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Investments and Protection of the Environment: Balancing conflicting issues

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List of acronyms and abbreviations

BIT	Bilateral Investment Treaty
CSP	Concentrated Solar Power
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EU	European Union
FIT	Feed in Tariff
ICSID	International Centre for Settlement of Investment Disputes
IICD	International Institute for Sustainable Development
NAFTA	North America Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
TANAP	Trans Anatolian Pipeline
TAP	Trans Adriatic Pipeline
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization
WWF	World Wildlife Fund

Summary

Greece is a country with a relatively high energy potential. Especially its renewable energy potential is worth mentioning as the strong winds and the sunshine days are a characteristic of the region. Its oil and natural gas reserves may also be remarkable.

Greece is also a country facing a strong financial crisis. High rates of unemployment, uncertainty in the economic sector and lack of investments are some of the problems Greece has to deal with. In order to deal with the crisis and regain its credibility Greece needs to boost its economy and the best way to do it is through investments. Taking into consideration the fact that the energy sector in Greece can be further developed and invested, the investments in this sector are considered necessary.

On the other side, energy is a sensitive issue for the state. It is connected with national safety and security and that is the reason why it is in a high degree regulated from the state. In other words, the state needs to be able to control the energy sector and to intervene when necessary. Energy is also connected with public interest. Taking into consideration the fact that energy investments often cause negative effects to the natural environment and to human health, the intervention of the state becomes even more important.

This thesis refers mainly to the connection of the energy investments with the protection of the environment. The protection of the environment is an obligation for the state and belongs to public welfare interests. As such, the state has the right and at the same time is obliged to take preventive measures for its protection and to intervene in case this good is in danger. But at the same time and especially during an economic crisis the state also legislates for the boost of investments. These laws are often violating the need for environmental protection.

In the first part of this thesis the main laws regarding environmental protection and energy investments will be examined and the most famous jurisdiction of the Greek Administrative Supreme Court regarding energy investments and the protection of the environment will be presented.

In the second part of this thesis ways for the protection of foreign investments will be explained. A detailed presentation of protective clauses in international and bilateral investment treaties will follow. The link between clauses, such as fair and equitable treatment and indirect expropriation with the protection of the environment will be explained and relative tribunal decisions will be presented.

The aim of this thesis is to show that a conflict between energy investments and the protection of the environment is inevitable. But both energy investments and a clean environment are essential for humans and must coexist. The key is that investors respect the surrounding environment and through corporate social responsibility take measures for its protection. On the other side the state must regulate energy and environment sector and avoid a very strict environmentally friendly policy that exclude investors.

1. Energy investments in Greece

Greece is a country of 132 thousand square kilometers located in the south east Europe. It shares borders with Albania, North Macedonia and Bulgaria to the north and Turkey to the east. It has a population of approximately 11 million.

It is a member of the European Union since 1st January 1981 and a member of Eurozone since 1st January 2001.

Greece's economy is mainly based on wholesale and retail trade, transport, tourist accommodation and services, public administration, defense, education, human health, social work activities and real estate.[1]

Global economy and therefore Greece's economy is mainly based on energy. The energy sector contributes to economic growth in two (2) ways. Firstly, it creates jobs both in the energy industry and in other sectors of economy which are the supply chains. Secondly the energy sector functions as an "*engine of growth, as its products serve as inputs into nearly every good and service imaginable*".[2]

The states use the energy produced primary in their own country and they also import energy products in order to cover their needs. Greece's primary production of energy in 2016 was 6.772 ktoe, 3.973 ktoe of which came from solid fuels and more specifically lignite and brown coal, 179 ktoe from crude oil and petroleum products, 10 ktoe from gas, 2.501 ktoe from renewable energy and 60 ktoe from non-renewable energy. In 2016, in order to cover its energy needs, Greece imported 37.502 ktoe energy products, 32.858 ktoe of which was crude oil and petroleum products.[3]

It is clear that Greece imports the majority of the energy needed from third countries. This doesn't mean that there is no need for energy investments in the Greek

[1] https://europa.eu/european-union/about-eu/countries/member-countries/greece_en
[2] World Economic Forum, Energy for Economic Growth, Energy Vision Update 2012.
[3] Eurostat, Energy balance sheets, 2016 Date, 2018 Edition.

territory. The imported energy must be refined, transferred and distributed. This demands advanced industry and technology. Furthermore, the production of green energy is constantly raising and the possibility of exploration and exploitation of minerals and hydrocarbons is increasing. At the same time Greece is becoming a transfer country as pipelines for the transfer of natural gas cross its mainland.

2. Protection of the environment in Greece

The protection of the environment is a relatively new legal field. It has been introduced in approximately 1970s and is connected with the rapid economic growth which led to ecological problems. The first declaration of environmental law took place in 1972 in Stockholm in the framework of the United Nations Conference on the Human Environment. According to principle one (1) of the declaration "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated".*[4]

The Rio Declaration of Environment and Development followed in 1992. According to principle one (1) of this declaration *"Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".* Moreover, and according to article 10 of the declaration *"environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making*

[4] UN Documents, Gathering a body of global agreements, Declaration of the UN on the Human Environment.

information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

In 1993, article 1.11 of the Vienna Declaration and Program of Action recognized that toxic and dangerous substances and waste constitute a serious threat to the human rights of present and future generations.

"The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping.

Everyone has the right to enjoy the benefits of scientific progress and its applications. The World Conference on Human Rights notes that certain advances, notably in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individual, and calls for international cooperation to ensure that human rights and dignity are fully respected in this area of universal concern".

Some years later, in 1998, the Aarhus Convention declared the free access to environmental information, the public participation in decision-making and the right to appeal to court for / against decisions regarding environmental issues.

The European Union followed the international environmental movement and the Charter of the Fundamental Rights of the European Union issued an article for the environmental protection. According to article 37 *"a high level of environmental protection and the improvement of the quality of the environment must be integrated*

into the policies of the Union and ensured in accordance with the principle of sustainable development". This article refers to national policies of member states, also refers to articles 2, 6 and 191 of the Treaty of the Functioning of the European Union. According to this article:[5]

"- preserving, protecting and improving the quality of the environment,

- protecting human health,

- prudent and rational utilization of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Union policy on the environment shall aim at a high level of protection of the environment, taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principles and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonization measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,

- environmental conditions in the various regions of the Union,

- the potential benefits and costs of action or lack of action,

- the economic and social development of the Union as a whole and the balanced development of its regions.

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international

[5] Article 191TFEU.

organizations. The arrangements for Union cooperation may be the subject of agreements between the Union and the parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

The Greek Constitution of 1975 did not contain a definite declaration of a right to a clean environment but it recognized the obligation of the State to protect the environment. Today, after the amendment of article 24 of the Greek Constitution in 2001, the protection of the environment is an obligation of the State and a right of everyone.

"*The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment. Matters pertaining to the protection of forests and forest expanses in general shall be regulated by law. Alteration of the use of state forests and state forest expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy.*

The master plan of the country, and the arrangement, development, urbanization and expansion of towns and residential areas in general, shall be under the regulatory authority and the control of the State, in the aim of serving the functionality and the development of settlements and of securing the best possible living conditions.

For the purpose of designating an area as residential and of activating its urbanization, properties included therein must participate, without compensation from the respective agencies, in the disposal of land necessary for the construction of roads, squares and public utility areas in general, and contribute toward the expenses for the execution of the basic public urban works, as specified by law.

The law may provide for the participation of property owners of an area designated as residential in the development and general accommodation of that area, on the basis of an approved town plan, in exchange for real estate or apartments of equal value in the parts of such areas that shall finally be designated as suitable for construction or in buildings of the same area.

The provisions of the preceding paragraphs shall also be applicable in the rehabilitation of existing residential areas. Spaces remaining free after rehabilitation shall be allotted to the creation of common utility areas or shall be sold to cover expenses incurred for the rehabilitation, as specified by law.

Monuments and historic areas and elements shall be under the protection of the State. A law shall provide for measures restrictive of private ownership deemed necessary for protection thereof, as well as for the manner and the kind of compensation payable to owners."

According to the above definition, environment is the natural ecosystems and the technical ones, such as agricultural areas. Other Greek laws have defined the environment as the land, the sea and the air that surrounds the man, including the fauna and the flora and the natural resources.[6]

Article 24 is included in the chapter "individual and public rights" of the Greek Constitution, it is binding and public administration, courts and the legislator must obey to it. The public administration must refrain from any act that has negative effects for the environment and at the same time has to take preventive and repressive measures for the protection of the environment. So the environmental protection in the Greek Constitution is an individual right that includes the claim of individuals that the state does not harm the environment, a public right, meaning that the state must legislate and take measures for the protection of the environment and a political right, that includes the right of everyone to participate in decision-making

[6] Article 1 par. 5 of Greek law 360/1976, article 1 of Greek law 1327/1983, presidential decree 1180/1991, presidential decree 293/1981.

regarding environmental issues.[7] In other words, the right to a clean environment is immediately connected with the protection of human nature, the right to life, freedom, equality and respect to human dignity and nobody can undermine it or exclude it from the Greek Constitution.

Furthermore, it is important to notice that paragraph 1 of article 2 of the Greek Constitution includes the preventive principle, which is defined in article 191 of the TFEU and is recognized as a basic rule for the environmental protection. According to this rule preventive measures for the protection of the environment must be taken when the environmental harm is irreparable or very difficult to be repaired.

The precautionary principle is also very important for the environmental protection. According to it, preventive measures for the protection of the environment must be taken even if the environmental risks are potential and cannot be quantified.

The precautionary principle origins from German environmental law. Before that no clear distinction was made between prevention of regular risks that science can quantify and precaution against potential risks that science cannot yet quantify.
The Greek Constitution also protects the forests by giving a special definition of it. The protection refers to both public and private forests and the change of its green form is only permitted under five (5) prerequisites. The transformation of the forest must be defined by a law, the need for the transformation has to be justified as public interest, it has to be the only solution and the loss of vegetation the minor possible. Except of the above, in case of reforestation no intervention is allowed. This high protection of areas under reforestation finds its legal base in article 117 paragraph 3 of the Greek Constitution.

Important to notice is also the sustainable development. It belongs to the main areas of European environmental policy and combines the protection of the environment

[7] Σιούτη Γλυκερία, *Εγχειρίδιο δικαίου περιβάλλοντος*, 2η έκδοση, 2011, σελίδες 32-39 (Siouti Glykeria, Environmental law, 2nd edition, 2011, pages 32-39).

with economic and social growth. In other words, the above mentioned three (3) elements ensure balance and a healthy development.

Sustainability was first introduced in the 16th century. In 1987 sustainable development was defined as "*a development that meets the needs of the present without compromising the ability of future generations to meet their own needs".*[8] In 1999 sustainable development became a founding principle of the European Union and was referred in the Treaty of Amsterdam.[9] The Nice Treaty repeated the wording of the Treaty of Amsterdam. In Lisbon Treaty sustainable development of Europe and sustainable development of earth were clearly mentioned as goals of the European Union. Article 3 of the TEU states that "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance… In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, … as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*".

The term sustainable development has also been introduced in article 37 of the European Charter of Fundamental Rights, which states that a high level of protection and improvement of the quality of the environment must be integrated into the European Unions' policies and be ensured in accordance with the principles of sustainable development.

3. Planning and siting of energy investments

Articles 24, 79, paragraph 8 and 106, paragraph 1 of the Greek Constitution refer to urban planning and general land planning. According to them, the state is

[8] Brundland Report, *Our Common Future*, 1987, page 15.

[9] In article 3 of the Treaty of Amsterdam the expression "*balanced and sustainable*" has been used and put it into the category of EU goals.

responsible for the land and urban planning, which are prerequisites for the sustainable development.

The 360/1976 law was introduced in compliance with the above mentioned Constitutional provisions. This law ordered the creation of a national land planning, of district plans and special plans. It was never implemented. In 1985 and in 1999 the regulatory plans respectively for Athens and Thessaloniki were passed. According to them, there are three (3) stages for planning, the general, the special and the district planning. The general planning sets the rules for the structure of the national land for the next fifteen (15) years. The special plans complete and make more specific the general planning in special areas of the national territory. In other words, they set prerequisites for the planning of specific industries. District plans are set for each administrative district of the country and aim to the sustainable development of it. They complete the previous two (2) stages of planning.

In 2008 the first General Land Planning of Greece was adopted. This planning is binding and sets general governmental goals.

The 4269/2014 law was passed in 2014 and was later amended by law 4447/2016. Neither of these laws has ever been applied. The 4447/2016 law introduces the strategic and regulative planning. The strategic sets the targets for the planning of the land and the general directions for the landform in national and district level. The regulative planning sets rules for the use and construction of areas which are within and out of urban planning. Strategic planning includes national land plans and district plans. Regulative planning includes local and special plans and town planning. The 4447/2016 law also changes the General Land Planning to General Land Planning Strategy.

Regarding the siting of renewable energy projects, it was issued after the on the spot examination and on the spot planning. This method was legal until a general land planning for renewable energy projects was issued. Later on, the Greek Supreme Administrative Court ruled that on the spot planning is legal only if a study on the

energy needs of the region and on the effects of the renewable energy project in the district is preceded. The Court also said that the renewable energy land planning must be finished within a reasonable time period.

In 2008 the Special Land Planning for Renewable Energy Projects was approved. It consists of seven (7) chapters. It starts with the description of the targets of the plan and gives the general definitions. The main target of the plan is the right siting of renewable energy projects so as the most suitable areas are chosen and the harmonically coexistence with other projects is taken into consideration. In articles four (4) to eleven (11) the prerequisites for the siting of wind farms are given. The third (3rd) chapter of the plan is devoted to the siting of small hydros and chapter four (4) to the siting of solar energy projects, biomass projects and geothermal energy projects.

No special land planning exists for oil, natural gas and lignite energy projects. Their licensing is given after the examination of the existing different plans and of course after the examination of the local conditions of the region where it is planned to be sited.

4. Environmental policy in economic crisis period

Investments, even when organized with a rational way, aim to profit. For this reason and in order to balance the negative effects of a policy aiming only to profit, state interference is necessary. In other words, measures that create obstacles to an over limits investment policy are essential. Such measures are often connected with the protection of the environment and more specific to the precautionary environmental control, to the control that takes place before the licensing of a project.

Targets of the public and social interest are both environmental protection and economic growth. These two (2) are connected to each other and shall be both accomplished in the frame of sustainable development. So it is essential that all three (3) elements of sustainable development are met and balanced all the time but

especially during an economic crisis. These three (3) elements are environmental protection, economic growth and social cohesion.

In Greece most of the measures aiming to the protection of the environment have a defensive character. They set rules and procedures, which vary from period to period and they target in avoiding environmental harm. There are few measures which regard environment as a factor that can increase state income.

An economic crisis affects the public policy in two (2) ways. First it leads to a transfer of financial resources which were planned to be given for the environmental protection to the tackling of other needs. Secondly during an economic crisis, public policy targets to the boost of the investments so prohibitions and other limitations set for the protection of the environment are set aside. Furthermore, during an economic crisis, investing on energy sector is promoted leading to the easier exploitation of natural resources.

During 1980, European Union started to produce jurisdiction for the protection of the environment, and especially the natural environment. This jurisdiction was developed during 1990s and was adopted by the Greek legal system. In some cases, Greek legislator introduced additional and stricter measures for the protection of the environment. These measures where completed by the jurisdiction of Greek Conseil d' Etat.

5. Boost of investments during economic crisis

The protection of the environment stands between ecological interests and economic interests. In other words, shall we protect the environment and promote an ecological policy against economic growth or shall we boost economic growth by destroying the environment? The common sense is that the environmental protection is the prerequisite for economic growth. Yet, things get more complicated when the state economy is not growing and social issues such as unemployment are raising. During the Greek economic crisis the legislator tried to boost and increase investments in Greek territory by introducing some specific laws.

In 2010, and during the hard economic crisis in Greece, "strategic investment" was introduced in the Greek legal system. According to article 24 of law 3894/2010, special planning for strategic investments is necessary to be made for the increase of investments in private property. This planning is not a part of the general and above-mentioned planning and aims to boost the state economy. The planning combines the investment with the specific land where it will be sited.[10]

In 2011, law 3986/2011 introduced rules for the use of land belonging to the property of the state. According to this law, any profit from this utilization is to be given for the payback of the national dept. It is interesting to note that, according to this law, the use of land and property situated in special protection areas, such as national preserve parks, significant protected wetlands, protected natural monuments etc., is not permitted. The use of property in regions of special protection, such as in archaeological sites, in natural parks etc. is permitted only under the specific terms and provisions of the relevant laws.[11] The same for property and land within a zone for the protection of wild birds.[12]

6. Investments in Renewable energy

Greece is a country with a significant renewable energy generation potential. Due to its climate, which is characterized by many days of sunshine and strong winds, energy investments in renewable energy, such as wind farms, solar-thermal power plants, small hydroelectric plants etc. are increasing. The interest of Greek and foreign investors in either big or small renewable energy investments in Greece is a fact and such projects are multiplying year after year.

Although renewable energy is an environmental friendly form of energy, many non-governmental organizations and local authorities complain for its negative effects to the environment and are against the construction of renewable energy power plants.

[10] Νόμος και Φύση, *Οικονομική κρίση και προστασία του φυσικού περιβάλλοντος* (Nomos+Physis, *Economical crisis and protection of the environment)*.
[11] Νόμος και Φύση, *Οικονομική κρίση και προστασία του φυσικού περιβάλλοντος* (Nomos+Physis, *Economical crisis and protection of the environment*).
[12] Directive 79/409/EEC.

A description on how Greek administrative courts deal with such cases and what has changed during the economic crisis will follow.

The first case is the construction of renewable energy projects in forests. Forests and forestlands are special ecosystems, which are in need of special protection. According to article 24 of the 1975 Greek Constitution a forest or a forestland cannot change its character and become a non-forestland. This protection was very strict regarding the private forests where the change of the forest character was not allowed at all. Regarding the forests owned by the state, this protection was not so strict. Article 24 of the Greek Constitution allowed the change of the character of a forest only for purposes of public interest and for the promotion of the national economy. And in such a case only a restricted destruction is allowed so as the character of a forest will not totally change. The Greek Supreme Administrative Court set more rules regarding the change of the character of a forest owned by the state. According to these rules, the destruction is allowed only when passed by law, only for the fulfillment of a great, serious public purpose, only when the destruction is the only way to fulfill such a purpose and on the condition that the loss of the flora is the smallest possible. In 2001 with the review of the Greek Constitution, article 24 changed and as a result the same laws exist for all private and public forests. From 2001 until today the change of the character of either a private forest or a forest owned by the state is subject to the same rules mentioned above. The Greek Conseil d' Etat has underlined that in many cases that followed (2089/2004, 2763/2006, 3588/2007, 3559/2008, 2517/2009, 2/2010, 2971/2010 etc). In other words, from 2001 up until today, the destruction of a forest can only take place if a public purpose exists, if the loss of flora is the only way to satisfy the public purpose and if the loss is the smallest possible.

In case of destruction of a forest from fire, the immediate characterization of this area as a reforestation area is obligatory.[13] When an area is characterized as a reforestation area, access to the forest is denied and the use of the forest for any

[13] Σιούτη Γλυκερία, *Εγχειρίδιο δικαίου περιβάλλοντος*, 2η έκδοση, 2011, σελίδες 74-78 (Siouti Glykeria, Environmental law, 2nd edition, 2011, pages 74-78).

reason is not allowed. The use is also not allowed for public purposes and no construction activities can take place.[14]

Later in 2011 the Greek Supreme Administrative Court took an important decision regarding the construction of wind farms in areas characterized as reforestation areas. In 2474/2011[15] decision the Greek Conseil d' Etat ruled that in case of fire the construction of a wind farm can only take place in the specific area of the forest where the wind turbines were planned to be established only when the license for it was given before the fire and even if the forest was characterized as a reforested land. The rest of the area will be left free in order to be reforested. The reason for the allowance of the construction of wind farms in reforested areas is that renewable energy is a public purpose interest for the state and possible postponing of the project would mean its cancellation. This decision affects only wind farms but it may be repeated in similar cases regarding solar power plants or other forms of renewable energy projects.

The second area of interest, regarding investments in renewable energy sources and especially investments in wind farms, is the protection of birds. In 2008 the Special Land Use Planning and Sustainable Development Plan for Renewable Sources of Energy was approved. This plan divides Greek territory in four (4) categories regarding its wind potential. The main land is furthermore divided to areas of wind appropriateness and areas of wind priority. The first category has a relatively good wind potential and the second one a really good wind potential. In this same plan it is mentioned that the construction of wind farms in absolute nature protected areas, in wetlands characterized as such from Ramsar Convection, in national parks, in aesthetic forests and in cultural heritage monuments is not allowed.

This plan was presented to the Greek Administrative Supreme Court with the request to be set aside as it was against the EU Directives 79/409 and 92/43, which protect the birds. According to these Directives each state must create zones and specific zones for the protection of specific bird species. Also, according to the above

[14] Hellenic Counsil of State 89/1981, 3053/1981, 3277/1986, 2778/1988, 664/1990.
[15] Hellenic Counsil of State 2474/2011, reason 14, Hellenic Counsil of State 2499/2012, reason 14.

mentioned Directives the construction of a wind farm in areas characterized as NATURA 2000 or as a zone for the protection of birds can take place only after studying each case. In other words, wind turbines and birds can coexist only when a specific study concerning the effects of the wind farm to the natural habitat of birds in the specific area has been concluded. The same study must be done prior to the construction of wind farms in areas characterized as significant areas for the birds. This last requirement was not included in the Special Land Use Planning and Sustainable Development Plan for Renewable Sources of Energy and that is the reason why it was presented to the Court. The Greek Conseil d' Etat confirmed that such a study is necessary also for the construction of wind farms in areas characterized as significant areas for the birds and set a two (2) month deadline to the Greek Government to include such a provision to the Plan.[1617]

Regarding the protection of the birds, the Greek Conseil d' Etat has also ruled that the environmental assessment study must include a preventive study for the total possible negative effects on the birds in case that the wind farm is planned in an area where other wind farms already exist. If such a study is not included in the environmental assessment study, the construction of the project cannot begin.[18]

Another area of interest is the construction of renewable energy projects in areas characterized as NATURA 2000 areas. According to the EU Directives 79/409 and 92/43 this issue is considered on a case to case basis after examining the environmental impact assessment of each project. In any case the renewable energy project must not cause any harm to protected species or to important ecosystems, either when it is in a protected area, nearby or outside of it.[19]

[16] Hellenic Counsil of State 1422/2013.
[17] Σακελλαροπούλου Αικ., Φοβάκης Αντ., *Νομολογία ΣτΕ για τα ειδικά πλαίσια χωροταξικού σχεδιαμού* (Sakellaropoulou Aik., Fovakis Ant., *Hellenic Counsil's of State Jurisdiction on Special Land Use Planning*).
[18] Hellenic Counsil of State 2306/2016, reason 8.
[19] Hellenic Counsil of State 2306/2016, reason 5, Hellenic Counsil of State 1422/2013, 2816/2013, 711/2014, 807/2014, 2741/2014.

Finally, it is important to mention the jurisdiction of the Greek Conseil d' Etat on urban planning issues. In this case the Court ruled for the first time in 1977[20] that no constitutional provision sets as prerequisite for the construction of a shipyard, the previous approval of a general urban-planning study. Such a requirement would be an obstacle to the economic development of the country as no investment project could start.

Later, in 1986[21], the Court changed its aforementioned jurisdiction and ruled that it is an obligation for the State to make an urban-planning study. This obligation clearly comes from article 24 of the Greek Constitution. But until this planning is finished and approved the on spot examination of the siting of the project is allowed.

Some years later, in 1993,[22] the Court ruled that on the spot urban-planning is against the Constitution. The State must submit a general urban planning study and before that no investment plan on the Greek territory will be approved.

In 1994,[23] the Court moved a step forward and ruled that until the urban planning study for renewable sources of energy is ready, the licensing of such projects may be given only under four (4) provisions. First of all, the energy needs of the region must be taken into consideration. Secondly, the negative effects of the operation of the project to the region must be examined. Thirdly, the total number of the energy projects (in this case wind farms) established in the district must be defined and last the carrying capacity of the environment of the region must also be set and respected.

7. Investments in the electricity sector

Acheloos river and its diversion was a complicated case for which the Greek Conseil d' Etat ruled many times. In 1964 the state decided to totally divert Acheloos river.

[20] Hellenic Counsil of State 810/1977.
[21] Hellenic Counsil of State 695/1986.
[22] Hellenic Counsil of State 304/1993, reason 9.
[23] Hellenic Counsil of State 2569/2004, reason 10.

The full scheme called for the construction of a major diversion channel, two (2) tunnels, a water intake system, sluice gates and surge shafts. Additional to these, the project would also incorporate a hydroelectric project, with a series of large dams to be built by Public Power Corporation. Moreover, service tunnels and access roads were considered necessary. The purpose was to produce hydraulic energy and ensure water supply to Thessaly.

In 1992 the first major buildings, a construction of an 18-kilometer long tunnel to direct water to Thessaly, with a series of dams and water reservoirs along the way were approved by the Ministers of Finance, Agriculture, Environment, Urban-Planning, Public Works, Industry, Energy and Technology. Local communities and NGOs complained and opposed to this diversion. They brought the case to the Greek Conseil d' Etat which decided[24] that the project could not be continued unless a thorough study of the environmental repercussions of the proposed project took place. In other words, the Greek Conseil d' Etat said that according to article 24 of the Greek Constitution, prior to any intervention in a natural environment, a thorough study of the possible environmental repercussions is necessary. Separate and individual studies on different environmental repercussions of different smaller projects which all together endorse the main project are not enough for the licensing of the project.

In 1995 the project was again resurrected by the same ministers and the same plaintiffs appealed to the court. This time the Greek Conseil d' Etat decided that[25], although the study of the environmental impacts of the project was adequate, alternative scenarios for the construction, magnitude and composition of the project were not taken into consideration. Such alternative plans could prevent the destruction of cultural monuments in the region, such as the Monastery of Saint George Myrofyllou. The Court therefore ruled against the undertaking on the grounds that it violated international legislation regarding the preservation of cultural heritage (Granada Convention). The Court also found that the project violated Greek and EU

[24] Hellenic Counsil of State 2760/1994.
[25] Hellenic Counsil of State 3478/2000.

legislation regarding water management. It concluded that the environmental impact assessment of the project did not sufficiently examine the planning of the location of the construction of the dams etc.

Following this court decision in 2002, the Greek Minister of Environment and Public Works ordered a supplementary study in order to facilitate the preservation of the aforementioned monastery. Moreover, the Minister called for an updated general overview of the project in order to re ensure that the project was economically sustainable. In 2005 the Court once again ruled[26] against the diversion of Acheloos River based on the fact that the project opposed both EU policies on water management and national law 1735/1987 for the "Management of Water Resources". The Greek Conseil d' Etat ruled that the protection of water resources derives from article 24 of the Greek Constitution and therefore environmental planning is considered necessary prior to any management of water resources. Furthermore, and according to national law 1735/1987, water resources are limited and that is the reason why prior to any action for their management a programming and licensing procedure must be followed. The Court also ruled that according to EU Directive 2000/60/EP, sustainable management of water supplies is done in each water catchment area and in any case underground water and nearby ecosystems and wetlands must be equally protected. In this case water management of Achellos River was not included in any national program for the development of water resources and therefore the licensing of the project was not legal.

These continuing negative rulings did not, however, deter the Greek Government from trying to restart the project in 2006 as "a project of national interest" and to approve environmental assessment study by law. The Court in this case ruled that[27], prior to the approval of environmental assessment planning, a public deliberation is necessary. In this case, the planning was approved by law so the participation of the public to the procedure was not possible and therefore the project was not in compliance with sustainable development. Before this ruling the Greek Conseil d'

[26] Hellenic Counsil of State 1688/2005.
[27] Hellenic Counsil of State 3053/2009.

Etat sent a request to the Court of Justice of the European Union (ECJ) in Luxembourg concerning the project's legality. The request included fourteen (14) questions concerning issues such as whether the Greek laws are in accordance with European legislation for the exploitation and protection of water resources and the construction of projects in protected areas (NATURA 2000), whether the approval of such a project is possible before the final approval of water management plan, whether the diversion of a river and the transfer of water from one catchment area to another is in accordance with EU law and whether it is legal when it is planned for irrigation purposes or production of energy purposes.

While waiting for the ruling of the ECJ, Greek WWF issued a request for the suspension of the project so that no negative effects to the environment will be caused. In 2010 the Suspension Committee of the Greek Conseil d' Etat accepted the request of WWF and ordered[28] the ending of all construction activities, the absence from any act that targets to the completion and operation of the project and the stop of the operation of the already finished projects. Later in 2010 the Greek Government asked the Court to allow the maintenance of one of the tunnels as it was in danger of major harm. The Court rejected the request and all operations in Acheloos River were stopped.

In September 2012 the ECJ ruled (C-43-2010) that the project does not violate European laws. It is also important to note that ECJ claimed that the approval of a project can be given before the water management plan is finished. It also said that the diversion of a river is legal when it is done for irrigation purposes or for production of energy purposes. The Directive for NATURA 2000 does not prohibit the diversion of a natural river ecosystem to another form.

Finally, in 2014 the Greek Conseil d' Etat issued a decision (26/2014) against the proposed project. According to this decision, the project violated sustainability principles and was negatively impacting the environment. The Court claimed that the project violated the Convention for the protection of architectural heritage of Europe

[28] Hellenic Counsil of State 141/2010.

as it affected important cultural artifacts, article 24 of the Greek Constitution, the EU Directive 85/337/EEC and the EU Directive 92/43/EC. In other words, the Greek Court supported that the whole project of the diversion of Achellos river is against the principle of sustainable development and cannot be continued.

8. Investments in natural gas

The Trans Adriatic Pipeline (TAP) is a natural gas pipeline designed to bring Caspian natural gas to Europe. It starts at the border of Greece and Turkey, where it connects with the Trans Anatolian Pipeline (TANAP), it crosses Greece, Albania and the Adriatic Sea to southern Italy where it connects to the Italian gas transportation grid. Once operational, TAP will provide transportation capacity that enables interested parties to market their gas on the European markets.

In 2014 the Greek Minister of Environment approved the environmental assessment plan for the construction of the TAP in the Greek territory. Municipalities affected asked for the cancellation of the project due to its negative effects on the environment and human health. The Greek Administrative Supreme Court ruled[29] that this project is of a strategic interest to the State as it boosts energy security and diversification in Europe, it brings profit and energy investments. Furthermore, and according to its environmental assessment plan, it is designed in a way that limits any negative effect on the environment. For 300 Km it runs parallel to an already existed natural gas pipeline and for another 180 km through a rural area. When in rural area the working zone around the pipeline must be 38 m, 16 m in each side. When in protected areas, such as forests, the working zone around the pipeline must be 28 m, 14 m in each side. When in high altitudes the working zone around the pipeline must be 18 m, 9 m in each side. The Greek Court rejected all the claims regarding extreme harm to forests, to nearby protected areas, to fauna and to the rural areas. Moreover, the construction of natural gas pipelines of strategic interest to the country is allowed in areas of agricultural land of high productivity and is rightfully planned in the environmental assessment plan. The possible harm to areas

[29] Hellenic Counsil of State 1362/2018.

neighboring to the pipeline, such as estuaries, areas with protected species, NATURA 2000 areas etc. are within the scope of the environmental assessment plan and possible solutions are recommended. Furthermore, the fact that along with the environmental assessment plan no characterization of forest land was submitted does not affect the environmental assessment plan as such a characterization can be submitted after the technical studies. Also, a variety of claims regarding the protection of forests were rejected because all negative effects were taken into consideration, were limited to the smallest amount possible and all possible solutions were given (the loss of flora would be counterbalanced by the planting in another area). It is also interesting to note that claims regarding the characterized as NATURA 2000 areas were rejected as these areas were not affected from the pipeline.

To sum up the Greek Conseil d' Etat rejected all claims for the cancellation of the construction of the Trans Adriatic Pipeline. The Court recognized the significance of the project to the Greek economy and ensured that the environmental assessment plan of the project was complete and included all the necessary studies and solutions for the best possible integration of the pipeline to the local environment.

Another interesting Court ruling regarding production of energy from the burning of natural gas is 2935/2016 decision of the Greek Conseil d' Etat. In this ruling the Court rejected the cancellation of the production license for an electric power plant in Attica. The power plant is not nearby the ecosystem of "Ormos Bourkariou" and it is impossible to affect it as it will not pour any liquids to the sea. Furthermore, cooling machines will be established to the power plant so as to avoid the heating of the sea. Moreover, the urban planning of Athens does not forbid the establishment of electric power plants. On the contrary it promotes energy planning that excludes fuels coming from lignite and oil. In other words, the establishment of a natural gas power plant in Attica region is not forbidden from the urban planning of Athens.

Decision 102/2018 of the Greek Conseil d' Etat is similar to the above mentioned. In this case an oil power plant was converted to a natural gas power plant in order to

provide energy for the production of aluminium. The plaintiffs again claimed that these power plants would cause environmental harm to the sea as a large quantity of used sea water in high temperature would be poured back into the sea. The Court rejected these claims because according to the environmental assessment plan the temperature of the water when returned to the sea would be to a normal temperature. Furthermore, the environmental assessment plan included specific measures for the protection of the sea ecosystem.

9. Protection of the foreign investors

From the above mentioned it becomes clear that the investor's rights in Greece are not absolute but often need to be balanced with public policy objectives such as environmental concerns.

In order to better understand this, we have to analyze the seriousness of energy investments in a country. Energy is vital for the economic and social development of a country. Without energy the industry cannot operate, transportation of goods and humans is not possible and human rights are violated. Energy is also important for the sovereignty and the power of a State. It is strongly linked with national safety and independency and that is the reason why states try to exploit energy from their territories and limit the energy imports from third countries. Furthermore, energy investments are very crucial for the State as they often affect the State's permanent sovereignty over natural resources[30] and for this reason the State regulates and intervenes more often in energy sector than in other sectors of the economy. Energy sector used to be fully controlled by companies owned by the State. This was the best way for each government to ensure energy efficiency and safety, to always

[30] The General Assembly adopted resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources" on 14 December 1962. The resolution had resulted from the General Assembly's focus on, firstly, the promotion and financing of economic development in under-developed countries and, secondly, in connection with the right of peoples to self-determination in the draft international covenants on human rights. Resolution 1803 (XVII) provides that States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter of the United Nations and the principles contained in the resolution. These principles are set out in eight articles concerning, *inter alia*, the exploration, development and disposition of natural resources, nationalization and expropriation, foreign investment, the sharing of profits, and other related issues.

have control on energy issues and to avoid risks. Nowadays, and according to the liberalization of the energy market in Greece and in all European Countries most of the energy activities and for coming investments have been transferred or are to be transferred to the private sector. This means that states try to maintain control over energy through other ways, such as by passing laws and intervening when necessary.

On the other side, energy investments, either if it is a small solar power plant or an investment in oil drilling, are very profitable investments. Private companies try to gain control on such investments and exploit the energy often without caring about the environment and the possible negative effects on it. A private investment may sometimes cause harm to the nature but also to human rights and to the rights of the habitants living near the energy project (harm of their health).

From the aforementioned it becomes clear that the energy sector is a field of battle between private interests and interests of the state. The balancing of these interests is often difficult to be achieved. It can occur as a respect of the human rights, a respect of environmental laws, a respect to sustainable development, a hearing of the local people and an efficient way to serve justice. This balancing is also a challenge for the international community as it has to draw the best strategy for a foreign investments policy in the energy sector.

Useful tools for the balancing of conflicting issues in the energy sector are also the international investment treaties[31] and the bilateral investment treaties that guarantee to the foreign investors[32] a fair and equitable treatment in the foreign land, a protection in case of expropriation, the right to resolve any disputes through arbitration etc. Except of a variety of bilateral investment treaties, the role of the

[31] Investment treaties emerged with the signing of the first Bilateral Investment Treaty (BIT) between Germany and Pakistan in 1957. Since then they became very popular as they create insurance for private investments mainly in developing states and as they are linked with other elements of globalization, such as free trade etc.

[32] According to most foreign investment treaties a foreign investor is a natural or juridical person of one contracting party that has made an investment in the territory of the other. Some agreements broaden that definition further by stating that an investor may include those that have not yet established an actual investment in the host country but are seeking to do so.

Energy Charter Treaty is very important, independently of the fact that important oil producing countries, such as the Russian Federation[33] and Norway have not signed this treaty.

10. International Investment Treaties and protection of the environment

It is interesting to consider whether international investment treaties refer to the protection of the environment. An OECD survey[34] examined the use of references to environmental concerns in international investment agreements and more specific the extend, the kind and the frequency of such references. The survey used a sample of 1.623 international investment agreements signed by 49 countries and 1593 bilateral investment treaties. According to the findings of this survey, 8,2% of the international investment agreements signed and 6,5% of the bilateral investment agreements signed contained a reference to environmental concerns. The environmental language in treaties tend, however, to become more common. Moreover, the practices of each country regarding the environmental language in these treaties vary a lot. The provisions in international and bilateral treaties are distinguished in seven (7) categories. First of all, the general language in preambles, then not lowering environmental standards in order to attract investment, general right to regulate language or reserving environmental policy space, right to regulate in relation to specific treaty provisions, recourse to experts in dispute resolution and intergovernmental consultation on environmental matters.

Regarding the environmental language used in the preambles of international investment treaties it is interesting to note that it is often used as a guide for the understanding of the object and the purpose of the treaty, which is the protection of foreign investments. Furthermore, even when the protection of the environment and

[33] The Russian Federation signed in 1991 the European Energy Charter, a political declaration on the development of multilateral international cooperation in the energy sector. In 1994 followed the signing of the ECT and the ECT Protocol. The ECT entered into force in 1998 but the Russian Federation never ratified the document. In 2009 Russia terminated the provisional application and stated its intent not to become an ECT contracting party.

[34] K. Gordon & J. Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers in International Investment, No 2011/1, 2011.

the promotion of sustainable development is mentioned in the preambles, these provisions do not create rights or obligations for the states and the investors. The preamble of a treaty is used only as a tool for the interpretation of the treaty[35]. For example, the WTO Appellate Body's decision in U.S.- Shrimp case interpreted the term "exhaustible natural resources" under article XX (g) GATT and said that "*the words of Article XX (g), 'exhaustible natural resources', were actually crafted more that 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement – which informs not only the GATT 1994 but also the other covered agreements – explicitly acknowledged 'the objective of sustainable development'*".[36] In other words, the preamble to a treaty is often instructive for the determination of its object and purpose and as the WTO Appellate Body said in U.S. – Shrimp case "*the specific language of the preamble to the WTO Agreement gives color, texture and shading to the rights and obligations of Members under the WTO Agreement, generally, and under the GATT 1994, in particular*".[37]

Countries that sign international investment treaties can, in many other ways, protect their rights and promote their interests. First of all, they can choose to sign the international investment treaty for the potential investors that seek to make investments in the country. In this case states are bind only for the pre-establishment stage of the foreign investment and any clause in the investment treaty refers only to the pre establishment stage. In such a way states can choose to regulate foreign investors at the access stage and deny entry to special categories of investors, set specific licensing requirements, tax arrangements, control requirements,

[35] Vienna Convention on the Law of Treaties 1155 U.N.T.S 331,8 I.L.M 679, 1969, article 31: "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the* purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preambles and annexes".

[36] United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, 1998.

[37] United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, 1998.

requirements of local collaboration and requirements related to the protection of the environment.[38] An often used in international investment treaties point that regulates the admission of foreign investors to the host state is the clause that reserves that the protection of foreign investors is made "in accordance with domestic law". This clause gives an explicit entry point to the regulation of externalities and carves out space for human rights and environmental considerations. However, this clause is often vague and not useful for the balancing of the investment protection regime. It is unclear which domestic laws have to be respected at the time the investment is made.

Also, after their establishment they can agree that the rules of the treaty will not be valid in special occasions such as in case of national security threat. Furthermore, they can agree to fully respect some special clauses of the treaty which will be described further.

The respect clause that may be included in an international investment treaty means that the contracting parties are obliged to respect any other contractual agreement that may exist and is relevant to the foreign investment. In this way this contractual agreement becomes an international obligation between the contracting parties and any conflict regarding it is resolved according to the terms of the investment treaty.

The fair and equitable treatment clause is met in almost all investment treaties and has been continually interpreted in a variety of different ways from tribunal courts. This leads to an ongoing uncertainty for both host governments and investors. For example, the notion that the fair and equitable treatment clause protects investors' legitimate expectations, has been repeated in many arbitral decisions. But in Saluka Investments BV v. Czech Republic case the tribunal said that the investors' expectations must be reasonable and legitimate *"in light of the circumstances prevailing in the host country*".[39] Another tribunal in Parkerings - Compagniet AS v. Lithuania decided that it was not legitimate for an investor to expect Lithuania, a

[38] Jorge E. Vinuales, *International Investment Law and Natural Resource Governance*, The E15 Group on Trade and Investment in Ectractive Industries, Think Piece, September 2015, page 6.
[39] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, Mar. 17, 2006, par. 304-05.

country facing significant regulatory changes as part of the process of EU accession, to remain at a legislative standstill.[40] To conclude there is a wide range of views on what is meant by investment treaty commitments to fair and equitable treatment and this creates uncertainty especially in the energy sector where the policies change very fast.

Expropriation clause refers to direct or indirect expropriation. An indirect expropriation is understood as an action of the state which takes control of the investment, but not through a direct taking of the property. In other words, the property still belongs to the investor but the state controls the projects and gains its profit. In the energy sector, states regulate a lot and may often proceed to indirect expropriations.

National treatment clause is also found in most of international investment treaties and means that the host state must treat the foreign investor no less favorably than it would treat domestic investors. Some treaties also specify that in order for the investors to be compared, they have to be "*in like circumstances*". But sometimes tribunals have adopted different views on what "*in like circumstances"* means and have even grouped investors belonging in completely different economic sectors and activities in the same category.

From the above mentioned it becomes clear that the protection of the environment and the protection of the rights of foreign investors from national policies aiming to the protection of the environment can be achieved through international investment treaties. In the paragraphs below details on how clauses in such treaties result in the protection of the investors will be given.

11. Fair and equitable treatment and protection of the environment.

Most of the international investment treaties include a provision for the fair and equitable treatment of the foreign investments. This clause is the main legal claim in

[40] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, Sept. 11, 2007, par. 335.

disputes between host state and the investor and has been interpreted in a variety of different ways from tribunal courts. Its content varies from an international investment treaty to another and it depends on each definition. According to Muchlinski "*the concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign…* ".[41] Others call fair and equitable treatment clause as a "*catch-all*" clause as it has emerged as a prominent feature in investors' actions against host states and has in many cases allowed investors to succeed where their expropriation, non-discrimination and other claims have failed. Many tribunals have considered fair and equitable treatment as an obligation of the host state to act in a rightful and transparent way, to respect the legitimate expectations of the investor, to avoid any abuse of the investor's rights or any discrimination.[42]

Fair and equitable treatment clause is in other words a very wide and flexible clause interpreted each time according to each case. It is a clause used a lot in disputes regarding energy issues as such investments last a long period of time and are characterized by a strong connection of the state with its natural resources.

Interesting to note is that in the framework of fair and equitable treatment, tribunals try to balance the expectations of the investor and the freedom of the state to regulate. In Saluka Investments BV v. Czech Republic case, the tribunal said that "*a weighting of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other*[43]" is required. In Metaclad case the "*permit was denied at a meeting of the Municipal Town Council of*

[41] Peter Muchlinski, Multinational Enterprises and the Law, 2nd Edition, 2007, page 625.
[42] UNCTAD, Fair and Equitable Treatment: UNCTAD Series in International Investment Agreements II, 2012.
[43] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, page 66, par. 306.

which Metaclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear".[44]

Another interesting case is Duke Energy v. Ecuador. In this case the tribunal underlined the significance of the general framework of the dispute and said that *"the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host state".*[45] Also, in Methanex case the tribunal said that the investor must know the regulatory framework regarding his investment. In such way tribunals evaluate both the conditions regarding the investment and the general policies of the host state on investments. In other words, the legitimate expectations of the investor need to be in accordance with the regulative activities of the state. Fair and equitable treatment protects the legitimate expectations of the investor. Fair and equitable treatment cannot ensure that the regulative activity of the host state will remain stable unless a stabilization clause coexists.

In Unglaube v. Costa Rica case the tribunal rejected the claim for a fair and equitable treatment claiming that the national policy for the protection of ecosystems and biodiversity justified the state's acts.[46] Also, in Glamis Gold case the tribunal rejected the claim of the investor for a violation of his legitimate expectations claiming that the investment was taking place in an environment "*becoming more and more sensitive to the environmental consequences of open-pit mining*".[47] In Plama v. Bulgaria case the investor complaint about an amendment of an environmental law, by which the state had no responsibility to compensate the investor for a previous damage to his investment. The tribunal rejected this claim saying that no clues prove that the state targeted to this specific investor and that the amendment was requested from the World Bank. The tribunal concluded that it was the investor's responsibility to

[44] Metaclad Corr. V. The United Mexican States, Case No. ARB (AF)/97/1, 30 August 2000, page 26, par. 91.
[45] Duke Energy v. Ecuador, ICSID Case No ARB/04/19, Award, 18 August 2008, pages 93-94, par. 340.
[46] Marion Unglaube v. Republic of Costa Rica, ICSID Case No ARB/08/1.
[47] Glamis Gold v. USA, UNCITRAL, Award of 8 June 2009, page 331, par. 767.

negotiate with the state and to avoid the damage.[48] From the above mentioned it becomes clear that fair and equitable treatment clause does not forbid the host state from regulating and taking measures for the protection of the environment, even when such measures lead to additional costs for the foreign investor.

The fair and equitable treatment clause can also be used by investors in order to force the host state to adhere to higher environmental standards. In the energy sector this is important when a state tries to attract investments in clean energy and especially in renewable energy. If the state does not provide the incentives promised to the investors, they are able to resort to the fair and equitable treatment provision for a remedy.[49]

An interesting case worth mentioning, is Eiser Infrastructure Limited and Energia Solar Luxemburg S.a.r.l. v. Kingdom of Spain.[50] From 2007 until 2011 the British company Eiser Infrastructure Ltd and its subsidiary company Energia Solar Luxemburg S.a.r.l invested around one hundred and twenty-six million Euro (126.000.000 €) for the construction and exploitation of three (3) concentrated solar power plants in Spain. Spain in accordance with EU Directive 2001/77/EC[51] and in order to comply with the European policy on reduction of greenhouse gases, legislated for the promotion of the renewable energy production and for the promotion of the energy produced by concentrated solar power plants.

In 2007 by royal decree 661/2007 Spain set a feed in tariff (FIT) for the production of electricity coming from concentrated solar power plants. In December 2012 and without prior notice to CSP producers the Spanish Parliament passed law 15/2012, inter alia imposing a 7% tax on the total value of all energy fed into the national grid by electricity producers and eliminating premiums for electricity generate with gas.

[48] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 27 August 2008.
[49] Makane Moise Mbengue and Deepak Raju, "*Foreign Investments in the Energy sector, Balancing Private and Public Interests*", page 186.
[50] Eiser Infrustructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36.
[51] EU Directive 2001/77 sets national indicative binding targets for the promotion of renewable energy production in each member state.

Royal decree law 2/2013 then eliminated the premium option altogether, leaving CSP producers the option of either the market price or the fixed rate tariff. Royal Decree 9/2013 eliminated the entire regime of fixed tariffs and premiums and substituted a system providing "special remuneration" based on "standard" (but not actual) costs per unit of installed power, plus standard amounts for operating costs. In 2014 a new regulatory regime for CSP was applied to the existing plants, which were constructed and financed under the principles of the prior regime. The new system provided a lower pre-tax rate of return calculated on the basis of hypothetical assets and costs without regard to specific existing plants' actual costs and efficiencies. Instead existing plants' remuneration was based on their generating capacity and regulators' estimates of the hypothetical standard installation of the type concerned. The regulatory regime also prescribed a twenty-five (25) year regulatory life for CSP plants. Once set, neither this regulatory life nor the prescribed "initial value of the investment" could be changed. These new measures were intended to accomplish the objective of significantly reducing the level of subsidies paid to CSP and other renewable generators.

Eiser Infrastructure Ltd appealed against Spain in the ICSID requesting a relief. The request was based on the declaration that article 13 of the Energy Charter Treaty (ECT) has been violated and the investment has been expropriated. The request was also based on article 10 of the ECT as the fair and equitable treatment clause has been violated.

Spain on the other side claimed that it did not violate articles 10 and 13 of the ECT as it did not deny fair and equitable treatment to Eiser. Moreover, Eiser Infrastructure Ltd maintained its ownership over the CSPs, it gained profit from the sale of energy and the feed in tariff and it had a reasonable profitable course, maintained by the new scheme.

The tribunal examined each of the claims of the claimant but decided that the claim regarding the obligation to accord investors fair and equitable treatment provided the most appropriate legal context in this case. According to the tribunal the main question in this case was "*to what extent treaty protections, and in particular, the*

obligation to accord investors fair and equitable treatment under the ECT, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate".[52]

The tribunal decided that "*the fair and equitable treatment standard does not give a right to regulatory ability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability".*[53] But the fact that the existing legal framework can change does not mean that unreasonable changes, such the one the Spanish government decided in 2014 can occur. The new scheme "*was profoundly unfair and inequitable, stripping Claimants of virtually all of the value of their investment*".[54]

Another interesting case is Vatenfall v. Germany. In 2011 and after the Fukushima accident, Germany decided to abandon use of nuclear energy by the year 2022. The Atomic Energy Act was discussed and adopted after the nuclear disaster in Fukushima and later it was amended. The new one immediately shut down the oldest of the seventeen (17) atomic energy power plants and set a deadline (until 2022) for the stop of the operation of the rest.

In May 2012 the Swedish company Vatenfall filed a request for arbitration against Germany at the ICSID regarding the shut-down of two (2) nuclear energy power plants (Brunsbuttel and Krummel) located in Hamburg. These two (2) power plants were shut down immediately after Fukushima accident regardless the fact that in 2010 the German government had agreed to extend their operation. According to the media[55], Vatenfall claimed that the change of policy of Germany has violated its

[52] Eiser Infrustructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, page 112, par. 362.
[53] Eiser Infrustructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, page 112, par. 362.
[54] Eiser Infrustructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, page 113, par. 365.
[55] Spiegel Online, Nuclear Phase-Out Faces Billion-Euro Lawsuit, 2 November 2011. https://www.spiegel.de/international/germany/vattenfall-vs-germany-nuclear-phase-out-faces-billion-euro-lawsuit-a-795466.html

rights and requested a compensation for past and future loss. Due to a request of confidentiality no details on the claims of Vatenfall regarding the provisions of ECT violated, have been published. Probably and in order to support its claim, Vatenfall will say that the new atomic energy act is violating article 10 of the ECT as it negatively distinguishes Vatenfall from other nuclear energy companies because it brings the immediate shut down of its plants.

At the same time Vatenfall brought a complaint to the German Federal Constitutional Court claiming that the shut-down of the nuclear power plants equals to an expropriation. Furthermore, the company claimed that since the atomic energy act does not provide compensation in relation to the phase-out of nuclear energy, it is against the German constitutional law[56]. The German Constitutional Court ruled in 2016 that the state enjoys broad regulatory powers when it comes to the protection of public goods, such as health and the environment. The German state is free to decide to shut down nuclear power stations. Despite this broad regulatory freedom, the state must act within certain boundaries and must protect the legitimate expectations of the investor. The German Court also made clear that the protection of property can be limited for public purposes. However, and according to the principle of proportionality, the German Constitutional Court found that the lack of any compensation for the complete reversal of its policy on nuclear power constitutes violation of the property rights of Vatenfall. In other words, expropriation for public purposes is acceptable but it must be accompanied by adequate compensation.

In Vatenfall v. Germany case the conflicting interests of the investors and the state are clear. Until the final ruling it is interesting to wonder if such arbitral decisions can become an obstacle to future environmentally friendly policies of the states and to whether the public interest for protection of the environment can really coexist with the investor's interests.

[56] Natalie Bernasconi-Osterwalder & Rhea Tamara Hoffman, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany* (II), October 2013.

12. Indirect expropriation and protection of the environment

According to international law, states are able to expropriate foreign investments. The expropriation is allowed when done for a public purpose, when in accordance with the due process of law and when a compensation is provided. There are two (2) types of expropriation, the direct and the indirect expropriation.

Direct expropriation is the physical taking or nationalization of an enterprise, which usually involves a transfer of ownership to the state. An indirect expropriation is a state action which takes effective control of the investment, but not through a direct taking of the legal property. According to tribunals indirect expropriation is the deny to reimburse the VAT payments[57], the arrest and the custody of the investor[58], the replacement of a board of directors.

But which state measures lead to an expropriation? Brownie claims that "*state measures, prima facie a lawful 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*".[59] Sornarajah characterizes the state measures for the protection of the environment as "*non compensable takings*".[60]

So, it is important to distinguish when a state measure is an act of state power and the investor cannot seek for compensation and when a state measure is an indirect expropriation and the investor has a right for compensation.

[57] Occidental v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

[58] Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghan, UNCITRAL, Award of Jurisdiction and Liability, 27 October 1989.

[59] Ian Brownlie, *Principles of Public International Law*, 6th Edition, 2003, page 509.

[60] M. Sornarajah, *The International Law of Foreign Investment*, Cambridge University Press, 1994, page 283.

Past tribunals have dealt with indirect expropriation in two (2) ways. According to the "sole effects doctrine" the only thing that defines an indirect expropriation is the extent of the state measure's impact on the investor. According to the "police powers" doctrine, a public measure that is non-discriminatory and is taken in good faith for public welfare reasons does not define an indirect expropriation. None of these doctrines is dominant over the other in international law.

Sole effects doctrine refers mainly to the negative effects of the public measure to the foreign investment. According to this doctrine the regulatory activity of the state targets to the public interest and often has negative effects for foreign investors. When these negative effects equal to depriving the property from the owner or depriving the investment from any profit, then the foreign investor must be compensated. The character and the reason (public purpose) of the state measure that led to this situation does not play any role to the obligation of the state to compensate the foreign investor.

The sole effects doctrine was followed in Metalclad v. Mexico case.[61] Metaclad involved two (2) separate government measures. The first was a set of events that denied the company a permit to operate a hazardous waste disposal facility. In relation to this issue the tribunal said that "*expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State*".[62] With respect to the second measure, which was a state level act that converted the area chosen from the investor for the proposed operations into an ecological reserve, the tribunal found that this act too was an act of expropriation. The tribunal also decided that the purpose of the measure was not important. *"The*

[61] Metalclad Corp v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.
[62] Metalclad Corp v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, page 28, par. 103.

Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110".[63] In other words, the tribunal decided that it was not important whether or not the measure was aiming at public welfare. The tribunal claimed that the main question was whether there was enough of an interference with the investor's investment. It concluded that there had been and that is why it characterized it as an expropriation.

In Santa Elena case[64] the property of the investor was expropriated for an environmental public purpose. The investor accepted the expropriation but asked from the tribunal for a better and fairer compensation. The tribunal said that the reason for the expropriation, no matter how important it is, cannot deprive investor from compensation. This decision was criticized as many consider that the tribunal should have taken into consideration the international obligations of the state for protection of the environment. This same theory is applied in many more cases where it is often stated that "*no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole – such as environmental protection*".[65]

On the other hand, the essence of the police powers doctrine is that the state is not liable for claims of indirect expropriation that stem from certain bona fide regulation.[66] This theory is based on the power of the state to limit personal freedom for public health and welfare purposes. There is no definition of police powers doctrine but it is mainly considered to refer to state measures regarding the safety of

[63] Metalclad Corp v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, page 30, par. 111.
[64] Compania del Desarrollo de Santa Elena SA v. Costa Rica, ICSID Case No. ARB/96/1, Award of 17 February 2000.
[65] Tecnicas Medioambientales Techmed SA v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, par. 164; Azurix Corp v. Republic of Argentina, ICSID Case No. ARB/01/12, Award of 14 July 2006, par. 310: "…the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim".
[66] Noam Zamir, *The police powers doctrine in international investment law*, Machester Journal of International Economic Law, Volume 14, Issue 3:318-337, 2017, page 1.

public goods, state precautionary measures regarding the protection of public goods and does not include an obligation for compensation. Howard Mann and Konrad von Moltke claim that "*under the traditional international law concept of the exercise of police powers when a state acted in a non-discriminatory manner to protect public goods such as its environment, the health of its people or other public welfare interests, such actions were understood to fall outside the scope of what was meant by expropriation… Such acts were simply not covered by the concept of expropriation, were not a taking of property and no compensation was payable as a matter of international law*".[67]

The police powers doctrine was adopted in the case of Methanex Corporation v. United States case.[68] In this case the state of California banned methyl tertiary butyl, a gasoline additive, because it was contaminating groundwater supplies. Methanex, a Canadian company, argued that this was a regulatory expropriation of its investments in the USA, since its business was the production of methanol, a key ingredient of methyl tertiary butyl ether. The tribunal dismissed Methanex's claim explaining that "*as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensatory unless specific commitments had been given*…".[69]

In Saluka v. Czech Republic case the tribunal said that "*the principle that a state does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police power of States forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in Methanex Corp v. USA said recently in its final award, it is a principle of customary*

[67] Howard Mann & Konrad von Moltke, *Protecting investor rights and the public good: Assessing NAFTA's Chapter 11*, IISD. https://www.iisd.org/library/protecting-investor-rights-and-public-good-assessing-naftas-chapter-11-english-spanish

[68] Methanex Corp v. US, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

[69] Methanex Corp v. US, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, par. 7.

international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required".[70]

There are measures that are carved out from the category of expropriation. In order for a measure to fall in this category it must be undertaken for a public purpose, must be of general application and non-discriminatory and must be enacted fairly. Police powers doctrine is a case where the measures are not considered to be expropriation in the first place and therefore no liability arises and no compensation is required.[71]

Although the police powers doctrine is recognized from international investment law, there is no bright and easily distinguishable line between non-compensable regulations and compensable expropriations. In Saluka case the tribunal said that "*international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered permissible and commonly accepted as falling within the police or regulatory power of states and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand, and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law*".[72]

The distinction between non-compensable regulations and compensable expropriations can be made in each case by the tribunal, based on the facts before it and on answers to relevant questions. First of all, it must be examined whether the loss of the property is immediately connected with the state measure. Then if the measure is aiming at a public welfare purpose, if it is discriminatory and if it is implemented in accordance with due process. These criteria will be examined on a case-to-case basis.

[70] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, par. 262.
[71] IISD, *Investment treaties & why they matter to sustainable development: questions & answers*, 2012, page 17, par. 2.5.2.
[72] Saluka Investments, ICGJ 367 PCA Case Repository, 263.

It is also interesting to analyze whether the shutdown of nuclear power plants of Vatenfall can be considered as an indirect expropriation. According to police powers theory, the gradual abolition of nuclear energy in German territory is done for a public purpose (protection of public health, transition to clean energy). However, it negatively affects the foreign investor and its interests. But taking into account the fact that this measure does not distinguish between national and foreign investors and that the investors affected had a reasonable time period to transfer their business in other sectors of the economy, the tribunal may reach the conclusion that the shut-down of the power plants is not a private expropriation.

13. Environmental protection in new generation bilateral investment treaties

Another interesting issue is whether corporate social responsibility standards regarding environmental protection can be incorporated into legally binding BITs. During the last decades there have been attempts in order to recognize the obligation of corporations to respect human rights, labor standards and environmental protection while conducting their activities. One of these attempts are the revised OECD Guidelines for Multinational Enterprises of 2000[73], which aims to ensure a harmonious relationship between foreign enterprises and state policy. One of OECD guidelines contains general policy requirements with respect to environmental protection. "*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development*". However, this guideline is not binding and it operates more as a recommendation to corporations rather than an obligation to respect and protect the environment. In 1999 the European Parliament passed a resolution on a code of conduct for European enterprises operating in developing countries[74]. The resolution recommended a model code of conduct for European businesses which consists

[73] OECD Guidelines 2000, supra note 8.

[74] Code of Conduct for European Enterprises Operating in Developing Countries. Res. A4-0508/98, 1999.

of internationally recognized minimum standards regarding human rights, labour standards and environmental protection.

Can such resolutions on corporate social responsibility be incorporated into legally binding BITs? One example was the draft Norwegian Model BIT, which in article 32 said that "*parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines on Multinational Enterprises and to participate in the United Nations Global Compact*".[75] According to the Norwegian Government this provision was aiming to the respect of OECD Guidelines and was referring to countries outside the OECD area. In June 2009 Norway withdrew its draft model BIT after public criticism. Another BIT which refers to corporate social responsibility is the one signed between Canada and Benin. In article 16 of this BIT it is written that "*each Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. Such national policies may be the first step to incorporate corporate social responsibility provisions into BITs or international investment treaties"*.[76]

Corporate social responsibility standards may also be taken into consideration in the interpretation of BIT provisions relating to non-discrimination of the foreign investors. Such an example is the free trade agreement between EU and the Republic of Korea. "*The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as*

[75] Norwegian Model BIT, supra note 58, 2007.

[76] Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, article 16, 2013.

fair and ethical trade and those involving corporate social responsibility and accountability".[77]

Other BITs require from the investor to conduct an environmental impact assessment. In this way the state can control if its environmental standards are taken into account by the investor. Environmental impact assessments aim to assess the likely or potential impacts of a proposed project before the project is approved. They also identify alternatives to the option proposed and consider preventive or mitigating actions to minimize any impact identified.

Other treaties require an environmental impact assessment for projects that may have a negative impact to the environment of other states. Such an example is the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which has been ratified by many countries. Furthermore, customary international law requires from all states to demand an environmental impact assessment for any activity in their territory that may cause environmental harm to other states. In Pulp Mills on the River Uruguay case the International Court of Justice claimed that "*the obligation to protect and preserve has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource*".[78]

Environmental impact assessments may also be required by international human rights law. In Saramaka People v. Suriname case[79], the Inter-American Court of Human Rights said that the government has to ensure that an environmental impact assessment is conducted before awarding timber and mining concessions on land belonging to tribal people. The environmental impact assessment must also be conducted by independent and technically capable entities.

[77] EU – Korea FTA, 16 September 2010, article 13.6 (2).
[78] Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 2010, page 14, par. 204.
[79] Saramaka People v. Suriname, Inter-American Court of Human Rights, November 28, 2007.

Another way to ensure environmental protection is the "non-lowering of standards" clause. The purpose of this clause, which may be interpreted in a BIT is to prevent the state from lowering its environmental standards in order to attract foreign investors. An example of this is article 114 (2) of NAFTA. According to it "*it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures*". This provision is non-binding but it is more and more often used in new signed BITs.[80]

The participation of third parties with environmental claims before an arbitral tribunal is another interesting issue. The first case where an amicus curiae submission was accepted was Methanex case.[81] In this case the tribunal decided that article 15 of UNCITRAL arbitration rules allowed the participation of the International Institute for Sustainable Development (IISD), the Commission for a Better Environment and the Center for International Environmental Law and accepted their submission. Although, it did not accept their participation in the hearings and any access to materials. Following this decision, the NAFTA FTC Statement passed which stipulates who can intervene as a non-disputing party before an arbitral tribunal and includes guidelines for the submission of amicus curiae briefs. In order for the tribunal to decide whether to grand access or not it must consider the extend to which *"(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address matters within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration*".[82] Following this Statement, Methanex Corporation suggested that the tribunal adopt these guidelines regarding the acceptance of amicus submissions. The tribunal did provide access to the third parties and allowed them to be present at the hearings, without having the

[80] US-Uruguay BIT, US Model BIT, Canadian Model FIPA, Norwegian Model BIT.
[81] Methanex Corp v. US, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.
[82] NAFTA FTC Statement 2003, supra note 3.

opportunity to make an oral statement. In the final award the tribunal made very little reference to the third parties' submissions.

In Glamis Gold[83] case four (4) amicus curiae briefs were filed by non-disputing parties. The tribunal accepted their participation and allowed them to present their views through written submissions. Moreover, it allowed public access to the oral hearings and recognized the value "*of significant involvement by non-disputing parties and civil society in general and more particularly the helpful involvement of the Quechan nation in assisting both the tribunal and the Parties in ensuring the confidentially of information concerning tribal lands*".[84]

Regarding ICSID arbitration, in 2006 its Arbitration Rules were updated and the participation of non-disputing parties was allowed, with the consent of the parties.[85] However in Suez Viventy case [86] the tribunal denied the request of a third party for access to the record of the proceedings, noting that the new ICSID Rule did not provide any guidance on the matter. Later in Biwater Gauff v. United Republic of Tanzania case[87], the tribunal accepted amicus curiae briefs claiming that they will help the tribunal by providing a different perspective of that of the disputing parties. However, it did not allow the attendance of the third parties to the hearings.

Following the issuing of the NAFTA FTC Statement some states revised their BITs in order to support the non-disputing party participation in disputes. Especially BITs signed from Canada or the USA with other countries often follow the text of the NAFTA Guidelines.[88]

[83] Glamis Gold v. USA, UNCITRAL, Award of 8 June 2009.
[84] Glamis Gold v. USA, UNCITRAL, Award of 8 June 2009, 10(2).
[85] ICSID Arbitration Rules, article 32.
[86] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17.
[87] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, 24 July 2008.
[88] Agreement for the Promotion and Protection of Investments, Canada-Peru, November 14, 2006, USA Model BIT, 2004 article 28 (3), U.S.-Uruguay BIT, 2005.

14. Conclusions

To conclude, the balancing of the public interest for protection of the environment and of the private interests of the investors is not easy at all. From the one side a stable and safe environment for the investor must be created and on the other side the state needs to be able to regulate without harming the expectations of the investors. Moreover, and despite the fact that investments help to the growth of the economy of the state and to energy efficiency and security, they often create obstacles to sustainable development. This has led many states to create a policy that is sometimes characterized by the boost of investments and sometimes by the control and limitation of them. So, it is clear that a national and international policy which defines the role of energy investments and faces national and foreign investors as equal is necessary.

In addition, the corporate social responsibility of the energy investors can play a key role to the balancing of energy investments and the protection of the environment. When the investors really care about the protection of the environment and the health of the inhabitants, the energy investments can easily coexist with a clean environment.

Finally, global community can debate on the creation of a new binding treaty that sets the minimum protection of the environment. In such a way the regulatory activity of the state will be eliminated and the legal framework for investments will be stabilized.

A brilliant example for a smooth relationship between environment and investments is Ecuador. For decades Texaco and Chevron exploited oil from Ecuador without respecting human rights and the environment. This was due to an absence of the state which was never intervening and regulating. In 2008 Ecuador had the first Constitution which worldwide was referring to “rights of the nature”. This was a will of the people of Ecuador to make our planet a place where the man can live with health, freedom and safety.

Environment and investments can coexist and sustainable development can be achieved. States must promote such a policy and courts and tribunals must try to implement it in the best possible way.

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