



# **Trans - Adriatic Pipeline (TAP): A Critical Energy Infrastructure Investment**

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I, Artemis Bakagianni, declare that this diploma thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgment, the work presented is entirely my own.

<b>CHAPTER 1 INTRODUCTION .....</b>	<b>4</b>
<b>CHAPTER 2 THE PROJECT .....</b>	<b>5</b>
2.1. OVERVIEW OF THE PROJECT .....	5
2.2. PLAYERS INVOLVED IN THE PROJECT .....	6
2.2.1. TAP AG AND ITS SHAREHOLDERS.....	6
2.2.2. SHAH DENIZ CONSORTIUM .....	7
<b>CHAPTER 3 THE MAIN PROJECT AGREEMENTS .....</b>	<b>8</b>
3.1 THE INTERGOVERNMENTAL AGREEMENT (IGA) .....	9
3.2 THE HOST GOVERNMENT AGREEMENT (HGA) .....	15
<b>CHAPTER 4 SECURITY OF SUPPLY .....</b>	<b>30</b>
4.1 EU AND GREECE SECURITY OF SUPPLY .....	30
4.2 THE IMPACT OF THE TAP ON THE GREEK ENERGY MARKET .....	33
<b>CHAPTER 5 REGULATORY FRAMEWORK .....</b>	<b>34</b>
5.1 GREEK AND EU GAS REGULATORY FRAMEWORK .....	34
5.2 EXEMPTIONS GRANTED .....	35
5.2.1 EXEMPTION FROM REQUIREMENT OF ARTICLE 9 OF THE GAS DIRECTIVE (OWNERSHIP UNBUNDLING) .....	37
5.2.2 EXEMPTION FROM REQUIREMENT OF ARTICLE 32 OF THE GAS DIRECTIVE (THIRD PARTY ACCESS) .....	38
5.2.3 EXEMPTION FROM REQUIREMENT OF ARTICLES 41.6, 41.8 AND 41.10 OF THE GAS DIRECTIVE (REGULATED TARIFFS) FOR THE INITIAL AND EXPANSION CAPACITY FORWARD FLOW .....	39
5.3 LICENCES GRANTED .....	40

**CHAPTER 6 INVESTMENT PROTECTION UNDER ENERGY CHARTER  
TREATY (ECT) - DISPUTE RESOLUTION ..... 40**

*6.1 ENERGY CHARTER TREATY (ECT) ..... 40*

*6.1.1 INVESTMENT PROTECTION PRINCIPLES ..... 41*

*6.1.2 DISPUTE RESOLUTION AND ARBITRATION ..... 45*

*6.2 DISPUTE RESOLUTION WITH GREEK STATE UNDER TAP HGA ..... 46*

**CONCLUSION ..... 47**

**REFERENCES ..... 48**

## **CHAPTER 1 INTRODUCTION**

One of the most important energy infrastructure projects, Trans Adriatic Pipeline (TAP) qualifies as an interconnector which lies across Greece, Albania and Italy allowing Caspian natural gas to flow into Europe's energy markets. Under this framework, TAP opens up the Southern Gas Corridor (SGC), the new energy route aimed at improving the security and diversity of the EU's energy supply by bringing natural gas from the Caspian region to Europe. As a result, the European Union recognizes the role of TAP in addressing the urgent energy policy objective of ensuring security and diversity of energy supply to Europe as well as enhancing the role of its involving member States as transit countries. Greece, being a transit country, is called to host this big investment in its territory, on the one hand by signing and applying a series of necessary agreements with the investor TAP AG, and its counterparts Albania and Italy, and on the other hand, by applying properly the relevant EU regulatory framework and protecting the investment within its territory.

In this context, the aim of this diploma thesis is to present the Trans Adriatic Pipeline project and highlight its major role to the contemporaine EU and, in particular, Greek energy market. The relationship between the players of the project, the Greek State and the national regulatory entities, whose role derives from the EU regulatory energy framework, creates a complicating network of rights and obligations for the Project Investors in order for the project to meet the certain standards and the clear objectives set by the European Union. Thus, it is necessary to review the main exemptions and licenses which were granted to the TAP AG in order to operate within Greek State in full accordance with the European energy framework. Last but not least, TAP, as a great energy infrastructure investment, must be accompanied by the necessary legal framework that will create a safe environment for the investor and protect effectively its investment against any arbitrary measure set by the hosting State. Under this framework, the undersigned Host Government Agreement, between the Project Investor (TAP AG) and the Hellenic Republic provides for an adequate protective legal framework under the EU

and Energy Charter Treaty (ECT) rules for the investment protection, as well as it foresees a certain dispute resolution procedure in case a dispute arises.

## CHAPTER 2 THE PROJECT

### 2.1 OVERVIEW OF THE PROJECT

The “Trans Adriatic Pipeline” (TAP) is a major infrastructure project that aims to introduce the gas produced in the second phase of the Azerbaijan gas field Shah Deniz (Shah Deniz II) from Greece through Albania to Italy and further to other European markets.

In order to accomplish the aforementioned overall transition from Shah Deniz II gas field towards European energy market, a great network of infrastructure projects have been planned. It is the Southern Gas Corridor (SGC), which is comprised by three pipeline projects, the South Caucasus Pipeline (SCPX) which starts from Azerbaijan and continues onwards Georgia, the Trans Anatolian Pipeline (TANAP) which lies all across Turkey from East to the West, and finally TAP which is the European part of the corridor.



*Image 1: Southern Gas Corridor (SGC)*

<https://www.tap-ag.com/the-pipeline/the-big-picture/southern-gas-corridor>

In particular, TAP starts near Kipoi in the Komotini region, on the border of Turkey and Greece, where it connects with the “Trans Anatolian Pipeline” (TANAP). From this point, TAP continues onshore on its longest stretch crossing the entire territory of Northern Greece, onwards east to west through Albania to the Adriatic coast. The offshore section of the pipeline begins close to the Albanian city of Fier and it

traverses the Adriatic Sea to connect with Italy's gas transportation network in Southern Italy.

TAP's overall length is about 878 kilometers (km) from which 550 km lie in Greece, 215 km in Albania, 105 km offshore in Adriatic Sea and finally 8 km in Italy. The "Initial Capacity" of TAP will be 10bcm/year. Through the next construction stages the pipeline capacity could increase ("Expansion Capacity") up to a Total capacity of 20 bcm/year by adding new compression facilities.

In compliance with the requirements of the Regulation 994/2010 of the European Parliament and Council regarding measures to safeguard security of gas supply, in case of emergency situations, TAP incorporates the necessary technical standards that allow the gas flow to be reversed ("Physical Reverse Capacity"). That means that it is possible if needed, the gas to be transported from Italy to Albania and Greece as well.

## 2.2. PLAYERS INVOLVED IN THE PROJECT

The sections below give a picture of the current shareholders and market participants who are directly or indirectly involved in the Project.

### 2.2.1. TAP AG AND ITS SHAREHOLDERS

TAP natural gas pipeline is being developed by TAP AG, a single purpose company -consortium- with sole purpose the development, construction, ownership and operation, including marketing of capacity and maintenance, of TAP Project. TAP AG's headquarters are in Baar, Switzerland and operate several offices in Greece, Albania and Italy.

TAP AG is responsible for the development and operation of the gas transportation infrastructure from the Greece/Turkey borders to Southern Italy. Once TAP is operational, it will provide transportation capacity that enables interested parties to market their gas on the European markets.

The consortium's current shareholding is comprised from the following entities:

- BP (20%),
- SOCAR (20%),

- Snam S.p.A. (20%),
- Fluxys (19%),
- Enagás (16%) and
- Axpo (5%)<sup>1</sup>.

Nevertheless, its shareholding structure is not strictly fixed since TAP Project is open to new equity partners. All stakeholders intend to sublet (to a “sublessee”), all or part of the unused capacity, or alternatively to assign (to an “assignee”) all or part of their obligation related to the exempted capacity to third parties.

It is to be noted that TAP AG will not own or sell the gas it transports. Gas sales agreements have been negotiated directly by Shah Deniz Consortium with gas purchasers in Europe.

#### 2.2.2. *SHAH DENIZ CONSORTIUM*

Given that TAP AG has specifically realised TAP Project to transport gas available from Shah Deniz II, it is also relevant to provide an overview of Shah Deniz Consortium and its relation with TAP AG.

The Shah Deniz Production Sharing Agreement’s Parties are:

- BP (28.8%),
- SOCAR (10%),
- TPAO (19%),
- PETRONAS (15.5%),
- LUKOil (10%)
- NIKO (10%), and
- SGC (6.7%).

Within Shah Deniz Consortium, the Gas Commercial Committee is charged with the commercialization of the gas produced by Shah Deniz II field.

Shah Deniz I field commenced production in December 2006. The gas production is approximately 8 bcm/year and it is sold to Azerbaijan, Georgia and Turkey. Shah Deniz II field is expected to add a further 16 bcm/year of gas production from Shah Deniz I field. Consequently, the main topic on the discussions raised in 2008, was

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<sup>1</sup> <https://www.tap-ag.com/about-us/our-shareholders>.



the selection of transportation routes for the additional gas volumes. In December 2013, with the signing of Final Investment Decision (FID), TAP Project was preferred from the Shah Deniz consortium over Nabucco Project, to deliver the additional gas from Shah Deniz II field to the European markets.

As it has already been mentioned, Shah Deniz Consortium directly negotiates and concludes the Gas Sales Agreements (GSA) with the European gas purchasers. So far, the consortium has concluded twenty five (25)-years sales agreements with nine companies for just over 10 bcm/year of gas to be produced from the Shah Deniz field in Azerbaijan<sup>2</sup>. The aforementioned purchasers are the following:

- Axpo Trading AG
- Bulgargaz EAD
- DEPA Public Gas Corporation of Greece S.A.
- Enel Trade SpA
- E.ON Global Commodities SE
- Gas Natural Aproveisionamientos SDG SA
- GDF SUEZ S.A.
- Hera Trading srl, and
- Shell Energy Europe Limited.

Thus, once TAP Project is completed and operates the natural gas, which it will transfer, will be delivered from the Shah Deniz to the abovementioned purchasers pursuant to the terms and conditions of each and every agreement have been concluded as above.

### **CHAPTER 3 THE MAIN PROJECT AGREEMENTS**

Given that TAP is a complex and prospective cross-border pipeline system that crosses three countries, the necessary agreements which regulate, on the one hand, the relations among the transit countries and, on the other hand, the relationship of each one of the latter with TAP AG being the Project Investor have been concluded accordingly. Under this framework, it is crucial to review the Intergovernmental

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<sup>2</sup> [https://www.bp.com/en\\_az/azerbaijan/home.html](https://www.bp.com/en_az/azerbaijan/home.html).

Agreement (IGA) which has been concluded between Greece, Albania and Italy, and the Host Government Agreement (HGA) signed between the Hellenic Republic and TAP AG. Both Agreements are non-binding in terms of international law. Their objective is to ensure and facilitate the realization of TAP for the transportation of the natural gas<sup>3</sup>.

### 3.1 THE INTERGOVERNMENTAL AGREEMENT (IGA)

The TAP IGA (or the “Agreement”) was signed between the Hellenic Republic, the Republic of Albania and the Italian Republic (hereinafter each one as the “Party” and all as the “Parties”) on 12 February 2013 in Athens, and was ratified by Greece with the Law 4145/18.04.2013. The Agreement sets the framework of the cooperation of the aforementioned countries regarding the pipeline infrastructure as a whole. It is, therefore, intended to facilitate the realization of the project within the territories of the states collectively.

The Agreement consists of fourteen Articles and generally covers issues including cooperation and coordination, land rights, transport of the natural gas, title to or ownership of the natural gas in the Pipeline System, non-interruption of the Project activities, environmental and safety standards, taxes and dispute resolution<sup>4</sup>. More specifically, the TAP IGA is structured as follows:

#### A. Preamble and Definitions

In its preamble the TAP IGA states that it is adopted *“in furtherance of the principles set forth in international trade and investment agreements applicable to each party, including the Energy Charter Treaty, the Community Treaties and the Energy Community Treaty”*.<sup>5</sup>

Moreover, it *“recognizes the important strategic and integral role that the TAP will fulfill in opening the Southern Gas Corridor and referring to the designation of the*

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<sup>3</sup> Introductory Note to the Second Edition of the Intergovernmental and Host Government Model Agreements of the Energy Charter Secretariat, Paragraph 29.

<sup>4</sup> Introductory Note to the Second Edition of the Intergovernmental and Host Government Model Agreements of the Energy Charter Secretariat, Paragraph 25.

<sup>5</sup> Law Number 4145/2013 on the Ratification of the Agreement among the Republic of Albania, Greece and the Italian Republic was published in Government Gazette A/89/18.04.2013, recital (1).

*European Union's Trans-European Networks — Energy program of the TAP as a southern corridor (natural gas route) pipeline”.*<sup>6</sup>

The definitions which govern the TAP IGA are attached as an Appendix at the end of the main text of the Agreement. Thus, under the scope of this Agreement, the latter sets the following definition of Trans Adriatic Pipeline:

*“Trans Adriatic Pipeline means the Natural Gas pipeline system intended to run from the Hellenic Republic at the Greek -Turkish border via the Republic of Albania to the vicinity of Lecce in the Italian Republic, including all the physical assets associated with that pipeline system, including all plant, equipment, machines, pipelines, tanks, compressor stations, fibre optic cables and other ancillary physical assets.”.*

#### B. Project Support and Cooperation

Article (2) of the Agreement includes provisions that cover the performance and observance of this and other related agreements, cooperation, transport of natural gas, nondiscrimination, and national treatment. In particular, it foresees that *“the Parties will facilitate, enable and support the implementation of the Project and to cooperate and coordinate with each other in that respect and shall provide stable, transparent and nondiscriminatory conditions for the implementation and execution of the Project”.*

It also provides that *“the Parties agree that Transport shall be performed in accordance with the provisions of this Agreement and the applicable legislation under the Community Treaties and the Energy Community Treaty relating to the same, and without imposing any unreasonable delays, restrictions or charges”.*

#### C. Relationship with Treaties

The Article (3) of the Agreement sets the context of its relationship with Laws and Treaties. In particular, it provides that *“no provision of this Agreement shall require: (a) the Greece or the Italian Republic to derogate from any mandatory requirement under the Community Treaties; or (b) the Republic of Albania to derogate from any mandatory requirement under the Energy Community Treaty”.*

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<sup>6</sup> Law Number 4145/2013 on the Ratification of the Agreement among the Republic of Albania, Greece and the Italian Republic was published in Government Gazette A/89/18.04.2013, recital (5).

In addition, *“the Project Participants shall be regarded as ‘Investors’ for the purposes of Article 1(7) of the Energy Charter Treaty and the Project and all aspects of it, and any interest they may have under any agreement relating to the Project, shall be regarded as an ‘Investment’ into the Territory of the relevant party for the purposes of Article 1(6) of the Energy Charter Treaty”*.

It is to be noted that pursuant to the aforementioned clauses the provisions of the TAP IGA have been set as supplementary to the ones of the Energy Charter Treaty (ECT), by indirectly referring to the application of ECT alternatively and where it is necessary.

#### D. Host Government Agreements

Pursuant to Article (5) of the Agreement the Parties in whose Territories the majority of the TAP will be located shall enter, into a Host Government Agreement with the Project Investor. As a result, on the basis of this provision, the Host Government Agreement, which will be presented in the sections below, has been signed between the TAP AG being the Investor and the Hellenic Republic respectively.

#### E. Authorizations

In addition, the TAP IGA , particularly provides a clause on Authorizations, under Article (6) which particularly foresees that *“each Party recognizes the strategic importance to that Party of the Project and accordingly shall take all measures to facilitate the fulfillment of the Project in its territory, including the granting of all Authorizations required for the implementation of the Project and the conduct of the Project in accordance with the Laws of the relevant Party without unreasonable delays or restrictions”*.

This clause implies that the Parties shall undertake all actions in the form of authorization, consent, concession, license, permit, or other form of approval that will be necessary to be issued in connection with the TAP Project.

#### F. Non-Interruption of the Project

Furthermore, Article (7) of the TAP IGA, includes a clause of non-interruption of the Project. In particular, it provides that no party, except through a competent

authority pursuant to the EU Regulation on Security of Gas Supply, may interrupt, curtail, or otherwise impede the flow of natural gas through the TAP.<sup>7</sup>

In case that any event occurs or any situation arises which gives reasonable grounds to believe that a threat exists, the Party in respect of whose territory the relevant threat has arisen must use all lawful and reasonable endeavors to eliminate that threat.<sup>8</sup>

Moreover, according to the same Article, the Party in respect of whose territory an event occurs or situation arises which interrupts, curtails, or otherwise impedes any aspect of the project must immediately notify the other Parties and the Project Investor, and must use all lawful and reasonable endeavors to eliminate the event or situation and must promote restoration of the affected aspect of the Project at the earliest opportunity.<sup>9</sup>

#### G. Project Standards

The TAP IGA provides for several basic standards among which environmental and safety standards and harmonization of technical standards. More specifically, pursuant to Article (8) of the Agreement, *“it is essential that a coordinated and uniform set of standards apply to the whole of the Project, including in relation to technical, safety, environmental, social, community and labor”*.<sup>10</sup>

Under this framework, the Implementation Commission, established by the TAP IGA, consisting of two duly authorized representatives of each State Party and an observer from the TAP, will be responsible among others, for establishing coordinated and uniform above mentioned standards.<sup>11</sup>

#### H. Taxation

Dealing with tax issues, Article (9) of the Agreement foresees particularly that *“for the determination of the tax assessment basis of the Project Investor, the provisions of the national legislation shall apply based on the principles of the Organization for Economic Cooperation and Development (OECD)”*. The OECD principles are

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<sup>7</sup> TAP IGA, Clause 7(1).

<sup>8</sup> TAP IGA, Clause 7(2).

<sup>9</sup> TAP IGA, Clause 7(3).

<sup>10</sup> TAP IGA, Clause 8.

<sup>11</sup> TAP IGA, Clause 10.

further extended by the TAP IGA, by providing that: *“For revenues and costs of the Project Investor, uniform and appropriate allocation keys consistent with the clauses of the double-taxation treaties relating to determination of business profits must be set out in legally binding advance pricing agreements made between the tax authorities of each of the parties among each other and with the tax authority of the Swiss Confederation (being the jurisdiction of enforcement of the Project Investor).”*

This clause aims to avoid double taxation and, at the same time, to expand upon OECD principles and thereby mitigating the risk of dispute and lack of clarity, by stating that only legally binding agreements shall establish uniformly and appropriately the allocation keys.

Furthermore, the same Article provides that *“advance pricing shall have a duration of a minimum of 25 years and will not be capable of being amended or terminated without the consent of the Project Investor”*. This provision establishes a stable and certain environment for the Project Investor by providing the legally binding nature of pricing arrangements over a long time period.

#### I. State Responsibility

Moreover, as regards the States’ responsibility, the Agreement, in Article (11) provides particularly that: *“Any failure of, or refusal by, a Party to fulfill or perform its obligations, take all actions and grant all rights and benefits as provided for by this Agreement shall constitute a breach of such Party’s obligations under this Agreement”*. In accordance with the general principles of international law, the responsibility of a Party under this paragraph extends to the acts and omissions of any State Authority or State Entity.

Being a key element of international law, State responsibility triggers a range of legal consequences that arise as a result of a breach of an international obligation. Thus, in the event of a breach, there would be either an obligation to cessation, meaning that the State discontinues the internationally wrongful and provides assurances and guarantees that the internationally wrongful act will not be repeated or, alternatively, an obligation to restore the situation to the *status quo ante* and therefore *“wipe out all the consequences of the illegal act”*<sup>12</sup>, and re-establish the

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<sup>12</sup> Permanent Court of International Justice in the 1928, Chorzów Factory case.

situation which in all probability would have existed if that act had not been committed.

#### J. Termination and Amendment

In Article (12), the Agreement regulates the amendment and termination prerequisites; it therefore provides that: “*No Party shall amend, or otherwise seek to avoid or limit this Agreement without the prior written consent of each of the other Parties*”, while any amendments ought to be in writing and shall enter into force by means of ratification.<sup>13</sup>

Additionally, it is foreseen that “*this Agreement shall remain in full force and effect until the date of completion of the decommissioning of the entire Trans Adriatic Pipeline*” and that “*no Party may denounce or withdraw from this Agreement or suspend the performance of its obligations under this Agreement without the prior consent of each of the other Parties*”<sup>14</sup>.

#### K. Dispute Resolution

The dispute settlement clause is included in Article (13), which simply provides that “*disputes relating to the interpretation or implementation of this Agreement shall be settled by diplomatic means*”.

This clause does not provide the possibility for the Parties to submit the matter to an arbitral tribunal for a final and binding resolution. That means that in case a dispute between the Parties arises, it shall only be settled by diplomatic means.

In this context, in accordance with Article 33 of the United Nations (UN) Charter, which provides for a general obligation to settle disputes in a peaceful manner, there have been created a number of diplomatic means which would be relevant and applicable to this clause as well. More specifically, in addition to negotiation, diplomatic means may include other measures which may require the involvement of a third party which facilitates negotiation among the parties or may propose a framework for reaching a settlement.

Mediation falls within the concept of diplomatic means as well. In mediation, a third-party, the mediator, interacts among the parties with a view to enabling the

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<sup>13</sup> TAP IGA, Clauses 12 and 14.

<sup>14</sup> TAP IGA, Clause 12.

parties to agree on certain aspects of the dispute and assist them in resolving their dispute.

Diplomatic means also may take the form of conciliation, where the involvement of a third-party individual or panel of individuals, take a more proactive approach to resolving the dispute and make a recommendation which is, however, not binding on the parties.

#### L. Ratification and Entry into Force

Lastly, the Article (14) provides that the Agreement “*shall enter into force on the date that the respective national instruments of ratification have been exchanged by all the Parties*”, being the effective date of the Agreement, while upon ratification “*each Party shall take the necessary legal measures to implement the provisions of this Agreement*”.

### 3.2 THE HOST GOVERNMENT AGREEMENT (HGA)

The TAP HGA (or the “Agreement”) was concluded between the Hellenic Republic and TAP AG (each one as the “Party” and together as the “Parties”) on 26 June 2013 and ratified by Greece, by Law 4217/10.12.2013. The Agreement was entered into force in furtherance of the TAP IGA for the purpose of implementing into Greek law the State’s obligation agreements, and undertakings under or in connection with the TAP IGA.<sup>15</sup> In particular, this Agreement covers the following issues and is structured as below:

#### A. Preamble

Setting the context of the Agreement, the Preamble states that “*the Parties acknowledge that the Project is of strategic importance as it will enable Greece to strengthen its position as a core transit country for the European Union’s energy security and diversity of supply objectives*”, while it is noted that, it will “*bring potential supplies of Natural Gas to Greece; deliver fiscal revenues and other economic benefits to Greece by way of taxes, employment and growth; and provide a basis for cooperation between the Parties in relation to future energy projects*”.<sup>16</sup>

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<sup>15</sup> TAP HGA Greece, Whereas Clause (G).

<sup>16</sup> TAP HGA Greece, Whereas Clause (B).



What is more important, the TAP HGA underlines that the *“Project Investor shall, in Greece, have the right to implement the Project and construct, own and operate the Pipeline System and utilize the resulting capacity of the Pipeline System”*,<sup>17</sup> while the State agrees *“to promote and protect investment in the Pipeline System and to safeguard the efficient, secure, stable and predictable development, ownership and operation of the Pipeline System within the Greek Territory”*.<sup>18</sup> Therefore, it is clarified that the Project Investor shall have the role of operator of the Pipeline System.

#### B. Interpretation and Scope of Agreement

The first section of the Agreement, under the title “Interpretation and Scope of the Agreement”, includes an article on Definitions and Interpretation, Effective Date,<sup>19</sup> as well as an article on Relationship with Treaties and Laws<sup>20</sup>. More specifically:

#### C. Effective Date

As regards the clause on Effective Date, the Agreement provides for a number of formalities including the requirement that the Agreement shall be ratified by the Greek Parliament and published in the Government Gazette.<sup>21</sup> Additionally, the effectiveness of the Agreement shall be subject to State Aid Clearance being obtained.<sup>22</sup> Both above mentioned requirements have been fulfilled; in particular, the TAP HGA Greece has been properly published in the Government Gazette on 10.12.2013, and the State Aid Clearance has been granted by the European Commission on 03.03.2016.<sup>23</sup>

#### D. Relationship with TAP IGA and Advance Pricing Agreement (APA)

Following the Effective Date clause, the Agreement settles as well the relationship with Treaties, Agreements, and Laws. Specifically, it provides that the Agreement is entered into in execution and implementation of the obligations of the State under

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<sup>17</sup> TAP HGA Greece, Whereas Clause (C).

<sup>18</sup> TAP HGA Greece, Whereas Clause (D).

<sup>19</sup> TAP HGA Greece, Clause 2, Effective Date.

<sup>20</sup> TAP HGA Greece, Clause 3, Relationship with Treaties and Laws.

<sup>21</sup> TAP HGA Greece, Clause 2.1, Paragraphs (b) and (c).

<sup>22</sup> TAP HGA Greece, Clause 2.1, Paragraph (d).

<sup>23</sup> European Commission Press Release, State Aid: Commission approves agreement between Greece and TAP, Brussels 3 March 2016.

the TAP IGA and the APA,<sup>24</sup> in elaboration of the principles and undertakings set out in the TAP IGA and for the purposes of transposing into Greek law Greece's obligations under the said agreements.<sup>25</sup>

Furthermore, the Greek State provides a number of representations and warranties to confirm that it has completed all necessary legislative action to endow the TAP IGA as binding on the State under both international and Greek law and will undertake all the necessary measures in the same manner regarding the APA to render it binding on Greece and enforceable by the Project Investor under Greek law.<sup>26</sup> It is provided that Greece will facilitate the Project's implementation under transparent and non-discriminatory conditions without imposing any unreasonable delays, restrictions, or charges.<sup>27</sup> The TAP HGA more particularly provides that Greece will not, unless through a competent authority pursuant to EU Regulation 994/2010, on Security of Gas Supply, interrupt, curtail, delay, or otherwise impede the flow of natural gas through the Pipeline System, while also sets out the proceedings if any event occurs or situation arises which threatens or results in the interruption, curtailment, or otherwise impedes any aspect of the Project in the Greek territory with a view to eliminating threats, notifying the Project Investor where necessary, and restoring the situation at the earliest possible opportunity, as the case may be.<sup>28</sup>

#### E. Relationship with Greek Law

Moreover, the TAP HGA incorporates a stabilization clause which clarifies that *“no Greek law, other than the Constitution, principles of public international law enforceable in Greece and any international treaty that is binding on Greece, that is contrary to, or inconsistent with, the terms of the Agreement or any other Project Agreement shall limit, abridge or affect adversely the rights granted to the Project Investor or any other Project Participants under this Agreement or any other Project Agreement or otherwise amend, repeal or take precedence over the whole or*

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<sup>24</sup> The APA is entered into, or to be entered into, between the State and the Swiss Confederation on the allocation of income between the Project Investor and its permanent establishment in the State in accordance with Article 24 of the Double Tax Treaty between the Swiss Confederation and Greece (as per the definition in the TAP HGA Greece).

<sup>25</sup> TAP HGA Greece, Clause 3.1(b).

<sup>26</sup> TAP HGA Greece, Clause 3.1(c), (i) and (ii).

<sup>27</sup> TAP HGA Greece, Clause 3.1(c).

<sup>28</sup> TAP HGA Greece, Clause 3.1(c)(iv), (iv–v).

*any part of this Agreement or any other Project Agreement*".<sup>29</sup> Nevertheless, there is a reservation to this provision since the State has preserved its right to implement any Excluded Change of Law which is restrictively defined in the TAP HGA Greece to include certain exclusions, notably: i) changes to the Constitution, ii) changes that are directly enforceable as deriving from European Union legislation, iii) any amendment to any double-taxation treaty, iv) any provision of a present or future international treaty in a number of fields, including peace and security, environment, human rights obligations and, in particular, with respect to social, labor, health and safety standards and regulation. Furthermore, an excluded change of law includes changes in the required premia or contributions to be made by employees in connection with state health insurance as well as changes to Greek law concerning labor law matters, but only to the extent that such changes are of general application within Greece.<sup>30</sup>

#### F. Relationship with Community Treaties and Other Treaties

As regards the relationship with Community Treaties and Other Treaties the TAP HGA provides for compliance with any requirement of EU law made under Community Treaties as well as the implementation of rights and remedies to which affected parties may be entitled from time to time under the Energy Charter Treaty, the Community Treaties, or any other international treaty that is in force.<sup>31</sup>

#### G. Relationship with Energy Charter Treaty (ECT)

As regards the relationship with the ECT, the TAP HGA provides that the Parties agree that the Project, the rights of Shippers under gas transportation agreements with the Project Investor, and the rights of the Project Participants will be regarded as an "Investment" in Greece in the sense of Article 1(6) of the Energy Charter Treaty. As a result, the Project Investor, each direct and indirect shareholder of the Project Investor incorporated in a state which is a party to the Energy Charter Treaty, and each Shipper which is a party to a gas transportation agreement or capacity reservation agreement with the Project Investor, will be regarded as "Investors" in

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<sup>29</sup> TAP HGA Greece, Clause 3.2(a)(ii).

<sup>30</sup> TAP HGA Greece, Clause 3.2(b), in conjunction with the definition for Excluded Change of Law.

<sup>31</sup> TAP HGA Greece, Clause 3.3 on Relationship with the Community Treaties, and Clause 3.6 on Relationship with other treaties.

the sense of Article 1(7) of the Energy Charter Treaty provided those persons are notified to the State by the Project Investor.<sup>32</sup>

Being a major international treaty which entails co-operation over cross-border energy projects and promotes protection of investments made by foreign parties, the ECT defines the investments<sup>33</sup> and investors<sup>34</sup> that qualify for protection in its Articles 1(6) and 1(7) respectively. For a company to take advantage of the benefits provided by the ECT, it would need to be organized under the laws of a contracting state, while the countries through which the pipeline traverses, notably Albania, Greece, and Italy, are all contracting parties to the ECT. The ECT refers in Article 1(6) to investments “*associated with an Economic Activity in the Energy Sector*”, while the definition of “economic activity in the energy sector” includes “*land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines*”, which clearly therefore incorporates the Pipeline System.

#### H. General Provisions and Cooperation

Under the General section entitled “General Obligations”, the TAP HGA includes eight articles. In particular, Article 4 foresees that “*the State acknowledges that the Project is a project of national and public interest of Greece*”<sup>35</sup>. Both Parties, meaning the State and the Project Investor, agree that a failure of any State

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<sup>32</sup> TAP HGA Greece, Clause 3.5.

<sup>33</sup> Article 1(6) of the Energy Charter Treaty broadly defines an “Investment” as every kind of asset owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, movable and immovable property and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contracts having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; and (f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

<sup>34</sup> For the purposes of Article 1(7) of the Energy Charter Treaty, “Investor” means: (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party; (b) with respect to a “third state”, a natural person, company, or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

<sup>35</sup> TAP HGA Greece, Clause 4.1.

Component<sup>36</sup> or a Project Participant<sup>37</sup> respectively to comply with the terms of the Agreement will be deemed a failure of the State or Project Investor, accordingly.<sup>38</sup> Moreover, the Parties, are called to “. . . *actively and efficiently co-operate with each other in respect of the Project and shall abstain, and shall cause each other State Component (in respect of the State) and Project Participant (in respect of the Project Investor) to abstain, from any action having as its purpose the frustration, impediment or delay of the Project or of any Project Activities*”, while the State shall use its best efforts to obtain cooperation of any Local Authorities, where needed.<sup>39</sup>

Assuring the rights of Project Investor and Project Participants, the Agreement further provides that, the State grants “*to the Project Participants, the absolute and unrestricted right and privilege to implement and carry out the Project in accordance with Greek law*”,<sup>40</sup> and “*to the Project Investor, the exclusive and unrestricted right and privilege to construct, own and possess and control the Greek Facilities in accordance with Greek law*”.<sup>41</sup>

Furthermore, it is foreseen that the State shall take all necessary actions in terms of legal authorization of each State Component in order to properly perform their obligations complying with the present Agreement.<sup>42</sup> Respectively, the Project Investor, targeting in facilitating implementation of the Agreement, is required to notify the State and provide evidence of Project Participant status.<sup>43</sup>

As regards the transit facilitations, the Agreement provides that all necessary measures must be taken by “*the State and each of the State Components . . . to facilitate the Transport of Natural Gas via the Pipeline System . . . consistent with the principle of freedom of transit, and without distinction as to the origin,*

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<sup>36</sup> State Components are defined under the TAP HGA Greece as the State, the State Entities, and the State Authorities and any Persons acting on behalf of, and all successors and permitted assignees of, any or all of the foregoing.

<sup>37</sup> Project Participants are defined as any interest holder, contractor, shipper, and lender as per the definition provided in the TAP HGA Greece.

<sup>38</sup> TAP HGA Greece, Clauses 4.2 and 4.3.

<sup>39</sup> TAP HGA Greece, Clauses 4.4.

<sup>40</sup> TAP HGA Greece, Clauses 4.5a.

<sup>41</sup> TAP HGA Greece, Clauses 4.5b.

<sup>42</sup> TAP HGA Greece, Clauses 4.6.

<sup>43</sup> TAP HGA Greece, Clauses 4.7.

*destination or ownership of such Natural Gas and without imposing any unreasonable delays, restrictions or charges”<sup>44</sup>.*

I. Commitments in Project Agreements entered into by State Authorities and/or State Entities, and commitments in respect to the actions of Local Authorities

The Agreement provides that *“the State shall ensure and guarantee (as primary obligor) the timely performance of the obligations and undertakings of each other State Component under each of the Project Agreements as and when such obligations and undertakings shall become due and performable according to the terms of the relevant Project Agreement”*.<sup>45</sup> By this way, the aforementioned provision aims to render the Host Government, meaning the Greek State, a financial guarantor of the State Components’/Local Authorities’ obligations.

Moreover, the Agreement foresees that the State’s guarantee may not be affected by any act, omission, matter, or other thing which would reduce any of its obligations under the guarantee provided, while in any case, the State’s/Host Government’s obligations will not be affected by the privatization, insolvency, liquidation, reorganization, or any change in the ownership, organizational structure, viability, or legal existence of any State Authority and/or State Entity.<sup>46</sup>

As regards, the Local Authorities actions, the Agreement provides that the State shall cause the Local Authorities to comply with the Agreement as though they were State Authorities as well as to perform obligations thereunder as though the term “State Components” included all Local Authorities.<sup>47</sup>

J. Existing Greek Gas Network

The Agreement further describes the Existing Greek Gas Network which provides for the interconnection of the Pipeline System with TANAP<sup>48</sup> and acknowledges that the State shall use reasonable endeavors to facilitate the cross-border arrangements necessary to support the interconnection between the Pipeline System and TANAP.<sup>49</sup> Nevertheless, it provides that in case the commercial operation of TANAP is

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<sup>44</sup> TAP HGA Greece, Clauses 4.8.

<sup>45</sup> TAP HGA Greece, Clauses 5.

<sup>46</sup> TAP HGA, Clause 5.2(a).

<sup>47</sup> TAP HGA, Clause 6.

<sup>48</sup> TAP HGA Greece, Clause 7.1(a).

<sup>49</sup> TAP HGA Greece, Clause 7.1(b).

delayed, the Project Investor shall use the Interconnector Turkey–Greece for notifying the State and agreeing with the State on the basis upon which the Project Investor may utilize the Interconnector Turkey– Greece with a view to transporting gas from the Turkish gas system to the Pipeline System pursuant to the terms of an ITG Interim Use Agreement, whereby the State shall take all necessary actions to enable the Project Investor to connect the Pipeline System to the Greek part of the Interconnector Turkey–Greece.<sup>50</sup> Furthermore, a reference to Greek Network Tie-Ins is separately foreseen where the Parties must enter into one or more Interconnection Agreements to enable “*interconnection between the Greek Facilities and the Greek gas transmission system and/or distribution networks*” while it is acknowledged and agreed by the parties “*that there are likely to be several such interconnections and, consequently, several Interconnection Agreements*”.<sup>51</sup>

#### K. Local Support

Pursuant to Article 8 of the Agreement, on the Local Support, the “*Parties acknowledge that the Project represents a major investment in Greece that will create significant opportunities for Greek labor and Greek contractors and acknowledge the geographical advantage and local knowledge benefits that such labor and contractors will offer in respect of the Project*”.<sup>52</sup> The Project Investor is required to “*ensure that the rules, procedures and qualification and evaluation criteria that it applies to the procurement processes that it conducts for the purpose of the Project Activities, including in respect of the construction and supply of materials for the Greek Facilities, encourage the use of Greek companies and labor throughout the Project supply chain by ensuring that there is no discrimination against Greek companies and, to the extent reasonably practicable, the Project Investor shall ensure that bidders are made aware of the benefits that Greek companies will offer in respect of the Project*”.<sup>53</sup> These provisions state the importance of using Greek labor and contractors, and poses the obligation on the Project Investor to encourage the use of Greek companies and labor.

#### L. Security

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<sup>50</sup> TAP HGA Greece, Clause 7.1(c).

<sup>51</sup> TAP HGA Greece, Clause 7.2.

<sup>52</sup> TAP HGA Greece, Clause 8.1.

<sup>53</sup> TAP HGA Greece, Clause 8.2.

As regards the security issues the Agreement includes provisions that import obligations to the State to protect the Project Activities and persons involved in the Project Activities from instances of Loss or Damage.<sup>54</sup> In particular, the Agreement requires the Project Investor to cooperate with the State in order to enable the State to accomplish its obligations efficiently.<sup>55</sup> The Agreement also includes provisions regarding the crossing infrastructure; thus effectively regulates matters related to security where the pipeline infrastructure potentially crosses other networks and infrastructure including pipelines, cables, roads, or railways.<sup>56</sup> More specifically, it is provided that any natural person or entity that wishes to install any crossing infrastructure should submit an application for that installation to the State and the latter, for the purposes of providing its consent, may notify the Project Investor and seek and take into consideration its comments.<sup>57</sup>

#### M. Access to Resources and Facilities

The Agreement includes special provisions regarding the access to resources and facilities and imports the obligation to State and State Components to exercise all reasonable endeavors to assist in the obtaining of readily available water proximate to the Pipeline System/Project Land in order to perform hydrostatic and other testing of the Pipeline System. Moreover, with respect to jurisdictions and authorities outside the Greek Territory, those rights, licenses, visas, permits, approvals, certificates, authorizations, and permissions necessary or appropriate for the project include in respect of: (a) storage and staging of lines of pipes, materials, equipment, and other supplies destined for or exiting from the Greek Territory, (b) all marine vessels sailing to or from the Greek Territory in connection with the export of Natural Gas/with the Performance of Project Activities, and (c) import and/or export or re-export of any goods, works, services, or technology necessary for the Project.<sup>58</sup>

#### N. Taxes

The Agreement extensive provisions on taxes; notably, it is worth stating that it affirms that the tax treatment will be no less favorable than that applicable to the

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<sup>54</sup> TAP HGA Greece, Clause 9.1(b).

<sup>55</sup> TAP HGA Greece, Clause 9.2.

<sup>56</sup> Introductory Report, at 1a; TAP HGA Greece, Schedule 1, Part 1, Clause 2.2(d).

<sup>57</sup> TAP HGA Greece, Clause 9.4.

<sup>58</sup> TAP HGA Greece, Clause 11.



state's nationals in the same circumstances under general tax legislation.<sup>59</sup> More schematically, the Agreement regulates the legal framework for the taxation of the investor providing for three separate taxation periods that apply other than with respect to value added tax (VAT). During these periods, the tax rates are frozen and in particular: (a) During the first tax period that is valid for a ten-year period from the commercial operation date, the State's tax laws will apply as at the signing date of the Agreement; (b) During the second tax period after ten years from the commercial operation date until the twenty-year commercial operation date, the tax laws will apply as in force on the day after the ten-year commercial operation date; and (c) During the third tax period from the date after the date of completion of the twenty-year commercial operation date until and including the twenty-five year commercial operation date, the tax law will apply as in force on the day after the twenty-year commercial operation date.<sup>60</sup>

Moreover, it is provided that *“the allocation of income between the Project Investor and the Permanent Establishment in the State must follow applicable OECD principles, including the commentary to Article 7 of the OECD Model Tax Treaty and the arm's-length principle as laid down in the 2010 OECD Transfer Pricing Guidelines, and shall be agreed between Greece and the Swiss Confederation as part of the APA”*.<sup>61</sup>

The purpose of Article 7 of the OECD is to provide limits to the right of one Contracting State to tax the business profits of enterprises of the other Contracting State,<sup>62</sup> while the right to tax of the Greek State does not extend to profits that the enterprise may derive from that State but that are not attributable to the permanent establishment in Greece.<sup>63</sup> In addition, the arm's-length principle follows the approach of treating members of a multinational group as operating as separate

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<sup>59</sup> TAP HGA Greece, Clause 12(1).

<sup>60</sup> TAP HGA Greece, Clause 12(5); Introductory Report, at 1b.

<sup>61</sup> TAP HGA Greece, Clause 12(10).

<sup>62</sup> Article 7(1) of the Model Convention, with respect to taxes, provides that “the profits of an enterprise of a Contracting State shall be taxable only in that State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment”, see <http://www.oecd.org/tax/treaties/1914467.pdf>

<sup>63</sup> Commentaries on the Articles of the Model Tax Convention; Commentary on Article 7 concerning taxation of business profits, at p. 157.

entities rather than inseparable parts of a unified business<sup>64</sup> and provides parity for tax treatment for members of multinational enterprises and independent enterprises.<sup>65</sup> These principles must be applied to the allocation of income to be agreed between Greece and the Swiss Confederation as part of the APA, which must be concluded in accordance with Article 24 of the double-taxation treaty between the countries. The APA is the advance-pricing agreement that will be entered into between the Greek State and the Swiss Confederation for the allocation of income between the Project Investor and its permanent establishment in Greece.<sup>66</sup> In order to ensure the avoidance of double taxation in any event and despite these provisions, the TAP HGA Greece acknowledges that “notwithstanding any other provisions of this Agreement to the contrary, Double Tax Treaties shall have the effect to give benefits with respect to Taxes related to the whole and any part of the Project Activities”. Finally, the Agreement provides for exclusion of withholding taxes,<sup>67</sup> while it is acknowledged that VAT should not be a cost to the Project.

#### O. Import and Export

As regards Import and Export, the Agreement provides that the Host Government accord natural gas and other goods and services associated, directly or indirectly, with the Project Activities treatment no less favorable in connection with their import into and/or export out of the Host Government or State than that which would be accorded to like goods and services of like origin that are not associated with the project.<sup>68</sup> Moreover, it foresees that the Host Government or State shall minimize the incidence and complexity of import and export formalities and decrease and simplify import and export documentation requirements in connection with the goods and/or services mentioned above,<sup>69</sup> while “*no excise duties . . . shall be applicable to any part of the Project or any Project Activities at the stage of its transportation via the Greek Territory*” except where products are released for consumption.<sup>70</sup> Thus, the

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<sup>64</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing, 1 September 2010, at p. 33.

<sup>65</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing, 1 September 2010, at p. 34.

<sup>66</sup> TAP HGA Greece, Clause 1(1), Definition of APA.

<sup>67</sup> TAP HGA Greece, Clause 12(13) and (14).

<sup>68</sup> TAP HGA Greece, Clause 13(1).

<sup>69</sup> TAP HGA Greece, Clause 13(4).

<sup>70</sup> TAP HGA Greece, Clause 13(7).

scope is to regulate matters relevant to customs and duties by providing for the simplification of relevant administrative procedures with the aim to facilitating the Project's performance. At the same time, matters related to the installation of metering stations and excise duties also are regulated.

P. Foreign Currency, Change of Law, Expropriation, and Foreign Capital

Pursuant to the Agreement, the Greek State confirms that the Project Investors and Participants have the right to bring into or take out of the territory foreign currency and to utilize and operate, without restriction, foreign currency accounts.<sup>71</sup> In particular, it provides that the Project Participants have the right to open foreign currency accounts, as well as to open, maintain, and operate local currency bank and other accounts inside the territory.<sup>72</sup> There also are standard provisions relating to the conversion of local currency and the transfer of foreign currency outside the territory.<sup>73</sup>

As regards the change of law, the Agreement foresees that the Greek State shall compensate the Project Investor for the costs/loss or damage it incurs as a result of the change of law.<sup>74</sup> In addition to changes of law that result in loss or damage, the Agreement includes special provision regarding changes of law that lead to savings and provide that where the Project Investor is able to realize savings in connection with the Project, and the Project Investor in fact realizes such savings, the Project Investor must, if so requested in writing by the Host Government/State, compensate the Host Government/State for one-half of the amount of such savings.<sup>75</sup>

In relation to expropriation, the Host Government Agreement provides that no investment owned or enjoyed, directly or indirectly, by any Project Participant in relation to the Project may be expropriated except where such expropriation is:

- (1) for a purpose that is a public purpose;
- (2) not discriminatory;
- (3) carried out under due process of law; and

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<sup>71</sup> TAP HGA Greece, Clause 14(1)(a).

<sup>72</sup> TAP HGA Greece, Clause 14(1)(b).

<sup>73</sup> TAP HGA Greece, Clause 14(1)(d)-(e).

<sup>74</sup> TAP HGA Greece, Clause 17(1)(b).

<sup>75</sup> TAP HGA Greece, Clause 17(2).

(4) accompanied by the payment of prompt, adequate, and effective compensation.<sup>76</sup>

Furthermore, it is provided that the compensation payable to the Project Investor so that it may in no case be lower than the sum of:

(1) all amounts payable under any existing and future agreements, contracts, and other documents relating to the Project to which the Project Investor is a party (“Implementation Contracts”), including Implementation Contracts with lenders;

(2) all equity or subordinated debt invested in the Project Investor by any person holding any form of direct or indirect equity or other ownership interest in the Project Investor;

(3) a sum equal to the net present value of the anticipated return on equity that would have been realized by those persons holding any direct or indirect equity or other ownership interest in the Project Investor had the expropriation not occurred; and

(4) those other losses or damages directly arising out of the expropriation.<sup>77</sup>

Moreover, the compensation shall, at the request of the Project Participant, be both expressed and payable in the convertible currency nominated by the relevant Project Participant.<sup>78</sup>

On foreign capital protection, it is confirmed by the Greek State that the Project will benefit from the provisions of Foreign Capital Protection Law, Legislative Decree No 2687/1953, as amended and in force (the “Foreign Capital Protection Law”).<sup>79</sup>

#### Q. Force Majeure

The force majeure clause that is included in the Agreement is limited to those events which are beyond control and not caused or contributed to by negligence of the contracting parties.<sup>80</sup> More specifically, the Agreement states that “*no provision of any Greek law shall act to provide either party with any greater relief or excuse*

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<sup>76</sup> TAP HGA Greece, Clause 18.1.

<sup>77</sup> TAP HGA Greece, Clause 18.3.

<sup>78</sup> TAP HGA Greece, Clause 18.5.

<sup>79</sup> TAP HGA Greece, Clause 19.1.

<sup>80</sup> TAP HGA Greece, Clause 21.2.

*from its liabilities and/or obligations in connection with this Agreement in any circumstances which is outside the control of that party than the relief or excuse from its liabilities and/or obligations that is provided under this Agreement”.*<sup>81</sup>

Thus, the clause excludes the possibility of any provision of Greek law superseding the terms of this Agreement regarding the matters of force majeure.

#### R. Insurance

The Agreement provides that the Project Investor has the obligation: (a) to effect and maintain, or cause to be effected and maintained, insurances in such amounts and in respect of such risks in accordance with the internationally accepted standards and business practices of the natural gas pipeline industry<sup>82</sup> while the Greek State should be notified of such insurances; and (b) upon request of the State, to provide evidence of insurance.<sup>83</sup>

Furthermore, it is provided that, other than with respect to mandatory insurances under Greek law, the Project Investor may not be in breach of its insurance obligations if it has failed to effect or maintain insurances: (a) not available in the worldwide insurance market with insurers having a credit rating of at least A- with Standard & Poor or equivalent with Moody’s or Fitch; (b) the premiums with respect to those insurances being substantially uneconomic; or (c) those insurances no longer being effected or maintained for projects similar to the Project.<sup>84</sup>

Moreover, it states that the insurer may not have any right of subrogation to any claim of the Project Investor against the State for loss or damage based on any contractual right under the TAP HGA.<sup>85</sup> It also provides for the possibility for self-insurance stating that insurances may include duly certified self-insurances.<sup>86</sup>

#### S. Dispute Resolution

The dispute resolution provisions, including the waiver of immunity and the dispute settlement between the Parties, are developed in the Articles 23 and 24 of the

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<sup>81</sup> TAP HGA Greece, Clause 21.3.

<sup>82</sup> TAP HGA Greece, Clause 22.1(a).

<sup>83</sup> TAP HGA Greece, Clause 22.1(b).

<sup>84</sup> TAP HGA Greece, Clause 22.2.

<sup>85</sup> TAP HGA Greece, Clause 22.3.

<sup>86</sup> TAP HGA Greece, Clause 22.1(a).

Agreement and are going to be analyzed hereby below in the Chapter 6.2 under the title “*Dispute resolution with the Greek State under TAP HGA*”.

#### T. Final Provisions

The duration of the agreement is foreseen to be twenty-five years from the date of the commercial operation subject to definitive interruption of activities by the Project Investor or termination in accordance with the provisions of the Agreement, which provide for the reasons and procedure for termination.<sup>87</sup> Moreover, the Agreement includes provisions on termination providing for a time period of forty-eight months, within which the Project Investor is required to have taken steps to commence the construction phase of the Project. If there is a delay beyond this period, the Greek State will have the right to give written notice to the Project Investor of the termination of the agreement.<sup>88</sup> Under this framework, the force majeure clause included in the Agreement as analyzed above, affects the Project Investor to extend the above-referenced forty eight-month period.<sup>89</sup>

It is also provided that, for the same period to be extended if and to the extent of any delays caused by the failure or refusal of any State Component to perform any of its obligations in respect of the Project Activities.<sup>90</sup> What is more, in the event of cessation of all Project Activities, caused by reasons within the control of the Project Participants for a period of at least five years (“Abandonment”), the State is able to give written notice to the Project Investor requesting the Project Investor to recommence the Project Activities within six months of receiving the State’s notice.<sup>91</sup>

Moreover, the duration of the Agreement is possible to be extended, upon agreement of the parties, in order to enable quantities of natural gas to be transported.<sup>92</sup> As regards project financing, the Agreement provides that the Parties will cooperate in order to facilitate the private project financing, which includes the State’s

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<sup>87</sup> Introductory Report, at 1c, Paragraph 19; TAP HGA Greece, Clause 29.1.

<sup>88</sup> TAP HGA Greece, Clause 29.2(b).

<sup>89</sup> TAP HGA Greece, Clause 29.2(b)(ii).

<sup>90</sup> TAP HGA Greece, Clause 29.2(b)(i).

<sup>91</sup> TAP HGA Greece, Clause 29.2(c).

<sup>92</sup> TAP HGA Greece, Clause 30(b).

willingness to enter into direct agreements with lenders.<sup>93</sup> In relation to the decommissioning, the Agreement foresees that the Project Investor shall decommission the Project according to the terms of the decommissioning plan which will be part of the environmental and social impact assessment process. This is the general rule except in case that the Greek State agrees that all rights concerning the Project shall be transferred to it.<sup>94</sup>

In an overall assessment, it is evident that both Agreements, the TAP IGA and TAP HGA, facilitate the efficient realization and operation of the TAP project in the short and long term as well, since essential issues have been addressed in order to ensure that the binding agreements will endure during the Project's lifetime.

## **CHAPTER 4 SECURITY OF SUPPLY**

As TAP consists a crucial energy infrastructure project that serves both Greece and Europe, it is crucial to depict the recent energy reality in both Europe and Greece in order to better understand the impact of the TAP project on both levels, the national and the European, and its role as major energy network in South East Europe.

### **4.1 EU AND GREECE SECURITY OF GAS SUPPLY**

One of the most important concerns of European Union's present and future agenda is its energy security. As the demand for energy supply constantly increases and the domestic energy production tends to decline due to the exhaustion of inland energy resources, the EU needs to examine various scenarios and form adequate alliances in order to meet the energy needs of its Member States (MS).

Nowadays, as regards natural gas consumption, Europe's main suppliers of natural gas are Russia (22% of the total supply), Norway (19%), and Algeria (10%) through pipelines and LNG, as shown in Figure 4.1.

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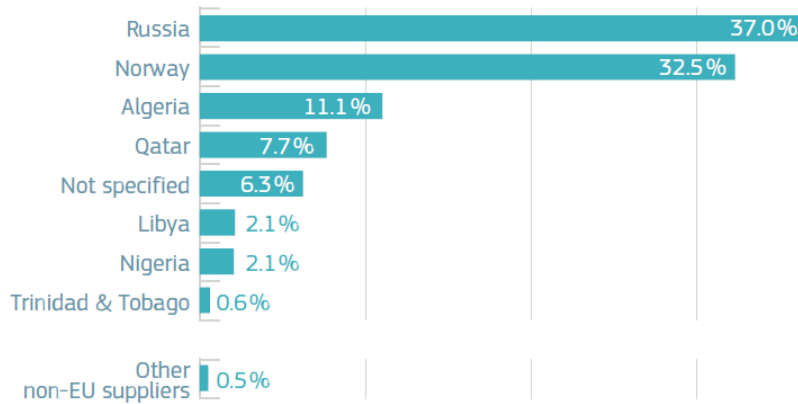
<sup>93</sup> TAP HGA Greece, Clause 33.

<sup>94</sup> TAP HGA Greece, Clause 32.

Figure 4.1

### EU-28 IMPORTS\* OF NATURAL GAS – 2015

Total non-EU = 12 624 717 TJ-GCV



Sources : European Commission - Energy in Figures, Statistical Pocketbook 2017, ISSN 1977-4559

As a result, an aspect of the EU's and MS's thereof energy security priority is the interdependence from Russian imports of natural gas. As Russia remains the major supplier of gas for the EU, its economic influence creates political control over the EU in general and over specific countries of the Union, either of those who depend on Russian gas imports to cover their energy needs or of those who are considered as transit routes for the transportation of gas from Russia to the European continent.

Given the fact that the control over the supply of gas to EU determines the quantity and the price of gas production and exports, a basic concern of the EU States is to develop a model of diversification of EU's energy resources and supply routes with the goal to reduce as much as possible the Union's dependence from Russia. Alarmed by the 2009 Russia-Ukraine gas crisis, the EU started to develop "a series of regional sub-networks of independent gas infrastructure hubs"<sup>95</sup> and to invest among others on the build out of cross-border interconnections, such as South Stream pipeline, the European part of which is the TAP, distributing therefore the weight of gas supply between the northern and the southern region of the EU. Thus, the development and the investments on new energy networks and interconnections is a major priority to the EU energy policy and key to the European energy security.

<sup>95</sup> A. N. Stulberg, "Natural gas and the Russia-Ukraine crisis: strategic restraint and the emerging Europe-Eurasia gas network", 2017.



Under the above-mentioned context, Greece's natural gas map follows a quite differentiated supply routes that are tending to be enhanced once TAP is fully operational. Currently the Greek gas market is supplied by pipelines importing gas from Russia, through Ukraine, Romania and Bulgaria, and from Azerbaijan, through Georgia and Turkey, as well as from the existing regasification LNG Terminal in Revithoussa.

Despite the fact that, the TAP project, at least in its Initial phase, is mainly dedicated to the transportation of gas to Italy, contribution to Greece's gas market and to the enhancement of the security of gas supply is expected to be very positive.

The construction and operation of TAP, as mentioned above provides a new supply route, which will allow for additional sources of gas, to reach Greece and further beyond. Furthermore, it is to be noted that the supplies will not only come from diversified sources, but will also belong to a number of shippers, including among others Greek eligible customers and suppliers, who are going to eventually conclude gas supply agreements with the Shah Deniz II Consortium, or others who have expressed their willingness to transport through TAP gas from other sources. As a result, once it is safeguarded by the competent regulators, that all of the aforementioned shippers committed to reserve capacity in TAP will be allowed to do so, and, on the other hand, obligations are imposed on TAP to develop connections to the Greek territory, the construction of TAP will greatly enhance competition in the Greek gas market, facilitating the reduction of the dominant position that either the Greek incumbent or the existing upstream suppliers have on the Greek market.<sup>96</sup>

The importance of the aforementioned contribution of TAP project is not negligible especially given the fact that the Greek market is relatively small and immature, compared to other European markets, thus collective dominance of a number of undertakings that may jointly/collectively dominate the market could also arise hindering competition. Under this context, conditions should be imposed, which would prevent DEPA SA, the Greek incumbent, or any other supplier of the Greek market with a share higher than 40% in the relevant product market, to obtain more than 50% of the new gas supplies from any future exit points of TAP in the Greek territory. Under these circumstances, the construction of TAP will greatly enhance

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<sup>96</sup> [http://www.rae.gr/site/file/categories\\_new/about\\_rae/factsheets/2013/gen/25072013?p=file&i=0](http://www.rae.gr/site/file/categories_new/about_rae/factsheets/2013/gen/25072013?p=file&i=0), p. 31.

competition in the Greek gas market, facilitating the reduction of the dominant position that either the Greek incumbent or the existing upstream suppliers have on the Greek market.

#### 4.2 THE IMPACT OF THE TAP ON THE GREEK ENERGY MARKET

Under this framework, the TAP Project is expected to critically contribute to the security of supply of Greece, in the following ways:

**A.** Enhanced possibility of diversification of supply sources: in the past years a relatively small percentage (average 2007-2011: 11%) of the gas supply mix is of Caspian region origin, through a supply contract between the incumbent DEPA S.A. and Botas S.A. Opening up of the Southern Gas Corridor through TAP, along with TAP capacity expansion and allocation through Market Tests and the construction of exit points in Greece will obviously provide the opportunity for larger quantities from the Caspian region — or potentially other regions — to enter the country, diversifying the supply mix.

**B.** Upgrade of the import capacity of Greece: the approximately 10 bcm/year (or even 20 bcm/year) throughput capacity of TAP, it will directly and positively affect the fulfillment of the N – 1 criterion of Regulation 994/2010. Virtual or physical reverse flow from Italy will have the same impact with adding a new import point to the Greek natural gas transmission system.

**C.** Connection with a well-diversified market: through TAP, the Greek natural gas system is connected to the market of Italy, one of the most diversified markets in Europe in terms of the supply mix. This would increase the number of options for emergency supplies of gas either through virtual or physical reverse flow.

**D.** Access to Storage facilities in Italy: the Interconnection with Italy will link the Balkans, a region effectively missing storage volumes with the Italian System which is endowed with significant underground storage volumes. Suppliers could therefore, through virtual or physical reverse flow from Italy arrange for the supply of gas from storage in case of emergencies or in order to cover peak demand.

**E.** Connection to the South Eastern Europe (SEE) region: there is the possibility in the future for the connection of the Greek Natural Gas Transportation System (NGTS) to the natural gas transportation systems in the North Western Balkans and

the Central Eastern Europe. This will not only enhance the security of supply of the Greek market, but also of the whole SEE region.

In addition to the above, the contribution of TAP to the security of gas supply in Greece, shall be further consolidated through imposing the obligation by the competent regulator, of providing for bi-directional connections to the National Natural Gas System at specific locations, effectively looping a critical part of the Greek system, in order to allow for diversion of gas quantities to different parts of the Greek system in case of emergency.<sup>97</sup>

## **CHAPTER 5 REGULATORY FRAMEWORK**

### **5.1 GREEK AND EU GAS REGULATORY FRAMEWORK**

As regards the Greek energy regulatory framework, access rules to both the transmission system and the LNG Revithoussa terminal were concluded through the past ten years and are included within a comprehensive package of secondary legislation comprising:

- the Network Code setting the rules for third party access to the transmission system and to the LNG terminal;
- the NNGS Users Registry Regulation setting the requirements and procedures for the registration of any legal or natural person as a gas shipper;
- the Authorisation (License) Regulation setting the rules for granting, amending and revoking gas supply and gas distribution licenses and the licenses for owning and operating an Independent Natural Gas System (INGS) in the country as would be the case of TAP (INGS License and INGS Operation License);
- the Measurements Regulation setting the technical rules and procedures for measuring natural gas volumes at the entry and exit points;
- the Standard Transportation Agreement and the Standard LNG Agreement, which the TSO concludes with system users wishing to access respectively the transmission system or the LNG terminal;

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<sup>97</sup> [http://www.rae.gr/site/file/categories\\_new/about\\_rae/factsheets/2013/gen/25072013?p=file&i=0](http://www.rae.gr/site/file/categories_new/about_rae/factsheets/2013/gen/25072013?p=file&i=0), p. 32-33.

- the Tariff Regulation, which imposes an Entry Exit tariffication system, accompanied by the publication of the corresponding Entry and Exit Tariffs.
- the Law 4001/2011 transposed the Gas Regulation (EC 715/2009) and Gas Directive (2009/73/EC) to the Greek legislation .

In addition, the Greek legislation also provides for the virtual reverse (backhaul) flow in the entire Greek NNGS, and every Entry point is also an Exit point. This provides additional flexibility, as well as the possibility for the use of TAP for gas trading transactions of various kinds, especially when combined with the development of a Virtual Gas Trading Point (VGTP), which is currently in the design phase in Greece. To this end, the development of TAP will provide for the future linkage between the Greek VGTP and the Italian PSV, a development which will enhance gas to gas competition, fully in line with the future Gas Target Model, with very positive effects for the whole SEE region.<sup>98</sup>

The aforementioned Greek regulatory legislation has been revised multiple times in order to correspond to the new EU standards and the Greek gas market which rapidly evolves.

On the European gas regulatory level the Gas Regulation (EC 715/2009) and Gas Directive (2009/73/EC), as mentioned above and transposed to the Greek legislation in 2011, set for the MS several rules, standards as well as exemptions to the imposed rules, to be adapted properly in order on the one hand, to safeguard a competitive, effective and transparent gas energy market within the EU, and on the other hand to facilitate and enhance the participation of as much as possible energy players to the European energy market and enhance the investment interest to European gas infrastructure projects.

## 5.2 EXEMPTIONS GRANTED

On 29.08.2011 and 31.08.2011, TAP AG submitted to the Italian Ministry of Economic Development (Ministero dello Sviluppo Economico, hereinafter, “MSE”) and to the Regulatory Authority for Energy of Greece (hereinafter, “RAE”) respectively, the “Exemption Application for Trans Adriatic Pipeline” (hereinafter,

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<sup>98</sup> [http://www.rae.gr/site/file/categories\\_new/about\\_rae/factsheets/2013/gen/25072013?p=file&i=0](http://www.rae.gr/site/file/categories_new/about_rae/factsheets/2013/gen/25072013?p=file&i=0), p. 29.

“Exemption Application”), as foreseen by Article 36 of the Gas Directive, and on 01.09.2011, submitted the Exemption Application to the Energy Regulatory Entity (hereinafter “ERE”) of Albania, in accordance with Article 22 of the Gas Directive 2005/54/EC, requesting the following exemptions:

**A. Related to the Initial Capacity of 10 bcm/year:**

(a) from the requirement of Third Party Access (TPA) (Article 32 of the Gas Directive);

(b) from regulated tariffs (Article 41.6, 41.8, 41.10 of the Gas Directive).

The above exemptions are meant for a period of 25 years from the Commercial Operation Date, equivalent to the duration of the long-term contracts.

**B. In respect of the possible realization of an Expansion Capacity in Phase II:**

(a) from regulated tariffs (Article 41.6, 41.8, 41.10 of the Gas Directive).

The above exemption is meant for the same period for which exemption for the Initial Capacity is applied for and granted.

**C. Irrespective of Initial or Expansion Capacity:**

(a) from regulated tariffs for Reverse Flow (Article 41.6, 41.8, 41.10 of the Gas Directive);

(b) from the unbundling provisions of the Third Gas Directive (Article 9);

(c) from the provisions of Gas Regulation (with exception of Article 19.4).

The above exemptions are meant for a period of 25 years from the Commercial Operation Date, equivalent to the duration of the long-term contracts.

Following the above-mentioned Exemption Application, and after notifying the latter to the European Commission, on 06.06.2013, the Energy Regulatory Authorities, “*Autorità per l’energia elettrica e il gas*” in Italy, “*Enti Rregullator I Energjise*” in Albania, and “*Ποθμιστική Αρχή Ενέργειας*” in Greece, issued their “Final Joint Opinion on TAP AG’s Exemption Application”, providing for the

following exemptions and licenses pursuant to the aforementioned regulatory framework and after.

*5.2.1 EXEMPTION FROM REQUIREMENT OF ARTICLE 9 OF THE GAS DIRECTIVE (OWNERSHIP UNBUNDLING)*

The exemption from the ownership unbundling requirements of Article 9 of the EU Gas Directive 2009/73, subject to conditions that prevent possible conflicts of interest between TAP as a pipeline operator and its shareholders active in the production and supply of natural gas, was granted to TAP AG for a period of 25 years starting from the Commercial Operation Date. This Exemption was granted under the following conditions:

**A.** Before allocating capacity as a result of the first Booking Phase, TAP AG had to be functionally unbundled and had to establish a compliance programme to ensure that it has taken all necessary measures to exclude discrimination vis-à-vis non-shareholder parties. As a result, the compliance programme shall provide at least the following requirements:

(i) Measures to prevent discriminatory conduct in relation to the participants in the first Booking Phase of the market test, who are not shareholders in TAP AG.

(ii) The duties and the rights of the employees of TAP AG in the fulfilment of the purposes of the Compliance Programme.

(iii) The person or body responsible for monitoring the Compliance Programme and submitting to the Authorities an Annual Compliance Report, setting out the measures taken.

(iv) The principles of the tariff methodology and the congestion management rules that were to be applied to the marketing of capacity by TAP AG.

Therefore, the compliance programme sets out measures which ensure that day-to-day activities are undertaken independently from the production or supply interests of its shareholders, so that principles of Functional Unbundling shall be adhered to continuously.

**B.** TAP AG was required to be fully certified on the basis of the independent transmission system operator (ITO) model, before the start of the construction of the pipeline, and not later than 1 January 2018. To this end, TAP AG applied for such certification with the view to safeguard the degree of independence of the top and executive management of TAP AG from its shareholders. The certification, on the basis of the independent transmission operator (ITO) model, was granted in April 2016 by the national regulatory authorities, after taking into consideration the opinions issued by the European Commission and the Energy Community Secretariat earlier in 2016.

TAP AG is not compelled to comply with Article 22 of the Gas Directive, giving the fact that the scope of the provisions of Article 22 of the Gas Directive are sufficiently addressed by the assessment of the Authorities and by the conditions and time limits which was imposed by this Joint Opinion.

*5.2.2 EXEMPTION FROM THE REQUIREMENT OF ARTICLE 32 OF THE GAS DIRECTIVE (THIRD PARTY ACCESS)*

The exemption from the provisions of Article 32 of the Gas Directive for the Initial Capacity, was granted to TAP AG, for the forward transportation of natural gas from the actual TAP entry point in Greece to its exit point in Italy, for a period of 25 years starting from beginning of the Commercial Operation Date, under the following conditions:

**A.** The Initial Capacity shall be dedicated to the transportation of gas volumes to be procured by Shah Deniz II gas, and any deviation from this principle will not be possible without prior approval by the Authorities.

**B.** The Initial Capacity shall be allocated to the shareholders of TAP AG in proportion to their shares under the strict obligation to transfer such capacity to all buyers entering into Gas Sale Agreements (GSAs) with Shah Deniz Consortium.

**C.** Obligation to perform the first Booking phase and to build the capacity reserved under this within six months from the Commercial Operation Date.

**D.** Participation in the first Booking phase, meaning that all participants to the Expression of Interest phase are allowed to participate to the first Booking phase as

well as the national TSOs from the transit countries irrespective of their participation in the Expression of Interest phase on the same conditions applying to all other participants of the Expression of Interest phase.

**E.** Obligation to perform subsequent market tests at least every two years, under guidelines to be approved by the Authorities.

**F.** Obligation to build Expansion Capacity and perform independent economic viability tests.

**G.** Possibility to further expand capacity beyond the Total Capacity, i.e. beyond 20 bcm/year.

**H.** Obligation to offer short-term products during the exemption; more specifically:

- 5% of the Initial Capacity, and

- 10% of the actually built Expansion Capacity.

*5.2.3 EXEMPTION FROM THE REQUIREMENTS OF ARTICLE 41.6, 41.8 AND 41.10 OF THE GAS DIRECTIVE (REGULATED TARIFFS) FOR THE INITIAL AND EXPANSION CAPACITY FORWARD FLOW.*

The exemption from the provisions regarding regulated tariffs for the Initial and Expansion Capacity forward flow was granted to TAP AG for a period of 25 years starting from beginning of the Commercial Operation Date, under the following conditions respectively:

**A.** As regards Initial Capacity, TAP AG was required to submit for the approval of the Authorities the TAP Tariff Code meaning a final methodology for the implementation of the TAP Tariff that would reflect efficient costs, would be transparent and non-discriminatory and would follow the principles described in the TAP's Exemption Application. The Authorities shall monitor regularly whether the TAP Tariff complies with the approved methodology.

**B.** As regards Expansion Capacity, it is required that (i) the capacity products shall be offered through auctions, as a result of a Market Test; (ii) each product (different duration and/or entry or exit point) shall be priced separately; (iii) for each product offered, the reserve price of the auction shall be set equal to TAP Tariff, according to the TAP Tariff Code; and (iv) the users of the Expansion Capacity shall pay the price set in the item (iii) above plus the premium resulting from the auction.



### 5.3 LICENSES GRANTED

Following the rules that regulate access to the transmission system, TAP AG was properly licensed for owning and operating an Independent Natural Gas System (INGS) in the country.

In particular, as regards Greece, on 5 September 2014, the Regulatory Authority for Energy (RAE) granted TAP AG the INGS license for a period of 50 years. This license authorized TAP to proceed to the necessary activities related to the construction of the pipeline such as installation of the pipeline, compressor and metering stations, block valve stations and other equipment. The license was further amended in 2015 and 2019.

As a holder of INGS license, TAP AG is entitled to be granted as well the INGS operation license. The application for issuing an INGS operation license shall be submitted at least 1 year before the commencement of the commercial operation which is determined in the INGS License. As a result, the application submitted by TAP AG, at the end of 2018 and RAE performs the review process.

## **CHAPTER 6 INVESTMENT PROTECTION UNDER ENERGY CHARTER TREATY (ECT) - DISPUTE RESOLUTION**

TAP IGA, in its Preamble states that it is adopted *“in furtherance of the principles set forth in international trade and investment agreements applicable to each party, including the Energy Charter Treaty, the Community Treaties and the Energy Community Treaty”*.

Being also signatory of the Energy Charter Treaty (ECT), Greece is obliged to comply with the investment protection provisions of ECT as well as dispute resolution proceedings set under the combined framework of ECT and TAP HGA.

### 6.1 ENERGY CHARTER TREATY (ECT)

The ECT is a multilateral treaty with binding force, limited in scope to the energy sector, providing a large geographical and country coverage in terms of investment protection since it counts a great number of signatories and Contracting Parties,

among which the EU and its member states<sup>99,100</sup>.

The provisions of the ECT focus on five broad areas:

- A. The protection and promotion of foreign energy investments based on the extension of national treatment or most-favoured nation treatment;
- B. Free trade in energy materials, products and energy-related equipment, based on WTO rules;
- C. Freedom of energy transit through pipelines and grids;
- D. Promotion of energy efficiency;
- E. Mechanisms for the Resolution of Disputes.

#### 6.1.1 INVESTMENT PROTECTION PRINCIPLES

In particular, the ECT creates a distinction between the phases prior and after the realization of an investment. The pre-investment phase regime is constituted by ‘best endeavor’ soft law obligations,<sup>101</sup> whilst the post investment phase regime contains binding obligations for the contracting parties.<sup>102</sup>

As regards the post-investment protection, Article 10(1) of the ECT under the title “*Promotion, Protection and Treatment of Investments*” contains the basic principles for the protection of foreign energy investments. More specifically, it provides that:

*“Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for*

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<sup>99</sup> A. Konoplyanik and T. Wälde, “Energy Charter Treaty and its Role in International Energy” // Journal of Energy and Natural Resources Law, 2006, op.cit., at p. 526.

<sup>100</sup> The Signatories and Contracting Parties to the Energy Charter Treaty are Afghanistan, Albania, Armenia, Australia (not ratified), Austria, Azerbaijan, Belarus (not ratified, but it applies provisionally), Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Norway (not ratified), Poland, Portugal, Romania, Russian Federation (not ratified), Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, found in <energycharter.org/who-we-are/members-observers/> last assessed 25 September 2017.

<sup>101</sup> K. Hobér, “The Energy Charter Treaty An Overview” // The Journal of World Investment & Trade, 2007, at p. 323-356, 325.

<sup>102</sup> Part III of the ECT (Articles 10-17); K. Hobér, “The Energy Charter Treaty An Overview” // The Journal of World Investment & Trade, 2007, at p. 323-356, 323-356, 325.

*Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by International law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”.*<sup>103</sup>

The provisions of the first paragraph of Article 10 constitute the legal basis of five substantive protection principles. It follows therefore, a brief overview of these principles in order to understand the protection level that TAP AG, as Investor benefits from.<sup>104</sup>

#### A. Fair and Equitable Treatment

Pursuant to the Arbitral practice, the fair and equitable treatment principle includes the principles of protection of legitimate investor expectations with respect to the maintenance of a stable and predictable business and legal environment by the host government, the principle of transparency, the good faith and abuse of rights principles, due process, as well as proportionality and the prohibition of arbitrariness.<sup>105</sup>

The standard of fair and equitable treatment derives from international law; however, despite the importance of the term for international investment protection, its exact meaning is not set in stone yet. This means that its *ad hoc* application

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<sup>103</sup> Energy Charter Treaty, Article 10(1).

<sup>104</sup> Energy Charter Treaty, Article 1.

<sup>105</sup> See e.g. *Mm Equity San. Bhd. MrD Chile S.A. v. Chile*, ICSID Case No. A1ZB/O1/7 (Malaysia/Chile BIT), Award, 25 May 2004; *Waste Management, Inc. v. Mexico (Number 2)*, ICSID Case No. Aas(AF)/00/3 (NAFTA), Final Award, 30 April 2004; *Cnts Gas Transmission Company v. Argentina*, ICSID Case No. AitB/O1/8 (United States/Argentina BIT), Final Award, 12 May 2005; *Azinian, Davitian Baca v. Mexico*, ICSID Case No. ARB(AF)/9712 (NAFTA), Award, 1 November 1999; *Metaldad Corporation v. Mexico*, ICSID Case No. APB(AF)/97/1 (NAFTA), Award, 30 August 2000; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSM Case No. AKts(AF)/00/2 (Spain/Mexico BIT), Award, 29 May 2003; K. Hobér, “Investment Arbitration and the Energy Charter Treaty” // *The Journal of World Investment & Trade*, 2007, at p. 323-356, 329.

requires a prior deep factual assessment and analysis, combined with the application of “*standards of good-government conduct*”.<sup>106</sup> Nevertheless, the principle has been interpreted through various awards among which the *Petrobart Award*,<sup>107</sup> where the Tribunal noted the standard of fair and equitable treatment derives from the entirety of the paragraph,<sup>108</sup> resulting into the view that, for the interpretation of the fair and equitable treatment, all the other standards mentioned must be observed as well.<sup>109</sup>

### B. Most Constant Protection and Security

This principle refers to the host state’s duty to protect the normal ability of the investor’s business to function in a level-playing field.<sup>110</sup> Therefore, it has been supported that it is required the assumption of an active obligation, by the Host State, to create a framework guaranteeing security to foreign investors.<sup>111</sup> This means that the obligation of the Host State occupies the protection against measures attributed to private persons or state organs,<sup>112</sup> whilst legal remedies against adverse action should be at the disposal of Investors.

### C. Prohibition of Unreasonable or Discriminatory Measures

Pursuant to Article 10(1) as cited above, the prohibition of discrimination presents similarities with the fair and equitable treatment principle, as mentioned in the same Article. It derives, therefore, that a breach of the prohibition of discriminatory

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<sup>106</sup> T. Wälde, “Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues”, // *Transnational Dispute Management Vol (2)*, 2004; K. Hobér, “Investment Arbitration and the Energy Charter Treaty” // *The Journal of World Investment & Trade Vol (1)*, 2010, at p. 153-190, 329.

<sup>107</sup> *Petrobart v The Kyrgyz Republic*, Award, 29 March 2005, *Stockholm International Arbitration Review* 3 (2005): 45, 82; found in: C. H. Schreuer, “Selected Standards of Treatment available under the Energy Charter Treaty” // G Coop and C Ribeiro (eds), *Investment Protection and the Energy Charter Treaty*, 2008, *JurisNet LLC*, 64.

<sup>108</sup> *Petrobart v The Kyrgyz Republic*, Award, 29 March 2005, *Stockholm International Arbitration Review* 3 (2005): 45, 84.

<sup>109</sup> C. H. Schreuer, “Selected Standards of Treatment available under the Energy Charter Treaty” // G Coop and C Ribeiro (eds), *Investment Protection and the Energy Charter Treaty*, 2008, *JurisNet LLC*, 65.

<sup>110</sup> T. Wälde, “Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues”, // *Transnational Dispute Management Vol (2)*, 2004; K. Hobér, “Investment Arbitration and the Energy Charter Treaty” // *The Journal of World Investment & Trade*, 2007, at p. 323-356, 329.

<sup>111</sup> C. H. Schreuer, “Selected Standards of Treatment available under the Energy Charter Treaty” // G Coop and C Ribeiro (eds), *Investment Protection and the Energy Charter Treaty*, 2008, *JurisNet LLC*, 68.

<sup>112</sup> See inter alia *PSEG v Turkey*, Award, 19 January 2007, paras 257-259; found in C. H. Schreuer, “Selected Standards of Treatment available under the Energy Charter Treaty” // G Coop and C Ribeiro (eds), *Investment Protection and the Energy Charter Treaty*, 2008, *JurisNet LLC*, 69.

measures unavoidably leads to a subsequent breach of the fair and equitable treatment standard. Nevertheless, in practice, the invocation of the non-discrimination principle founds in the *Nykomb* case,<sup>113</sup> where Latvia was found in breach of the non-discrimination principle, by offering higher tariffs for electricity to other companies and failing to present any evidence as to why those companies should be treated differently.<sup>114</sup>

#### D. Pacta Sunt Servanda

The Host State is obliged to “*observe any obligations it has entered into with an Investor or an Investment of an Investor of any other contracting party*”, according to Article 10 of the Treaty. Despite that the ad hoc interpretation and implementation of the obligation belongs to the tribunals, a combined approach of Article 10 with Article 22 of the Treaty, could lead to the argument that the Host State may become responsible, under the ECT, for a wide range of actions or omissions, even in cases of commercial interactions between Host State and foreign enterprises.<sup>115</sup>

#### E. Prohibition of Expropriation

One of the most fundamental provisions of the investment protection regime, prohibition of expropriation is provided in Article (13) of the ECT as follows:

*“Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation”.*

This provision protects the Investor from measures equivalent to nationalization or expropriation, including the case of indirect expropriation, while the right of an

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<sup>113</sup> *Nykomb Synergetics Technology Holding AB v the Republic of Latvia*.

<sup>114</sup> *Nykomb Synergetics Technology Holding AB v the Republic of Latvia*; K. Hobér, “Investment Arbitration and the Energy Charter Treaty” // *The Journal of World Investment & Trade*, 2007, at p. 323-356, 320.

<sup>115</sup> K. Hobér, “Investment Arbitration and the Energy Charter Treaty” // *The Journal of World Investment & Trade*, 2007, at p. 323-356, 331.

expropriated investor to prompt, adequate, and effective compensation is guaranteed even in case the expropriation is lawful. This provision is further specialized in Clause 14 of TAP HGA as mentioned above.

#### *6.1.2 DISPUTE RESOLUTION AND ARBITRATION*

Dispute settlement is regulated in Articles 26-28 of the ECT. In particular, Article 26 governs investment disputes between investors and contracting states, and extends to investors a right to arbitration of such disputes.<sup>116</sup> In order for a dispute to fall under the scope of the ECT, must concern persons, subject-matter, and temporal element falling within the scope of the Treaty.

More specifically, the ECT provides that, in case the Host State has breached one of the ECT's investment protection obligations, the investors are given three options for presenting claims, providing although that the amicable dispute settlement between the Parties does not resolute in a fruitful result within three months.<sup>117</sup> In this event, the unresolved dispute can be submitted either to a domestic court of the Host State, or to any applicable, previously- agreed dispute settlement procedure or to international arbitration. As regards the right to international arbitration of investment disputes, Article 26(4) provides that investors may elect any of the following forms of international arbitration:

- A.** International Centre for Settlement of Investment Disputes (ICSID), (provided that both parties are signatories to the Washington Convention);
- B.** ICSID Additional Facility (if one party is a signatory to the Washington Convention, but the other party is not);
- C.** Ad hoc UNCITRAL; and
- D.** Arbitration administered by the Stockholm Chamber of Commerce.

The aforementioned dispute resolutions provisions included in the ECT, consist an additional protection to the one specifically provided for the TAP AG in the TAP

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<sup>116</sup> K. Hobér, "Investment Arbitration and the Energy Charter Treaty" // *The Journal of World Investment & Trade*, 2007, at p. 323-356, 325.

<sup>117</sup> Energy Charter Treaty, Articles 26(1),(2).

HGA with the Greek State.

## 6.2 DISPUTE RESOLUTION WITH GREEK STATE UNDER TAP HGA

The TAP HGA Greece primarily provides for resolution of disputes by arbitration,<sup>118</sup> with the exception of taxation disputes that are to be resolved by the Greek tax administration and/or Greek Courts in accordance with the Greek law.<sup>119</sup> More particularly, according to the TAP HGA, the Parties give their unconditional consent to any such submission to arbitration.<sup>120</sup> A Party will only be entitled to refer a dispute to arbitration where the Parties have been unable to reach an amicable agreement after one month of the Party raising the dispute serving written notification of the dispute to the other Party.<sup>121</sup> Moreover, the Party initiating the arbitration must submit the dispute at its option to the International Center for Settlement of Investment Disputes or to an arbitral tribunal established under the Rules of Arbitration of the International Chamber of Commerce in force on the date of the dispute, which choice will be final and binding on the other Party.<sup>122</sup> Furthermore, the TAP HGA provides that there must be three arbitrators, the two of which shall be nominated by each Party and the third one, who will act as chairman of the tribunal, shall be chosen by the two arbitrators appointed by the Parties.<sup>123</sup> The language of the arbitration shall be English,<sup>124</sup> while the Parties agree that the seat of the arbitration will be Vienna, unless otherwise agreed in writing.<sup>125</sup>

Moreover, the TAP HGA has special provisions regarding the resolution of taxation disputes and provides that these must be resolved according to Greek law by the competent Greek tax administration Courts or Greek Courts. In accordance with Greek law, there is a requirement, in order for the competent Court to hear and consider the appeal or challenge, for the Project Participant to make an upfront payment corresponding to fifty per cent (50%) of the amount that is the subject of a

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<sup>118</sup> TAP HGA Greece, Clause 24.3(a).

<sup>119</sup> TAP HGA Greece, Clause 24.9.

<sup>120</sup> TAP HGA Greece, Clause 24.1.

<sup>121</sup> TAP HGA Greece, Clause 24.2.

<sup>122</sup> TAP HGA Greece, Clause 24.3.

<sup>123</sup> TAP HGA Greece, Clause 24.4(a)–(b).

<sup>124</sup> TAP HGA Greece, Clause 24.6.

<sup>125</sup> TAP HGA Greece, Clause 24.8.

challenge or appeal, subject to such amount being capped at €1-million.<sup>126</sup> As regards waiver of immunity, the TAP HGA contains relevant clauses and provides that the Host State waives and agrees not to claim any sovereign or other immunity in relation to the recognition of any judgment or order of the Greek Courts and any other competent Courts of any other jurisdiction in support of any arbitration in relation to the dispute.<sup>127</sup> The State consents to the enforcement of any order or judgment in support of arbitration or any award in connection with any dispute.<sup>128</sup>

## CONCLUSION

Currently, TAP Project is in its testing phase by introducing the first natural gas volumes into 2 km Greek section, while within 2020 it is foreseen that the TAP pipeline operations will be started. It is to be noted however, that TAP's schedule is in full alignment with upstream developments, meaning that exact timings will depend on the progress of the Shah Deniz II field development. Nevertheless, it is expected that within the following months, TAP's commercial operation will be initiated and it will supply EU energy market with Azerbaijani natural gas pursuant to its construction plans.

The present thesis targeted to present the scope and main players of the Project, the necessary agreements regulating the relations among the involved states, as well as their relations with TAP AG being the Investor, the Greek energy market and the contributions of TAP Project to both EU and Greek energy markets, the regulatory standards to be met by the Project and the investment protection and dispute resolution proceedings provided under ECT and the respective aforementioned agreements.

TAP Project is a part of a wider energy infrastructure network in the SEE region, which aims to render EU and Members States' energy market more secure within the following years.

As a result, this energy infrastructure investment analysis shall provide guidelines on

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<sup>126</sup> TAP HGA Greece, Clause 24.10(a).

<sup>127</sup> TAP HGA Greece, Clause 23(a).

<sup>128</sup> TAP HGA Greece, Clause 23(b).



the main regulatory issues of other similar energy infrastructure projects which are planned to take place within EU and particularly Greek territory.

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