in the treatment of domestic investors and the foreign investors in similar factual circumstance.[260] On the other hand, should be taken into consideration the specifics of such treatment in the conditions of the crisis, and followed anti-crisis measures by the state. Within the limited resources, each state will privilege the own domestic investor, in order to save or support national economic system, rather it will seek the balance of rights of different investors.[261]

Most of BITs between the RF and EU member states also provide opportunity for the host state to apply the exemptions from the national and most favoured nation treatment following the ECT reasons.[262] The national law of the RF[263] specifies that exemptions from the treatment can be both of stimulating, in a purpose of the social economic development of the RF, or restrictive character.

[260] *Marvin Roy Feldman Karpa vs. United Mexican States*
[261] ANUFRIEVA,A, Protection of foreign investment in the conditions of the financial crisis, 2016, Zakon, N3 (Ануфриева, А, Защита иностранных инвестиций во время финансового кризиса, Закон) regarding the case S.D. Mayers inc. vs. Canada
[262] art. 3 par. 3-5
[263] Federal Law on Foreign Investment, namely art. 4 par. 2

3.3.2. Definitions used in the agreements

There is a standard form of the bilateral investment agreements, which are parties attempting to meet. For purposes of this thesis twenty four bilateral investment agreements between Russia and each EU member state were analysed, excluding Latvia, Estonia and Malta, due to the absence of such agreements, or ratifications of such agreements between Russia and the following EU member states: Croatia, Cyprus, Poland, Portugal, and Slovenia.[264]

In general, the bilateral agreement on promotion and mutual protection of investments has following objectives:

- To create favourable conditions for investor, investment and related activities,
- To provide adequate protection of the foreign property,
- To provide investors transfer abroad of payments related to their investment activities,
- To ensure adequate dispute settlement.

BITs are more or less of the same structure, starting with a preamble, where is expressed the purpose of this international agreement. Many arbitrators are referring to the preamble, following the Vienna Convention's rules of the treaty interpretations, established by the article 31. Thus, the purpose and the objective of the agreement are not to exclusively protect foreign investment as such, but to protect them as the means of the development the national economy.[265] It is followed by the definitions of the investment, investor, territory, revenue, which can have a substantial meaning in the judicial process. The determinations of the treatment of the foreign investment, conditions of expropriation and compensations, or provisions on subrogation constitute to the substantive legal rules.

---

[264] list of the states is available on http://investmentpolicyhub.unctad.org/IIA/CountryBits/175?type=c#iiaInnerMenu

[265] SCHILL, S, *Foreign Investment in the Energy Sector: Lessons for International Investment Law*, 2014, in Foreign Investment in the Energy Sector. Balancing Private and Public Interests. Brill.

BITs further determine the conditions of the dispute settlements between both parties, and between the investor and the host state. The final provisions fix the date of BITs entry into force, duration and termination.

However, the specificity of BITs determines the set of provisions under a similar term. In each BIT the definition of "investor", "investment", "asset" and "territory" differs, moreover, some BITs exclude some terms as "territory"[266], or as in the case of Italy it includes term "activity in connection with the investment", or "investment agreement". Definition of such terms is a key element of the BIT. It determines the specific investors and investments, which should be attracted or excluded from the scope of the agreement. While with the revealing of the nature of investor BITs are not offering many possibilities, recognizing as a foreign investors both individuals and legal entities, the term of investment may include various definitions.

The states seek to protect their interest in the agreement, as from the negative practice treaty shopping or forum shopping,[267] as to specify the requirement for the investment activity.

3.3.2.1. Investor

The term investor defines the range of persons, on whom will apply the agreement in protection of their rights and interests.

The ECT determines investor both as a natural person "*having citizenship or nationality of or who is permanently residing*" (article 1 (7) (a) (i)), and as "*a company or other organization organized in accordance with law*" of the state (article 1 (7) (a) (ii)), and

---

[266] For example, RF-Czech BIT

[267] More on treaty shopping in the OECD Report, 2015, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015, Final Report, available on http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WRBaKojyiM8

in respect to the third state all mentioned which "*fulfills, mutatis mutandis, the conditions specified in subpara (a) for a contracting party*" (article 1 (7) (b)).

An investor may be as a natural person, as well as a legal entity. That is how defines investor Germany - the USSR BIT "*The term "investor" means an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments.*"[268] The Czech - RF BIT further extends it to the requirements should investor operate "on condition that the natural or legal person is competent, in accordance with the legislation of that Contracting Party, to make investments in the territory of the other Contracting Party."[269]

Determining whether the investor has a right to bring a claim is based on its nationality, if the person has several nationalities, will apply the "dominant or effective nationality". In addition, the rules of the ICSID tribunal prohibit the investor to make a claim, if it has citizenship of the both contracting states of the BIT, on which basis it makes a claim.

In the RF and the Netherlands BIT is used the criterion of the registration on the territory of the member state of the agreement.[270] This allows the companies - investors to make a claim to the state of the nationality. As in the case *Saluka Investments BV v. Czech Republic*[271], or *Tokios Tokeles vs. Ukraine*[272], where two Ukrainian investors for the protection of the interests registered the company in the Lithuania, and as a Lithuanian company brought an action against the Ukraine, which in that case was a host-state.

---

[268] Germany-USSR BIT, (1989), article 1 (c), available on http://investmentpolicyhub.unctad.org/Download/TreatyFile/1398

[269] Czech Republic – RF BIT (1994), article I (1), available on http://investmentpolicyhub.unctad.org/Download/TreatyFile/3406

[270] BITs France, UK, the BIT between the EU and Canada – the criterion of good governance, or the need to conduct the activities in the place of registration. In the TTIP there is a article "denial of benefits", which refuses to extend the benefits of the provisions of the investment agreements for the companies that have no business activity at the place of registration

[271] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 2006, para 240-241

[272] *Tokios Tokeles v. Ukraine*, Decisionon Jurisdiction, 2004, para 21-72

Also, by the investors was used the state of their nationality to initiate a dispute with a third state. As in the case *Sedelmayer v. Russia*, the Arbitration Institute of the Stockholm Chamber of Commerce was deciding on the case Sedelmayer, the German citizen, but acting in the territory of the Russian Federation through its company *Sedelmayer Group of Companies International Inc. (SGC International*) incorporated in the United States of America, and in the year 1990 together with the Russian GUVD (Main Department of Internal Affairs) of the city Leningrad (St. Petersburg) owned a joint company in Russia. In 1995 Sedelmayer was informed about the cancellation of the previous agreement, without any compensation of his loss or investment made previously. In 1996 Sedelmayer made a claim to the Arbitration Institute of the Stockholm Chamber of Commerce on the basis of the BIT between Germany and the USSR 1989. Although the Tribunal concluded in 1998 that the RF should pay compensation to the investor Sedelmayer, the case itself brought many issues, including identifications of the parties.

The tribunal rendered the natural person Sedelmayer as an investor, instead of his company, making investing activities in the host-state. The Tribunal decided that Sedelmayer is entitled to claim under the BIT between Germany and the USSR, as the claimant is the German citizen, and he is “de facto investor”, unlike the classic Barcelona Traction case as the Tribunal decided on the basis of the nationality of the shareholder, but not on the corporate nationality.[273]

In its judgement regarding the rate of interest of the compensation, the SCC stated “as the rate of bank interest on the day of performance of the monetary obligation or respective part thereof which existed *at the place of residence of the creditor, and if the creditor is a juridical person, at the place of its location <…> Since, in the present case, the creditor is*

---

[273] *Barcelona Traction, Light and Power Company, limite*d- Belgium v. Spain, ICJ 1962

resident in Germany, the relevant rate of interest would be the rate applied there. In the present case, compensation *shall be paid in another currency than rubles*."[274,275]

Otherwise discusses arbitrator Zykin in his dissenting opinion to this decision. He claims that the claimant is not performing as a natural person, but as an owner of the American company SGC international, which is a shareholder of the subjected joint venture established in Russia thus, the USA-RF BIT should be applied.

Interestingly, that the same SCC arbitration tribunal in the case *Berschader and Bershader v. Russian Federation*[276], two brothers, citizens of the Belgium, operated in the territory of the RF through the company registered in Belgium, in response to the respondent's objection, that the claimants, as physical persons did not implement any capital investments in the territory of the RF, brought controversial formulation. It referred to the Belgium and Luxembourg - USSR BIT definition of the "investor", who is "*inter alia any natural person who is recognized as a citizen of the USSR, Belgium or Luxembourg and is entitled to make investments*" in the territories of these states.[277] Thus, the tribunal did not tie the investor with the investment activity.

The judge Weiller offered a different interpretation in his separate opinion. He referred to the article 31 (1) of the Vienna Convention on Treaties, regarding the interpretation the agreement, should be taken into account the treaty text itself, including its purpose. He proposed the better argumentation than the definition of the term "investor" is in the definition of the term "investment", which also means "*indirect investments made by investors of one of the contracting parties in the territory of another contracting party by the intermediary of an investor of a third state*".[278]

---

[274] Para 115 of the decision in *Sedelmayer v. Russia*.
[275] Emphasized by the author of this paper.
[276] *Berschader and Bershader v. Russian Federation*, Case No. 080/2004, Belgium-Russia BIT http://www.italaw.com/cases/140
[277] Para 105,106 of the judgement on *Bershader & Bershader v. Russia*.
[278] Para 12 of the separate opinion in *Bershader & Bershader v Russia*.

Besides the identification of the investor, the SCC Tribunal in the case Sedelmayer v. Russia, brought an issue on defining the respondent party. The Russian Federation in the request for Arbitration initially was not mentioned as the defendant, otherwise it was "the presidential administration, procurement department", however, later the claimant stressed the proper respondent should be that one, which is authorized to represent the Russian Federation.[279] As the Russian side was not able to provide a proper argument, what authority exactly should represent the RF, the tribunal stated in that arbitration it is represented by the Procurement Department. The opposite argument uses arbitrator Zykin in his dissenting opinion to that case, noting, that the Procurement Department, approved by the internal legislation, namely Decree No 797, of the year 1995, it is not legally identical to the Russian Federation.

Interestingly, how the Comprehensive and Economic Trade Agreement between the EU and Canada defines the investor. It defines investor both as an enterprise and as a natural person, with an exception for Latvia, where the natural person is the one who is not a citizen of the Latvia, but natural person permanently residing in this state.[280] Moreover, the trade and investment agreements between the EU as a whole, and third countries, as Canada and Singapore, require from the investor to have in the domestic state "substantial economic activity", preventing the possible opportunistic behavior.

3.3.2.2. Investment

The definition of the investment is necessary for an understanding the circle of operations that are covered by the agreement. The absence of an unambiguous clear

[279] Arbitration Award of Arbitration Stockholm, Sweden on *Sedelmayer vs. the RF* through the Procurement Department of the President of the Russian Federation, 07.07.1998, Ch. 2.5.3.,p. 78, available on http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf

[280] Article 8.1.(b) http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

understanding of investments can lead to the difficulties in resolving specific investment disputes, especially in the energy sector. Overall, BITs have a similar list of forms of investment. It should be mentioned such forms of investment as securities or portfolio investments, due to their high mobility of such assets, when it is hard to predict for the state who will be the owner of the asset.[281]

The term "investment" does not have any common or precise definition, notwithstanding with the extensive legal basis in the framework of the international treaties, and the presence of the specific national legislation in this area.

The Encyclopaedia of Public International Law defines investment as "*a transfer of funds or materials from one country (called capital-exporting country) to another country (called host country) in return for a direct or indirect participation in the earning of that enterprise*"[282]. The legal concept of the investments is closely related to the economic definitions. J. M. Keynes in General Theory of Employment, interest and money (1936) defines the investment as "the current addition to the value of the capital equipment which has resulted from the productive activity of the period", "saving" and "*that part of the income of the period which has not passed into consumption.*"[283] Nevertheless, there is no only definition of the terms as investment, investor, and capital. Various determinations could be found not only between the fields as law and economy, but also inside the specific legal sector, due the normative character of the law.[284] "*According to Juillard and Carreau, the absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments*

[281] the case *Fedax vs. Venezuela*, where the holder of the promissory note paper – the local investor – has transferred the papers to the foreign person – the citizen of the state, with which the Venezuela has BIT

[282] The Encyclopaedia of Public International Law, 1985, vol. 8, Max Planck Institute for Comparative Public Law and International Law, Amsterdam, North Holland Publishing Company, D. W. Bowett, pp.551, p. 246

[283] KEYNES, J., *General Theory of Employment, interest and money*,1936, chapter 6 "The Definition of Income, Saving and Investment", p. 56, Atlantic publishers & distributors, Nice Printing Press, Sahibabad, India, 2008. Available https://books.google.cz/books?id=xpw-96rynOcC&printsec=frontcover&hl=cs#v=onepage&q&f=false

[284] See more H. L. A. Hart The Concept of Law (1961)

which contain it."[285] This is related to the variety of forms and types of the foreign investments, as well as their objectives.[286] Investments may be in material form (as technological equipment's, goods), and in immaterial form (intellectual property, rights, interests), in the form of financial contribution, and due to the development of technology, new forms of investment arise in the international market.

The lawmakers of the international agreements took that into consideration, thus there is no strict definition in the international agreements, rather recommendation left to the states to decide, what might be an investment. Organization for Economic Cooperation and Development elaborated in its Code of Liberalization of Capital Movements[287] the main elements of investments. It stresses the "establishing of lasting economic relations", and in a case of the direct investment, the investor should "exercise an effective influence on the management" of the company, it had invested. In the Benchmark Definition of Foreign Direct Investment, the OECD adds the characteristics: "*Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The 'lasting interest' is evidenced where the director investor owns at least 10 per cent of the voting power of the direct investment enterprise*".[288]

The ICSID applies the so-called "Salini test", or algorithm, formulated in the case *Salini et al.v.Morocco* in 2001, where the investment should meet four points: (1) contribution

---

[285] Supra note 153 (CARREAU, D., JUILLARD, P., *Droit international économique* (3e édition, Dalloz, Paris, 2007), 403 : *"La difficulté que l'on rencontre, lorsque l'on veut proposer une définition de l'investissement international, vient de la multiplicité des conceptions en cette matière – cette multiplicité des conceptions, en définitive, ne reflétant que la prolifération des sources."*) http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf
[286] SORNARAJAH M., *The International Law on Foreign Investment.* 2010, 3 ed., Cambridge university press, p.8
[287] See www.oecd.org/dataoecd/10/62/4844455.pdf
[288] OECD Benchmark Definition of Foreign Investment (Draft) – 4th Edition, DAF/INV/STAT(2006)2/REV. 3, 2007, supra note 161 http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf

of money or assets, (2) certain duration, (3) an element of risk, (4) contribution to the economic development of the host state.[289]

In BITs between the Russian Federation and EU member states in the Russian version of the document is used the synonym of "investment" – "*kapitalovlozheniye*", which translates as "insertion/contribution of the capital", in a meaning of the direct investment.

The Czech-Russian BIT widens the definition to "all kinds of assets which investors of one of the contracting party invest in the territory of the other contracting in accordance with its legislation in relation to realization of business activities in order to profit <…>"[290]

In the case *Bershader v Russia*[291], on the basis of the USSR-Belgium and Luxembourg BIT, the SCC Arbitration Tribunal concluded, that Russian term *"kapitalovlozheniye"* or "capital investment" is identical to the term "investment"[292]. Subjected BIT was concluded in two languages – in Russian, and French, and the tribunal in its argumentation for comparison used the French version of the word "*kapitalovlozheniye*", in the treaty as "*investissement*"[293], tribunal compared these language interpretations and concluded that above mentioned word is identical to the English "*investment*". Moreover, the second argument was that in the meaning of the treaty the Russian term was identical to the English "*investment*" or "*to invest", thus, not limiting the purpose of the investing to the "contribution to the charter capital of a joint venture*".[294] Thus, the decision became a precedent in interpretation of the Russian definition of investments.

There are public and private types of investment, in accordance with the source of the investment – state ownership and private property, whereas the state ownership, due to the sovereignty has a special status in the national and international law. In that case, the state

[289] *Salini et al. v. Morocco*, ICSID Case, No ARB/00/4, Decision on Jurisdiction, para 52, 42 I.L.M. 609 (2003)
[290] Article I para 2
[291] *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award of August 21, 2006 (hereinafter "Berschader v. Russia")
[292] Ibid, para 108-109 of the decision SCC case No 080/2004.
[293] Para 110 of the decision SCC case No 080/2004
[294] Para 108-110 of the decision of the SCC case No 080/2004

property has immunity, and cannot be the subject of nationalization or any other form of expropriation, except the case of international responsibility or liability.

In the national law of the Russian Federation[295], the foreign investment is defined, as the "*contribution of the foreign capital to the object of the business activity in the territory of the RF in the form of objects of the civil rights, owned by a foreign investor, if such objects of civil rights have not been withdrawn from the circulation or limited in circulation in the RF in accordance with the federal laws, including money, securities (in the foreign currency and in the currency of the RF), other property, property rights, which have monetary value of exclusive rights to result of intellectual activity (intellectual property, as well as services and information)*".[296] An almost similar formulation of the investment can be found in the BITs, which "*contains a general statement followed by a non-exhaustive list of categories of covered investments directly or indirectly controlled by investors of either Party*".[297,298] In particular, investment in the BITs is defined as "*all kinds of assets that an investor of one contracting party invests in the territory of the other contracting party in accordance with its legislature*". The trade and investment agreements between the EU as a whole and the third countries, as Canada, Singapore, or USA, are repeating the *Salini test*. In the EU-Canada CETA the investment defines investment as "*every kind of asset that an investor owns or controls, directly or indirectly*" and further gives a specifications that "has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption

[295] Federal Law No 160 "On foreign investments", 09.07.1999, Федеральный закон от 09.07.1999 № 160-ФЗ «Об иностранных инвестициях в Российской Федерации», 12.07.1999

[296] Federal Law No 160 "On foreign investments", article 2

[297] http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf, p. 50

[298] Rubins uses three categories of International Investment Agreements in order to organise the different approaches to defining investment: those which contain an "illustrative list of elements" (broad definition, most BITs), an "exhaustive list" (NAFTA) or a "hybrid list" (US-Singapore FTA for instance), RUBINS, N., *The Notion of 'Investment' in International Investment Arbitration* in HORN, N., KROLL, S.(eds.), *Arbitrating Foreign Investment Disputes* , 2004, Kluwer Law International, The Hague, and also mentioned DOLZER&STEVENS,n 15)

of risk", and covers the debt instruments, bonds, debentures, and exclude the particular claims to money.[299]

Regarding the energy sector, the Energy Charter Treaty in article 1 (6) defines investment as "every kind of asset". It might include as material and immaterial property, as well as property rights, or any rights in accordance with the law, or under the contract. The ECT follows the international conceptual approach, according to which contracts are treated as property concept, as an asset or value, but not as a source of commitment.[300] "*Most BITs take four basic definitional dimensions into consideration: 1) the form of the investment; 2) the area of the investment's economic activity; 3) the time when the investment is made; and 4) the investor's connection with the other contracting state.*"[301]

The term "investments" in all BITs between the RF and the EU member states determined as "all kinds of assets". The studies of these BITs shows that, in general, foreign investments are covered by the similar range of property values. Article 1 of the BIT between the RF and Denmark[302] defines investment as

"*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations and shall include in particular:*

(a) movable and immovable property, related property rights, such as mortgages and guarantees, as well as leases,

(b) shares, parts or other forms of participation in enterprises,

(c) claims to money and claims to performance pursuant to contracts having an economic value and associated with an investment,

[299] Article 8.1.(b) http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

[300] See SCHWARZENBERGER, G., *Foreign investments and international law*, 1969, L.S., h. 17

[301] SALACUSE,J.,SULLIVAN,N, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 2005, Harv. Int L.J., 67

[302] Signed in 1993, entry into force 1996, English version is available on http://investmentpolicyhub.unctad.org/Download/TreatyFile/1028
http://investmentpolicyhub.unctad.org/IIA/CountryBits/175#iiaInnerMenu

(d) intellectual property rights, as well as technology, goodwill and know-how,

(e) any rights, conferred by law or under contract, to undertake economic activity, including rights to search for, cultivate, extract or exploit natural resources, a change in the form in which assets are invested does not affect their character as investments."

In some BITs, the subparagraph (d) is extended for the "industrial rights" or "industrial property rights", as in BITs between the RF and France, Germany, or the Czech Republic. And, accordingly to the cooperation in the energy sector, also added subparagraph (e) by the provision on "*commercial activities provided relating to the exploration, development, extraction and exploitation of natural resources*". More appropriate is to outline, what is not a foreign investment, as short-term commercial loans, un-aimed state loans, sponsorship proceeds and other means of foreign origin.[303]

Interestingly, investments could also be the cross-border sale of gas, as in the case *Petrobart v. Kyrgyzstan*,[304] where the company claimant was providing the gas condensate, but had not received the payment on the three invoices, so he stopped the deliveries, and made a claim on the basis of the Energy Charter Treaty. The tribunal recognized as an investment in accordance with the ECT, the right of the claimant on the payment for the gas as an asset. According to academic Bělohlávek this conclusion is the opposite to that, which can be possibly made on the basis of the ordinary formulation of the number of other investment protection agreements, as they do not contain such a broad definition of investment.[305]

The construction or purchase of equipment, as an investment, should not be underestimated, taking into consideration its quantitative and qualitative importance, especially in the gas sector. It is starting with the investment in the industry sector constructing the equipment for exploration, up to the final distribution as pipelines, and

[303] FARHUTDINOV, I., *International investment law*, 2014, 5.1.2. state and private investment, p. 105
[304] *Petrobart Limited v The Kyrgyz Republic*, Arbitral Award, 29.03.2005, SCC Case No 126/2003, Arbitral Award. available http://www.italaw.com/cases/documents/826#sthash.KAvetU69.dpuf
[305] BĚLOHLÁVEK, A., *Ochrana přímých investic v energetice*, 2011, C.H. Beck, p. 23-25.

storages. High range of investments in the first phase can affect the pricing to the end consumer.

3.3.2.3. Other definitions and terms

The scope of the "**territory**", where is this BIT applied, is determined in each BIT in accordance with the article 29 of the Vienna Convention: "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". However, some BITs, as with Belgium and Luxembourg, or France, BITs applies to the "territory of each contracting parties as well as the maritime zone of each contracting party, determined as the economic zone" (art.1(4) BIT France) and "continental shelf, which extend beyond the territorial waters of each of the contracting parties and over which they exercise in under international law sovereign rights and jurisdiction for the purpose of exploration, exploitation and conservation of natural resources" (art. 1(4) France, art. 1(2) Belgium and Luxembourg). In other words, that involves not only the spatial scope of the territory of the contracting parties, but also, not exhausted, spaces covered by Antarctic Treaty 1959, Treaty on the Use of Outer Space, including the Moon and Other Celestial Bodies , 1967.

It is important to mention that most of the energy disputes between the states are related to the boundary or cross-border disputes, most of which are in maritime waters.

In some BITs the definition of territory is missing.[306] On the other way, the provisions on the territory contain the BITs with such states, which are involved in the energy-related projects.[307]

[306] As for example in the RF-Austria BIT
[307] France, Germany.

In BITs between the RF and Denmark, or Belgium and Luxembourg is contained provision on **"subrogation"**, on the substitution of the investor's rights, where the one state, contracting party granted guarantee against any non-commercial or political risks to its investor to the investment in the territory of the other state, so the host state shall recognize the rights of the first contracting party "*by virtue of subrogation to the rights of the investor when payment has been made under this guarantee*" by the first party-state. This provision allows bringing the investor-state relations on the public international level, limiting the possibility of political risk.

For the purposes of the prosperous cooperation and creditability of investment, in some BITs is provided possibility of **"consultations"** - on **accounting** terms in the frame of the national legislation (as in the RF - Finland BIT, article 7), or "in order to review the implementation or application" of the agreement (article 10 of the RF - Denmark BIT).

The duration of BIT is set on the conditionally certain **period of time**: "*this agreement shall remain in force for a period of ten years. Thereafter it shall remain in force until the expiration of twelve months from the date on which either contracting party shall have given written notice of termination of this agreement to the other contracting party*", article 13, para 3 of the RF – Czech Republic BIT. Most of the BITs are concluded to the period of the 15 years with the similar mentioned above procedure of extension. On that point good to have a look at BIT between the Netherlands and Russia, where regarding the duration is mentioned, that it could be prolonged only once for ten years.

It is also important to mention the other provisions included in some BITs, as in between the USSR and Kingdom of Belgium and Grand Duchy of Luxembourg (1989), article 12 states that "*this agreement shall apply to all investments made in the territory of the one of the contracting parties by investors of the other contracting party, starting from 1 January 1964*", similarly in the BITs with Netherlands (1989) – from 01.01.1969, and Finland

(1989) – 01.01.1946. As it is clear that the parties extended the application of BITs for the time prior BITs themselves were concluded, by including the principle of retroactivity. Vienna Convention on the law of treaties, which in article 28 proclaims the principle of non-retroactivity of treaties, however stipulates - "unless a different intention appears from the treaty". Worth to mention that, in a number of BITs, the principle of retroactive application is also determined, however without provision of a specific date. As in the article 12 of BIT between the RF and the UK and the North Ireland *"this agreement shall apply to all investments made before or after its entry into force, but will not apply to any whatsoever terms relating to investment that have arisen, or claims related to investments that were settled before the entry into force of this agreement"*. It should be emphasized that in BITs between the RF and Spain, Portugal or Romania, there is no such provision regarding the principle of retroactivity.

Such provisions are related to the economic and investment relations, which started between the USSR and EU member states in 1940s, however were not secured by the investment protection treaty. Considering the wide range of the investment projects, and specifics of the sectors, especially energy sector, investing of capital, and development of the project require a lot of time, therefore is needed an adequate legal basis, which covers previous already established and functioning cooperation.

Some BITs have attachments in the form of additional protocols and letters. Although from the view of international law, addendum is a part of the international agreement only in the case, if only so expressly stated in the agreement or in the addendum, however in the discussed BITs the situation varies. As in the protocol to the RF – Belgium and Luxembourg BIT, it is proclaimed that "*this protocol is an integral part of the treaty*". However, in the protocol to the RF - Germany BIT there is no such provision, similarly in the protocols and the letter of exchange to the RF - Slovak or the RF – Poland BITs.

It is noteworthy that there is no single compulsory **language** of international treaties, and most of the bilateral treaties are prepared in the official languages of both contracting states. Thus, these agreements comprise two respective language texts, in both languages the text is authentic, as in the BIT with the Czech Republic article 13: "*DONE in duplicate at Moscow, this 5th day of April, 1994, in the Czech and Russian languages, both texts being equally authoritative.*" However there are agreements, which are made in three languages – languages of contracting parties and English, concurrently the English version is prevailing, as in the BITs with Hungary or Denmark.

3.3.3. Jurisdiction and Arbitration

There are two mechanisms of dispute settlement provided in the bilateral investment treaties. One is regarding the dispute between two states, and the second is dealing with the investor-state disputes.

Bilateral investment treaties provide different mechanisms used to settle investment state-to-state disputes - judicial, quasi-judicial and arbitration procedures, including diplomatic protection provisions.[308] However, in BITs between the RF and EU member states can be observed mostly references to the arbitration procedures.

In accordance with the article 9 of the Germany - Russian BIT, the disputes concerning interpretation and application of the treaty shall be settled through negotiations, and if such dispute cannot be settled by negotiations (within 6 month), then shall be submitted to an arbitration tribunal. The preference of the amicable settlement of the dispute is further emphasized in the article 10 (1) of the subjected BIT.

[308] BERNASCONI-OSTERWALDER,N., *State –state dispute settlement in investment treaties*, 2014, best practices series, IISD, available on https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf

The arbitration tribunal shall be appointed by the representatives of each contracting parties, and these 2 arbitrators shall select a third one from the third state, which should be a chairperson or the presiding arbitrator. If the appointment within three months will not be made, the parties can invite the President of the International Court of Justice to make necessary appointments. These provisions in the BITs between the RF and each EU member state are almost of the same content, the only differences are the period of time for the panel appointment, or the references to the international body, as in the RF – France BIT it is the General Secretary of the UN, or in the BIT with Spain it is specified that the tribunal is *ad hoc*. These arbitration panels are appointed individually, according to the specific dispute. Further, para 2 of article 10 the RF - Germany BIT states that, if the dispute is not settled within 6 months, the parties are entitled to refer the matter to an international arbitral tribunal.

Concerning the investor-state disputes, BITs provide investors a mechanism of securing their rights, in the frame of independent arbitration with a host state, whereas the host state is obliged to proceed with the dispute with the investor to the arbitration, apart from the exhaustion of all domestic legal remedies of the host-state. At the same time, the possibility to claim the host-state actions, not limited by the violations under the specific contract[309], but in accordance with BIT, led to the parallel dispute settlements, as in the case *Exxon Mobil vs Venezuela*[310]. The attractiveness of the arbitration tribunals, is dictated not only by the effectiveness, relatively short period of the proceedings, and the finality of the decision, but also due to the extensive interpretation of the specific provisions, and so-called „umbrella clause“.[311]

[309] *Noble Ventures v. Romania*. ICSID Case No ARB/01/11. http://italaw.com/documents/Noble.pdf
[310] *Exxon Mobil v. Venezuela ICSID CASE NO. ARB/07/27*
[311]Currently, more than 40% of BIT in the world includes the umbrella clause. The UK and Ireland – the USSR-BIT also contains provision "contracting party shall observe any obligation it may have entered into consistently with this agreement with regard to investments of investors of the other contracting party" (art. 2 par. 2). MORTENSON J.D. *The Meaning of investment: ICSID's travaux and the domain of international investment law*. Harvard International Law journal, vol. 451 No. 1, p. 257-318

An existing umbrella clause in some BITs between the RF and the EU MS, where the investor can revise the arbitration measures of a general nature taken by the state-importer of investments. This became a solid concern in 2010, in time when the UK was the EU member state, and the *Yukos case*, based on the UK - USSR BIT, brought an issue under the umbrella clause, which was included in this BIT, stating that „*no contracting state shall by the mere facto of its ratification, acceptance or approval of this conventions and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration*".

In some BITs a requirement of state consent to the initiating of the arbitrational proceedings (as in BIT between the UK-USSR) is included, a so-called, *fork in the road*. In practice, several tribunals reviewed this obligation, as in the case *Austrian Airlines v. Slovakia*[312]; Tribunal stated that it does not „*consider that provisions that embody a State's consent to arbitration must be strictly interpreted.*" This view was adopted by the tribunals in *Plama v. Bulgaria, Telenor v. Hungary, Bershader v. Russia*.

In BITs between the RF and EU member states are mentioned the UNCITRAL rules, organs ICSID and the Institute of Arbitration of the Chamber of Commerce of Stockholm as a dispute settlement body *ad hoc*. Solely to the UNCITRAL refer BITs with Poland, France and Bulgaria. The RF – German or the RF – Finland BITs state *ad hoc* arbitration tribunal the Institute of Arbitration of the Chamber of Commerce of Stockholm. In addition BIT with Finland provides besides that decisions of the arbitrators are final and binding on the parties. Further it refer to the New York Convention, stating that such arbitration decisions are recognized and enforced in accordance with the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on June 10, 1958 in New York. To the ICSID, as to the arbitration tribunal, refer only BITs between the RF and

[312] para 119

Czech, and the RF and Slovak Republic. Interestingly what do BITs with Romania (article 8) and with Portugal (article 7) provide regarding the investor-state dispute settlement. They namely state, that parties can refer to the UNCITRAL, but also in the next paragraph express that parties can refer also to the ICSID, but only "*if the RF will accede to the Convention on Investment Disputes Settlement between the states and natural or legal persons of the other states, signed in Washington March, 18 1965, or by the use of the supplementary procedure of the mentioned international centre, stipulated by the decision of its secretariat.*" To compare article 8 of the RF - Czech BIT formulates it as following "*to the International Centre for Settlement of Investment Disputes, for the implementation of the Arbitration Procedures as soon as both the Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done in Washington D.C. on March 18, 1965 (Convention), or to the Additional Facility of the Centre, in case the Czech Republic or the Russian Federation haven't joined the Convention*".

References to two arbitration bodies, besides Portugal, contain Russian BITs with Spain, Croatia, Cyprus, the UK and North Ireland, Lithuania, Italy, Hungary, Denmark, Austria, Belgium and Luxembourg, to both UNCITRAL rules and the Institute of Arbitration of the Chamber of Commerce of Stockholm; mentioned Czech Republic, Slovak Republic and Romania - to UNCITRAL and ICSID rules and procedures.

Having a look at the statistics of the ICSID can be seen that most of the decisions on the merits, or *rationae materiae,* was made by the tribunal in favour of the investor. Also, the ICSID is often deciding on the jurisdictional issues, and the issues of the arbitrability.[313] The majority of the cases registered in the ECT in 2015 were filed under the ICSID.[314] The main

[313] Art. 25(1) Washington convention, ŠTURMA, P., BALAŠ, V., *Mezinárodní parvo ekonomické*, 2013, pp.416-421

[314] The leading responding state party is Spain with almost 30 claims filed against it. In contrast the number one nationality of claimants is by far German with 43 claims, http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/, ICSID database https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

means of the international legal protection of investments in the energy sector are provided in the article 26 of the ECT, with the expansion of the arbitration jurisdiction.[315] That arbitration jurisdiction in fact gives to the investor the opportunity to negotiate directly with the government, which is one of the specific forms of the dispute resolution, and then to choose the international arbitration in accordance with the article 26 (4). In a case of being unsuccessful in the national arbitration, parties may appeal in accordance with the ECT. Moreover, the requirement of the ECT of written consent to the article II of the New-York Convention seem very risky for the CIS states, due to the finality of the decision in the international level.[316] The claim can be brought against any contracting party, or even the whole European Union.

Also, the EU and the RF have undertaken the international obligations of the commercial arbitrations, which are based on the specific contract between the state and the investor. In addition, should be mentioned that some of the BITs between the EU member-states and the RF are signed but not in force, as they were not ratified by one of the contracting parties,[317] which complicates the choice of jurisdiction in a case of the dispute.

One of the examples is the recent case *Lithuania against Gazprom*[318], where Lithuania brought a claim against Gazprom's pricing before the national tribunals, whereas the RF made a claim in the international arbitration in the Stockholm Chamber of Commerce, pointing that in the Russian - Lithuanian agreement contains an arbitration clause. Remarkable case is showing the potential parallel proceeding before the national court in the EU member state and the arbitration court in another EU member state, where Lithuania claimed that the arbitral tribunal may undermine the jurisdiction of the national court. Parties required for

---

[315] See articles of KONOPLYANIK,A., GUDKOV, I.

[316] OECD overview

[317] With Croatia, Cyprus, Poland, Portugal, Slovenia.

[318] *Case C-536/13*, http://curia.europa.eu/juris/liste.jsf?num=C-536/13

preliminary ruling from the Court of the EU, which has not enlightened the situation, as it is limited in its judgment on explaining the EU Council Regulation 44/2001 (Brussels I).

The possibility to apply for more than one arbitration dispute-settlement body may seem an advantage though, on the other side it may lead to the parallel proceedings and unpredictable results. As it illustrates the case *Lauder v CME*, the dispute with the Czech Republic, when two different arbitration bodies were considering on the basis of two different BITs – London arbitration tribunal considered on the basis of the USA - Czech BIT, which decided, that the violation of the Czech Republic has not occurred, and Stockholm arbitration tribunal – on the basis of the Netherland - Czech BIT, which concluded that the host-state applied the hidden expropriation and held that the Czech Republic should pay compensation in amount of USD 335 million.[319]

The other issue occurs in regard with expropriation based on public interest, and the measures which entails and not lead to compensation. However, the right of the investor for compensation in a case of violation, may lead to an abuse by the investor of such arbitration possibility, „*investment treaties that were originally aimed at reducing the risk of investing aboard have now become an instrument that is used to attack the extremely wide range of actions of host-state"*[320], as in the case *Vattenfall vs Germany*[321]. A Swedish energy company *Vattenfall* was obliged by the host-state to shutdown its nuclear power plants, due to German new energy legislation for the safety purposes, as well as environmental and energy policy. Thus, the company brought an action to ICSID on the basis of the ECT. This is a conflict of

---

[319] FRANCK S., *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 2005, Fordham Law Rev. 73, p. 1559-1568

[320] CHOUDHURY B., *Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?* 2008,Vanderbilt Journal of transnational law, vol.41, p.782

[321] Case *Vattenfall AB v. Federal Republic of Germany*, ICSID case No ARB/09/6. Germany on the first time decided to pay compensation to the Swedish company, by choosing the amicable agreement, and milded the previously established restrictions on the nuclear power plants. In several years, Vattenfall brought an action against Germany the second time, *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No ARV/12/12) the case is still pending. http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf

interests, when the state is taking measures on regulating its economy and ecology and the need to pay compensation, again, in public purposes.

As a consequence, the question of legitimacy arose, in which occurred in the legal vacuum fulfilled by uncertainty among the dispute parties. Some academics even talk about the problem of the privatization of the international law by the investment arbitrators.[322] The other ones talk about the principle of the *abus de droit* in the context when was decided on the subject of the dispute.[323]

In view of the fact that there is a high level of the fragmentation of the international law and absence of the single dispute settlement body, especially in the field of investment, arise the following questions: Which tribunals' decision is the right and the final one in a case of the parallel proceedings? In relations to it, as Russia in cases of *Yukos, Sedelmayer* and other, requested for the revision of the arbitration decisions by the national courts at the place of the arbitration tribunal location, what decision will be considered as the binding and the final one? Academic Balaš having regard to recognizing the right and final decision suggests to prefer its correctness to the finality of the award, stressing the public nature of such investment disputes.[324]

The issue of *lis pendens* was analyzed in the *case Sedelmayer v. Russia*, under Germany –USSR BIT.[325] The claimant Sedelmayer has brought an action in front of the local customs committee in St. Petersburg, so the defendant (the RF) argued that it might be the case of *lis pendens* or the parallel proceeding. The tribunal decided in accordance with the article 4 of the subject BIT, it is stated, that the investor irrespective of such action <review by the host-states courts>, "shall have the right… to appeal to an international arbitral tribunal

---

[322] FRANCK S., *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International law Through Inconsistent Decision*s, 2005, p. 1520-1625

[323] BALAŠ, V., *Konkurující jurisdikce v oblasti mezinárodního ekonomického práva*, 2009, p. 80, in*: Konkurující jurisdikce mezinárodních rozhodovacích orgánů.*

[324] BALAŠ, V., *Review of awards*, 2008, p. 1148, pp. 1127-1153, in MUCHLINSKI, P., ORTINO, F., SCHREUER, C., *The Oxford handbook of international investment law*, 2008, Oxford University Press, Oxford.

[325] *Sedelmayer v. Russia*

to resolve disputes on the procedure for the payment of compensation and the amount thereof", thus, there is no issue of *lis pendens*.

The case *Lauder v. Czech Republic*[326] and the *CME v. Czech Republic*[327] evoked discussions of the issue of concurrent and antagonistic decisions of the international arbitration tribunals. These are the cases of the same subject, same parties, but based on different BITs, with two conflicting decisions of the two different tribunals. Many authorities criticized the position of the Czech Republic that it did not use the possibility to consolidate the disputes.[328] Nevertheless, interesting point is that the Stockholm arbitration tribunal did not pursue the issue of *lis pendens* and *res iudicata*, stating that modern investment treaties avoid any kind of restrictions which may provide uncertainties for the identification of the protected investment', thus stating on non-existing *lis pendens*, and on extensive right of the arbitration right.[329]

The *RosInvestCo v. Russia* tribunal stated that "the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his 'use' and 'enjoyment,' procedural options of obvious and great significance.[330]

The case *Renta 4 v RF*, Spanish shareholders of *Yuko*s, based on BITs with Spain[331], where the SCC ordered to pay compensation of USD 2,7 million loss, due the unlawful expropriation of *Yukos* assets by the host state, illustrates the uncertainty of the choice of jurisdiction. The RF requested for revision the Stockholm District court, which later

---

[326] RONALD S., *Lauder v. The Czech Republic, under Czech Republic – United States BIT*, 2001, London Arbitration Tribunal

[327] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, under Czech Republic- Netherlands BIT, Stockholm Arbitration Tribunal, 2001

[328] Supra note 270 SCHREUER CH., BOCKSTIEGEL K.H., ILA conference in Berlin, in Konkurující jurisdikce mezinárodních rozhodovacích orgánů, 2009, Praha, UK, p. 81

[329] Para 409 of the decision '*Treaty proceedings are barred by civil law proceedings only if the respective investment treaty contains provision. Modern bilateral investment treaties usually do not contain judicial limitations like that.* <…> (GIORGIO SACERDOTI *Bilateral Treaties and Multilateral Instruments on Investment Protection* in Recueil des Cours 1997)', pp. 108-109 of decision.

[330] *Case RosinvestCo v RF,* para 130

[331] investment funds Quasar de Valores, Renta 4

confirmed the decision of the Stockholm arbitration tribunal. However, in 2016 the Svea Court of Appeal overturned the decision of the Stockholm District Court, and approved the RF's plea. It stated that the Stockholm arbitration court lacked jurisdiction to make a decision on that case. The Svea Court of Appeal arrived at its conclusion by interpreting the provisions in the underlying BIT between the Russian Federation and Spain. The Svea Court of Appeal found that when the relevant dispute-resolution clause (article 10 in conjunction with article 6) in the BIT is interpreted in accordance with article 31 and 30 of the Vienna Convention on the Law of Treaties: *"...article 10 of the Treaty does not include an examination of whether expropriation has taken place. <...> This interpretation neither leaves room for any remaining ambiguity or obscurity regarding the meaning of the article nor leads to a result that is manifestly absurd or unreasonable*." Article 10 states that: "*1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under article 6 of this Agreement, <...> may be referred to <...>An arbitral tribunal* <...>." It only covers jurisdiction over issues relating to the amount, or method of payment, of compensation paid in the event of an expropriation, and not cover the issue as to whether expropriation of an investment has occurred or not. The standard included in the MFN-clause – "fair and equitable treatment" – was not considered to amount to an unconditional right for investors to have their case heard by an international arbitral tribunal. The investors nevertheless argued that they would not receive fair proceedings in the Russian court. These arguments were, however dismissed by the Svea Court of Appeal since the investors failed to produce any proof supporting this claim. [332]

It should be mentioned that the relevant issue was faced by several arbitration tribunals, including Stockholm Chamber of Commerce, the ICC International Court of Arbitration, the London Court of International Arbitration (the "LCIA"), in the disputes involved Russian parties sanctioned by

[332] Svea Court of Appeal judgment 2016-01-18, case number T 9128-14, page 10

the EU. These tribunals developed a joint article, where they stressed the "impartiality and independence of the procedure".[333]

Interestingly in the BITs between the Russian Federation and the EU member states, there is expressly mentioned the finality of the arbitration award, and there is no allusion on the appellate body or the possibility of appeal. However, taken into consideration the above mentioned cases, where the party respondent is the Russian Federation, it is clearly seen that Russia is mostly unsatisfied with the decision and pursues its revision at the judicial bodies. Thus, for the purpose of the economy and efficiency of the proceedings, originates the issue of the necessity of the inclusion the appellate instrument into the bilateral treaties.

3.3.4. Enforcement of the arbitration decision

Regarding the disputes arose from the bilateral treaties the issue of the enforcement of arbitral awards is relevant. The states are reluctant to pay the awards ordered by arbitration tribunals, and although in BITs it is stated that the arbitration decision is the final decision, the RF is nevertheless requesting for revision the courts of the local national judicial systems. Although, the arbitration under the UNCITRAL rules is followed with the obligation of the party to subdue the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958.[334]

Even though the Convention consists of 150 participants, including the Russian Federation and EU member states, some academics do not recognize its universal nature.[335]

---

[333] 17.06.2015 http://sccinstitute.com/media/80988/legal-insight-icc_lcia_scc-on-sanctions_17-june-2015.pdf

[334] besides this convention, the RF is participant of the European Convention on International Commercial Arbitration 1961, and the Moscow Convention on the Arbitration of civil law disputes, arising from the relations of economic and scientific and technical cooperation, 1972 (between the states of Council for Mutual Economic Assistance, COMECON or CMEA)

[335]BORN,G.B., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. 2013, 4th ed.,p.151

This convention is directed to provide the performance of the award made by the arbitration tribunal. In accordance with the New York convention, the signatory states are committed to recognize and enforce the arbitral awards, regardless the fact on which state territory the decision was taken. Thus, is enshrined the rule of the recognition and enforcement of the decision in the states participants and non-participants, but only based on reservation on the conditions of reciprocity.[336]

The enforcement of the arbitral awards is carried out in accordance with the procedural law of the state, in which the arbitral award recognition and enforcement is required by the parties. In accordance with the article III of the Convention, the states shall recognize arbitral awards as binding and enforce them in accordance with the procedural rules of the state, where the award was relied upon. Article IV describes the process of the requirement the recognition and enforcement of the decision.[337] The article V of the mentioned Convention contains the exhaustive list of the grounds to refuse the recognition and enforcement of the award. Nevertheless the article III of the subject convention reminds that all the decisions are binding for the state.[338]

The Convention itself is not long, and basically provides the comprehensive grounds for its application, however, there is its no sole interpretation. Different courts in various jurisdictions come to even antagonist solutions and decisions regarding the recognition and enforcement of an arbitral award. As in the case *Diag Human S.E. v. Czech Republic*[339],

---

[336] such reservation was made in the USSR, and continues to apply in the RF (as in the state-successor), so in the RF are recognized and enforced decisions only of the states-participants of the New York Convention.

[337] in the RF the application for recognition and enforcement of awards shall be made in the arbitration court of the subject of the RF, at the location or residence of the lost party, or its property location (in accordance with the RF arbitral procedural code, art. 242)

[338] FG Hemisphere v. Democratic Republic of Congo, see also CHENG, T, S.C., LAI, L., *Lessons learned from the FG Hemisphere vs DRC and Huatianlong Case*, 2009, International council for commercial arbitration, available http://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf.

[339] different interpretations contained in judgments and decisions could be found at http://www.italaw.com/cases/2587, More about interpretation of this case see: FEIGERLOVA, M., *DIAG HUMAN: S case study on multi-jurisdictional enforcement of an international arbitration award*, CYIL, 6 (2015), pp. 357-371

where the English, French and US tribunals could not agree on the wording of the Convention "binding" regarding the "finality" of the arbitral award. Some experts even consider the possibility of the strategic approach in choosing the state of application of the Convention, and the concern about political bias of the courts. As in the case of *Yukos v. Rosneft* in 2009, where the Amsterdam tribunal decided to recognize the finality and the binding nature of the first instance decision, ignoring the stages of appeal, which abolished the first decision and set this case aside. The tribunal reasoned its recognition by referring to the information, acquired from the mass media, stating that the Russian courts are biased.[340]

Another issue is that the state may refuse to pay the compensation and the award, so in this case, the instruments of enforcement will be applied. The case *Sedelmayer v. Russia* illustrates the issue of the seizure of the property. This case was pending for 15 years, but the Russian side has not paid yet the awarded compensation in the amount of USD 2,350,000. The RF in addition made a counter-claim on *Sedelmayer* to pay the loss on tax avoidance.

This case brings also the additional matter - the monetization of the sale of the state property and the issue of the state immunity and jurisdiction. The claimant took measures on arresting the Russian property in the foreign countries, and with the latest decision of the Swedish Supreme Court in 2011,[341] which confirmed the claimant's rights, on monetization of the sale of the Russian Commercial Chamber in Stockholm.[342] The RF claimed that act, stressing the state immunity issues, referring the New York Convention's article V (2) (b) on refusal "*the recognition or enforcement of the award would be contrary to the public policy of that country*". However, the tribunal in accordance with the UN Convention on Jurisdictional

[340] See analysis of VAN DEN BERG,A.,J., *Enforcement Of Arbitral Awards Annulled In Russia, Case Comment On Court Of Appeal Of Amsterdam*, April 28,2009, 2010, Journal Of International Arbitration, 27 (2), Pp. 179-198

[341] Decision of the Swedish Supreme Court, 1 July 2011, http://www.italaw.com/sites/default/files/case-documents/ita0766.pdf

[342] It was done in auction in 2014.

Immunities of States (2004)[343] stated that state properly used in commercial purposes is excluded from the state immunity.

The same opportunity was attempting to use Swiss legal entity *Noga*[344], which was operating in the Russian Federation, based on the decision of the SCC tribunal in 1997. After 10 years of unsuccessful attempts to receive an award from the lost side – Russia, *Noga* was trying to put an arrest on the Russian tall ship *Sedov*, which was temporarily in France, however, the Paris Court of Appeal declined such possibility for *Noga*.[345]

Miscellaneous interpretations, unreasonable approach, un-finality of the decision (see for example Diag Human case), which can be appealed, and reviewed by the different court, these all leads not to the cross-fertilization of the court, but to the legal uncertainty and unreliability of the international law function. Such un-enforcement of law have for the applicants negative consequences, thus it should be paid a careful attention to this sector of the law. Although it is related to the state responsibility for its judicial system, it is affecting the science of the international law, bringing the difficulties for the future decisions.

Summary

This chapter focused on the investment relations between the EU and the RF, taking into consideration the legal background of the investment cooperation in the multilateral or universal level. The main documents and bodies related to this sector, including the ICSID, WTO, and the most relevant instruments for the EU – RF relations – Energy Charter Treaty and the Partnership and Cooperation Agreement was analyzed. Also was examined why the ECT is of great importance, and why the parties were disregarding it, in particular through the

---

[343] Which is yet to come into force, text available on https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf

[344] *Compagnie Noga D'importation Et D'exportation S.A. V. The RF*, 02-9237(L), 02-9272(Con), 2004

[345] https://arbitrationlaw.com/pdf/france-%D1%83noga%D1%84-case-and-seizure-sedov-international-arbitration-court-decisions-3rd-edition, http://caselaw.findlaw.com/us-2nd-circuit/1241558.html,

case of *Yukos v. Russia*, or *Electabel v. Hungary*. Moreover it was shown both obsolescence and importance and potential of the Partnership and Cooperation Agreement for the EU-RF legal background via the *Simutenkov*' case.

Expropriation, the most dangerous issue for the investor in the host state was further discussed, and it was shown the justification of the state expropriatory measures, including public purposes, and examined the matter of the compensation, especially its different understanding.

Given the aim of the paper, this chapter concentrated on the bilateral investment treaties between the RF and each EU member state, highlighting important provisions, regarding the treatment of investments, or jurisdiction and arbitration, the diverse definitions of the main terms as investor, investment, or territory. The cases of *Sedelmayer v. Russia*, as an example of the settlement under the German- USSR BIT, and pointed the fragmented interpretations of the terms were discussed.

In addition, the case was used to illustrate the difficulties in the enforcement and recognition of the arbitration awards, and the relevant state in regard to the RF and the EU relations.

IV. Perspectives of the EU-RF BIT

4.1. Legal regulation of foreign investment in gas sector in the Russian Federation

On the basis of bilateral investment treaties between the states, the investment contracts conclude, as the agreements between the state and the investor. These are not international treaties, in accordance with the international law, and they are covered mostly by the national law of the host-state. Although, the existence of investment contracts is not a necessary condition for the protection of investment, however they are of important role as specific obligations undertook by the parties, in interpretation and application of BITs' standards.[346]

The Russian investment and energy legislation is aimed towards liberalization and promotion of the state as lucrative and stable for foreign investments. The Federal Law on Foreign Investments (09.07.1999) is the only basic law specifically devoted to the complete and exclusive regulation of investment relations of an international character. It considers the legal content of the conceptual framework of the investment law, in particular provides a definition of the term "foreign direct investment". The law lists the guarantees to foreign investors, as early gains on loan lenders, protection of certain rights, and limits the financial risk of the sponsors of the project. In accordance with the ECT, it provides the national treatment to the foreign investors, and the legal protection against certain political and economic risks. It also contains the determination of the "public interest", referring the conditions, in accordance to which is possible the expropriation, however, they are of a wide scope, and the specifications of them left to the judicial bodies. However, the practice shows the investors need additional guarantees, especially in the gas sector, where should be

[346] ŠTURMA, P., BALÁŠ, V., *Mezinárodní ekonomické právo*, 2013, p. 335-336

provided the competitive conditions, as well as facilitated access to the gas sector of the foreign investors.[347]

In the energy sector, the investment projects face a higher risk of capital loss, which is related to the specifics of the activity in this industry – the geological and technical, moreover the multiplicity of taxes and other obligatory payments, high level of decentralization of authorities, uncertainty and instability of the mode of foreign trade and exchange regulations and other. For a foreign investor – the investment in the Russian energy sector is riskier due to economic and political reasons. It should be also mentioned that the costs connected with the activity in the energy sector can bear only a large company, which has the necessary financial means.

For the RF, as a state, with natural resources, the energy sector has a strategic value, over which Russia, as many states - producers, is keen to keep the control. This is in accordance with the doctrine of the permanent sovereignty over natural resources.[348]

In the RF, the following Civil Law Acts regulate the investment in the energy sector. The Law on Production Sharing Agreement (PSA)[349] since it is a fundamental legal act regulating the relations arising from the conclusion, performance and termination of PSA[350], with which the civil law relations were for the first time extended to the energy-mineral resource sector, where are the parallel existing two regimes – public law and the civil law. The RF acts as both a higher sovereignty or as a subject of the public law, and as the owner of

[347] OECD report 2008 – "*Implementing a coherent energy investment policy framework is critical to cope with Russia's huge energy investment needs and sector-specific challenges, in particular volatility of international energy prices, significant sunk costs and usually long-term returns on investment. Maintaining the vital role of Russia's energy sector for domestic economy and external economic relations thus depends not only on geological reserves and technological capacities but also on a sound energy investment policy framework enabling to attract adequate investment*."

[348] SORNARAJAH,M., *The international law on foreign investment*, 2010, 3 ed. Cambridge university press, p. 40.

[349] 30.12.1995, No 225-FZ

[350] art. 4 par. 1 of PSA Law

the subsoil, or a subject of the private law.[351] The PSA Law introduced the specific type of agreements, which includes provisions on arbitration, in particular international, in the agreements between state and non-state investors. The PSA law is based on the international investment law[352] and domestic investment law.

In accordance with the PSA Law, the state provides the investor exclusive rights to use mineral resources in the specific area, and the investor develops the subsoil at its own expenses and risk.[353] Since the beginning of commercial production of the minerals, the investor is entitled for compensation for its costs spent for the development of the field. Remaining production after the reimbursement of the costs is profitable and shall be divided between the parties (state and investor). The part of the production thus belongs to the investor as a property right[354].

The investor is required to pay an income tax on its share of profit production.[355] This production may be exported from the territory of the RF in accordance with the agreement and the Customs Code of the RF. Nevertheless in reality, for the foreign exporters the situation in the gas market in Russia was unattractive, and the export is not as easy as it may

---

[351] DANELYAN A, FARHUTDINOV, I., MAGOMEDOV, M, *National legal regulation of the foreign investment in Russia*, 2013, Zakon, # 1, p. 103-119 (Данельян А., Фархутдинов, И., Магомедов М. Национально-правовое регулирование иностранных инвестиций в России. Закон.)

[352] DANELYAN A, FARHUTDINOV, I., MAGOMEDOV, M, National legal regulation of the foreign investment in Russia, 2013, Zakon, # 1, p. 103-119 (Данельян А., Фархутдинов, И., Магомедов М. Национально-правовое регулирование иностранных инвестиций в России. Закон.) DANELYAN, A, ESEDOV D., *Foreign Investor and the state in the Eurasian space*, 2012, Eurasian Juridical journal, #3 (46), pp. 13-16 (Данельян А., Эседов Д. Иностранный инвестор и государство в евразийском пространстве Евразийский юридический журнал)

[353] The period, for which can be the license provided to the investor's use and develop of the field, is determined in accordance with the Regulation approved by the Decree of the Supreme Court of the RF (15.07.1992) No 3314-1 "on the regulation of subsoil licesing procedure" (FARHUTDINOV, I.,International investment law and process, 2014, Prospect (Фархутдинов, Международное инвестиционное право и процесс, Проспект).supranote 243), which cannot exceed 25 years, but can be renewed for the term of the agreement.

[354] art. 9 PSA

[355] *Investor may be exempt from the state and local taxes and fees according to the decision of the government' corresponding subject of the RF and/or representative body of the local self-government* (article 346.35 of the Tax Code RF). The taxes and fees paid by the investors shall be reimbursed. The taxes and fees related exclusively for the implementation of the activities under the PSA agreement investor does not pay. FARHUTDINOV, I.,International investment law and process, 2014, Prospect (Фархутдинов, Международное инвестиционное право и процесс, Проспект).supranote 131)

seem, due to the limitations in energy transport capacity and specific technical requirements from the exporters, confirmed in 2006 by the Law on Gas Export. Thus, the foreign investors in the gas sector are operating in collaboration with Gazprom, a Russian gas company-monopolist.

PSA regulates also relations arising in the process of prospecting, exploration and extraction of mineral raw materials, their transportation, handling, storage, processing, use, sale or the other disposition, in other words the whole complex of the gas issues.

Under the PSA Law, the investors are "*the citizens of the RF, foreign citizens, legal entities and associations established based on agreements on joint activities, which have not the status of the legal entity, engaged in investing their own borrowed or attracted funds (property of property rights) in the prospecting, exploration and extraction of the mineral raw materials and which are subsoil users on the terms of the agreement*"[356].

This PSA law provides the protection by the means and methods of the civil law, where the state and investor are equal subjects. At the same time, in the law there is a number of substantial reservations, which put several limitations on the investor, as the procedure of the approval by the parliament the lists of fields which can be developed on the basis of PSA[357]; declared quotas, as in the PSA regime could be developed no more than 30% of known and recorded by the state balance mineral reserves. Moreover, the number of employees having Russian citizenship on the project should be no less than 80%, and not less than 70% of the total orders for equipment, facilities and needed for the project materials should be placed in the Russian enterprises. There is also priority of the domestic suppliers in acquisition of the new technology and the introduction of advanced technologies on a competitive basis.

[356] article 3 PSA

[357] There are the 27 subsoil fields, which can be developed on the basis of the PSA, where 21 –oil fields, 2- gas, 3- gold, 1 –iron-ore.

There are many opinions about the status of such agreements. According to one view, PSA is the most promising way of attracting the investment in the energy sector, and as a potential to improve experts to see the possibility to cancel the quotas and minimize the restriction in law.[358] On the other side, the legislators stress that these are not the restrictions, but counter concessions granted to investors in exchange for preferential activity regime.[359]

The other view is based on the point that PSA should be concluded in a case of specific capital-intensive projects, as a privilege provided to investors to enable them to implement the projects, which are not effective in the context of a general tax regime.[360] The Law on Foreign Investment and the PSA law are inextricably linked to each other and complement each other.

Besides that, there is also the Law on Concession Agreements, entered into force in 2005, which introduced the concept of public - private partnership, which is however not developed for the use in the gas sector. In the OECD report was stated that it could apply on the gas transportation, however was not any application for the energy-related project. The project Sakhalin-2 has implemented the production-sharing agreement, whereas in the case of Kovykta, there is a joint venture, which is operating under a license.

Project Sakhalin-2,[361] is an example, of international investing in the territory of the RF, by the EU company,[362] under the PSA, where initial negotiations had priority over the

---

[358] OECD Foreign investors would like to see improvements in the current PSA legislation, in particular the removal of the current high local content requirement for PSA projects, which is inconsistent with the WTO Agreement on Trade-Related Investment Measures (TRIMs).

[359] See article in the OIL & GAS Journal, *Russian Oil and Gas Production-Sharing Agreements Promising but worrisome*, Oct 18, 1999, p.36, SHULGA A., *Foreign investment in Russia's oil and gas: legal framework and lessons for the future*, 2002, https://www.law.upenn.edu/journals/jil/articles/volume22/issue4/Shulga22U.Pa.J.Int'lEcon.L.1067(2001).pdf.

[360] (OECD) The limited use of a PSA-based legislation in Russia contrasts with the situation prevailing in many energy producing countries where such investment regime represents more than half of all known contracts in oil and gas upstream activities in force in June 2007.4

[361] information on the Sakhalin-2 project in the official webpages, available on http://www.gazprom.ru/about/production/projects/lng/sakhalin2/ , http://www.sakhalinenergy.ru/ru/index.wbp, http://www.shell.com.ru/o-hac/%D0%9D%D0%B0%D1%88%D0%B8-

legislation and environmental protection[363]. In the regulation of investments, as has been mentioned above, the state has a right to perform its sovereign duty, by suspending or terminating investment activity of the foreign investor for the public purposes, respecting the balance of the public and private interests, and in accordance with the international law.

The project Sakhalin-2 started to develop in 1990s, when the price for oil was low, and capital intensive investment in the difficult Russian region of oil and gas fields in sea[364] was not lucrative for many investors. Thus, the RF provided more favourable conditions, and in conflict with the Presidential Decree[365] on issues of product-sharing agreements. Until the year 2007, the shares on this project belonged to foreign investors, where the company Shell was a major shareholder. After the environmental crisis in 2006, and judicial processes, which initiated Russian Environmental Authority,[366] there were amended the Federal laws on Foreign Investments in the Business Entities of Strategic Importance for National Defense and State Security,[367] and brought better understanding the activities, the strategic fields in the transportation infrastructure, as well as liberalization objectives. Gazprom is engaged in exploration, development and production, gas transportation, processing, export and marketing of natural gas. *De facto* monopoly of Gazprom was consolidated by the Gas Export Law 2006. Thus, in 2007 Gazprom bought the shares of the operating company of the project

%D0%BF%D1%80%D0%BE%D0%B5%D0%BA%D1%82%D1%8B/%D0%9F%D1%80%D0%BE%D0%B5%D0%BA%D1%82-%D0%A1%D0%B0%D1%85%D0%B0%D0%BB%D0%B8%D0%BD-2.html

[362] Enterprise SHELL Sakhalin Holdings B.V.(Netherland-UK oil-gas company, a subsidiary of the Royal Dutch Shell plc). Operator of the project Sakhalin-2 is the joint stock company Sakhalin Energy, was established besides the Netherland UK Shell (27,5% minus one share), the Russian company Gazprom (50% plus one share), and Japanese companies – Mitsui and Mitsubishi. Until year 2007, Shell had 55%, Mitsui – 25%, Mitsubishi 20%.

[363] http://news.bbc.co.uk/hi/russian/russia/newsid_5363000/5363114.stm

[364] Piltun Astokhskoye oil and Lunskoye gas fields in the Okhotsk sea on the offshore the island Sakhalin, located in the far east of Russia, on the border with Japan.

[365] Presidential Decree No 2285, of the 24.12.1993, which issued a year before the contract on the Sakhalin-2 project was concluded.

[366] Rosprirodnadzor made a claim on the Moscow district court on incompliance with the environmental law, however the court declined its claim stating that this organ had not had competence to make a claim in that case, more https://www.sakhalin.info/news/06.09.2006/38976/, https://ria.ru/analytics/20060914/53871520.html, https://www.pravda.ru/news/economics/17-10-2006/200337-sakhalin-0/

[367] Federal Act No FZ-57, RF

Sakhalin-2, and became a major shareholder, which was considered by many observers, as a political step to tighten the state control over oil-gas industry, in the time of increasing prices on the oil.[368]

As a WTO member, Russia meets these organization's (including TRIMS) requirements, which contributed in the customs legislation, and in the technical standards on the energy equipment. Before its membership, were considerations among Russia's foreign trading partners about the pricing policy in the gas sector in comparison with the domestic and export energy-prices, nevertheless the situation has changed, and domestic demand confronts with the higher gas prices.[369]

UNCTAD remarks in its report[370] the positive changes in Russian investment policy, although there are many steps for a transparent and a clear sector. It stresses the specifics of the Russian "national security" objects, and several restrictions of the investor-activity.

The Russian Energy Strategy for the period up to 2035, the strategic directions of the gas sector development are:

- achievement of an optimal, socially and economically justified balance of interests of consumers and gas producers;

- establishment of equal economic conditions for the activity of gas producers on the basis of balance of their rights and obligations;

- formation of Common Gas Eurasian Market.

In the pricing policy should be made a phased transition from the regulation of the wholesale gas prices to the market pricing mechanisms, with the exception of population and equal categories of consumers.[371]

---

[368] http://news.bbc.co.uk/hi/russian/russia/newsid_5317000/5317616.stm

[369] Statistic report of the Analytical Center for the Government of the Russian Federation, Russian Energy 2015, p. 35, available on http://ac.gov.ru/files/publication/a/10205.pdf, also to compare official statistic department Rosstat, "Russia in figures", reports are available on http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/publications/catalog/doc_1135075100641

[370] UNCTAD, Investment Policy Monitor Database, World Investment Report 2016, pp. 10-12

The other energy project is related to the gas transportation, including the pipeline transport, international transport relations, in particular the transport development in the EU, specifically improvement of competitiveness of the transport system, reduction of the total costs.[372]

Recently, there is an intensive construction of pipelines, with a significance of international pipelines, and they are of great importance from the legal point of view, as it is hard to predict the interests of the parties, regarding the non-discriminatory access to the pipeline, also should be taken into consideration the economic and technical difference of the transportation of gas and the oil.[373]

4.2. Legal regulation of foreign investment in gas sector in the EU

The legal regulation of investment relations in the EU has an independent and exclusive content, with the growing a special branch – the European Investment Law. The fundamental basis of which is the supranational EU legislation, the feature of which is a vast range of actors involved in the investment relations. These investment relations include aspects of the public and private law.

4.2.1. EU common investment policy

With the entry into force of the Lisbon Treaty, the regulation of the foreign investments is a part of the common commercial policy of the EU. The article 207 of the

---

[371] Energy strategy till year 2035 - http://minenergo.gov.ru/node/1920 , p. 25

[372] RF Government Decree No 1734-r, 22.11.2008, on the transport strategy of the RF.

[373] GUDKOV, I, *Transboundary pipelines: Some aspects of Legal Regulation*; 2008 Oil, Gas and Law, No 5, p. 49, pp. 49-59, (Гудков, И., Трансграничные трубопроводы: некоторые аспекты правового регулирования, Нефть, Газ и Право)

Treaty on the Functioning of the EU (TFEU)[374] assigns a regulation of foreign investment as an EU exclusive competence. In addition, the EU has a right to conclude international investment related agreements, and exercise an international investment activity on its own behalf. Arguably, the member states do not have previous right to conclude independently BITs with third states. What is the scope of the division of competence and international liability for the breach of BITs between the EU and member states? The Regulation No 1219/2012 established transitional arrangements for BITs between member states and the third states, where these agreements should remain in force, until they will be replaced by BIT between the EU, as a whole, and the third states.[375] Although the entry into force of the Lisbon Treaty did not affect the validity of BITs, nor to the right of the EU MS to conclude BITs, however, the absence of the transition period on this issue, and problematic of application article 351 paragraph 2 of the TFEU created a situation of the legal uncertainty. Šturma and Balaš agree that for now the protection of investment on EU law level is not developed on the needed state, that it may supply BITs.[376]

The mentioned regulation provides the control by the Commission of all BITs in the form of the special permits – authorization, issued by the Commission to the member states to analyze of the provisions for compliance with EU law.[377]

Thus, the EU expanded the power of its institutions and, in some point, limited the sovereign competence of the member states, and became an important subject of the international investment law.

---

[374] the Treaty on European Union and the Treaty on the Functioning of the European Union, 2007, 2012/C 326/01

[375] Commission asks Member States to terminate their intra-EU bilateral investment treaties. Press release, 18.07.2015. http://europa.eu/rapid/press-release_IP-15-5198_en.htm

[376] ŠTURMA P, BALÁŠ V., *Mezinárodní právo ekonomické*, 2013, p. 332-333

[377] MAES, M., *While the EU member states insist on the status quo, the European Parliament calls for a reformed European investment policy*, 1.07.2011, available on www.iisd.org/itn/2011/07/01/while-the-eu-member-states-insist-on-the-status-quo-the-european-parliament-calls-for-a-reformed-european-investment-policy/

However, there is no consensus among the specialists, about the scale of the external competence of the EU. The issue arises, whether the EU may conclude international agreements with the third states on its own behalf, or with the simultaneous participation of all member states, by concluding so-called “mixed agreements”.[378]

The founding treaties of the EU do not contain rules governing the direct investment activities in the energy, particularly gas sector, and the key sources of EU investment law are the specialized acts of the secondary law. The EU secondary law regulating investment activity enshrines the fundamental principles of free movement of persons, services and capital.

The investment policy of the European Union is aimed to provide an equal access to the market and compliance with the same standards for the investments in relation to third countries. In accordance with article 63 (1) of the Treaty on Functioning the European Union (TFEU) - are removed restrictions on movement of capital between member states and third countries. The European Commission, as a responsible organ of the EU, is engaged in the negotiation process on the investment policy, protection of investments, and performs as a party of full value in the agreements on the consolidated trade with the third countries, including Singapore, Canada, the USA, and not least Russia.

The investment protection of EU member state with so-called third state, or non-EU state, is in competence of both entities - the European Union, as a whole, and EU membe state, bilateral investment treaties were concluded with each EU member state. According to the article 351 TFEU EU member states “*shall take all appropriate steps to eliminate the incompatibilities established [in the Bilateral Investment Treaty (BIT)]*” and “*where necessary, assist each other to this end and shall, where appropriate, adopt a common*

[378] FECÁK, T., *Mezinárodní dohody o ochraně investic a právo EU*, 2015, Wolters Kluwer, CR, p. 130

attitude".[379] The EU aims to liberalize foreign direct investments protection through the BIT, which were already concluded with the non-EU states. The EU and its member states are acting in parallel in this field, thus, their activity applies on the aspects of the international investment process. The EU in parallel is struggling with BITs inside the European Union, between the EU MS, thus, in 2015 the European Commission, based on the article 258 TFEU, called five EU member states (Slovakia, Austria, Netherlands, Romania, Sweden) to terminate their intra-EU BITs.[380] The case law settles that "the purpose of the provision (of article 351) is to establish that the application of EU law does "*not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder*"[381]. In other words in the obligation of the states is to remove existing inconsistencies, even though it could lead to suspension or termination of the particular BIT.[382]

The approach of the European Commission is critical to the existing investment agreements, and it is assumed, that these BITs will be replaced by the free trade agreements with the provisions on regulation and protection of investments. The European Commission stressed that in the perspective there will not be the need to apply BIT in an effective protection of the investments.[383] The main points of BITs, which are specifically mentioned by the Commission, are the umbrella clause, as well as not sufficient transparency of the investment arbitration, as well as fragmentation of the law with the parallel proceedings, unpredictable practice and absence of the appeal mechanism. Regarding the stabilization and

---

[379] CANNIZZARO, E., PALCHETTI, P., WESSEL R.A., *International Law as Law of the European Union*, 2014, ISBN 978-90-04-18857-0, p. 120, Jan Klabbers, Article 351 TFEU

[380] Commission asks Member States to terminate their intra-EU bilateral investment treaties. Press release, 18.07.2015. http://europa.eu/rapid/press-release_IP-15-5198_en.htm

[381] ROSAS, A., *The Status in EU Law of International Agreements Concluded by EU Member States*, 2011, Fordham International Law Journal, vol. 34, issue 5, article 7, pp. 1304-1343, p. 1321

[382] Judgement of the CJEU *in cases Commission v. Austria, C 205/06, Commission v Sweden C 249/06*, where the states should terminate or renegotiate the BITs, so they will be in compliance with the EU law.

[383] COMMUNICATION OF THE EUROPEAN COMMISSION, *Towards a comprehensive European Investment Policy*, 2010, Com. 343 final, p.6

umbrella clauses, however parties claim the importance of a certain and predictable strict follow of negotiations on the investments made especially in the gas sector, by illustrating the controversial recent development of internal legislation as pipeline as a property, and an obligation to provide a third party access. The Commission considers, the EU as a whole, to become a party of the Washington Convention 1965. However, such approach raises many related issues, as a party of this Convention could be only a state, as it does not provide the membership for international organizations.

The long-term priority of EU is a termination of bilateral agreements between the member states, and between member states and third states.[384] Number of BITs announced its intention to terminate intra-EU BITS, however some of the states reacted negatively on proposal of termination.[385]

A number of EU member states, including the Czech Republic, considers such BITs as undesirable, since with the accession to the EU, the competence in the investment policy undertook the EU as a whole. Moreover, in that regard the European Commission in 2015 brought an action against 21 EU member states called as EU Pilot.[386]

Such issues on the compatibility of international agreements by EU member states concluded before their accession to the EU, have been raised forty years ago, where the CJEU in its approach applied the "effect-based" consideration,[387] where some provisions in these treaties de facto may effect or affect the existing EU legislation. If a contradictory provision

---

[384] DANELYAN, A, *International economic law in the conditions of the globalization: problems of development*, 2014, Law and State, Theory and Practice,#1 (109) p. 127-132 (Данельян, А., Международное экономическое право в условиях глобализации: проблемы развития, Право и государство: теория и практика). DANELYAN, A, *International economic law in the conditions of the globalization: problems of development*, 2014, Mezhdunarodniy pravovoy kuryer,#5 (5) p. 32-39 (Данельян, А., Теория и практика современного международного права относительно проблемы принудительного изъятия иностранной собственности. Международный правовой курьер).

[385] e.g. Italy and Ireland

[386] As a response to the infringement proceedings initiated by the European Commission against Slovakia, Sweden, Austria, Netherlands and Romania, the other states decided to terminate their BITs, as Poland, or Denmark, http://europa.eu/rapid/press-release_IP-15-5198_en.htm, see also EU page on the Pilot project http://ec.europa.eu/internal_market/scoreboard/_archives/2014/02/performance_by_governance_tool/eu_pilot/index_en.htm. (7678/15).

[387] CRAIG, P, BURCA G, *The Evolution of EU Law,* 2011, Oxford University Press, P. 253-260

was found, EU member state should eliminate it, however it didn't influence the validity of the whole subjected international agreement.

The cases *Commission v Austria, Commission v Sweden, Commission v Finland*[388] have brought the new approach of "hypothetical incompatibility".[389] Commission has initiated the cases, as they potentially may violate the EU law by incompliance of these EU member state' BITs concluded before the states accession to the EU. The incompatibility was with the European Council's new authority to put limitations on the capital movement from and to third countries, granted by articles 64 (2), 66, 75(1) of TFEU. The CJEU recognized the claim of the European Commission, stating that BITs should contain provisions in accordance with EU law.

The legal uncertainty in the common investment policy causes concerns for all EU member states to become the defendants in the case of investment arbitration, which will be based on the legal acts adopted at the EU level, notwithstanding with the fact, which EU member state exactly violated the investment agreement. This process has started in 2012, when the Russian Gazprom was attempting to bring an action to the international arbitration tribunal against the measures taken by Lithuania in its pursuance of the EU legislation, namely Third Energy Package, on the basis of BIT between Russia and Lithuania.[390]

The case – *Commission v Slovak Republic (*2011)[391] brought a clarification regarding EU law and BITs with third states. That case illustrates the conflict of EU law and international,[392] in particular, investment law, which *inter alia* affects the other decisions in

---

[388] *C-205/06 Commission v Austria, C-249/06 Commission v. Sweden, C-118/07 - Commission v Finland*

[389] CRAIG, P, BURCA G, *The Evolution of EU Law,* 2011, Oxford University Press, P. 259

[390] *Case C-536/13*, http://curia.europa.eu/juris/liste.jsf?num=C-536/13, Gazprom v. EU, 2012, Vedomosti (Газпром против ЕС, 2012, Ведомости, 02.03.2012, p.7).

[391] *Case C 264/09 Commission v Slovak Republic* [2011], available on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0264:EN:HTML

[392] More regarding the conflict of the EU law and International law vis AAKEN, A.*, Fragmentation of international law: the case of international investment protection*.2008. University of St Gallen Law School. Law and Economics Research Paper Series. Working paper. #16; KLEINHEISTERKAMP,J., *The next 10 years ECT investment arbitration: a vision for the future – from a European law perspective*. 2011. LSE Law, Society and Economy working papers #7.

this area. In addition, the presented case is interesting from the point of the judicial solution – here the European Union Court of Justice acts as an institution, which settles the disputes in the investment area between the states.

This is the case regarding investment in the energy sector, based on the BIT between Switzerland and Czechoslovakia from the year 1990. On the basis of the contract the Slovak as a host-state guaranteed to the Swiss investor ATEL access to the capacity of the electricity power transmission, which put all other users of the systems, including EU member states in a less advantageous position. With the accession of Slovak Republic to the EU in 2004, the state should fulfil the obligations of EU law. However, this particular BIT and the contracts were concluded before its accession. To liberalize the internal trade, the EU ordered the member states to provide equal non-discriminative conditions for investors, in accordance with EU law. Slovak Republic's argument in defence was based on the Energy Charter Treaty, its BIT with Switzerland, and on the article 351 of the TFEU.[393]

The CJEU in its approach, firstly identified, whether the guaranteed access to the transmission system by Slovakia, is an investment, in accordance with the mentioned BIT, and, secondly, whether Slovakia is able to terminate the contract, without violating its obligations under this BIT.

The court concluded that this contract is an investment, as in these circumstances the right of access to capacity clearly has an economic value. Then, the CJEU noted that Slovakia was bound by the obligation to fulfil the terms of the contract based on BIT, and the derogation of an equal access to transmission system. Although it contradicts the principle of non-discrimination, nevertheless the court stressed the legitimacy of the Slovak's action. The court further explained that, the purpose of the article 351 TFEU "*is to make clear, in*

---

[393] ISPOLINOV A., ANUFRIEVA A., 2011, *The EU law and the international law: consequences of the new approach of the CJEU to the treaties, concluded by the EU member states with the third-states*. Eurasian Law Journal, #3. (Исполинов А., Ануфриева А. Право ЕС и международное право: последствия нового подхода Суда ЕС к договорам, заключенным государствами-членами с третьими странами. Евразийский юридический журнал)

accordance with the principles of international law, as set out in, inter alia, Article 30(4)(b) of the Vienna Convention on the Law of Treaties of 23 May 1969, that the application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder."[394] In addition to it, in the next paragraph, the court reminds that "*in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations the performance of which may still be required by non-member countries which are parties to it.*"[395] Nevertheless, the CJEU brings an example of the case of Portugal[396], where in the contract was the possibility of denunciation in case of conflict of the international contract with the law, but the present case does not contain any clause providing a possibility of denunciation, and the termination from the one side by the host state would be tantamount to expropriation. In the paragraphs 48-50 the court concluded, that the contract as an investment is a subject of protection from any kind of expropriation, as direct, so indirect, and the termination of the contract on the basis of the internal EU legislation may be evaluated as a form of indirect expropriation.

As it is clear from the above mentioned the court proceeds the principle of *pacta sunt servanda,* and in a case of conflict of the EU and international law, takes the side of the international law. Also should be noted the willingness of the court to prevent the claims to the investment arbitrations of the cases, where the European Commission is one of the party, thus, would be possible controversial decisions on the EU law, or its critical re-assessment.

---

[394] Paragraph 41 of the Judgment. available on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0264:EN:HTML

[395] Paragraph 42 of the Judgment. available on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0264:EN:HTML

[396] *Case C‑62/98 Commission v Portugal [2000] ECR I‑5171, paragraph 49*

One of the latest cases was brought to the European Union Court of Justice, regarding the BITs with a third state was in 2012.[397] The case *Commission v. Bulgaria*[398] can be considered regarding the internal EU investment and energy rules towards to the third states in the gas sector. The Commission claimed that Bulgaria has failed to fulfil its obligations to ensure offering virtual reverse flow gas transmission services to the relevant points of connection with the gas transmission systems, or to ensure providing capacity to market participants in services on gas transportation. The Commission referred to the Directive 715/2009, articles 14 (1), 16(1),(2). Bulgaria argued that, the reason it did not fulfil its obligations under the Third Energy Package is that there was not a physical connection between the transit system and the transportation system, and these two systems are subject of different level regulations. Moreover, the respondent referred to the interstate agreements between Bulgaria and the USSR, which were concluded in 1980s, in particular, the agreement between Bolgartransgaz and Gazprom in 1998. Although the Court dismissed the action of the Commission, referring to the absence of the express statement to provide virtual reverse flow transmission capacity in the Directive, it however shows the approach of the Commission. It is attempting to seek a failure to fulfil the obligation of EU member state in the moment EU law is being amended, even "*during the course of the pre-litigation procedure*".[399]

At the present time about 20% of the investment disputes are directed against EU member states, where investors from third countries are challenging not only the national legislation of the particular member state, but also the obligations given by EU law.[400]

---

[397] *Commission v. Bulgaria C-198/12,* available on http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CC0198

[398] *C-198/12*

[399] Para 23 of the opinion of Advocate General Jaaskinen, 17.11.2013 the case European Commission v Republic of Bulgaria, C 198/12, available http://curia.europa.eu/juris/document/document.jsf?text=&docid=144494&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=437136

[400] SCHACHERER, S., *Can EU Member States Still Negotiate BITs with Third Countries?* 2016 https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/, Latest Developments in Investor-state dispute settlement, UNCTAD, IA Monitor, No 1(229), UNCTAD/WEB/DIAE/IA/200+/Rev.1.c.10

What causes concerns for many academics and analysts, who discuss this situation, is the EU's liability, in a case of BIT breaching by any of EU member states, even in such BITs, where the EU as a whole, is not a party. The Regulation 912/2014 establishing the detailed arrangements for the allocation of the financial consequences of investment arbitrations conducted on the basis BIT newly concluded by the EU between the member states, and contains rules for determining which entity will act on behalf of the defendant – the EU as a whole or the Member State. It is another question related to it, whether the EU may conclude the international agreements, including comprehensive treatment of the investment with third countries itself or only with a simultaneous participation of all member states as "mixed agreements", which are in practice of the EU external relations as a common solution.[401]

The main issue is that these BITs provide unconditional rights for establishments, made by investors of partner states for free movement of capital, and this might affect the powers granted to the Council to apply measures of capital movement in accordance with the articles 75, 59, 60 of the TFEU.

BITs with the third state are seen by the EU as non-problematic, as on them, in the territory of the EU, apply not only international law, international investment treaties and measures, but also the EU non-discriminatory regulations.[402] The opposite view may be seen from the side of third state. Due the fact that the international legal obligations are based on the international law and its fundamental principle *pacta sunt servanda,* the rights and obligations in the agreements were concluded with the will and specifications of particular relations between the states. In these agreements were references to the international

[401] FECÁK, T., *Mezinárodní dohody o ochraně investic a právo Evropské unie*, 2015, Wolters Kluwer, a.s, 11/2015,ISBN 978-80-7478-982-3, 548
[402] http://ec.europa.eu/finance/capital/third-countries/bilateral_relations/index_en.htm

investments organizations, where the parties of the agreement are the members.[403] Therefore, changing these agreements *ex-post* might be in some point discriminative.

However, it has not been resolved with a consideration that the EU as whole is not a party of the Treaty on the International Centre for Settlement of Investment Disputes. Moreover, the European Commission initiated several cases against some member states and their bilateral investment treaties with the third countries, when it found the incompatibility of bilateral investment treaties' provisions, which were concluded before EU legislative acts came into force.[404]

The EU attempts to regulate not only the internal market and investment situation on it, but also applies its power on the third states, which have an access to EU market. Regarding Russia, the position of the EU is even stricter, due to the recent gas crisis and suspicion of Gazprom's abusing of dominant position in the CEE region, and not the least the economic sanctions. Due to the current situation, Gazprom sold large shares of the energy companies and reduced and restructured the foreign energy assets in them.

Another unclear situation is in the area of the jurisdiction and enforcement of judgments, introduced by Regulation 1215/2012 in 2015, and brings a substantial change to EU rules, where "*parallel actions in breach of a valid exclusive jurisdiction clause are now blocked.*" Even if another EU court is first seized, it must stay the case until the chosen court has ruled on the validity of the clause and accepted jurisdiction. The recent decision of the Court of Justice of the European Union (CJEU) clarifies the old rules in the Regulation

---

[403] ŠTURMA P, BALÁŠ, V., *Mezinárodní právo ekonomické*,2013, p. 333. Such BITs with the each EU member state will be supplied by the agreements with the EU as a whole in a regard to the same theme, in a form of the Free Trade Agreements, as between the EU or S. Korea, which is nevertheless not expressly covering other than FDI.

[404] LAVRANOS, N., *Member States' Bilateral Investment Treaties (BITs): Lost in Transition?* 2012, Hague yearbook of international law, Vol. 24,p. 301.

44/2001 (Brussels I) and simply confirms that arbitration falls entirely outside the scope of the EU rules on the allocation of jurisdiction and recognition of judgments[405].

This regulation is based on the Brussels convention (1968) and Lugano Convention (1988) on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, amending and covering the existing gaps. However, some lawyers argue that, this regulation left the room for the *forum shopping* and opportunistic practices, as tactical litigation,[406] highlighting the article 25 "*if the parties, regardless of their domicile, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise*".

In the article 73 (2) is mentioned that the New York Convention 1958 has the priority before this Regulation. Some lawyers have concerns on the application of this regulation with the New York Convention in practice, and possibility recognition and enforcement of conflicting judgments. At the same time they appraise the approach to *lis pendens* revised by this regulation, but it seems incomprehensible in application in the disputes with the third countries.[407]

On the other side, the EU Commission intends to include the mechanism of the dispute settlement in form of compromise, by establishing quasi-permanent appeal mechanisms on a

---

[405] in *Case C-536/13 Gazprom OAO v. Lithuania*

[406] PODDA, P, PASTORE, M, *Recast Brussels Regulation and the Challenges of Forum Shopping*, 2016, AA Law Forum, John H. Carey II School of Law, No 7, pp.34-44.

[407]GARVEY, S., *Brussels Regulation (Recast): Are You Ready?,* 18.03.2015, available http://www.allenovery.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx

multilateral basis, which it presented in the Concept Paper in the framework of the TTIP agreement in 2015.[408]

4.2.2. The EU Energy Union

In the summer of 2014, the EU and the states of the Energy Community[409] signed a memorandum on gas market integration and diversification of gas supply sources.[410] In 2015, the European Commission published a strategy for the Energy Union, the objective of which is integration of European energy market, where the members of the EU must coordinate their energy policies with their neighbours, and consumers of one state is able to freely buy the energy or fuel in the other one.[411]

In accordance with the agreement, EU member states work on optimizing the use of existing gas infrastructure, particularly the reverse supply, and actively create the missing links in the infrastructure. As priority projects were selected – Trans Adriatic Pipeline (TAP), LNG terminal in Croatia strengthening energy systems in Bulgaria and Romania, interconnectors between Greece and Bulgaria, Serbia and Bulgaria.

In the international environment the EU is acting as two distinct entities:

1. As a single economic block with its internal (regional) law making powers and external law making powers; within the international/supranational organizations; and

---

[408] Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court. Concept paper. http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, European Parliament resolution of 8.07.2015 containing the European Parliament's recommendations to the European Commission for negotiations on the Transatlantic trade and investment partnership (TTIP) [2014/2228 (INI)].

[409] Energy community, established by the EU in order to extend the EU internal energy market, consists of the member states of the EU, and the contracting parties – Albania, Macedonia, Serbia, Kosovo, Bosnia and Herzegovina, Montenegro, Ukraine, Moldova, Georgia. More information available on the official webpage https://www.energy-community.org/portal/page/portal/ENC_HOME/MEMBERS

[410] document was signed by the European Commission, Austria, Bulgaria, Croatia, Greece, Hungary, Italy, Romania, Slovakia, Slovenia, Albania, Macedonia, Serbia, and Ukraine.

[411] Pages of the European Commission https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union

2. As an intergovernmental organization expressing the geopolitical security preferences of individual Member States.[412]

Internal Single Market of the European Union – is a unique interstate space, where the internal cross-border barriers are abolished, the discriminatory restrictions on the movement of goods, services, capital, labour, businesses and individuals are prohibited, and spatial differences of economic performance are reduced.

However, speaking about "Energy Europe" (Europe in terms of energy flows), it has a much broader scope than the "European Union" (within its current political boundaries) or even "geographical Europe" (from the Atlantic to Urals). This is because today the EU (as a community of end-user markets and of mostly energy-importing states) is interconnected by the immobile, fixed infrastructure with non-EU energy producers and transit states. Moreover, investment decisions of the latter regarding the energy projects destined for the EU markets, are based on the sovereign decisions of these non-EU states.[413]

EU law, governing the various issues related to energy, including the liberalization of the gas and electricity markets, has stepped far beyond the borders of member states, and it is applied by the members of the Agreement on the European Economic Area, Energy Community, as well as the members of the Energy Charter Treaty.

European Community does not have a solid legal basis that would support other measures of the energy policy[414]. Thus, the regulation of the gas market liberalization in the EU is realized by the norms of the different aspects of the EU Law of the internal market.

In 2016, the European Commission amended its decision No 994/2012 EU on establishing an information exchange mechanism with regard to intergovernmental

---

[412] TURKSEN, U., WOJCIK, J., *The European Union And Russia Energy Trade – Thickening Of Legality And Solidarity?*, 2012, IELR, P. 3 Supra Note

[413] KONOPLYANIK, A., *Russia and the Third EU Energy Package: Regulatory Changes For Internal EU Energy Markets In Gas and Possible Consequences For Suppliers (Including Non-EU Suppliers) and Consumers*, 2011, IELR.

[414] BĚLOHLÁVEK, A, *Ochrana přímých zahraničních investic v energetice*, 2011, Beck, 1 ed, Praha, p.184

agreements between member states and third countries in the field of energy, where the member-states should inform the European Commission about the intergovernmental agreement, moreover to require Commission on its ex-ante assess and permission. The principles of EU energy law are based on the Energy Charter Treaty. Primary law within the EU on the field of energy regulates the Treaty on the Functioning of the EU (TFEU), part III, title XXI, article 194, the Energy Policy. It includes three major dimensions of the EU common energy policy, outlined in the White Book on energy policy in 1996: 1. Security of supply; 2. Competitiveness, and 3.environmental protection.[415]

And that decision on Intergovernmental Agreements is enhanced, and in line with the articles 194(1)(b) of the Treaty on the Functioning of the European Union (TFEU) – security of energy supply in the Union, and article 3(3) TFEU – together with the article 194 (1) following the goal to establish a functioning internal energy market, in the spirit of solidarity between the member states.[416]

The article 194 of the TFEU is a compromise between national sovereignty of the member state which regulates the energy, exploitation of natural resources and energy taxation and the overall competence of the EU in other areas.

The common European Union energy policy, which grew into the Energy Union in 2016, has been evolving with the European Union itself. Starting from the 1950s, the roots of the EU energy regulation lie in the integration process. Initially, in the first European Treaties, establishing European Coal and Steel Community (ECSC) in 1952 (where the primary energy resource was coal), and the Treaty establishing the European Atomic Energy Community Treaty (EURATOM) in 1957, were addressed to the issues of the energy. All subsequent

---

[415] BELYI,A., *The EU's External Energy Policy*, 2012, Polinares, EU Policy On Natural Resources.

[416] proposal for a decision of the European Parliament and of the Council on establishing and information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between member states and third countries in the filled of energy and repealing Decision No 994/2012/EU, Brussels, 16.2.2016 Com(2016) 53 Final 2016/0031 (Cod)) Available On https://ec.europa.eu/energy/sites/ener/files/documents/1_en_act_part1_v12.pdf

treaties with the exceptions of the European Community Treaty and the Maastricht Treaty, 1992, did not provide any other provisions with regard to the energy sector, especially helping to secure the energy supply to the EU.[417]

Later, in primary law of the European Union, by the Lisbon Treaty[418] was included a new section on the regulation of energy. However, besides special rules, the regulation of energy sector is ensured also by application of provisions of the Treaty on the Functioning of the EU, which regards the building of the internal market, and competition.

The strong dependency in the gas sector, led the European Commission to achieving the internal gas market harmonisation through a shifting of the regulatory authority to the European Union (i.e. the Commission) level and by developing the common voice in the external energy policy.[419] Documents governing the energy issues contented the provisions not only about the rules of the internal single market, but also energy policy, its three main dimensions, including security of supply, competitiveness, environmental protection. The newly established Energy Union in 2015 extends these dimensions, and offers five mutually supportive ones: energy security, the internal energy market, energy efficiency, decarbonisation of the economy, research, innovation and competitiveness.[420]

The idea of the common energy policy is to harmonize the strategic sector of each state, among EU member states, and to create a single energy market, with competitive environment, with transparent, secure and reliable supplies. The lawmakers see the liberalized market not only inside of the particular EU member state, but also, what is more important, on

---

[417] TURKSEN, U., WOJCIK, J, *The European Union And Russia Energy Trade – Thickening Of Legality And Solidarity?*, 2012, IELR, P.4.

[418] Treaty of Lisbon, available on http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML

[419] TICHY, L., ODINTSOV, N., *The European Union As An Actor In Energy Relations With The Islamic Republic Of Iran*, 2015, CEJISS, 4, P.62

[420] http://www.eceee.org/policy-areas/energy-union, http://europa.eu/rapid/press-release_MEMO-15-4485_en.htm, http://www.consilium.europa.eu/en/press/press-releases/2015/03/conclusions-energy-european-council-march-2015/, http://www.consilium.europa.eu/cs/policies/energy-union/

the cross-borders, emphasizing the equal access to the energy market to natural gas for all states with various infrastructures and different levels of development.

The main challenges in creating a single gas market are due to the following: the lack of predictability, the lack of effectiveness of the integration measures, the problems related to ensuring security of supply, and to conclude that, for the purposes of achieving a harmonious integration and security of supply are required legal guarantees return on investment in all parts of production - sales cycle. The importance of this issue is stressed by the EU's dependence on foreign gas producers, for whom the terms of making investments in facility is the "security of demand".

In order to reach the stated goals, the European Union has started to liberalise different fields of the energy markets since 1990s by secondary legal acts. Due to the fact, the gas sector is a sector of economy, in which the law of free competition and trade is limited by consideration of public safety; the legal acts were aimed to increase the competitiveness of the market. In the gas sector, the liberalization attempts started by Gas Directive 98/30/EC, which curtained the conditions of cooperation between the member states in the fields of distribution, transmission and storage of the natural gas, including the liquefied natural gas[421]. This Directive required from undertakings to separate the accounts for different activities. The regulation and control of the situation left on the competence of each member-state. However, the member-states shall take the measures to negotiate access to the system and use this system to the undertaking on the basis of voluntary commercial agreement.

The second liberalization energy package was adopted in 2003, by Directive 2003/55/EC[422], which required the transmission and distribution system operators to legally separate entities in order to ensure efficient and non-discriminatory network access. The second liberalization package established national regulatory authorities.

[421] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0030:CS:HTML
[422] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0055

The particular attention should be paid to the relevantly new EU legislation acts, which are aimed to the liberalization of the gas and electricity markets, namely Third Energy Package (2009). It *inter alia* contains third country regime, which applies to the states that are not EU member states. Furthermore, the Third Energy Package requires unbundling and shortening of long-term contracts. Thus, sets for the undertakings (both the EU-members and non-EU) a number of restrictions on participation in the market processes in the EU.[423] The Third liberalization Energy Package is aimed to enhance the building of a single internal market of the EU, in order to decrease the level of monopolization in the gas market and make the market diversified. It was aimed *inter alia* against the companies - monopolists, wholesale buyers of Russian gas, abusing their dominant position in the internal EU markets.

By the Third Energy Package should be the long-term liberalization measures completed, the Member-States should adopt the mandatory third-party access to gas transport infrastructure, the segmentation of vertically integrated companies and other instruments.

In 2005 was launched, and in 2007 was published final report, Sector Inquiry, covering the gas industry to perceive problems with competition in the gas markets. It showed that there are serious distortions of competition in this sector, in particular:

1. At the wholesale level – the high level of concentration.
2. Lack of liquidity and limited access to infrastructure, which causes entry barriers to new competitors.
3. Lack of competition in cross-border sales.
4. Lack of transparent information.

[423]the Third Energy Package contains of: Directive 2009/72/EC, Http://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2009:211:0055:0093:En:Pdf, Directive 2009/73/EC, Http://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2009:211:0094:0136:En:Pdf, Regulation (EC) N 714/2009, Http://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2009:211:0015:0035:En:Pdf, Regulation (EC) N 715/2009, Http://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2009:211:0036:0054:En:Pdf, Regulation (EC) N 713/2009, Http://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2009:211:0001:0014:En:Pdf

5. Lack of effective and transparent price formation.[424]

Therefore were carried out several inspections in a number of energy companies in 2006, regarding to article 102 Treaty on Functioning of the EU (Abuse of dominant position) violations, and European Commission opened a number of cases in the gas sector against E.ON and GDF (long-term capacity bookings), ENI (hoarding/underinvestment), RWE (hoarding/margin squeeze).[425]

Notably, the investigations were related not only to the known: vertical integration conflicts; foreclosure issues in relation to infrastructure capacity; foreclosure issues in relation to long-term contracts; cross-border issues; and alleged market manipulation, but also have been raised the issues of new types of abuses such as "strategic underinvestment", "capacity hoarding" and "withholding of generation capacity".[426]

The liberalization of the natural gas market, its grid infrastructure in the European Union and the supply of energy is essentially built upon mutual trust among Member States[427]. Infrastructures are still largely depending on the willingness of each EU member state to build them, as each keeps a veto right on such building.

EU member states bring their national legislation and the conditions of national gas supply system in line with the Third Energy Package.

Most of the governments of the countries, which have set the task of the gas market liberalization, proclaim their main targets - to reduce prices for consumers and to increase efficiency of the gas industry as a result of competition regulation. At the same time provided,

[424]Sector Inquiry, For More It Is Available On Http://Ec.Europa.Eu/Competition/Sectors/Energy/Inquiry/Index.Html

[425]Sector Inquiry, Gas Sector, Available On Http://Ec.Europa.Eu/Competition/Sectors/Energy/Gas/Gas_En.Html

[426]RATLIFF, J., GRASSO, R., *Unilateral Conduct In The Energy Sector: An Overview Of EU and National Case Law*, 2012, Available On Http://Oiguskantsler.Ee/Sites/Default/Files/Imce/Unilateral_Conduct_In_The_Energy_Sector_-_An_Overview_Of_Eu_And_National_Case_Law.Pdf

[427] COTTIER, T., MATTEOTTI-BERKUTOVA, S., NARTOVA, O., *Third Country Relations In EU Unbundling Of Natural Gas Markets: The "Gazprom Clause" Of Directive 2009/73 EC And WTO Law*, 2010, NCCR Trade Regulation

due to the reforms, should not be affected the security of supply, which has been ensured by traditional monopolistic forms of sector organization.

Naturally, the reforms of gas markets in different countries are in different rates, depending on their goals, historical relations, as well as different geographical and social conditions. Currently, in some countries have already been some positive developments related to effecting change.

In particular, in some countries at the legislative level is accepted a limit for market share per supplier (not more than a third – in Italy, for example). Accordingly, the share of the "old" national monopoly on the national gas markets should decrease, and in fact, all previously contracted volumes of gas imports were oriented precisely on this national monopoly, and hence there is a problem accessing other emerging national wholesale gas sellers to the imported gas resources (e.g., from Russia).[428]

EU enlargement has not been accompanied by a sufficient improvement of the governance in several countries, either in their implementation of EU rules or through the necessary independent regulatory bodies.[429] The current absence of free flow in the markets of Central and Eastern member states could be the result of the failure of sufficient development of the internal EU infrastructure As well as the lack of incentives to invest in regulates infrastructure development within unbundled EU gas markets[430]. As a consequence, the benefits of the internal market have not always been reaped and a certain fracture between Eastern and Western Europe remains in the field of energy[431].

[428] GUDKOV, I., *Gas Market Of European Union, The Legal Aspects Of Creation, Organization And Functioning*, 2007, Moscow, Nestor Academic, P. 131

[429] GUDKOV, ibid

[430] KONOPLYANIK, A.*, EU Versus Gazprom; Energy Law Group,2010, Underground Gas Storage In Europe: A Legal Overview*, 2013, 7 International Energy Law Review 228-242

[431] ANDOURA, S., VINOIS, J.-A., DELORS., J., *From The European Energy Community To The Energy Union, A Policy Proposal For The Short And The Long Term*, 2015, Notre Europe

By the Third Energy Package[432], should the long-term liberalization measures be completed, the member states should adopt the mandatory third-party access to gas transport infrastructure, the segmentation of vertically integrated companies and other instruments till year 2014. However, the process has not finished yet. Despite the liberalization policy of the European Union, the Third Energy Package still lacks the unified market. Although the Single energy market is still on the way of building, the national states are left to decide on their best economic interests.[433]

In addition, the significant impact in the implementation of the EU energy legislation has the European Court of Justice' jurisprudence, through which are interpreting the relevant rules of the EU legislation and hence are eliminating the existing gaps in the legislation.

The main terms were brought with the energy package – unbundling and untying. Unbundling is the separation of gas producers, gas distributors, and gas transmission networks, in order to aim the high competitiveness in the area. It was primarily aimed to limit or eliminate the influence of non-EU companies on the national markets of member states, and also applies on non-EU companies (as Gazprom). The European Commission initially offered the full unbundling, stressing the possible increase of investment in new infrastructure and trade by the independence of the Transmission System Operators (TSOs) by separation of the owner of production, transmission and distribution infrastructure[434]. However, due to appeared concerns of some member states about the possible threats to the energy security, EC has to propose three versions of the unbundling[435]. First is the mentioned full unbundling – separation of the production and transmission. The second model is the regime of the

---

[432] Regulations 713/2009 And 715/2009

[433] KANTER, J., *Gazprom Objects To European Antitrust Inquiry*, 2012, NY Times, Available On http://www.nytimes.com/2012/09/06/business/global/gazprom-objects-to-europeanantitrust-inquiry.html?_r=1&

[434] Or Full Separation: Physical, Legal and Property Sales Transmission System to a Third Party. See: ČERNOCH, FILIP, A, ZAPLETALOVÁ, V. *Energetická Politika Evropské Unie.* Brno: Masarykova Univerzita, 2014 , P. 69

[435] TICHÝ, L., *Liberalizace energetického trhu v EU a pozice České Republiky*, současná Evropa, 02/2011, http://ces.vse.cz/wp-content/tichy.pdf, KOVAČOVSKÁ, L.,Současná evropa 2011/1, liberalizace vnitřního trhu s elektřinou a zemním plynem jako prostředek zajišťování energetické bezpečnosti EU

Independent System Operator (ISO), where the companies should pass part of their powers to the benefit of the ISO, which will decide on investment and trade activities. The third model-regime of Independent Transmission Operator (ITO), which is de facto subsidiary of the vertically integrated company, that applies part of its powers through the supervisory board, composed of company's representatives, third parties and transmission networks.[436]

Besides the legislative basis, the European Union has initiated different projects aimed to monitor and regulate the market liberalization. On this basis was established the community of European Energy Regulators – The Agency for Cooperation of Energy Regulators (ACER), created by the Third Energy Package[437]. ACER's gas department's main aim is to support the creation of a competitive, efficient, monitored and transparent, and sustainable internal market particularly for gas in Europe. ACER is a platform for cooperation and information exchange between the national regulatory authorities. The European Commission is in response on the measures to complete the internal energy market and alongside with the ACER was created the European Network of Transmission System Operators of Gas (ENTSOG). The ENTSOG is obliged to ensure the application of market rules in accordance with EU technical and market requirements. The Agency should prepare annual reports on the stage of removing internal barriers for integration of the internal gas markets, assessing the retail prices and network access.

In addition, there were initiated regional initiatives of the regulators to foster the integration of EU gas market, as *Visegrad Initiative, Pentalateral Forum, Nordpool*, or in year 2014 - *Central West Europe* and the *PRISMA* platform for transnational allocation of capacity in gas. However, regional initiatives have been disappointing and other regional cooperation frameworks have not been performing to their full extent, with large asymmetries

[436] HORÁK, J. *Liberalizace Elektroenergetiky: Cesta K Vnitřnímu Trhu EU*. Praha, 2014, P. 76.
[437] And it closely cooperates with the Council Of European Energy Regulators (CEER)

from one region to the other.[438] Moreover, there is a threat that this initiative could be suspended by party-state at any time for any reason, since it is built on a voluntary basis.

The liberalization of the natural gas market, its grid infrastructure in the European Union and the supply of energy is essentially built upon mutual trust among member states. Traditional perceptions of national security and control make a way to cooperation and integration among member states and industries concerned. Under the recently adopted legislation, it is readily possible that grid infrastructure will be controlled by the companies located in another member state, and gas will be equally traded by a company of non-national operators.

Although the legislative regulations of the European Union are directed to cover such energy sectors as electricity and natural gas, they have substantial differences. Gas is a natural resource, an imported product outside of the European Union, and it cannot be produced in artificial conditions and also needs adequate storage facilities. Even though, the demand for gas is inelastic from short to medium-term, it requires not only high capital, administrative and time-consuming transportation, especially cross-border, but also an infrastructure construction. The natural gas can be imported through the pipelines, which requires investments. Moreover, gas could be liquefied and imported in gallons, and as it is relatively a new dimension. It also requires investments on infrastructure, and technology for its storage and un-liquifying. The other state of gas is compressed natural gas, which is used as a fuel to transport, and also needs financial means on its usage.

Besides the above mentioned, the import of gas brings many risks, depending on the security of supply and reliability of suppliers (as gas-exporter/gas producer, as well as transit state), as it may be used as a tool due to unpredictable political situations. Therefore, the Directive 2004/67/EC was drafted, covering the specific aspects of the gas supply security, in

[438] ANDOURA, S., VINOIS, J.-A., DELORS., J., *From The European Energy Community To The Energy Union, A Policy Proposal For The Short And The Long Term*, 2015, Notre Europe

annex of which is provided a list of various instruments to strengthen the security of gas supply.

The main priorities of the European Union as a whole may vary, even contradict the priorities of each member state. Depending on the geographical position of member state, its economy, level of development of the gas infrastructures, diversified structure of individual national energy companies, the European Union regulations can have a different impact, and the promotion of common European rules and standards could not be easily acceptable across the EU. Energy was always a strategic field of the national state policy. State pays a heed on the new actors operating on the gas sector. Thus, the third party access to the gas market was reluctant and painful for many states. The fact that integration in the gas market brings not only positive, but also negative effects to the economy of each member state is clear.

However, the European Commission has its specific tools to ensure the timely building of the internal market, by enforcing the adoption of EU legislation. So, after the second liberalization package came into force, infringement procedures were initiated against 17 member states by the Commission[439], including the Czech Republic, and also were investigated several companies in gas sector for breaching the law, to issue the implementation of EU law.[440] The European Commission claimed insufficient unbundling, lack of competence of regulatory organs, discrimination of the third parties from accessing the network. However, in a year the European Commission stopped the investigation against the Czech Republic, due to the improved situation on gas market.[441]

---

[439] Belgium, Sweden, Germany, Austria, France, Spain, Italy, Poland, Slovenia, Czech Republic, Estonia, Lithuania, Latvia, Greece, United Kingdom and Ireland. ANDOURA , S., HANCHER , L. VAN DER WOUDE , M. *Towards a European Energy Community: A Policy Proposal.* 2010. Notre Europe, Studies & Research. http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/nsalliarelis/public/Towards%20a%20European%20Energy%20Community_A%20Policy%20Proposal.pdf, p. 22.

[440] based on article 258 of the Treaty on the Functioning of the European Union, former article 226 of the Treaty establishing the European Community

[441] more detailed information on the official pages of the EU: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1768&format=HTML&aged=0&language=CS&guiLanguage=en.

The EU, by adopting normative and legal acts on energy issues within the framework of internal competence, expands its exclusive external “energy competence”. To highlight notes of the stronger positions of the EU in its external energy relations and “gradual disappearance” of EU member states competence, by the enlarging and detailing of internal energy *acquis*.[442]

The shared competence in the energy issues does not mean that the EU and EU member states should jointly pursue external energy relations and conclude international energy treaties with third countries. Article 3 (2) of the Treaty on Functioning of the European Union provides the EU exclusive external competence in the following matters: if the conclusion is provided in the EU regulatory act, if the conclusion is necessary for the fulfilling its internal competence, and if the conclusion can affect the rules of the EU or change its scope. The purpose of the EU exclusive competence is to maintain the effectiveness of EU law and proper functioning of the systems established by its norms.[443]

According to Article 4(2) of the Treaty on Functioning of the European Union energy is part of the shared competences, which means that the member states exercise their competences in a scope in which the EU does not exercise or stopped exercising its own competences.[444] Here, according to Article 5(3, 4) of the Treaty on the European Union, the principles of proportionality and subsidiarity are applied, which means that ‘the Union shall act only if and in so far as the objectives of the proposed actions cannot be sufficiently achieved by the Member States […]’, and its actions “*shall not exceed what is necessary to achieve the objectives of the Treaties*.”[445]

[442] HAGHIGHI S. *Energy Security. The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries*. Oxford and Portland, Oregon, 2007, p. 182-183
[443] Opinion 1/03 re the new Lugano Convention [2006] ECR I-1145, para 131.
[444] TICHY, L., ODINTSOV, N., *The European Union As An Actor In Energy Relations With The Islamic Republic Of Iran*, 2015, CEJISS, 4/2015, P.64, Supra Note
[445] Ibid

Given the fact that the EU Commission's external initiatives in the energy sector may still be blocked by EU member states, in accordance with the article 218 TFEU, the energy policy in the EU is still under control of the individual member states. The governments of EU member states have refused to give up their national sovereignty in this strategic sector. However, the EU implemented a number of measures and has a mandate in the field of environment law, and also publishes and standardizes technical standards in this area.[446] Such mandate was given for the negotiations with Azerbaijan and Turkmenistan on the Trans-Caspian gas pipeline.[447]

The Commission plays a significant role in energy relations within the EU, regulating relations and influencing member state actors' interpretation and response to events, contributing towards the internalization of socially constructed norms, which act as "*guiding devices…for the recognition and appreciation of extraordinary crises and indicators, as well as for the search for policy alternatives*"[448] and contributing to a degree of consensus amongst member states that whilst significant sovereignty of energy mix and source remains their sovereign right, according to article 194(2). It is the EU which is in an appropriate level takes certain measures contributing to increasing energy security in terms of security of gas supplies.[449]

The above mentioned illustrates that the regulation of energy relations, although attributed to the shared competence of the EU and EU member states, by virtue of the subsidiarity principle, and the public interest, leaves a space for the national measures in this area, thus braking the realization of the supranational regulations in this strategic sector.

---

[446] BĚLOHLÁVEK, A, *Ochrana přímých zahraničních investic v energetice*, 2011, Beck, 1 ed, Praha, p.184
[447] Press-release IP/11/1023 "EU starts negotiations on Caspian pipeline to bring gas to Europe". 12.09.2011.
[448] KAUNERT, C. *European Internal Security: Towards Supranational Governance?,*2010b, Manchester: Manchester University Press, p.38
[449] MALTBY, T., *European Union Energy Policy Integration: A Case Of European Commission Policy Entrepreneurship And Increasing Supranationalism*. 2013. Energy Policy , Pp. 435-444, P.436

4.3. Legal analysis of the relevant state the EU investment cooperation

In 2011, in order to provide robust protection for the states and the investments, several EU member states initiated the consultations on the provision of the Resolution of the European Parliament as a strong platform for the cooperation between the EU as a whole and third countries, so it will be no weaker than the Economic Policy Program of their BITs. The European Commission should regularly consult with the European Parliament,[450] and receive an approval of the European Parliament, EU Council, and EU member states to the Commissions approach in negotiations with third countries.[451]

Although, the proposed agreements are aimed to decrease the legal uncertainty by providing the detailed definitions of the main terms, exhaustive list of specifications and conditions, also arrangements regarding the regime of investments, including the practice of the investment arbitration tribunals, the drafted mandates caused many discussions, due to their ambiguity in such sensitive areas. The discussed issues are the free transfer on the territory of the EU and particular EU member states[452], dispute settlements, as how they will be resolved, as the EU is not a party of the Convention establishing ICSID, and also connected with it the issue of enforcement of the decisions, as the EU is not a signatory of the New York Convention 1958 as well. Also, it is unclear what the type of treatment of the investments will be chosen – on the basis of the WTO, or on the basis of some particular agreement, as in the agreement between the EU and Canada CETA - Comprehensive Economic and Trade Agreement[453], is applying the national regime and the most-favoured nation treatment depending on the investment phase, before or after the investments are

---

[450] Resolution of the European Parliament on the future European international investment policy, 06.04.2011, available: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+O+DOC+XML+VO//EN, para 6

[451] In 2010 were initiated negotiations on investment cooperation with Canada (and finished the legal review in 2016 - CETA), India, Singapore, in 2012 with Japan, in 2013 with China, in 2015 with Vietnam (EU-Viet Nam FTA).More on: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

[452] The cases of *Commission v. Sweden (C-249/06), Commission v. Austria (C-205/06*), and interpretation of the ECJ decisions, whether may the EU member states block access of the investor, in some circumstances?

[453] Text of CETA is: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

made.[454] Even though the proposed agreements with several states respond the current needs, covering the existing judicial and arbitration investment practice, there is no sole model agreement - each document is made in accordance with the specifics of the certain relation between the EU and its third country partner.

In the beginning of the negotiations with Canada, India, or Singapore, there was considered that such agreements would be based or led by the model EU IPPA, however, later it was clear that in the texts with the US or Canada, it follows the NAFTA practice or style. Consequently, were provided the detailed conditions and procedures on the dispute settlement, which should begin with the consultations, in specific period of time. From the side of the EU the dispute settlement provisions were enriched by the identifying the respondent, whether it will be EU member state or the EU institution. This, regarding to Fecák, may lead to the controversies, taking into consideration decision 912/2014, and absence of specification on the certain party-respondent and its financial responsibility.

The other issue is the competence – what exactly covers the EU exclusive and shared competences? Several issues directly and indirectly related to the investment and especially in the energy sector are in the exclusive competence of each EU member state, as the protection of consumer. Regarding this issue, it is worth to mention the highlights of Wessel on the problematic of disparity in the competence of the EU and EU member states, which may occur in the situation of disagreement of particular EU member state and EU institution regarding the settlement of the dispute in the area, where is not clear the competence.[455] He further stresses the concern of EU member states regarding the EU action, and the related

[454] CETA Canada-EU, ARTICLES, FECÁK, T., *Mezinárodní dohody o ochraně investic a právo EU*, 2015, Wolters Kluwer, CR, p. 189

[455] WESSEL, R.A., *The Legal Framework for the Participation of the EU in International Institutions, European Integration*, 2011, vol. 33, No 6, p.621-635

issue of the responsibility of the member states. Thus, they are mostly reluctant to allow the EU to act on their behalf.[456]

How such disparities would be crossed and solved seems a complex topic. Leal-Arcas refers to the Vienna Convention on the Law Treaties 1969 (articles 26-38), stressing the principle *expressio unius est exclusion alterios*, as an interpretive principle, where the "*express mention of a matter or circumstance in a treaty in an exhaustive manner has the effect of excluding such matters not included"*, or in other words, it would be improper, if there was not involved the possibility to "aggrandize EU competences". Thus, the competence in particular sectors or policy, which was not expressly stated in the agreement, remains the "*sovereign preserve of the EU member states*".[457]

The other logical compromise however to advise with each EU member state, and give the possibility to sign and ratify each EU-third state investment agreement, brings the time excesses and further difficulties in a case, the particular state will disagree with some provision. However, several mandates provisions refer to the "mixed competence", thus in order to make a statement on what basis would be done the agreements with the third countries, the Commission requested the EU Court of Justice to provide the opinion.[458]

Nevertheless, the European Commission in its concept paper has developed several important points, which systemize the relations between the proposed arbitration dispute settlement body and the national courts. Regarding the Commission, the great obstacle for the international dispute is that, not all provisions of international agreements are incorporated to the national legislations of some member states. Moreover, the interpretation of the national courts may be inconsistent with the EU policy, taken into consideration its obligational

---

[456]WESSEL, ibid

[457] LEAL-ARCAS,R., GRASSO, RIOS, *Overview EU, EC – Energy security, Trade and the EU*, 2016, p. 28, supra note 106

[458] In 2014 the European Commission requested the CJEU on the opinion on the trade deal with Singapore, Press release, http://europa.eu/rapid/press-release_IP-14-1235_en.htm, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1269

character, may be dangerous for the EU. Besides, the national courts are applying the national legislation, instead of the international rules on protection of investment consistency of the state behaviour.[459]

The investment arbitrations are not taking into consideration the specifics of internal EU law in their decisions. The conflict between the EU law, on the one side, and the BITs between EU member states and third states, on the other side, has not been left without attention of the experts. N. Lavranos proposes either to acquire the prejudicial opinion of the CJEU by the investment arbitrations, or to create a special organ, which will deal with particularly investment issues in the Framework of the EU judicial system.[460]

However, regarding the investment dispute settlement were made new approaches by the EU, through the establishment of the Investment Court System (ICS) in each trade and investment agreements between the EU and the third states, with the tribunal of first instance, and body of appeal.[461] This institutionalized dispute settlement body is aimed to cover the particular relation, preventing the ambiguity in the interpreting approaches and fragmentation of law. Experts mark the challenges as the multiple coexisting dispute settlement bodies, and possible procedural and systemic challenges, as passing the national courts of the EU member state, and claiming directly on the EU level, which may affect the decision, by weakening the host-state's position.[462] Not at last that such BITs, even between the EU as a whole and the

---

[459] FECÁK, T., *Mezinárodní dohody o ochraně investic a právo EU*, 2015, Wolters Kluwer, CR, iii – concept paper, 795-796

[460] The situation of the conflict between the international and EU law regarding the human rights, occurred in the case *Bosphorus v. Ireland* (2005, *case No 45036/98*, available on http://hudoc.echr.coe.int/eng#{"itemid":["001-69564"]}), in the judgement of which the ECHR formulated the restriction of the competence between the ECHR and the courts of the EU, where the ECHR refused to consider complaints of individuals against the actions of states committed by them in the performance of their obligations as the EU member states. In paragraph 155 "*State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides*"

[461] Which were already included in the EU-Viet Nam FTA, and EU-Canada CETA, and one of the subject of negotiation on the EU-US TTIP, see on UNCTAD framework policy,2016, p.26,

[462] Germany expresses concerns about US and Canada Trade Deals. Financial Times, 2014, http://www.ft.com/cms/s/0/671841da-44c1-11e4-bce8-00144feabdc0.html#axzz3VoW9Zi4D, Commissioner

third country, could be invalid with the international law, and one of the parties, as a sovereign subject of the international law, can withdraw from the agreement.[463]

Taking into consideration that the US has BITs with several EU member states, but excluding Portugal, Spain, Sweden,[464] and what is more important, it has long-term commercial relations as with EU member states, so with the EU as a whole, the legal coverage of the investment relations seems lucrative for both parties. It is important for the parties due to the relatively new investment policy of the EU, so most of BITs between EU MS and the US should be reviewed, and it may cause an unattractive investing process for both sides, thus, it is important to increase the investment flow, the cooperation to a higher level, by providing opportunity also for the labour forces.

Following the EU relations with the other third countries, as relations with Russia through the Third Energy Package and the Russian legal entity Gazprom, or China in its willing of purchasing the EU actives and operating in the EU, caused the concerns from the US side, such as the restriction directed to one third country may affect another third country.

The US-EU investment dialogue launched almost ten years ago, in 2007, and should be finished by the conclusion of the agreement in 2010, which however due several reasons has not happened. In 2013, the Commission received a mandate to negotiate with the US on the EU-US the Transatlantic Trade and Investment Partnership (TTIP).[465]

However, this agreement has not been signed yet and negotiations still continue, due to several reasons. Many EU observers concern the lack of transparency on the initial negotiation of the agreement. The text of the agreement is of seven chapters, where the chapter I and II contains definitions and general provisions regarding the investments,

---

Malmström consulted the European Parliament on reforms of investment dispute resolution in TTIP and beyond, 2015, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303

[463] LEAL-ARCAS,R., GRASSO, RIOS, *Overview EU, EC – Energy security, Trade and the EU*, 2016, p. 18

[464] See more about US trade agreements on http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp

[465] Consultation on investment protection in EU-US trade talks, 2015, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234

arranging in accordance with the WTO, the treatment "no less favourable" and national regime regarding specific terms listed in the annexes of TTIP (article 5), but not limiting to "*benefit (the investors and investments of a party) from more favourable treatment, where such treatment is accorded by the legislation of the other party*" (article 6), and accordance of the fair and equitable treatment and full protection and security to investments and investors (article 12). Other provisions are in accordance with the OECD rules, including prohibition of discriminatory expropriation, and prompt, adequate and effective compensation.

After publishing several provisions of the draft agreement, most concerned were companies operating in the agrarian sector, due to the protection of geographical indications of products, decrease of the level of the standard, on the system of control and name of origin. The other issue is the liberalization of the mutual access to the services market.[466]

The energy sector also causes contradictions, while the USA remains potential gas exporter to the territory of the EU. The EU is expecting to diversify the gas supplies by LNG from the US, and get the non-discriminatory access to US infrastructure to the gas and oil transportation, in exchange of same opportunities to US companies in the EU. However were offered the regulatory authorities on regard to specific sectors. These authorities shall be independent, and should cooperate with the parties in order to provide the full information, revise and monitor the current state of the specific sector.

[466] Besides that it brought concerns and issues in many sectors. As to the public procurement, where from the US side was not agreed to allow EU companies to access to the railway and urban transit market, aviation security field, as well as purchases by the Federal Aviation Administration, which are not included into the annex of the WTO agreement on public procurement, but might be agreed on the basis of the TTIP. On the other side, in the EU the access is limited to a number of services, including areas of communications, education, transport and finance. Due to several issues on the surveillance of citizens and companies from the US side, the EU had concerns on the guarantees of personal data protection. The initiative of creating the common financial space was not aimed to provide the extension of general regulatory financial rules to the free trade zone, giving the discriminatory privileges in relation to the EU financial markets. The other threat is the currency dumping by the US dollar, the rate of which may adapt to the interest of the US exporters.

The United States of America remains one of the major gas exporters to the European Union, thus cooperation of these two parties important for the Russian federation, as for the energy supplier, from the one side, and as the investment partner from the other.

Although the protagonists of TTIP emphasize the multilateral economic growth, the opponents warn on the increase of the corporation activity, which will break the state regulation of markets.[467] Concerns on it caused the treaty articles on establishment the dispute settlement body, which is inspired the WTO DSB organ, with possibility to appeal.[468] This body is expected to be comprised of the permanent arbitrators and will consider the complaints and appeals, on the decisions of the mixed arbitrations, making judgments on the merits of the dispute. This organ is expected to create its own arbitration and judicial practice, and will be able to eliminate obvious mistakes caused by the diverse interpretation of international law norms by mixed arbitrations in the consideration of various disputes. At the same time, the practice of this body will be used by other international dispute settlement institutions.

It is planned, that is would be comprised of 15 judges with high technical and legal qualifications, where five are the EU nationals, five – US nationals, and the remained fived – nationals of third countries. In the concept paper[469] the lawmakers refer to the International Court of Justice and WTO dispute settlement body, emphasizing the qualifications of judges, and Appeal Tribunal accordingly. The TTIP provides several forms of the alternative dispute

---

[467] The Atlantic Council of the US, the Bertelsmann Foundation, and the British Embassy in Washington, 2013, TTIP and the fifty states: Jobs and Growth from Coast to Coast, available on https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245085/TTIP_and_the_50_States_GovUK.pdf, Or public concerns: CARDOSO, D., MTHEMBU, PH, VENHAUS, M., GARRIDO, M, V., In collaboration between Berlin Forum on Global Politics Internet and Society Collaboratory FutureChallenges.org, The Transatlantic colossus, Global Contributions to Broaden the Debate on the EU-US Free trade agreement, 2013, in particular see HARTMANN, A., TAFTA/TTIP: No thank you! That's not what a transatlantic partnership means, p.21-23

[468] http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153021.8%20Dispute%20settlement.pdf, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf, concerns see for example: HILARY, J., *The Transatlantic Trade and Investment partnership*, 2014, Rosa Luxemburg Stiftung, Brussels Office, p.30-34, available http://rosalux.gr/sites/default/files/publications/ttip_web.pdf

[469] Available on http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

settlements, including consultations (article 4 subsection 2), mediation (article 3), having in preference amicable resolution. Moreover, within requirements of the claim submission (article 5-6) it regards to the UNCITRAL and ICSID rules and procedures.

Trade and investment treaties between the EU and Canada and the EU and Viet Nam, in comparison, provide clear dispute settlement body, with the procedures, periods and references to international acts. They propose a permanent investment court, comprised by the residents of both parties and same number of independent nationals, appointed by the special Committee, which will serve the particular period of time 5 or 4 years for Canada and Viet Nam, accordingly. As for the body of appeal it should consist of the nationals of the contracting parties and independent persons, demonstrated experts in the public international law with the appropriate qualification, regarding the grounds of appeal it refers to the ICSID Convention, namely article 52, as errors of law, or corrupt tribunal. The appellate body should provide the final decision.[470] These treaties further specify that the tribunal should not render its decision in accordance with any national law, and it should interpret the law in accordance with the Vienna Convention on the Law of Treaties (CETA article 8.31 para 2).[471]

---

[470] EU - Viet Nam Free Trade Agreement, chapter 13, available on http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437, EU-Canada Comprehensive Economic and Trade Agreement (CETA), chapters 8 and 29, available on http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

[471] Also the EU as a whole is not a signatory of the Vienna Convention on the Law of Treaties 1969, the relations between the EU and convention illustrates the intra-EU case, *Case C-118/07 Commission v Finland* [2009] ECR I-10889, finding of the CJEU in para 39, " *According to well-established case-law, an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Conventions of 23 May 1969 on the Law of Treaties and of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express, to this effect, general customary international law, stipulate in that respect that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose* ", available on http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d62b4cb759d3134fb6a454f35066946144.e34KaxiLc3eQc40LaxqMbN4Pax0Qe0?text=&docid=73856&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=112363

Following this mechanism, the European Union's new trend is Multilateral Investment Court,[472] specialized body, with the permanent arbitration panel and Appellate Tribunal.

Many academics[473] discussed the consequences of such organs, including Koskiennemi, which expressed the worries, that it might threaten the sovereignty of the states, by narrowing and decreasing the independence of legal experts, giving them an opportunity to widely interpret the legal acts of the signatory states.[474] Professor Kleinheisterkamp points out that such tribunals may increase the level of investor's protection, up to abusing such opportunity.[475] Politics[476] see the risk of increasing rights of the foreign investors to the detriment of the local or domestic investors, as well as the citizens, and the state position, reminding the discussed case of *Vattenfall v Germany*.

The proponents[477] of such arbitration institutions remind the extension and unpredictability of the state court system due to the bureaucracy burden, cumbersome and solely process-oriented, and name the arbitration as relatively short, independent and critical institution, as a valuable alternative. It should be mentioned that there is no comprehensive

---

[472]Press release 2014 http://europa.eu/rapid/press-release_IP-14-951_en.htm, European Commission, The Multilateral Investment Court project, Brussels, 21 December 2016, More on http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608

[473] See: SORNARAJAH, M, An International Investment Court: a panacea or purgatory?, 2016, Columbia FDI Perspectives No 180, http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf, KAUFMANN-KOHLER, G., POTESTA, M., Challenges on the road toward a multilateral investment court, 2017, Columbia FDI Perspectives, No 201, http://ccsi.columbia.edu/files/2016/10/No-201-Kaufmann-Kohler-and-Potesta-FINAL.pdf

[474] In KONTTINEN, J. PROFESSOR: Finland's legislative power may be in jeopardy. (2013, December 15). *Helsinki Times*. available http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html, also see MALMSTRÖM, C. (COMMISSIONER FOR TRADE*), Remarks at the European Parliament on Investment in TTIP and Beyond.* 2015. Meeting of the International Trade Committee of the European Parliament, Brussels, available http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153430.pdf

[475] KLEINHEISTERKAMP, J., *Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?* 2014, available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188

[476] As Minister Industry and Commerce of India, Sitharaman, stressed the necessity to exhaust local remedies More on http://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece, also see O'CONNOR, B, AQUILINI, I., *The multilateral investment court,* 2017, NCTM, Across the EUniverse, #18

[477] See, for example VON KUMBERG, W., COVER, M., *The ECT and ADR in the context of investor/state and other disputes*, 2016, Energy Charter Secretariat Knowledge Centre, p. 1 , blog of the EU Commissioner C. Malmstrom https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en, https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/davos-discussing-investment-disputes_en

research paper on this issue, and the opinions of the most debating specialists are only in the media level, with some degree of politicization.

Having regard to the Free Trade Agreements, it is interesting to compare the dispute settlement mechanism in the FTA between Viet Nam and Eurasian Economic Union. In 2015 was concluded the FTA between Viet Nam and Eurasian Economic Union, member states of which are the Russian Federation, Belarus, Kazakhstan, Kyrgyzstan, and Armenia.[478] Chapter 14 of the mentioned FTA, provides the terms of the dispute settlement mechanism. Following the logic of the major investment documents, the agreement provides the possibility for the parties (Viet Nam, the Eurasian Economic Union as a whole and member states of the EEU) to agree to good offices, conciliation or mediation (art 14.5), as well as solutions by the consultations (art. 14.6). The FTA refers to the dispute settlement procedures under the WTO agreement (art. 14.3.) and provides the rules and terms on it. The other international instrument on which refers the agreement is the Permanent Court of Arbitration, namely the Secretary General on appointing the arbitral panel in accordance with the terms and periods of time of the FTA (14.8. para 3). In regard to appointment the arbitral panel, it follows BITs, providing the number of arbitrators – three members. This agreement contents detailed conditions, and procedural rules in respect of the establishment of the Arbitral panel (art.14.7.), its function consistence (art. 14.9.), proceedings (art. 14.10.) ,and reports activity (14.13.), qualification of arbitrators (art. 14.8. para 4), however, it, similarly, as BITs between the RF and EU member states, does not provide any possibility to appeal.

---

[478] Free Trade Agreement between the Eurasian Economic Union and its Member States, and the Socialist Republic of Viet Nam, signed 29.05.2015, entry into force 05.10.2016, Available on http://investmentpolicyhub.unctad.org/Download/TreatyFile/3455

4.4. Perspectives of the EU-RF commercial investment partnership and cooperation

To overcome the existing and prevent potential disagreements in the energy, in particular gas sector, would be a compulsory to set an international agreement for the EU - RF cooperation that would allow to eliminate the conflict of legislation, and to provide legal certainty and predictability for the commercial partners.

As it is clear, the formation of EU common investment policy has the direct relation to the Russian Federation as its commercial partner. First of all, as it has been mentioned, the RF has BITs almost with all EU member states, excluding Malta, Latvia and Estonia. Secondly, the developing and liberalizing EU's internal legislation, with its obligation to change the existing BITs affects the RF, as the third state. The approach of the EU, that the energy cooperation with Russia should be carried out "*in accordance with EU rules*" seems unequal, considering the fact of the deep, large, multiple and multilevel cooperation between the EU and the RF. Thirdly, connected to it there are interdependent and symmetrical partners, where in the field of cooperation should not be any law priority, except to international law.

There are attempts from both sides to bring the relations to the new level, however due to a possible different approach or perception of international agreements, the EU-RF trade and investment agreement stuck in the middle. In 2011-2012, Russia submitted a Framework Agreement on the regulation of the trans-boundary energy infrastructure, but there was not a comprehensive respond from the EU, that is perhaps due to the fact that the EU is not willing to create something what is already created, as the ECT mechanisms.

The EU and the RF are mutually interested in the stable partner relations, in the establishment of the adequate legal basis. Although, for the EU the RF is a strategic partner,

however, with this state the EU is not yet negotiating on the free trade, despite the fact that all trade agreements are available on the EU web pages, the RF is not even in the perspective.[479]

There are also different views on the future cooperation, while the RF is seeking the basis in the new Partnership and Cooperation agreement, the EU still refers to the Energy Charter treaty. For the author of this thesis the point to agree upon is to apply the developed basis, and also the practice of EU-Canada negotiations, in order to make and develop the new or semi-new document, with the possibility to establish an adequate dispute settlement mechanism. There are few possibilities the EU and the RF can cooperate in the nearest future: on the ground of the ECT or the Agreement on Partnership and Cooperation, renewed and amended.

In 2009, while withdrawing from the Energy Charter Treaty, the RF proposed to develop a Convention on international energy security, in supplement of the ECT. The parties of the ECT instead developed the International Energy Charter, which however does not cancel or replace the ECT, and these documents apply in parallel. It was expected that RF will sign this Charter, however, it did not happen. Moreover, it abstains from the participation in the process of negotiation the provisions. During the RF's participation in the ECT, the EU and the RF were attempting to develop their relations under the treaty however due to the disparities in the transit issues in 2007,[480] and later the mentioned *Yukos case*, the parties did not reach the agreement.

The experts[481], although being protagonists of the ECT basis, are sceptic on the RF application of the ECT in the nearest future, as the basis for the future stable cooperation with

---

[479] EU trade map trade partners, https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

[480] KONOPLYANIK, A., RUSNAK,U., *Energy Charter without Russia*, 2015, Vedomosti. No. 3810 (Конопляник,А., Руснак, Энергетическая хартия без России, Ведомости)

[481] KONOPLYANIK, A., WALDE, T, *Energy Charter Treaty and its Role in International Energy,* 2006, Journal of Energy & Natural Resources Law, vol. 24, No 4, p.523-558, BELYI,A, *RF and the ECT*, 2010, EKO, No6 (4), p.97-114 (Белый,А, Россия и Договор Энергетической хартии), GUDKOV I. *The decision of the Hague arbitration in cases of former shareholders of YUKOS against Russia: ECT that the drawbar, where to turn, went there?* 2014, Internet magazine "All Europe", №10 (92),(Гудков И. Решение гаагского арбитража по делам бывшие

the EU, even though the application under the ECT will remain for the RF until the year 2029. In addition, expert Belyi notes that the ECT provisions the RF uses on the "daily basis", in its conceptual approach, including them in its Road Map[482].

Adherents[483] of the PCA stress that, its potential is far from being exhausted. This agreement determines the common goals, supplemented by sectorial and special agreements, political declarations, unilateral and bilateral acts and documents, and by providing the institutional framework for the bilateral cooperation, serves the platform for the dialogue in a number of areas. Since London's summit EU-RF in 2005, the parties were opened to the update of the legal framework for cooperation on the basis of this agreement, as both partners went through important political, economic and social changes from 1994, signing of the PCA. The Russian academic Entin stresses that in the PCA is interested not only the Russian side, but also the EU. The agreement gives the EU more reliable tools for implementing external and internal policies towards the RF, by providing mechanisms of better coordination and comprehension of the distribution of competence, as well as reliable control over the consistent implementation,[484] which confirms German expert Monaghan.[485] Although some theorists express the concerns on the RF reliability as a partner, referring to the cuts of the gas

акционеры ЮКОСа против России: ДЭХ что дышло, куда повернешь, туда и вышло? Интернет-журнал «Вся Европа»), KONOPLYANIK, A, RUSNAK,U, *Russia and ECT: do not stay on the sidelines,2015,* Oil and gas vertical. №10. ,p.8 (Конопляник, У.Руснак, Россия и ДЭХ: не остаться на обочине Нефтегазовая вертикаль.)

[482] BELYI, M*odernizing ECT process*, 2011, Journal of Energy & Natural Resources Law, Vol 29 No 3

[483] See CHIZHOV, V, *Russia and the European Union: Forming a Strategic Partnership*, 2009, International Affairs, No. 10. (Чижов В, Россия и ЕС: формирование стратегического партнерства, Международная жизнь), UTKIN S., *The main instruments of the Common Foreign and Security Policy of the EU*,2005, the World Economy and International Relations № 11 (Уткин С. Основные инструменты общей внешней политики и политики безопасности ЕС, Мировая экономика и международные отношения), AVDEEV A., *European vector of Russia's foreign policy*, 2000, Modern Europe. № 4., (Авдеев А. А. Европейский вектор внешней политики России, Современная Европа), LIKHACHEV V, *Russia and the European Union*, 2002,International Affairs. № 12.(Лихачев В. Н. Россия и Европейский союз, Международная жизнь)

[484] ENTIN M, *Political and legal aspects of EU reform in the light of the Lisbon Treaty*, 2009, Report of the Institute of Europe of the Russian Academy of Sciences. № 241 (Энтин М. Л. Политико-правовые аспекты реформирования ЕС в свете Лиссабонского договора, Доклад Института Европы РАН).

[485] MONAGHAN, A., *EU-Russia Relations:"Try again, fail again, fail better"*, 2007, No2, Defense and Security studies. Available https://brage.bibsys.no/xmlui//bitstream/handle/11250/99429/1/DS_2_2007_final.pdf

supplies on Ukraine, which affected several EU member states, as well as the RF's policy in its neighbourhood.[486]

Considering the official page of the European Commission on the relations between the EU and the RF, it does not provide any reference to the degree of intensity of such relations,[487] on which may be concluded, that these relations are not on the most productive level.

However, as was discussed above, the Agreement on Partnership and Cooperation is part of the internal law as the RF, so the EU moreover regulates the cross-border relations of the representatives of the both parties. This agreement was supplemented by the Four Common Spaces, and Road Maps, and numerous Energy Dialogues.

Commenting the text of the PCA can be noted that, besides the basis for bilateral relations, it lacks the response to the current situation, as it does not provide a clear division on the issues of the competence. There is no reference, on which issues should be discussed with the EU as a whole, and on which with the EU member states.

It is worth to have a look at the Agreement on Partnership and Cooperation in the lights of the current relations between the EU and the RF, in particular the sanctions measures[488] from the EU side on Russian company Rosneft.[489]

Rosneft in its statement before the Grand Chamber of the EU court considering the pre-judicial request of the High Court of England and Wales referred to the EU-RF PCA, stating that sanctions are incompatible with this agreement. In march 2017 the Grand Chamber in its pre-judicial order ruled in the *case C-72/15*, that, besides the others, the article

[486] Although the link is from the year 2006, eleven years after, on the moment of writing the dissertation – the discussions remain the same. See KEMPE, I, SMITH, H, *A decade of partnership and cooperation in Russia-EU relations, perceptions, perspectives and progress – possibilities for the next decade*, 2006, Helsinki conference 26-28.04.2006.
[487] http://ec.europa.eu/comm/external_relations/russia/intro/index.htm
[488] Council Regulation No 269/2014 and Council Decision 2014/145/CFSP
[489] *Case C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and others, Case T-715/14 NK Rosneft a.o. v Council*

99 of the agreement does not prevent a party from taking any measures, which considers necessary for the protection of its essential security interests, and further pointed out the letter (d) of the article “in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”.[490]

In addition, the court cleared the provision on the EU Common Foreign and Security policy, stressing the right of the EU complete cessation of the economic relations with the third countries and its residents, and such measures were adopted within the framework of the EU Council’s competence. This case can be called precedent, as there are more Russian companies under the EU sanctions, including Gazpromneft.

As we can observe, the legal mechanisms of the national law affect and influence the international law, and vice versa. The relevant EU law, with the common investment policy is providing new conditions for the new agreement between the European Union and the third states, in particular the RF. Although EU law is developing and enriching by the half-century practical issues, which is on one side cultivate and challenges the international treaties, on the other side however, it may be seen as protectionism, by unilaterally providing to the partners the EU standards. However, standards take their roots in the international documents or the documents, including decisions declarations, and decision-making processes of the international organizations.[491]

In order not to come down to the transnational and inter-state cooperation, the attention should be paid to the international nature of such relations. Thus, balanced strategic partnership is a landmark in the relations between the EU and the RF. Absence of the binding

---

[490] The objectives of the restrictive measures were aim to stop the actions of the RF on undermining the territorial sovereignty and integrity of Ukraine, by prohibition the exports of certain types of equipment destined for the Russian oil sector (EU Council Decision 512/2014)

[491] FOLLESDAL, A., WESSEL,R.A., WOUTERS, J., eds. ,*Multilevel regulation and the EU: the interplay between global, European and national normative processes*, 2008, Leiden: Martinus Nijhoff.

basis and quasi-existence of the handicapped agreement, is the problem of the unserious and concern-full approach of both sides. In order to avoid it in the future should be left the room for its systematic amendment, which will accompany the regular meetings.

But first of all should be chosen the certain format of the cooperation. Taken into consideration the experience of the EU with TTIP, and the opinions of the experts, the bilateral cooperation between the EU and the RF should not be limited by them two, as international partners, should be paid more attention to act incompliance with the international law. For the EU should be borne in mind, that besides its impact on the wide number of states, including its 27-members, and states of the Neighbourhood policy, and Energy community, the cooperation with the third states, should not be considered as solely "cooperation with the third states", rather cooperation with the equal partners in the international area. The relations between the EU and the RF are not subject to the agreement of the European Neighbourhood Policy.

There is a hidden threat that the perception of the international law through the prism of the EU law may substitute the concept in the relations between the EU and the non-EU member states, where the EU law may be applied as priority for the third countries as well.

As has been mentioned, the EU concluded partnership and cooperation agreements with number of the post-USSR states, including Belarus, Armenia and Kazakhstan, parties of the Customary Union with the RF. In comparison to the RF, the EU already amended the old PCA with Kazakhstan, and in May 2016 already started the provisional application of the Agreement on Enhanced Partnership and Cooperation, signed in 2015.[492] This agreement is in line with the WTO provisions, since the Kazakhstan is WTO member from 2015, and it responds the current needs, including provisions on the free trade zone and the joint-cooperation in the innovation area. The new EU-Armenia PCA is also based in compliance

[492] https://eeas.europa.eu/headquarters/headquarters-homepage/18499/enhanced-partnership-and-cooperation-agreement-between-european-union-and-republic-kazakhstan_en

with the WTO norms, though the agreement was not signed yet, however Armenia already enjoys the regime of Generalized System of Preferences, which grants preferential tariffs to Armenian exports on the territory of the EU.[493]

As has it was discussed, the PCA between the EU and the RF was developed as a model or a framework agreement, and there are still on-going discussions on the new Agreement on Partnership and Cooperation, however without a final consent of the parties. It also expresses the idea on the negotiations between the “blocks” – the EU and the Eurasian Economic Union,[494] or Customs Union between the RF, Belarus, Republic of Kazakhstan, Kyrgyzstan and Armenia.[495] The assumed documents with a binding nature are also just in plans.

Obviously, the discussions on the establishment the mutually beneficial agreement might last long time, and in the end might not be concluded any document. Although there will be a dynamic cooperation, the legal basis will not be able to cover it. The consequences are known prolonged communication, loss of financial means, uncertainty of the dispute settlement, unpredictability and the unreliability of both partners.

It is an ambitious idea to establish a dispute settlement body between the EU and a third state in the perspective seems, due to numerous potential EU partners, as an utopia. However, on one side we could observe the inclusion of the investment court system into the

---

[493] http://ec.europa.eu/trade/policy/countries-and-regions/countries/armenia/

[494] More on the web page: http://www.eaeunion.org/

[495] See, The Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement, available: http://www.eu2008.si/en/News_and_Documents/download_docs/June/0627_eu_RUS-izjava.pdf; http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/, LEAL-ARCAS,R., *the EU and Russia as Energy Trading Partners: friends or foes?*, 2012, European Foreign Affairs Review, 14(3), p. 337-366, KONOPLYANIK, A, *A common Russia EU energy space (The New EU Russia Partnership Agreement, acquis communautaire, the energy charter and the new Russian initiative),* 2010, in: TALUS, K., FRATINI P (eds), *EU-Russia Energy Relations (Rixensart:Euroconfidentiel)*; BORDACHEV, T, *New strategic union, Russia and Europe challenged of the 21 century: possibility of the big deal*, 2009, M:Europa, p. 266 (Бордачев Т. В. Новый стратегический союз. Россия и Европа перед вызовами XXI века: возможности «большой сделки». М.: Европа). London, Chatham House: Russia and Eurasia Programme, August 2012. REP BP 2012/01; SHUMYLO-TAPIOLA, O. *The Eurasian Customs Union: Friend or Foe of the EU?* Carnegie Europe, 2012.

agreement CETA between the EU and Canada.[496] On the other side, establishment on the permanent EU basis the DSB, it will not be considered as an international organ, rather a new EU institution. Gaillard distinguishes the *monolocal*, *Westphalian* and *transnational* systems of justice,[497] prioritizing and justifying the transnational system is the most rational one. He states, that especially on the basis of the transnational vision are based the international arbitrations, including the New York Convention 1958 and UNCITRAL rules, as this transnational system puts as priority the agreement of the nations on how should the arbitration be, rather than state/institutions individualistic interests, and which is "entirely divorced from the national legal systems of states".

However, already existing tribunals have not always been seen sufficient and effective, due to various approaches to the interpretation of the particular document, up to possibility of the *lis pendens*, so the consequences for the parties may be radical. In addition, the establishment of diversified dispute settlement bodies with narrow specialization may deepen the fragmentation of the international law, and strengthen the atmosphere of legal uncertainty. For the nearest future, in order to review the decisions of such courts will be needed already established bodies by the whole (most) international community.[498]

Should be also borne in mind, that dispute settlement body is not necessarily means arbitration, instead it includes more amicable instruments: negotiation, mediation, expert determination, dispute review board,[499] litigation. Thus, such dispute settlement body may bring more useful critical overviews on the relevant cases, without weight in vain fully charged tribunals. Therefore, occur the necessity to pay more attention to the pre-judicial

[496] As have been discussed in the previous chapter (4.3.) of this thesis.
[497] GAILLARD, E., *International Arbitration as a Transnational System of Justice, in International Council for Commercial Arbitration*, 2012, Arbitration – the Next fifty years, ed. Van den Berg, A.J., p.68-69
[498] KOSKENNIEMI, M., *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, 2006, Report of the Study Group of the International Law Commission, p.28-29
[499] As in the International Chamber of Commerce, or the International Centre for Dispute Resolution

dispute settlement, in order to resolve potential dispute amicably, out of the court and arbitration tribunal.

Academics note that instead of creating something new, it is better to develop something existing. That will be the organ, which should be evolved, as the existing WTO dispute settlement body. As have been mentioned in the previous chapters, the WTO arbitration mechanism is of great importance, which helps to avoid the trade conflicts or even wars between the WTO member states. The DSB acts in accordance with the Dispute Settlement Understanding Rules and Procedures,[500] and usual rules of the interpretation of international public law. After exhausting all means on a bilateral basis in order to settle the dispute, the WTO member state may apply to the General Council, or Dispute Settlement Body, which consists of all WTO members. The WTO DSB is empowered to establish arbitration panels, Appellate Body, and monitor the implementation of decisions and recommendations.

Within the mechanism of the dispute settlement, there are two stages, first of which is consultation lasting during the 60-day period.[501] If there is no settlement by the mediation by the WTO Director-General, follows the second stage – where is the arbitration panel being appointed, which consists of the 3-5 experts. The panel perform in accordance with the terms, time period given by the rules and procedures, thus not letting the proceedings last more than a year in the first instance. Strictly provided wide range of steps of the proceedings by the WTO: hearings, rebuttals, an expert review or an advisory report, the first draft of the report, an interim report with findings and conclusions, the review of the previous reports, and the final report – gives the affected parties the opportunity to actively participate in the dispute settlement and resolve the case in the efficient ways. The final stage of the dispute settlement under the WTO is the implementation of the recommendations of the Dispute Resolution

[500] Article III, para 2-3 of the Agreement Establishing the World Trade Organization, 1994, and Annex 2 to it.
[501] Article 4, article 5 para 4 of the Annex 2 to the Agreement Establishing the WTO.

Body, and performance of it is possible in the form of paying compensation by the violator, or taking of the counter-measures by the affected state. However, as has been mentioned earlier in this thesis[502] the WTO does not have the enforcement mechanism.

On the basis of the GATT/WTO are functioning the agreements which are not just related, but also cover, though not fully, the sector of energy trade. Although WTO instruments are relevant for the energy sector, as the mentioned above General Agreements on Tariffs and Trades (GATT), on Trade and Services (GATS), Trade Related Investment Measures (TRIMs), also Subsidies and Countervailing Measures, and Agreement on Government Procurement, nevertheless they are not applying directly, and their approach on the energy is rather distant than exhausting. That could be understood due to the fact that, there was no need to discuss this issue closely, as many states energy producers and exporters were not the part of WTO process. However, the situation has changed and among the WTO participants are states, as Russia, Kazakhstan, or Saudi Arabia. Some researchers point out that the energy is not out of the trade issue, it is otherwise, tradable good, but with known specifics.[503] Moreover, the WTO prefers to coordinate and cooperate with the institutions, which are aimed to legally frame the energy related issues, in particular the Energy Charter Treaty.

Due to the fact that, the RF is not a part of the ECT, and the energy projects are capital-intensive investment, WTO should deal and it already deals with the energy investments. Selivanova notes that TRIMs agreement "*does not deal with investment policy per se*", rather fulfil the administrative function on putting the quantitative restrictions, requirements for the currency, and refers to the national obligation to develop the restrictions

---

[502] Chapter III, 3.1.

[503] See several opinions of the Ricardo Melendez-Ortiz, co-founder and CEO of International Centre for Trade and Sustainable Development (ICTSD), available on www.ictsd.org/about-us/ricardo-melendez-ortiz, also: MARHLOD,A., *The Nexus between the WTO and the ECT in Global Energy Governance: Analysis and policy implications*.2016, ICTSD, SELIVANOVA, Y., *The WTO Rules and Agreements of Relevance to the Energy Sector*, 2007,ICTSD, issue paper No 1.

accordingly.[504] Danelyan points that TRIMs does not disclose the concept of investment measures of the commercial nature, and due to that reason in the process of this agreement realization many developing states (including Russia) had the problem of the determination of the investment measures in accordance with the TRIMs, or the "performance requirements".[505] These requirements are aimed to decrease the level of protectionist measures taken by the state energy exporter, as mentioned requirements by the Russian Product Sharing Agreement (Federal Law No 225), where the produced energy production should be shared between the state and the investor.

However, it should be stressed that, for the state it is not seemed as a protectionist measure, but in the opposite, the possibility to develop the economy, especially in such a strategic field. On the contrary, for the investor it is a limitation of competition, connected with the use of its investment activity.

Nevertheless, WTO is the only functioning basis for the EU - RF cooperation, taking also into account, that the EU as a whole is a part of WTO. However, WTO does not provide sufficient substantive basis neither for the energy, in particular gas relations between the EU and the RF, nor the investment cooperation as a whole.

Thus, the most logical solution for the EU-RF gas relations is to update the existing Agreement on Partnership and Cooperation, using the provisions of the Energy Charter Treaty and developed treaty with Canada, in line with the unexceptionable practice of WTO measures. With the regard to the analysed cases, there is a need of establishment dispute settlement mechanism between the EU and the RF on an adequate legal basis. However, taking into consideration agglomerated market of dispute settlement bodies, and continuous fragmentation of international law, the better path would be to find a solution among the

---

[504] SELIVANOVA, Y., *the WTO Rules and Agreements of relevance to the energy sector*, 2007, ICTSD, issue paper No1, p. 4

[505] DANELYAN,A., *The agreement on trade-related investment measures (TRIMS) and the principle of "performance requirements".* 2016, Eurasian Law Journal, No 2(93), p. 71-73

existing tribunals, by developing the substantive, institutional and administrative basis for the certainty and predictability of decisions, with the accent on the protection of investment, rather investors.

Observing the technological progress and thus innovating the cooperation between the EU and the RF, and the importance of the natural resource – gas, it is obvious that the relations will remain for a long time, but the issue is on which basis. The ineffectiveness of the established legal framework governing the sectors of energy and investment witnesses on the unwillingness of the partners to compromise, and that the political temporary issues are prevailing upon the permanent legal agreements.

Thus, as a good example could be the dispute settlement mechanism under the framework bilateral agreement between the UK and Norway.[506] In order to use the existing practice of the dispute settlement mechanisms in the gas sector it is good to have a look at the practice of the European states – major gas importers in the European region, and their dispute settlement mechanisms in development and operation of trans-boundary field under mentioned agreement. It is being called as one of the most developed international agreement in this area,[507] and the legal basis of exploitation and operation of the transboundary resources is carefully balanced. For the purposes of this theses it is useful to have a look at the article 5 of this agreement – regarding the dispute settlement, which is in comparison with the bilateral investment treaties between EU member states and the Russian Federation, or the EU-RF Agreement on Partnership and Cooperation, is carefully developed. The UK - Norway agreement provides a few mechanisms of the dispute settlement, establishes procedure and conditions of the dispute realization, by introducing a special organ – Conciliation Board,

---

[506] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway concerning Cross-Boundary Petroleum Co-operation, 4.04.2005, available https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243184/7206.pdf

[507] GULIYEV, I., LITVINYUK, I., MARKIN, I., *Dispute settlement mechanisms in development and operation of transboundary field under the framework agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway concerning cross-boundary petroleum cooperation*, 2016, Eurasian Law Journal, No 2(93), p.88-90

comprised of 5 members, each 2 members should be provided by both states, and the fifth one should be the chairman of this board, who is not resident of the both states. The agreement further refers to the international organ – President of the International Court of Justice, to designate the required number of members (article 5 (1)(iii)), in a case both parties fail to do so. The Board makes decisions by the simple majority.

The other organ provided as a dispute settlement mechanism and its procedures in the article 3.4 and annex D – the Expert, also with refer to the third organ, in a case the party will lack in appointing one – the *Institut Français du Pétrole et des Energies*. The expert should be professional in this particular area, and make decisions in a case of a dispute, and the governments of both states should assure that these decisions are binding, and required by the decision from parties to perform.

Dispute settlement in the framework of the agreement relations especially regarding the gas sector, is very important in international cooperation. The necessity of the dispute settlement mechanisms, their development and thoroughness parties established ensures the effectiveness of the cooperation in the international area.

Returning back to the Agreement on Partnership and Cooperation between the EU and the Russian Federation it is good to mention that this document already contains such advisory body for the potential dispute settlement. The final provisions of the agreement, namely title XI, expressly state the establishment of the Cooperation Council body, where are represented parties through the members of the Government of the RF, Council of the EU, and EU Commission. The presidency in such Council shall be held alternately by a representative from both parties.[508] The competence of the Council is rather advisory, it shall monitor the implementation of the agreement,[509] and in accordance with the article 101 para

[508] article 91 para 3 of the PCA
[509] Article 90 of the PCA

2, it may settle the dispute by means of recommendation. Detailed mechanism of the dispute settlement in the agreement is absenting.

Although, the advisory mechanism is already included into the agreement, however, it does not fully cover the procedural rules, terms, and specifics of the cooperation between the parties in the potential situation of the dispute. Also, it does not state what kind of dispute it should help to resolve.

As has been mentioned previously,[510] the Agreement on Partnership and Cooperation refers as to the GATT/WTO as an international institution,[511] as well as on the Energy Charter Treaty.[512] It also encourages the arbitration, includes references to the UNCITRAL rules, and the New York Convention 1958.[513]

Since the RF withdrew from the Energy Charter Treaty, the reference of the PCA regarding the energy sector is no longer efficient and effective. Even though the ECT applies for the agreements concluded by the RF until 2009, however it does not cover the agreements concluded after this time. Thus, the gas sector in a frame of the cooperation between the RF and the EU still remains uncovered either by the Partnership and Cooperation Agreement, as well as by Energy Charter Treaty. That makes the necessity of the effective cooperation in establishing a substantive legal basis between the actors emerging.

Summary

This chapter was dedicated to the national or internal legislation in the energy and investment sectors in the European Union and the Russian Federation. The main laws regulating these areas were illustrated, the opportunities and difficulties for the RF-EU

[510] in the chapter III, article 3.1.1. of this thesis
[511] Article 94 of the PCA
[512] Article 105 of the PCA
[513] Article 98 of the PCA

relations were discussed through the liberalizing EU investment and gas market, or the development of the Energy Union.

Further discussed was the cooperation between the EU as a whole with third states, risks seen by the academics, in the division of competence between EU member states and the EU. The perspectives for the cooperation between the EU and the RF were discussed regarding investment and energy, in particular the gas sector, and what legal basis should be developed was analysed, what functioning examples should be followed, and what goals should be met by the EU and the RF.

In particular was analysed the perspectives of the cooperation between the EU and the RF under the Agreement on Partnership and Cooperation.

V. Conclusion

In conclusion, the main summaries and suggestions of the author on the research topic were provided.

There is a high cooperation between the EU and the RF in energy investment sectors, as these partners are closely linked not just economically, but also technically, through the infrastructure, for a long period of time since the 1940s. It was demonstrated, that with no exaggeration, in the mid-term and long-term perspective, up to the year 2030, the EU is unable to refuse the gas from the RF.

Regarding the EU and the RF, we can talk neither about asymmetry, nor on disparity, rather on the fair *in parita* relations of the energy and investment partners. The EU companies are operating on the RF gas market starting from the production and exploration, up to the distribution level as well, so the RF companies are in the territory of the EU. While the cooperation is prevailing in the territory of the particular partner, the legislation of this host state will prevail. However it is in accordance with international law. Chapter II of this thesis provided specific data and statistics in order to illustrate the EU-RF gas relations, mentioned the construction of the projects South Stream, Nord Stream and OPAL, as well as analysed related cases. It was illustrated the situation of the unfair pricing of the Russian monopolist gas supplier Gazprom on the territory of the Central Eastern European Union states, and the steps taken by the EU for liberalizing the EU gas market.

There are several international agreements and instruments, which apply both on the EU and the RF; however, only few can be regarded on the cooperation of the partners. One of these documents is the Agreement on Partnership and Cooperation, signed in 1994, which is however obsolete and does not respond to the current needs and realities. The other one – Energy Charter Treaty can hardly be considered as a basis for the cooperation, due to the RF withdrawal from the Treaty in 2009. In the thesis are discussed and analysed the reasons on

why the RF does not see the ECT as a main platform for operating in the international area, in particular in cooperation with the EU. The analysis of the *Yukos* case in the frame of the ECT from the RF's point of view, as well as the case *Electable*, illustrated the ECT from the EU perspective. The cases illustrated that both the EU and the RF are reluctant to follow the ECT provisions, if they are inconsistent with the internal legislations and the political discourse.

Regarding specifically the energy sector, the only basis is the legally unbinding dialogues, and declarations, which support the relevant agreements from the political side.

The basis for the investment sector is the bilateral investment treaties (BITs) between each EU member state and the RF, the treaty between the RF and the EU as a whole is absenting. The conclusion of the BITs between the RF and each EU member state was conditioned by the specific interstate relations and history cooperation, as well as the economic attractiveness of each country. Thus, even though content of BITs is more or less the same, some important provisions in every agreement vary. As it has been discussed in detail in the chapter 3.3 of this thesis, the bilateral investment treaties between EU member states and the Russian Federation contain different kinds of investments treatment standards, refer to various arbitration bodies, and include distinct definition of the territories, where the investment may be made.

Significant definitions of investment and investor are not exhaustingly listed in these agreements, rather specifications could be found in the decisions and judgments. Regarding this were illustrated cases, where the RF was in the role of a respondent, as a host state receiving the investments.

The definition of the investor presents the case *Sedelmayer v. Russia.* Tribunal of the Stockholm Chamber of Commerce rendered natural person as an investor, instead of the company, on behalf of which he was making investing activities in the host-state. The Tribunal decided that Sedelmayer is entitled to claim under the BIT between Germany and the

USSR, as the claimant is the German citizen, and he is “de facto investor”, unlike the classic Barcelona Traction case as the Tribunal decided on the basis of the nationality of the shareholder, but not on the corporate nationality. It is worth to mention the discenting opinion of the arbitrator Zykin, which stressed that investor was performing as an owner of the US company, but not as a natural person. Thus, this case shows a gap in BIT, leaving the possibility to abuse by the investors their position. As in the discussed case Tokio Tokeles v. Ukraine, the Ukrainian citizens registered company in Lithuania in order to be a foreign investors in the Ukraine and get better protection. The same with some clauses can be observed in Yukos v. Russia, where the Russian citizens registered companies in the offshore zones and performed in the RF as foreign investors.

It is also important to connect an investor with its investment activity. Judge Weiler in his separate opinion on the case Bershader v. Russia, noted the importance of interpreting the term investor in connection with the term investment. Regarding the definition of the term investment, used in the RF - Belgium and Luxembourg BIT, illustrates the case *Bershader v. Russia*. In this case the SCC tribunal determined any kind of investment as the Russian word used in BITs, *“kapitalovlozheniye”*. The Russian side contented to equalize the term “*kapitalovlozheniye*” or literally “capital investment” to the “contribution to the charter capital of a joint venture”. The tribunal rejected this objection, comparing the Russian version with the French authentic version, where was used the term “*investissement*”, which is identical to the English “investment”. Moreover, the second argument was that in the meaning of the treaty the Russian term was identical to the English “*investment*”. Comparing this interpretation and argumentation of the Stockholm tribunal it is hard to disagree, as the term “*kapitalovlozheniye*” is used in every bilateral agreement between the Russian Federation and each member state of the European Union. In addition, there is also a list of activities, which should be considered as an investment.

On the basis of the *Yukos* case such sensitive issues as expropriation and compensation in accordance with the international investment law were analysed. In accordance with the discussed legal documents, in particular, the Energy Charter Treaty, and bilateral investment treaties, the state can lawfully expropriate the foreign investor's property or investments in strictly defined conditions (non-discriminatory and in public purposes), with the obligatory paid prompt, adequate and effective compensation. In this regard was discussed the justification of the expropriation as public purposes. Various tribunals were considering whether the Energy Charter Treaty applies on this case, also whether the expropriation was lawful, and based on what calculation should be paid certain amount of compensation.

In the introduction, the question was posed, regarding the cases *Yukos, Sedelmayer, Bershader, Noga*, if they are real EU investors, or persons avoiding the legislation and using the possibility to be a foreign investor in order to get benefits as tax regime, better protection of investments and position in the market? As it is clear from the thesis, *Sedelmayer* was a German citizen, *Bershaders* were Belgium citizens, although the case of *Yukos* was different, where the company's shareholders are various EU and EU based companies. The tribunals in these cases carefully considered the claims and arguments of these claimants, and respondent – the RF, and regarding the joint case *Yukos*, indeed accepted the RF's statements on a tax avoidance, however put on priority the international law principle "*pacta sunt servanda*", and prohibition of expropriation without providing a prompt, adequate and effective compensation.

Not the least, the important thing of any decision is its implementation, thus was examined the matter of jurisdiction, arbitration and enforcement of decisions, in the light of the New York Convention on Enforcement and Recognition of Arbitral Awards 1958, and related to it cases of *Noga or Sedelmayer v Russia*.

It was shown, that each case the Russian Federation participates as a respondent, the proceedings do not end with the arbitration award, otherwise, the RF is requesting for revision the judicial bodies. Thus, the statement in BITs on the finality of the arbitration award does not seem reliable, consistent and even correct. Moreover, it affects the recognition and enforcement of the award, as some courts may decide on implementation of the New York Convention 1958 on the decision in the first instance, as it has been discussed in the chapter 3.3.4.

Since the previously mentioned international multilateral and bilateral agreements were mostly concluded in 1990s, it is clear that the states continued their [states] development, both economically and institutionally. Since that time there were several changes, as in the territory of the EU establishment of the common commercial policy, where the investment policy became the exclusive competence of the EU as a whole, granted by the Lisbon Treaty in 2009.

The relevantly new EU common investment policy is aimed to replace existing investment agreements between EU member states and third countries on the new agreements, where the EU will communicate on behalf of its 27 member states. In chapter 4.2 were analysed internal EU common commercial policy, recent legislative acts, and relevant and related to it cases. It was paid attention on how is the common legislation developing, and whether it is in line or contradicts to the international law and previous agreements made by EU member states with non-EU countries.

Were discussed the cases *Commission v. Slovak Republic*, and *Commission v. Bulgaria*, in regard of the fulfilment of the EU member states the EU law, and their obligations under BITs and the ECT towards third states. It was analysed that the Commission is attempting to seek a failure to fulfill obligation of EU member state in the moment, EU law is being amended, even “during the course of the pre-litigation procedure. Regarding the case

Commission v Slovak Republic was highlighted the issue of the *pacta sunt servanda* under BIT and changing legislation of the EU, where the Slovak Republic is a member state. The Court of the EU concluded that the contract as an investment is a subject of protection from any kind of expropriation, as direct, so indirect, and the termination of the contract on the basis of the internal EU legislation may be evaluated as a form of indirect expropriation.

Was overviewed the formation of the Energy Union, examined the phenomenon of the Energy Europe, and reviewed the connected legislation on the liberalization of EU internal energy market. Meanwhile the RF in 2012 accessed to the WTO, and the RF in line with this institution's requirement, liberalized or still liberalizing its internal energy market. The current legislation was overviewed, legal requirements on the investing activity in the energy sector in the RF was illustrated also by the situation on the project *Sakhalin 2*.

There are already running negotiations between the EU and the Canada, USA, states of ASEAN or South Mediterranean states, developing the definitions and condition terms on the investment activity. It is considered to establish the dispute settlement body on the basis of such free trade agreements. The EU further negotiated and signed updated Partnership and Cooperation Agreements with the post-Soviet states, members of the Custom Union, Kazakhstan and Armenia. However, there is no yet even in plans the negotiation on the new document between the RF and the EU as a whole, although both parties need it.

Based on the results obtained from the analysis of the EU-RF relations in the energy and investment sectors, in the international legal framework, this dissertation attempted to discuss whether the current legal basis between the EU and the RF in the investment and energy sector is comprehensive and sufficient. It was illustrated via the theoretical and empirical studies of the legal regulation on protection of foreign investments, gas legislation, current documents on cooperation, that there is a space for improvement and development. The object of research raises the legal relations in connection with the assistance and the

implementation of foreign investment in the gas sector. In the research paper was studied and analysed the current practice of the investment relations in the framework of the gas relations between the EU and the Russian Federation.

In the introduction the author mentioned the importance of the creation the substantive legal basis for the EU –RF cooperation in the gas sector, as well as the establishment of the dispute settlement body. However, after the analysis made in this thesis, was concluded that it is better to develop existing basis and increase the functionality of the advisory mechanisms under the PCA, and establishment the body of Appeal, in order to make the gas relations more effective and efficient. Establishment of the totally new dispute mechanism body between the RF and the EU may seem as a utopia and may lead to the biased decision, decreasing the level of the internationality, and leading to the trans-boundary relations.

The proposals and conclusions are the following:

- Currently the mechanisms of the commercial cooperation between the EU and the RF in the field of investment and gas sector are covered by the Agreement on Partnership and Cooperation, bilateral investment treaties, and the national legislation of the RF, law of the EU, and provisions of the Energy Charter Treaty. Should be borne in mind, the Energy Charter Treaty in regard to Russia, covers the limited number of agreements, which were concluded on the time, the ECT was applied provisionally.
- Given the current trends in the development of the EU law and the EU policy, it is supposed that in the nearest future the bilateral investment treaties between the EU member states and the third countries will be replaced by the treaties on the EU level. The difficulties will arise with their realization and implementation of the provisions in the arbitration tribunals. It is expected that some existing clauses in the extra-EU BITs will be obligatorily revised. The arbitration procedure is also one of the discussing points.

- Existence of the EU common commercial policy and Energy Union, on the one side and development of the Eurasian Economic Union on the other side provides possibility for the assumption of the new level of regulation of the RF – EU relations on the institutional level.
- Due to the differences in each bilateral investment treaty between an EU member state and the RF, it is important to pay attention to the analysis of the binding mechanism of the future cooperation, in order to avoid the soon obsolescence and prevent the prolongation of the discussion on ratification, and to measure potential complexity of the implementation of the decision of investment arbitration. At last, but not the least, should be paid more attention in developing the arbitration tribunal, and considering about establishment the Appellate Body, for the purposes of the economy and efficiency of the proceedings, and avoiding the rivalry of the arbitration and judicial bodies.

The perspectives of the cooperation were seen by the author in the amended and updated the Agreement Partnership and Cooperation, with inclusion of the provisions of the Energy Charter Treaty and developed the EU-Canada CETA, in line with the unexceptionable practice of WTO measures. With the regard to the analysed cases, there is a need of establishment dispute settlement mechanism between the EU and the RF on an adequate legal basis. However, taking into consideration agglomerated market of dispute settlement bodies, and continuous fragmentation of international law, the better path would be to find a solution among the existing tribunals, by developing the substantive, institutional and administrative basis for the certainty and predictability of decisions, with the accent on the protection of investments, rather investors. Thus it is important to pay attention to the development of a functional Advisory body between the EU and the RF, as well as establishment of the Appellate Body within the PCA, due to the numerous revisions of the arbitration awards in the judicial bodies. Both parties should better develop their international cooperation,

bringing their relations to the level of the multilateral cooperation than abridging it to the bilateral level.

Summary

Despite the development of the use of the renewable energy, the demand for the gas is still high and growing, due to the fact that it is efficient, with wide range of usage, clean, and environmental friendly non-renewable resource. However, the reserves of the natural gas are limited, and the EU satisfies its demand by the import of this resource from other states, the major supplier being the Russian Federation.

The relations between the EU and the RF in the gas investment sectors are long-term, starting from the 1940s. Although the cooperation of these partners is stable, however it faces many inconsistencies due to political or economic reasons. Thus, in order to avoid uncertainties in the relations of such strategic public sector, which directly affects the welfare of the citizens, there is a need of an adequate legal basis.

In the thesis is discussed the absence of a substantive legal basis, mentioning that though there are international instruments, as multilateral and bilateral treaties, still they are not sufficient for the effective cooperation, thus have a potential threat for the future relationships. The long term cooperation between Russia and the EU has only one bilateral agreement – the Agreement on Partnership and Cooperation signed in 1994, which is however obsolete, and does not meet the contemporary needs. The adequate legal basis for Russia–EU cooperation in the gas sector is still missing. The protection of investments in the gas sector is being realized by bilateral agreements between Russia and EU member states, soft law and general international agreements, without any specifications for those two partners. The only international instrument covering the energy relations of these two partners – Energy Charter

Treaty cannot be considered as a reliable mechanism, as Russia withdrew from it more than 8 years ago. The reasons of the withdrawal and the Yukos case as an illustrative example are discussed in this paper. Moreover, these agreements contain different provisions with various definitions of the same term. Even bilateral treaties between the RF and each EU member state although are of similar scope and intention for the investment protection, still they do not provide sole determination of the terms. In addition, the EU and EU law are developing, and the EU presents its investment wills of all 27 members exclusively, thus, it is in the process of replacing BITs between each EU member state and third states to the agreement with the EU as a whole. It is worth to mention the differences in economic, political and technological development of each state, which makes this transition more difficult. However, there are already signed free trade agreements with Canada and Viet Nam, in a contrary in the planning list for establishing these FTAs with the third states, the RF is not even in perspective.

As to the point of the arbitration and judicial interpretation of the terms and conditions of the agreements, there is no one dispute settlement body. It is seen from the discussed cases in this paper that the RF is not satisfied with the finality of the arbitration decision, and requests to revise them in the judicial bodies, thus, arises the need of a dispute settlement mechanism as offers the WTO, with the body of Appeal. Since the costs for the proceedings are very high, and in the case when one of the parties is the state, the costs of the dispute settlement bear the tax-payers. Therefore, it is important to make the procedure of the settling of the dispute effective, and more economical. The EU is developing the permanent multilateral investment court based on each FTA with the third state, as it is made with Canada. However, in opinion of the author of this thesis, it may bring higher fragmentation of law, and less consistency in the dispute settlement. Thus, for the EU-RF cooperation the author proposes to update the existing Agreement on Partnership and Cooperation and

develop the instrument of the advisory board, and consider on establishing the body of appeal in a frame of the appointing the arbitration panels.

Seznam použitých pramenů a literatury

1. Literatura

AAKEN, A., *Fragmentation of international law: the case of international investment protectio*n.2008. University of St Gallen Law School. Law and Economics Research Paper Series. Working paper. #16;

ANDOURA, S., VINOIS, J.-A., DELORS., J., *From The European Energy Community To The Energy Union*, A Policy Proposal For The Short And The Long Term, 2015, Notre Europe

ANDOURA , S., HANCHER , L. VAN DER WOUDE , M. *Towards a European Energy Community: A Policy Proposal*. 2010. Notre Europe, Studies & Research. http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/nsalliarelis/public/Towards%20a%20European%20Energy%20Community_A%20Policy%20Proposal.pdf

ANUFRIEVA,A, *Protection of foreign investment in the conditions of the financial crisis*, 2016, Zakon, #3 (Ануфриева, А, Защита иностранных инвестиций во время финансового кризиса, Закон)

AVDEEV A., *European vector of Russia's foreign policy*, 2000, Modern Europe. #4., (Авдеев А. А. Европейский вектор внешней политики России, Современная Европа)

BALAŠ, V., *Konkurující jurisdikce v oblasti mezinárodního ekonomického práva*, in: ŠTURMA, P., HÝBNEROVÁ, S., ONDŘEJ, J., BALAŠ, V., BÍLKOVÁ, V., HONUSKOVÁ, V., *Konkurující jurisdikce mezinárodních rozhodovacích orgánů*, 2009, Praha: Univerzita Karlova

BALAŠ, V., *Review of awards*, 2008, pp. 1127-1153, in MUCHLINSKI, P., ORTINO, F., SCHREUER, C., *The Oxford handbook of international investment law*, 2008, Oxford University Press, Oxford.

BANKES, N., WHITSITT, E., *The Evolution of international investment law and its application to the energy sector*, 2013, in the evolution of international investment law, 51 (2), pp. 207-247

BASYROVA, Z., KONISCHEVA, T., MELENTYEV, A., *Legal régime of foreign investment: legislative regulation and practice of relations between the state and investors in the RF*. 1996. Ekonomika and life #5, Moscow, p. 125 (Правовой режим иностранных инвестиций: Законодательное регулирование и практика отношений государства и инвесторов в РФ. Экономика и жизнь)

BĚLOHLÁVEK, A., *Ochrana přímých zahraničních investic v energetice*, 2011, C.H. Beck, Praha

BĚLOHLÁVEK, A., *Rozhodčí řízení, ordre public a trestní právo*, 2008, Komentář, I. ed, C.H. Beck

BELYI, A., *The EU's External Energy Policy*, 2012, Polinares, EU Policy on Natural Resources

BELYI, A, *Modernizing ECT process*, 2011, Journal of Energy & Natural Resources Law, Vol 29 No 3

BELYI, A, *RF and the ECT*, 2010, EKO, No6 (4), p.97-114 (Белый,А, Россия и Договор Энергетической хартии)

BELZ, M, *Provisional Application of the ECT: Kardassopoulos v. Georgia and Improving Provisional Application in multilateral treaties*. 2008, Emorgy International Law Review, 22, pp.727-760.

BERNASCONI-OSTERWALDER,N., *State –state dispute settlement in investment treaties*, 2014, best practices series, IISD, available on https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf

BESSON, S., 04.03.2002, *La Suisse abrite les fonds évadés d'un géant russe, Swiss newsportal Le Temps*, https://www.letemps.ch/economie/2002/03/04/suisse-abrite-fonds-evades-un-geant-russe, and BESSON, S., 06.03.2002, *Yukos dément avoir eu des comptes en Suisse*, https://www.letemps.ch/economie/2002/03/06/yukos-dement-comptes-suisse

BOGUSLAVSKIY, M, *International private law*, 2004, Jurist (Богуславский М. Международное частное право. Юристъ).

BORDACHEV, T, *New strategical union, Russia and Europe challenged of the 21 century: possibility of the big deal*, 2009, M:Europa (Бордачев Т. В. Новый стратегический союз. Россия и Европа перед вызовами XXI века: возможности «большой сделки». М.: Европа). London, Chatham House: Russia and Eurasia Programme, August 2012. REP BP 2012/01; SHUMYLO-TAPIOLA, O. The Eurasian Customs Union: Friend or Foe of the EU? Carnegie Europe, 2012.

BORN,G.B., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. 2013, 4th ed.

BOUTE,A, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 2009, Journal of Energy & Natural Resources Law, 27(3), p. 333 - 337

BOYKA, M., STEFANOVA, M., *Energy Security Article 7 European Strategies For Energy Security In The Natural Gas Market*, 2012, Journal Of Strategic Security, 3/5, The University Of Texas At San Antonio

BOWETT, D.W., *The Encyclopaedia of Public International Law*, 1985, vol. 8, Max Planck Institute for Comparative Public Law and International Law, Amsterdam, North Holland Publishing Company, pp.551

BROWNLIE I., *Public International Law*, 2003, 6th ed. Oxford, Oxford Press

CAMERON,P., *Stability of Contract in the International Energy Industry*, 2009, Journal of Energy & Natural Resources Law, 27 (3)

CAMERON,P., speech in the Energy and Arbitration seminar in Brussels, organized by the Association for International Arbitration and The Vienna International Arbitral Centre, Arbitration Austria, Greek Energy Forum, 19.05.2016.

CANNIZZARO, E., PALCHETTI, P., WESSEL R.A., I*nternational Law as Law of the European Union*, 2014, ISBN 978-90-04-18857-0, Jan Klabbers, Article 351 TFEU

CARDOSO, D., MTHEMBU, PH, VENHAUS, M., GARRIDO, M, V., In collaboration between Berlin Forum on Global Politics Internet and Society Collaboratory FutureChallenges.org, *The Transatlantic colossus, Global Contributions to Broaden the Debate on the EU-US Free trade agreement*, 2013

CARREAU D., JUILLARD P.,*Droit international economique*, 2013, Dalloz

ČEPELKA,Č.,ŠTURMA,P., *Mezinárodní Právo Veřejné*, 2008, 2nd ed, C.H.Beck, Prague

ČERNOCH, FILIP, A, ZAPLETALOVÁ, V. *Energetická Politika Evropské Unie*.2014. Brno: Masarykova Univerzita.

CHENG, T, S.C., LAI, L., *Lessons learned from the FG Hemisphere vs DRC and Huatianlong Case*, 2009, International council for commercial arbitration, available on http://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf

CHIZHOV, V, *Russia and the European Union: Forming a Strategic Partnership*, 2009, International Affairs, No. 10. (Чижов В, Россия и ЕС: формирование стратегического партнерства, Международная жизнь)

CHOUDHURY B., *Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?* 2008,Vanderbilt Journal of transnational law, vol.41

COLLIER, J., LOWE, V., The settlement of disputes in international law: institutions and procedures, 2008, 7th ed., Oxford University Press.

COTTIER, T., MATTEOTTI-BERKUTOVA, S., NARTOVA, O., *Third Country Relations In EU Unbundling Of Natural Gas Markets: The "Gazprom Clause" Of Directive 2009/73 EC And WTO Law*, 2010, NCCR Trade Regulation

CRAIG, P, BURCA G, *The Evolution of EU Law*, 2011, Oxford University Press

CRAWFORD, J., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 2001, online: American Society of International Law http://www.asil.org/ajil/ilcsymp7.pdf, articles on Reponsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001, article 36 (2)

CRAWFORD J, *International protection of FDI: between clinical isolation and systematic integration*, 2011, in HOFFMANN, R, TANS CH, J., (eds), *International Investment Law and General international law*, Nomos, Baden-Baden

CRAWFORD, J., *Brownlie's principles of public international law*, 2012, 8th ed., Oxford University Press.

DANELYAN, A, *International economic law in the conditions of the globalization: problems of development*, 2014, Law and State, Theory and Practice,#1 (109) p. 127-132 (Данельян, А., Международное экономическое право в условиях глобализации: проблемы развития, Право и государство: теория и практика).

DANELYAN,A., *The agreement on trade-related investment measures (TRIMS) and the principle of "performance requirements"*.2016, Eurasian Law Journal, No 2(93)

DANELYAN A, FARHUTDINOV, I., MAGOMEDOV, M, *National legal regulation of the foreign investment in Russia*, 2013, Zakon, # 1, p. 103-119 (Данельян А., Фархутдинов, И., Магомедов М. Национально-правовое регулирование иностранных инвестиций в России. Закон.)

DANELYAN, A, ESEDOV D., *Foreign Investor and the state in the Eurasian space*, 2012, Eurasian Juridical journal, #3 (46), pp. 13-16 (Данельян А., Эседов Д. Иностранный инвестор и государство в евразийском пространстве Евразийский юридический журнал)

DENZA E. BROOKS S., *Investment Protection Treaties:The United Kingdom Experience*.1987. London

DILVEKA, S,Head of the Mena Chambers, speech in the Energy and Arbitration seminar in Brussels, organized by the Association for International Arbitration and The Vienna International Arbitral Centre, Arbitration Austria, Greek Energy Forum, 19.05.2016.

DOLZER R., SCHREUER, CH., *Principles of international investment law*,2008,1 ed. Oxford university press, New York, LAUTERPACHT, E., Foreword to SCHREUER, CH.,The ICSID- Convention, 2000, xi.

DOLZER R., STEVENS, M., *Bilateral Investment Treaties*, 1995, ICSID.

DORONINA, N, *Multilateral International Treaties and Russian legislation on investments*, 2002, Journal of Russian law, #11, p.47-60 (Многосторонние международные договоры и российское законодательство об инвестициях. "Журнал российского права")

DORONINA, N., *Commentary on the Law of the Foreign Investment in the RF*, 2000, Justicinform (Комментарий к закону об иностранных инвестициях в РФ. М.: Юридический дом «Юстицинформ»).

DORONINA, N, SEMILYUTINA, N., *Legal regulation of the foreign investment in Russia and abroad*, 1993, Moscow (Доронина Н., Семилютина Н. Правовое регулирование иностранных инвестиций в России и за рубежом.)

ENTIN M, *Political and legal aspects of EU reform in the light of the Lisbon Treaty*, 2009, Report of the Institute of Europe of the Russian Academy of Sciences. № 241 (Энтин М. Л. Политико-правовые аспекты реформирования ЕС в свете Лиссабонского договора, Доклад Института Европы РАН).

FARHUTDINOV, I., *International legal foundations of foreign investment in Russia: Coll. Of norm.acts and documents*, 1995, Moscow (Международно-правовые основы иностранных инвестиций в России: сб. норм. актов и документов).

FARHUTDINOV, I, *Function of the international treaties in the area of the foreign investment*, Trudy Moskovskoy Akademii,1999, #2(Фархутдинов И. Действие международных договоров в сфере иностранных инвестиций. Труды Московской государственной юридической академии.)

FARHUTDINOV, I.,*International investment law and process*, 2014, Prospect (Фархутдинов, Международное инвестиционное право и процесс, Проспект).

FARHUTDINOV, I, *About international treaties of the Russian Federation in the area of the foreign investment*, 1999, Vestnik of Bashkirskiy University, #1 (Фархутдинов И., О международных договорах Российской Федерации в сфере иностранных инвестиций. Вестник Башкирского университета).

FECÁK, T., *Mezinárodní dohody o ochraně investic a právo Evropské unie*, 2015, Wolters Kluwer, a.s, 11/2015,ISBN 978-80-7478-982-3

FEIGERLOVA, M., DIAG HUMAN: *S case study on multi-jurisdictional enforcement of an international arbitration award*, CYIL, 6 (2015)

FEYGIN, V, GROMOV, A, *Formation and first results of the CSG in the context of Russian-EU gas relations*, 2014, Academic journal of the Russian gas society, # 1, pp. 39-48 (Фейгин В.И. Громов А.И. Становление и первые результаты работы КСГ в контексте отношений России и ЕС в газовой сфере. Научный журнал Российского газового общества.)

FOLLESDAL, A., WESSEL,R.A., WOUTERS, J., eds. ,*Multilevel regulation and the EU: the interplay between global, European and national normative processes*, 2008, Leiden: Martinus Nijhoff.

FRANCK S.,*The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 2005, Fordham Law Rev. 73, p. 1559-1568

FRANZA, L., *Long-term gas import contracts in Europe: the evolution in pricing mechanisms*, 2014, CIEP Paper

GAILLARD, E., *International Arbitration as a Transnational System of Justice, in International Council for Commercial Arbitration*, 2012, Arbitration – the Next fifty years, ed. Van den Berg, A.J.

GARVEY, S., *Brussels Regulation (Recast): Are You Ready?*, 18.03.2015, available http://www.allenovery.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx

GLADER, M, KOKKORIS, I., "*Excessive Pricing" in EU Competition Law*, 2013, in Volume V Abuse of Dominance Under Article 102 TFEU ed. by GONZALEZ-DIAZ, F.,SNELDERS, R., CLAYES&CASTELS,pp. 615-665

GUDKOV, I., *Problems of international legal regulation of energy relations using the example of cooperation between RF and the EU*, 2015, Zakon, No1 (Проблемы международно-правового регулирования энергетических отношений на примере взаимодействия России и ЕС, Закон)

GUDKOV, I., *The Energy dialogue of the RF and EU: relevant political legal problems*,2014, Zakon, No 7 (89) (Гудков, И, Энергетический диалог России и ЕС: актуальные политико-правовые проблемы, Закон)

GUDKOV, I., *Antimonopoly Regulation of Energy Sector in the European Union*, 2012, Energy Law, No.1. (Гудков И. Антимонопольное регулирование энергетической сферы в Европейском союзе Энергетическое право)

GUDKOV, I, *Transboundary pipelines: Some aspects of Legal Regulation*; 2008 Oil, Gas and Law, No 5, p. 49, pp. 49-59, (Гудков, И., Трансграничные трубопроводы: некоторые аспекты правового регулирования, Нефть, Газ и Право)

GUDKOV, I., *Gas Market Of European Union, The Legal Aspects Of Creation, Organization And Functioning*, 2007, Moscow, Nestor Academic

GUDKOV I. *The decision of the Hague arbitration in cases of former shareholders of YUKOS against Russia: ECT that the drawbar, where to turn, went there?* 2014, Internet magazine "All Europe", №10 (92),(Гудков И. Решение гаагского арбитража по делам бывшие акционеры ЮКОСа против России: ДЭХ что дышло, куда повернешь, туда и вышло? Интернет-журнал «Вся Европа»)

GULIYEV, I., LITVINYUK, I., MARKIN, I., *Dispute settlement mechanisms in development and operation of transboundary field under the framework agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway concerning cross-boundary petroleum cooperation*, 2016, Eurasian Law Journal, No 2(93), p.88-90

HAGHIGHI S. *Energy Security. The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries*. 2007, Oxford and Portland, Oregon

HAN WANG, *Towards a cooperative framework for a China-central Asia energy transit community*, 2016, ECT secretariat knowledge centre

HARRINGTON, MATTHEW P., *Public Use' and the Original Understanding of the So-called 'Takings' Clause*, 2002, Hastings Law Journal 53,p. 1245–1301

HARTLEY, T., *The foundations of European Union Law*, 2010, Oxford University Press, Oxford

HELEN, H., *The EU's energy security dilemma with Russia*, 2010, POLIS Journal, available on http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ma-winter-10/helen-e.pdf

HIGGINS, R, *The taking of property by the State*,1982, Hague Recueil

HILARY, J., *The Transatlantic Trade and Investment partnership*, 2014, Rosa Luxemburg Stiftung, Brussels Office, p.30-34, available http://rosalux.gr/sites/default/files/publications/ttip_web.pdf

HILLION C., *Case C-265/03 Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fúmbol*, 2005, ECR I-2579, 2008, Common Market Law Review, vol. 45, p. 815–833.

HOCKE M., *Have Measures Adopted by States to Cope with the Global Financial Crisis Been in Accordance with their Obligations under International Investment Law*, 2012, Goettingen Journal of International Law. Vol.4, #1,p. 177 – 197

HORÁK, J. *Liberalizace Elektroenergetiky: Cesta K Vnitřnímu Trhu EU*. Praha, 2014

ISPOLINOV A., ANUFRIEVA A., *The EU law and the international law: consequences of the new approach of the CJEU to the treaties, concluded by the EU member states with the third-states.* 2011. Eurasian Law Journal, #3. (Исполинов А., Ануфриева А. Право

ЕС и международное право: последствия нового подхода Суда ЕС к договорам, заключенным государствами-членами с третьими странами. Евразийский юридический журнал)

JUILLARD, P, *Calvo Doctrine/Calvo Clause*, 2007, Oxford, MPEPIL, also GARCIA-MORA, M, The Calvo Clause in Latin American Constitutions and International Law,1950, 33 MarqLRev 205–219

KALINICHENKO, P, *The CJEU practice for consideration of application of Russian citizens and legal entities*, 2010, Lexrussica, vol. 5 (Калиниченко, П, Практика суда ЕС по рассмотрению обращений Российских граждан и юридических лиц).

KALINICHENKO, P, *Application of the PCA between the RF and the EU in Russian jurisprudence*, 2007, Zakon, #11 (Калиниченко П.А. Применение Соглашения о партнерстве и сотрудничестве между РФ и ЕС в российских судах, Закон)

KALINICHENKO,P, *EU law in practice of Russian courts*, 2008, Zakon, # 11(Калиниченко П.А. Право Европейского союза в практике российских судов, Закон)

KALINICHENKO, P, *Protection of the rights of Russian individuals in the EU in the context of the CJEU decision on the Simutenkov case*, 2008, Zakon, #1, p. 211-220 (Калиниченко П.Защита прав российских частных лиц в Европейском Союзе в контексте Решения Суда ЕС по делу Симутенкова, Закон)

KANTER, J., *Gazprom Objects To European Antitrust Inquiry*, 2012, NY Times, Available On http://www.nytimes.com/2012/09/06/business/global/gazprom-objects-to-europeanantitrust-inquiry.html?_r=1&

KAUFMANN-KOHLER, G., POTESTA, M., *Challenges on the road toward a multilateral investment court*, 2017, Columbia FDI Perspectives, No 201, http://ccsi.columbia.edu/files/2016/10/No-201-Kaufmann-Kohler-and-Potesta-FINAL.pdf

KAUNERT, C. *European Internal Security: Towards Supranational Governance?*,2010b, Manchester: Manchester University Press, p.38

KEMPE, I, SMITH, H, *A decade of partnership and cooperation in Russia-EU relations, perceptions, perspectives and progress – possibilities for the next decade*, 2006, Helsinki conference 26-28.04.2006.

KEPPLER, J.H., SCHULKE, CH., *Investing in the Energy sector: an issue of governance*, 2009, Gouvernance europeenne et geopolitique de l'energie, available: http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/42/050/42050162.pdf

KEYNES, J., *General Theory of Employment, interest and money*, 1936, chapter 12 "The Definition of Incom, Saving and Investment", Atlantic publishers & distributors, Nice Printing Press, Sahibabad, India, 2008. Available on https://books.google.cz/books?id=xpw-96rynOcC&printsec=frontcover&hl=cs#v=onepage&q&f=false

KLEINHEISTERKAMP, J.,*Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*. 2012, Journal of International Economic Law.15(1).

KLEINHEISTERKAMP,J., *The next 10 years ECT investment arbitration: a vision for the future – from a European law perspective*. 2011. LSE Law, Society and Economy working papers #7.

KLEINHEISTERKAMP, J., *Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?* 2014, available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188

KONOPLYANIK, A., RUSNAK,U., *Energy Charter without Russia*, 2015, Vedomosti. No. 3810 (Конопляник,А., Руснак, Энергетическая хартия без России, Ведомости)

KONOPLYANIK, A., WALDE, T, *Energy Charter Treaty and its Role in International Energy,* 2006, Journal of Energy & Natural Resources Law, vol. 24, No 4.

KONOPLYANIK, A., RUSNAK, U., *Energy Charter without Russia* (Энергетическая хартия без России. 12.04.2015. http://www.vedomosti.ru/opinion/articles/2015/04/13/energeticheskaya-hartiya-bez-rossii (01.03.2017)

KONOPLYANIK, A, RUSNAK,U, *Russia and ECT: do not stay on the sidelines*,2015, Oil and gas vertical. №10. (Конопляник, У.Руснак, Россия и ДЭХ: не остаться на обочине Нефтегазовая вертикаль.)

KONOPLYANIK, A, *Gas Market in the Conditions of Uncertainty*, 2014 (Конопляник А: рынок газа в условиях неопределенности. 03.02.2014 г.: http://www.pro-gas.ru/price/news/98_print.htm)

KONOPLYANIK, A., *The EU versus Gazprom*. 2012, Energy Economist, Issue 372, October 2012.

KONOPLYANIK, A., *The Europe is more than the Europe*, 2011, Neft' Rossii, #7, p. 53 (Конопляник А. Европа - больше, чем Европа. Нефть России)

KONOPLYANIK, A., *Russian gas to Europe: from long-term contracts, on –border trade and destination clauses to…?,* 2005, Journal of Energy and Natural Resources Law, 23 (3)

KONOPLYANIK, A., *Russia and The Third EU Energy Package: Regulatory Changes For Internal EU Energy Markets In Gas and Possible Consequences For Suppliers (Including Non-EU Suppliers) and Consumers*, 2011, IELR.

KONOPLYANIK, A., EU *Versus Gazprom; Energy Law Group,2010, Underground Gas Storage In Europe: A Legal Overview*, 2013, 7 International Energy Law Review 228-242

KONOPLYANIK, A, *A common Russia EU energy space (The New EU Russia Partnership Agreement, acquis communautaire, the energy charter and the new Russian initiative),* 2010, in: TALUS, K., FRATINI P (eds), EU-Russia Energy Relations (Rixensart:Euroconfidentiel)

KONOPLYANIK, A., *Russia's withdrawal from the temporary use of the ECT and the "YUKOS affair": commentary on the outcome of the procedural decision of the Arbitration Court in The Hague,*2010, Neft', gas i pravo, 1/2010, pp.42-49.(Конопляник,А, Выход России из временного применения ДЭХ и «дело ЮКОСа»: комментарий по итогам процедурного решения арбитражного суда в Гааге, Нефть, Газ и Право) available on www.konoplyanik.ru/ru/publications/articles/461_Vyxod_Rossii_iz_vremennogo_primeneniya_DEX_i_delo_YuKOSa_kommentarij_po_itogam_procedurnogo_resheniya_arbitrazhnogo_suda_v_Gaage.pdf

KONTTINEN, J. PROFESSOR: *Finland's legislative power may be in jeopardy*. 15.12.2013. Helsinki Times. available http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html

KOSKENNIEMI, M., *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, 2006, Report of the Study Group of the International Law Commission

KOULEN, M., *Foreign Investment in the WTO*, 2001, in EC Nieuwenhuys and MMTA Brus, eds, Multilateral Regulation of Investment, pp. 181-203.

KOVACEVIC, A., *The Impact of the Russia–Ukraine Gas Crisis in South Eastern Europe*, 2009, The Oxford Institute for Energy Studies

KOVAČOVSKÁ, L., *Liberalizace vnitřního trhu s elektřinou a zemním plynem jako prostředek zajišťování energetické bezpečnosti EU*, 2011, Současná Evropa, 2011/1

KVOCHKO, LENSHINA, *Problems and perspectives of cooperation between Russia and the EU in the framework of the energy dialogue*. 2006, Moscow: Institute of international organizations and cooperation

LABIN, D, *Analysis of some aspects of international legal practice of the concluding state bilateral investment treaties*, 1999, Gosudarstvo i pravo, # 10(Лабин Д. Анализ некоторых аспектов международно-правовой практики заключения государственных двусторонних инвестиционных договоров. Государство и право.)

LAVRANOS, N., *Member States' Bilateral Investment Treaties (BITs): Lost in Transition?* 2012, Hague yearbook of international law, Vol. 24

LEAL-ARCAS, R., *The EU and Russia as Energy Trading Partners: friends or foes?* 2012, European Foreign Affairs Review, 14(3), p. 337-366

LEAL-ARCAS, R., PEYKOVA, M., *Energy Transit Activities: Collection of Intergovernmental Agreements on Oil and Gas Transit Pipelines and Commentary*, 2014, Queen Mary School of Law Legal Studies Research Paper No. 177/2014, p. 1–54.

LEAL-ARCAS., R., PEYKOVA, M., CHOUDHURY, T., MAKHOUL, M., *Energy Transit: Intergovernmental Agreements on oil and gas transit pipelines*, 2015, RELP, 2/2015, 122-162

LIKHACHEV V, *Russia and the European Union*, 2002,International Affairs. № 12.(Лихачев В. Н. Россия и Европейский союз, Международная жизнь)

MAES, M., *While the EU member states insist on the status quo, the European Parliament calls for a reformed European investment policy*, 1.07.2011, available on www.iisd.org/itn/2011/07/01/while-the-eu-member-states-insist-on-the-status-quo-the-european-parliament-calls-for-a-reformed-european-investment-policy/

MALANCZUK, P. *Modern International Law*, 1997, 7th Edition, Taylor & Francis e-Library, 2002

MALMSTRÖM, C. (COMMISSIONER FOR TRADE), Remarks at the European Parliament on Investment in TTIP and Beyond. 2015. Meeting of the International Trade Committee of the European Parliament, Brussels, available http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153430.pdf

MALTBY, T., *European Union Energy Policy Integration: A Case Of European Commission Policy Entrepreneurship And Increasing Supranationalism.* 2013. Energy Policy , Pp. 435-444

MANN, K. VON MOLTKE, A. COSBEY, L.E. PETERSON, *IISD Model International Agreement on Investment for Sustainable Development*, 2005, available at http://www.iisd.org

MANN P. *British Treaties*. 1981.British Journal of International Law. No. 52.

MARHLOD,A., *The Nexus between the WTO and the ECT in Global Energy Governance: Analysis and policy implications*.2016, ICTSD

MARTIN, A.T., *Dispute resolution in the international energy sector: an overview*, 2011, Journal of World energy law and business, vol. 4, #4, p. 332-368

MELLING,A. J., Natural Gas Pricing And Its Future, Europe As The Battleground, 2010, Carnegie Endowment, Available On Http://Carnegieendowment.Org/Files/Gas_Pricing_Europe.Pdf

MONAGHAN, A., *EU-Russia Relations:"Try again, fail again, fail better*, 2007, No2, Defense and Security studies. Available https://brage.bibsys.no/xmlui//bitstream/handle/11250/99429/1/DS_2_2007_final.pdf

MORTENSON J.D. *The Meaning of investment: ICSID's travaux and the domain of international investment law*. Harvard International Law journal, vol. 451 No. 1, p. 257-318

NAGAPETYANC, R., *Agreements on promotion and protection of investment*, 1991, Vneshnyaya Torgovlya #5, p. 10-14 (Нагапетьянц Р. Соглашения о поощрении и взаимной защите капиталовложений. Внешняя торговля.)

NESHATAEVA, T, *International law in a judicial practice of arbitration tribunals*, 1998, Zakon, # 7 (Международное право в судебной практике арбитражных судов, Закон).

NORTON, P., *A law of the future or a law of the past? Modern tribunals and the international law of expropriation*, 1991, The American Journal of International Law, vol. 85 #3, pp. 474-505

O'CONNOR, B, AQUILINI, I., *The multilateral investment court,* 2017, NCTM, Across the EUniverse, #18

OSMININ, B., *The conclusion and implementation of international treaties and domestic law*, 2010, monography, Moscow, Infotropic Media (Осминин, Б., Заключение и имплементация международных договоров и внутригосударственное право)

PETROV, R., KALINICHENKO, P, *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: the Cases of Russia and Ukraine*,2011, International and Comparative Law Quarterly, vol. 60

PODDA, P, PASTORE, M, *Recast Brussels Regulation and the Challenges of Forum Shopping,* 2016, AA Law Forum, John H. Carey II School of Law, No 7.

RATLIFF, J., GRASSO, R., *Unilateral conduct in the energy sector: an overview of EU and national case law*, 2012, Available On Http://Oiguskantsler.Ee/Sites/Default/Files/Imce/Unilateral_Conduct_In_The_Energy_Sector_-_An_Overview_Of_Eu_And_National_Case_Law.Pdf

ROGGENKAMP,M, *Energy Law in Europe*, 2000, Oxford, Oxford University Press

ROMANOVA, T, ENTIN, K, *Russia and the EU: Political and Legal Aspects, in: Russia in Modern Integration Processes,* 2014, Moscow: MGIMO-University. (Романова, Т, Энтин,К, Россия и ЕС: политико-правовые аспекты, в кн. Россия в современных интеграционных процессах, М, МГИМО-Университет.)

RONALD S., *Lauder v. The Czech Republic, under Czech Republic – United States BIT*, 2001, London Arbitration Tribunal

ROSAS, A., *The Status in EU Law of International Agreements Concluded by EU Member States*, 2011, Fordham International Law Journal, vol. 34, issue 5, article 7

RUBINS, N., *The Notion of 'Investment' in International Investment Arbitration*, in HORN, N., KROLL, S.(eds.), Arbitrating Foreign Investment Disputes , 2004, Kluwer Law International, The Hague

SALACUSE,J.,SULLIVAN,N, *Do BITs really work? An evaluation of Bilateral Investment Treaties and their grand bargain*, 2005, Harv. Int L.J., 67

SCHACHERER, S., *Can EU Member States still negotiate BITs with Third Countries?* 2016, IISD, available on https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/

SCHILL, S, *Foreign Investment in the Energy Sector: Lessons for International Investment Law*, 2014, in Foreign Investment in the Energy Sector. Balancing Private and Public Interests. Brill.

SCHILL, S., *The multilateralization of international investment law*, 2009, Cambridge University Press, New York.

SHULGA A., *Foreign investment in Russia's oil and gas: legal framework and lessons for the future,* 2002, https://www.law.upenn.edu/journals/jil/articles/volume22/issue4/Shulga22U.Pa.J.Int'lEcon.L.1067(2001).pdf

SCHWARZENBERGER, G., *Foreign investments and international law*, 1969, L.S., h. 17

SELIVANOVA, Y., *The WTO Rules and Agreements of Relevance to the Energy Sector*, 2007,ICTSD, issue paper No 1.

SORNARAJAH,M, *The international law on foreign investment*, 2010, 3 ed., Cambridge, Cambridge University Press.

SORNARAJAH, M, *An International Investment Court: a panacea or purgatory*?, 2016, Columbia FDI Perspectives # 180, http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf

STERN J., ROGERS H. *The Transition to Hub-Based Pricing in Continental Europe: A Response to Sergei Komlev of Gazprom Export*, 2013, Oxford Institute for Energy Studies

STERN, J., *The Russian-Ukrainian gas crisis of January 2006*, 2006, The Oxford Institute for Energy Studies

ŠTURMA, P., HÝBNEROVÁ, S., ONDŘEJ, J., BALAŠ, V., BÍLKOVÁ, V., HONUSKOVÁ, V., *Konkurující jurisdikce mezinárodních rozhodovacích orgánů*, 2009, Praha: Univerzita Karlova.

ŠTURMA, P., BALÁŠ, V., *Mezinárodní ekonomické právo*, 2013, 2 ed., C.H. Beck, Praha.

ŠTURMA, P., BALAŠ, V., SYLLOVÁ, J., JIRÁSKOVÁ V., *Vybrané problémy sjednávání mezinárodních smluv a jejich vnitrostátního projednávání*, 2010, závěrečná studie k projektu MZV, č. RM 05/01/10, available on http://www.mzv.cz/file/570095/Vybrane_problemy_sjednavani_mezinarodnich_sm_luv_res.pdf

TALUS, K., *EU Energy Law and Policy: a critical approach*, 2013, Oxford, Oxford University Press;

TALUS, K., *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 2011, Kluwer Law International.

TICHÝ, L., *Liberalizace energetického trhu v EU a pozice České republiky*, Současná Evropa, 02/2011, http://ces.vse.cz/wp-content/tichy.pdf,

TICHY, L., ODINTSOV, N., *The European Union as an actor in energy relations with the Islamic republic of Iran*, 2015, CEJISS, 4.

TULLY, S., *The 2000 review of the OECD Guidelines for Multinational Enterprise*, 2001, ICLQ 394.

TURKSEN, U., WOJCIK, J., *The European Union and Russia energy trade – thickening of legality and solidarity?*, 2012, IELR.

UTKIN S., T*he main instruments of the Common Foreign and Security Policy of the EU*,2005, the World Economy and International Relations № 11 (Уткин С. Основные инструменты общей внешней политики и политики безопасности ЕС, Мировая экономика и международные отношения)

VAN DEN BERG,A.,J., *Enforcement Of Arbitral Awards Annulled In Russia, Case Comment On Court Of Appeal Of Amsterdam*, April 28,2009, 2010, Journal Of International Arbitration, 27 (2).

VON KUMBERG, W., COVER, M., *The ECT and ADR in the context of investor/state and other disputes*, 2016, Energy Charter Secretariat Knowledge Centre.

VOLOSHIN, V, *Position of Russia in the energy sector of the world economy*., 2009, Red. ALEKSEEV, A, Moscow, IE RAN (Волошин В. Позиционирование России в энергетическом секторе мирового хозяйства; отв. ред. А.В. Алексеев. ИЭ РАН).

VOZNESENSKAYA, N., *Legal regulation and protection of the foreign investment in Russia*. 2011,Wolters Kluwer, Moscow (Вознесенская Н, Правовое регулирование и защита иностранных инвестиций в России, монография).

WESSEL, R.A., *The Legal Framework for the Participation of the EU in International Institutions, European Integration*, 2011, vol. 33, No 6.

WHITSITT,E., *Application of the Most-favored-Nation Clauses to the Dispute Settlement Provisions of the Bilateral Investment Treaties: an Assessment of the Jurisprudence*, 2009, Journal of Energy & Natural Resources Law, 27 (4),527;

WHITSITT,E., *Application of MFN Clauses to the Dispute Settlement Provisions of BITs: an Updated Assessment of the Jurisprudence since Wintershall*, 2011, Journal of Arbitration and Mediation, 2 (1).

WONG,J., *The Misapprehension of Moral Damages in Investor-State Arbitration*, in ARTHUR ROVINE, ed, Contemporary Issues In International Arbitration And Mediation: The Fordham Papers 2012

WOUDE, M., *Unfair and Excessive Prices in the Energy Sector*, 2007, European Competition Law Annual

ZHUWEI W., *China, Central Asia and the Relevance of the ECT*, 2014, Occasional Paper, ECT

ZIEGLER, A.,*The assessment of "good faith" in the YUKOS saga – institutional overlap in times of political uncertainty*. 2011, Swiss NCCR Working Paper #2011/60

ZYKIN, I, *External economic operations: law and practice*, 1994, Moscow (Зыкин И. Внешнеэкономические операции: право и практика).

Legal Acts

United Nations Charter 1945
Vienna Convention on the Law of Treaties 1969
Treaty establishing European Coal and Steel Community 1952
Treaty establishing the European Atomic Energy Community 1957
Treaty on the Functioning of the European Union 1957
Treaty on European Union 1992
Treaty on the European Union and Treaty on the Functioning of the EU, 2009
Regulation (EU) No.1219.2012 of the European Parliament and of the Council of 12.12.2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. OJ L 351/40
Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest, OJ L 349/28

Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295/1, 2010
Third Energy Package contains of: Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) N 714/2009, Regulation (EC) N 715/2009, Regulation (EC) N 713/2009,
DG Competition Report Sector Inquiry 2007
Treaty establishing the Energy Community 2005
Energy Charter Treaty 1994
Agreement on Partnership and Cooperation, establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part 1994
The General Agreement on Tariffs and Trade 1947
Agreement Establishing the World Trade Organization, 1994
The WTO trade-related measures
White Book on energy policy 1996
Energy Dialogues
Energy Roadmap 2050
Energy Strategy 2020
Energy Strategy with Russia 2030
Energy Strategy of the Russian Federation 2020
Constitution of the Russian Federation 1993
Civil Code of the RF, part III, No 146
Federal Law of the Russian Federation on international treaties, from 15.07.1995 No 101 FL, amended on 25.12.2012
Federal Law No 160, 09.07.1999, On Foreign Investments in the Russian Federation
Federal Law of the Russian Federation on gas export No 117
Federal law of the Russian Federation on concession agreement No 115
Federal Law, on Production Sharing Agreements, No 225-FZ 30.12.1995,
Federal Law, on Procedures for Foreign Investments in the Business Entities of Strategic Importance, No 57, 29. 04. 2008
Federal Law of the Russian Federation on procedures for foreign investments in the business entities of strategic importance for Russian National Defense and State Security No 57
Decree of the Supreme Court of the RF (15.07.1992) No 3314-1 on the regulation of subsoil licesing procedure
Presidential Decree No 2285, of the 24.12.1993
EU Council Decision 512/2014
Council Regulation No 269/2014 and Council Decision 2014/145/CFSP
EC Decisions on the Agreement on Partnership and Cooperation: Republic of Armenia 1999, decision 99/602/EC, Republic of Azerbaijan 1999, decision 99/614/EC, Georgia 1999, decision 99/515/EC, Republic of Kazakhstan 1999, decision 99/490/EC, Kyrgyz Republic 1999, Decision 99/491/EC, Republic of Moldova 1999, decision 98/401/EC, Russian Federation, decision 97/800/EC, Ukraine 1998, decision 98/149/EC, Republic of Uzbekistan 1999, Decision 99/593/EC, Tajikistan, 2010, decision 2009/989/EC
Agreement establishing the Commonwealth of Independent States, signed in Minsk on 12 December 1991
OECD Draft Convention on Foreign Property. 12.10.1967.
OECD, Working Papers On International Investment, 2004/3, Fair And Equitable Treatment Standard In International Investment Law https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf

Resolution of UN General Assembly 3171, Resolution 3281, article 2 para 2 - Charter of Economic Rights and Duties of States
International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,2001,Yearbook of the International Law Commission, 2001, vol. II, Part Two
http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,2001,Yearbook of the International Law Commission, 2001, vol. II, Part Two
http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
Resolution of UN General Assembly 3171, Resolution 3281, article 2 para 2 - Charter of Economic Rights and Duties of States
World Bank, Legal Framework for the Treatment of Foreign Investment Volume II Guidelines (1992), World Bank.http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway concerning Cross-Boundary Petroleum Co-operation, 4.04.2005, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243184/7206.pdf
Decree of the Government of the RF No 1055-r on the notice of intention not to become a party of the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects.

List of cases

Commission v. Austria C-205/06
Commission v. Bulgaria C-198/12,
Commission v Finland C-118/07
Commission v Portugal Case C ‑ 62/98
Commission v Slovak Republic Case C 264/09
Commission v. Sweden C-249/06,

Case T-235/08 Acron OAO and Dorogobuzh OAO v. Council of the European Union
Case C-536/13, Gazprom v. EU
Case C-536/13 Gazprom OAO v. Lithuania
Case C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and others,
Case T-715/14 NK Rosneft a.o. v Council
Case C-265/03 Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fúmbol, 2005, ECR I-2579
Case 27/76 United Brands v. Commission [1978] ECR 207

Hoffmann-La Roche v Commission – case 85/76,
Europrmballage and Continental Con v Commission, 6/72,
British Airway v Commission 95/04
Long-term contracts in France COMP/39.386

GDF/ENEL, GDF/ENI - COMP/38.662
Microsoft v Commission T-201/04
E.ON Ruhrgas v Commission, T-360/09
GdF Suez v Commission T-370/09
ENI v Commission T-39/07
RWE v Commission T-381/09

CMS Gas Transmission Company v. The Argentine Republic, ISID Case No ARB/01/8, *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, *BG Group*
Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24
Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1
Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2
Ioannis Kardassopulous, and Ron Fuchs v The Republic of Georgia, ICSID Case No ARB/05/18, ARB/07/15.
Vattenfall AB v. Federal Republic of Germany, ICSID case No ARB/09/6, , *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No ARV/12/12)
AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22
Electrabel v. Hungary, ICSID case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 2012.
Noble Ventures v. Romania. ICSID Case No ARB/01/11. http://italaw.com/documents/Noble.pdf
Exxon Mobil v. Venezuela ICSID CASE NO. ARB/07/27
Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3
Salini et al. v. Morocco, ICSID Case, No ARB/00/4, Decision on Jurisdiction, para 52, 42 I.L.M. 609 (2003)
Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18
Joseph Charles Lemire v Ukraine (2011), Case No ARB/06/18 (ICSID)
Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi vs. Ireland [GC], No 45036/98 judgement (30.06.2005) of the ECHR
*Barcelona Traction, Light and Power Company, limite*d- Belgium v. Spain, ICJ 1962
Factory at Chorzow (Ger. v. Pol.) (Indemnity), 1928 PCIJ (Ser. A) no. 17, 10/2013
Shahin Shaine Ebrahimi vGovernment of the Islamic Republic of Iran. AWD 560-44/46/47-3, Iran-United States Claims Tribunal, 12.10.1994

Plc v Argentina, UNCITRAL Award, 24.12.2007, *National Grid plc v The Argentine Republic*, UNCITRAL Award, 03.11.2008
Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 2006, para 240-241
YUKOS:
Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226
Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227
Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228
RosInvestCo v. Russia, SCC Case Ano. Arb. V079/2005 (UK/USSR BIT), Final Award, 12.09.2010,

Berschader and Moïse Berschader v Russian Federation (2006), Case No 080/2004 (Arbitration Institute of the Stockholm Chamber of Commerce), Award [Berschader];
Sedelmayer vs. the RF through the Procurement Department of the President of the Russian Federation, 07.07.1998,
Renta 4 SVSA v Russian Federation (2009), Case No 24/2007 (Arbitration Institute of the Stockholm Chamber of Commerce), Award Preliminary Objections [Renta 4]
CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, under Czech Republic-Netherlands BIT, Stockholm Arbitration Tribunal, 2001
Petrobart Limited v The Kyrgyz Republic, Arbitral Award, 29.03.2005, SCC Case No 126/2003, Arbitral Award.
Compagnie Noga D'importation Et D'exportation S.A. V. The RF, 02-9237(L), 02-9272(Con), 2004

WTO cases: WTO Case No DS476: RF v. EU and its member states – certain measures relating to the energy sector, WTO, EU v. RF, DS462 on recycling fee on motor vehicles, initiated in 2013 (GATT994, TRIMs), DS 475, measures on the importation of live pigs, pork and other pig products from the EU, initiated in 2014 (GATT 1994, Sanitary and Phytosanitary Measures), DS479 anti-dumping duties on light commercial vehicles from Germany and Italy, initiated in 2014 (GATT 1994), DS485 tariff treatment of certain agricultural and manufacturing products, initiated in 2014 (GATT 1994).
WTO, RF v. EU, DS 474, cost adjustment methodologies and certain anti-dumping measures on imports from Russia, initiated in 2013, and in 2015 second complaint on the same matter (based on GATT 1994, subsidies and countervailing measures, Agreement establishing the WTO)

Decision of the Commission on OPAL pipeline of 12.06.2009 http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/gas/2009_opal_decision_de.pdf

Internet sources

COMMUNICATION OF THE EUROPEAN COMMISSION, Towards a comprehensive European Investment Policy, 2010, Com. 343

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, AND THE COMMITTEE OF THE REGIONS, ENERGY ROADMAP 2050, 2011, Brussels, COM 2011, 885 final.

EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, *'Member States' Energy Dependence: An Indicator-Based Assessment*, 2013, Occasional Papers 145,p. 5.

EUROPEAN COMMISSION, *Renewable Energy: A Major Player in the European Energy Market*, 2012, SWD 149, p.11

EUROPEAN COMMISSION, *Key Figures, Market Observatory for Energy*, 2011, Directorate-General for energy, p. 18

UNCTAD, IA Monitor, No 1(229), UNCTAD/WEB/DIAE/IA/200+/Rev.1.c.10

UNCTAD, World investment report 2016, available, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf, http://unctad.org/en/Docs/diaeia20102_en.pdf

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS EIGHTEENTH SESSION, YILC 1966, Vol. II, p. 210, SUPRA NOTE 20, in http://www.mzv.cz/file/570095/Vybrane_problemy_sjednavani_mezinarodnich_sm_luv_res.pdf

Article in the OIL & GAS Journal, Russian Oil and Gas Production-Sharing Agreements *Promising but worrisome*, Oct 18, 1999.

IEA statistics, available on, World energy outlook 2016, Key world energy statistics, available http://www.iea.org/publications/freepublications/publication/KeyWorld2016.pdf, http://www.worldenergyoutlook.org/

http://www.sccinstitute.com/media/30005/magnusson_gasdisputes_thescc_experience.pdf, SCC Gas disputes 2012,Dolzer, Schreur,p.272

Pages of the Energy Charter, www.encharter.org

ECT cases: http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/

ICSID annual report, and statistics, 2016, 2017 https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf

Official web pages of the European Union

www.ec.europa.eu

www.trade.ec.europa.eu

Pages of the European Commission regarding the Energy and Energy Union https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union

EU-Vietnam Free Trade Agreement, chapter 13, available on http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437, EU-Canada Comprehensive Economic and Trade Agreement (CETA), chapters 8 and 29, available on http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

Blog of the EU Commissioner C. Malmstrom, https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/

Resolution of the European Parliament on the future European international investment policy, 06.04.2011, available: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+O+DOC+XML+VO//EN,

The Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement,

http://www.eu2008.si/en/News_and_Documents/download_docs/June/0627_eu_RUS-izjava.pdf; http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/,

Energy community official webpage https://www.energy-community.org/portal/page/portal/ENC_HOME/MEMBERS

Pages of the GATT/WTO, www.wto.org

Web pages of Russian company Gazprom, www.gazprom.ru

Statistic report of the Analytical Center for the Government of the Russian Federation, Russian Energy 2015, http://ac.gov.ru/files/publication/a/10205.pdf, also to compare official statistic department Rosstat, “Russia in figures”, reports are available on http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/publications/catalog/doc_1135075100641\
Federal Antimonopoly Service (FAS), Press Releases on "Gaspromregiongas," 18 May 2007, and "Gaspromtrans," 27 April 2007.

EU-Russia Common Spaces. Progress Report 2007’ (2008) http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report2007.pdf; ‘EU-Russia Common Spaces. Progress Report 2008’ (2009) http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report_2008_en.pdf; ‘EU-Russia Common Spaces. Progress Report 2009’ (2010), http://www.eeas.europa.eu/russia/docs/commonspaces_prog_report_2009_en.pdf; ‘EU-Russia Common Spaces. Progress Report 2010’ (2010) http://eeas.europa.eu/russia/docs/commonspaces_prog_report_2010_en.pdf; ‘EU-Russia Common Spaces. Progress Report 2012’ (2013), http://eeas.europa.eu/russia/docs/commonspaces_prog_report_2012_en.pdf.

Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement,
http://www.eu2008.si/en/News_and_Documents/download_docs/June/0627_eu_RUS-izjava.pdf; http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/

Natural Gas, educational portal, on http://www.naturalgas.org/overview/background.asp https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_use,

Proposal for a Decision of the European parliament and of the council on establishing and information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the filled of energy and

repealing Decision No 994/2012/EU, Brussels, 16.2.2016 COM(2016) 53 final 2016/0031 (COD) https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v12.pdf

Texts of the international treaties http://investmentpolicyhub.unctad.org

Texts of the decisions www.italaw.com

Case law of the CJEU
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CC0198
http://curia.europa.eu/juris/liste.jsf?num=C-536/13

Shrnutí/resumé

Navzdory rozvoji využívání obnovitelné energie, je poptávka po plynu vysoká a stále roste kvůli tomu, že je to efektivní, čistý neobnovitelný zdroj energie, který má široké využití a je šetrný k životnímu prostředí. Však, zásoby zemního plynu jsou omezené, a EU uspokojuje svou poptávku dovozem z jiných států, přičemž hlavním dodavatelem je Ruská federace.

Vztahy mezi EU a RF v investičním a plynovém sektoru jsou dlouhodobé, počínajíc od čtyřicátých let 20. století. I když je spolupráce těchto partnerů stabilní, však aktéry čelí mnoha nesrovnalostem z politických a ekonomických důvodů. Proto, aby se předešlo nejistotě ve vztazích kryjících takový strategický veřejný sektor, který přímo ovlivňuje blaho bytí občanů, existuje potřeba adekvátního právního základu.

V této práci se diskutuje o absenci hmotného právního základu s tím, že i když existují mezinárodní právní nástroje, jako mnohostranné a dvoustranné smlouvy nejsou však dostačující pro efektivní spolupráci, a tak mají potenciální hrozbu pro budoucí vztahy. Dlouhodobá spolupráce mezi Ruskem a EU má jen jednu dvoustrannou dohodu – Dohodu o Partnerství a Spolupráci podepsanou v r. 1994, která nicméně je zastaralá, a neodpovídá současným potřebám. Adekvátní právní základ pro spolupráci mezi Ruskem a EU v plynovém sektoru stále chybí. Ochrana investic v plynovém sektoru je realizována prostřednictvím dvoustranných dohod mezi Ruskem a každým členským státem EU, *soft law* a obecnými mezinárodními dohodami bez jakýchkoliv specifikací pro tyto partnery. Jediným mezinárodním nástrojem pokrývající energetické vztahy těchto dvou partnerů - je Smlouva o Energetické Chartě, kterou však nelze považovat za spolehlivý mechanismus, navíc Rusko od ní odstoupilo před 8 lety. Důvody zmíněného a případ *Yukosu* jako ilustrace jsou diskutovány v této dizertaci. Navíc, tyto dohody obsahují různá ustanovení s rozlišujícími se definicemi. Dokonce i bilaterální smlouvy mezi RF a každým členským státem EU, i když jsou

podobného rozsahu a zaměřují se na ochranu investic, stále neposkytují jednotnou determinaci pojmů a podmínek. Kromě toho jak Evropská Unie, tak i právo EU se rozvijí. EU prezentuje investiční vůle všech svých 27 členských státu, a proto se nachází v procesu nahrazení bilaterálních dohod členských států s třetími státy, dohodou s EU jako celkem. Je nutné zmínit rozdíly v ekonomickém, politickém a technologickém vývoji jednotlivých členských států, což ztěžuje tento přechod. Existují však již podepsané dohody o volném obchodu mezi EU a Kanadou, nebo Vietnamem, na rozdíl dohoda mezi EU a Ruskem není ani v perspektivě.

Dále, s ohledem na rozhodčí a soudní podmínky zmíněné v mezinárodních dokumentech, se musí zmínit, že neexistuje jediný orgán řešení sporů. Z diskutovaných případů v této disertaci je zřejmé, že RF není spokojena s konečností rozhodnutí rozhodčího orgánu, a žádá o jejich revizi soudní cestou, proto vzniká nutnost mechanismu přezkumu rozhodnutí jaký nabízí WTO. Vzhledem k tomu, že náklady řízení jsou vysoké, a jelikož jednou ze stran řízení je stát, pak náklady na řešení sporů nesou daňové poplatníky. Proto je důležité, učinit proces řešení sporů efektivním a ekonomičtějším. Tak, EU rozvíjí myšlenku stálého multilaterálního investičního soudu, dle každé dohodě o volném obchodu s třetími státy, jak je to s Kanadou. Však, podle názoru autorky této práce, toto může přinést vyšší fragmentaci práva a nižší úroveň důslednosti při řešení sporů. Pro spolupráci mezi EU a RF proto autorka navrhuje aktualizovat stávající Dohodu o Partnerství a Spolupráci a rozvíjet mechanismus poradního orgánu, a také zvážit vytvoření odvolacího orgánu v rámci jmenovaných rozhodčích senátů.