ADVANTAGES AND DISADVANTAGES OF ARBITRATION UNDER THE ECT: AN INVESTOR'S PERSPECTIVE BEFORE A NEW EUROPEAN RENEWABLE ENERGY PANORAMA

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Resumen: *El cambio de política en materia de energía renovable en Europa ha dado lugar a un incremento considerable en el número de arbitrajes de inversiones al amparo del Tratado sobre la Carta de la Energía ('the Energy Charter Treaty'), hecho que ha evidenciado al arbitraje como el mecanismo preferido de resolución de conflictos entre los inversores extranjeros. Este artículo resalta: (i) las dos principales razones detrás de esta tendencia; (ii) los problemas que inversores están teniendo ante este tipo de disputas gobernadas por el meritado Tratado y (iii) algunas cuestiones prácticas que pueden contribuir a que la resolución del conflicto tengo lugar de modo más satisfactorio. En este sentido, algunas de las conclusiones alcanzadas es que la elección de las reglas de arbitraje del ICSID así como el uso de cláusulas de estabilización puede ser una buena alternativa.*

I. Introduction

More than one decade ago, many European countries were encouraged by the European Commission to adopt a set of measures in order to promote investment in the renewable energy sector, creating a stable framework. The aims of these developments were to attract investment in a sector that allows lower energy dependence, alongside the possibility to improve a new technological field and combat environmental problems. Lured by a stable legal framework that encourages the investment in the sector through concession of grants, tax incentives, soft loans and loan guarantees, many domestic and foreign investors decided to stake in a great number of energy renewable projects.[2] Therefore, these investments across Europe were motivated by expectations emerging from legislative provisions rather than contractual promises guaranteeing certain conditions.

Nonetheless, political, economic and power system concerns have led the same countries that deployed investment incentives in the sector to modify and often diminish these investment supportive measures. To control the increasing price of electricity, the Germany government has reduced incentives for solar photovoltaic and, in the same way, Italy has put in placed some restrictions on financial support aimed at the renewable energy sector.[3] Another good example is the Kingdom of Spain, where the economic-financial crisis and the enormous tariff deficit of the energy sector obliged the national government to undertake numerous reforms to guarantee the sustainability of the sector, reasonable return on investment and cer-

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2 George Venetsanos, (Ecn-eu.com) <https://www.ecn-eu.com/by-invitation/renewable-power-sources-and-incentives-in-europe/9> accessed 3 August 2015. See also Fernando Badenes, (Kwm.com) <http://www.kwm.com/en/es/knowledge/insights/the-umbrella-for-international arbitration-against-spanish-energy-renewal-20141205> accessed 3 August 2015.

3 Phillipe Brown, (Fas.org) <https://www.fas.org/sgp/crs/row/R43176.pdf> accessed 3 August 2015.

tainty to the industry.[4] Overall, these measures have consisted of reducing periods of amortization and diminishing the retribution on the bases of premiums already paid; new circumstances that can eliminate profits for renewable plants and, in extreme situations, to put installations at risk of insolvency.[5]

As a result of these legislative amendments damaging the profitability of the renewable energy sector, a number of international investors have decided to bring arbitration procedures under the Energy Charter Treaty (hereinafter: ECT)[6] and more actions of this type are expected, for instance against the UK.[7] In this regards, the number of arbitration cases under Article 26 of the ECT has increased considerably, having the number of solar claims against Spain and Czech Republic a huge influence on that outcome.[8] By contrast, there is no evidence that foreign investors have decided to recourse to the national courts.

Before proceeding to restrict the scope of this article, it is necessary to make a brief mention to the structure and main provision of the ECT. In order to promote the long-term cooperation in the energy field, its content is concentrated on provisions related to trade (Parts II and VI); the protection and promotion of investment in the energy sector (Part III); the transit of energy (Article 7); energy efficiency and environmental protection (Article 19) and the settlement of disputes (Part V). Ho-

4 PKR, 'ICSID claims against Spain mount, while private citizens take the state to court' (Pkrllp.com January 13, 2015) <http://www.pkrllp.com/icsid-claims-against-spain-mount-while-private-citizens-take-the-state-to-court/> accessed 3 August 2015. Similar tendency has been appreciated in countries such the Czech Republic, Greece, Romania and Bulgaria as well. See Jones Day, '' (Jonesday.com) <http://www.jonesday.com/International-Remedies-for-Foreign-Investors-in-Europes-Renewable-Energy-Sector-02-19-2015/?RSS=true> accessed 3 August 2015.

5 Kpmg International, '' (Kpmg.com) <https://www.kpmg.com/.../taxes-and-incentives-for-renewable-energy/.../tax...> accessed 3 August 2015.

6 In the early 1990s, that is, at the end of the communist rule in Central and Eastern Europe and the beginning of the breakup of the Soviet Union, the new governments sought to develop the energy cooperation between them. While the former Soviet Union was rich in energy sources, it had a huge necessity of investment to reconstruct its run-down economy, which lacked of capital, technology and expertise. On the other hand, the West Europe was looking for the way to diminish its energy dependence on the Middle East and make sure access to energy supply from the former Soviet Union. This starting point, after negotiations, finished with the signature of the ECT and its Protocol on Energy Efficient and Related Environmental Aspects in December 1994, entering into force in April 1998. At present, the ECT has been ratified by forty-six states, the European Union (EU) and the European Atomic Energy Community (Euratom), being described as the most widely ratified investment protection treaty. This is a multilateral binding treaty that confines its scope to the important energy sector, being aimed at 'promoting long-term cooperation in the energy field, based on complementary and mutual benefits, in accordance with the objectives and principles of the European Energy Charter' (Article 2). See for more detail about the origin and purpose of the ECT T Walde, The Energy Charter Treaty: An East-west Gateway for Investment and Trade (1st edn, Kluwer Law International 1996) 254-262.

7 Recent changes in the regime for onshore wind developments have warned the UK government about the possibility of being claimed by foreign investors under the ECT as well. See Out-law.com, (Out-law.com) <http://www.out-law.com/en/articles/2015/july/international-energy-investors-could-pursue-uk-for-compensation-following-subsidy-cuts-says-expert/> accessed 7 August 2015.

8 Crina Baltag,

'Http://kluwerarbitrationblogcom/blog/2015/06/13/whats-new-with-the-energy-charter-treaty/'(Kluwerarbitrationblogcom,13June,2015)<http://kluwerarbitrationblog.com/blog/2015/06/13/whats-new-with-the-energy-charter-treaty/>accessed 3 August 2015. See also Dentons, '' (Dentons.com) <http://www.dentons.com/en/insights/alerts/2013/december/5/abengoa-s-subsidiary-launches investment-treaty-proceedings-against-spain> accessed 3 August 2015.

wever, due to the objective of this article, the focus will be on provisions regarding to the protection of foreign investments (Part III) and the settlement of dispute (Part V). The aim of Part III is to promote foreign investment and to minimise non-commercial risk of such investment through the establishment of protection standards, regime generally based on provisions set out by other bilateral investment treaties and the North American Free Trade Agreement (NAFTA). Pursuant to Article 10(1) of the ECT, contracting parties shall give to investors of other contracting party fair and equitable treatment, most constant protection and security and prohibit discriminatory and expropriation acts. Likewise, one of the cornerstones of these protective provisions is that contracting parties are bound to provide to investors the most favour nation treatment, what means that investment protections contained in bilateral investment treaties may apply to investors even though his home state is not party of that treaty.[9]

On the other hand, as to the settlement of disputes (Part V), Article 26 entitles private investors to seek protection against a contracting host state as long as they believe that there has been a breach of the duties contained in Part III. In that context, the dispute will be solved in the elected jurisdiction by the investor, which can be one of the following: (i) the national court or administrative tribunal of the contracting party where the investment was made; (ii) in accordance with a previously agreed dispute settlement procedure, or (iii) by international arbitration. If the investor chooses arbitration, he will be able to submit the dispute to the ICSID (provided that both the host state and the investors have ratified the ICSID Convention), to ICSID's Additional Facility, to ad hoc arbitration using the UNCITRAL Arbitration Rules or to arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce. The selection of the arbitral forum is notably important when the investor is national of any contracting party listed in Annex D of the ECT (e.g. such Spain, Greece, Italy, Portugal, Romania), since once the investor has decided to submit the dispute to the national courts of the host state or to another agreed settlement procedure, it would not be able to pursue arbitration regarding the same dispute -Article 26(3)(b)-. This rule is known as a 'fork in the road', requiring the claimant to make an irreversible choice of forum for its claim.

The focus of this essay is, firstly, to determine why those investors affected by the policy change in the European energy sector prefer investment arbitration against recourse to national courts and the main drawbacks that they will face under the ECT. Although recourse to national courts by foreign investors is not the best solution, the use of arbitration under the ECT is not exempted of problems, being difficult to predict the result of procedures depending on vague and subjective protection standards and existing a potential risk of interference in the recognition and enforcement of intra-EU arbitral awards. As to the latter, there have been cases where the European Commission has frustrated the enforcement of the final award, claiming that this would be contrary to the EU Law –EU state aid law-. Secondly, the essay will identify some practical tips that can help investors to face those problems, recommendations connected with the selection of the forum to arbitrate and the use of contractual devices.

As to the structure of the article, Part II deals with the identification of international investment arbitration benefits against national court jurisdiction and the main challenges for investors under the ECT. Part III makes reference to some prac-

9 A Konoplyanik and Thomas Walde, 'Energy Charter Treaty and its Role in International Energy' [2006] 24(4) Journal of Energy & Natural Resources Law 532-539.

tical tips that could offset the aforementioned challenges. Finally, Part IV concludes by establishing some final remarks.

II. ECT: main advantages of the arbitral jurisdiction v. national courts and consideration of pitfalls from the investor perspective.

A. Main benefits of investment arbitration

a) Investment arbitration provides a neutral forum

The main reason why investors prefer to recourse to arbitration rather than filling claims before national courts of the host state is because of the perception that the latter way of dispute settlement does not seem sufficiently neutral in resolving the investment dispute, where concurs a judicial loyalty towards the forum state. To some extent, domestic courts embody a power of the state and judges are employees of it.[10] A good example that represents this issue is the decision of the Supreme Court of Sri Lanka in a dispute between the national government and Deutsche Bank.[11] The Supreme Court of Sri Lanka rendered an injunction ordering that payment to the bank entity should be suspended. This was done in less than two days after receiving the claim from the national government and without proper evaluation and notification to the bank allowing the opportunity to respond.[12] Moreover, corruption in courts is a common issue in many countries around the globe.

Even in developed countries where courts are supposed to be independent, judicial decisions are often influenced by national loyalties, being reluctant to find for the investor due to the political nature and social importance that the question at stake can have.[13] Likewise, corruption in the public sector is just not a problem in developing countries but also in developed economies, with high perceptions of corruption levels in countries such Romania, Italy, Greece, Bulgaria, Croatia, Czech Republic and Hungary.[14] As to the corruption in the judiciary, it has been stated that 'the public often views its judiciary as more corrupt than it actually is: more people around the world described their judiciary as extremely corrupt than have personally been part of judicial corruption'.[15]

Therefore, direct access to arbitration without any necessity of using up local remedies seems to be an important advantage for foreign investors, who are entitled to avoid weaknesses of the judicial system including a certain degree of partiality in favour of the defendant state. National courts are more sympathetic with the public interest involved in this type of energy policy disputes than international arbi-

10 CH Schreuer, 'Do We Need Investment Arbitration?' [2014] 11(1) Transnational Dispute Management <http://www.transnational-dispute-management.com/article.asp?key=2026> accessed 4 August 2015.

11 Deutsche Bank AG v Sri Lanka (Final Award, 2012) ICSID Case No ARB/09/02 (Deutsche Bank).

12 D Zachary and others, *The Foundations of International Investment Law Bringing theory into practice* (1st edn, Oxford University Press 2014) 392 y 393.

13 A Boute, 'Challenging the Re-regulation of Liberalized Electricity Prices under Investment Arbitration' [2011] 32(2) Energy Law Journal 1-43.

14 Transparency.org, (Transparency.org) <https://www.transparency.org/cpi2014/results> accessed 4 August 2015.

15 Transparency.org,(Transparency.org)<https://www.transparency.org/research/gcr/gcr_judicial_systems/0/> accessed 4 August 2015.

tral tribunals.[16] A good example of this appreciation of public interest by national courts could be the current position of the Spanish Supreme Tribunal towards national investors claims filled before local courts, stating that the reforms affecting the renewable industry sector does not violate the legal framework and principles such legal certainty, legitimate trust, non-attachabilility, effective court protection and prohibition of the unfavourable retroactivity of the reform.[17] Among other grounds, it is pointed out that the legal amendments giving rise to a decline of profits are reasonable considering the general economy and sectorial context. If the economic and financial crisis is triggering cutting spending in many productive sectors, it is not unjustified the enactment of this type of measures in a sector with a high tariff deficit due to the application of setting regulated (grid) access tariffs, which covers among other costs transport and distribution network costs.[18] Nevertheless, this influence of national interests does not necessarily mean that all claims filled by investors before national courts are dismissed. For instance, the Bulgaria's Constitutional Court overrode a 20% fee that the government had implemented on the revenues of solar energy producers on the base that the legislator should encourage investment and shield investments made in order to allow a normal function of the economy.[19]

On the contrary, though the impartiality and independence of arbitrators has been called into question by some critics claiming that they will satisfy the interest of those who appoint them in order to be designated again in the future, there are in place some instruments aimed to ensure that arbitrators meet these requirements. First, arbitrators should disclosure all the information that could be used as ground for disqualification, such as any type of relationship with the parties. For example, as to investor-state arbitration, the ICSID Arbitration Rules, r6(2) provides that before the first session of the arbitral tribunal, each arbitrator shall sign a specific declaration form stating, among other declarations, 'the past and present professional, business and other relationship, if any, with the parties and any other circumstances that might cause my reliability for independent judgment to be questioned by a party'. Secondly, challenge of arbitrators can be brought by the parties when there is doubt about the arbitrator's impartiality or independence. This option is expressly embedded, for instance, by the UNCITRAL Rules (Article 10(1)), the ICSID (Article 14, 38, 39 and 51) and Article 57 of the Washington Convention, which states that 'a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required', that is, lack of impartiality and impartiality and/or when the arbitrator was ineligible for appointment pursuant Section 2 of Chapter IV of the same Convention. In addition, alongside the fact that parties have a clear participation in the decision-making process through the appointment of arbitrators, some commentators have argued that informal mechanisms avoid as well bia-

16 Matthias Herdegen, *Principles of International Economic Law* (1st edn, Oxford University Press 2013) 411-414.

17 SSTS 12 April 2012 (RJ 2012/5275, RJ 2012/5775, RJ 2012/5788, RJ 2012/8866); 25 June de 2013 (RJ 2013/5644, RJ 2013/6461, RJ 2013/6725, RJ 2013/7149, RCA 188/2012 and RCA 252/2012); 13 January 2014 (JUR 2014/14099).

18 AIMendoza,(GomezAceboPombo)<http://www.gomezacebopombo.com/index.php/es/conocimiento/analisis/item/1357-el-tribunal-supremo-confirma-los-recortes-a-las-retribuciones-de-las-instalaciones-fotovoltaicas-sts-de-13-de-enero-de-2014-jur-2014-14099> accessed 4 August 2015.

19 A Bangachev, (Lexology.com) <http://www.lexology.com/library/detail.aspx?g=0baef-9a0-fe12-4d05-8fc0-483ec42c127a> accessed 4 August 2015.

sed and unjustified awards. The reputation on which depend arbitrators can be easily destroyed by the lack of impartiality and independence, being not an incentive to find for in favour of any party in order to secure new appointments.[20]

b) Finality over consistency: lack of appeal

Another advantage of arbitration from the investor perspective seems to be the lack of an appeal mechanism. As stated in a study conducted by the Queen Mary University of London and Price Waterhouse Coopers, the vast majority of corporations interviewed are not in favour of including such mechanism, claiming that finality of arbitration awards should apply over consistency and correctness. The right to appeal is deemed as 'a disadvantage because it makes arbitration more cumbersome and litigation-like and essentially negates a key attribute of the arbitral processes'.[21] Although the question as to the convenience of incorporating an appeal mechanism is outside the scope of this article, it is convenient to make reference to the definition of finality against correctness and the arguments that negate the benefits of an appeal mechanism.

The adjective final means that once the arbitral tribunal has settled the dispute, the award is final and binding on the parties as long as the tribunal follows all the procedural formalities. Consequently, the losing party is not entitled to appeal on the merits of the dispute, even in situations where it is clear that the arbitral decision was wrong.[22] Despite some commentators support that consistency and correctness are more important than finality of the award in investment-state arbitrations, on the bases that those requirements would enhance the legitimacy of investor-state dispute process, currently all decisions and awards in international investment arbitration are final. There is no doubt that the lack of an appeal mechanism is due to its potential disadvantages and the standpoint of investors and states, the key users of this type of settlement dispute mechanism. As pointed out by Jason Clapham, 'if the investor-state arbitration process is to be sustainable, the system must meet the needs and objectives of these parties. Based on the available evidence, it is submitted that states and investors continue to prefer finality over consistency and correctness'.[23] Furthermore, the inclusion of an appeal option would affect directly the principle of finality as one of the most important advantages of investor-state arbitration; will increase the cost of arbitration and does not guarantee consistency. Brower asserts that 'one of the main justifications of an appeal mechanism (to achieve consistency in international investment arbitration) is over exaggerated and that consistency is actually unattainable anyway'.[24]

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20 C Brower, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' [2009] 9(2) Chicago Journal of International Law 471-498.

21 Queen Mary University of London and PWC, '' (Pwc.co.uk) <www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed 4 August 2015.

22 A Redfern and M Hunter, Law and Practice of International Commercial Arbitration (4th edn, Oxford university Press 2004) 432,433.

23 J Clapham, 'Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?' [2009] 26(3) Journal of International Arbitration, Kluwer Law International 437-466.

24 Charles H. Brower, Confronting the Truth: Sources and Magnitude of Decentralization in Investment Treaty Arbitration in C Rogers and P Alford (eds), The future of Investment Arbitration (Oxford University Press 2009) 339-48.

Nevertheless, not every in the garden is lovely. Investors that start arbitration claims under the ECT will face some drawbacks, being a nightmare under certain circumstances to achieve the recognition and enforcement of the award. These problems or areas of improvement are now discussed in turn.

B. Weighing the ECT investors' pitfalls

a) Vagueness and subjectivity of the protection standard

In spite of some commentators asserting that the protection embedded by the ECT is generous in comparison with bilateral investment treaties (BITs),[25] the reality seems to be that the ECT reflects the common standards laid down by the international investment law. In this regards, many of the BITs, as well as the ECT, provides the same level of protection through the recognition of the fair and equitable treatment, protection from expropriation, unreasonable and discriminatory treatment and treatment in accordance with international law. The problem with these terms, as it will be seen, is that they are quite vague and rely upon the interpretation of the arbitral tribunal, alongside the lack of rule of binding precedent in arbitration and the tiny number of cases solving investor-state energy disputes under the ECT.[26]

Having said that, the protection given by the ECT is going to be analysed, bearing especially in mind Article 10 and 13. While Article 13 is related to the concept of expropriation, the former states the main protection principles: fair and equitable treatment; full protection and security; umbrella clauses; national and most favoured nation treatment.

(i) Fair and equitable treatment

This principle can be breached in two different ways, by the treatment given to the investors by national courts or, the second and most common, due to the administrative actuation.[27] There is no doubt that in the practical issue at hand, in case that there were a breach of this principle, that would be because of the administrative decisions taken by the national governments –regulatory changes- rather than judicial decisions.

As to the review of administrative decisions such legislative amendments, tribunals have considered the treatment of investors bearing in mind two factors. Firstly, the stability of the legal and business framework, where tribunals consider whether the state has interfered in the legitimate expectations of investors. If the host state gave an assurance of treatment on which the investor relied to make the investment that could be a transgression of such principle. For example, in a case involving Spanish companies against the Argentinian government,[28] the arbitral tribunal considered under the applicable BIT that a change of tariff agreed in the concession agreement was a transgression of the fair and equitable treatment.

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25 J D'agostino and J Oliver, 'Energy Charter Treaty: a Step towards consistency in International Investment Arbitration?' [2007] 25(3) Journal of Energy & Natural Resources Law 225-243.

26 K Gadiyev, 'Arbitration of Energy-Related Disputes under the Energy Charter Treaty' [2008] 8(2) Global Jurist 1-15.

27 C Mclachlan and others, *International Investment Arbitration Substantive Principles* (1st edn, Oxford University Press 2008) 226.

28 *Suez, Sociedad General de Aguas de Barcelona S.A and Vivendi Universal S.A. v Argentina Republic* (ICSID Case No ARB/03/19, 30 July 2010).

Secondly, the tribunals' concern is whether the administrative action was taken through a fair process and in order to exercise powers for improper purposes.[29]

On the contrary, there are some factors which indicate that the state has not breach the protection. The most important factor is when the administrative action has been triggered by a public interest. States should be qualified to modify the regulatory framework so as to give answer to changing circumstances in the public interest.[30] This conclusion was drawn by the tribunal of the Saluka case,[31] providing that: 'No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well'. Likewise, in a most recent award based on the ECT –ICSID case-,[32] it was stated by the arbitral tribunal that 'any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times' and, therefore, there was no breach of the fair and equitable treatment standard based on the alleged failure to provide a stable legal and business framework.

(ii) Full protection and security

Full protection and security is not concern with the decision making process but with failures of the State to protect investors from damages of State official or others, making sure that the investor's business works in a level playing field.[33] For instance, a tribunal found for the Mexican government since the investor did not proved that the Mexican authorities have 'encouraged, fostered, or contributed their support to the people of groups that conducted the community and political movements against the landfill, or that such authorities have participated in such movement'.[34] This duty of a State to provide protection to foreigners is well known in international law, which was recognised by the ICJ in *Tehran Hostages* case.[35]

(iii) Umbrella clause

The ECT contains an umbrella clause, in which the treaty provides to the investors with an additional protection, being possible to convert a contractual claim into a treaty claim. In other words, the treaty elevates contractual rights to the level of treaty rights.[36] To the date of this writing, there is no arbitral awards interpreting the application of these umbrella clauses, but it seems clear that this clause under

29 Mclachlan and others (n 27) 234.

30 Alexis Martinez, Invoking State Defenses in Investment Treaty Arbitration. in M Waibel (ed), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 334.

31 *Saluka Investments BV v. The Czech Republic, Partial Award,* March 17, 2006, available at http://www.italaw.com/cases/documents/963 (accessed 4 August 2015).

32 *AES Summit Generation Limited and AES-Tisza Eromu Kfi v The Republic of Hungary* (ICSID Case Nº ARB/07/22 (ECT), 25 September 2010.

33 K Hober, 'Investment Arbitration and the Energy Charter Treaty' [2010] 1(1) Journal of International Dispute Settlement 153-190.

34 *Tecnicas Medioambientales Tecmed S.A. v United Mexican States,* ICSID Case Nº ARB (AF) 00/2, 29 May 2003.

35 United States of America v Iran, ICJ Judgement of 24 May 1980, available at www.icj-cij.org/docket/files/64/6293.pdf, accessed 4 August 2015.

36 B Blackaby and others, Redfern and Hunter on International Arbitration (5th edn, Oxford

the ECT holds host state potentially liable for a huge number of actions and omissions in the fulfilment of agreements.[37]

(iv) National and most favoured Nation Treatment

Another protection provided by the ECT is that the investment must be treated at least as well as national and companies of the host State –national treatment- or of any other third country –most favoured national treatment). Therefore, this protection entitles investors to rely on protection contained in a BIT to which the host state is a party, even if the investor's home state does not have a bilateral investment treaty with the host state.[38]

The domain application of this protection is connected with the application of substantive rights, since question of jurisdiction in international law depends exclusively of parties consent.[39] For example, imagine a situation where the host state gives some regulatory concessions to investors of certain nationality but not to third investors. The latter would be able to rely upon the MFN clause and claim the same treatment. However, in *Maffezini* case the application of the MFN clause was extended to jurisdictional matters, accepting the arbitral tribunal that the investor was able to benefit from other BIT and, consequently, was not a requirement to recourse to national court before filling a claim in the arbitral tribunal[40].

(v) Expropriation

As many BITs, the ECT provides protection in cases of expropriation, which is defined in Article 13(1). In this regards, it is stated that contracting parties should not nationalize, expropriate or subject to other measures with similar effects the investments of investors of other contracting parties, unless this act 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. Thus, within the sphere of protection fall illegal takings by the host state –direct expropriation- as any measure that has similar effects to nationalisation, such us indirect expropriations.[41]

The identification of direct expropriation by arbitral tribunals does not give rise to many difficulties, taking place when the host state gets the ownership of the investment or the investor is deprive of it by the public authorities[42]. In this regards, imagine a situation when a host state decides to take over a company or maybe deprive of some benefits attached to the property. On the other hand, an 'indirect expropriation or national is a measure that does not involve an overtaking, but that effectively neutralized the enjoyment of the property[43]'. An indirect expropriation does not take necessarily through a single act but it can be a gradual process, which is known as creeping expropriation. As provided by an ISCID award, 'creeping expropriation is a form of indirect expropriation with the distinctive temporal quality

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University Press 2009) 482

37 Hober (n 33), 159.

38 J Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Place 2015) 280.

39 D Caron and E Shirlow, 'Most Favoured Nation Treatment-Substantive Protection in Investment Law' [2015] 2015(23) King's College London Law School Research Paper 1-17.

40 *Emilio Agustín Maffezini v Kingdom of Spain* (Jurisdiction) 5 ICSID Rep 387.

41 Energy Charter Secretariat, (Internationalenergycharter.org) <international.energycharter.org/fileadmin/.../Expropriation_2012_en.pdf> accessed 5 August 2015.

42 Mclachlan (n27), 290.

43 *Lauder v The Czech Republic,* (UNCITRAL Rules) Final Award, IIC 205 (2001).

in the sense that it encapsulated the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriation taking of such property'[44]. In order to achieve this goal states can make use of their regulatory activity, as some arbitral decisions have recognised: 'Regulations can indeed be exercised in a way that would constitute creeping expropriation … indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole ink international protection against expropriation'[45].

Moreover, state acts can constitute expropriation when they are contrary to promises given to foreign investors so as to encourage and underpin investments. Some commentators and arbitral tribunals have supported the idea that state undertaking lead to 'acquired rights' for investors. As defined by O'Connell, 'acquired rights are any rights, corporal or incorporal, properly vested under the municipal law in a natural or juristic person and of an assessable monetary value. Within the scope of such rights fall interests which have their basis in contract as well as in property, provided they concern an undertaking or investment of a more or less permanent character'.[46] Likewise, in CME v Check Republic, the tribunal held that Check government breached contractual undertakings, causing a ruin of the investment commercial value and amounting, consequently, to an expropriation.[47]

Nevertheless, not all contractual breaches amount to expropriation. For instance, in an ECT case (*Nymkomb v Latvia*),[48] the arbitral tribunal rejected the expropriation. As to the facts, a co-generation plant had been erected on the bases of a double contractual tariff to be paid by the state to the private investor, though before the investor made the investment the tariff was changed by a lower one. Against the allegations of expropriation filled by the investors, Latvia asserted that the investor assumed the risk since the investment was made after the tariff amendment. Finally, the arbitral tribunal rejected the expropriation since 'there was no possession taking Windau or its assets, no interference with the shareholders' rights or with the management's control over and running of the enterprise'.

If there is an expropriation, whether lawful or unlawful, the effect is the same on both situations, that is, the entitlement of an adequate and unlawful compensation. While in case of legal expropriation the compensation is a precondition of lawfulness, in the latter case compensation is to offset the damages caused to the investor.[49]

Consequently, the protection of investors under the ECT depends on principles which should be apply in a subjective manner by each tribunal, modus operandi that together with the small number of cases can triggered some lack of coherence and difficulties when it comes to predict the outcomes. As stated by McLachlan,

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44 Generation Ukraine Inc v Ukraine (Award) ICSID case ARB/00/9 (ICSID, 2003, Paulsson J, Salpius & Voss).

45 *Pope & Talbot Inc v Government of Canada (Interim Award) 7 ICSID Rep 69 and Feldman v United Mexican States (*Award) 7 ICSID Rep 341.

46 D.P O'Connell, *International Law* (2nd ed., 1970), Vol. II, pp. 763-64.

47 CME Czech Republic BV (The Netherlands) v Czech Republic, (UNCITRAL Rules) Partial Award, IIC 61 (2001).

48 *Nymkomb Synergetics Technology Holding AB v Latvia*, Stockholm Chamber of Commerce, Award, 16 December 2003. See also P Muchlinski and others, *The Oxford Handbook of International Investment Law* (1st edn, Oxford University Press 2008) 441, 442.

49 Mustafa Erkan, *International Energy Investment Law: Stability Trough Contractual Clauses* (1st

Shore and Weiniger, 'there are still only a small number of cases on each of the main treatment provisions. It is therefore inevitable that there will be some unevenness in the decisions, and that there will be many issues yet to be addressed'.[50] Furthermore, investors who have decided to bring arbitral claims against host states must prove some sort of irrationality, target that can be quite cumbersome bearing in mind this type of investments have been made as a result of the enactment of certain legal frameworks. In other words, where states have reflected in a written form some type of promises that can make the dispute easier for investors, since the right of states to change their normative regulation is to some extent confined.

b) Conflicts between the ECT and the EU Law: frustrating the enforcement of the arbitral award.

A second problem related to claims against these European countries that have undertaken legal reforms in the energy sector is, when the investor is from another EU country, the conflictual relationship between the ECT and the EU law. This problem has come out recently with the decision of EU investors to initiate arbitration proceeding against EU states, due to the derogation of beneficial measures in the energy renewable sector. As explained in the next paragraphs, the EU law interference can even frustrate the recognition and enforcement of arbitral awards, one of the cornerstones of any mechanism of dispute settlement.

On the one hand, there has been some discussion as to what extent the provisions of Part III of the ECT should apply in an intra-EU context. In this regard, the European Commission has pointed out that in situations when the claim is brought by investors based in one member state against another member state the arbitral tribunal set up pursuant to article 26(1) lacks of jurisdiction, since the claim is not against another contracting party, leading this position to some European Commission's requests in arbitral tribunals.[51] Simultaneously, it is claimed by the European Commission that a tribunal created under Article 26 have to decline to arbitrate on the ground that to do so would be contrary to the binding 'applicable rules and principles of international law' mentioned by Article 26(6) and, finally, that the EU law should be taken into account as relevant rules of international law. The latter is justified on the basis of Article 31(3) of the Vienna Convention on the Law of Treaties of 1960 (VCLT), which provides that when interpreting a treaty: 'There should be taken into account … (c) any relevant rules of international law applicable to the parties'. By contrast, some commentators and arbitral tribunals have concluded the opposite, that is, the ECT prevails over EU Law in matters of energy.[52]

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edn, Wolters Kluwer Law & Business 2011) 70

50 Mclachlan (n27), 225. See also N Butler, 'Possible Improvements to the Framework of International Investment Arbitration' [2013] 14(1) The Journal of World Investment & Trade 613-637, where it is recognized the interpretation of key terms in investment arbitration as one of the most important problems in investment arbitration. A proposal to create some sort of guidelines to facilitate interpretation and improve coherence and consistency is suggested.

51 For example, in AES v Hungary (Nº2) [AES Summit Generation Ltd and AES-Tisza Eromu Kft. v. Republic of Hungary (ICSID Case No. ARB/07/22)], under Rule 37(2) of the ICSID Arbitration Rules, which enables to file submissions as a non-disputing party, the Commission arose the discussion connected with the EU law-ECT relationship.

52 T Roe, European Union law and the Energy Charter Treaty. in Roe and others (eds), *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011) 89-103. See also, J Kleinheisterkamp, 'The Next 10 Year ECT Investment Arbitration: A

On the other hand, this alleged interference of the EU Law leads to problems in the enforcement of arbitral awards conceding compensation by investors, evident issue when it comes to the relationship between EU state aid law and compliance with intra-EU investment arbitration awards. When an arbitral awards requires to an EU Member State to compensate –payment of amount of money- a foreign investor from another member state, pursuant to the position held by the Commission, this could give rise under certain circumstances to a violation of Article 107 of the Treaty on the Functioning of the European Union (TFEU).

In accordance with the imputability doctrine, which has been recognised by the Court of Justice of the European Union (CJEU), only voluntary measures fall within the sphere of Article 107 TFEU. For instance, in Asteris case,[53] the CJEU concluded that when a Member State is ordered to compensate an investor for damages they have caused to those individuals, there is no incompatibility with Article 107 TFECU. Therefore, there would be an illegal State aid when a state has granted an economic advantage to an investor in a voluntary way, which can interfere with the normal functioning of trade between Member States.[54] The Commission supported this interpretation as well in one of its decisions, stating that 'compensation usually entails no selective advantage, no illegal state aid, as long as it merely aims at compensating damages which are caused by government actions and as long as it is determined on the basis of a general rule of compensation, which is directly based on constitutional property rights –national law- in the light of the relevant case law'.[55]Therefore, a state compensation will be legal pursuant Article 107 TFEU, providing that the payment right is recognised by law and case law.

Likewise, it is considered that the existence of an arbitral award binding an EU Member State to compensate is enough to draw the conclusion that the payment is not an illegal aid. The aforementioned Commission's decision established that awards based on international agreements should receive the same importance as decisions adopted under implemented national legislation, since as stated by some commentators Member States complying with an award are simply respecting its supranational obligations.[56] Nevertheless, this affirmation is not accurate in situations when the award, which recognition and enforcement is pretended, is contrary to the public policy of the host state bound to compensate. In this regards, pursuant to Article V(2) of the New York Convention, recognition and enforcement that can be denied in case of conflict with the public policy of the recognizing state. This problem is clearly reflected in the Micula case –ICSID-, where the Commission interfere in the execution of an intra-EU arbitral award since this would be contrary to the EU state aid law.[57] During the end of the 90s the Romanian government established a pack of regional aids addressed to encourage foreign investment and make possible the fulfilment of the EU requirements for its accession. However,

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Vision for the Future - From a European Law Perspective' [2011] 2011(7) LSE Law, Society and Economy Working Papers 7/2001 1-19.

53 *Asteris AE and other v Hellenic Republic and European Economic Community* [1988] ECR 5515.

54 Cases 67, 68 and 70/85 *Van der Kooy v Commission* [1988] ECR 219; Case T-358/94 *Air France v Commission* [1996] ECR II-2109 and 217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479.

55 C (2004) 2026 fin, Commission Decision of 16 June 2004, OJ 2005 C 81.

56 C Tietje and C Wackernagel, 'Outlawing Compliance? - The Enforcement of intra-EU Investment Awards and EU State Aid Law' [2014] 11(3) Transnational Dispute Management 1-9.

57 *Ion Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013.

due to incompatibilities with Article 107, those schemes were put to an end, administrative decision that justified the interposition of investors' claims against Rumania. In *Micula*, the group of Swedish investors who filled the claim has seen the intervention of the Commission in the arbitral procedure as amicus curiae, being the payment of the Micula award suspended because of a suspension injunction under Article 11(1) of Council Regulation (EC) Nº 659/1999. Currently, the formal investigation started by the Commission is ongoing, though in a statement submitted in November 2014 it was reiterated that the enforcement of the *Micula* award could be an illegal state aid.[58]

The previous reasoning is especially problematic in the type of cases that we are dealing with, since there has been some suggestions that the tariff schemes implemented for renewable energy across Europe could be incompatible with Article 107 TFEU, even though their derogation were an option of these countries rather than an imposition from Brussels.[59] For instance, in July 2014 the European Commission interfere as amicus curia in six arbitral claims brought against Check Republic under the UNCITRAL Arbitration Rules, stating that the elimination of the previous tariff scheme meant the removal of illegal aid in order to comply with the EU Law.[60]. Whatever the result in these procedures, since there are many similar cases pending against European states, it is likely that the conflict between laws and enforceability of awards would stay and evolve. For sure that in those cases where an arbitral award declared the re-instalment of an illegal state aid in the Commission's opinion, even though this was cancelled in a voluntarily manner by the host state, this will intervene through the institution of amicus curiae claiming that the fulfilment of the award is against Article 107 TFEU and thus the EU public policy.[61] Moreover, it is important to consider that the European Court of Justice has held that 'a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to … Article 81 EC, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy'.[62]

Having identified the main difficulties that investors bringing arbitration claims under the ECT can face, the following will identify some points that can be key to guarantee a smoother resolution of the investment-state dispute.

III. Brief practical recommendations for investors

A. Choosing the forum to arbitrate

An important decision that should be taken by any investor who wishes to start an arbitration procedure against the host state is to determine the arbitral forum in which to initiate the claim, that is, to submit the dispute to the ICSID (provided that both the host state and the investors have ratified the ICSID Convention), to

58 7 November 2014, OJ C 393, 27-40.

59 P Ortolani, 'Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance' [2015] 2015(6) Journal of International Dispute Settlement 118-135.

60 *Antaris and other v Czech Republic; Natland Investment Group and others v Czech Republic; ICW Europe Investments Ltd v Czech Republic; Voltaic Network GmbH v Czech Republic; Photovoltaic Knopf Betriebs GmbH v Czech Republic; WA Investments-Europa Nova Limited v Czech Republic.*

61 Ortolani (n60), 127.

62 Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055.

ICSID's Additional Facility, to ad hoc arbitration using the UNCITRAL Arbitration Rules or to arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce. The selection of forum can have a huge impact in the dispute at hand being necessary to bear in mind aspects such the possibility of challenging the award and its enforceability. Moreover, this selection is vital since once the forum has been elected this decision would be irrevocable because of the "for-in-the-road" principle.[63]

(i) ICSID Arbitration

The ICSID was created in 1965 by the World Bank through the signature of 'the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', the so-called Washington Convention, new arbitral forum that was created to settle disputes between investors and states. Investors can bring arbitration claims before the ICSID pursuant the Washington Convention or the ICSID's Additional Facility Rules, existing significant differences between them.[64]

Under Article 25(1) of the Washington Convention, the claim must be brought by a national of a Contracting State against another Contracting State. If this is the case, the arbitration claim will be govern by the ICSID Arbitration Rules, which complement the Washington Convention and regulates procedural aspects. As to the challenge of an award, under Article 53 of the ICSID Convention, this cannot be challenged in the courts of the seat of arbitration, providing that 'the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. In this regards, the Convention highlights the finality of the award and sets forth a limited recourse against the awards: (i) interpretation of the award when there is doubt as to the scope of it (Article 50); (ii) revision of the award if a party has discovered some fact which can affect the award (Article 51) and (iii) annulment of awards based on grounds based on abuse of process and lack of legitimacy of the procedure (Article 52).

Articles 50 and 51 do not affect the award in itself, because the interpretation or revision of the award does not affect to the effectiveness of the award, which remains in force. Similarly, the application of the annulment grounds apply restrictively, since this is one of the Convention draftsman intentions.[65] However, as pointed out by Clapham, that does not mean that the system works perfectly and that finality of the award is completely achieved.[66] There are some decisions issued as a result of an annulment claim, which undermines the finality of the award, declaring it null on the ground of a review of the merits, rather than on the restricted grounds established by Article 52. For example, in Klockner case, the "ad hoc" committee held that the award should be annulled on the basis that the tribunal

63 A Hyder Ali, 'In the Eye of the Storm: Spain's Nexus to Investment Disputes' [2013] 2013(18) Kluwer Arbitration 5-36.

64 For a detailed analysis, see C Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009) and L Reed and others *Guide to ICSID Arbitration (*Kluwer Law International, 2004).

65 E Baldwin and others, 'Limits to Enforcement of ICSID Awards' [2006] 23(1) Journal of International Arbitration 1-24.

66 Clapham (n23), 456.

had failed to apply the choice of law done by the parties and that the tribunal failed to state reasons.[67]

On the other hand, the possibilities of challenging the enforcement of the award are even more restricted. In accordance with Article 54 of the ICSID Convention, contracting parties should 'recognize an award rendered pursuant to this Convention as binding and to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State'. Consequently, as long as the host state should perform a pecuniary obligation, the enforcement cannot be thwarted by any question, including questions of public policy.[68]

By contrast, if the dispute arises between states and nationals of states that are not contracting parties of the Washington Convention or the dispute does not fall within the scope of the ISCID Convention, the parties would be able to make use of the facilities provided by the Arbitration Additional Facility Rules, which were adopted by the ICSID in 1978. These rules, similarly to the ICSID Arbitration Rules provides the possibility of interpretation and correction of the award by the Tribunal, but the main distinction is as to the recognition and enforcement of award, point that is subject to domestic rules and thus to the regime of the New York Convention if the country in which is requested the enforcement is party.[69] In other words, the recognition and enforcement of award can be denied because of the limited grounds stated in Article V, among others, that 'the recognition or enforcement of the award would be contrary to the public policy of that country' (Article V(2)(b)).

(ii) UNCITRAL Arbitration

The UNCITRAL Arbitration Rules were enacted in order to govern ad hoc arbitrations, that is, arbitration procedures that are not administered by specialist arbitral institutions. However, they can be also used in cases when the dispute is submitted to an institutions as long as the parties agree that the arbitration will be conducted pursuant to the these rules.

The UNCITRAL Rules of Arbitration are deemed as the most accurate ad hoc arbitration rules, being even more detailed that many institutional arbitration rules. For this reason they have been used in important arbitration procedures, both commercial and investor-state disputes.[70] Nevertheless, the challenge of the award and the challenge of its recognition and enforcement can arise on the basis of public policy of the host state –Article 34(2)(b)(ii)-.

(iii) The SCC

Being founded in 1917, almost one century ago, the SCC is recognised as a leading institution, particularly in investment procedures where parties are interested in keeping the confidentiality of the procedure.[71] As in the case of the UNCITRAL Arbitration Rules, the ground to challenge the award are quite limited, though the

67 Klocner Industrie-Anlagen v republic of Cameroon, ICSID Case No. ARB/81/2, 03 May 1995.

68 Schreuer (n65), 1139 and 1141.

69 A Bos and others, *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (1st edn, Martinus Nighoff Publishers 1986) 42-43.

70 K Sauvant, *Yearbook on International Investment Law & Policy* 2010-2011 (Oxford University Press 2012) 39.

71 B Bonde, '' (Globalarbitrationreview.com). <http://globalarbitrationreview.com/re-

recognition and enforceability of the award can be challenge because of public policy issues providing that the host state is a party to the New York Convention.[72]

Therefore, taking into account the special problem as to the possible contradiction between awards according compensation in favour of the investors and the state-aid EU Law (Article 107 TFEU), it is not a non-sense to assert that the best option for investor would be to select the ICSID Convention as the forum in which to arbitrate. Tough this would not avoid the intervention of the European Commission as in Micula case, this solution provides more guarantees to the investor.

(iv) Contractual devices

Due to the difficulties that investors can have in order to prove a breach of some protective principles under the ECT and the flexibility that State can have in order to adapt the regulatory framework to the changing circumstances –public interest-, it could be recommendable for investors to negotiate some type of contractual protection, such stabilisation clauses. Returning to the AES v. Hungary case, the use of this type of clause is mentioned in order to dismiss the investor claim on the ground that there was not any type of assurance by the state, which created legitimate expectations. Similarly, in Parkerings v Lithuania, the ICSID tribunal dismissed the claim against Lithuania since the investor's expectations were not based on any agreement, in the form of stabilisation clause or otherwise, and therefore the state was completely free to exercise its legislative power providing that this was done in a fair, reasonable and equitable manner.[73]

Stabilization clauses have been defined as contractual agreements between investors and host states, which are aimed to 'address the issue of changes in law in the host state during the life of the project'.[74] The main types of stabilisation clauses are: a) Freezing clauses, which freeze the law applicable at the time of entering into the contract. Some of this clauses freeze the relevant legislation while others are aimed to freeze regulation connected with particular issues. b) Economic equilibrium clauses, which do not avoid changes in the legal regime but guarantees in such a case a compensation that maintains the original economic equilibrium. c) And hybrid clauses, which leave up to the parties to determine the way to achieve the economic equilibrium –exemption from regulatory changes or compensation-.[75]

As to the rationale of these clauses, it is the management of risk derive of political, social and economic factors; however, the use of these stipulations is not achievable for anybody. Stabilization clauses are mainly used in contracts that require a huge amount of investment and become profitable over time, such energy projects which are related to public services.[76] Furthermore, the use of these stipulations is normally applied in contracts with developing countries, where there is a higher political and legal instability and where the bargaining position of the country is

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views/67/sections/233/chapters/2707/sweden/> accessed 6 August 2015.

72 Roe and other (53), 155-161.

73 *Parketings-Compagniet AS v. Lithuania,* ICSID Award Case No ARB/05/8, 14 August 2007.

74 A Shemberg, 'Stabilization Clauses and Human Rights' [2009] IFC/SRSG Research Paper <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES.> accessed 7 August 2015.

75 T Treves and others, *Foreign Investment, International Law and Common Concerns* (1st edn, Routledge Research in International Economic Law 2014) 113-114.

76 K Gehne and R Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' [2014] 1(1) Ncrr trade regulation swiss national centre of competence in research, 5.

weaker, being obliged to accept those propositions to undertake projects aimed to boost the economy and thus the public welfare.[77] Nonetheless, that does not mean that, despite the differences in the amount of risks, these clauses cannot or should not be used in cases where the host state is a developed country.

Even in developed countries can be certain risk, as it has been proved through the history and recently with the legislative changes in the renewable energy sector. Experiences like the interference in property right in the North Sea by the UK in the 1970's and the current change of policy in the renewable energy sector, chipping away any type of incentives and giving rise in extreme situations to the insolvency of investment projects, seems to be enough to consider the contractual implementation of stabilisation clauses so as to guarantee recompense for state activities that have an effect on the investment.[78]

IV. Conclusion

The leading reason why foreign investors under the circumstances described in the introduction prefer to make use of international investment arbitration in accordance with Article 26 of the ECT before recourse to national courts is mainly as a result of two factors.

Firstly, investors perceived that domestic courts are influenced by national loyalties, which are more familiar with the so-called public interest in disputes where there is involved some kind of political or social aspect. Although some commentators have raised doubt about the impartiality and independence of arbitrators, even when there are in place some arbitration rules and informal mechanisms to avoid unfair decisions, investors feel more confident with investment arbitral tribunals selected by them avoiding the shortcomings of national courts. This does not mean both that investor cannot achieve favourable judgement before national courts and arbitral tribunals do not ponder aspects of public interest. While some claims filled before national courts have succeeded, the concept of public interest is present in some awards which recognised the capacity of states to adapt the legislation to the evolving conditions. Secondly, in investment arbitration there is not an appeal mechanism against the award, feature that is viewed by investor as an advantage. To have such possibility would affect the principle of finality and increase the cost of arbitration, issue that is considered by states and investors like a burden.

Notwithstanding, investors that decide to pursue arbitration under the ECT can encounter difficulties when it comes to the outcome predictability and the recognition and enforcement of the arbitral award. As to the former inconvenience, the protection standards embedded in the ECT are ambiguous and dependent on the tribunal interpretation, which alongside the lack of cases solving investor-state energy disputes and a rule of binding precedent constitutes a real problem when it comes to the prediction of the dispute solution. In addition, taking into account that this type of investment were encouraged by legislative regimes rather than by contractual undertakings from host states the proof of any breach under the Treaty can be more difficult, being possible to justify legislative amendments on the

77 A Faruque, 'Validity and Efficacy of Stabilisation Clauses Legal protection vs Functional Value' [2006] 23(4) Journal of International Arbitration 317-336. See also, H Mann, '' (Iisd.org) <http://www.iisd.org/itn/2011/10/07/stabilization-in-investment-contracts-rethinking-the-context-reformulating-the-result/> accessed 7 August 2015.

78 M Erkan, *International Energy Investment Law: Stability Through Contractual Clauses* (1st edn, Kluwer Law International 2011) 123.

grounds of public policy as it was done in the Saluka case. With reference to the recognition and enforcement of arbitral awards, a conflict between the ECT and the EU Law emerges when the claimant investor is from another EU country, interference of laws that has motivated the intervention of the European Commission in arbitral procedures as amicus curia, being the predominant claim that the recognition and performance of the award would amount to an illegal state aid (Article 107 TFEU).

To counterbalance those pitfalls under the ECT, this article has explored the different arbitral forums available, concluding that investors should choose, when possible, ICSID Arbitration Rules before the rest of options available –ICSID Arbitration Additional Facility Rules, UNCITRAL Arbitration and the SCC-. The central ground that supports that recommendation is that the ICSID Arbitration Rules are governed by the Washington Convention, treaty that does not allow the challenge of the enforcement even when there is some question of public policy. By contrast, awards issued in one of the other arbitral forums available can be challenged on that ground pursuant to the New York Convention. Furthermore, it is suggested from the investor point of view the use of stabilization clauses, a sort of contractual device that helps to manage political, social and economic factor, making more straightforward as well the proof of any breach by the host state.

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