ON ENERGY LAW AND CROSS-BORDER ENERGY INVESTMENTS: IS INTERNATIONAL ENERGY INVESTMENT LAW A DISTINCT SUBSET OF LAW?

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Abstract

In the energy sector large cross-border investments have been made for over a century and disputes between foreign investors and host states or state owned enterprises (SOEs) have arisen on a regular basis. This has resulted in a relatively well documented volume of jurisprudence involving inter-state and investor-state cases as well as disputes between investors and SOEs. Perhaps as a result, terms such as '(international) energy investment law' or '*lex petrolea*' have been used by authors to refer to instruments that regulate the relationship between foreign investors and host states or SOEs and the resulting jurisprudence. This chapter examines what 'international energy investment law' encompasses and whether it can be considered as a distinct subset of law.

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1 Introduction

What is energy law and what does it encompass? Those are questions that have most likely been posed to all energy lawyers and that I discussed on several occasions with Professor Roggenkamp, under whose supervision I wrote my PhD dissertation. The topic of my dissertation was the promotion and protection of renewable energy investments under the Energy Charter Treaty (ECT).[2] As such, I – personally – considered that my dissertation was principally about International Investment Law (IIL) as applied in the factual context of the renewable energy sector. The question was whether this resulted in a dissertation about 'energy law.' At first sight, there is a very close connection between the energy sector and IIL, with disputes in the former often contributing to the development of the latter.[3] Probably due to the considerable amount of published legal decisions, the attention of authors was sparked, who subsequently used terms as 'International Energy Investment Law'[4] (IEIL) or '*lex petrolea*'[5] to refer to the corpus of instruments and legal decisions (mostly arbitral awards) relating to cross border energy investments or, in the case of *lex petrolea,* specifically to the petroleum industry.

In this chapter, I will give my two cents on whether IEIL is a distinct subset of law as the term implies. The reader might ponder why this is a question worth considering. Whether one works in academia or private practice, there are seemingly advantages to using specific 'labels' for your field of expertise. It has been said that in academia, the creation and usage of labels may contribute to the acceptance of the ideas that a label intends to carry forward, which may result in new areas that can be studied and taught.[6] When working in private practice, the usage of such labels may even create advantages. For instance, the Dutch bar association maintains a register[7] of fields in which an attorney specializes and the register is supposed to be an important objective yardstick for defining the quality of the legal profession, in the interest of both the attorney and the litigant.

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2 Cees Verburg, *Modernizing the Energy Charter Treaty: Facilitating Foreign Investment in the Renewable Energy Sector* (University of Groningen 2020, diss.), 431 p.

3 Anibal Sabatar and Mark Stadnyk, 'International Arbitration and Energy: How Energy Disputes Shaped International Investment Dispute Resolution', in Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar 2014).

4 Peter Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010).

5 Doak Bishop, 'International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*' [1998] 23 Yearbook of Commercial Arbitration 1131.

6 Terence Daintith, 'Against '*Lex Petrolea*' [2017] 10(1) Journal of World Energy Law and Business 1.

7 Energy law is – (partially) thanks to Professor Roggenkamp – recognized in said register.

This chapter is structured as follows. Section 2 will briefly address the most important matters that are regulated by IEIL and in section 3 the question pertaining to the existence of IEIL will be discussed. Finally, this chapter will end with a conclusion.

2 Scope of Regulation of International Energy Investment Law

Large cross-border investments were probably already common in the energy sector long before the word 'globalization' came into use. Since energy investments are usually made for the long term and the various interests involved – both private and public – are significant, it is no surprise that disputes between foreign investors and host states have occurred regularly. In case a dispute arises, the relationship between the host state and the foreign investors may well be regulated through a variety of legal instruments, such as i) the administrative law and/or constitutional law of the host state, ii) applicable human rights law, iii) investment contracts and/or concessions as concluded between the investor and the host state or a SOE, and iv) Public International Law (PIL), including International Investment Agreements (IIAS).

To illustrate the frequency with which investment disputes have arisen in the energy sector, one can refer to the upstream oil sector where 'waves' of nationalizations occurred in the 1930's, '50s, '70s and the first decade of this century.[8]

Investment disputes are not, however, limited to the petroleum sector. By now they have arisen in every subsector of the energy industry and the energy transition, which includes phasing out certain economic activities that are no longer considered desirable, has already caused several disputes as well.[9] This is also the reason that in this chapter the term IEIL is used, which encompasses all energy sources, and not the narrower term *lex petrolea,* which is often used to refer to a specific *lex mercatoria* for the oil sector.

Some of these past disputes gave rise to seminal legal decisions that will ring a bell with many. Decisions such as *Saudi Arabia v. Arabian American Oil Company*[10] and *Conocophillips v. Petroleos de Venezuela, S.A.*[11] are probably familiar names to arbitration

8 Peter Cameron, 'In Search of Investment Stability', in Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar 2014), p. 124.

9 This becomes apparent when one considers the investor-state disputes that have arisen under the ECT: <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed on 12 June 2021.

10 *Saudi Arabia v. Arabian American Oil Company (Aramco)* Award [1958] 27 ILR 1963 117.

11 *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos de Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.*, ICC Case No. 20549/ASM/JPA, Final Award, 24 April 2018.

specialists. As are the *ELSI* case[12], *Barcelona Traction*[13], and the *Anglo-Iranian Oil Company* case[14] to public international lawyers. Finally, the worlds of PIL and arbitration law collide in cases such as *Yukos v. Russian Federation*[15], *Methanex Corporation v. United States of America* [16] and *ExxonMobil v. Venezuela*.[17]

From the above, one might get the impression that IEIL merely relates to post-establishment investment protection and dispute settlement. While these elements certainly explain why rules on foreign investment are so important to energy investors, the scope of regulation of IEIL is broader.

For instance, investment liberalization commitments are increasingly included in IIAs which are aimed at removing barriers to Foreign Direct Investment (FDI) by prescribing non-discriminatory treatment in relation to market access. By agreeing to such rules, states limit their sovereign right to regulate the inflow of FDI.[18] Such (often far reaching) liberalization commitments are usually accompanied by extensive lists – of up to hundreds of pages – of exceptions and derogations. It is often in these exceptions that the word 'energy' appears.[19]

Rules regarding FDI liberalization are highly relevant to energy investors. In the past, the state or SOEs often dominated domestic energy markets in many countries, in particular the gas and electricity markets. However, privatization and liberalization has often reduced the role of the state from active market participant to regulator. This means that certain crucial roles to sustain modern day life, such as the management of gas and electricity grids, may well be performed by private companies. If these companies fall into foreign hands, in particular if the new owner is from a rivalling nation,

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12 *Case Concerning Elettronica Sicula S.P.A.(ELSI) (United States of America v. Italy)* [1989] ICJ Rep 15.

13 *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Second Phase) [1970] ICJ Rep 3.

14 *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)* (Jurisdiction) [1952] ICJ Rep 93.

15 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Award, 18 July 2014.

16 *Methanex Corporation v. United States of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

17 *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of the Tribunal, 9 October 2014.

18 Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008), p. 13.

19 See for the Schedule Japan, sub 7, Agreement Between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (Japan-Georgia) (adopted 29/01/2021, entrance into force still pending). Annex I HKSAR-10, Investment Agreement Between the Government of Australia and the Government of the Kong Kong Special Administrative Region of the People's Republic of China (adopted 26/03/2019, entered into force 17/01/2020).

worse yet, a SOE from a rivalling nation, this often evokes strong emotions from civil society and politicians. For instance, attempts of Chinese companies to acquire (shares) in European electricity system operators were viewed with suspicion and, in some instances, triggered reactions from legislators that *de facto* kept these Chinese investors out.[20] However, in case the Comprehensive Agreement on Investment between the European Union and China is concluded, which is supposed to contain rules regarding market access and investment liberalization, it might be more difficult in the future to obstruct controversial transactions involving Chinese investors.[21]

Moreover, many states enacted legislation that is ostensibly incompatible with FDI liberalization commitments, and which affect the ability of international investors to enter foreign markets. In this regard, one can think of domestic equity participation requirements, domestic content requirements, restrictions on the ability of foreign investors to own land, and FDI screening mechanisms. It is thus to be expected that, as states more often include FDI liberalization commitments in IIAs, the impact thereof for the energy sector becomes more apparent.

Furthermore, investor behavior and conduct are also topics that are increasingly regulated in IIAs and which are relevant for energy investors, as energy investments are regularly tainted with fraud, corruption and/or associated with environmental degradation.[22]

Contemporary IIAs are largely a one-way street in procedural and substantive terms and merely regulate state conduct and not investor behavior, perhaps with the main exception that investments are to be made in accordance with the domestic law of the host state.[23] Consequently, all that investment tribunals can do in cases of fraud and corruption is decline jurisdiction or declare a claim inadmissible.[24]

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20 Cees Verburg, 'The Screening of Foreign Direct Investments into the European Union: Regulation 2019/452 and its Implications for Energy Investments' [2020] 13 European Energy Law Review 219, pp. 220-221.

21 For an overview of the EU-China Comprehensive Agreement on Investment, see: European Commission, The EU-China Comprehensive Agreement on Investment, the Agreement in Principle (30 December 2020) available at <https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159242.pdf> accessed on 30 May 2021.

22 Lucina Low and Richard Battaglia, 'Corruption and the Energy Sector: Inevitable Bedfellows?', in Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar 2014).

23 For several interesting cases where a broader scope is adopted, see: *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017, para. 60. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, paras. 1110-1211.

24 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

Slowly but surely, the one-way street is widening. IIAs, or model texts thereof, increasingly include investor obligations relating to a variety of topics, such as corruption, corporate social responsibility, the environment, labor rights, and human rights.[25] It has to be noted however, that this development is still in its infancy and shortcomings can be identified that may affect the legal consequences of said developments. For instance, clauses may be phrased in a non-normative manner or fall outside the scope of the investor-state dispute settlement clause. Nevertheless, the first signs of a paradigm shift are seemingly emerging.

3 The Existence of International Energy Investment Law

While rules on FDI are thus highly relevant in the energy sector, is it possible to consider IEIL as a distinct subset of law? The first 'I' in the abbreviation 'IEIL' implies that it concerns rules of PIL relating to energy investments. However, a literature review demonstrates that this is not necessarily the case.

In 1998, Doak Bishop published his well-known article on the '*lex petrolea*' in which he reviewed and categorized arbitral awards regarding contract based petroleum disputes, many of which related to expropriation.[26] At the end he concluded that 'this *lex petrolea* may yet mature into a fully-developed subset of *international law*.'[27] In a 2011 'update' of this article, Thomas Childs, also took into account arbitral awards rendered by tribunals that were constituted under investment treaties.[28]

In 2010, Peter Cameron published a book titled 'International Energy Investment Law' in which he assessed a variety of contract and treaty based instruments in commer-

25 See for instance, Articles 14, 17, 18, 19, 20 and 24, Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (concluded 3/12/2016, entrance into force still pending). Article 10, Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (concluded 19/1/2016, entered into force 30/08/2017). Article 7, Netherlands Model Bilateral Investment Treaty 2019. Articles 11 and 12, Indian Model Bilateral Investment Treaty 2015. Article 16, Canada Model Bilateral Investment Treaty 2021.

26 Doak Bishop, 'International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*' [1998] 23 Yearbook of Commercial Arbitration 1131.

27 Ibid, pp. 1207-1208. Emphasis added.

28 Thomas Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' [2011] 4(3) Journal of World Energy Law and Business 214.

cial and international law that are aimed at protecting the respective interests of investors and states.[29]

What the above-mentioned sources have in common is that they analyze arbitral awards rendered by tribunals that derive their jurisdiction from both contracts and treaties.[30] In my view, however, IEIL does not include contracts and concessions as these are governed by the domestic law of a state. As such, they are not (public) international law, notwithstanding the fact that the transaction involved may well be international, in the sense that it involves parties from different jurisdictions.

Making this distinction is in line with the view of the International Court of Justice (ICJ). In the *Anglo-Iranian Oil Company* case the United Kingdom (UK) argued that a 1933 concession entered into by the Anglo-Iranian Oil Company (AIOC) and Iran had a double character, in the sense that it was both a concession contract between Iran and AIOC and a treaty between the UK and Iran.[31] The ICJ did not concur and held that the concession was 'nothing more than a concessionary contract between a government and a foreign corporation.'[32] Hence, it did not regulate any public matters directly concerning the UK and Iran and it could not possibly be considered to lay down the law between the two nations.[33]

This does not mean, however, that concessions are not relevant in investment disputes.[34] After the *Anglo-Iranian Oil Company* case, IIAs started to include so-called 'umbrella clauses' which require a host state to observe any obligations it has entered into with investors of the other contracting party.[35] Obligations of the host state *vis-à-vis* the

29 Peter Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010).

30 As to awards regarding contractual disputes, see: Doak Bishop, 'International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*' [1998] 23 Yearbook of Commercial Arbitration 1131, pp. 1154-1165. Thomas Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' [2011] 4(3) Journal of World Energy Law and Business 214, pp. 217-220. Peter Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010), pp. 103-144.

31 *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)* (Jurisdiction) [1952] ICJ Rep 93, p. 111-112.

32 Ibid, p. 112.

33 Id. See also: *Sebian Loans case (France v. Serb-Croate-Slovene State)* (Judgment of 12 July 1929) PCIJ Series A, No. 20.

34 André von Walter, 'Investor-State Contracts in the Context of International Investment Law', in Marc Bungenberg *et al* (eds.), International Investment Law – A Handbook (C.H. Beck 2015).

35 See for instance, Article 10(1) Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998): "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."

foreign investor are thereby elevated to obligations on the inter-state level.[36] The protection offered by umbrella clauses may even include commitments undertaken by the host state in its national law.[37] While the violation of a concession or statutory law may consequently amount to an internationally wrongful act by the host state, the concession or law itself remains an instrument of national law.[38]

It has to be noted however that of the more than 3.000 IIAs in existence, nearly all apply to foreign investment in general. The ECT is the most notable example of an IIA that applies specifically to investments associated with an economic activity in the energy sector.[39] This observation is most likely the strongest argument against the existence of IEIL as a separate subset of law: while rules of PIL regarding foreign investment are of tremendous importance to the energy sector, few of such rules relate *specifically* to the energy sector.

4 Conclusion

In the introduction I explained why, in my view, labels matter and Professor Roggenkamp, and her tireless promotion of 'energy law', is an excellent illustration thereof. She has contributed – in the Netherlands and far beyond – to the wider acceptance and dissemination of 'energy law' as a field of law that is worthy of research, education and specialization. With her retirement imminent, it seems safe to say that the recognition of 'energy law' as a field of law has already reached a point of no return a while ago. After all, societal interest in anything related to energy is expanding at such a rate that few will question the existence and relevance of energy law nowadays.

But is IEIL a distinct subfield of law? While it is undeniable that rules of IIL are of great importance in the energy sector, it is – arguably – difficult to justify the existence of IEIL

36 Anthony Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' [2004] 20(4) Arbitration International 411, p. 412.

37 Maria Cristina Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder *et al* (eds.), *International Investment Law for the 21*st *Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), p. 491. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012), pp. 177-178.

38 It has to be noted that umbrella clauses have given rise to divergent lines of jurisprudence, see: James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351.

39 Article 1(6) Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998). See also, Annex 14-E, paragraph 6(b), United States-Mexico-Canada Agreement (adopted 30/11/2018, entered into force 01/07/2020).

as a separate subfield of law, since few rules of IIL relate specifically to investments in the energy sector. Nevertheless, a few of such rules most definitely do. Therefore, IEIL can be said to exist, no matter how small. Since the scope of regulation of IIAs is broadening – and increasingly includes investor behavior and investment liberalization – and the forces of globalization are seemingly unstoppable, the relevance of IIAs for energy investors will only increase in the future.

Rest to say that I am grateful to have had Professor Roggenkamp as my mentor in the field of energy law, from LLM student to PhD candidate and thereafter. I wish her all the best for years to come.