

# International Energy Investments: Tracking the Legal Concept

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## Keywords

INTERNATIONAL INVESTMENT LAW; ENERGY LAW; ENERGY INVESTMENTS

## Abstract

International investment flows are rising firmly and rapidly on a daily basis throughout the world. In international investment flow energy plays a valuable role. The common point of international investment law regime and international energy law regime is, they remain many issues still to define and clarify in international investment law and energy law. In these undeveloped legal areas, the clarification of these basic issues has an essential role, as legal systems are established on the basis of clear terminology. While the significance of energy and energy-related issues in international investment law is mentioned above, there are still many blurred lines as to when “energy investments” in particular become relevant. In these situations, the limits of what may be considered an “energy investment” must be clarified. In order to explicitly explain references to “energy investments”, this article will firstly discuss the definition of international investments; secondly, the definition of energy will be analysed and then what is described as “an energy investment” will be thoroughly scrutinised. During these discussions, examples from other sectors’ investment disputes and other legal areas will also be examined and compared to provide more explicit answers as to the limits of the term.<sup>1</sup>

## I. Introduction

International investments law and its importance for international capital flows and globalisation cannot be denied. The system appears complicated because of the huge numbers of bilateral investment treaties (BITs), multilateral investment agreements

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(MIAs), regional trade and investment treaties, national regulations, national and international judicial awards.

Despite this complex system involving different kinds of treaties and legal documents, international investments were not as complicated in the past. The *treatification*<sup>2</sup> process of international investments was instigated a long time ago, but the system developed slowly over the centuries. Hence international investment law is still developing; it is in the adolescent years of its development.<sup>3</sup> This significant characteristic of international investment law is a result of the introduction of the international investment treaty, which consists of modern investment provisions that may be traced from the time of World War I (WWI).

This slow development process accelerated after World War II (WWII). As a result of rapid developments, the system became complex and now appears to be in deep crisis.<sup>4</sup> In reality, the system proceeds to apply and help to solve investment disputes: international investment law involves issues and challenges, which may be observed in every new legal area or rule.

Despite on-going discussions about international investment law, according to the ICSID 176 disputes were solved under the ICSID Convention, and 275 investment disputes have been solved under the ICSID Convention up to today.<sup>5</sup> In total, 451 international investment disputes have been solved under ICSID. If other international investments dispute resolution institutions, *ad hoc* arbitrations and alternative dispute resolution methods are counted, it gives a picture of the dimensions of international investment. Besides investment disputes, today, almost 2600 BITs and around 300 regional trade and investment treaties are applicable.<sup>6</sup> This means that although modern international investment law is young, its significance cannot be ignored. It is a large and promising, new legal area which may be able to achieve more than other legal regimes.

The energy sector plays an important role in international investment. Although the amount of energy sector investments cannot be accurately foreseeable, statistics on energy needs indicate its importance.<sup>7</sup> Those statistics contain significant indicators, for example the charts that show showing possible rises in the demand and consumption of

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<sup>2</sup> The word “treatification” is used by Jeswald W. Salacuse in reference to the process of development ranging from customary law to treaties; Salacuse, J. W., *The Law of Investment Treaties*, Oxford University Press, New York, 2010, 78.

<sup>3</sup> Alvarez, J. E., “The Once and Future Foreign Investment Regime”, in: Arsanjani, M. H. *et al.*, eds., *Looking to the Future: Essays on International Law in Honour of W Michael Reisman*, Koninklijke Brill N.V., Leiden, 2010, 607-608.

<sup>4</sup> In the doctrine, many scholars prefer to describe it as a “legitimacy crisis”; however, a legitimacy crisis is a strong word choice in order to describe problems of international investment law. This discussion is opted out from this article; however, for further discussion please check: Browsers, C. Schill, S., “Is Arbitration a Treat or a Boon to the Legitimacy of International Investment Law”, *Chicago Journal of International Law*, vol. 9, 2009, 471.

<sup>5</sup> International Center for Settlement of Investment Disputes, *About ICSID*, 2014, available online at <[icsid.worldbank.org/ICSID/Index.jsp](http://icsid.worldbank.org/ICSID/Index.jsp)> (accessed 15 November 2013).

<sup>6</sup> Vandevelde, K.J., “A Brief History of International Investment Agreements”, *UC Davis Journal of International Law & Policy*, vol. 12, ed. 1, 2005, 1-2.

<sup>7</sup> BP Global, *Statistical Review of World Energy 2013*, available online at <[www.bp.com/en/global/corporate/about-bp/energy-economics/statistical-review-of-world-energy-2013.html](http://www.bp.com/en/global/corporate/about-bp/energy-economics/statistical-review-of-world-energy-2013.html)> (accessed 30 January 2014).

energy can be interpreted as having two elements.<sup>8</sup> The first is that energy consumption and demand will increase every year. The second, which is related to this article, is that this increase in consumption and demand will cause a rise in energy investments. Therefore, importance of the energy in international energy flow cannot be underestimated.

The essence of this paper is to determine what may be considered an “energy investment”, with critical approach towards the general content of all components of energy investments or investments in the energy sector.

Therefore, in this paper, international investment and its context will first be discussed. Subsequently, in order to understand the concept of international energy investments, the definition of ‘energy’ will be given. Finally, international energy investment and its scope will be analysed.

## II. The Context of International Investment and International Investment Law

The international investment law regime is a part of international economic law. However, it has its own characteristics. A reason for this distinction is related to its historical roots and the reasons for its existence. Traces of international investment and international investment law can be found in early legal foundations.

For instance, the early beginnings of international investments go back to AD 1296, in an agreement between King Erik of Norway and merchants in Hamburg. The king provided privileges to Hamburg merchants for ‘*meliorandum terram nostram cum mercaturis*’ (for the amelioration of our territories through trade).<sup>9</sup>

However, international investment law, according to modern needs, started to appear in the 18<sup>th</sup> century. The United States of America (USA) began to secure its commercial and investment activities outside the USA’s territory, through the Treaty on Friendship, Commerce and Navigation in 1796, concluded with many other countries. The main idea behind those Friendship Treaties – both the USA treaties and the European treaties – was to improve trade more rather than investments. Another similarity between these treaties was the sources and the norms used to secure investments.<sup>10</sup>

In 1868, the famous *Calvo Doctrine* was published by Carlos Calvo, the Argentine jurist. He claimed that the host state must have full sovereignty over the interpretation and application of applicable international rules and norms.<sup>11</sup> After the *Calvo Doctrine* and the Russian Revolution in 1917, the security of investments and foreign investors’ rights became difficult to ensure. During WWI and World War II (WWII), the international investment regime suffered due to poor international financial and economic development.

After WWII, the importance of an international investment regime for domestic and international economic development was acknowledged. States started to seek a form of

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<sup>8</sup> For further details and relevant statistics please check International Energy Agency, *Key World Energy Statistics 2013*, 46-47, available online at <[www.iea.org/publications/freepublications/publication/KeyWorld2013.pdf](http://www.iea.org/publications/freepublications/publication/KeyWorld2013.pdf)> (accessed 28 January 2014).

<sup>9</sup> *Supra* nt. 2, 80.

<sup>10</sup> *Supra* nt. 2, 158-159.

<sup>11</sup> Dolzer, R., and Schreuer, C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2012, 1.

protection for their investors and investments outside of their territories. As a result of this Germany signed the first BIT with Pakistan in 1959. The Germany-Pakistan BIT started a new trend for investment protection and international investment law.<sup>12</sup>

After the first BIT between Germany and Pakistan, international investment law and the international investment regime rapidly grew. However, in terms of the international investment regime and its fundamental institutions, the signing of the ICSID is the most significant role in current international investment law regime.

The ICSID Convention opened for signatures on 18th March 1965, and entered into force on 14 October 1966.<sup>13</sup> Before the ICSID Convention, similar attempts, such as the Havana Charter (1948), the International Chamber of Commerce's International Code of Fair Treatment of Foreign Investment (1949), the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), had not been successful. After the ICSID, the OECD Draft Convention on the Protection of Foreign Property (1967) was also unsuccessful.

The ICSID Convention and the ICSID itself were a revolutionary development in international investment law history and for the international investment regime. The ICSID Convention offers a practical approach and institutional support for the enforcement of BITs and international investment law. More explicitly, investors and the host states achieved effective compensations and remedies for the first time in the history of international investment law.<sup>14</sup>

After the establishment of the ICSID and the ICSID Convention, other multilateral treaties involving investment provisions, such as the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA), were signed.

Today, the international investment regime is governed by a high number of BITs and multilateral treaties that involve investment provisions, international dispute settlement institutions and *ad hoc* tribunals.<sup>15</sup>

In spite of this history of international investment relations, the international investment regime is still developing and is still young, compared with other international economic law regimes.

All of the aforementioned explanations resulted in a remarkable outcome for the international investment regime. International investment law and its principles are the result of the strong need to sustain globalisation and international economic development. Today, international investment law is a separate field of international law and the international economic law regime, and therefore having its own rules and principles. Nevertheless, this does not mean that fundamental norms and principles of international law are not applicable in international investment law.

As previously summarised, the international investment law regime developed separately from other international economic law regimes, including international trade law. In addition, its nature is different because the needs and roles of relevant actors are different. Actors involved in the international investment regime have various roles and positions in comparison to other international law regimes. For example, in international trade law, all regimes are governed by states via international institutions and

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<sup>12</sup> *Supra* nt. 2, 88-89.

<sup>13</sup> *Supra* nt. 3.

<sup>14</sup> Waters, M., *Globalization*, Routledge, London, 2001, 1.

<sup>15</sup> Governing elements international investment law regime will be referred to as "institutions of international investment regime".

international organisations. In international trade law, the international trade regime and related treaties – especially The General Agreement on Tariffs and Trade (GATT) and The General Agreement on Trade in Services (GATS) - are governed by the World Trade Organization (WTO). Moreover, disputes are claimed and solved between states.

In international investment law, the regime is governed by home states, host states, investors and other institutions, and international investment regime's norms and principles are established with international treaties, customary international law, and arbitral awards. States may be in a position of being the host state or home state because BITs are not one-sided treaties. In other words, all rules and principles within BITs bind both parties. Also. Additionally, both states are obliged to provide a secure investment environment for the investors.

The first distinguishing characteristic of the international investment regime is the kind actors involved in the regime. In most international law regimes, the relevant actors are mainly sovereign states and international organisations. However, the actors within the international investment regimes are sovereign states, foreign investors and dispute settlement institutions. Foreign investors are natural persons or legal persons who are subject to private law regimes. Dispute settlement institutions may be established as being either *ad hoc* or institutional.

These actors and their roles in the international investment law regime have shaped its development. More explicitly, the regime is regulated by international investment treaties that are signed by two sovereign states. When disputes arise, these are resolved between the investor and the host state by an international investment dispute resolution institution.

The most significant and distinct characteristic of international investment law related to dispute resolution. Differently from other international law regimes, disputes are resolved between host states and investors under international investment law. This means that the international investment law dispute resolution mechanism allows a person or legal person who is a foreigner to bring a claim against a sovereign state in front of an international dispute resolutions body.

Actors and their roles in the international investment regime led to another important feature of international investment law. International law regimes are divided into two frameworks based on actors and disputes: public international law and private international law. Public international law mostly governs relationships between states and international legal persons (as well as individuals), while private international law generally governs issues related to conflict of laws or applicable rules of jurisdiction.

Based on this division, international law regimes belong to one of these frameworks, but international investment law and its *sui generis* nature make it difficult to categorise into one of these frameworks.<sup>16</sup> International investment regime actors and their relationships with one other are particularly different, and the regime is governed by complex bilateral international treaties. As a result of the *sui generis* features of the regime, categorising international investment law as either strictly public international law or private international law is beyond the bounds of possibility.

Another distinct feature of the international investment regime is its development process. The development processes of international law and international legal regimes are mostly cyclical. They generally start with a legal relationship between two states.

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<sup>16</sup> Van Harten, G., *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford, 2007, 8.

They then develop to involve contributions of more than two states, and then the circle proceed with regional international legal regimes. Therefore, in general, relations begin bilaterally and then become multilateral and finally regional.<sup>17</sup> If necessary, this cycle may start again from the beginning.<sup>18</sup>

This cycle is an applicable approach to understanding many international legal regimes; however, international investment law does not fit this cyclical pattern. In the history of international investment law, there have been many attempts to create successful multilateral investment treaties. For instance, the Multilateral Agreement on Investment (MAI) is one example of the failed attempts to create a multilateral environment in international investment law. The MAI was initiated by the Organisation for Economic Co-operation and Development (OECD) in 1998. The agreement failed because it sought to regulate international investment environment with a binding international instrument. On the one hand, the MAI was understood as an opposite impact towards globalisation and a liberal international economic order by capital exporting countries. On the other hand, the MAI was seen as a binding international legal instrument that introduced investment protection rules without accommodating environmental, human rights concerns.<sup>19</sup>

This aspect of the MAI is lacking an international instrument, which regulates general principles and norms of international investment. This can be seemed as the cyclical nature of international law which does not apply within international investment law. However, the existence of the ICSID and its enforceable nature brings an idea of the cyclical nature of international law partially exists in international investment law. In other words, the ICSID convention is the first step to establishing a multilateral framework for the consensus of dispute resolution of the international investment regime.<sup>20</sup>

In short, in order to describe foreign investment, or international investment, the nature of international investment law should be explained.

The development process of international law is different from other international law regimes. The nature of international law is fragmented and cyclical, as previously mentioned. This fragmentation is reflected in the complex and high number of BITs and different dispute resolution institutions of international investment law. The cyclical nature of international law is, however, partially true in the case of international investment law. Despite the international investment regime being governed via bilateral relations, the ICSID Convention and the high demand of the dispute resolution system of ICSID are proof that the multilateral part of cyclical nature should be interpreted in different way.

Actors in the international investment regime and their roles are different from those of other international law system. Disputes arise between host-states and foreign investors and they are solved via international arbitral tribunals based on BITs. As a result of this role division between the actors, it is not easy to categorise international

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<sup>17</sup> For further explanation about “cyclical nature of international law” please see: Leal-Arcas, R., *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Edward Elgar Publishing Limited, Cheltenham, 2011, 1-8.

<sup>18</sup> *Ibidem*.

<sup>19</sup> Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, 27.

<sup>20</sup> *Supra* nt. 14, 32-35.

investment law under this international law framework. Whereas most of the international law regimes are categorised as either public international law or private international law, international investment law does not manifest the distinctions between these frameworks.

With regard to the explanations above, it would not be wrong to say that international investment law has a *sui generis* nature. This does not mean that defining the investment is as complicated as understanding the international investment regime.

International investment treaties define investments as broadly as possible to provide as much protection as possible.<sup>21</sup> In the most general terms, international investments include both tangible and intangible assets, which are moved from one country to another under the full or partial control of foreign investors for the purpose of producing wealth.

This definition excludes shareholders and their rights from the protection of international investment law. In the *Barcelona Traction Case*, the International Court of Justice (ICJ) did not hold shareholders and their rights to fall under the protection of international investment law.<sup>22</sup> When the judgment was delivered by the ICJ it caused huge debates over the borders of foreign investment. This debate continues today due to the fragmented nature of international investment law.<sup>23</sup>

As a consequence of broad BIT provisions, the capacity to considering foreign investment as an interpretative tool is in the hands of arbitrators. Because interpretation authority of international investment law norms and principles are strictly in arbitrators' hands.

### III. The Complexity of the Definition of Energy: Defining the Unidentifiable

Law and other disciplines strictly bind each other when their interests of related authorities overlap. Energy is one of the significant examples where these issues overlap. When the term *energy* emerged, not only social science aspects started to be debated, but also aspects of all other science and engineering fields. In engineering and sciences the scientific explanation of energy is used by specialists. However, legal definition of energy also has an important meaning and role for fields such as international relations and political science. To illustrate, energy is defined in three different ways in the Oxford Dictionary; as

- a) the strength and vitality required for sustained physical or mental activity;
- b) power derived from the utilization of physical or chemical resources, especially to provide light and heat or to work machines and;
- c) Physics: the property of matter and radiation which is manifest as a capacity to perform work (such as causing motion or the interaction of molecules).<sup>24</sup>

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<sup>21</sup> *Supra* nt. 16, 10.

<sup>22</sup> International Court of Justice, 24 May 2007, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*

<sup>23</sup> *Supra* nt. 17, 1-20.

<sup>24</sup> *Paperback Oxford English Dictionary*, Oxford University Press, Oxford, 2010.

Even in the dictionary, energy cannot be defined with one single explanation, so it is only logical that every academic field has its own definition or meaning for energy. This notwithstanding, the legal definition of energy has a specific importance, which affects other fields. Sometimes, legal regulations or legal definitions have precedence over international relations or political science terminology and, in other cases, legal regulations and definitions are taken over for discussions in other fields. Therefore, often relationships between actors are framed by legal definitions. This is also valid for energy.

Apart from the above explanations - like many international law areas - energy definitions and international energy regulations are of a fragmented nature.<sup>25</sup> In energy sector, fundamental documents, which affect countries' internal law systems are shaped based on international treaties and international organizations' documents which have a binding nature for member states.<sup>26</sup> The fragmented nature of the international law regime also has an impact on energy. In legal terms, energy can refer to different types of energy, such as renewable energy and carbons, oil and gas, as well as the sub-categories of these main groups.

Although energy is regulated under many international organizations, understanding energy and its nature plays an important role in comprehending energy investments. In order to illustrate international energy investments, perspectives of leading public international organisations, such as the United Nations (UN), the ECT Secretariat, and the International Energy Agency (IEA), the Organization of Petroleum Exporting Countries (OPEC).

The first thing to observe, when regarding International Organizations, is the lack of unity in energy governance. Due to this, governing and defining energy and the energy sector is not easy.

For example, the structure of the UN is divided into various agencies, which specialize in different global issues.<sup>27</sup> While most of these issues are the focus of one specialized agency under the UN, energy is dealt with by more than one agency, which works on different types of energy, under several programmes.<sup>28</sup> These different programmes were discussed in the Johannesburg Plan of Implementation (JPOI), 2002. According to decisions taken in this plan, UN-Energy was established in 2004. UN-Energy is established as a coordination mechanism, which aims to improve coherence between all UN departments, which handle programmes related to energy issues. Hence, members of UN-Energy are separate agencies and UN-Energy is structured as a multi-disciplinary mechanism. UN-Energy aims to ensure coherence and coordination under three main themes and each theme is led by two UN agencies.<sup>29</sup> The JPOI and global energy governing programmes do not include any definition or binding legal provisions for signatories or member states. As T. Walde noted, those programmes and their

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<sup>25</sup> Barker, J. C., *International Law and International Relations*, Continuum, London, 2000, 1-25.

<sup>26</sup> Florini, A., and Dubash, N. K., "Introduction to the Special Issue: Governing Energy in a Fragmented World", *Global Policy*, vol. 2, ed. Supplement S1, 2011, 1-5, 3.

<sup>27</sup> Klabbbers, J., *An Introduction to International Institutional Law*, Cambridge University Press, New York, 2009, 47.

<sup>28</sup> Walde, T. W., *International Energy Law and Policy*, Elsevier Inc., 2004, 5.

<sup>29</sup> Varis, O., "Comparative Definition of Energy Under Public International Organizations", *International Journal of Energy Economics and Policy*, vol. 3, Special Issue, 2013, 141.



documents do not have international regulatory capacity, but are merely *tangential policy documents*.<sup>30</sup>

This situation is no different in the IEA either. Although the main idea behind the establishment of the IEA was to control oil prices and improve cooperation in the oil market, its mandate was defined to cover all different types of energy. In the declaration of establishment, the power to develop new energy sources is also included.<sup>31</sup> This broad power, covering both, known energy types and future energy sources, gives the IEA the power authority to affect the international energy market. However, membership of the agency is not as wide as the IAEA or other the UN based programmes/agencies.<sup>32</sup> As a result of the broad wording in the declaration of establishment, the IEA is the only institution, which may define current and future energy sources, and via this capacity, can draw the limits of the energy sector.

The OPEC is different from the UN and the IEA in a couple of ways. Its limits and mission were well described by its *raison d'être*. The main mission of the OPEC is to keep the privileges and powers of its members – petroleum-producing countries - –in the energy market to provide stabilisation. The second mission is to protect the value and importance of petroleum products in the global energy market.<sup>33</sup>

So far, the OPEC does not have any action plans or decisions about environmental issues or any other energy types. In this regard, the OPEC is the only public international organisation, whose *raison d'être* explicitly affects its actions. Moreover, the OPEC is the only public international organisation whose legal power and capacities are very well clarified.

The Energy Charter Treaty (ECT)<sup>34</sup> is the most important international document for the energy sector. It is neither a tangential policy document like the UN's JPOI and global energy governing programmes, nor unclear like the IEA's programmes. The ECT also does not involve a specific definition on "What may be considered as energy?". However, The ECT is the multilateral energy treaty, with the largest geographical and country coverage.<sup>35</sup> Although there are doubts about the significance and effectiveness after the Russian Federation opted out, the ECT still has an important role in international energy related issues, especially international investment in the energy sector.<sup>36</sup>

According to the ECT Secretariat, the ECT is applicable to all energy types.<sup>37</sup> However, application of the ECT to issues related to renewable energy sources is a

<sup>30</sup> *Supra* nt. 25, 7.

<sup>31</sup> International Energy Agency, Decision of the Council establishing an International Energy Agency, at <[iea.org/aboutus/history/](http://iea.org/aboutus/history/)> (accessed 1 February 2014).

<sup>32</sup> Florini, A., and Sovacool, B. K., "Who governs energy? The challenges facing global energy governance", *Energy Policy*, vol. 37, 2009, 5239.

<sup>33</sup> *Supra* nt. 25, 9.

<sup>34</sup> For further information about signatories and the history of the ECT Secretariat please check <[www.encharter.org/index.php?id=7](http://www.encharter.org/index.php?id=7)> (accessed 14 April 2014)

<sup>35</sup> Konoplyanik, A. and Walde, T. W., "Energy Charter Treaty and its Role in International Energy", *Journal of Energy and Natural Resources Law*, vol. 24, ed. 4, 2006, 523.

<sup>36</sup> International Association for Energy Economics Forum, Nappert, S., *EU-Russia Relations in the Energy Field: The Continuing Role of International Law*, 2009, available online at <[iaee.org/fr/publications/newsletterdl.aspx?id=110](http://iaee.org/fr/publications/newsletterdl.aspx?id=110)> (accessed 20 March 2013).

<sup>37</sup> The Energy Charter Secretariat Official Web-Site, Energy Charter, available online at <[www.encharter.org/index.php?id=1&L=0](http://www.encharter.org/index.php?id=1&L=0)> (accessed 20 October 2012).

problematic point in the doctrine, since they were not separately expressed in the ECT.<sup>38</sup> Another issue about the scope of the ECT is its *raison d'être*. The main idea behind the ECT is to regulate international energy investments and dispute resolutions in energy related issues. During dispute settlements, arbitrators try to clarify the ECT and interpret the meaning of the relevant provisions. Apart from several arbitral dispute settlement awards based on the ECT, there are no explanations of the scope of the treaty or a clear definition of energy.<sup>39</sup>

To sum up, tracking the definition of energy in international documents and under international law is not an easy task. The answer to the question “What may be considered as energy/an energy source?” cannot yet be found under international law. Some public international organisations, such as the OPEC, have an explicit definition of their and limited legal capacity for particular energy types. However, many international organizations do not have binding legal documents. The ECT is the most significant exception. Although the ECT does not provide answers in regard to definitions, it is a binding legal document, which especially governs international investments in the energy sector.

Based on the explanations above, it can be claimed that *energy is the strength and vitality, which is necessary to proceed with causal works*. Additionally, the energy sector is dependent on economic activities, to provide energy.

#### **IV. International Energy Investments or International Investments in the Energy Sector: Combining Two Legal Aspects**

The energy sector is one of the most important sectors in the global investment regime. Both down-stream and up-stream energy activities have a higher cost, than activities in many other sectors. Consequently, making foreign investments in the energy sector is inevitable, especially for capital-exporting countries. Like other natural resources sectors, raw materials, which are provided by capital-importing countries, are essential.<sup>40</sup> Therefore, foreign investors support many investments in the energy sector.

Due to the above, in order to understand energy investments, international investment law and energy need to cooperate with each other. This cooperation is visualised in the ECT. The main rationale of the ECT and its investment provisions is to create an equal, stable and favorable environment for investors. According to the official ECT resources,<sup>41</sup> all the other treatment principles in international law and investment law are also valid and applicable to the ECT investments.

The *raison d'être* of the ECT is to create a secure and stable investment environment for the nationals of member states. The ECT contains some remarkable provisions in its specific investment chapter, so an analysis of the ECT enables us to understand the concept of energy investments.

The second paragraph of Article 1(6) determines the *ratio temporis*. In accordance with this Article, the ECT covers all investments, which exist at the entry into force of the

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<sup>38</sup> *Supra* nt. 29, 143.

<sup>39</sup> *Supra* nt. 25, 9.

<sup>40</sup> *Supra* nt. 17, 38.

<sup>41</sup> “Official Resources” refers to the main treaty documents and the readers’ guide.

Treaty and thereafter. The date as of when the investments are covered by the ECT is referred to as the Effective Date, which is the date when the Treaty becomes binding for the Contracting Parties. Although the Treaty is quite clear, some controversy remains about the precise meaning of the Effective Date, and some scholars interpret it as the date when that the Treaty starts to bind the Contracting state internationally.<sup>42</sup> However, according to Article 45(2), the Effective Date is the date of signature, and all the contracting parties have an obligation to implement the ECT provisions into their domestic law.<sup>43</sup>

The last paragraph of Article 1(6) refers to “an economic activity in the Energy Sector”, which raises the question of the definition of economic activity. The most suitable way to clarify this paragraph is to interpret it in a manner consistent with the whole of Article 1(6). In the Reader’s Guide to the ECT,<sup>44</sup> the following explanation for economic activity in the energy sector is given: “the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products”. Another issue is the question: “What type of, or to what degree, economic activities are covered by the ECT?” This question has been tested in above-mentioned debates; in *Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia*,<sup>45</sup> the arbitration tribunal decided to include all activities related to the energy sector association in the definition. In the literature, this interpretation has been criticized, especially as it could be seen to exclude non-landed investments.<sup>46</sup>

The definition of investor under the ECT is provided in Article 1(7).<sup>47</sup> The definition refers mainly to a natural or legal person who is making investments under the ECT and who has the citizenship of one of the Contracting States. Citizenship is determined in accordance with the domestic laws of the investor’s home State. The ECT also covers investors who are permanently residing in the Contracting State.

Determination of citizenship for legal entities is not as simple as for natural persons. For legal entities, the ECT does not cover any restrictions like the place of the main seat theory (*siège social*) or nationality of the board of directors. The only criterion is that nationality should be in accordance with the law applicable in the Contracting state.<sup>48</sup>

In short, investments are all kinds of economic activities made by investors in the energy sector. Investors can be both natural persons and enterprises, which have legal personality. Therefore, when the essence of this article is considered, the need for the separate term energy investments should be discussed.

As explained in detail, foreign investments cover all kinds of economic activities in host-states that have the intention of producing wealth. When the definition of energy investments is revised, investments in the energy sector should be named as such, as the

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<sup>42</sup> Gaillard, E., “Investments & Investors Covered by the Energy Charter Treaty”, in: Ribeiro, C., “Investment Arbitration & the Energy Charter Treaty”, Juris Net LLC, Huntington, 2006, 63.

<sup>43</sup> See for a case in which “Effective Date” is discussed in practice Arbitration Institute of the SCC, 29 March 2005, *Petrobart Ltd. (Gibraltar) v. Kyrgyzstan*, Case No 126/2003.

<sup>44</sup> Energy Charter, *The Energy Charter Treaty Reader’s Guide*, 2004, 21, available online at <encharter.org/fileadmin/user\_upload/Publications/ECT\_Guide\_ENG.pdf> (accessed 22 June 2013).

<sup>45</sup> Arbitration Institute of the SCC, **16 December 2003**, *Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia*, Case No. 118/2001, 10, 2.2.

<sup>46</sup> *Supra* nt. 25, 64.

<sup>47</sup> *Id.*, 41.

<sup>48</sup> *Supra* nt. 11, 49.

distinction is obvious.<sup>49</sup> Also, the historical development of international investment law and the nature of the international investment regime do not involve specific legal norms and principles between the sectors.

As a result of all these discussions, foreign investments in the energy sector are made up of all kinds of economic activities, made by foreign investors with the purpose of providing wealth and strength in the host country, which are necessary to daily life.

## V. Conclusion

Analysing the term energy investment and its scope is the essence of this article. Therefore, in order to clarify these terms, international investment law and energy law were discussed in this article. Thereby, special attention was paid to international investment law and its background. In particular, the nature of international investment law and international investment regime were emphasized.

The cyclical and fragmented nature of international law is reflected in international investment law, as well as in energy law and international energy governance. Both regimes are fragmented as they are governed and regulated by different institutions and international legal documents. This fragmentation makes it difficult to clarify fundamental legal terms. Due to the complexity of both international energy law and international investment law regime, judicial authorities (in investment law mostly arbitrators) come across with difficulties during the application of norms and principles. In international investment law, arbitrators generally face with these difficulties because of they have the capacity to interpret rules and principles. In international energy law regime, governmental authorities, lawyers generally face with uncertainty of legal norms and principles. In both regimes those authorities interpret legal norms and principles. Furthermore, if there is a need, they also describe terms.

Although, uncertainty of content of legal norms and principles widely spread in international energy investment sector. In particular, defining energy is the challenging part. It can be described as “the strength and vitality, which is necessary to proceed casual works”. This definition can be the energy sector is formed by all kinds of economic activities to offer essential services to provide energy.

While it is difficult to define energy, the scope of energy investment is defined in the ECT. According to Article 1 paragraph 6, this includes it all kinds of economic assets, which are owned or controlled by foreign investors. If its scope is compared with general foreign investment and other sectors, the distinction cannot be easily made. Due to this reason, using the term “investments in energy sector” is more suitable to illustrate the scope.

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<sup>49</sup> The author preferred not to discuss “*lex petrolea*” arguments in this paper due to the need of a discussion on specific energy type.